

By: Armbrister

S.B. No. 1173

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of a perpetual care cemetery and the sale of interment rights in a mausoleum before completion of construction.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (b), Section 712.001, Health and Safety Code, is amended by amending Subdivision (1) and adding Subdivisions (4-a), (4-b), and (6) to read as follows:

(1) "Banking department" or "department" means the Banking Department of Texas.

(4-a) "Preconstruction trust" means a trust established by a corporation under this chapter for the purpose of administering proceeds from sales of undeveloped mausoleum spaces.

(4-b) "Preconstruction trustee" means the trustee of a preconstruction trust.

(6) "Undeveloped mausoleum space" means a crypt or niche in a mausoleum or mausoleum section that is designed to contain at least 10 crypt or niche interments and that is not ready for the interment of human remains or cremated remains on the date an interment right pertaining to the mausoleum space is sold. The term does not include a private mausoleum or mausoleum section in which all mausoleum spaces are intended to be sold under a single contract.

SECTION 2. Section 712.044, Health and Safety Code, is

1 amended to read as follows:

2 Sec. 712.044. EXAMINATION OF RECORDS; EXAMINATION FEES AND
3 EXPENSES. (a) The commissioner may examine, annually or more
4 often as the commissioner reasonably considers necessary or
5 appropriate to protect the interest of plot owners and efficiently
6 administer and enforce this chapter:

7 (1) the books and records of a corporation relating to
8 its fund, including deposits to or withdrawals from the fund,
9 income of the fund, and uses and expenditures of that income;

10 (2) the books and records of a corporation relating to
11 sales of undeveloped mausoleum spaces and any preconstruction trust
12 established by the corporation as provided by Section 712.063,
13 including deposits to or withdrawals from the preconstruction
14 trust, income of the preconstruction trust, and uses and
15 expenditures of principal and income of the preconstruction trust;
16 and

17 (3) ~~the~~ consumer complaint files of a corporation relating to
18 ~~protect the interest of plot owners. In addition, the commissioner~~
19 ~~may examine~~ the fund, sales of undeveloped mausoleum spaces, a preconstruction
20 trust, or to discharge of the corporation's perpetual care
21 responsibilities, minutes of the corporation's board of directors,
22 cemetery dedication statements and plat maps, and mausoleum and
24 lawn crypt construction contracts and specifications.

25 (b) A corporation that is examined under this section shall
26 make the specified books and records available for examination by
27 the banking department upon reasonable notice to the corporation

1 and shall pay to the commissioner for the examination a reasonable
2 and necessary fee set by rules adopted by the Finance Commission of
3 Texas under Section 712.008 to defray:

4 (1) the cost of examination;

5 (2) the equitable or proportionate cost of maintenance
6 and operation of the department; and

7 (3) the cost of administering and enforcing this
8 chapter.

9 SECTION 3. Subsection (f), Section 712.0441, Health and
10 Safety Code, is amended to read as follows:

11 (f) The commissioner may issue an order requiring
12 restitution by a corporation to its fund or to a preconstruction
13 trust if, after notice and opportunity for hearing held in
14 accordance with the procedures for a contested case hearing under
15 the Administrative Procedure and Texas Register Act, the
16 commissioner finds that the corporation has not made a deposit in
17 the fund as required by Section 712.028 or in the preconstruction
18 trust as required by Section 712.063.

19 SECTION 4. Chapter 712, Health and Safety Code, is amended
20 by adding Subchapter D to read as follows:

21 SUBCHAPTER D. SALE OF UNDEVELOPED MAUSOLEUM SPACE

22 Sec. 712.061. OFFER AND SALE OF UNDEVELOPED MAUSOLEUM
23 SPACE. (a) A corporation may not directly or indirectly sell or
24 offer for sale an undeveloped mausoleum space unless before the
25 sale or offer the corporation:

26 (1) establishes a preconstruction trust as provided by
27 Section 712.063 or executes and submits a performance bond payable

1 to the commissioner as provided by Section 712.067; and

2 (2) submits a written notice to the commissioner as
3 required by Subsection (b).

4 (b) The written notice to the commissioner must set forth:

5 (1) the date the corporation anticipates that sales of
6 undeveloped mausoleum spaces will begin;

7 (2) a copy of the sales contract proposed for use that
8 complies with Section 712.066;

9 (3) if the corporation establishes a preconstruction
10 trust as provided by Section 712.063, a copy of the executed
11 preconstruction trust agreement that complies with this subchapter
12 and identifies the preconstruction trustee;

13 (4) if the corporation submits a performance bond
14 payable to the commissioner as provided by Section 712.067, the
15 executed, original performance bond in the amount required by
16 Section 712.067 and documentation supporting the corporation's
17 computation of that amount; and

18 (5) other information the commissioner reasonably
19 requires to properly administer and enforce this subchapter.

20 (c) At any time before beginning construction of the
21 mausoleum or mausoleum section in which undeveloped mausoleum
22 spaces are being sold, a corporation that has established a
23 preconstruction trust may substitute a performance bond that meets
24 the requirements of Section 712.067. On acceptance of the
25 performance bond by the commissioner, the corporation may terminate
26 and withdraw all proceeds deposited in the preconstruction trust.

27 Sec. 712.062. DEPOSITS TO FUND. This subchapter does not

1 affect the corporation's obligation to make deposits to its fund as
2 provided in Subchapter B.

3 Sec. 712.063. PRECONSTRUCTION TRUST. (a) Except as
4 provided by Section 712.067, a corporation that intends to directly
5 or indirectly sell or offer for sale undeveloped mausoleum spaces
6 shall establish a preconstruction trust by written declaration and
7 agreement appointing as preconstruction trustee a financial
8 institution with trust powers that is located in this state.

9 (b) The corporation shall deposit in the preconstruction
10 trust an amount equal to at least 40 percent of all proceeds
11 received directly or indirectly from the sale of undeveloped
12 mausoleum spaces, not including interest, finance charges, sales
13 taxes, credit life insurance premiums, or deposits to the
14 corporation's fund required by Section 712.029(c).

15 (c) On application, the commissioner may authorize a
16 corporation to deposit less than the amount required by Subsection
17 (b) if the corporation demonstrates to the reasonable satisfaction
18 of the commissioner that:

19 (1) the sales projections of the corporation are
20 prudent and based on reasonable assumptions;

21 (2) the projected cost of construction is objectively
22 determined based on documentation similar to that required by
23 Section 712.067(b); and

24 (3) the amount of money projected to be deposited in
25 the preconstruction trust under the proposed lesser amount will
26 equal or exceed 120 percent of the cost of constructing the
27 mausoleum or mausoleum section.

1 (d) The corporation shall deposit the required amount into
2 the preconstruction trust on or before the 30th day after the end of
3 the month in which payment is received. At the time of making a
4 deposit, the corporation shall furnish to the preconstruction
5 trustee the name of each payor and the amount of payment on each
6 account for which the deposit is being made. A contract between the
7 corporation and an agent or third party developer may not restrict
8 or waive the corporation's primary liability for making the
9 deposits required by this section.

10 (e) The preconstruction trustee may commingle deposits
11 received if the accounting records accurately establish a separate
12 account for each contract and reflect the amounts deposited and the
13 income and loss allocable to each contract.

14 (f) Money in a preconstruction trust may be invested only
15 in:

16 (1) demand deposits, savings accounts, certificates
17 of deposit, or other accounts in financial institutions if the
18 amounts deposited in those accounts are fully covered by federal
19 deposit insurance or otherwise fully secured by a separate fund of
20 securities in the manner provided by Section 184.301, Finance Code;

21 (2) marketable notes, bonds, evidences of
22 indebtedness, or obligations with a term to maturity of five years
23 or less and:

24 (A) issued by the United States or an
25 instrumentality of the United States; or

26 (B) the principal and interest of which are
27 guaranteed by the full faith and credit of the United States; and

1 (3) a mutual fund the portfolio of which consists
2 wholly of investments permitted by Subdivisions (1) and (2).

3 (g) The preconstruction trustee may withdraw money from
4 earnings on a preconstruction trust for the purpose of paying
5 reasonable and necessary costs of operation of the preconstruction
6 trust, including trustee or depository fees and expenses, and any
7 special examination fees due to the department related to an
8 examination of the preconstruction trust that is not incidental to
9 examination of the corporation's fund. With the department's prior
10 approval, the corporation may withdraw money from earnings on a
11 preconstruction trust to pay any tax incurred because of the
12 existence of the preconstruction trust.

13 (h) The preconstruction trust and the preconstruction
14 trustee are governed by Subtitle B, Title 9, Property Code.

15 Sec. 712.064. CONSTRUCTION; DEFAULT. (a) The corporation
16 shall start construction of the mausoleum or mausoleum section in
17 which sales or reservations for sale of undeveloped mausoleum
18 spaces are being made on or before a date that is 48 months after the
19 date of the first of those sales or reservations and shall complete
20 construction on or before a date that is 60 months after the date of
21 the first of those sales or reservations. The commissioner may
22 grant extensions for good cause shown.

23 (b) If construction of a mausoleum or mausoleum section
24 related to an undeveloped mausoleum space has not begun or been
25 completely constructed by the applicable time specified by
26 Subsection (a), on the written request of the buyer, the
27 corporation and the preconstruction trustee shall, on or before the

1 30th day after the date of the buyer's request, refund the entire
2 amount paid for the undeveloped mausoleum space plus, if the
3 corporation established a preconstruction trust, net income earned
4 on that portion of the money deposited in the preconstruction
5 trust. The corporation is liable to a buyer for any portion of the
6 purchase price paid for undeveloped mausoleum spaces that was not
7 deposited in the preconstruction trust.

8 Sec. 712.065. RELEASE OF TRUST FUNDS TO CORPORATION.

9 (a) On completion of construction of a mausoleum or mausoleum
10 section subject to this subchapter, the corporation may withdraw
11 all money deposited in the preconstruction trust and the net income
12 earned on the money after submitting to the preconstruction trustee
13 a sworn affidavit of completion executed by an officer or agent of
14 the corporation on a form prescribed by the department.

15 (b) During construction of the mausoleum or mausoleum
16 section containing the undeveloped mausoleum spaces, the
17 corporation may periodically withdraw from the preconstruction
18 trust an amount equal to the previously unreimbursed cost of
19 performed labor or delivered materials after submitting to the
20 preconstruction trustee a sworn affidavit of expenditures for
21 construction cost executed by an officer or agent of the
22 corporation on a form prescribed by the department.

23 (c) If the corporation delivers a completed mausoleum space
24 acceptable to the buyer in lieu of the undeveloped mausoleum space
25 purchased, the corporation may withdraw all money deposited to the
26 preconstruction trust for that buyer and related income earned on
27 the money after submitting to the preconstruction trustee a sworn

1 affidavit of performance executed by an officer or agent of the
2 corporation on a form prescribed by the department.

3 (d) The corporation shall maintain copies of the affidavits
4 required by this section for examination by the department.

5 Sec. 712.066. CONTRACT DISCLOSURES. (a) A sales contract
6 for an undeveloped mausoleum space, whether in English or Spanish,
7 must inform the buyer:

8 (1) that the buyer by written notice may cancel the
9 contract for the failure of the corporation or its agent or
10 contractor to construct the mausoleum or mausoleum section
11 containing the undeveloped mausoleum space within the time limits
12 specified by Section 712.064(a) and receive a refund of the entire
13 amount paid under the contract for the undeveloped mausoleum space
14 plus, if the corporation established a preconstruction trust, net
15 income earned on that portion of the money deposited in the
16 preconstruction trust, as provided by Section 712.064(b);

17 (2) of the options available under a fully paid
18 contract in the event that the person to be interred in the
19 undeveloped mausoleum space dies before completion of the related
20 mausoleum or mausoleum section, which may include an option to:

21 (A) select a replacement mausoleum space or other
22 interment that is acceptable to the buyer or buyer's
23 representative; or

24 (B) elect temporary interment of the human
25 remains or cremated remains in an existing mausoleum space until
26 the undeveloped mausoleum space is completed, at which time the
27 corporation shall disinter and reinter the human remains or

1 cremated remains at no additional charge; and

2 (3) if the corporation does not offer a temporary
3 interment option and the buyer does not accept a replacement
4 mausoleum space or other interment, that the buyer or the buyer's
5 representative by written notice may cancel the contract and
6 receive a refund of the entire amount paid under the contract for
7 the undeveloped mausoleum space plus, if the corporation
8 established a preconstruction trust, net income earned on that
9 portion of the money deposited in the preconstruction trust, as
10 provided by Section 712.064(b).

11 (b) A corporation's sales contract for undeveloped
12 mausoleum space must comply with applicable regulations of the
13 Federal Trade Commission, including 16 C.F.R. Section 433.2, with
14 respect to a contract payable in installments.

15 (c) Required notices to buyers must be written in plain
16 language designed to be easily understood by the average consumer
17 and be printed in an easily readable font and type size.

18 Sec. 712.067. BOND IN LIEU OF PRECONSTRUCTION TRUST.

19 (a) In lieu of establishing the preconstruction trust required by
20 Section 712.063, a corporation may execute and submit a bond issued
21 by a surety company authorized to do business in this state and
22 reasonably acceptable to the commissioner. The bond must be
23 payable to the commissioner and conditioned on the faithful
24 performance of the contracts for sale of undeveloped mausoleum
25 spaces.

26 (b) The amount of the bond must equal or exceed 120 percent
27 of the cost of construction of the related mausoleum or mausoleum

1 section. The cost of construction of the mausoleum or mausoleum
2 section must be based on:

3 (1) estimates of the design architect and two or more
4 bids for the construction from qualified contractors authorized to
5 do business in this state;

6 (2) the actual cost of construction set forth in an
7 executed contract with a qualified contractor authorized to do
8 business in this state; or

9 (3) if the corporation intends to construct the
10 mausoleum itself, an amount equal to 120 percent of the estimated
11 cost of construction, including both direct and allocated labor and
12 material costs.

13 (c) At any time before beginning construction of the
14 mausoleum or mausoleum section in which undeveloped mausoleum
15 spaces are being sold, a corporation that has submitted a
16 performance bond may establish a preconstruction trust that meets
17 the requirements of Section 712.063. On acceptance of the
18 substituted preconstruction trust by the commissioner, the
19 corporation may terminate and withdraw the previously submitted
20 performance bond.

21 Sec. 712.068. REPORTS. On or before the date the
22 corporation's annual statement of funds is due as required by
23 Section 712.041, the corporation shall cause the preconstruction
24 trustee to file with the department, in the form prescribed by the
25 department, a full and true statement regarding the activities of
26 any preconstruction trust that was subject to this subchapter at
27 any time during the preceding calendar year.

1 SECTION 5. (a) Except as provided in Subsection (b) of
2 this section, this Act applies to a contract for the sale of an
3 undeveloped mausoleum space that is executed on or after the
4 effective date of this Act. A contract for the sale of an
5 undeveloped mausoleum space that is executed before the effective
6 date of this Act is governed by the law as it existed immediately
7 before the effective date of this Act, and that law is continued in
8 effect for that purpose.

9 (b) This Act does not apply to a sale of undeveloped
10 mausoleum space in an existing mausoleum project if at least 20
11 percent of the available, undeveloped mausoleum spaces have been
12 sold under contracts executed before the effective date of this
13 Act. On request, the banking commissioner of Texas may otherwise
14 exempt an existing mausoleum project based on a determination that
15 application of this Act to the subject mausoleum project would be
16 capricious, arbitrary, or unfair in light of the degree to which the
17 corporation has demonstrated detrimental reliance on the prior law.
18 The sale of an undeveloped mausoleum space in a mausoleum project
19 that is exempt under this subsection is governed by the law as it
20 existed immediately before the effective date of this Act, and that
21 law is continued in effect for that purpose.

22 SECTION 6. This Act takes effect September 1, 2005.