

AN ACT

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

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

amended to read as follows:

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

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

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

(3) the ~~[, annually or more often as necessary to protect the interest of plot owners. In addition, the commissioner may examine]~~ consumer complaint files of a corporation relating to the fund, sales of undeveloped mausoleum spaces, a preconstruction trust, or to discharge of the corporation's perpetual care responsibilities, minutes of the corporation's board of directors, cemetery dedication statements and plat maps, and mausoleum and lawn crypt construction contracts and specifications.

(b) A corporation that is examined under this section shall make the specified books and records available for examination by 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. Section 711.009, Health and Safety Code, is  
2 amended by adding Subsection (c) to read as follows:

3           (c) This section applies only to a cemetery located in a  
4 municipality with a population of 40,000 or more or in a county with  
5 a population of 290,000 or more.

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

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

27           SECTION 7. This Act takes effect September 1, 2005.

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President of the Senate	Speaker of the House

I hereby certify that S.B. No. 1173 passed the Senate on April 28, 2005, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendment on May 28, 2005, by the following vote: Yeas 31, Nays 0.

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I hereby certify that S.B. No. 1173 passed the House, with amendment, on May 25, 2005, by a non-record vote.

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Approved:

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Date

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Governor