

1-1 By: Armbrister S.B. No. 1173
1-2 (In the Senate - Filed March 8, 2005; March 21, 2005, read
1-3 first time and referred to Committee on Business and Commerce;
1-4 April 18, 2005, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 9, Nays 0; April 18, 2005,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1173 By: Armbrister

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to the regulation of a perpetual care cemetery and the sale
1-11 of interment rights in a mausoleum before completion of
1-12 construction.

1-13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-14 SECTION 1. Subsection (b), Section 712.001, Health and
1-15 Safety Code, is amended by amending Subdivision (1) and adding
1-16 Subdivisions (4-a), (4-b), and (6) to read as follows:

1-17 (1) "Banking department" or "department" means the
1-18 Banking Department of Texas.

1-19 (4-a) "Preconstruction trust" means a trust
1-20 established by a corporation under this chapter for the purpose of
1-21 administering proceeds from sales of undeveloped mausoleum spaces.

1-22 (4-b) "Preconstruction trustee" means the trustee of a
1-23 preconstruction trust.

1-24 (6) "Undeveloped mausoleum space" means a crypt or
1-25 niche in a mausoleum or mausoleum section that is designed to
1-26 contain at least 10 crypt or niche interments and that is not ready
1-27 for the interment of human remains or cremated remains on the date
1-28 an interment right pertaining to the mausoleum space is sold. The
1-29 term does not include a private mausoleum or mausoleum section in
1-30 which all mausoleum spaces are intended to be sold under a single
1-31 contract.

1-32 SECTION 2. Section 712.044, Health and Safety Code, is
1-33 amended to read as follows:

1-34 Sec. 712.044. EXAMINATION OF RECORDS; EXAMINATION FEES AND
1-35 EXPENSES. (a) The commissioner may examine, annually or more
1-36 often as the commissioner reasonably considers necessary or
1-37 appropriate to protect the interest of plot owners and efficiently
1-38 administer and enforce this chapter:

1-39 (1) the books and records of a corporation relating to
1-40 its fund, including deposits to or withdrawals from the fund,
1-41 income of the fund, and uses and expenditures of that income;

1-42 (2) the books and records of a corporation relating to
1-43 sales of undeveloped mausoleum spaces and any preconstruction trust
1-44 established by the corporation as provided by Section 712.063,
1-45 including deposits to or withdrawals from the preconstruction
1-46 trust, income of the preconstruction trust, and uses and
1-47 expenditures of principal and income of the preconstruction trust;
1-48 and

1-49 (3) the ~~the~~, annually or more often as necessary to
1-50 protect the interest of plot owners. In addition, the commissioner
1-51 ~~may examine~~ consumer complaint files of a corporation relating to
1-52 the fund, sales of undeveloped mausoleum spaces, a preconstruction
1-53 trust, or to discharge of the corporation's perpetual care
1-54 responsibilities, minutes of the corporation's board of directors,
1-55 cemetery dedication statements and plat maps, and mausoleum and
1-56 lawn crypt construction contracts and specifications.

1-57 (b) A corporation that is examined under this section shall
1-58 make the specified books and records available for examination by
1-59 the banking department upon reasonable notice to the corporation
1-60 and shall pay to the commissioner for the examination a reasonable
1-61 and necessary fee set by rules adopted by the Finance Commission of
1-62 Texas under Section 712.008 to defray:

1-63 (1) the cost of examination;

2-1 (2) the equitable or proportionate cost of maintenance
2-2 and operation of the department; and

2-3 (3) the cost of administering and enforcing this
2-4 chapter.

2-5 SECTION 3. Subsection (f), Section 712.0441, Health and
2-6 Safety Code, is amended to read as follows:

2-7 (f) The commissioner may issue an order requiring
2-8 restitution by a corporation to its fund or to a preconstruction
2-9 trust if, after notice and opportunity for hearing held in
2-10 accordance with the procedures for a contested case hearing under
2-11 the Administrative Procedure and Texas Register Act, the
2-12 commissioner finds that the corporation has not made a deposit in
2-13 the fund as required by Section 712.028 or in the preconstruction
2-14 trust as required by Section 712.063.

2-15 SECTION 4. Chapter 712, Health and Safety Code, is amended
2-16 by adding Subchapter D to read as follows:

2-17 SUBCHAPTER D. SALE OF UNDEVELOPED MAUSOLEUM SPACE

2-18 Sec. 712.061. OFFER AND SALE OF UNDEVELOPED MAUSOLEUM
2-19 SPACE. (a) A corporation may not directly or indirectly sell or
2-20 offer for sale an undeveloped mausoleum space unless before the
2-21 sale or offer the corporation:

2-22 (1) establishes a preconstruction trust as provided by
2-23 Section 712.063 or executes and submits a performance bond payable
2-24 to the commissioner as provided by Section 712.067; and

2-25 (2) submits a written notice to the commissioner as
2-26 required by Subsection (b).

2-27 (b) The written notice to the commissioner must set forth:
2-28 (1) the date the corporation anticipates that sales of
2-29 undeveloped mausoleum spaces will begin;

2-30 (2) a copy of the sales contract proposed for use that
2-31 complies with Section 712.066;

2-32 (3) if the corporation establishes a preconstruction
2-33 trust as provided by Section 712.063, a copy of the executed
2-34 preconstruction trust agreement that complies with this subchapter
2-35 and identifies the preconstruction trustee;

2-36 (4) if the corporation submits a performance bond
2-37 payable to the commissioner as provided by Section 712.067, the
2-38 executed, original performance bond in the amount required by
2-39 Section 712.067 and documentation supporting the corporation's
2-40 computation of that amount; and

2-41 (5) other information the commissioner reasonably
2-42 requires to properly administer and enforce this subchapter.

2-43 (c) At any time before beginning construction of the
2-44 mausoleum or mausoleum section in which undeveloped mausoleum
2-45 spaces are being sold, a corporation that has established a
2-46 preconstruction trust may substitute a performance bond that meets
2-47 the requirements of Section 712.067. On acceptance of the
2-48 performance bond by the commissioner, the corporation may terminate
2-49 and withdraw all proceeds deposited in the preconstruction trust.

2-50 Sec. 712.062. DEPOSITS TO FUND. This subchapter does not
2-51 affect the corporation's obligation to make deposits to its fund as
2-52 provided in Subchapter B.

2-53 Sec. 712.063. PRECONSTRUCTION TRUST. (a) Except as
2-54 provided by Section 712.067, a corporation that intends to directly
2-55 or indirectly sell or offer for sale undeveloped mausoleum spaces
2-56 shall establish a preconstruction trust by written declaration and
2-57 agreement appointing as preconstruction trustee a financial
2-58 institution with trust powers that is located in this state.

2-59 (b) The corporation shall deposit in the preconstruction
2-60 trust an amount equal to at least 40 percent of all proceeds
2-61 received directly or indirectly from the sale of undeveloped
2-62 mausoleum spaces, not including interest, finance charges, sales
2-63 taxes, credit life insurance premiums, or deposits to the
2-64 corporation's fund required by Section 712.029(c).

2-65 (c) On application, the commissioner may authorize a
2-66 corporation to deposit less than the amount required by Subsection
2-67 (b) if the corporation demonstrates to the reasonable satisfaction
2-68 of the commissioner that:

2-69 (1) the sales projections of the corporation are

3-1 prudent and based on reasonable assumptions;

3-2 (2) the projected cost of construction is objectively
 3-3 determined based on documentation similar to that required by
 3-4 Section 712.067(b); and

3-5 (3) the amount of money projected to be deposited in
 3-6 the preconstruction trust under the proposed lesser amount will
 3-7 equal or exceed 120 percent of the cost of constructing the
 3-8 mausoleum or mausoleum section.

3-9 (d) The corporation shall deposit the required amount into
 3-10 the preconstruction trust on or before the 30th day after the end of
 3-11 the month in which payment is received. At the time of making a
 3-12 deposit, the corporation shall furnish to the preconstruction
 3-13 trustee the name of each payor and the amount of payment on each
 3-14 account for which the deposit is being made. A contract between the
 3-15 corporation and an agent or third party developer may not restrict
 3-16 or waive the corporation's primary liability for making the
 3-17 deposits required by this section.

3-18 (e) The preconstruction trustee may commingle deposits
 3-19 received if the accounting records accurately establish a separate
 3-20 account for each contract and reflect the amounts deposited and the
 3-21 income and loss allocable to each contract.

3-22 (f) Money in a preconstruction trust may be invested only
 3-23 in:

3-24 (1) demand deposits, savings accounts, certificates
 3-25 of deposit, or other accounts in financial institutions if the
 3-26 amounts deposited in those accounts are fully covered by federal
 3-27 deposit insurance or otherwise fully secured by a separate fund of
 3-28 securities in the manner provided by Section 184.301, Finance Code;

3-29 (2) marketable notes, bonds, evidences of
 3-30 indebtedness, or obligations with a term to maturity of five years
 3-31 or less and:

3-32 (A) issued by the United States or an
 3-33 instrumentality of the United States; or

3-34 (B) the principal and interest of which are
 3-35 guaranteed by the full faith and credit of the United States; and

3-36 (3) a mutual fund the portfolio of which consists
 3-37 wholly of investments permitted by Subdivisions (1) and (2).

3-38 (g) The preconstruction trustee may withdraw money from
 3-39 earnings on a preconstruction trust for the purpose of paying
 3-40 reasonable and necessary costs of operation of the preconstruction
 3-41 trust, including trustee or depository fees and expenses, and any
 3-42 special examination fees due to the department related to an
 3-43 examination of the preconstruction trust that is not incidental to
 3-44 examination of the corporation's fund. With the department's prior
 3-45 approval, the corporation may withdraw money from earnings on a
 3-46 preconstruction trust to pay any tax incurred because of the
 3-47 existence of the preconstruction trust.

3-48 (h) The preconstruction trust and the preconstruction
 3-49 trustee are governed by Subtitle B, Title 9, Property Code.

3-50 Sec. 712.064. CONSTRUCTION; DEFAULT. (a) The corporation
 3-51 shall start construction of the mausoleum or mausoleum section in
 3-52 which sales or reservations for sale of undeveloped mausoleum
 3-53 spaces are being made on or before a date that is 48 months after the
 3-54 date of the first of those sales or reservations and shall complete
 3-55 construction on or before a date that is 60 months after the date of
 3-56 the first of those sales or reservations. The commissioner may
 3-57 grant extensions for good cause shown.

3-58 (b) If construction of a mausoleum or mausoleum section
 3-59 related to an undeveloped mausoleum space has not begun or been
 3-60 completely constructed by the applicable time specified by
 3-61 Subsection (a), on the written request of the buyer, the
 3-62 corporation and the preconstruction trustee shall, on or before the
 3-63 30th day after the date of the buyer's request, refund the entire
 3-64 amount paid for the undeveloped mausoleum space plus, if the
 3-65 corporation established a preconstruction trust, net income earned
 3-66 on that portion of the money deposited in the preconstruction
 3-67 trust. The corporation is liable to a buyer for any portion of the
 3-68 purchase price paid for undeveloped mausoleum spaces that was not
 3-69 deposited in the preconstruction trust.

Sec. 712.065. RELEASE OF TRUST FUNDS TO CORPORATION.

4-1 (a) On completion of construction of a mausoleum or mausoleum
 4-2 section subject to this subchapter, the corporation may withdraw
 4-3 all money deposited in the preconstruction trust and the net income
 4-4 earned on the money after submitting to the preconstruction trustee
 4-5 a sworn affidavit of completion executed by an officer or agent of
 4-6 the corporation on a form prescribed by the department.

4-7 (b) During construction of the mausoleum or mausoleum
 4-8 section containing the undeveloped mausoleum spaces, the
 4-9 corporation may periodically withdraw from the preconstruction
 4-10 trust an amount equal to the previously unreimbursed cost of
 4-11 performed labor or delivered materials after submitting to the
 4-12 preconstruction trustee a sworn affidavit of expenditures for
 4-13 construction cost executed by an officer or agent of the
 4-14 corporation on a form prescribed by the department.

4-15 (c) If the corporation delivers a completed mausoleum space
 4-16 acceptable to the buyer in lieu of the undeveloped mausoleum space
 4-17 purchased, the corporation may withdraw all money deposited to the
 4-18 preconstruction trust for that buyer and related income earned on
 4-19 the money after submitting to the preconstruction trustee a sworn
 4-20 affidavit of performance executed by an officer or agent of the
 4-21 corporation on a form prescribed by the department.

4-22 (d) The corporation shall maintain copies of the affidavits
 4-23 required by this section for examination by the department.

4-24 Sec. 712.066. CONTRACT DISCLOSURES. (a) A sales contract
 4-25 for an undeveloped mausoleum space, whether in English or Spanish,
 4-26 must inform the buyer:

4-27 (1) that the buyer by written notice may cancel the
 4-28 contract for the failure of the corporation or its agent or
 4-29 contractor to construct the mausoleum or mausoleum section
 4-30 containing the undeveloped mausoleum space within the time limits
 4-31 specified by Section 712.064(a) and receive a refund of the entire
 4-32 amount paid under the contract for the undeveloped mausoleum space
 4-33 plus, if the corporation established a preconstruction trust, net
 4-34 income earned on that portion of the money deposited in the
 4-35 preconstruction trust, as provided by Section 712.064(b);

4-36 (2) of the options available under a fully paid
 4-37 contract in the event that the person to be interred in the
 4-38 undeveloped mausoleum space dies before completion of the related
 4-39 mausoleum or mausoleum section, which may include an option to:

4-40 (A) select a replacement mausoleum space or other
 4-41 interment that is acceptable to the buyer or buyer's
 4-42 representative; or

4-43 (B) elect temporary interment of the human
 4-44 remains or cremated remains in an existing mausoleum space until
 4-45 the undeveloped mausoleum space is completed, at which time the
 4-46 corporation shall disinter and reinter the human remains or
 4-47 cremated remains at no additional charge; and

4-48 (3) if the corporation does not offer a temporary
 4-49 interment option and the buyer does not accept a replacement
 4-50 mausoleum space or other interment, that the buyer or the buyer's
 4-51 representative by written notice may cancel the contract and
 4-52 receive a refund of the entire amount paid under the contract for
 4-53 the undeveloped mausoleum space plus, if the corporation
 4-54 established a preconstruction trust, net income earned on that
 4-55 portion of the money deposited in the preconstruction trust, as
 4-56 provided by Section 712.064(b).

4-57 (b) A corporation's sales contract for undeveloped
 4-58 mausoleum space must comply with applicable regulations of the
 4-59 Federal Trade Commission, including 16 C.F.R. Section 433.2, with
 4-60 respect to a contract payable in installments.

4-61 (c) Required notices to buyers must be written in plain
 4-62 language designed to be easily understood by the average consumer
 4-63 and be printed in an easily readable font and type size.

Sec. 712.067. BOND IN LIEU OF PRECONSTRUCTION TRUST.

4-64 (a) In lieu of establishing the preconstruction trust required by
 4-65 Section 712.063, a corporation may execute and submit a bond issued
 4-66 by a surety company authorized to do business in this state and
 4-67 reasonably acceptable to the commissioner. The bond must be
 4-68

5-1 payable to the commissioner and conditioned on the faithful
5-2 performance of the contracts for sale of undeveloped mausoleum
5-3 spaces.

5-4 (b) The amount of the bond must equal or exceed 120 percent
5-5 of the cost of construction of the related mausoleum or mausoleum
5-6 section. The cost of construction of the mausoleum or mausoleum
5-7 section must be based on:

5-8 (1) estimates of the design architect and two or more
5-9 bids for the construction from qualified contractors authorized to
5-10 do business in this state;

5-11 (2) the actual cost of construction set forth in an
5-12 executed contract with a qualified contractor authorized to do
5-13 business in this state; or

5-14 (3) if the corporation intends to construct the
5-15 mausoleum itself, an amount equal to 120 percent of the estimated
5-16 cost of construction, including both direct and allocated labor and
5-17 material costs.

5-18 (c) At any time before beginning construction of the
5-19 mausoleum or mausoleum section in which undeveloped mausoleum
5-20 spaces are being sold, a corporation that has submitted a
5-21 performance bond may establish a preconstruction trust that meets
5-22 the requirements of Section 712.063. On acceptance of the
5-23 substituted preconstruction trust by the commissioner, the
5-24 corporation may terminate and withdraw the previously submitted
5-25 performance bond.

5-26 Sec. 712.068. REPORTS. On or before the date the
5-27 corporation's annual statement of funds is due as required by
5-28 Section 712.041, the corporation shall cause the preconstruction
5-29 trustee to file with the department, in the form prescribed by the
5-30 department, a full and true statement regarding the activities of
5-31 any preconstruction trust that was subject to this subchapter at
5-32 any time during the preceding calendar year.

5-33 SECTION 5. (a) Except as provided in Subsection (b) of
5-34 this section, this Act applies to a contract for the sale of an
5-35 undeveloped mausoleum space that is executed on or after the
5-36 effective date of this Act. A contract for the sale of an
5-37 undeveloped mausoleum space that is executed before the effective
5-38 date of this Act is governed by the law as it existed immediately
5-39 before the effective date of this Act, and that law is continued in
5-40 effect for that purpose.

5-41 (b) This Act does not apply to a sale of undeveloped
5-42 mausoleum space in an existing mausoleum project if at least 20
5-43 percent of the available, undeveloped mausoleum spaces have been
5-44 sold under contracts executed before the effective date of this
5-45 Act. On request, the banking commissioner of Texas may otherwise
5-46 exempt an existing mausoleum project based on a determination that
5-47 application of this Act to the subject mausoleum project would be
5-48 capricious, arbitrary, or unfair in light of the degree to which the
5-49 corporation has demonstrated detrimental reliance on the prior law.
5-50 The sale of an undeveloped mausoleum space in a mausoleum project
5-51 that is exempt under this subsection is governed by the law as it
5-52 existed immediately before the effective date of this Act, and that
5-53 law is continued in effect for that purpose.

5-54 SECTION 6. This Act takes effect September 1, 2005.

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