

BILL ANALYSIS

C.S.H.B. 1038
By: Ritter
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

During the 78th Legislative Session (2003), H.B. 730 was filed and created the Texas Residential Construction Commission (TRCC). This Act adopted performance standards and statutory warranties for residential construction, and established a state-sponsored inspection and dispute resolution process designed to assist consumers in resolving construction issues with homebuilders. Additionally, the Act required, for the first time in history, the registration of homebuilders and remodelers with the state.

C.S.H.B. 1038 gives the TRCC more disciplinary powers, including the ability to discipline builders who do not register with the TRCC, or who repeatedly fail to make an offer to repair or do not reasonably perform on an accepted offer to repair a building defect based on a third-party's recommendations or an appeal of the third-party inspector's recommendation. The bill gives the TRCC the power to issue cease and desist orders against those violating the TRCC Act and proscribes a penalty of up to \$100,000 for violations involving the misappropriation of funds or engaging in statutory or common law fraud. The bill further provides that a homeowner may disregard the state-sponsored inspection and dispute resolution process and go directly to court or arbitration if the builder is not registered with the TRCC, and prohibits a builder from enforcing a contract if the builder is not registered with the TRCC.

The bill offers various other deletions, additions, and modifications to the operation of the TRCC as initially outlined and passed in the Texas Residential Construction Commission Act.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1. Amends Section 41.007, Property Code, by amending Subsection (a) and adding Subsection (c). Requires certain construction contracts to contain the TRCC registration number of the contractor if the contractor is required to register as a builder with the commission. Further requires such contracts to contain the address and telephone number at which the owner may file certain complaints with the commission. Mandates that certain construction contracts which contain a clause requiring the parties to submit disputes arising under the contract to binding arbitration, must contain a space immediately adjacent to the clause for the purpose of the owner acknowledging acceptance of the clause in writing by signing such space. Further mandates that the clause must be conspicuously printed or typed in a size equal to at least 14-point bold type.

SECTION 2. Amends Sections 401.003(a) and (c), Property Code. Clarifies the definition of builder to include any other person that, for a fixed price, commission, fee, wage, or other compensation, constructs or manages the construction of certain homes or home improvements. Deletes language stating that the term does not include certain entities and individuals who have been issued licenses by a political subdivision of the state. Clarifies that an agency means a state agency. Amends the definition of builder to include the construction or supervision of an improvement to the interior of an existing home when the cost of the work exceeds \$10,000, as opposed to the current \$20,000.

SECTION 3. Amends Section 401.005, Property Code, by adding Subsection (c), making an individual who builds or materially improves a home with the intent to sell that home immediately following completion, and does not live in the home for at least one year following the work, liable as a builder under the warranty obligations for work completed by the individual.

SECTION 4. Amends Chapter 401 of the Property Code by adding Section 401.007. Allows the commission, under certain circumstances, to issue a cease and desist order and/or an order to take affirmative action, against a person it reasonably believes is violating a statute to which the chapter applies. Allows a person to appeal the order directly to a district court in accordance with Chapter 2001 of the Government Code. Provides that before issuing an order under this section, the commission shall set and give notice of a hearing before a hearings officer and that such hearing shall be governed by Chapter 2001 of the Government Code. Allows the commission to find, by order, whether a violation has occurred, based on the findings of fact, conclusions of law, and recommendations of the hearings officer. Allows the commission, after providing notice and opportunity to appear for a hearing, to impose against a person who violates a cease and desist order, an administrative penalty not to exceed \$1,000 for each day of the violation. Allows the commission, in addition to any other remedy provided by law, to institute in district court, a suit for injunctive relief and to collect an administrative penalty. Provides that bond is not required of the commission with respect to the injunctive relief granted under this section. Allows the court in such an action to enter an order awarding a preliminary or final injunction. Provides that if a party seeks review of a commission order, the party shall file a petition initiating judicial review not later than the 30th day after the date of the issuance of the decision.

SECTION 5. Amends Section 406.004(b), Property Code, by adding officers of a residential construction trade association to the list of those who cannot be members or employees of the commission. Further amends the section to disqualify a person from being a member or employee of the commission if their spouse is an officer of a residential construction trade association.

SECTION 6. Amends Section 408.002, Property Code. Allows the commission to charge late fees, in any amount that does not exceed the fee due, for any late payment of any fees due to the commission. Allows the commission to charge reasonable fees for certain state-sponsored inspection requests, providing certain public information, and producing, mailing and distributing certain materials and publications for use and distribution by builders.

SECTION 7. Amends Section 408.003, Property Code, by adding Subsection (c), allowing the commission to procure and distribute informational and promotional items that contain commission contact and outreach information, to consumers.

SECTION 8. Amends Chapter 408, Property Code, by adding Section 408.005, allowing the commission to seek reimbursement of any amounts due to the commission and restitution for any dishonored payment instrument presented for payment to the commission.

SECTION 9. Amends Section 409.003, Property Code, by adding Subsections (d) and (e). Requires the commission to make certain information regarding disciplinary actions available to the public.

SECTION 10. Amends Section 416.004, Property Code, by amending Subsection (a) and adding Subsection (c). Mandates that the commission collect late fees not to exceed the amount of the fee due if payment of a registration application or renewal fee due under Title 16 of the Property Code is late. Makes all fees paid to the commission under this section nonrefundable.

SECTION 11. Amends Section 416.008(d), Property Code, by allowing the hearing officer of a hearing for the denial of an application for an original certificate of registration to grant a motion of continuance of the hearing at the request of the commission or applicant.

SECTION 12. Amends Section 416.011(d), Property Code, by making a "Texas Star Builder" designation valid for at most one year and renewable on a date determined at the commission's discretion.

SECTION 13. Amends Chapter 416, Property Code, by adding Section 416.012, prohibiting a builder from suing to enforce certain contracts or collect certain fees and damages, unless the builder held a certificate of registration under Chapter 416, Property Code, at the time the contract was entered into and work under the contract was performed.

SECTION 14. Amends Section 417.003, Property Code, by mandating that the commission collect late fees not to exceed the amount of the fee due if payment of a registration or application fee due under Title 16 of the Property Code is late. Makes all fees paid to the commission under this section nonrefundable.

SECTION 15. Amends Sections 418.001 and 418.002, Property Code, as follows:

Section 418.001 is expanded to specify that builders, builder's agents as designated under Section 416.006 of the Property Code, and persons who own or control a majority interest in the builder, are subject to disciplinary action under Chapter 418 of the Property Code. Adds and/or amends the following grounds for disciplinary action: 1) the misapplication of trust funds in the practice of residential construction, including a violation of Chapter 32, Penal Code, or Chapter 162, Property Code, if found by a final nonappealable court judgment; 2) failure to honor an instrument of payment, including a credit or debit card or electronic fund transfer, after the commission has sent a request by certified mail for payment to the person's last known address, according to commission records; 3) failure to pay a fee under Chapter 426, Property Code; 4) engaging in statutory or common law fraud or misappropriation of funds, as determined by the commission after a hearing under Section 418.003 of the Property Code; 5) failure to participate in the state-sponsored inspection and dispute resolution process if required by Title 16 of the Property Code; 6) failure to register as a builder as required by Chapter 416, Property Code; 7) using or attempting to use a certificate of registration that has expired or that has been revoked; 8) falsely representing that the person holds a certificate of registration issued under Chapter 416, Property Code; 9) acting as a builder using a name other than the name listed on the person's certificate of registration; 10) aiding, abetting, or conspiring with a person who does not hold a certificate of registration to evade the provisions of this title or rules adopted under this title, if found by a final nonappealable court judgment; 11) allowing the person's certificate of registration to be used by another person; 12) acting as an agent, partner, or associate of a person who does not hold a certificate of registration with the intent to evade the provisions of Title 16, Property Code, or rules adopted under the title; 13) a failure reasonably perform on an accepted offer to repair or a repeated failure to make an offer to repair, based on the recommendation of a third-party inspector under Chapter 428.004, Property Code, or a final holding of an appeal under Chapter 429, Property Code; and 14) otherwise violating Title 16, Property Code, or a commission rule adopted under the title. For the purposes of statutory or common law fraud or misappropriation of funds under the proposed Subsection 418.001(a)(12), Property Code, the commission may not revoke a registration or certification or impose an administrative penalty unless there is a finding of statutory or common law fraud or misappropriation of funds by a court in a final nonappealable judgment. Changes "nonpayment of a final nonappealable judgment..." to "failure to pay a final nonappealable judgment...". Changes "...provided in Section 428.004(d)" to "...provided by Section 428.004(d)".

Section 418.002 adds the imposition of an administrative penalty under Chapter 419 of the Property Code to the actions the commission may take upon a determination that a ground for disciplinary action under Section 418.001 of the Property Code exists.

Adds a Subsection (b) to Section 418.002, Property Code, which provides that the commission may not revoke a registration or certification unless the conduct that is the basis for the revocation was committed during the 12 months preceding the date of the revocation and involves a specified number of the homes registered by the builder under Section 426.003, Property Code. This subsection only applies to acts involving transactions between a builder and a homeowner.

SECTION 16. Amends Section 418.004, Property Code, by adding Subsection (c), providing that an appeal of certain commission decisions to a district court is determined by a preponderance of the evidence.

SECTION 17. Amends Chapter 418, Property Code, by adding Section 418.005, allowing the commission to take administrative action under the chapter simultaneously against a builder, a builder's agent as designated under Section 416.006 of the Property Code, and a person who owns or controls a majority interest in the builder, and makes them jointly and severally liable for any amounts due to the commission under Title 16 of the Property Code.

SECTION 18. Amends Section 419.001, Property Code, by allowing the commission to impose an administrative penalty on "a person" rather than "a registered and certified person" that violates Title 16 of the Property Code or a rule adopted or order issued by the commission under the title. Deletes language specifying that there be a contested case involving disciplinary action, as well as language that an administrative penalty be part of a commission order, for the commission to impose an administrative penalty. Adds Subsection (d) providing that if the commission imposes an administrative penalty for failure to comply with statutory warranties or building and performance standards, it must show at a hearing that the violations were repeated and continuous.

SECTION 19. Amends Section 419.002, Property Code, by amending Subsection (a) and adding Subsection (c). Increases certain administrative penalties to an amount not to exceed \$10,000. Proscribes a penalty not to exceed \$100,000 for violations under Section 418.001(a)(2), Property Code, or proposed Section 418.001(a)(12), Property Code.

SECTION 20. Amends Section 426.003(b), Property Code, to require certain builders to have the registration of applicable homes or other residential construction projects delivered to the commission no later than the 15th day after the earlier of 1) the date of the home's substantial completion; 2) the date of occupation; or 3) the date of the issuance of a certificate of occupancy or certificate of completion.

SECTION 21. Amends Section 426.004, Property Code, by amending Subsection (c) and adding Subsection (d). Provides that for certain cases where the transfer of title or a contract for improvement of a home occurred before January 1, 2004, the commission shall register the home and the builder shall pay the registration fee required by Section 426.003 of the Property Code. Allows the commission to reimburse third-party inspectors for travel expenses incurred to complete an inspection, regardless of whether the expenses exceed the amount collected under this section.

SECTION 22. Amends Section 426.005, Property Code, by amending Subsection (a) and adding Subsection (f). Requires the builder, in addition to the homeowner, to comply with Subtitle D of the Property Code before initiating an action for damages or other relief arising from an alleged construction defect. Provides that a homeowner is not required to comply with the subtitle if, at the time the homeowner requests an inspection, the builder is not registered or the certificate of registration of the builder has been revoked or is inactive.

SECTION 23. Amends Section 426.007, Property Code, to make certain aspects regarding the disclosure of information and admissibility of evidence applicable to the responder of a state-sponsored inspection and dispute resolution process. Replaces existing language referring to "an expert" with "a witness."

SECTION 24. Amends Section 426.008, Property Code, by adding Subsection (c) which provides that for the purposes of admissibility in certain actions involving a construction defect, a third-party inspector's recommendation or a ruling by a panel of state inspectors shall be considered a business record under Rule 902 of the Texas Rules of Evidence.

SECTION 25. Amends Section 427.001, Property Code, by amending Subsections (b), (c), and (d). Lowers the applicable required experience of a third-party inspector who inspects an issue involving workmanship and materials from a minimum of five years to a minimum of three years. Lowers the applicable required experience of a third-party inspector who inspects an issue involving a structural matter or involving workmanship, materials, and a structural matter from a minimum of ten years to a minimum of five years. Clarifies that inspectors who inspect an issue involving workmanship, materials, and a structural matter must be an approved structural engineer or an approved architect, and must have a minimum of five years experience in residential construction. Makes certain training regarding the state-sponsored inspection and

dispute resolution process and Subtitle D of the Property Code, as well as annual continuing education in the inspector's area of practice, apply to all third-party inspectors.

SECTION 26. Amends Chapter 427, Property Code, by adding Section 427.003, providing that third-party inspectors and state inspectors who do not act with wanton or willful disregard for the rights, safety, or property of others are not liable for civil damages for any act or omission within the course and scope of carrying out their duties or functions as third-party inspectors or state inspectors. Provides that this section does not apply to intentional acts of misconduct or gross negligence.

SECTION 27. Amends Sections 428.001(d) and (g), Property Code. Requires that a person requesting a state-sponsored inspection and dispute resolution must provide a copy of the request to each other party involved in the dispute at the time the requestor submits the request under this section. Deletes language requiring the commission to provide a means to electronically submit a state-sponsored inspection and dispute resolution request.

SECTION 28. Amends Section 428.004 Property Code, by amending Subsection (a) and adding Subsections (e) and (f). Requires a third-party inspector to issue a recommendation regarding workmanship and materials not later than 30, rather than 15, days after the date the third-party inspector receives the appointment from the commission. Adds language that the commission may not require a builder to reimburse fees or inspection expenses under this subsection if, before the inspection, the builder offered to make repairs or have repairs made substantially equivalent to those required by the findings of the final report confirming the defect requiring repair. Prevents the commission from reporting a finding against the builder, if, before or after the inspection, the builder made or offered to make repairs substantially equivalent to those required by the finding of the final report confirming the defect.

SECTION 29. Amends Chapter 428, Property Code, by adding a Section 428.006 which provides that if a request for a state-sponsored inspection and dispute resolution is filed under this section and accepted by the commission, certain parties to the dispute may submit a written response and present evidence in support of the response no later than the 15th day after the date the person received a copy of the request under Section 428.001(d). Further provides that if the response alleges the existence of a construction defect not alleged in the original request, the third-party inspector shall inspect and issue a determination regarding that defect and any other defect alleged in the response.

SECTION 30. Amends Section 429.001(c), Property Code, by requiring a panel appointed under Chapter 429, Property Code, to review certain recommendations for compliance with Title 16, Property Code, as required by rules adopted by the commission under current statutory authority. Deletes language stating that such panel shall review certain recommendations without a hearing unless a hearing is otherwise required by rules adopted by the commission under current statutory authority.

SECTION 31. Amends Section 430.005, Property Code, clarifying that builders in certain unincorporated areas are not exempt from the registration requirements imposed under Title 16 of the Property Code, and that allegations of post-construction defects in a construction project in such areas are subject to the state-sponsored inspection and dispute resolution process described by Subtitle D of the Property Code.

SECTION 32. Amends Section 430.006, Property Code, to clarify that warranties that apply to an area described under Section 430.005 of the Property Code are included among the warranties that exist for residential construction or residential improvements. Makes conforming changes.

SECTION 33. Amends Subchapter Z, Chapter 214, Local Government Code, by adding Section 214.906, prohibiting municipalities from issuing building permits to builders, as defined by Section 401.003 of the Property Code, for construction described by Section 401.003(a) of the Property Code, unless the municipality determines that builder is registered with the Texas Residential Construction Commission under Chapter 416 of the Property Code.

SECTION 34. Requires the House Committee on State Affairs to conduct an interim study regarding the feasibility of creating a fund designed to reimburse aggrieved persons who

experience actual damages from a builder's actions in violation of Title 16, Property Code. Sets certain parameters and deadlines for the study. Provides that this section expires on October 1, 2008.

SECTION 35. States that this Act applies only to an application for a building permit or certification as a Texas Star Builder, or a request for a state-sponsored inspection and dispute resolution filed on or after the effective date of the bill. Further states that an application for a building permit or for certification as a builder or a Texas Star Builder or a request for state-sponsored inspection and dispute resolution that was filed before the effective date of this bill is governed by the law as it existed immediately before the effective date of this bill, and that law is in effect for that purpose.

SECTION 36. States that Section 416.012, Property Code, as added by this Act, applies only to work performed by a builder on or after the effective date of the Act. Work performed by a builder before that date is governed by the law in effect when the work is performed, and the former law is continued in effect for that purpose.

SECTION 37. States that the changes in law made by this Act by the amendment of Section 418.001, Property Code, apply only to conduct that occurs on or after the effective date of the Act. Conduct that occurs before that date is governed by the law in effect when the conduct occurs, and the former law is continued in effect for that purpose.

SECTION 38. Effective Date.

EFFECTIVE DATE

September 1, 2007.

COMPARISON OF ORIGINAL TO SUBSTITUTE

SECTION 1 of the committee substitute requires certain construction contracts to contain the TRCC registration number of the contractor if the contractor is required to register as a builder with the commission. Requires such contracts to contain certain information regarding the address and telephone number at which certain complaints can be filed, as well certain clauses for the purpose of the owner acknowledging acceptance of an arbitration clause in writing. Further mandates that the clause must conform to a certain type setting. The original had no corresponding section.

SECTION 2 of the committee substitute amends the definition of builder to include the construction or supervision of an improvement to the interior of an existing home when the cost of the work exceeds \$10,000, as opposed to the current \$20,000. This provision was not in the original.

SECTION 4 of the committee substitute grants the commission cease and desist powers and the ability to administer monetary penalties for violations of the cease and desist orders. It includes provisions regarding appeal of the orders and gives the commission the ability to file suits for injunctive relief and to collect administrative penalties. The original limited the commission to injunctive powers.

SECTION 6 of the committee substitute adds language allowing the commission to charge certain reasonable fees. The corresponding section in the original did not contain this provision.

SECTION 7 of the committee substitute allows the commission to "procure and distribute" certain materials and items. The original merely allowed the commission to "distribute" such items.

SECTION 9 of the committee substitute adds language requiring the commission to make certain information regarding disciplinary actions available to the public.

SECTION 13 of the committee substitute prohibits a builder from suing to enforce certain contracts or collect certain fees and damages, unless the builder held a certificate of registration

under Chapter 416, Property Code, at the time the contract was entered into and work under the contract was performed. The original had no corresponding section.

SECTION 15 of the committee substitute provides that builders, certain builder's agents, and persons who own or control a majority interest in the builder, are subject to disciplinary action. The original read that builders and certain builder's agents who own or control a majority interest in the builder, are subject to disciplinary action. The committee substitute also adds several new grounds for disciplinary action, and deletes one of the proposed grounds found in the original.

SECTION 16 of the committee substitute provides that an appeal of certain commission decisions to a district court is determined by a preponderance of the evidence. The original had no corresponding section.

SECTION 17 of the committee substitute allows the commission to take certain administrative actions simultaneously against a builder, certain builder's agents, and a person who owns or controls a majority interest in the builder, and makes them jointly and severally liable for certain amounts due to the commission. The original allowed the commission to take certain administrative action simultaneously against a builder and certain builder's agents who own or control a majority interest in the builder, and made them jointly and severally liable for certain amounts due to the commission.

SECTION 19 of the original is deleted.

SECTION 19 of the committee substitute increases certain administrative penalties to an amount not to exceed \$10,000, and proscribes a penalty not to exceed \$100,000 for certain violations involving the misappropriation of funds or engaging in statutory or common law fraud. The original had no corresponding section.

SECTION 20 of the committee substitute adds language that makes the relevant statute apply to the construction of the home or other residential construction project. The corresponding section in the original did not contain the language reading "or other residential construction project."

SECTION 21 of the committee substitute provides that for certain cases where the transfer of title or a contract for improvement of a home occurred before January 1, 2004, the commission shall register the home and the builder shall pay certain registration fees. The corresponding section in the original did not contain this provision.

SECTION 22 of the committee substitute requires the builder to comply with Subtitle D of the Property Code before initiating certain actions, and provides that a homeowner is not required to comply with the relevant subtitle if, at the time the homeowner requests an inspection, the builder is not registered or the certificate of registration of the builder has been revoked or is inactive. The original had no corresponding section.

SECTION 23 of the committee substitute makes certain aspects regarding the disclosure of information and admissibility of evidence applicable to the responder of a state-sponsored inspection and dispute resolution process and replaces existing language referring to "an expert" with "a witness." The original had no corresponding section.

SECTION 24 of the committee substitute provides that for the purposes of admissibility in certain actions involving a construction defect, a third-party inspector's recommendation or a ruling by a panel of state inspectors shall be considered a business record under Rule 902 of the Texas Rules of Evidence. The original had no corresponding section.

SECTION 25 of the committee substitute addresses certain experience requirements for certain third-party inspectors and makes certain training apply to all third-party inspectors. The original had no corresponding section.

SECTION 26 of the committee substitute grants certain liability limits to third-party inspectors and state inspectors. The original had no corresponding section.

SECTION 27 of the committee substitute requires that a person requesting a state-sponsored inspection and dispute resolution must provide a copy of the request to each other party involved in the dispute at the time the requestor submits the request under the relevant section and deletes language requiring the commission to provide a means to electronically submit a state-sponsored inspection and dispute resolution request. The corresponding section in the original only contained the portion deleting the language requiring the commission to provide a means to electronically submit a state-sponsored inspection and dispute resolution request.

SECTION 28 of the committee substitute moves the language added to Section 428.004(d), Property Code, to a new Subsection (e) and changes the language in that section reading “the builder made or offered to make repairs” to “the builder offers to make repairs or have repairs made”. The committee substitute also adds a new Subsection (f) to Section 428.004, Property Code, preventing the commission from reporting a finding against the builder, if, before or after the inspection, the builder made or offered to make repairs substantially equivalent to those required by the finding of the final report confirming the defect.

SECTION 29 of the committee substitute provides that if certain requests for a state-sponsored inspection and dispute resolution are filed, certain parties to the dispute may submit a written response and present evidence in accordance with the proposed section. Provides that if the response alleges the existence of a construction defect not alleged in the original request, the third-party inspector shall inspect and issue a determination regarding that defect and any other defect alleged in the response. The original had no corresponding section.

SECTION 30 of the committee substitute requires a panel appointed under Chapter 429, Property Code, to review certain recommendations for compliance with Title 16, Property Code, as required by rules adopted by the commission under current statutory authority. Deletes language stating that such panel shall review certain recommendations without a hearing unless a hearing is otherwise required by rules adopted by the commission under current statutory authority. The original had no corresponding section.

SECTION 34 of the committee substitute requires the House Committee on State Affairs to conduct an interim study regarding the feasibility of creating a fund designed to reimburse aggrieved persons who experience actual damages from a builder’s actions in violation of Title 16, Property Code. The original had no corresponding section.

SECTION 36 of the committee substitute adds transitional language for Section 416.012, Property Code, as added by this Act.

SECTION 37 of the committee substitute adds transitional language for Section 418.001 as amended by this Act.

The sections in the original have been renumbered in the committee substitute.