

BILL ANALYSIS

S.B. 1167
By: Carona
Pensions, Investments & Financial Services
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Perpetual care cemeteries, or cemeteries for which a perpetual care fund has been established to provide for the ongoing maintenance, repair, and care of the cemetery, are required to be licensed by the Texas Department of Banking. Interested parties assert that a number of issues have recently arisen in connection with the regulation of these types of cemeteries. S.B. 1167 seeks to amend applicable provisions of law relating to cemeteries and perpetual care cemetery corporations.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Finance Commission of Texas in SECTION 8 of this bill.

ANALYSIS

S.B. 1167 amends the Health and Safety Code to require a corporation to hold a certificate of authority to operate a perpetual care cemetery. The bill automatically grants a certificate of authority to a person who owns and operates a perpetual care cemetery on September 1, 2011, that on that date complies with applicable filing and notice requirements, as those requirements existed before amendment or repeal by the bill, and sets an expiration date for such a certificate on March 1, 2012, unless the certificate holder renews the certificate.

S.B. 1167 requires an applicant for a certificate of authority, not later than the 30th day after the date a corporation files its certificate of formation or application for registration with the secretary of state, to file an application, made under oath, on a form prescribed by the Banking Department of Texas, as defined in provisions relating to perpetual care cemeteries, and pay the required filing fee. The bill establishes that a fee or cost paid in connection with an application or renewal is not refundable. The bill authorizes the Banking Commissioner of Texas to instruct the secretary of state to remove a corporation that fails to comply with application requirements from the secretary's active records or cancel the corporation's registration. The bill requires the secretary of state to remove a corporation from the secretary's active records or cancel the corporation's registration on an instruction from the commissioner and to serve notice of the cancellation on the corporation by registered or certified letter, addressed to the corporation's address.

S.B. 1167 authorizes the commissioner to investigate an applicant before issuing a certificate of authority. The bill establishes certain qualifications that an applicant must demonstrate to the commissioner's satisfaction to qualify for a certificate of authority. The bill requires the commissioner to issue a certificate of authority if the commissioner finds that the applicant meets the qualifications and it is reasonable to believe that the applicant's cemetery business will be conducted fairly and lawfully, according to applicable state and federal law, and in a manner commanding the public's trust and confidence; the issuance of the certificate of authority is in the public interest; the documentation and forms required to be submitted by the applicant are acceptable; and the applicant has satisfied all requirements for issuance of a certificate of

authority. The bill entitles the applicant, on request, to a hearing on a denial of the application. The bill requires the request to be filed with the commissioner not later than the 30th day after the date the notice of denial is mailed. The bill requires the hearing to be held not later than the 60th day after the date of the request unless the administrative law judge extends the period for good cause or the parties agree to a later hearing date. The bill establishes that the hearing is a contested case under the Administrative Procedure Act.

S.B. 1167 sets the expiration date for an initial certificate of authority as March 1 of the year after the year the certificate is issued, requires the certificate to be renewed at that time and by March 1 of each following year, and sets out certain requirements for renewal. The bill requires the commissioner, if the department does not receive a certificate holder's renewal fee and complete renewal report on or before the certificate's renewal date, to notify the certificate holder in writing that the certificate holder must submit the renewal report and pay the renewal fee not later than the 30th day after the certificate's renewal date and authorizes the commissioner to require the certificate holder to pay a late fee, in an amount established by rule of the Finance Commission of Texas and not subject to appeal, for each business day after the certificate's renewal date that the commissioner does not receive the completed renewal report and renewal fee. The bill requires the department, on timely receipt of a certificate holder's complete renewal report and renewal fee and any late fee, to review the report and authorizes the commissioner to renew the certificate of authority or refuse to renew the certificate of authority and take other action the commissioner considers appropriate. The bill entitles the applicant on request to a hearing to contest the commissioner's refusal to renew the certificate. The bill requires the request to be filed with the commissioner not later than the 30th day after the date the notice of refusal to renew is mailed and establishes that the hearing is a contested case hearing. The bill requires the holder or principal of or the person in control of the holder of an expired certificate of authority, or the holder or principal of or person in control of the holder of a surrendered certificate of authority, who wishes to conduct activities for which a certificate of authority is required to file a new application for a certificate of authority and satisfy all requirements for the certificate that apply at the time the new application is filed.

S.B. 1167 prohibits a transfer or assignment of a certificate of authority. The bill requires a certificate holder to notify the department in writing of a transfer of ownership of the certificate holder's business or a transfer of 25 percent or more of the stock or other ownership or membership interest of the corporation and sets deadlines for notice with respect to whether a transfer is voluntary or involuntary. The bill requires a proposed transferee that is not a certificate holder to file any necessary documents with the secretary of state and an application for a certificate of authority with the department. The bill prohibits the transfer of the perpetual care fund from occurring until after the date a certificate of authority is issued to the transferee applicant. The bill authorizes a hearing to be requested and conducted under the same procedures as applicable to the issuance of any other certificate of authority if the commissioner denies the application.

S.B. 1167 authorizes a certificate holder to apply to the commissioner for permission to surrender the certificate of authority if the holder is a cemetery that qualified for an exemption but voluntarily elected to become a perpetual care cemetery, has performed not more than 10 burials per year during each of the last five years, is not larger than 10 acres, and has a perpetual care fund that is less than \$30,000. The bill requires the application for permission to surrender a certificate of authority to be sworn to and be on a form prescribed by the department. The bill requires a certificate holder to publish a notice of intention to surrender a certificate of authority to operate a perpetual care cemetery one time in a newspaper of general circulation in each county in which the cemetery is located and sets out requirements for the form and content of the notice. The bill requires the certificate holder to submit a publisher's affidavit evidencing publication of the notice not later than the seventh day after the date the notice is published. The bill requires the commissioner to hold a hearing under the Administrative Procedure Act if a request is timely filed by a plot owner or plot owner's heir. The bill authorizes the commissioner to approve or deny the application if a request for a hearing is not timely filed by a plot owner or

plot owner's heir. The bill authorizes an applicant to request a hearing to appeal the denial of the application if an application is denied and if a hearing is not held before the denial. The bill requires the applicant's request for a hearing to be filed with the commissioner not later than the 30th day after the date the notice of denial is mailed and establishes that the hearing is a contested case hearing. The bill requires an order approving the surrender of a certificate of authority to impose four conditions that are not subject to objection and sets out those conditions. The bill makes the failure to satisfy any of the conditions a violation of the commissioner's order and makes the certificate holder subject to an enforcement action. The bill requires a certificate holder, not later than the 10th day after the date an order approving the surrender of a certificate of authority is signed, to deliver the original certificate of authority to the commissioner along with a written notice of surrender that includes the location of the certificate holder's records and the name, address, telephone number, and other contact information for an individual who is authorized to provide access to the records. The bill establishes that the surrender of a certificate of authority does not reduce or eliminate a certificate holder's administrative, civil, or criminal liability arising from any acts or omissions that occur before the surrender of the certificate.

S.B. 1167 authorizes the commissioner to issue a cease and desist order to a person on a finding by examination or other credible evidence that the person has violated a state law relating to perpetual care cemeteries, the commissioner's final order, or a finance commission rule and the violation was not corrected by the 31st day after the date the person receives written notice of the violation from the department. The bill requires an order to be served on the person and to state the grounds for the proposed order with reasonable certainty and the proposed effective date, which may not be less than the 20th day after the date the order is mailed or delivered. The bill establishes that the order becomes effective on the proposed date unless the person requests a hearing not later than the 19th day after the date the order is mailed or delivered. The bill requires a hearing to be conducted in accordance with procedures for a contested case hearing.

S.B. 1167 authorizes the commissioner to issue an emergency order that takes effect immediately if the commissioner finds that immediate and irreparable harm is threatened to the public or a plot owner, marker purchaser, or other person with protected interest in a perpetual care cemetery, which order remains in effect unless stayed by the commissioner. The bill authorizes the person named in the emergency order to request in writing, not later than the 18th day after the date the order is mailed, a hearing to show that the emergency order should be stayed. The bill requires the commissioner, on receipt of the request, to set a time for the hearing not later than the 21st day after the date the commissioner received the request, unless extended at the person's request. The bill establishes that the hearing is an administrative hearing relating to the validity of findings that support the order's immediate effect.

S.B. 1167 authorizes the attorney general to seek the appointment of a receiver in conjunction with a proceeding to forfeit the right to do business in Texas brought by the attorney general, which remedy is in addition to other grounds for the appointment of a receiver. The bill requires a private party receiver to be compensated from the corporation or, if the corporation has no assets available to pay the receiver, from the income only of the perpetual care fund. The bill prohibits the receiver from invading the principal of the fund. The bill authorizes the court to appoint a department employee as receiver, but prohibits such employee from receiving compensation for serving as receiver in addition to the employee's regular salary. The bill authorizes the department to receive reimbursement from the corporation for the travel expenses and the fully allocated personnel costs associated with the employee's service as receiver. The bill exempts a department employee serving as receiver from personal liability for damages arising from the employee's official act or omission unless the act or omission is corrupt or malicious. The bill requires the attorney general to defend an action brought against an employee serving as receiver because of an official act or omission as receiver regardless of whether the employee has terminated service with the department before the action commences.

S.B. 1167 establishes a presumption that the person with the right to control the disposition of a decedent's remains is unable or unwilling to control the disposition if the person fails to make

final arrangements or appoint another person to make final arrangements for the disposition before the earlier of the 6th day after the date the person received notice of the decedent's death or the 10th day after the date the decedent died, in which case the person's right to control the disposition is terminated and the right to control the disposition is passed to the following persons in the following priority: any other person in the same priority class as the person whose right was terminated or a person in a different priority class.

S.B. 1167 authorizes the installation of a lawn crypt that is part of a private estate in fewer than 10 units and characterizes a private estate as a small section of a cemetery that is sold under a single contract, is usually offset from other burial sites, allows for interment of several members of the same family or their designees, and is identified on the cemetery property plat as a private estate.

S.B. 1167 requires a cemetery in which undeveloped lawn crypt spaces are being sold or reserved for sale to begin construction on the lawn crypt section not later than 48 months after the date of the first sale or reservation, whichever is earlier, and to complete construction not later than 60 months after the earlier of those two dates. The bill requires the cemetery, on the buyer's written request, to refund the entire amount paid for the undeveloped lawn crypt space not later than the 30th day after the date of the buyer's request if construction of a lawn crypt does not begin or has not been completed by the specified dates. The bill requires a sales contract for an undeveloped lawn crypt space to contain disclosures, whether in English or Spanish, about the buyer's cancellation rights for a failure by the cemetery or contractor to construct the crypt space within the given time limits and about the options available under a fully paid contract if the person to be interred in the crypt space dies before completion of the lawn crypt section. The bill requires a sales contract for undeveloped lawn crypt space to comply with applicable regulations of the Federal Trade Commission with respect to a contract payable in installments. The bill requires each required notice to be written in plain language designed to be easily understood by the average consumer and be printed in an easily readable font and type size.

S.B. 1167 prohibits a perpetual care cemetery from being operated in Texas unless a certificate of formation for a domestic filing entity or registration to transact business for a foreign filing entity is filed with the secretary of state and removes a provision prohibiting such an operation without the filing of articles of incorporation. The bill includes in the requirements for such a certificate or registration that it contain subscriptions and payments in cash for 100 percent of the entity's ownership or membership interests, rather than for the corporation's full capital stock.

S.B. 1167 authorizes the commissioner to examine a corporation's books and records relating to the corporation's fund or to the corporation's sale of undeveloped mausoleum spaces and preconstruction trusts and the corporation's consumer complaint files relating to the fund, spaces, and trusts on a periodic basis as the commissioner reasonably considers necessary or appropriate to protect the interest of plot owners and efficiently administer and enforce provisions governing perpetual care cemeteries, rather than conducting such examinations annually or more often.

S.B. 1167 authorizes the commissioner to issue an order requiring restitution by a person if, after notice and opportunity for a hearing held in accordance with the procedures for a contested case hearing, the commissioner finds that the corporation has not ordered memorials in compliance with the deadlines established by the applicable rules.

S.B. 1167 authorizes, rather than requires, a trier of fact to recommend to the commissioner that the maximum administrative penalty permitted be imposed on a person committing a violation or that the commissioner cancel or not renew the corporation's certificate of authority if, after a contested case hearing, the trier of fact finds that a violation of law or a rule of the finance commission establishes a pattern of wilful disregard for existing law or commission rules.

S.B. 1167 provides that a person commits an offense, punishable as if it were a Penal Code

offense for misapplication of fiduciary property or property of a financial institution, if the person collects money for the purchase of a memorial and knowingly defalcates or misappropriates the funds. The bill establishes that this provision does not prevent an aggrieved party or the attorney general from maintaining a civil action for the recovery of damages, or the commissioner from maintaining an administrative action for restitution, caused by an injury resulting from such an offense.

S.B. 1167 redefines "cemetery organization" and "corporation."

S.B. 1167 repeals the following provisions of the Health and Safety Code:

- Section 711.062
- Section 712.0031
- Section 712.0441(e)

EFFECTIVE DATE

September 1, 2011.