

SUBJECT: Establishing the Texas Residential Construction Commission

COMMITTEE: Regulated Industries — committee substitute recommended

VOTE: 5 ayes — King, Hunter, Baxter, Crabb, Guillen

1 nay — Wolens

1 absent — Turner

WITNESSES: For — Bobby Bowling, Tropicana Homes and Patriot Mortgage; Bob Bush, Texas Association of Builders and Home Buyers Warranty Corp.; Jerry Carter, J. Carter Homes; Bob Garrett, Texas Association of Builders; Douglas Gilliland, Triwest Group; Gregory Harwell; John Hubbard, Home Buyers Warranty Corp.; John Krugh, Perry Homes; Aaron Seaman, KB Homes; Ray Tonjes, Ray Tonjes Builder; Ron Walken, Texas Association of Realtors; *(Registered, but did not testify:)* Tamir Ayad, Pyramid Homes; Karey Barton and Gloria Gilley, Texas Association of Builders; Thomas Breznik and Linda Strickel, Bonded Builders Home Warranty; Carl Buck, Quivira Luxury Homes; Michael Carver, Andrew Erben, Steve Still, and Victor Toledo, KB Homes; Charley Castleberry; Paul Cauduro, Home Builders Association of Greater Dallas; Gary Clifton and Bruce Sommers, Ashworth Construction; Doug Groves, Capitol City Insurance; Gaylord Haynes, Homes by Haynes; Daniel Jensen, Majestic Homes; Anwar Khalifa, Khalifa Inc. and DAR Development Corp.; George Lewis, George Lewis Custom Homes; William Long, Bill Long Custom Homes and The Preston Group Designers and Builders; Robert Morris, Home Builders Association of Greater Dallas; Jayne Mortensen, Highland Lakes; Scott Porter, Porter Contracting Co.; Jesse Rider, Rider Homes; Harry Savio, Home Builders Association of Greater Austin; Mike Schovanec, MGM Custom Homes and Remodeling; Ronald Slovacek, Millennium Home Builders; Bob Stout, The Woodlands Operating Co.; Jeffrey Thomas, Regal Residences; Jim Warren, Plumbing, Air Conditioning and Mechanical Contractor Association; Kathryn Wood, Greater Houston Builders Association; T.J. Wright, Home Critic

Against — Janet Ahmad, Home Owners for Better Building; Evelyn Arentz; Diane Barkalow; Robert Comer; Mark Eberwine; William Herrscher; Reggie

James, Consumers Union; Virginia Martinez; Missie Middleton; Patricia Middleton; Lisa Nogle; Tamara Pearlman, Home Owners Against Deficient Dwellings; Billy Porter; Dawn Richardson; Roberto Rodriguez; Danny South; Anne Stark; Josh Tahmasebi; Cheryl Turner; Amy Weaver, Home Owners Against Deficient Dwellings and Home Owners for Better Building; Amanda Williams; *(Registered, but did not testify:)* Mary Cohn, Homeowners for Better Building; Dan Lambe, Texas Watch; Mary Pruess; Tom “Smitty” Smith, Public Citizen; Claudio Solorzano

BACKGROUND: Property Code, ch. 27, the Residential Construction Liability Act (RCLA), governs actions to recover damages resulting from a construction defect. It establishes notification requirements and procedures for reaching a settlement before a claimant can file suit. Generally, it provides incentives for parties to act reasonably. If a claimant unreasonably rejects a settlement offer or does not give the contractor a reasonable opportunity to repair the defect, the act limits the amount the claimant may recover. If a contractor fails to make a reasonable settlement offer or fails to make a reasonable attempt to complete repairs, the act precludes the contractor from limitations on damages and defenses to liability.

DIGEST: CSHB 730 would establish the Texas Residential Construction Commission and would:

- require home builders to register with the commission;
- establish a state-sponsored inspection and dispute-resolution process to resolve homeowner and builder disputes over construction defects;
- require the commission to adopt limited statutory warranties and building performance standards for new homes; and
- amend the RCLA.

A construction defect would mean:

- the failure of a home to meet the applicable warranty and building and performance standards during the warranty period; and
- any physical damage to the home proximately caused by that failure.

It would not include a defect or any damages that arose from:

- the negligence of anyone besides the builder or an agent, employee, subcontractor, or supplier;
- the failure of anyone besides the builder or an agent, employee, subcontractor, or supplier to take reasonable action to mitigate damages arising from a defect or to maintain the home;
- normal wear, tear, or deterioration; or
- normal shrinkage due to drying or settlement of construction components within the tolerance of building and performance standards.

Construction commission. CSHB 730 would create a nine-member Texas Residential Construction Commission, comprising six registered builders, two public members, and a licensed professional engineer. The commission would have to comply with standard agency provisions governing conflicts of interest, training and grounds for removal of members, standards of conduct, separation of policy-making functions and management, equal employment opportunity, public testimony; and maintenance of complaint information. The commission would expire September 1, 2015.

The commission's purview would not include a home built by the owner and lived in for at least one year after completion of construction.

The commission could adopt rules to carry out its duties. Before adopting a substantive rule, however, the commission would have to submit the proposed rule to the attorney general to determine its validity. Rules adopted by the commission could include:

- rules governing the state-sponsored inspection and dispute-resolution process, including building and performance standards, administrative regulations, and the conduct of hearings;
- rules establishing limited statutory warranties and building and performance standards for residential construction;
- rules approving third-party warranty programs; and
- rules approving third-party inspectors.

The commission would have to adopt reasonable and necessary fees to cover the cost of administering its duties. It would have to file an annual report with the governor and the Legislature.

BUILDER REGISTRATION

CSHB 730 would prohibit a builder from building a home unless the builder was registered with the commission. The commission would have to begin requiring builders to register by March 1, 2004.

In applying for a certificate of registration, an applicant would have to disclose whether he or she had been convicted of or pled guilty to a felony. The commission could conduct a criminal background check on the applicant. Application fees could not exceed \$500 for an original certificate of registration or \$300 for a renewal. A fee schedule adopted by the commission would have to take into account the volume of potential applicants.

General requirements to receive a certificate would include being a U.S. citizen who was at least 18 years old and the commission's satisfaction that the applicant was honest, trustworthy, and had integrity. An applicant that was a business entity would have to designate a corporate officer, manager, or partner as an agent for the purposes of registration. The agent would have to register individually as a builder.

Within 15 days of receiving an application from a qualified applicant, the commission would have to issue a certificate of registration. The commission could issue a new certificate or renewal good for up to two years. If the commission denied an application, it would have to notify the applicant within 15 days. The applicant then would have 30 days to appeal the denial by requesting a hearing before the commission. The commission would have to hold a hearing within 30 days of receiving an appeal.

Disciplinary action. The commission could take disciplinary action, including revoking, suspending, or probating suspension of a certificate or reprimanding a certificate holder, against a person who:

- fraudulently obtained a certificate;
- misappropriated trust funds in the practice of residential construction;

- failed to honor a check written to the commission;
- failed to pay an administrative fee;
- failed to pay a nonappealable judgment arising from a construction defect or other transaction between the person and a homeowner; or
- failed to pay a home registration fee.

A person subject to disciplinary action by the commission would be entitled to a hearing before the commission or to appeal the commission's decision to a district court in the county in which the administrative hearing was held.

Administrative penalty. In a contested case involving disciplinary action, the commission could impose an administrative penalty on a registered builder who violated the bill's provisions or a commission rule. The penalty could not exceed \$500 per violation. In determining the penalty, a hearing officer or the commission would have to consider:

- the seriousness of the violation;
- the history of previous violations;
- the amount necessary to deter a future violation;
- efforts to correct the violation; and
- any other matter justice may require.

If a person did not pay an administrative penalty, the commission could refer the matter to the attorney general or could enforce any part of the order specifying disciplinary action to be taken if the person did not pay the administrative penalty within the time prescribed.

INSPECTION AND DISPUTE RESOLUTION

CSHB 730 would establish a state-sponsored inspection and dispute-resolution process for disputes between a builder and a homeowner arising from an alleged construction defect. A request for the state-sponsored inspection and dispute-resolution process would have to be made within two years of the discovery of the alleged defect, but before 30 days after the expiration of the warranty period.

A dispute would be eligible for the process if:

- the dispute arose from an alleged construction defect, other than a claim for personal injury, survival, wrongful death, or damage to goods; and
- a request for resolution was submitted to the commission within 10 years of the transfer of title or the date on which the builder and homeowner entered into a construction improvement contract.

A dispute would not be eligible if it arose from:

- an alleged violation of state law prohibiting fraud in real estate or stock transactions;
- a contractor's wrongful abandonment of an improvement project before completion; or
- a violation of statutory prohibitions against misapplication of trust funds.

Request for resolution. A builder or homeowner could submit a request to the commission for inspection and dispute resolution of a dispute arising from an alleged construction defect. The request would have to:

- specify each alleged construction defect;
- state the amount of any known out-of-pocket expenses or engineering or consulting fees connected to the alleged defect;
- include any evidence depicting the nature and cause of each alleged construction defect and the nature and extent of necessary repairs;
- include an application fee and any amount necessary to cover the expense of a third-party inspector; and
- state the name of any person who had, on behalf of the requestor, inspected the alleged defect.

At least 30 days before making a request to the commission, a homeowner would have to notify the builder of each alleged construction defect. After receiving notice, the builder would have to have a reasonable opportunity to inspect the home. A requestor also would have to send a copy of the request to every party involved in the dispute. Filing a request would suspend the

statute of limitations in an action arising from the subject of the request until 45 days after a final nonappealable recommendation was issued.

On the builder's request, the builder would receive another opportunity before the conclusion of the process to inspect the home to determine the nature and cause of the alleged defect and the extent of necessary repairs.

If a builder received notice of a request relating to a defect that posed an imminent threat to the health or safety of the home's residents, the builder would have to take steps to fix the defect as soon as possible. If the builder failed to fix the defect in a reasonable amount of time, a homeowner could have someone else fix the defect and recover the cost from the builder.

Within 15 days of receiving a request, the commission would have to appoint a third-party inspector to inspect the home and meet with the homeowner and builder.

If the dispute involved workmanship or materials in the home and was a nonstructural matter, a third-party inspector would have to issue a recommendation within 15 days of being appointed by the commission. If the dispute involved a structural matter, the commission would have to appoint an approved engineer as the third-party inspector. The inspector would have to inspect the home within 30 days after the request and issue a recommendation within 60 days of being appointed by the commission, unless additional time was requested. A third-party inspector's recommendation could address only the construction defect and would have to designate a repair method, if any.

A homeowner or builder could appeal a third-party inspector's recommendation within 15 days. If a recommendation was appealed, the executive director of the commission would have to appoint three state inspectors to a panel to review the recommendation. One of the inspectors would have to be a licensed professional engineer if the dispute involved a structural failure. The appointed panel would have to:

- review the recommendation without a hearing, unless a hearing was otherwise required by commission rule;
- approve, reject, or modify the recommendation of the third-party inspector, or remand the dispute for further action by the inspector; or

- issue findings of fact and a ruling on the appeal within 30 days of the date on which the appeal was filed with the commission.

Registration fee. A builder would have to pay a registration fee on closing the sale of each new home and would have to pay the fee on a transaction involving new improvements or additions to a home. The registration fee would be set by the commission and could not exceed \$125.

Application fee. A person who submitted a matter to the commission for the inspection and dispute resolution would have to pay an application fee and any additional amount required to cover the expense of the third-party inspector. The commission could permit a waiver for a homeowner unable to pay the fees or expenses. If the transaction between the builder and homeowner occurred before January 1, 2004, the person who submitted a matter to the commission also would have to pay the registration fee.

Prerequisite to action. A homeowner would have to comply with the state-sponsored inspection and dispute resolution process before initiating an action to recover damages or other relief arising from an alleged construction defect. An action would have to be filed within 90 days of the third-party inspector's recommendation or 90 days after the commission ruling, if the inspector's recommendation was appealed. Any claim for personal injury, damage to personal goods, or consequential damages or other relief arising from an alleged construction defect would have to be included in the action.

Admissibility of evidence. A person requesting state-sponsored inspection and dispute resolution would have to disclose a person who inspected the home for the requestor in connection with the alleged construction defect. If the person's name was not disclosed, the requestor could not retain that person as an expert or use materials prepared by that person in the state-sponsored inspection and dispute resolution process or in an action arising out of the alleged construction defect.

Effect of recommendation or ruling. In any action involving a construction defect brought after a recommendation by a third-party inspector or ruling by a panel of state inspectors, the recommendation or ruling would be presumed to be reasonable and dispositive. A party seeking to dispute, vacate, or overcome that presumption would have to establish by clear and convincing

evidence that the recommendation or ruling was inconsistent with applicable warranty and building standards. The presumption would apply only to an action between a homeowner and builder. The recommendation would not be admissible in an action by other parties.

Inspectors. A third-party inspector approved by the commission would have to apply annually to the commission and meet certain qualifications, including:

- having at least five years of experience in the residential construction industry, if inspecting an issue involving workmanship and materials;
- being an approved structural engineer or architect with at least 10 years experience in residential construction, if inspecting an issue involving a structural matter;
- being certified to the International Residential Code, and having received commission training and continuing education; and
- receiving less than 10 percent of his or her income from providing expert witness services.

The commission would employ state inspectors certified to the International Residential Code to:

- sit on an appeals panel and review the recommendations of third-party inspectors;
- provide consultation to third-party inspectors; and
- administer the state-sponsored inspection and dispute-resolution process.

WARRANTY AND BUILDING PERFORMANCE STANDARDS

CShB 730 would require the commission to adopt limited statutory warranties, as well as building and performance standards. Warranty periods would be:

- one year for workmanship and materials;
- two years for plumbing, electrical, heating, or air-conditioning systems; and
- 10 years for major structural components of the home.

The warranties and building and performance standards would have to:

- require substantial compliance with the nonelectrical standards of the International Residential Code for one-family and two-family dwellings and electrical standards of the National Electrical Code;
- include recommended management practices for limiting moisture intrusion in a home; and
- establish performance standards for interior and exterior components of a home, including foundations, floors, ceilings, walls, roofs, drainage, landscaping, irrigation, heating, cooling, and electrical and plumbing components.

The bill would specify which portions of the nonelectrical standards of the International Residential Code and the electrical standards of the National Electrical Code would apply to residential construction, depending on whether it was located in a municipality or extraterritorial jurisdiction, unincorporated area, or a county that contained no incorporated area.

Unless otherwise specified by an agreement between a builder and the initial home buyer, a warranty period for a new home would begin on the date of occupancy or the transfer of title, whichever was earlier. A warranty period for a construction improvement other than a new home would begin on the date that the improvement was substantially completed.

Exclusivity of warranty. The warranties adopted by the commission would supersede all implied warranties. The only warranties for residential construction would be warranties adopted by the commission, warranties created by other statutes expressly referring to residential construction, or an express written warranty acknowledged by the builder and homeowner. A court could not discern or declare any other implied warranty.

Third-party warranty company. The commission could approve a third-party warranty company that had operated in Texas for five years, was insured by an authorized insurer, or was an insurance company that insured a builder's warranty obligations.

If a builder chose to provide an approved third-party warranty company, the builder could limit liability to the homeowner under terms of the warranty. A

limitation of liability would not be effective unless the warranty company agreed to perform the builder's warranty obligations and actually paid for or corrected any construction defect covered by the warranty.

A third-party warranty company could not assume liability for personal injury or damage to personal property. By providing a warranty from an approved third-party warranty company, a builder would not avoid liability for personal injury or damage to personal property for which the builder otherwise would be liable under law. A company administering a warranty for a third-party warranty company would not be liable for any damages resulting from a construction defect or repairs covered under the warranty.

A third-party warranty company would have to use an inspection procedure for construction defects that was substantially similar to commission procedures. A warranty company could adopt warranty standards in addition to the commission's standards, but it could not reduce the warranty and building and performance standards adopted by the commission.

Effect on other rights. The inspection and dispute-resolution process and warranty and building performance standards established by CSHB 730 would provide the sole rights and obligations between a homebuilder and buyer, unless additional rights or obligations were provided in a express written contract.

After an inspector review panel ruled on an appeal of a third-party inspector's recommendation, a homeowner could bring a cause of action against a builder or third-party warranty company for breach of a limited statutory warranty. However, a homeowner could recover only economic damages.

The inspection and dispute-resolution process and statutory warranty and building performance standards would create the only cognizable cause of action available against a builder or third-party warranty company.

AMENDMENTS TO RESIDENTIAL CONSTRUCTION LIABILITY ACT

CSHB 730 would amend the RCLA to reflect the state-sponsored inspection and dispute-resolution process codified by the bill. It also would amend the statute to include an arbitration action, among other changes.

The bill would specify that the RCLA did not apply to an action to recover damages arising from:

- a violation of state law prohibiting fraud in real estate or stock transactions;
- a contractor's wrongful abandonment of an improvement project before completion; or
- a violation of statutory prohibitions against misapplication of trust funds.

It would specify that a builder had 15 days from a final unappealable determination in the state-sponsored inspection and dispute-resolution process to make an offer of settlement to the requestor. If the requestor considered the settlement offer to be unreasonable, the requestor would have to notify the builder why he or she considered the offer unreasonable within 25 days of receiving the offer, and the builder could make a supplemental offer within 10 days of receiving the requestor's notice.

The bill would amend the process by which a court could dismiss a suit, to include an arbitration action. An arbitration tribunal would have to dismiss an action if the statute of limitations was not at issue and if the tribunal found, after a hearing, that the builder was entitled to a dismissal because the requestor had failed to comply with the state-sponsored inspection and dispute-resolution process or failed to follow notification procedures for settling a claim.

If a requestor or other claimant rejected a reasonable settlement offer made by the builder or did not allow the builder a reasonable opportunity to inspect or repair the defect, he or she could not recover an amount greater than the fair market value of the builder's last settlement offer or greater than the amount of an offer by the builder to buy the home.

The claimant could recover only necessary costs and attorney's fees as prescribed by the Texas Disciplinary Rules of Professional Conduct.

In an action, a claimant could only recover economic damages caused by a construction defect, including:

- the lesser of the cost of repairs or the difference in value of the home as built and the value if it had been built without the defect;
- reasonable and necessary cost to replace or repair any damaged goods in the home; or
- reasonable and necessary engineering and consulting fees.

The bill would allow an agreement between the builder and homeowner in which the builder agreed to buy the home in lieu of paying damages, if the cost of necessary repairs was above an agreed percentage of the fair market value of the home. The builder could not buy a home more than five years old. If the builder chose to buy the residence:

- the builder would pay the original purchase price, plus closing and title transfer costs;
- the homeowner could recover reasonable attorney's and expert fees; and
- conditioned on payment for the house, the homeowner would tender a special warranty deed to the builder, free of all claims and liens and without damage by the homeowner.

Mental anguish. The bill would prohibit a person seeking damages for a residential construction defect from recovering damages for mental anguish in an action or arbitration.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 730 would establish a better way to resolve disputes between builders and homeowners. It would allow resolution without resorting to costly and lengthy litigation. The bill would create the Texas Residential Construction Commission to oversee resolution of disputes based on the recommendations of independent inspectors. All builders in Texas would have to register with the commission. The commission would have to adopt building performance standards and statutory warranties that would apply to all new homes built in Texas. The new standards would set benchmarks for a home's performance. The warranties would ensure clear and consistent application, instead of the vague implied warranties that courts have imposed.

Through the state-sponsored inspection and dispute-resolution process, a homeowner and builder could arrive at a fair resolution of a dispute without turning to the adversarial process set up under current law. Upon finding a defect in a new home, most homeowners simply want the problem fixed properly and promptly, without a fight. Most builders do not want to fight either, not only because it increases costs but also because it creates dissatisfied customers.

Before an inspector was appointed, a homeowner and builder would have an opportunity to resolve a dispute on their own. Upon noticing a construction defect in a new home, a homeowner first would contact the builder to remedy the defect. The vast majority of construction defects are dealt with between the builder and homeowner. One study has indicated that less than one-half of 1 percent of new home sales result in unresolved disputes. If the builder and homeowner could not resolve a dispute over the construction defect, either party could submit a request for resolution to the commission.

After receiving a request for resolution, the commission would have to appoint an inspector within 15 days, ensuring that an alleged defect was inspected promptly. The inspector would have to issue a recommendation within 15 or 60 days of being appointed, depending on the nature of the defect. Current law provides no guarantee that an inspector would be on-site this quickly to perform an inspection. In fact, both sides probably would be hiring lawyers and experts already.

CSHB 730 would not prevent a homeowner from seeking redress at the courthouse. After completing the inspection process, including an opportunity to appeal the inspector's recommendation to a review panel, either party could file an action to recover damages or other relief.

Besides improving the process for resolving disputes, the bill would establish clear performance standards and warranties for new homes. A home is a unique product. It is built to remain standing in one place and consists of thousands of components that involve workmanship in dozens of crafts. Although building codes specify how a home is to be built, they are silent as to how a home should perform when built. CSHB 730 would specify performance standards so that both homeowners and builders would know exactly what standards a new home should meet.

Inspectors would base their recommendations on the performance standards and warranties adopted by the commission. The statutory warranties adopted by the commission would replace the vague “implied warranties” existing today, which require interpretation by the courts. The bill would enable homeowners and builders to understand easily the terms of warranty, without paying lawyers and court costs. Also, the warranty terms would be applied consistently instead of through the interpretive approach under current law.

The commission would have to adopt building codes for the entire state, including unincorporated areas. SB 365 by Armbrister, enacted by the 77th Legislature, designated the International Residential Code as the municipal residential building code for the state and the National Electrical Code as the state’s municipal electrical residential construction code. Under current law, however, no codes exist in unincorporated areas. CSHB 730 would require the commission to adopt codes for the entire state, improving the safety and soundness of homes built in unincorporated areas. Because the bill would not apply to a home built and lived in by the owner, it would not restrict ranchers or farmers from building their own homes as they saw fit.

Composition of commission. Resolving disputes between homeowners and builders would be the work of independent inspectors and a review panel, not the commission. The commission’s most important work would be creating and maintaining the statutory warranty and performance standards. This task would require a commission with adequate technical expertise in the field of residential construction. Also, as the community being regulated, builders should have adequate representation on the commission. A proposed floor amendment to the bill would improve the balance between the number of builders and members of the public serving on the commission.

Fees. CSHB 730 would specify that builders must pay the registration fee upon closing the sale of each new home. The fee would be used to fund the commission. Like any business expense, the fee could be passed along to consumers. In return, however, consumers would have access to the state-sponsored inspection and dispute-resolution process, instead of being forced to pay lawyers and expert witnesses to wage battles in court. Moreover, by creating an entirely fee-funded commission, the bill would enable the state to provide a new service to citizens without tapping into precious general revenue during the current budget crisis.

Evidence. The bill would specify that overturning a final nonappealable ruling by the inspector review panel would require presentation of clear and convincing evidence, a high evidentiary standard in the law. This requirement would protect a homeowner from an overzealous builder unsatisfied with the panel's final ruling and who sought to have the panel's decision thrown out in court.

If a homeowner sought resolution of a dispute over a construction defect, he or she would have to disclose any person that had inspected the defect before the request. If not, the bill would prohibit the homeowner from retaining that person as an expert, or from using materials prepared by the person, in the state inspection process or any action arising from the defect. This provision would ensure that as much information as possible about the defect was out in the open before the resolution process began. Also, it would protect against an unscrupulous homeowner seeking to recover damages for financial gain. The bill would prevent such a homeowner from hiding information about the defect during the resolution process and waiting until he or she could pursue the dispute in court to use the information to his or her advantage.

Disciplinary action. The commission would have adequate grounds for disciplinary action. The bill's goal is not to create an adversarial process under which the commission would hand out penalties in disputes between builders and homeowners. Problems between homeowners and builders would be dealt with through the resolution process that the bill would establish. A proposed floor amendment would expand the grounds for disciplinary action, adding new grounds for false consideration in a contract: false advertising or discrimination. Another proposed floor amendment would increase to \$5,000 the cap on the administrative penalty the commission could impose.

Arbitration. CSHB 730 would not change arbitration procedures. Federal law allows parties to contract to resolve a dispute through arbitration, and the state cannot preempt federal law. Although arbitration has been encouraged as an alternative to litigation and many new home contracts require arbitration, some have expressed concerns about the process, usually because they have received unfavorable outcomes. The bill would work in their favor, however, by providing an alternative means of settling a dispute before arbitration.

OPPONENTS
SAY:

CSHB 730 would diminish the rights of homeowners who are victims of negligent or fraudulent construction practices. It would create a commission dominated by builders with limited representation of consumers. It would eliminate the implied warranties of good workmanship and habitability that courts have upheld and would replace them with limited warranties favored by builders. In the event of a dispute between a homeowner and builder, the homeowner would have to pay for a complex and costly bureaucratic process with significant legal consequences. In fact, the bill would make buying a new home so treacherous that some homeowner advocates have said they would have to recommend that consumers simply do not buy new homes.

CSHB 730 would increase costs for homeowners. If a dispute arose with the builder, the homeowner would have to participate in a so-called administrative process before going to court. The stakes for unwittingly navigating this process would be so high, however, that homeowners would have to hire lawyers to see them through it. In addition, participating in the mandatory process would require a homeowner to pay an application fee and for the expense of a third-party inspector.

The bill would eliminate homeowners' only real protection under the law. Implied warranties set a minimal standard for residential construction, requiring that homes be built in a good and workmanlike manner and are habitable. Courts have upheld implied warranties, which have been developed through common law since the 1960s. The warranties are based on the sound concept that the state should not allow builders to sell poorly constructed and uninhabitable homes. By enforcing this minimal standard, implied warranties protect consumers from being taken advantage of by unscrupulous builders. However, CSHB 730 would throw out implied warranties and replace them with limited warranties adopted by the commission.

The limited warranties that the commission would adopt to replace implied warranties are in use today. In most cases, a third-party company provides a warranty covering the entire home for one year, mechanical systems for two years, and major structural defects for 10 years. These warranties are nearly worthless for expensive foundation defects because the standard for what constitutes a major structural defect is so high. A cracked foundation is very expensive to repair and usually is covered by a limited warranty only if it

affects a load-bearing wall, rendering the house unsafe or uninhabitable. CSHB 730 would codify these flawed warranties in state law.

Composition of commission. The composition of the commission would be fundamentally unfair. Builders would hold six of the nine seats, with only two seats representing consumers. A physical engineer would hold the ninth seat. Such a commission would not have even a superficial appearance of fairness. Moreover, the commission would oversee a process that profoundly affected the legal rights of homeowners, by creating a prerequisite to filing suit or arbitration, establishing presumptions of evidence, and affecting the use of experts in subsequent proceedings.

Those seeking to justify the builder-dominated composition of the commission claim that it would need technical expertise to adopt standards. Without adequate consumer representation in the adoption of these standards, however, the builder-dominated commission would be likely to adopt lowest-common-denominator standards. In effect, the state would be sanctioning a gap between the reasonable expectation of a homeowner and the standards to which a new home would be built. Equal representation is a vital first step to creating a residential construction commission that would be truly fair and credible to both sides.

Fees. The commission would have an open checkbook to set fees, nearly all of which would be borne by the consumer. The fee paid at closing would be passed on to the new homeowner and used to fund the commission. A homeowner also would have to pay a fee for submitting a request to the commission and for the expenses of an inspector. Although either party could submit a request to the commission, builders would have no reason to pursue a process that could bring them closer to litigation. Thus, only homeowners would pay the application fee. Homeowners who received an unfavorable ruling would be penalized doubly: not only would they have paid for the process, but they also would have created a strong evidentiary record for the builder to use in court. CSHB 730 would require the homeowner to foot the bill for a process that provided little or no corresponding benefit.

Evidence. Because the bill would establish evidentiary standards and would control the use of experts in subsequent proceedings, savvy homeowners would realize that they needed to hire lawyers. Those who attempted to

navigate the process without legal counsel could find themselves arriving at its conclusion without remedy, and having limited their ability to prove their case in subsequent proceedings.

In order to overturn an unfavorable ruling, a homeowner would have to present clear and convincing evidence that the ruling was inconsistent with commission-adopted performance standards and warranties. This is a very high legal standard of proof under civil law. Moreover, the homeowner would have to meet this standard after having participated in a process in which he or she was at a disadvantage every step of the way. First, the bill would require the third-party inspector's recommendation to be based solely on standards and warranties adopted by the builder-dominated commission. A homeowner could appeal the recommendation, but only to a review panel of inspectors employed by the commission. At the conclusion of the process, a homeowner could find that a courtroom was the only forum left for relief, except that the evidentiary standard to prove the homeowner's case would be higher, having been raised at his or her expense.

CSHB 730 would require a homeowner requesting resolution to disclose in the request any expert who had inspected the defect. If the homeowner failed to do so, the expert and any materials he or she had prepared would be inadmissible in a subsequent court proceeding or arbitration. However, the bill would not include a corresponding disclosure restriction on the builder. It would not compel a builder to disclose any experts that may have inspected the defect on the builder's behalf.

Disciplinary action. Although the bill would require registration of builders, the commission overseeing registration would have no teeth. The bill would establish limited grounds for disciplinary action, excluding, for instance, grounds for action against unscrupulous builders with a consistent record of taking advantage of homeowners. Most of the grounds for action would relate only to the builder's administrative relationship with the commission, such as fraudulently obtaining registration or failing to pay a fee. Also, administrative penalties would be capped at \$500, a pittance for a high-volume builder.

Arbitration. The bill would throw up another roadblock in the path of a homeowner seeking remedy for a construction defect in court, a path already closed to many by binding arbitration. Most new-home contracts require

arbitration, but the contract often specifies the process and forum for arbitration, resulting in a biased panel of available arbitrators. Although championed as a cheaper alternative to the courtroom, arbitration is often just as expensive, necessitating hiring a lawyer and an expert witness as in a courtroom trial, but without an impartial jury of peers. CSHB 730 would allow unscrupulous builders to hide behind another mandatory layer of costly bureaucracy.

NOTES: Significant changes made by the committee substitute to the filed version of HB 730 include:

- requiring registration of home builders;
- establishing grounds for disciplinary action and the commission's disciplinary powers;
- creating an administrative penalty for disciplinary actions;
- requiring the commission to appoint an inspector within 15 days of receiving a request for resolution; and
- amending the economic damages that a claimant could recover under the RCLA.

The companion bill, SB 383 by Duncan, has been referred to the Senate Business and Commerce Committee.