

BILL ANALYSIS

C.S.H.B. 2295

By: McClendon
Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In 2003, the Legislature created the Texas Residential Construction Commission to regulate the residential construction industry and provide clear, limited warranties for all new construction homes and remodel projects. To accomplish this goal, the Commission licenses builders, remodelers, new homes, and remodel projects and administers the State-sponsored Inspection and Dispute Resolution Process which provides a neutral, third-party review of alleged post-construction defects.

The Commission is subject to the Sunset Act and will be abolished on September 1, 2009, unless continued by the Legislature. The Sunset Commission found that despite efforts last session to address concerns about the agency's ability to effectively oversee builders and protect Texans from poor quality home construction, additional changes are needed to ensure adequate oversight of the industry and public protection. Also, the agency needs more time to assume its new powers and to develop a track record for judging its performance in overseeing the industry and resolving disputes through the State Inspection Process.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Residential Construction Commission in SECTION 22, SECTION 34, SECTION 45, SECTION 47, SECTION 56, SECTION 58, SECTION 60, SECTION 61, SECTION 62, SECTION 64, SECTION 69, SECTION 70 and SECTION 72 of this bill.

ANALYSIS

Establishes requirements and process for licensing builders

C.S.H.B. 2295 adds provisions requiring the Commission to adopt rules necessary to implement a licensing program for builders, including rules relating to license eligibility; renewal requirements, examination requirements, and continuing education requirements; security and insurance requirements; and disciplinary actions. The bill contains conforming changes to refer to licensing instead of registration throughout the Act.

The bill requires builders to complete an eight hour course – one hour of which must address ethics and two hours of which must address limited statutory warranties, building and performance standards, requirements of the International Residential Code, and other provisions in law that apply to builders.

The bill requires the Commission to issue a provisional license that is valid for 30 days to qualified persons who have not completed the required coursework and to issue an original license to persons who complete the required coursework within 30 days of receiving the provisional license. The bill requires the Commission to review the builder's compliance with completion of the eight-hour course before issuing an original license. The bill also provides that the new course requirement and provisional license apply only to persons licensed for the first time on or after January 1, 2010.

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Comment [W1]: MISLEADING!
"The Texas Residential Commission" was never meant to be a true regulatory agency with a clear mission of protecting the public." – Sunset Advisory Staff report (first sentence)

Comment [W2]: MISLEADING!
Commission-adopted limited warranty and performance standards provide illusory protection and are in many ways far worse than the Implied Warranty of Habitability that existed before the TRCC. Exemptions to warranty coverage include:

- "Changes to the soil that are not a direct result of construction activities." (i.e. expansive clay soil)
- "Work performed or materials supplied by someone other than the builder/remodeler." (i.e. by a subcontractor)

- TRCC's "Homeowner Information Packet"

Comment [W3]: FALSE & MISLEADING!
The Commission does not license builders and remodelers; it only registers them. "Registration is the least restrictive form of regulation." Because the TRCC provides the illusion of regulation, the Sunset staff said, "Having a poor regulatory program is worse than having no regulatory program at all."

Comment [W4]: TO CLARIFY...
The Sunset Commission staff recommended to "Abolish the Texas Residential Construction Commission and repeal the Texas Residential Construction Commission Act."

This bill, by extending the Commission for another six years, ignores the staff recommendation, a similar recommendation from an earlier Texas Comptroller's report, and overwhelming public testimony.

The ONLY support for keeping the Commission comes from the builders themselves or their representatives. "However, protecting practitioners is not the rationale for involving the power of the State, nor is it the benchmark for evaluating the need for regulation."

The bill also requires, as a condition of licensure, that builders post a \$25,000 surety bond, approved by the Commission, payable to the Commission, and for the benefit of the party who suffers damages from the license holder's violation under the law. The bill requires this security requirement to be maintained as a condition of licensure.

The bill specifies that applicants for licensure who apply on or after September 1, 2011 must take a licensing examination prescribed by the Commission. The bill provides that applicants for the examination must meet qualifications required in the Act and must pay fees required by the Commission. The bill requires the examination to be prepared by the Commission or a multistate contractor licensing association approved by the Commission, and it requires the examination to be designed to determine the fitness of the applicant to engage in business as a builder.

The bill provides for persons who are registered before January 1, 2010 or who are licensed before September 1, 2011 to be licensed without satisfying the examination requirement if the Commission determines their certificate or license was active and in good standing. The bill requires that such persons whose certificates or licenses were not active and in good standing on those respective dates must satisfy the examination requirement.

The bill authorizes the Commission to issue a provisional license that is valid for six months for an applicant who has been licensed or registered in good standing for at least two years in another jurisdiction with substantially equivalent licensing or registration requirements, is currently licensed or registered in that jurisdiction, and has passed an examination recognized by the Commission.

Clarifies the Commission's mission

C.S.H.B. 2295 establishes an agency mission in the Texas Residential Construction Commission Act, which reflects the agency's dual purpose of providing industry oversight and operating a service-related program through the State-sponsored Inspection and Dispute Resolution Process. The bill defines the agency's overall purpose as maintaining oversight of all persons required to be licensed with the agency as builders and remodelers, ensuring that those persons are responsible and accountable to the homeowners with whom they contract. The bill also includes the Commission's role in educating builders and homeowners about aspects of the residential construction industry affecting the building and remodeling of Texas homes and facilitating the resolution of disputes between them as part of the agency mission.

Renames the State-sponsored Inspection and Dispute Resolution Process

C.S.H.B. 2295 changes the name of the State-sponsored Inspection and Dispute Resolution Process to the State Inspection Program and makes conforming changes throughout the Texas Residential Construction Commission Act.

Clarifies exemptions from licensure for certain individuals making improvements to the interior of an existing home

C.S.H.B. 2295 clarifies that persons who make an improvement to the interior of an existing home when the cost of the work exceeds \$10,000 and sell the home immediately following the completion of the remodeling are responsible as a builder for the statutory warranties provided in the Act and are required to become licensed as a builder. The bill also clarifies that individuals who improve their homestead by making improvements to the interior of their primary residence when the cost of the work exceeds \$10,000 and then immediately sell the home, are not considered builders for purposes of licensure or statutory warranties.

Continues the Commission for six years

C.S.H.B. 2295 continues the Commission for six years and provides for the next Sunset review to include an assessment of the agency's overall performance, as in any Sunset review, and the agency's ability to implement statutory changes and management actions resulting from this current review.

Restructures the Commission

The bill increases the size of the Commission from nine to 11 members. The bill adds a public member and provides for both a licensed architect and a building inspector instead of having either of these professions on the Commission. The bill also provides the staggering of the terms of the expanded Commission.

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Requires posting of complaint information

C.S.H.B. 2295 requires the Commission to post on its website, and annually update, information regarding the number of complaints the commission receives in a calendar year regarding a builder that are justified. The bill also requires the Commission to post these complaints as a percentage of the number of homes the builder has registered. The bill defines a justified complaint as one that is considered closed by the agency and the Commission has taken disciplinary action against the builder.

Comment [W5]: MISLEADING

Provides criminal penalties for failure to obtain licensure

C.S.H.B 2295 provides criminal penalties for persons acting as a builder without a license. The bill defines the offense as a Class B misdemeanor.

Allows flexibility in nonprofit corporations' ability to designate a primary agent

The bill requires nonprofit corporations to designate either one of its officers or executive-level administrators as its agent, instead of the requirement only to designate one of its officers as applies to other corporations. The bill applies this new designation only to a new license issued for the first time on or after January 1, 2010.

Increases continuing education requirements for licensed builders and remodelers.

The bill requires licensed builders and remodelers to have 16 hours of continuing education every two years instead of five hours every five years. C.S.H.B. 2295 also prohibits licensed builders from completing the existing requirement for one hour of ethics education by self-directed study and it conforms the existing prohibition against self-study to the two-year license renewal cycle. The bill also removes the separate requirement for persons registered for the first time on or after September 1, 2007 to complete five hours of continuing education in their first year of registration.

Clarifies the Commission's enforcement authority

The bill clarifies the Commission's authority to consider revocation and suspension of a builder's license without the builder having had repeated violations that result in disciplinary action. The bill also authorizes the Commission to take disciplinary action against a builder or designated agent for failure to participate in the State Inspection Program, failure to make an offer to repair, failure to respond to a Commission request, failure to comply with the requirements of the County Inspections Program without the builder having to violate these requirements multiple times.

The bill also adds as grounds for disciplinary action the failure to comply with the post-State Inspection Program reporting requirements and the failure to substantially complete all of the obligations under an express contract for construction, if found by a final, non-appealable court judgment. The bill also adds as a ground for disciplinary action, the failure to comply with Commission rule regarding the duties and obligations of a Third-party Inspector to disclose a conflict of interest.

The bill adds to the Commission's disciplinary power the authority to prohibit an individual from acting as a builder, or from owning or operating a company that supplies goods or services to a builder or contractor for a period of time and under conditions specified by the Commission.

C.S.H.B. 2295 also clarifies the Commission's cease-and-desist authority, including the authority to assess administrative penalties as part of a cease-and-desist order, and the authority for the Executive Director to issue an emergency order in cases involving unlicensed activity.

Comment [W6]: TO CLARIFY... We would not expect this builder protection" agency to do much more with these new powers since they've not used the powers they have already. The Commission got cease-and-desist authority last session in HB 1038 but never used it.

Establishes contract requirements for binding arbitration clauses

C.S.H.B. 2295 requires written arbitration agreements to include a statement, initialed by each party to the agreement that each party has chosen to arbitrate a controversy that exists at the time of the agreement or that arises between the parties after the date of the agreement. The bill also provides that a party to a contract may not require any other party to the contract to agree to arbitration as a condition to a contract. The bill also requires builders to display arbitration clauses in 12-point bold font type in a residential construction contract, instead of 10-point bold font.

Establishes a consumer recovery fund

C.S.H.B. 2295 establishes a recovery fund, within the Texas Treasury Safekeeping Trust Company, to reimburse consumers who have completed the State Inspection Program or voluntary mediation, as outlined in the bill, for damages caused by builders for violations of the Act if the homeowner: obtains a court judgment against a builder and perfects a judgment lien for unsatisfied damages; proves a claim against a builder in a bankruptcy proceeding for damages that are uncollectable because of a ruling of the bankruptcy courts; or proves damages, including attorneys fees and court costs are less than \$10,000, the builder has not repaired the construction defects and the damages are uncollectable without civil action.

The bill requires the Commission to hold a hearing after receiving a request for payment to determine if the person is entitled to payment and the amount of the payment. The bill limits payments from the fund to the lesser of the amount of actual damages or \$75,000.

C.S.H.B. 2295 provides for a one-time deposit to the fund account any excess revenue collected by the agency during fiscal year 2010 that exceeds direct or indirect agency costs. The bill also provides for the comptroller to annually deposit 10 percent of the administrative penalties collected by the agency into the fund. The bill prohibits the fund from holding a balance in excess of \$5 million at the end of a calendar year, and requires the Commission to deposit any excess money into the general revenue fund.

Requires the Commission to produce a pamphlet detailing agency programs

C.S.H.B. 2295 requires the agency to produce a homeowner information pamphlet, providing basic information about the Commission, the State Inspection Process, statutory warranties, and building and performance standards and how they all relate to new and newly remodeled homes. The bill requires closing agents to distribute this pamphlet at new home closings and for the agency to mail the pamphlet to homeowners of registered remodeled homes. The bill also requires builders to declare whether a home registered is new construction or a newly remodeled home.

Clarifies the amount of State Inspection fees collected by the agency

The bill clarifies that the agency must collect a filing fee for the State Inspection Program that offsets rather than covering the expense of assigning a Third-party Inspector.

Allows both parties to opt out of the State Inspection Program

C.S.H.B. 2295 authorizes both parties to stop the State Inspection Program and pursue legal action if the timeframe for the agency's Appeal Panel to issue a final action goes beyond the 30-day statutorily allowed timeframe, or if the Process, at any point, goes beyond 75 days for inspections involving workmanship and materials and 90 days for inspections involving structural elements of a home. The bill provides that, if a homeowner or builder cause a delay of more than five days in the completion of a State Inspection, the statutory timeframes, including those that allow the homeowner or builder to opt out of the Program, are extended by the number of days delayed.

The bill also clarifies that, if homeowners use the opt-out provision before a recommendation by a Third-party Inspector, a ruling on an appeal, or the expiration of a Commission-established mediation period, a builder has the right to make a written offer of settlement or an election to purchase the home as outlined in the Residential Construction Liability Act.

C.S.H.B. 2295 also clarifies that once a final, non-appealable recommendation or ruling is issued both parties to the State Inspection can immediately pursue legal action. The bill clarifies that a homeowner is not required to delay filing a legal action to allow the builder an opportunity to make an offer of a settlement or repair, as specified in the Residential Construction Liability Act. The bill also clarifies that the filing of an action by a homeowner does not affect the builder's right to make such an offer of a settlement or repair.

Allows flexibility in the agency's assignment of Third-party Inspectors

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Comment [W7]: ILLUSORY
This \$5 million fund is not nearly adequate to compensate for damages when they extend through entire neighborhoods, as we've seen already. And the \$75K limit won't cover homes with serious issues that make them uninhabitable and unsellable.

Comment [W8]: SEE COMMENT "W2"

Comment [W9]: ILLUSORY
The "opt out" clause was sold as a way to shorten the SIP process, but with no limit to the length of delay(s), the process can be extended indefinitely.

This is just another way that builders can wear down the homeowner.

The bill allows the Commission flexibility to assign two Third-party Inspectors to those cases involving both structural and workmanship and materials issues, instead of being required to assign one inspector that is qualified to perform inspections in both areas.

Requires the agency to implement a priority processing scheme for State Inspection cases

C.S.H.B. 2295 requires the Commission to adopt procedures, by rule, for processing State Inspection requests, including allocating agency staff and other resources in the most efficient manner to address requests. The bill requires the Commission to consider ways to expedite the State Inspection Program in cases involving emergency circumstances, such as habitability; appropriate handling of complex case material; and the most efficient use of staff.

Streamlines the State Inspection Program

C.S.H.B. 2295 eliminates the requirement for homeowners to provide an initial, 30-day written notice to a builder or remodeler before filing a State Inspection request with the Commission. The bill decreases the statutory timeframe for the agency to assign a third-party inspector to a State Inspection case from 30 days to 10 days after the Commission receives the request. The bill also authorizes the Commission to use its own staff to conduct inspections in emergency situations. C.S.H.B. 2295 decreases the timeframe for a third-party inspector to complete structural case reports from 60 days to 45 days.

Changes appointment provisions for Third-party Inspectors

The bill removes the ability for the homeowner and builder to each strike the appointment of an inspector to conduct State Inspections. The bill requires Third-party Inspectors to decline an appointment to a State Inspection case and disclose a conflict of interest, including having an employment or financial interest in a business entity or other organization owned by or receiving money from the homeowner or builder involved in the case. The bill also authorizes the Commission to impose an administrative penalty on or remove an Inspector from the list of eligible State Inspectors if the Inspector knowingly fails to decline and appointment or disclose a conflict of interest.

Authorizes Third-party Inspectors to include additional defects in the final inspection report

C.S.H.B. 2295 allows third-party inspectors to add defects discovered during the inspection that are not included in the homeowner's original list of defects filed in the State Inspection request. The bill specifies that any additional defects listed in the inspector's final report must be a violation of applicable building performance standards that if left unrepaired, may threaten the health and safety of the home's occupants, or a violation of a building code applicable to the construction. The bill clarifies that the Third-party Inspector is not obligated to inspect any alleged defects that are not included as part of the initial State Inspection request.

Clarifies posting requirements for State Inspection reports

C.S.H.B. 2295 prohibits the Commission from including a homeowner's name when posting a State Inspection final report on the agency's website. The bill requires the agency to post whether the builder offered to make repairs, as recommended by the final report, or otherwise resolved the dispute with the homeowner. The bill requires the agency to remove State Inspection request forms, case material, and final report from its website and internal files if the builder repairs the confirmed defect and if the agency has confirmed with the homeowner and the Inspector that the repairs were made. The bill also specifies that such a final report removed from the agency's website is **not subject to public disclosure**.

Clarifies timeframes for re-inspection of repaired defects

The bill specifies timeframes for re-inspections of accepted offers to repair as 30 days after completion of the repairs for workmanship and materials cases and 45 days after completion of repairs for structural cases. The bill adds language to clarify the process for conducting inspections to determine that repairs comply with the applicable statutory warranty and building and performance standards. The bill also clarifies that the builder is entitled to a reasonable period of time, no longer than 15 days, as is currently provided in the Residential Construction Liability Act, to address minor cosmetic items that are not necessary to fully complete the repairs.

Comment [W10]: TO CLARIFY...
These provisions block access to the information even through an Open Records request, as a way of preventing independent third-party surveys of homeowners. Not only are builders freed from accountability but, with this language, so is the agency that's supposed to regulate them.

C.S.H.B. 2295 authorizes the Commission to require that an alleged defect or repair of a construction defect be re-inspected again by another Third-party Inspector, state inspector, or Commission employee. The bill authorizes the Commission to charge the builder a fee when these types of inspections are performed. The bill also allows a homeowner to refuse any such inspection of repairs.

Comment [W11]: TO CHARIFY...
What the Bill Summary does not disclose is that the builder is free to hire an inspector of his choosing. That's absurd and like letting the fox hire a wolf to verify that the chickens are safe.

Requires builders to report the status of repaired defects

C.S.H.B. 2295 requires builders to submit to the Commission information relating to any activities, including settlements, repair efforts, mediation, arbitration or litigation, which have occurred as part of the findings of the State Inspection Process. The bill details required information on a form prescribed by the Commission, including the builder's name, name and address of the homeowner, and whether repairs were offered, accepted, and made, and whether the parties pursued further legal action. The bill requires builders to submit these status reports within the initial 21 days after the report becomes final and non-appealable, and to update the report within 21 days after the defect is repaired and re-inspected, any legal proceedings are final, the builder repurchases the home, or any other resolution of the dispute is finalized.

Establishes an Office of the Ombudsman

The bill establishes an Office of the Ombudsman in statute to provide information and advice to homeowners and builders engaged in defect repairs and to help them understand the post-inspection process. The bill also provides for the Ombudsman to help homeowners and builders locate medication services, if requested, under the Commission's voluntary mediation procedures. The bill would also require the lead Ombudsman to be a licensed attorney who would be hired by and report directly to the Commission. The bill requires the Ombudsman to comment on rules and other policy changes before the Commission. The bill also prohibits the Ombudsman from giving legal advice to homeowners or builders.

Establishes a Voluntary Mediation Program

C.S.H.B. 2295 requires the Commission to, by rule, establish procedures for the builder and homeowner to engage in a third-party mediation performed by a mediator not employed by the Commission. The bill provides for mediation in lieu of going through the State Inspection Process if the homeowner submits a statement to the Commission and builder requesting mediation. The bill also allows homeowners to request mediation if the builder requests a State Inspection. The bill provides that the request must be submitted before the expiration of time outlined for the State Inspection Process, and requires the builder to participate in the mediation in good faith, as determined by the mediator.

Comment [W12]: ILLUSORY, MISLEADING
LOCAL MEDIATION IS AN ILLUSION. It only becomes an option for homeowners if the builder requests SIP, and that is very unlikely.

What's not disclosed in this Bill Summary is how the bill changes current law that would require mediation in the county where the home resides. Instead, builders can request mediation in their home state, be it California, Florida, Michigan, etc.

NOTE: We need to verify the venue issue since I didn't find it in the bill. And what is the implication of completion of SIP?

A party to the mediation may not file an action for damages or other relief arising from the alleged construction defect before the expiration of the mediation period, unless an agreement is executed as a result of the mediation that is breached before the mediation period expires. The bill also places a time limit of 90 days on the mediation proceedings and clarifies that if the parties have failed to reach an agreement within 90 days, either one may pursue legal action. The bill specifies that a builder's failure to comply with an agreement reached by both parties as a result of the mediation process is grounds for disciplinary action, including an administrative penalty. The bill also clarifies that, if both parties use the mediation program and still pursue other legal action, a builder has the right to make a written offer of settlement or an election to purchase the home as outlined in the Residential Construction Liability Act. The bill requires both parties to split the fees of the third-party mediator equally.

The bill specifies that good faith participation in mediation, as determined by the mediator, constitutes a final, nonappealable determination and completion of the State Inspection Process for purposes of the Residential Construction Liability Act. The bill also specifies that if a builder makes a repair pursuant to an offer under the Residential Construction Liability Act, the builder may engage a Third-party Inspector to inspect the repair and determine if the residence, as repaired, complies with the applicable limited statutory warranty and building performance standards.

Extends timeframes for statutory warranties

C.S.H.B. 2295 changes the warranty periods from one to two years for workmanship and materials and from two to four years for plumbing, electrical, heating, and air-conditioning delivery systems. The bill requires the Commission to adopt

new statutory warranties and building performance standards under these new timeframes to apply to new residential construction beginning or under a contract entered on or after January 1, 2010.

Redefines the building code for unincorporated areas

C.S.H.B. 2295 specifies that the International Residential Code and National Electric Code that apply to residential construction located in an unincorporated area that is not in the extraterritorial jurisdiction of a municipality is the version adopted by the Commission, and not the codes of the county seat of the county in which the construction is located. The bill also deletes language specifying that the code applicable to unincorporated areas of counties that do not contain incorporated areas is the version that existed on May 1, 2001.

Comment [W13]: NEED CLARIFICATION

This removes code requirements for those areas, which benefits builders who want to cut corners but is probably not what the legislators intended.

Establishes the Warranties and Performance Standards Advisory Committee

The bill requires the Commission to appoint a Warranty and Performance Standards Advisory Committee and establishes the duties of the Committee to evaluate the residential performance standards adopted by the Commission; to review and evaluate any proposed changes to standards brought forward by Commission members, agency staff, or members of the public; and to make recommendations for action to the Commission. The bill requires the Commission to establish, by rule, the number of Committee members, qualifications for appointment, terms of service of Committee members, and duties and operating procedures of the Committee. The bill also authorizes a Committee member to be reimbursed for reasonable travel expenses incurred from Committee-related business. The bill also provides that the terms of the current members of the Warranty and Performance Standards Advisory Committee expire on the date when the new Committee is appointed.

Expands the eligibility for fee inspectors under the County Inspections Program

C.S.H.B. 2295 expands the eligibility of persons who may perform fee inspections under the County Inspections program to include plumbing inspectors employed by a municipality and licensed by the Texas State Board of Plumbing Examiners and building inspectors employed by a political subdivision.

Abolishes the Star Builder Program

The bill removes the Star Builder Program from statute.

Repeals the Residential Construction Arbitration Subtitle

C.S.H.B. 2295 repeals the Residential Construction Arbitration Subtitle of the Act, which requires arbitrations involving alleged defect disputes to be held in the county where the home is located; establishes a residential construction arbitration task force to study residential arbitrators and arbitration and advise the commission with respect to both; requires a summary of arbitration awards to be filed, within 30 days of filing in a court, with the Commission; and requires the Commission to set a fee assessed for late filing of arbitration awards. The bill also repeals grounds for vacating an award in residential construction upon showing of manifest of disregard for Texas law.

Comment [W14]: TO CLARIFY...

This bill ABOLISHES LOCAL ARBITRATION of residential construction disputes. Texas homeowners could be forced to conduct arbitrations anywhere in Texas, subject to the laws of that state, such as California, Michigan or New York, even though the property is located in Texas.

Applies standard Sunset across-the-board recommendations

C.S.H.B. 2295 adds standard Sunset language requiring the Commission to make effective use of technology in delivery of services and provision of information to the public and requiring the Commission to develop a policy that encourages the use of negotiated rulemaking and alternative dispute resolution.

This change has HUGE implications but is buried at the bottom of a 66-page bill that seems intentionally convoluted, confusing, and vague, with tentacles into other part of the law, including RCLA, Occupations Code, and Engineering Practices Act, among others.

The bill repeals the following statutory provisions

- Property Code, '401.002 (12)
 - Property Code, '416.011
 - Property Code, '416.012 (b)
 - Property Code, '418.002 (d)
 - Property Code, '428.001 (c)
- Property Code, Subtitle E, Title 16

Comment [W15]: TO CLARIFY...

This change has equally HUGE implications but is buried at the bottom as well.

EFFECTIVE DATE

C.S.H.B. 2295 81(R)

September 1, 2009.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 2295 changes the Sunset date for the Texas Residential Construction Commission to 2015, instead of 2013 as provided in the original version of the bill.

Comment [W16]: TO CLARIFY...
This substitute was sold as a “compromise bill” but is measurably worse than the original and extends the TRCC for 6 years instead of 4.

The public would be better off if the TRCC were allowed to sunset.

C.S.H.B. 2295 adds language that was not in the original version of the bill to require written arbitration agreements to include a statement, initialed by each party to the agreement that each party has chosen to arbitrate a controversy that exists at the time of the agreement or that arises between the parties after the date of the agreement. The substitute also provides that a party to a contract may not require any other party to the contract to agree to arbitration as a condition to a contract. The original bill did not contain any similar provisions.

C.S.H.B. 2295 adds provisions not contained in the original version requiring the Commission to adopt rules necessary to implement a licensing program for builders, including rules relating to license eligibility; renewal requirements; examination requirements, and continuing education requirements; security and insurance requirements; and disciplinary actions. The substitute also requires builders to post a \$25,000 surety bond, approved by the Commission, as a condition of initial licensure and license renewal. The substitute also makes conforming changes to refer to the licensing instead of the registration of builders. The original bill did not contain any similar provisions.

Comment [W17]: TO CLARIFY...
This bill’s “licensing” requirements are a sham and should be offensive to any licensed professional. “By not ensuring the competence and financial responsibility of builders in Texas, the regulations do not prevent unqualified persons from entering the field and thus are not designed to prevent problems from occurring.” – Sunset Commission staff report

Comment [W18]: TO CLARIFY...
A surety bond is not the same as a performance bond for each home. This bill does not provide insurance and binding requirements to protect homeowners.

C.S.H.B. 2295 adds language to require first-time builders to take an eight-hour class within one month of initial licensure. The substitute outlines that the class must address at least one hour of limited statutory warranties; building and performance standards; requirements of the International Residential Code as adopted by the Commission by rule; and other statutes and rules that apply to builders under this Title. The substitute also adds language requiring the Commission to issue a provisional license that is valid for 30 days to a qualified person who has not yet completed the required coursework. The substitute provides for the Commission to issue an original license to persons who complete the required coursework within 30 days of issuance of the provisional license. The substitute specifies that the provisional license expires on the 31st day after it is issued. The substitute also provides that new applicants are only required to satisfy the eight-hour class requirement if they become licensed on or after January 1, 2010. The original version of the bill did not contain similar language.

C.S.H.B. 2295 specifies that applicants for licensure who apply on or after September 1, 2011 must take a licensing examination prescribed by the Commission. The substitute provides for persons registered before January 1, 2010 or licensed before September 1, 2011 to be licensed without satisfying the examination requirement if the Commission determines their certificate or license was active and in good standing. The substitute authorizes the Commission to issue a provisional license that is valid for six months for an applicant who has been licensed or registered in good standing for at least two years in another jurisdiction with substantially equivalent licensing or registration requirements, is currently licensed or registered in that jurisdiction, and has passed an examination recognized by the Commission. The original version of the bill did not contain any similar provisions.

C.S.H.B. 2295 modifies the original bill by changing the name of the “State-sponsored and Dispute Resolution Process” to the “State Inspection Program,” and updates references in the Property Code to reflect this change. The substitute also repeals the definition of the State-sponsored Inspection and Dispute Resolution Process. The original version of the bill did not contain any similar provisions.

C.S.H.B. 2295 clarifies the original bill by modifying the agency’s mission to include overseeing builders required to be licensed, instead of builders registered with the Commission.

The substitute modifies existing statutory language to require homeowners making improvements to existing homes, when the cost of the improvement exceeds \$10,000 and the homeowner does not live in the home for at least one year following

completion of the building or remodeling, to obtain licensure as a builder, as well as fulfill the statutory warranty obligations outlined in statute. The substitute also adds language to clarify licensure requirements and warranty obligations do not apply to individuals who improve their homestead by making more than \$10,000 in interior improvements to an existing home that is their primary residence, even if they sell the home and do not live in it for at least one year following the completion of the improvements. The original version of the bill did not contain similar language.

The substitute adds language to require the Commission to post information regarding complaints against builders, as related to the number of the builder's registered homes, on the agency's website. The substitute specifies that the posted complaints must be justified and defines justified as a closed complaint where the Commission has taken disciplinary action against the builder. The original version of the bill did not contain similar language.

The substitute adds language to subject individuals acting as a builder or remodeler without a license to a Class B misdemeanor. The substitute also adds an instructional provision to the bill stating that criminal penalties may only be assessed if the individual fails to become licensed after September 1, 2009. The original version of the bill did not contain similar language.

C.S.H.B. 2295 adds language to require a nonprofit corporation to designate as its agent one of its officers or executive-level administrators, instead of only requiring an officer as currently required by statute. The original version of the bill did not contain similar language.

The substitute modifies language in the original version to require builders to complete 16 hours of continuing education within a two-year renewal period, instead of five hours every five years. The substitute adds language, not in the original version of the bill, to specify that the existing one hour of continuing education addressing ethics may not be completed by self-directed study. The substitute also reinstates existing statutory language that had been modified in the original version of the bill allowing two hours of the continuing education to be completed via self-study.

C.S.H.B. 2295 adds language defining a failure to comply with the post-State Inspection or post-mediation reporting requirements as a ground for disciplinary action. The substitute also adds language defining a failure to substantially complete all the obligations under an express contract for construction without reasonable grounds for the failure to do so as a ground for disciplinary action against the builder. The substitute requires that a court issue a final, non-appealable judgment before the Commission may take action against a builder regarding substantial completion under the terms of a contract. C.S.H.B. 2295 also adds language defining a failure to comply with Commission rule related to the duties and obligations of Third-party Inspectors. The original version of the bill did not contain any similar provisions.

The substitute adds to the Commission's disciplinary powers the authority to prohibit an individual from acting as a builder, from acting as a general contractor, or from owning or operating a company that supplies goods or services to a builder or contractor for a period of time under conditions determined by the Commission. The original version of the bill did not contain any similar provision.

The substitute adds language not in the original version of the bill to provide a revenue stream for the consumer recovery fund and a process for making claims and receiving payment from the fund. The substitute outlines legislative intent, stating that the fund is intended to serve as a resource of last resort for homeowners who are unable to collect damages from a builder arising from the builder's violation of the Act or are unable to get a confirmed defect repaired by the builder. The substitute provides that all revenue collected by the agency during fiscal year 2010 that is not used for direct or indirect agency operation costs will be deposited into the fund instead of the General Revenue Fund. The substitute provides that 10 percent of the agency's collected administrative penalties will be deposited in to the fund on an annual basis. The substitute adds language that the fund may only have a balance of \$5 million or less on December 31st of a year, and provides that any excess funds will be swept from the consumer recovery fund and deposited in the General Revenue Fund. The substitute adds language regarding claim for payment from the fund, including that in order to be eligible to receive payment, a homeowner must have completed the State Inspection Program or voluntary mediation, as

outlined elsewhere in the bill. The substitute specifies the conditions under which a person is entitled to payment from the fund. The substitute requires the Commission to hold a hearing after receiving a request for payment to determine if the person is entitled to payment and the amount of the payment, and it limits payments from the fund to the lesser of the amount of actual damages or \$75,000. The original version of the bill did not contain these detailed provisions regarding the operation of the recovery fund. The substitute modifies language in the original bill to clarify the type of information required when registering a new home or remodel project. The substitute requires a builder who registers a home or residential construction project to state whether the registration concerns a new home, a material improvement to a new home, or an improvement to the interior of an existing home when the cost of the work exceeds \$10,000.

C.S.H.B. 2295 adds language to clarify that a person submitting a request for a State Inspection must pay an amount to “offset” rather than “cover” the expenses of the Third-party Inspector. The original version of the bill did not contain any similar provisions.

C.S.H.B. 2295 changes the timeframes that had been set in the original version of the bill to allow parties to pursue legal action if the State Inspection Process goes beyond 75 days for inspections involving workmanship and materials and 90 days for inspections involving structural elements. The original bill had established these timeframes as 90 and 105 days, respectively.

The substitute adds language to specify that if a homeowner or builder cause a delay in the State Inspection process of more than five days, the time required to opt out of the process is extended by the number of days of the delay.

C.S.H.B. 2295 adds language to allow the Commission the option to assign two Third-party Inspectors for State Inspection cases involving both structural and unrelated workmanship and materials issues in addition to assigning a single inspector who meets the requirements for each type of inspection. The original version of the bill did not contain any similar provisions.

The substitute removes the ability for both parties to a State Inspection case to strike the assigned Third-party Inspector once. The substitute adds language to require the Third-party Inspector to disclose any conflicts of interest and decline any appointment to a case where such conflicts exist. The substitute defines a conflict of interest, including situations where the Third-party Inspector and builder or homeowner have a financial ties. The substitute also includes the authority for the Commission to impose an administrative penalty or remove the Inspector from the list of eligible inspectors for failure to disclose a known conflict of interest.

C.S.H.B. 2295 adds language not in the original version of the bill prohibiting the Commission from including a homeowner’s name in the final inspection report posted on the agency’s website. The substitute also adds language to require the agency to list whether the builder offered to make a repair as recommended by the final inspection report or otherwise resolved the dispute with the homeowner.

C.S.H.B. 2295 moves language from the Residential Construction Liability Act to the Texas Residential Construction Commission Act that clarifies a builder is entitled to a reasonable period of time, not to exceed 15 days, to address minor cosmetic items that are necessary to fully complete repairs. The original version of the bill did not contain this clarification.

The substitute adds language authorizing the Commission to require that an alleged defect or repair of a construction defect be re-inspected again by another Third-party Inspector, state inspector, or Commission employee. The substitute also clarifies that the Commission may charge the builder a fee when these types of inspections are performed and that the homeowner may refuse such an inspection. The original version of the bill did not contain any similar provisions.

The substitute modifies language in the original version of the bill to require builders to submit status reports within 21 days after repairs are re-inspected and accepted by the homeowner, any legal proceedings are final, the builder

repurchases the home, or any other resolution of the dispute is finalized. The original bill required builders to submit these status reports every 21 days until one of these events occurred.

The substitute modifies language that was in the original version of the bill to clarify that the Ombudsman's duty is to provide information and advice to homeowners and builders engaged in defect repairs without providing them legal advice. The substitute also clarifies language in the original version of the bill that on request, the Ombudsman shall assist homeowners and builders in locating mediation services under the Commission's voluntary mediation process.

C.S.H.B. 2295 establishes a **voluntary mediation** option by which a homeowner may submit a statement to the Commission and the builder, before the expiration of time outlined for the State Inspection Process and before a third-party inspection has been performed, requesting mediation as an alternative to the State Inspection Process. The substitute clarifies that the mediation would not be performed by Commission staff, but rather a third-party mediator not employed by the Commission. The substitute requires the builder to participate in the requested mediation in good faith, as determined by the mediator. The substitute provides that if a homeowner requests mediation, an action for damages or other relief arising from the alleged construction defect may not be filed before the expiration of the mediation period unless an agreement is executed as a result of the mediation that is breached before the mediation period expires. The substitute provides that the mediation period expires on the 90th day after the homeowner submits a statement of intent to engage in mediation and that a homeowner and builder may file legal action if no agreement is reached before the expiration of the mediation period. The substitute specifies that a builder's failure to comply with an agreement reached by both parties as a result of the mediation process is grounds for disciplinary action, including an administrative penalty. The substitute requires both parties to split the fees of the third-party mediator equally. The original version of the bill did not contain any similar provisions.

C.S.H.B. 2295 **changes the warranty periods** from one to two years for workmanship and materials and from two to four years for plumbing, electrical, heating, and air-conditioning delivery systems. The original version of the bill did not contain any similar provisions.

C.S.H.B. 2295 adds language to define the International Residential Code and National Electric Code that applies to unincorporated areas of the state that are not extraterritorial jurisdictions of a municipality as the codes adopted by the Commission, by rule, instead of tying the codes to the county seat of the county in which the construction was located. The substitute also removes language currently in statute that specifies the versions of the International Residential Code and National Electric Code that apply to residential construction located in an unincorporated area in a county that does not contain an unincorporated area is the version that existed on May 1, 2001. The original version of the bill did not contain any similar provisions.

The substitute adds language to require the Commission to appoint a Warranty and Performance Standards Advisory Committee and establishes the duties of the Committee to evaluate the residential performance standards adopted by the Commission; to review and evaluate any proposed changes to standards brought forward by Commission members, agency staff, or members of the public; and to make recommendations for action to the Commission. The substitute requires the Commission to establish, by rule, the number of Committee members, qualifications for appointment, terms of service of Committee members, and duties and operating procedures of the Committee. The substitute also authorizes a Committee member to be reimbursed for reasonable travel expenses incurred from Committee-related business. The substitute also adds an instructional provision to the bill stating that the terms of the current members of the Warranty and Performance Standards Advisory Committee expire on the date when the new Committee is appointed. The substitute also adds an instructional provision to the bill stating that the compensation of members only applies to members appointed after September 1, 2009. The original version of the bill did not contain any similar provisions.

The substitute **repeals Subtitle E, Residential Construction Arbitration**. The original version of the bill did not contain any similar provisions.