

DRAFT SUMMARY
Sunset Commission Decisions on the
Texas Residential Construction Commission
Sunset Decision Meeting - December 16, 2008

Continuation – Sunset Review

- **Continue the Texas Residential Construction Commission as an independent state agency for four years, instead of the standard 12-year period.** In the next Sunset review, Sunset staff would also assess not only overall performance, as in any Sunset review, but also evaluate the agency's ability to implement statutory changes and management actions resulting from this current review.

HOT advocates abolishing the TRCC entirely and views efforts to "fix" it as a less attractive compromise.

Agency Mission

- **Amend the Texas Residential Construction Commission Act to include an agency purpose clause.** This recommendation would establish an agency mission in statute to include an overall purpose of **oversight of the responsibility and accountability** of the builders and remodelers registered with the agency **to the homeowners with whom they contract**. In addition, the agency's mission would include having a role in educating builders and homeowners about all aspects of the residential construction industry affecting the building or remodeling of Texas homes. Finally, the agency's mission would include having a **service role in facilitating dispute resolution** regarding construction defects between homeowners and builders through the State-Sponsored Dispute Resolution Process.

Public perception is that the mission of the TRCC is to protect homebuilders by blocking homeowner access to courts and other legal solutions to construction defect disputes. Defining a mission to benefit homeowners is a good step, but because the powerful builders' lobby has so much, we remain skeptical that it will actually happen as presented here.

Policy Body – Board Composition

- **Restructure the Commission's membership, increasing the size from nine to 11 members.** This recommendation increases the size of the Commission from nine to 11 members by adding an additional public member and adding a requirement for an architect and an engineer, instead of the original requirement of one architect or engineer member.

Paid consultants of consumer associations are currently prohibited from serving on the Commission, and there are no conflict-of-interest provisions to prevent Public members from having family or professional ties to the building industry.

This restructuring does little to resolve these problems and would still give too much influence to builders. Rather than this proposal (4 builder members, 4 public members, 1 engineer, 1 inspector, 1 architect), we prefer one of the other proposals (i.e. an all public board with an advisory committee composed of representation from the homebuilding and inspection industry. It's OK to allow members of the regulated industry serve in an advisory capacity, but they should NOT serve in a rule-making capacity!

Public Information and Customer Service

- **Require the Commission to produce a brochure detailing agency programs to be distributed at closing.** The agency would continue to update and produce a **homeowner information booklet**, such as *Are You Puzzled About Your New or Newly Remodeled Home?*, and make it available online or in a hard copy format. However, the agency would no longer mail this booklet to a homeowner once the home is registered. Instead, closing agents would be required to distribute this publication at closing. The Commission would retain the responsibility to provide brochures to homeowners with newly remodeled homes. To gain needed information, the Commission would require builders and remodelers to designate whether a project is a new home or a remodel project during the home registration process.

The TRCC's Homeowner Information Booklet is misleading and provides additional builder protections. It says "It's important to know that state law requires your builder or remodeler to stand behind their work" but fails to admit that the TRCC has no authority to enforce that. It also describes a minimum set of warranties but then goes on to list 9 different exclusions. Notable examples include:

- *Work performed or materials supplied by someone other than the builder/remodeler. (i.e. subcontractors?)*
 - *Changes to the soil that are not a direct result of construction activities. (i.e. expansive clay, which causes improperly engineered foundations to crack.)*
- **Amend the Act to **delete all public records** of a State Inspection request if the builder fixes the defect.** This recommendation would add a provision in statute to direct the agency to remove State Inspection request forms, case material, and final recommendations from the website if the builder repairs the confirmed defects. The agency would confirm this process with the homeowner and the inspector who performed the second inspection to ensure that all defects are in fact repaired. In addition, a state inspection would no longer be considered a public record at the time it is removed from the website.

This additional requirement to delete records of complaints is yet another step toward protecting bad builders. Already, the TRCC has successfully blocked public access to new homeowner information, even through an Open Records request. This is presumably because such information could be used to conduct surveys and prove the ineffectiveness of the agency. Good builders should have nothing to hide.

Consumer Representation

- **Establish an **Office of the Ombudsman to ensure consumer interests are represented within the agency and before the Commission.**** The Office of the Ombudsman would be detailed in statute, formalizing an existing program which helps facilitate defect repairs following completion of the State Inspection Process. The Ombudsman would be required to be a licensed attorney and would be hired by and report directly to the Commission. The Ombudsman's main duties would include overseeing staff to carry out the post-SIRP mediation process between builders and homeowners. The Ombudsman would also be responsible for commenting on rules and other policy changes before the Commission.

The ombudsman concept is noble and suggests that the Sunset Advisory Commission has its heart in the right place. But isn't the TRCC "supposed" to protect the public and the interests of consumers in the first place? The very fact that this is proposed seems more like an admission that the agency actually does serve builders more than homeowners.

If the TRCC is to survive, we suggest that all of its services (State inspection, mediation, ombudsman, consumer education, etc.) be optional to homeowners. And by surveying their interests and experience with these services, the next Sunset Review can determine if the public really wants or needs the agency.

Registration – Continuing Education

- **Require registered builders and remodelers to complete three hours of continuing education every two years.** This recommendation would increase the amount of continuing education requirements which registered builders and remodelers must satisfy from five hours every five years to three hours every two years. Also, new requirements would be effective on September 1, 2009 but would not be considered as a part of renewal until September 1, 2011.

Is this a joke – just 1.5 hours per year? Even TRCC Executive Chairman Duane Waddill recommended 5 hours per year, including three hours involving technical building topics, one hour regarding the TRCC, and one hour in ethics.

We proposed additional topics, such as building science (e.g. engineering foundations for expansive soils), estimating and proposal writing (so builders don't get themselves overcommitted), project management (to help them stay on schedule), and business law and best practices (to help them run their business profitably without screwing homeowners).

Enforcement

- **Clarify the Commission's authority to suspend or revoke a builder's registration.** This recommendation would allow the Commission to consider revocation and suspension of a builder's registration without the builder satisfying a prerequisite of repeated violations that result in disciplinary action. Specifically, this recommendation would remove from statute the provision requiring that a builder have repeated violations which have resulted in disciplinary action (Sec. 418.002 (d)) before the Commission can revoke or suspend that builder's registration.

***Don't confuse Registration and Licensing!** A license is a right to perform a task and generally requires proof of competency and responsibility. Registration is simply administrative record keeping with little to no authority. In the last legislative session the Commission was granted enforcement authority, but it has **yet to suspend any registration** for failing to fix defects. We don't see "clarifying the Commission's authority" as much improvement.*

We believe that Licensing, rather than Registration, is the most effective way to hold builders accountable, and the TDLR (Texas Department of Licensing and Regulation) is better suited to handle such regulatory oversight than the TRCC.

Our objective in promoting licensing is to prevent the primary cause of lawsuits – major defects resulting from bad building (and business) practices. The TRCC, and its State Inspection Process and dispute resolution "services," also helps to prevent lawsuits, but NOT by ensuring that homebuilders are qualified or held accountable to homeowners.

- **Clarify the Commission's general disciplinary authority to take action without multiple violations.** The Commission would be authorized to take disciplinary action against a builder or designated agent for failure to participate in the State Inspection Process, failure to respond to a Commission request, or failure to comply with the requirements of the County Inspection program without the builder having to violate these requirements multiple times. Specifically, the

word “repeatedly” would be removed from the following provisions: Sec. 418.001 (13), (22), and (25).

What about failure to repair confirmed defects? The TRCC does not have that authority. And what is meant by “disciplinary action?” A \$1,000 fine is not a deterrent and rather a cost of doing business. It’s far from a ban on doing business in Texas, which licensing could accomplish. In California, for example, a citizen can call a policeman if they believe a construction worker is working without a license. The police can arrest violators the same as they arrest anyone caught driving a car without a license.

- **Clarify the Commission’s cease-and-desist authority.** This recommendation would clarify that the Commission has clear, **direct authority to issue cease-and-desist orders to stop unlicensed activity that threatens the safety of the public.** In addition, the Commission could assess administrative penalty as a part of a cease-and-desist order.
- **Direct the agency to use the disciplinary process to help negotiate repair offers.** As a management action, the Commission would be directed to begin the disciplinary process against a builder involved in a State Inspection case once the Third-party Inspector issues their final report. **Currently, the agency does not pursue disciplinary action** against a builder involved in an open State Inspection case. This change would encourage the builder to make repairs by allowing the **agency to negotiate lower disciplinary action if repairs are made** to a consumer’s satisfaction.

This is way too vague and open to builder interpretation. There still seems to be no way to force repair of confirmed defects. Again, licensing would resolve that issue, because revoking a license would remove the right to work as a builder/contractor.

State Inspection – Timeframes

- **Eliminate the requirement for homeowners to provide initial notice before filing a State Inspection Request.** Homeowners would not be required to provide an initial, 30-day written notice to a builder or remodeler before filing a State Inspection request. This change would not affect notice required by other pieces of law, such as those provided for in the Residential Construction Liability Act.

Changes to State Inspection Timeframes are designed to compress the average time of the SIRP process from 147 days to 105 days and allow various points within the process that the homeowner can opt-out and proceed with other legal remedies. While this is an improvement, we still view SIRP as an expensive and disruptive barrier that should be made OPTIONAL. It’s expensive because the homeowner needs to be represented during the SIRP process by their own attorney, inspector and engineer, knowing that the builder will likely bring their own experts.

- **Decrease the amount of time allowed to assign a Third-party Inspector.** This recommendation would decrease the statutory timeframe provided 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 State Inspection request. In addition, the agency would be authorized to use its own staff to conduct inspections in emergency situations.

The inspection process is currently stacked in favor of the builder, and this “improvement” does not change that. We think it’s a travesty that third-party building inspectors don’t need a license. Without licensing, as is required for commercial buildings, there’s no way to ensure that inspectors have the necessary knowledge of Building Sciences to enforce building codes, ensure that homes are built properly, and protect the health and safety of residents.

In contrast, the Texas Real Estate Commission licenses real estate inspectors who examine existing homes before resale. They benefit homeowners and lenders by checking to make sure that the HVAC heats & cools and dish washers and other appliances work, but they can't see the framing behind the walls or the foundation under the carpet.

Because it's more critical to ensure structural integrity (and long term value) of the home, we see no reason not to license home building inspectors, except to advantage the builders.

- **Clarify statute to provide specific timeframes for inspection completion and shorten the amount of time provided for a structural inspection report to be issued.** This recommendation would maintain the 30-day timeframe Third-party Inspectors have to complete an inspection report for workmanship and materials cases and decrease the timeframe to complete reports for structural cases, from 60 days to 45 days.
- **Amend the State Inspection Process to allow both parties to opt out if the Process goes beyond the new, shortened statutory timeframes.** Both parties to a State Inspection case would have the right to stop the State Inspection Process and pursue legal action if the a final action by the agency's Appeal Panel goes beyond the 30-day timeframe, or if the Process, at any point, goes beyond 90 days for inspections involving workmanship and materials and 105 days for inspections involving structure.

SIRP should be OPTIONAL. While SIRP may be a valuable service for "some" homeowners, for others there's little value in beginning an expensive and unnecessary State Inspection Process only to opt out of it later.

- **Clarify statute to provide timeframes for re-inspection of repaired defects.** Under current Commission rule, if a homeowner accepts a builder's offer to repair, the builder is required to re-hire and pay for the Third-party Inspector who performed the initial State Inspection to inspect the completed repair work. This recommendation would amend statute to specify timeframes for these re-inspections as 30 days for workmanship and material cases and 45 days for structural cases. This recommendation would also clarify that homeowners who do not accept a builder's offer of repair can immediately pursue legal action.

This last sentence seems to weaken our argument for making SIRP optional. What do you think?

- **Clarify statute to require builders to report the status of repaired defects.** Under current Commission rule, builders are required to submit information relating to any activities, including settlements, repair efforts, arbitration or litigation, which has occurred as part of the findings in the State Inspection Process. This recommendation would codify this process in statute and increase the frequency of reports to every 21 days, instead of the current 45-day timeframe.

State Inspection – Prioritization

- **Require the agency to implement a priority scheme for processing State Inspection requests.** The agency would adopt procedures for processing State Inspection requests, which would include assessing cases to better prioritize its efforts when appropriate. When developing these procedures, the agency should consider emergency circumstances, including habitability, and complexity of case material, including structural defects vs. workmanship and material complaints.

This response to consumer complaints is vague so far. We look forward to seeing details in the proposed bill.

State Inspection – Process

- **Authorize Third-party Inspectors to include additional defects in the final inspection report.** This recommendation would allow Third-party Inspectors to add defects discovered during the inspection that are not included on the original State Inspection request. Inspectors would be authorized to use their own judgment in determining whether a defect should be included in the initial inspectors report and should not base this determination solely on a request by either the homeowner or the builder. Items added by the Inspector and included in the inspector's report as defects would be the responsibility of the builder to repair. In addition, the defects **must relate to violations of codes, standards, or warranties.**

If TRCC & SIRP survive, this is a good improvement.

Star Builder

- **Remove the Star Builder Program from statute.** This recommendation would remove the Star Builder Designation from statute, abolishing the program.

OK. The Star Builder objective, to highlight reputable builders, is good but not used. Some people suggested enhancing Star Builder to make it like Licensing. We proposed replacing Star Builder with a true, market-driven consumer rating system, like AngiesList.com, which prevents industry players from directly influencing their ratings. It's not clear that Government, however, should take on the task of administering such a system, especially since a private company like AngiesList.com may do it better.

County Inspections

- **Expand the eligibility to provide fee inspections as part of the County Inspections program.** This recommendation would include licensed plumbing inspectors and certified building officials as eligible to perform fee inspections as part of the County Inspection Program.

Warranties and Performance Standards – Building Requirements

The Sunset Advisory Commission failed to address serious flaws in Warranty and Performance standards. Their ONLY recommendation (below) is to sponsor a two-year study of adopting building codes for unincorporated area. Much more is needed:

WARRANTIES:

- *According to the Houston Chronicle, John Krugh, corporate counsel for Perry Homes, drafted the TRCCA and the TRCC Warranty & Performance Standards. As a result, these standards protect builders, not consumers. With no requirement for financial responsibility, there is no means to ensure that a builder is able to assume liability for warranty items.*
- *Builders often offload their financial responsibilities through illusory 3rd party warranties that provide little real coverage. We understand from NAB members that the TRCC has even provided "continuing education" classes to teach them how to do this.*
- *The Commission is not positioned to review warranty contracts and has never pursued a 3rd party warranty company to require repair of structural defects confirmed through SIRP.*

- *If warranties were actuarial insurance instruments regulated by the Texas Department of Insurance, the insurance and homebuilding industries would have incentives to work toward improved building standards and quality, in order to prevent defects that lead to claims.*

STANDARDS:

- *We recommend that the latest (2008 IRC and 2008 NEC) standards be adopted statewide, including in municipalities.*
 - *We recommend a maximum deflection of L/480 for slab grade foundations. And remove the requirement for homeowners must water around the foundation, since there are no approved watering guidelines.*
 - *Require site-specific geotechnical soil testing. And require foundations on soils with a plasticity index >30 to be engineered & inspected, with records archived for 10 years, because it can take that long for serious foundation problems to show up.*
- **Direct the agency to study the possibility of adopting building codes for unincorporated areas.** As a management action, the agency is directed to create a panel or advisory committee to research the feasibility of adopting or amending building codes for unincorporated areas of the state. In developing this research, the panel should include expertise from the following organizations:
 - The Building Officials Association of Texas,
 - The Texas Association of Counties,
 - Texas A&M University’s Department of Construction Science, and
 - any other organization that has expertise in the area of building codes.

Also, in developing this research the panel should **conduct its work in an open meeting** and take public comment from various stakeholders in accordance with the Open Meetings Act. The agency should complete this study by January 1, 2011 and submit the findings in a report to the Sunset Commission and the agency’s House and Senate oversight committees.

The January 2011 deadline does not allow time for the Sunset Commission to act on the study’s findings, so this should be adjusted to October 2010 at the latest.

INSURANCE:

- *Insurance-backed Warranties covering real defects over reasonable time periods*
- *Payment & Performance Bonds (protects homeowners when builders don’t complete work or pay subcontractors)*
- *General Liability Insurance*
- *Workman’s Compensation (how to insure against the devastating effect of construction accidents)*
- *Because of the actuarial complexity involved, these new insurance instruments could be added to the scope of this study.*

Recovery Fund

- **Establish a recovery fund.** This recommendation would establish a recovery fund to reimburse consumers for damages caused by builders that has gone without remedy because the builder is no longer in business. (Note: This provision was adopted as a concept, with details on how the fund would be establish and operate to be developed during the upcoming Legislative Session.)

We envision the Victim’s Recovery Fund and a Lemon Law concepts as new insurance instruments that protect homeowners with legitimate claims and legal judgments from builders who leave the industry, go

bankrupt or otherwise hide their assets. These insurance instruments, however, require actuarial analysis using real data. So far, the TRCC has blocked access, even through Open Records requests, to new homeowners, which could facilitate surveys that discover that data.

We do NOT think adding \$50 to builder registration fees will come close to funding these programs and instead recommend a required \$100 fee per home, paid either by the homeowner or homebuilder.

Across-the-Board Recommendations

- Adds standard Sunset language requiring the Commission to **make effective use of technology** in its delivery of services and provision of information to the public.
- Adds standard Sunset language requiring the Commission to develop a policy that encourages the use of **negotiated rulemaking** and **alternative dispute resolution**.

We wholeheartedly endorse dispute resolution alternatives, including ombudsmen, mediation, arbitration, and civil lawsuits, each applied as appropriate. And we see the State Inspection Process as just another one of those options, which is why, if applied at all, it should be optional.

HOT Issues that were Not Covered

- **State-approved Contract Terms** for the essential conditions establishing parties' rights, such as contract terms requiring binding-arbitration, which is almost always favors builders and blocks homeowner access to courts.
- **RCLA (Residential Construction Liability Act) – Repeal the provisions that prohibit Class Actions, Punitive Damages, and the ability to recover Attorney Fees**, since they make it nearly impossible for homeowners to justify legal action or even engage representation by an attorney.