

BILL ANALYSIS

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S.B. 1173
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AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

Current law allows perpetual care cemeteries to sell niche and crypt spaces in a "to-be-built" mausoleum and collect and use the sales proceeds. The perpetual care cemetery, in effect, is promising to build the mausoleum when total sales proceeds reach a level to justify construction. The law today does not require collected funds to be placed in escrow or trust, nor is the seller required to be bonded. Consequently, severe problems in this area have arisen in Texas.

As proposed, S.B. 1173 protects a purchaser of such a crypt space in the event that construction on the mausoleum is either not begun or is left unfinished.

S.B. 1173 creates a new regulatory requirement to ensure that funds are available to construct "to-be-built" mausoleums in perpetual care cemeteries. It requires a perpetual care cemetery, before starting a sales effort, to take measures to ensure construction of the proposed mausoleum. S.B. 1173 mandates a timeline by which perpetual care cemeteries must begin construction of proposed mausoleums, which if not reached entitles consumers to a full refund with interest. The bill provides for a choice of solutions for consumers and perpetual care cemeteries when mausoleums are not completed prior to the death of a purchasing consumer. It limits preconstruction trust investments to cash, cash-equivalents, and marketable short-term government securities. S.B. 1173 permits the perpetual care cemetery to withdraw construction progress payments during construction and withdraw any remaining balance when construction is completed.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Finance Commission of Texas is modified in SECTION 2 (Section 712.044, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 712.001(b), Health and Safety Code, to define "department," "preconstruction trust," "preconstruction trustee," and "undeveloped mausoleum space."

SECTION 2. Amends Section 712.044, Health and Safety Code, as follows:

Sec. 712.044. EXAMINATION OF RECORDS; EXAMINATION FEES AND EXPENSES. (a) Authorizes the Banking Commissioner of Texas (commissioner) to examine certain files and documents, annually or more often as the commissioner reasonably considers necessary or appropriate to protect the interest of plot owners and efficiently administer and enforce this chapter. Makes conforming changes.

(b) Requires a corporation that is examined under this section to make the specified books and records available for examination by the Banking Department of Texas upon reasonable notice to the corporation and requires the corporation to pay to the commissioner for the examination a reasonable and necessary fee set by rules adopted by the Finance Commission of Texas under Section 712.008 (Rules) to defray certain costs.

SECTION 3. Amends Section 712.0441(f), Health and Safety Code, to authorize the commissioner to issue an order requiring restitution by a corporation to its fund or to a preconstruction trust. Makes a conforming change.

SECTION 4. Amends Chapter 712, Health and Safety Code, by adding Subchapter D, as follows:

SUBCHAPTER D. SALE OF UNDEVELOPED MAUSOLEUM SPACE

Sec. 712.061. OFFER AND SALE OF UNDEVELOPED MAUSOLEUM SPACE. (a) Prohibits a corporation from directly or indirectly selling or offering for sale an undeveloped mausoleum space unless before the sale or offer the corporation meets certain requirements.

(b) Requires the written notice to the commissioner to set forth certain information.

(c) Authorizes a corporation that has established a preconstruction trust, at any time before beginning construction of the mausoleum or mausoleum section in which undeveloped mausoleum spaces are being sold, to substitute a performance bond that meets the requirements of Section 712.067. Authorizes the corporation to terminate and withdraw all proceeds deposited in the preconstruction trust on acceptance of the performance bond by the commissioner.

Sec. 712.062. DEPOSITS TO FUND. Provides that this subchapter does not affect the corporation's obligation to make deposits to its fund as provided in Subchapter B (Perpetual Care Trust Fund).

Sec. 712.063. PRECONSTRUCTION TRUST. (a) Requires a corporation that intends to directly or indirectly sell or offer for sale undeveloped mausoleum spaces, except as provided by Section 712.067, to establish a preconstruction trust by written declaration and agreement appointing as preconstruction trustee a financial institution with trust powers that is located in this state.

(b) Requires the corporation to deposit in the preconstruction trust an amount equal to at least 40 percent of all proceeds received directly or indirectly from the sale of undeveloped mausoleum spaces, not including interest, finance charges, sales taxes, credit life insurance premiums, or deposits to the corporation's fund.

(c) Authorizes the commissioner, on application, to authorize a corporation to deposit less than the amount required by Subsection (b) if the corporation provides certain information to the reasonable satisfaction of the commissioner.

(d) Requires the corporation to deposit the required amount into the preconstruction trust on or before the 30th day after the end of the month in which payment is received. Requires the corporation, at the time of making a deposit, to furnish to the preconstruction trustee the name of each payor and the amount of payment on each account for which the deposit is being made. Prohibits a contract between the corporation and an agent or third party developer from restricting or waiving the corporation's primary liability for making the deposits required by this section.

(e) Authorizes the preconstruction trustee to commingle deposits received if the accounting records accurately establish a separate account for each contract and reflect the amounts deposited and income and loss allocable to each contract.

(f) Sets forth the accounts in which a preconstruction trust is authorized to be invested.

(g) Authorizes the preconstruction trustee to withdraw money from earnings on a preconstruction trust for the purpose of paying reasonable and necessary costs of operation of the preconstruction trust, including trustee or depository fees and expenses, and any special examination fees due to the department related to an examination of the preconstruction trust that is not incidental to examination of

the corporation's fund. Authorizes the corporation, with the department's prior approval, to withdraw money from earnings on a preconstruction trust to pay any tax incurred because of the existence of the preconstruction trust.

(h) Provides that the preconstruction trust and the preconstruction trustee are governed by Subtitle B (Texas Trust Code: Creation, Operation, and Termination of Trusts), Title 9, Property Code.

Sec. 712.064. CONSTRUCTION; DEFAULT. (a) Requires the corporation to start construction of the mausoleum or mausoleum section in which sales or reservations for sale of undeveloped mausoleum spaces are being made within 48 months after the first sale or reservation and complete construction 60 months after the date of the first of those sale or reservation. Authorizes the commissioner to grant extensions for good cause shown.

(b) Requires the corporation and the preconstruction trustee, if construction of a mausoleum or mausoleum section related to an undeveloped mausoleum space has not begun or been completely constructed by the applicable time specified by Subsection (a), on the written request of the buyer, on or before the 30th day after the date of the buyer's request, to refund the entire amount paid for the undeveloped mausoleum space plus, if the corporation established a preconstruction trust, net income earned on that portion of the money deposited in the preconstruction trust. Provides that the corporation is liable to a buyer for any portion of the purchase price paid for undeveloped mausoleum spaces that was not deposited in the preconstruction trust.

Sec. 712.065. RELEASE OF TRUST FUNDS TO CORPORATION. (a) Authorizes the corporation, on completion of construction of a mausoleum or mausoleum section subject to this subchapter, to withdraw all money deposited in the preconstruction trust and the net income earned on the money after submitting to the preconstruction trustee a sworn affidavit of completion executed by an officer or agent of the corporation on a form prescribed by the department.

(b) Authorizes the corporation, during construction of the mausoleum or mausoleum section containing the undeveloped mausoleum spaces, to periodically withdraw from the preconstruction trust an amount equal to the previously unreimbursed cost of performed labor or delivered materials after submitting to the preconstruction trustee a sworn affidavit of expenditures for construction cost executed by an officer or agent of the corporation on a form prescribed by the department.

(c) Authorizes the corporation, if the corporation delivers a completed mausoleum space acceptable to the buyer in lieu of the undeveloped mausoleum space purchased, to withdraw all money deposited to the preconstruction trust for that buyer and related income earned on the money after submitting to the preconstruction trustee a sworn affidavit of performance executed by an officer or agent of the corporation on a form prescribed by the department.

(d) Requires the corporation to maintain copies of the affidavits required by this section for examination by the department.

Sec. 712.066. CONTRACT DISCLOSURES. (a) Requires a sales contract for an undeveloped mausoleum space, whether in English or Spanish, to inform the buyer of certain information.

(b) Requires a corporation's sales contract for undeveloped mausoleum space to comply with applicable regulations of the Federal Trade Commission, including 16 C.F.R. Section 433.2, with respect to a contract payable in installments.

(c) Sets forth requirements for notices to buyers required under this section.

Sec. 712.067. BOND IN LIEU OF PRECONSTRUCTION TRUST. (a) Authorizes a corporation, in lieu of establishing the preconstruction trust required by Section 712.063, to execute and submit a bond issued by a surety company authorized to do business in this state and reasonably acceptable to the commissioner. Requires the bond to be payable to the commissioner and conditioned on the faithful performance of the contracts for sale of undeveloped mausoleum spaces.

(b) Requires the amount of the bond to equal or exceed 120 percent of the cost of construction of the related mausoleum or mausoleum or mausoleum section. Requires the cost of construction of the mausoleum or mausoleum section to be based on certain factors.

(c) Authorizes a corporation that has submitted a performance bond, at any time before beginning construction of the mausoleum or mausoleum section in which undeveloped mausoleum spaces are being sold, to establish a preconstruction trust that meets the requirements of Section 712.063. Authorizes the corporation to terminate and withdraw the previously submitted performance bond on acceptance of the substituted preconstruction trust by the commissioner.

Sec. 712.068. REPORTS. Requires the corporation, on or before the date the corporation's annual statement of funds is due as required by Section 712.041 (Annual Statement of Funds), to cause the preconstruction trustee to file with the department, in the form prescribed by the department, a full and true statement regarding the activities of any preconstruction trust that was subject to this subchapter at any time during the preceding calendar year.

SECTION 5. (a) Makes application of this Act prospective, except as provided by Subsection (b).

(b) Provides that this Act does not apply to a sale of undeveloped mausoleum space in an existing mausoleum project if at least 20 percent of the available, undeveloped mausoleum spaces have been sold under contracts executed before the effective date of this Act. Authorizes the commissioner, on request, to otherwise exempt an existing mausoleum project based on a determination that application of this Act to the subject mausoleum project would be capricious, arbitrary, or unfair in light of the degree to which the corporation has demonstrated detrimental reliance on the prior law. Provides that the sale of an undeveloped mausoleum space in a mausoleum project that is exempt under this subsection is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 6. Effective date: September 1, 2005.