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Texas Residential Construction Commission

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January 28, 2004

CERTIFIED MAIL RETURN RECEIPT REQUESTED

FILE # ML-43473-04
I.D. # 43473

The Honorable Greg Abbott
Office of the Attorney General
Opinions Division
209 West 14th Street, 6th Floor
Austin, Texas 78711

RQ-0176-GA

Re: Enforcement of provisions of House Bill 730 (Act effective Sept. 1, 2003, 78th Leg., R.S., ch. 458, §1.01).

Dear General Abbott:

The Texas Residential Construction Commission ("commission") seeks your opinion regarding the enforcement of the Texas Residential Construction Commission Act, Title 16, Property Code (the "Act") and, more specifically, Property Code §416.001, which requires that persons operating as builders hold a certificate of registration under Chapter 416 of the Property Code.

If the commission determines that a person is operating as builder, as that term is defined in Property Code §401.003, without having obtained a certificate of registration, and the person fails to register once having been notified by the agency of its obligation to do so, may the commission, with the assistance of the Attorney General, seek an injunction against that person to prevent further violation of the statute?

During the 78th regular legislative session, the Texas Legislature enacted House Bill 730, which created the commission. The commission is a regulatory body, which, among other things, must begin registering builders operating in the State of Texas by March 1, 2004. The commission has the obligation to determine whether the applicant for builder registration meets certain statutory requirements and whether the applicant has proven to the satisfaction of the TRCC the applicant's honest, trustworthiness and integrity. Property Code §416.002 and §416.005. The commission has the authority to deny a registration to those who

do not meet the statutory qualifications or who fail to demonstrate their honesty, trustworthiness or integrity to the satisfaction of the commission. Property Code §416.008(a). A person who is denied a registration has a right of appeal. Property Code §408(b). In addition, builder registrations are subject to expiration and must be renewed annually. Property Code §416.009. Furthermore, Property Code §418.002 gives the commission certain disciplinary powers, including the power to revoke or suspend a certificate of registration provided by the commission.

Property Code §416.001 states that a person *may not* act as a builder unless the person is registered with the commission. Property Code §416.001 (V.T.C.A. Supplement 2004) (emphasis added). The use of the term “may not” indicates a prohibition against taking action. *See*, Gov’t Code §311.016(5). Accordingly, the commission interprets the language of §416.001 to be a mandate for builders to register with the commission in order for builders to lawfully operate and those builders who are not registered with the commission after March 1, 2004 will be in violation of the statute. The overall statutory scheme regarding the registration of builders is one of licensure—the issuance of a permit evidencing a person’s legal right to do what would otherwise be unlawful. *See, Lipsey v. Texas Dept. of Health*, 727 S.W.2d 61 (Tex. App.—Austin 1987).

The commission anticipates that it will learn of persons operating as builders in this state without commission-issued certificates of registration. It is the commission’s intention to notice those persons of their obligation to become registered under the Act and to give those persons an opportunity to become registered. If a person fails to become registered after notice from the commission, the commission intends to seek the assistance of the Office of the Attorney General in enforcing the provisions of the Act, including bringing an action for equitable relief to enjoin a person who fails to become registered as a builder.

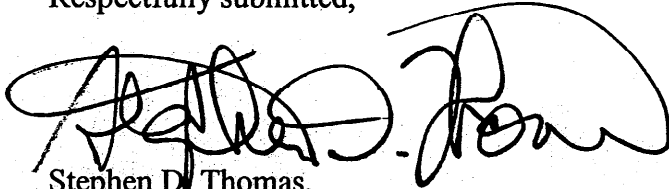
House Bill 730 vests the commission with rulemaking authority to adopt rules as necessary for the implementation of the Act. Although the statute does not expressly provide for the commission to seek equitable relief in the form of an injunction against a person who fails to become registered with the commission as required by the Act, the commission believes that the statute expresses a legislative intent for the commission to enforce its provisions by reasonable means. Moreover, the commission’s authority to ensure that builders are registered implies a concomitant authority to take action against persons who fail to comply. Without the authority to penalize non-registered builders, the commission’s authority to impose sanctions on those registered with the commission would be meaningless.

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Accordingly, the commission asks for your opinion on whether the commission has implied authority to seek an injunction against a person who fails to register as a builder under Property Code §416.001.

If you have any questions regarding this opinion request, please contact our General Counsel, Susan Durso, directly at (512) 475-0595.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen D. Thomas". The signature is stylized with large, sweeping loops and a prominent flourish at the end.

Stephen D. Thomas,
Executive Director

cc: Commissioners



Texas Residential Construction Commission

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FEB 27 2004

OPINION COMMITTEE

February 19, 2004

Executive Director
Stephen D. Thomas

FILE # RD-0176-GA
43532-04
I.D. # 43532

CERTIFIED MAIL RETURN RECEIPT REQUESTED
7002 2030 0005 8662 5552

The Honorable Greg Abbott
Office of the Attorney General
Opinions Division
209 West 14th Street, 6th Floor
Austin, Texas 78711

Re: Enforcement of provisions of House Bill 730 (Act effective Sept. 1, 2003,
78th Leg., R.S., ch. 458, §1.01).

Dear General Abbott:

The Texas Residential Construction Commission ("commission") seeks your opinion regarding the implementation of the Texas Residential Construction Commission Act, Title 16, Property Code (the "Act") and, more specifically, Property Code §416.001, which requires that persons operating as builders hold a certificate of registration under Chapter 416 of the Property Code, and Property Code §401.003(c), which excludes from the definition of builder

...any entity or individual who has been issued a license by this state or an agency or political subdivision of this state to practice a trade or profession related to or affiliated with residential construction if the work being done by the entity or individual to the home is solely for the purpose for which the license was issued.

Are persons who have registered under a municipal ordinance to perform home repairs within the municipality excluded from the provisions of House Bill 730 that relate to "builders" because of the language in Property Code §401.003(c)?

During the 78th regular legislative session, the Texas Legislature enacted House Bill 730, which created the commission. The commission is a regulatory body, which, among other things, must begin registering builders operating in the State of Texas by March 1, 2004.

2/19/2004

Letter to Attorney General

Re: Municipal Home Repair Ordinances

House Bill 730 provides a comprehensive statutory framework for setting minimum residential construction standards in Texas and providing a neutral inspection and dispute resolution process to assist builders and homeowners in resolving post-construction disputes. Its stated primary purpose, from the bill analysis that accompanied the legislation in the Senate, was to assist homeowners and builders in resolving disputes without costly litigation:

[t]he lack of state performance standards for residential construction in Texas and case law makes it difficult for homeowners and homebuilders to resolve construction issues without costly and time-consuming litigation. Without state regulation, homeowners and homebuilders will have to continue to resort to litigation to resolve disputes.

Committee Report, Bill Analysis to Committee Substitute for H.B. 730, Senate Business & Commerce Committee, 5/21/2003.

The legislation requires the commission to implement a state-sponsored inspection and dispute resolution process (SIRP) for new home construction and for construction on an existing home that constitutes a material improvement to the home or an interior renovation of the home with a cost in excess of \$20,000. Moreover, the commission has been assigned the task of developing limited statutory warranties and building and performance standards for residential construction. The new legislation provides that the statutory warranties established under the new law will supersede all implied warranties and "the only warranties that exist for residential construction and improvements are warranties created by [Chapter 430] or by other statutes expressly referring to residential construction or residential improvements, or any express, written warranty acknowledged by the homeowner and the builder." Property Code §430.006.

The warranties and standards created by Chapter 430 are the back-bone of the SIRP. The SIRP is available after construction has been completed or substantially completed and assures that the construction is performing within the minimum standards set by the state. Once a party has submitted a request to the commission to engage in the dispute resolution process, a third-party inspector appointed by the commission must provide a report that addresses only the construction defects based on the applicable warranty and building and performance standards. Property Code §428.004. Participation in the SIRP is a prerequisite to legal action between a homeowner and a builder for an alleged construction defect resulting from home construction transactions governed by the Act.

The commission has become aware that some cities in Texas have ordinances requiring those who perform certain home repairs and renovations to register with

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Letter to Attorney General

Re: Municipal Home Repair Ordinances

the city. For example, the City of San Antonio has Home Improvement Contractor's Licensing Ordinance No. 37812, which it passed in 1969. Under the San Antonio ordinance, a Class 1 Licensee can perform any home improvement—as defined in the ordinance—on private residences, including one or two-family dwellings and on residential accessory structures; a Class 2 Licensee is limited to performing non-structural home improvement work. The San Antonio ordinance specifically excludes from the definition of “home improvement” the construction of a new private single or two-family residence.

The City of Dallas has a similar Home Repair Ordinance. It requires contractors, not otherwise licensed by the state, to obtain a home repair license to perform any addition, improvement, remodeling, repair or replacement to an existing single or two family dwelling. Like the San Antonio ordinance, the Dallas ordinance does not define home repair to include new home construction.

The existence of these ordinances combined with the exclusionary language in Property Code §4010.003(c) leaves unclear whether a person who has received municipal approval to perform certain home repairs under a municipal ordinance, such as the San Antonio and Dallas ordinances, is a “builder” subject to the provisions of the Act, provided that the person performing construction is not engaging in new home construction. If those who hold licenses from certain municipalities are not “builders” under the Act, significant home improvement transactions on existing homes that happen to be within municipalities with home repair licensing ordinances would be excluded from the third-party inspection and dispute resolution process. Such an interpretation of the statute would deprive persons who perform residential construction and certain homeowners from the benefit of the SIRP depending upon the municipality in which they reside and perhaps upon the language of each individual municipal ordinance. Such an interpretation of the exclusionary language in §401.003(c), despite appearing to be facially plain language, would lead to an absurd result. In construing a statute, when a literal enforcement would lead to unreasonable consequences, it is reasonable to presume that such consequences were not intended and it is reasonable to adopt a construction that will promote the purpose for which the legislation was passed. King v. Texas Employers' Ins. Ass'n, 716 S.W.2d 181 (Tex. App.-Fort Worth, 1986).

The commission interprets the exclusionary language in the definition of “builder” in Property Code § 401.003(c) to exclude trade professionals, such as state-licensed plumbers, electricians and air conditioning contractors, if their work on a home is limited to the type of work for which they hold a license. This is a reasonable interpretation given that those professionals are already under the supervision of a state regulatory body that has requirements regarding the proficiency of the licensed individual and has authority to take disciplinary action

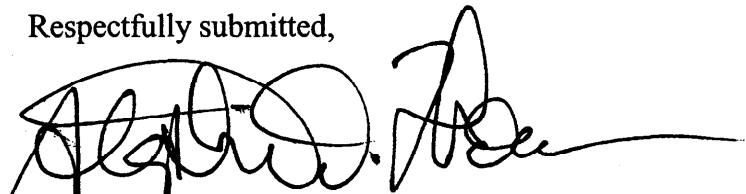
against those it regulates. For those who are not subject to such oversight and regulation, House Bill 730 clearly provides that such a person may not operate as a builder in this state after March 1, 2004, without registering with the commission.

Further, the municipal ordinances on home repair vary greatly, provide no consistency with regard to the requirements for registration or licensure and provide no process for review of the registrants' work product post-construction. As a result, the commission believes that excluding persons registered under a myriad of inconsistent municipal ordinances would create an unintended anomaly in the application of the statute. When construing a statute, it must be presumed that the legislature intended a feasible execution of its intent. Conseco Finance Servicing Corp. v. J & J Mobile Homes, Inc., 120 S.W.3d 878 (Tex. App.-Fort Worth, 2003), petition for review filed (Dec 02, 2003).

Accordingly, the commission seeks your guidance on the question of whether persons who have registered under a municipal ordinance to perform home repairs within the municipality fall within the exclusionary language of Property Code §401.003(c).

If you have any questions regarding this opinion request, please contact our General Counsel, Susan Durso, directly at (512) 475-0595.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen D. Thomas". The signature is fluid and cursive, with a long horizontal line extending to the right.

Stephen D. Thomas,
Executive Director

cc: Commissioners
Senator Duncan
Senator Fraser
Representative Edwards
Representative King
Representative Ritter
Representative Seaman
Representative Wooley