

SENATE BILL REPORT

E2SSB 5895

As Passed Senate, March 11, 2009

Title: An act relating to improving residential real property construction by creating the office of consumer education for home construction, strengthening warranty protections applicable to residential real property construction, creating remedies, requiring third-party inspections, enhancing contractor registration requirements, establishing worker certification standards, and enhancing bonding requirements.

Brief Description: Addressing residential real property construction improvements through consumer education, warranty protections, legal remedies, third-party inspections, contractor registration requirements, worker certification standards, and bonding requirements.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Tom, Kohl-Welles, Fraser and McDermott).

Brief History:

Committee Activity: Labor, Commerce & Consumer Protection: 2/19/09, 2/23/09 [DPS-WM, DNP].

Ways & Means: 2/26/09, 3/02/09 [DP2S, DNP, w/oRec].

Passed Senate: 3/11/09, 25-24.

Brief Summary of Engrossed Second Substitute Bill

- Creates within the Office of the Attorney General the Office of Consumer Education for Home Construction and the Home Construction Board.
- Creates implied statutory warranties and requires third-party inspections for new residential construction and substantial remodels.
- Requires applicants for contractor registration to provide additional information and directs the Department of Labor & Industry to establish worker certification requirements in the areas of foundations, framing, siding, roofing, windows, and doors.
- Increases bonding requirements for registered contractors.

SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: That Substitute Senate Bill No. 5895 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Franklin and Kline.

Minority Report: Do not pass.

Signed by Senators Holmquist, Ranking Minority Member; Honeyford and King.

Staff: Ingrid Mungia (786-7423)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5895 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Prentice, Chair; Fraser, Vice Chair, Capital Budget Chair; Tom, Vice Chair, Operating Budget; Fairley, Hobbs, Keiser, Kline, Kohl-Welles, McDermott, Murray, Oemig, Pridemore and Rockefeller.

Minority Report: Do not pass.

Signed by Senators Carrell and Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senators Zarelli, Ranking Minority Member; Parlette.

Staff: Michael Bezanson (786-7449)

Background: The Contractor Registration Act requires contractors to register with the Department of Labor & Industries (L&I). L&I also provides information to consumers about working with registered contractors.

Consumer Outreach. L&I provides homeowners with information on how to hire a registered contractor, processes complaints for both registered and unregistered contractors, and enables the public to look up whether or not a person is registered or has been previously registered. The Office of the Attorney General (AGO) also receives consumer complaints about residential construction issues and provides consumers with information on working with contractors. The Better Business Bureau also receives complaints regarding residential construction issues.

Contractor Registration. In order to become a registered contractor in Washington, a person or business must post a surety bond of \$6,000 for specialty contractors and \$12,000 for general contractors, and upon registering, provide the following information:

1. employer social security number;
2. unified business identifier number (UBI);
3. for contractors with employees, evidence of workers' compensation coverage;
4. for contractors with employees, employment security department number;
5. the type of contracting activity, whether a general or specialty contractor, and if the latter, the type of specialty; and
6. the name and address of each partner, owner, sole proprietor, or corporate officer, depending on the applicant's business structure.

L&I can suspend or deny a registration in the case of unsatisfied final judgment if the applicant owes the L&I money for any outstanding penalties or fees; if the applicant does not have a valid UBI or falsified information on the application; or if the applicant does not have an active and valid certificate of registration with the Department of Revenue.

Legal Remedies. An aggrieved homeowner may sue a constructional professional for breaching the implied warranty of habitability, provided for under common law. This implied warranty may be modified, limited, or waived. This warranty covers structural defects in the house and its foundation that make the home unfit for its intended purpose and only applies to the original purchaser.

The Washington Condominium Act establishes the following implied warranties: the condominium is suitable for the ordinary uses of real estate of its type and is free from defective materials; and the condominium has been constructed in accordance with sound engineering and construction standards, in a work like manner, and in compliance with all applicable laws. These implied warranties do not apply to new single-family home residential construction or substantial remodels.

Generally, city and county governments are not liable for the acts of building inspectors in respect to upholding the provisions of the State Building Code.

All multiunit residential buildings are required to have the building envelope inspected by a qualified inspector during the course of construction. This requirement does not extend to new single-family residential construction or substantial remodels.

Residential Contractor Study. A budget proviso in 2008 directed the Department of Licensing (DOL) to conduct a review of the need for regulation of contractors involved in the repair, alteration, or construction of single-family homes. The recommendations from the study includes the following:

- Strengthen registration requirements by authorizing the L&I to suspend registration for cause. Establish mechanisms for monitoring industry performance.
- Ensure that enforcement resources are adequate to establish compliance by contractors.
- Strengthen registration by requiring disclosure of prior business names and/or bankruptcy, two years experience in the construction industry, and evidence of training in regulations and business practices in the construction industry.
- Develop and require the use of model construction documents and specify prohibited provisions.
- Create a central complaint repository within state government. Establish a database and encourage state agencies and local authorities to share information in a uniform format.
- Encourage an integrated/coordinated consumer education program. Involve the AGO, L&I, DOL, industry associations, the Better Business Bureau, consumer advocates, and other stakeholders sharing common values.

Summary of Engrossed Second Substitute Bill: The Office of Consumer Education for Home Construction (Office) This Office is created within the Office of the Attorney

General. The Office will look into establishing a recovery fund to provide compensation to homeowners through a claim filing process. The Office is to make recommendations to the Legislature by December 1, 2010.

The Home Construction Board (Board) is created with the Office for the purpose of providing homeowners and construction professionals with a cost-effective and time efficient process to resolve disputes arising from alleged construction defect. The Board consists of seven members appointed by the Governor. The Board is to investigate and mediate claims filed by a homeowner against a construction professional. The homeowner is to pay a filing fee of no more \$100 and must first provide notice and opportunity to cure to the construction professional. The homeowner must first go through this process before pursuing a private right of action.

The Consumer Education Account is created in the custody of the State Treasurer. Upon registering or renewing a contractor's registration, an annual fee of \$100 will be assessed. This fee will be deposited in the account for the purpose of funding the Office.

Legal Remedies, Warranties, Municipal Liability, and Third-Party Inspections. *Common Law Implied Warranty of Habitability.* The common law implied warranty of habitability is modified to provide that it may not be contractually disclaimed, waived, modified, or limited.

Statutory Implied Warranties. Statutory implied warranties are established for the new construction or substantial remodel of residential real property. "Residential real property" means a single-family home, duplex, triplex, or quadriplex. A construction professional involved in the construction of new residential real property or the substantial remodel of existing residential real property warrants that the work will not impair the suitability of the property for the ordinary uses of real estate of its type and that the work will be free from defective materials and constructed in accordance with sound engineering and construction standards; constructed in a work-like manner; and be constructed in compliance with all laws then applicable to improvements.

A current owner may bring an action against a construction professional for a breach of any of the warranties. Absence of privity of contract is not a defense to an action for breach of the warranties. The damages that are awarded for a breach are the cost of repairs. However, if the cost of repairs is clearly disproportionate to the loss in market value, the damages are limited to loss in market value.

An action for breach of a warranty must be brought within four years after the date the cause of action accrues. The cause of action accrues (1) in the case of newly constructed residential real property, on the date the first owner takes possession; and (2) in the case of improvements on existing residential real property, upon the later of substantial completion of construction or termination of the construction project. In the case of a latent structural defect or a latent water penetration defect, the cause of action accrues when the claimant discovers or reasonably should have discovered the defect, in which case the cause of action must be brought within four years after the cause of action accrues.

The implied warranties do not create an independent right to a class action against any construction professional.

Fraud. Actions and claims for fraud arising from, including but not limited to, construction, alteration, repair, design, planning, survey, and the engineering of improvements upon real property must be commenced within three years of discovery by the aggrieved party and are not subject to the six-year statute of repose.

Third-Party Inspections. Building enclosure design documents must be submitted with any application for a building permit for the construction of a residential building or substantial remodel. The documents must be stamped by an architect or engineer and must address waterproofing, weatherproofing, and other protections of the building from water or moisture intrusion. A building department may not issue a building permit unless the design documents have been submitted, but the department need not review or approve the documents.

The building enclosures of all residential buildings and substantial remodels must be inspected during the course of construction. The inspection must determine through periodic review whether construction is in compliance with the enclosure design documents. In addition, the inspection must include testing windows and window installations for water penetration problems. The inspections must be performed by a person who has training and experience in design and construction of building envelopes, who is free of improper interference or influence, and who has not been an employee of the developer. Notwithstanding these restrictions, however, the inspections may be done by the architect or engineer who prepared the design documents or who is the architect or engineer of record on the project.

A building department may not issue a certificate of occupancy for a residential building or substantial remodel until a building enclosure inspection report has been submitted. However, the department need not determine the adequacy of the inspection.

The design document and inspection requirements do not create a right of action or any liability against any architect, engineer or inspector. However, the developer and any architect, engineer, or inspector on a project may contractually agree on the extent of possible liability to the developer.

The State Building Code Council is to adopt rules requiring that natural or manufactured wood framing members used in residential construction be tested for maximum allowable moisture content prior to enclosing the framing.

Working Certification, Contractor Registration and Bonding. *Worker Certification.* It is the intent of the Legislature to establish a worker certification requirement for those doing construction work in the areas of foundation, framing, siding, roofing, windows, and doors. L&I is directed to hire a consultant to work with stakeholders to develop recommendations on the education, experience, and examination requirements of the certification. Recommendations must be submitted to the Legislature by November 1, 2009.

Contractor Registration. In addition to other required information, an applicant for contractor registration must provide the L&I with the following information:

- whether the work the contractor performs is residential, commercial, or both;

- the social security number, date of birth, and driver's license number of owners, principals, or officers of the contracting business;
- the registration numbers and UBI account numbers of previously or currently registered businesses involving the same owner, principal, or officer as the applicant;
- disclosure of any bankruptcy proceedings against the applicant;
- information about any construction licenses, certifications, or registrations that have been issued to the applicant by other states; and
- details about any denials, suspensions, revocations, or any construction-related enforcement actions against the applicant by other states.

The L&I must deny a contractor registration if another state has taken enforcement action against the applicant for activities that would be a violation of Washington's Contractor Registration Act (Act) if they had occurred in Washington.

The L&I must suspend a registration if another state has taken enforcement action against the applicant for activities that would be a violation of the Act if they had occurred in Washington or if the registrant failed to reasonably supervise employees, agents, or subcontractors or performed negligently or in breach of contract so as to cause injury or harm to the public.

A registered contract, by or against which a petition in bankruptcy has been filed, must notify L&I of the proceedings in bankruptcy, including the identity and location of the court in which the proceedings are pending, within ten days of the filing.

Bonding. An applicant for contractor registration must file with L&I a surety bond for \$12,000 if the applicant is a specialty contractor and \$24,000 if the applicant is a general contractor.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony (Labor, Commerce & Consumer Protection):

PRO: Condo buyers have four-year statutory warranties, unlike single-family residences. As a matter of public policy, they should be treated the same. There are limited legal remedies in Washington for homeowners, which is why these protections are needed. Current warranties are not helpful, almost never enforced, and often you have to bring an action within one year of possession. Oregon has law to recover from any negligent contract, but our state doesn't allow that. Insurance costs will not kill the industry, as demonstrated by the healthy condo market. In the end, both homeowners and contractors will benefit by the bill as the quality of the product increases. Although some homeowners do due diligence by checking into a contractor's record with L&I, this wasn't helpful in the end because the contractor did business under a different name or litigation against the contractor wasn't revealed. Consumers need more information.

CON: This is a bad bill because of insurance requirements. Builders will not be able to get insurance, even those who never had a claim against them. This would be bad for the economy. Most builders build less than ten homes a year and the requirements under this bill will put them out of business. Oregon has a construction board to resolve disputes, we should look at that model. The bond rate is too high. There are stamping requirements (building envelope) which creates an issue for single-family homes. Litigation needs finality so fraud should be limited to six years. HB 1393 is more practical and insurable.

Persons Testifying (Labor, Commerce & Consumer Protection): PRO: Cheryl Whitcom, M. Jayne Freitag-Koonz, Sandy Levy, Karen Veldheer, citizens; Blair Anundson, Washington Public Interest Research Group; Andrew Villeneuve, Northwest Progressive Institute.

CON: Jon Simpson, Building Designer; Hugh Hall, Lynwood Custom Builders; Timothy Buckley, Building Industry Association of Washington; Alan Trunell, Community Frameworks; Jeffrey Hamlett, Timothy Buckley, American Institute of Architects; Jeffrey Meyers, Washington Cities Insurance Authority; Gregory Clark, Foster Pepper, Association of Washington Businesses.

Staff Summary of Public Testimony (Ways & Means): CON: Sections 2 and 3 of this bill cause the most concern. It will be difficult to get one contractor to proceed if liability cannot be segregated between the first worker and the second worker. This could cause a great deal of trouble in the future.

The fiscal note shows that this bill creates a new cause of action. The causes of action created by this measure will substantially burden the courts of Washington State. It is important that those costs be fully evaluated so that they can be accounted for by budget writers and fully considered by this committee.

This bill creates new liabilities for local governments and building officials. This will require additional insurance or additional costs that they will have to carry. The fiscal note does not estimate the impact on the construction market itself or the tax revenue that may not be gained from lack of construction starts due to the new liability. Differences between the licensing laws and the new standards in the bill will lead to further confusion. For architects, whose liability insurance only covers errors and omissions, would not be able to get liability insurance provisions, therefore could not do this work, and would not be stamping these documents. And building designers and contractors who do single family construction will not be able to stamp documents because they do not legally have a stamp.

Persons Testifying (Ways & Means): CON: Brad Tower, Community Bankers of Washington; Mel Sorensen, Washington Defense Trial Lawyers; Stan Bowman, American Institute of Architects Washington Council.