

Texas Monthly - Friday, 15 July 2005  
by Patricia Kilday Hart

# Home Buyer Beware

## **How a new state agency of the builders, by the builders, and for the builders makes it harder for you to sue, yes, your builder.**

IN THE GOOD OLD DAYS, if you scrimped and saved and bought your dream home in Texas, you could sleep easy at night knowing that the roof over your head was protected by a common-sense legal doctrine. Known as an implied warranty of habitability, in layman's terms it meant that—whether or not anything was put in writing—the courts would hold the builder to a guarantee that your home was fit to live in and constructed with care. If your foundation sagged or your windows leaked or your roof caved in, you could demand that the builder fix the defect and take him to court if he didn't.

That option is no longer available. In 2003, after spreading around \$9 million in campaign contributions, the powerful home builders' lobby got the Legislature to agree with its contention that implied warranties were too darn vague and that the lawsuits they produced were too damaging to the industry. Instead, it asked lawmakers to create a new state agency to protect builders from legal retribution. It was one of the most blatant power plays in recent years, made possible by an anti-lawsuit fervor that swept through the new Republican-controlled Legislature and by the influence of two politically active builders: the biggest individual contributor, Bob Perry (no relation to Governor Rick Perry but lots of political ties), and the co-founder of Texans for Lawsuit Reform, Dick Weekley. Thus was born the Texas Residential Construction Commission (TRCC), which in its short life has served as the classic case study of what can happen when a public agency is captured by the industry it is supposed to regulate.

With four building-industry representatives among its nine members (several other members have livelihoods that at times relate to homebuilding as well), the TRCC has adopted a torturous process for dissatisfied buyers with complaints against builders. The new agency has also adopted "performance standards" that form the basis of judging homeowners' complaints, which, to chagrined but not especially surprised consumer advocates, permit significant flaws after the first year of ownership like cracks in the walls, roof leaks, and the separation of tile from a floor.

All this took place in relative obscurity during the tumultuous 2003 session and its aftermath, when battles over a \$10 billion budget shortfall, tort reform, and congressional redistricting forced other issues out of the spotlight. Not until the end of the 2005 session did the actions of the commission come into public view, when a fight in the Senate over confirming three gubernatorial appointments to the TRCC highlighted the simmering discontent of consumers and lawmakers in both parties over the change in Texas law that puts at risk the biggest investment most families will make.

One of Rick Perry's first appointments to the commission was John Krugh, the general counsel for Bob Perry's Houston-based homebuilding company. Among the \$3 million Bob Perry contributed to politicians in the 2003—2004 election cycle was \$100,000 to the governor a month before Krugh's appointment. Krugh was a principal architect of the legislation creating the TRCC and this year opposed legislation that would have improved the agency's ability to act on behalf of consumers. Such cozy dealing led Mark McQuality, a Dallas lawyer who has been practicing in the area of consumer protection law for 28 years, to offer in an academic paper on the new law a concise analysis of why homebuyers now face an uphill battle to have their grievances addressed: "Money talks." Loud and clear.

In the confirmation fight, the homebuilders' lobby would again prevail, but not before the flaws in the TRCC were exposed for all to see. Consider these excerpts from an exchange at a committee hearing between Krugh and Robert Duncan, a Republican state senator from Lubbock, about Duncan's bill proposing reforms of the agency:

Duncan: "Did you object to the legislation . . .?"

Krugh: "[A]bout 30 percent of that...as a builder [emphasis added] I found objectionable."

Duncan: "I'm asking you to take off your builder hat. When you are sitting on this commission, you are sitting in a fiduciary [capacity] for the State of Texas. You have to make decisions based on...what's fair and balanced, not on what's in the best interests of the builder. Taking off that builder hat, do you not think that it's a good thing for consumers to know that their house hasn't been inspected?"

Krugh: "Once you put it that way, I agree with you. Yes, sir. My involvement with the legislation was not as a member of the commission."

There you have it. Although a member of a commission that is supposed to be concerned with protecting the public, Krugh was concerned mainly with protecting his boss from lawsuits. No wonder a pro-builder mentality has permeated the agency's actions. Consider the mandatory process for dispute resolution: Blocked from going straight to the courthouse, an unhappy homeowner must now file a complaint with the TRCC, pay a minimum fee of \$350 for a state inspection, and present his evidence. Even if the agency rules in his favor, it lacks the power to take any action against the builder. The only effect of a favorable ruling is that it allows the homeowner to use the commission's findings as evidence. The homeowner can still sue after an unfavorable ruling, but the agency's findings can be used against him.

Another hurdle for the homeowner is the agency's rules, which often favor builders. For instance, a consumer must list all known defects associated with the home; if others are discovered later, he must start the process anew with a second complaint. The homeowner must name any inspector he has hired to examine the defects or lose the right to use that inspector as an expert witness. If the commission's inspector notices additional problems with the home not cited in the official complaint, he cannot reveal them to the homeowner.

While the agency touts that it has found in favor of the consumer in 92 percent of its cases, the statistic is phony. It applies only to cases that the commission determines are eligible for review. In fact, 814 consumers have contacted the agency with complaints, but only 186 cases were accepted as eligible. Homeowner advocate Janet Ahmad points out that the agency refuses to hear cases involving incomplete construction, even though one of the most common complaints against homebuilders involves those who disappear and leave behind half-finished projects. Ahmad conducted telephone interviews and found overwhelmingly that the consumers who had “won” their cases at the agency felt it did no good because they still had to pursue action in court against their builders.

Builders do have to register with the TRCC, at a cost scheduled to rise to a maximum fee of \$500, but, as Duncan pointed out during a committee hearing, the commission conducts no screening of builders, nor does it require them to meet any standards in order to appear as registered on the agency’s Web site. “We’re giving them a badge that gives them elevated credibility with the public,” Duncan said. His legislation would have required the agency to make available to the public any court judgments or bankruptcy filings involving a builder. A bill by state representative Jessica Farrar, a Houston Democrat, that required registered builders to carry insurance also died this session after fierce opposition from the building industry.

Even the performance standards adopted by the TRCC, providing the first uniform definition of what should be covered under homebuilding warranties in Texas, have generated criticism. According to Mark Eberwine, a San Antonio home inspector, the standards—which are based on input from professional engineers and Texas A&M’s Construction Sciences Department—allow, among other things, a significant tilt in foundations, one-eighth-inch cracks in brick mortar, deficient water pressure, and dips and cracks in driveways. “The state has now sanctioned poor builder behavior,” he said. TRCC member Paulo Flores, a lawyer who has represented homeowners against builders, voted for the standards because they gave consumers some predictability. “Prior to what we’ve done, there was nothing,” said Flores. “As a lawyer, you never knew where you stood.” But Mickey Redwine, an East Texas cable construction company owner who was appointed to represent the public, abstained from voting, indicating, he said, his “personal belief that we could have stronger consumer protections.”

It is ironic that Duncan has become the TRCC’s chief critic, because he co-sponsored and later fine-tuned the bill that created the agency in 2003. The argument that he found persuasive was that lawsuits were a costly and time-consuming way to resolve homeowners’ disputes and that administrative findings against builders could lead to quick settlements. But that was before the governor saw to it that the commission would be so builder-friendly. During the 2005 session, Duncan proposed legislation that would have made the complaint process more attuned to consumers and forced builders to disclose possible defects. One draft was made available to Krugh, who responded by marking through pages to indicate his disagreement. “No counteroffers or suggestions,” Duncan said.

After losing the fight over the bill, Duncan decided to “send a message” to the TRCC by attempting to block Krugh’s confirmation. At one point, Duncan said, he had the necessary votes, but his efforts unraveled after an intensive lobby effort. “Nobody wanted to take on Bob

Perry,” he said. The Senate ultimately confirmed Krugh, but not before long speeches by Duncan and Royce West, a Democrat from Dallas, harshly criticizing the TRCC.

In an interview at Perry Homes’ headquarters on Houston’s Gulf Freeway, Krugh called the controversy “both embarrassing and humbling.” A soft-spoken man who seemed honestly perplexed by the uproar, Krugh said that his years in the trenches with emotional homeowner lawsuits led him to seek the creation of an agency to help resolve disputes. “On the one hand, I saw lawsuits coming at builders based on criteria that would vacillate depending on whatever an expert had to say, as opposed to something uniform,” he told me. “On the other side, I saw consumers who had problems with their houses and, I thought, basically wanted to get them fixed. The old system drove them to their lawyers and their experts, and they got caught up in what I call this vortex of litigation, and they couldn’t get out. The third-party-intervention method at least gives the homeowners some control over what goes on before they get caught up in that vortex.”

Krugh said he believed the commission would adopt rules that would accomplish a lot of what Duncan hoped to achieve with his legislation and would “look at the methods by which consumers could obtain information about builders’ lawsuits and bankruptcy filings.” He also noted that the agency recently changed its rules to require the builder to communicate with the agency after it has inspected a home for a consumer complaint to let the agency know “what goes on between homeowners and builders with regards to resolution.” If a builder fails to do that, “it will be considered grounds for a potential fine, suspension, or revocation,” Krugh added. “If a builder does not respond at all, we’re going to take that into consideration.”

Clearly, the battle this session got Krugh’s attention. But did it get Rick Perry’s? The effectiveness of the agency depends upon the governor’s willingness to appoint commissioners who will not wear their builder’s hats when deciding how to protect the public against unscrupulous or careless action. With an announced Republican primary opponent, Comptroller Carole Keeton Strayhorn, already lambasting him, Perry might want to blunt an issue that would be easy to turn into an effective television spot. After all, bad foundations affect Republicans and Democrats alike.