RESIDENTIAL CONSTRUCTION CLAIMS AFTER THE ADVENT OF THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

BUILDING BETTER PROTECTION FOR TEXAS HOMEOWNERS– OR BUILDERS TAKE CONTROL?

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I. INTRODUCTION

Prior to the 2003 Legislative Session, residential construction claims were governed in large part by the Residential Construction Liability Act, Texas Property Code Section 27.001, et seq., ("RCLA"). Residential construction claims also typically involve claims under the Texas Deceptive Trade Practices - Consumer Protection Act, Texas Business & Commerce Code Section 17.41 et seq. ("DTPA"). While the 2003 Legislative Session brought some modifications to the RCLA, it also brought about House Bill 730. Included in HB 730 was the Texas Residential Construction Commission Act ("TRCCA") which created the Texas Residential Construction Commission ("Commission"). The RCLA is still the comprehensive law governing such claims, but it necessarily incorporates the TRCCA and the Commission, given the pervasive effect of the Commission on residential construction claims in Texas after the passage of the TRCCA.

The Commission is established to review and pass judgment on residential construction claims. It is a state agency created to assist homeowners and builders/remodelers who are not able to reconcile disputes involving alleged defects that become apparent after construction is completed. The Commission is designed to work much like a review board and in some respects will be similar to the workers' compensation board. Texas is unique in that only two other states have state-sponsored dispute resolution processes. Arizona and Oregon have established a similar process to Texas's, while five states (California, Florida, Michigan, New Jersey, and Hawaii) have some level of state-sponsored review of construction-related issues.

The Commission is charged with setting building and performance standards for workmanship and these standards are the only warranties that run with residential construction in Texas. The Commission is also responsible for reviewing and making determinations concerning claims by homeowners. The determinations made by the Commission are not the end of the road for a homeowner, as a homeowner may still proceed with a lawsuit or demand arbitration after a decision by the Commission. However, what a homeowner is ultimately able to pursue with a lawsuit is limited by the standards set by the Commission. The homeowner will also have to overcome a rebuttable presumption created by the Commission's findings in order to prevail in a lawsuit against the builder.

Needless to say, the changes brought about by the TRCCA have had and will have a significant impact on the litigation of residential construction claims in Texas. The extent and scope of that impact is uncertain. The TRCCA created the Commission to oversee resolution of disputes between builders and homeowners based on an independent inspector's recommendations. This paper explores the scope of the TRCCA, how it is applied, and its interaction with the RCLA. Additionally, this paper evaluates the TRCCA's newly adopted warranties, dispute resolution process, and what actions must be taken for pursuing damages for alleged construction defects. Finally, the paper discusses the RCLA and its provisions after the enactment of the TRCCA.

II. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

The mission of the Commission is to "provide Texas homeowners and the residential construction industry an opportunity to resolve differences through a neutral dispute resolution process and ongoing education." The TRCCA is an initial step that homeowners or builders must take before pursuing an action for damages or other such relief arising from residential construction defects.

The TRCCA only applies to "homes," which are defined as "real property and improvements and appurtenances for a single-family house or

duplex."[1] While the TRCCA applies to construction defects occurring in single-family homes and duplexes, it does not apply to multi-family residences (apartment complexes, condominiums, etc.) even though those structures are residential structures. Interestingly, the RCLA applies not only to single-family homes and duplexes, but also to owners of triplexes, quadruplexes, and individual condominiums in a condominium complex.[2]

The new Texas Residential Construction Commission Act is designed to establish a Commission to handle disputes between a homeowner and builder involving residential construction defects arising after construction is complete.[3] The Commission is designed to handle virtually all aspects of residential construction claims. It is intended to be all encompassing and to apply to every residential construction claim made in the state of Texas that accrues on or after September 1, 2003. How the Commission will go about addressing the claims that come before the effective date, however, is not at all clear.[4]

The Commission currently includes four builders who will hold certificates of registration, Art Cuevas, John Krugh, Glenda Mariott, and Scott Porter; three members of the general public, Patrick Cordero, Paulo Flores, and Mickey Redwine; one engineer practicing in the area of residential construction, Ken Davis; and one inspector practicing in the area of residential construction, Lewis Brown.[5] Patrick Cordero was selected by the governor to serve as the Chair of the Commission.[6] Each commission member will serve a staggering term.[7]

The Commission is charged with setting the standards for residential construction by establishing limited statutory warranty and building and performance standards.[8] The Commission also has the responsibility for presiding over disputes involving residential construction claims.[9] This responsibility includes setting up a dispute resolution process complete with persons to review and investigate claims (third party inspectors) and persons to hear and make determinations on claims, establishing the building and performance standards and limited statutory warranties, and adopting and setting

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[1] TEX. PROP. CODE ANN. § 401.002(6) (Vernon Supp.2005).

[2] TEX. PROP. CODE ANN. § 27.001(7) (Vernon Supp. 2005).

[3] House Comm. On Regulated Bus. Indus., Bill Analysis, Tex. H.B. 730, 78th Leg., R.S. (2003); *see* TEX. PROP. CODE ANN. title 16 (Vernon Supp. 2005).

[4] The Beaumont Court of Appeals evaluated allegations by a home builder that the homeowners did not properly comply the with provisions of the TRCCA when they asserted construction defects. *In re Hall*, 2005 WL 3440620, at *1 (Tex. App.–Beaumont 2005, no pet. h.). The homeowners argued the TRCCA did not apply to them because their house was built, the defects were discovered, and their causes of action accrued prior to September 1, 2003, the effective date. *Id*. at *1. The trial court denied the builder's motion to dismiss and the appellate court refused to issue a writ of mandamus. *Id*. The court concluded that the statutory language is not ambiguous. The court held "[i]f the alleged construction defect was discovered before September 1, 2003, the state-sponsored inspection and dispute resolution process does not apply to the dispute." *Id*. at *2. Therefore, the builder did not show the court that the TRCCA was invalid. *Id*.

[5] Texas Residential Construction Commission, *FAQ - The Commission*, http://www.trcc.state.tx.us/faq/faq_commission.htm (last visited Jan. 10, 2006); *see* TEX. PROP. CODE ANN. § 406.001(a)(1)-(4) (Vernon Supp. 2005).

[6] Texas Residential Construction Commission, *FAQ - The Commission*, http://www.trcc.state.tx.us/faq/faq_commission.htm (last visited Jan. 10, 2006).

[7] *Id*.

[8] TEX. PROP. CODE ANN. § 408.001(2) (Vernon Supp. 2005).

[9] § 408.001(1).

rules to administer all of the Commission's duties and responsibilities.[10]

One of the Commission's first duties is to register all builders and contractors in the state of Texas.[11] For the first time, Texas home builders and contractors who will be engaging in residential construction in Texas must be registered and get a certificate of registration with the state.

The TRCCA defines "builder" as:

> any business entity or individual who, for a fixed price, commission, fee, wage, or other compensation, constructs or supervises or manages the construction of:
>
> (1) a new home;
>
> (2) a material improvement to a home, other than an improvement solely to replace or repair a roof of an existing home; or
>
> (3) an improvement to the interior of an existing home when the cost of the work exceeds $20,000.[12]

There are certain minimal requirements including: any individual applying must be a citizen or legal resident and be over the age of 18 and any corporation, partnership, or other entity that applies must be approved to transact business in the state.[13] The Commission is also supposed to perform background checks on any applicants and it must be satisfied with the honesty, trustworthiness, and integrity of the applicant before a certificate will be issued. The statute also sets forth a "Star Builder" designation that is designed to provide an elevated status for those builders who maintain an excellent reputation.[14] This designation should be a useful marketing tool for any builder who qualifies for such designation.

Concerns were raised regarding enforcing the registration requirements for builders. The Commission subsequently asked the Office of the Attorney General for an opinion as to whether or not the Office of the Attorney General may seek an injunction against a builder who has not complied with the TRCCA. The Attorney General issued an opinion finding that the Administrative Procedure Act allows the Commission to "refer names of builders that have failed to register with the commission, a violation of a commission rule, to the attorney general, who may seek injunctive relief for those violations."[15] The Attorney General opined that injunctive relief is permitted even though the enabling statute lacks specific statutory language to that effect.[16]

A. The TRCCA Is Meant to Be Exclusive

The TRCCA is meant to be the exclusive mechanism for adjudicating residential construction claims, at least initially. The goal of the statute is to provide the sole rights and obligations between a homeowner and a builder.[17] It also is intended to create the only cognizable cause of action available against a builder or third party warranty company with regard to construction defects.[18]

"Construction defect" is defined differently under RCLA than under TRCCA; however, RCLA's definition was amended to incorporate the

[10] § 408.001(1)-(4).

[11] § 416.

[12] § 401.003(a).

[13] § 416.005.

[14] § 416.011.

[15] Op. Tex. Att'y Gen. No. GA-0233 (2004).

[16] *Id*.

[17] *See* TEX. PROP. CODE ANN. § 426.005.

[18] *See id*.

TRCCA's definition for all claims to which the TRCCA applies, but retains the original definition for "any other action."[19] The TRCCA applies only to "construction defects" and is not applicable to claims solely for personal injury, survival, or wrongful death, or claims for damages solely to goods and not the home.[20]

The TRCCA's definition of construction defect does not include claims for construction defects which arise wholly or partly from:

> (1) the negligence of a person other than the builder or an agent, employee, subcontractor, or supplier of the builder;
>
> (2) failure of a person other than the builder or an agent, employee, subcontractor, or supplier of the builder to: (A) take reasonable action to mitigate any damages that arise from a defect; or (B) take reasonable action to maintain the home;
>
> (3) normal wear, tear, or deterioration; or
>
> (4) normal shrinkage due to drying or settlement of construction components within the tolerance of building and performance standards.[21]

The statute's language can be interpreted to read that any of these claims are not subject to the Commission's control. The question arises what to do with construction defect claims that are caused, at least in part, by design defects.

In addition to the homeowner's claim for the construction defect(s) and the associated costs of repair, the TRCCA also provides for the recovery of other economical damages, including reasonable expenses for temporary housing during the repair period (additional living expenses - ALE) and reasonable and necessary engineering and consulting fees.[22] The statute also makes clear that if a suit is brought involving a construction defect after a determination by the Commission, then any claim for personal injury, damages to personal goods, or consequential damages must be brought along with the claim for construction defect.[23] The TRCCA further provides that it is not applicable at all to a subrogation claim.[24]

B. TRCCA Warranties v. Common Law *Humber* Warranties

Prior to the enactment of the TRCCA, the only warranties that existed for construction of new homes were the implied warranty of habitability and the implied warranty of construction in a good and workmanlike manner.[25] The *Texas Business and Commerce Code* was not implicated in the purchase of a residence because the sale of real property did not fall within the Code's definition of "goods."[26] The Texas Supreme Court answered this problem in *Humber v. Morton.*[27] The court held that there are warranties implied in law including the implied warranty of fitness. There was no specific definition of the implied warranty

[19] § 27.001(4).

[20] § 426.001(a).

[21] § 401.004(b)(1)-(4).

[22] § 430.011(b) (referencing Section 27.004(g) of the RCLA; several of the provisions of the TRCCA and the RCLA work interchangeably as evidenced by the reference in the TRCCA to the RCLA as to what type of damages are recoverable).

[23] § 426.005(c).

[24] § 426.005(d).

[25] *See e.g. Centex Homes v. Buecher,* 95 S.W.3d 266 (Tex. 2002).

[26] TEX. BUS. & COMM. CODE ANN. § 2.105 (Vernon 2002).

[27] 426 S.W.2d 554 (Tex. 1968).

although the court determined it would include performing work in a good and workmanlike manner.

In *G-W-L, Inc. v. Robichaux*, the supreme court evaluated whether contractors could validly provide express warranties as a means of replacing the implied warranties, even though the express warranties provided much less protection.[28] The court held that buyers should protect themselves by reading the contract before signing. Then in *Melody Home Manufacturing Co. v. Barnes*, the Texas Supreme Court broadened the scope of the implied warranties to service transactions in order to cover repair services performed on existing homes.[29] The court held that the implied warranties could not be waived or disclaimed by contract and overruled *Robichaux* to the extent that it conflicted with the court's opinion.[30]

Even after these cases, Texas courts still did not adequately distinguish between the warranty of habitability and the warranty of workmanship. Then in *Centex v. Buecher*, the Texas Supreme Court defined these warranties differently.[31] The implied warranty of good workmanship requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances; it serves as a "gap-filler" or "default warranty" and applies unless and until the parties express a contrary intention.[32] The other implied warranty, the implied warranty of habitability, requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation; in other words, this implied warranty only protects new home buyers from conditions that are so defective that the property is unsuitable for its intended use as a home.[33]

Through the enactment of the TRCCA, homeowners lose any protection offered by the implied warranties of construction in a good and workmanlike manner and habitability. Texas law previously established that a homeowner had no claim for breach of implied warranties against a subcontractor in *Codner v. Arellano*. In that case, a homeowner sued a subcontractor, alleging that the subcontractor negligently poured the foundation of the homeowner's residence and that he violated the DTPA by breaching an implied warranty of good-and-workmanlike performance in the construction of the foundation.[34] The court found that no Texas case "implies a warranty of good-and-workmanlike performance from a builder's subcontractor directly to the homeowner." Before the enactment of the TRCCA, no uniformity existed for the warranties and performance standards in construction defect cases.

C. TRCCA Warranties and Performance Standards

Prior to the TRCCA, the minimum warranty standards under the law (i.e., implied warranties, as those were the only ones existing absent an express warranty) were vague, somewhat misunderstood, and subject to debate and argument. The Commission was charged with developing limited statutory warranties for residential construction projects in Texas. The Commission was provided very little guidance by the Legislature as to the standards they were to seek to establish in the scope of the contemplated warranties or any other details concerning this relatively important task. It took several months

[28] 643 S.W.2d 392 (Tex. 1982).

[29] 741 S.W.2d 349, 353 (Tex. 1987).

[30] *Id.* at 355.

[31] 95 S.W.3d 266, 272 (Tex. 2003).

[32] *See e.g., id.*

[33] *See e.g., id.*

[34] 40 S.W.3d 666, 673 (Tex. App.–Austin 2001, no pet.).

after the enactment of HB 730 just to get the Commission appointed and established. Once it was up and running, the Commission went to work and ultimately released a working draft of the warranties in May 2004 to allow all interested parties to participate in creating the warranties.[35] The Commission entered into an interagency agreement with Texas A&M's construction sciences department to develop the construction warranties and standards.[36] The Commission worked in tandem with Texas A&M to develop a comprehensive set of warranties and standards for Texas homeowners and builders.[37] The Commission held town hall meetings to garner public support for the new warranties and standards.[38] The rules were published in the Texas Register on October 22, 2004 and a public hearing was conducted on November 9, 2004.[39] The Commission adopted the warranties and standards after receiving and addressing all responses regarding concerns for the warranties and standards.[40]

The Commission endorsed the warranties stating that "with clear objective criteria, the homeowner will know what to expect from the builder and the builder will know what is expected."[41] The Commission stated that the warranties "will apply to all residential construction which begins on or after June 1, 2005, if the construction is for a new home, material improvement of an existing home or an interior renovation to an existing home that costs in excess of $20,000."[42]

The warranties only apply to construction which begins on or after June 1, 2005. Any residential construction that began prior to June 1, 2005, will be governed by warranties and building and performance standards applicable to construction before that date.

The length of the warranty depends on the type of component. The statutorily mandated warranty periods are: one (1) year for workmanship and materials;[43] two (2) years for plumbing, electrical, heating, and air-conditioning delivery systems;[44] and ten (10) years for major structural components.[45] Warranty periods established by the Commission "will reassure all home buyers that, in the event that a home component covered by the warranty does not perform up to standards, it will be repaired or replaced."[46] There is a warranty of habitability of ten (10) years. This warranty covers a construction defect in a component that is otherwise covered under one of the other warranties, but was not discoverable by a reasonably prudent inspection during the original warranty period, and the defect has made the home unsafe or unfit for humans to inhabit. Any remaining warranty periods are transferred automatically to the new homeowner when a home is sold.

While the Commission established the minimum requirements for warranties in Texas, the builders are responsible for providing them. The builders

[35] Senate Comm. on Bus. & Comm., Texas Residential Construction Commission, Interim Report to the 79th Texas Legislature 6.

[36] 10 TEX. ADMIN. CODE § 304, pmbl.(2005)

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Senate Comm. on Bus. & Comm., Texas Residential Construction Commission, Interim Report to the 79th Texas Legislature 6.

[42] 10 TEX. ADMIN. CODE § 304, pmbl. (2005).

[43] 10 TEX. ADMIN. CODE § 304.10-.33 (2005).

[44] 10 TEX. ADMIN. CODE § 304.50-.52 (2005).

[45] 10 TEX. ADMIN. CODE § 304.100 (2005).

[46] Texas Residential Construction Commission, *FAQ - Warranties...*, http://www.trcc.state.tx.us/faq/faq_warranty.htm (last visited Jan. 11, 2006).

are given discretion with regard to the manner in which the warranties are provided. All that is mandated is that the builders provide them. The warranties supercede all other implied warranties for new home construction, improvements, and remodeling. Parties are not allowed to waive the statutory warranties by contract.[47] The warranties cannot be waived, modified, or reduced to limit the protection offered; although builders may provide more protection than is required.

The warranties established by the Commission are exclusive and supercede all implied warranties. [48] The only warranties applicable are those created by the Commission and other statutes which expressly refer to residential construction or residential improvements or any express, written warranty between the homeowner and builder.

The following chart summarizes the new warranties and performance standards which were adopted by the Commission and became effective June 1, 2005.

One-Year Warranty

for Workmanship and Materials

- Yard Grading
- Foundations and Slabs
- Slab Foundation
- Pier and Beam Foundations
- Other Structural Components
- Exterior Concrete (Flatwork)
- Framing
- Walls, Ceilings, and Beams
- Sub-Flooring and Stairs
- Drywall
- Insulation
- Exterior Siding and Trim
- Masonry
- Stucco
- Roofs
- Doors and Windows
- Doors
- Windows
- Garage Doors
- Carpet
- Finished Concrete Flooring
- Wood Flooring
- Vinyl Flooring
- Hard Surfaces
- Painting, Staining, and Wall Coverings
- Plumbing Fixtures and Accessories
- Pipes and Vents
- Heating and Cooling
- Ductwork
- Electrical Fixtures
- Smoke Detectors and CO^2 Detectors
- Interior Trim
- Closet Shelving
- Mirrors, Interior Glass, and Shower Doors
- Hardware and Ironwork
- Fireplaces
- Irrigation Systems
- Fencing
- Pest Control

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[47] TEX. PROP. CODE ANN. § 430.007.

[48] § 430.006.

Two-Year Warranty for Plumbing, Electrical, Heating, Ventilation and Air Conditioning Delivery Systems

- Electrical Delivery System
- Electrical Wiring
- Electrical Panel, Breakers, and Fuses
- Electric Outlets with Ground Fault Interrupters
- Fixtures, Outlets, Doorbells, and Switches
- Wiring and Outlets for Cable Television, Telephone, Ethernet, or Other Services
- Plumbing Delivery Systems
- Pipes (Water and Gas Pipes, Sewer and Drain Lines, Fittings, and Valves)
- Individual Wastewater Treatment Systems
- Heating, Ventilation and Air Conditioning Delivery
- Refrigerant Line
- Heating and Cooling Functions
- Vents, Grills and Register
- Ductwork

Ten-Year Warranty

on Structural Components

- Foundations and Slabs
- Slab Foundation
- Pier and Beam Foundations

See Appendix A for a comprehensive summary of each warranty and performance standard adopted by the Commission.

D. How the State-Sponsored Inspection and Dispute Resolution Process Works

All residential construction defect claims that fall under the TRCCA (i.e., claims involving single family homes and duplexes) are supposed to be submitted to the Commission before a claim can proceed to suit. The TRCCA "applies to a dispute between a builder and a homeowner if the dispute arises out of an alleged construction defect, other than a claim solely for personal injury, survival, or wrongful death, or damage to goods."[49] The dispute resolution process is referred to as a state-sponsored inspection and dispute resolution process (SIRP). Either the builder or the homeowner can submit a claim to the Commission, however, the process starts prior to the submission of a request to the Commission. The process begins by requiring that the complaining party notify the builder in writing, not less than thirty (30) days prior to submitting the dispute resolution request, of every defect that the homeowner is aware of.[50] Next the homeowner must provide the builder with an opportunity to inspect the alleged defects on his own or have the builder's designated consultants inspect the home.[51]

The applicable limitations period for a homeowner or builder to submit a request for SIRP on construction projects is (1) "[o]n or before the tenth anniversary of the initial transfer of title from the builder to the owner of the home or the improvement. If there is no transfer of title, the request should be submitted by the tenth anniversary of the date on which the contract for construction of an improvement was entered into"; or (2) "[o]n or before the second anniversary of the date the claimed construction defect was discovered but not later than the 30th day after the date the applicable warranty period

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[49] § 426.001(a)(1).

[50] § 428.001(c).

[51] *Id.*

expires."[52] The statute of limitations under this statute is effectively two (2) years from the date of discovery, but not later than thirty (30) days after the expiration of the applicable warranty period.[53] Claims under the TRCCA are subject to the ten (10) year statute of repose.

Once a request has been made by either the homeowner or the builder, the Commission will determine whether the request is eligible under the TRCCA and, if so, the Commission will designate a third-party inspector to inspect the alleged defect(s) outlined in the request.[54] The party submitting the request to the Commission must also pay the expenses of a third-party inspector ($250, which may be waived in cases of financial need).[55] If the third-party inspector's findings support all or a portion of the alleged defects, the Commission will reimburse the inspection fee to the homeowner, and the builder/remodeler will be responsible for the fee.[56] If the SIRP is requested by the builder, the fee for a workmanship and materials inspections is $350, a structural inspection is $450, and a joint inspection of a structural issue and an unrelated workmanship and materials issue is $650.[57]

The Commission must appoint the third party inspector within fifteen (15) days.[58] Each party has one strike to exercise against the appointed inspector.[59] Within fifteen (15) days of receiving this appointment, the third-party inspector must issue a recommendation on the workmanship and materials claims.[60] This is a very short time frame. If the claim is a structural claim, the inspector has more time. The inspector has thirty (30) days in which to inspect the property.[61] The third party inspector will then issue a report with his recommendations within sixty (60) days.[62] If necessary, the third party inspector can request additional time.

The inspector issues his recommendation based on the warranties and building and performance standards set by the Commission.[63] He also designates a method or manner of repair that is designed to address the construction defect.[64] A third party inspector may not include payment of any monetary consideration as part of his recommendation.[65] He may, however, assess the inspector's fees against a non-submitting party. If the construction defect creates a threat to safety,

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[52] Texas Residential Construction Commission, *FAQ - State-Sponsored Inspection and Dispute Resolution Process (SIRP)*, http://www.trcc.state.tx.us/faq/faq_ssirp.htm (last visited Jan. 10, 2006); *see* § 426.001(a)(2).

[53] 10 TEX. ADMIN. CODE § 304.2 (2005).

[54] TEX. PROP. CODE ANN. § 428.003(a).

[55] § 426.004; *see* Texas Residential Construction Commission, *FAQ - State-Sponsored Inspection and Dispute Resolution Process (SIRP)*, http://www.trcc.state.tx.us/faq/faq_ssirp.htm (last visited Jan. 10, 2006).

[56] Texas Residential Construction Commission, *FAQ - State-Sponsored Inspection and Dispute Resolution Process (SIRP)*, http://www.trcc.state.tx.us/faq/faq_ssirp.htm (last visited Jan. 10, 2006).

[57] *Id*.

[58] TEX. PROP. CODE ANN. § 428.003(a).

[59] § 428.003(b).

[60] § 428.004(a).

[61] § 428.004(b).

[62] *Id*.

[63] § 428.004(c)(1).

[64] § 428.004(c)(2).

[65] § 428.004(d).

a homeowner can fix the property and then recover its costs and attorneys fees.[66]

Once the third party inspector has issued his recommendation, a party can appeal that recommendation to the Commission.[67] The appeal is actually to a Commission review panel of three state inspectors.[68] If the claim involves a structural defect, one of those inspectors must be an engineer. The appeal to the Commission must be filed within fifteen (15) days after the inspector's recommendation.[69] Once an appeal has been filed, a panel can review it without a hearing unless the Commission's rules require one and can approve, reject, or modify it or can remand it back to the third party inspector. After the appeal, the panel will issue its findings within thirty (30) days.[70]

What remains unclear after the adoption of the SIRP is what the penalty is for the homeowner or builder who refuses to participate in the mandated dispute resolution process. The RCLA provides a means for dismissing a suit if the TRCCA applies and has not been complied with.[71] However, if a contractor will not comply with the TRCCA, there is no mechanism available to the homeowner to compel him to comply. The builder of course will likely not care. The enforcement mechanisms under the TRCCA are virtually nonexistent.[72] The homeowner can of course sue under RCLA to enforce a determination by the TRCCA but that does not give him anything more than he had before. The only real motivating factor compelling a builder to comply with the process is the opportunity to limit damages through a reasonable settlement offer.

One of the goals of the TRCCA is to reduce litigation in the construction field promoting an atmosphere of settlement via a state-sponsored dispute resolution process. TRCCA attempts to streamline residential construction defect cases through a solitary state-sponsored ADR system. While homeowners are required to proceed with allegations of construction defects via the SIRP, the door to the courthouse remains open to homeowners, they just have to go through the SIRP process first. If a homeowner files suit without first going through the SIRP process, the builder can move to have the suit dismissed until the homeowner has complied with the TRCCA and the court must dismiss the case.[73]

Opponents of the TRCCA are critical of the fact that the TRCCA does not permit other responsible parties, such as subcontractors, design professionals, and building material suppliers, to be involved in the dispute over alleged construction defects.[74] This omission could lead to two separate actions: (1) first, a claim by the homeowner against the builder which must be pursued first under the TRCCA, followed by (2) a claim by the homeowner against the builder,

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[66] § 428.005.

[67] TEX. PROP. CODE ANN. Chapter 429 (Vernon Supp. 2005).

[68] § 429.001(b).

[69] § 429.001(a).

[70] § 429.001(c)(3).

[71] § 27.004(d).

[72] The enforcement mechanisms available under the TRCCA are limited to "disciplinary actions" for, among other things, nonpayment of a "final nonappealable judgment," which would not apply to a determination by a third party inspector pursuant to a SIRP. A disciplinary action against a builder can affect their registration or certification under the TRCCA, but the relief available is limited to a fine of $5,000. §§ 418.001(8); 418.002(1); 419.001; 419.002(a).

[73] § 27.004(d).

[74] Anthony Spaeth, *Pitfalls and Successes at the Residential Construction Commission,* HOUSTON LAWYER, March/April 2005, at 37.

subcontractors, and manufacturers.[75] Proponents of the TRCCA urge that builders now face a higher burden than before because builders must now comply with minimal statutory warranties and performance standards.

The following chart summarizes the steps the submitting parties must go through to proceed on a construction defect claim.

QUICK STEPS THROUGH THE SIRP

STEP 1: Review the SIRP Request

- Commission receives the SIRP request form and inspection fee
- Commission staff evaluates the SIRP request if filed within the proper jurisdiction
- During all steps of the SIRP, upon written request of the builder, homeowner gives builder a reasonable opportunity to inspect the home to determine the nature and cause of the alleged defect(s) described in the SIRP request

STEP 2: Third-Party Inspector Appointed

- Within 15 days of receipt of an SIRP request form, the Commission appoints the third-party inspector to inspect the home
- Each party has the opportunity to reject the appointed inspector or the appointed inspector must decline due to any conflicts

STEP 3: Inspection

- Third-party inspector contacts homeowner to schedule inspection
- Third-party inspector advises builder of the scheduled inspection
- Inspection conducted and findings reported to Commission

STEP 4: Report

- Commission delivers third-party inspector's report, with findings and recommendations to all involved parties

STEP 5: Appeal Process (if necessary) – If no appeal, move Step 6.

- Either party may request an appeal of the third-party inspector's findings
- Commission Appeals Panel receives the appeal request
- Commission Appeals Panel conducts a review of the third-party inspector's initial findings and issues its written findings

STEP 6: Offer of Settlement Outside of the Commission

- Builder may opt to offer a written settlement
- Homeowner may accept the offer, or make a written counteroffer
- Builder may make supplemental offer to repair

E. Cause of Action for Breach of TRCCA Warranties and Performance Standards

Under the TRCCA, a homeowner must first comply with all requisite provisions of the SIRP in order to recover damages or other relief for residential construction defects.[76] If after going through the SIRP process a homeowner does not resolve the dispute over construction defects, a homeowner may file a lawsuit or demand arbitration ("an action") seeking damages for the alleged construction defects.[77] A party can file an action without appealing an inspector's findings, but he must get those inspector's findings, through

[75] *Id.*

[76] TEX. PROP. CODE ANN. § 426.005(a).

[77] § 426.005.

the dispute resolution process, before he can proceed with an action. The homeowner must be aware that the statute of limitations for filing an action against a builder for construction defects is not tolled during the filing of the arbitration claim.[78] If a party does file an action, he must do so on or before any applicable statute of limitations expires or within forty-five (45) days after the inspector issues his recommendation; or if an appeal is taken, on or before any applicable statute of limitations expires or within forty-five (45) days after the panel issues its findings, whichever is later.[79] The TRCCA requires that any claims for personal injuries, damages to personal goods, or consequential damages arising from the alleged construction defects must be included in an action regarding the construction defects.[80]

An action, however, is not subject to the same standard that an action was prior to the TRCCA. The claimant must now overcome the inspector's recommendation or the appeal panel's ruling, which by statute effectively creates a rebuttable presumption concerning the appropriate determination of the construction defect claim.[81] A party that wants to overcome that rebuttable presumption must establish by a preponderance of the evidence that the recommendation or ruling, whatever the case may be, is not consistent with the applicable warranty and building and performance standards, which are of course established by the Commission.[82] Assuming that a party satisfies this burden, in addition to any repairs the party may also recover additional living expenses and diminution in market value of the property, as well as its reasonable attorneys fees and any engineer's and inspector's fees.

Under the TRCCA, homeowners must bring claims alleging breach of workmanship or failure to meet the performance standards of an item included in the one-year warranty within two years of the discovery of the defect. The RCLA does not specifically provide a limitations period; therefore the limitations period in an RCLA action is determined by the underlying cause of action.[83] While many claims are brought within a few years of the completion of construction and a claim for fraud or breach of warranty can be brought within four years of its accrual, the limitations period is longer under these theories.[84]

F. Damages for Breach of TRCCA Warranties and Performance Standards

Any award of damages under an action filed after the SIRP process will be the same damages as provided in the RCLA.[85] If the TRCCA applies to a recovery for a construction defect, the claimant is entitled to recover only "economic damages proximately caused by a construction defect."[86] Under the RCLA, economic damages are defined as follows:

> (1) the reasonable cost of repairs necessary to cure any construction defect; (2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence; (3) reasonable and necessary engineering and consulting fees; (4) the reasonable expenses of temporary housing reasonably necessary during the repair period; (5) the reduction in current market value, if any, after

[78] *See* § 426.005(b).

[79] § 426.005(b)(1)-(2).

[80] § 426.005(c).

[81] § 426.008.

[82] § 426.008(a).

[83] § 27.001-.007.

[84] TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a).

[85] TEX. PROP. CODE ANN. § 430.011(b) (Vernon Supp. 2005).

[86] § 27.004(g) (Vernon 2000 & Supp. 2005).

> the construction defect is repaired if the construction defect is a structural failure; and (6) reasonable and necessary attorney's fees.[87]

If the claim is for an amount greater than $7,500, either the contractor or the homeowner may file a motion to compel mediation, which the court must grant.[88] Unless the contractor fails to make a reasonable offer to repair, these provisions are applicable.[89]

Unless the RCLA preempts a claim, homeowners may file another cause of action such as fraud, which allows for exemplary damages, or the DTPA, which includes damages for mental anguish and possible treble damages..[90] Not every injury that results from a construction defect is preempted by RCLA; only those causes of action which conflict with the RCLA are preempted.[91] For example, fraud and DTPA violations are not in conflict with the RCLA because they are different causes of action. Although a DTPA claim may still be applicable to a construction defect claim, a breach of a limited statutory warranty is "not, by itself . . . a violation of the [DTPA]."[92] Therefore, a claim for breach of TRCCA warranties is enough to stand on its own, apart from the DTPA, but the claimant may only recover economic damages.[93]

III. RESIDENTIAL CONSTRUCTION LIABILITY ACT

In 1989, the Texas Legislature first enacted the RCLA, which until House Bill 730 solely governed actions against contractors arising from construction defects for damages.[94] Unless the TRCCA applies, the RCLA continues to mandate the procedures for handling construction defect claims and continues to govern such claims beyond the scope of the TRCCA. The scope of the RCLA covers: "any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods" and "any subsequent purchaser of a residence who files a claim against a contractor."[95] Under revisions made during the 2003 legislative session, the scope of the RCLA broadened to include "other relief" for those claimants seeking relief for construction defects, including injunctive and declaratory actions.[96] Under the RCLA, "construction defect" is defined using the meaning under the TRCCA for all claims to which the TRCCA applies. For all other claims construction defect is defined as follows:

> a matter concerning the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor. The term may include any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.[97]

[87] § 27.004(g)(1)-(6).

[88] § 27.0041(a)-(b).

[89] § 27.004(g).

[90] *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121, 123-24 (Tex. App.–San Antonio 1997, writ denied).

[91] TEX. PROP. CODE ANN. § 27.002(b).

[92] § 430.011(c).

[93] *Id*. Under the DTPA, a consumer can recover mental anguish damages in addition to economic damages.

[94] § 27.004.

[95] § 27.002(a)(1)-(2).

[96] § 27.002(a)(1).

[97] § 27.001(4).

This means that claims for damage not caused by construction related sources are not covered by the RCLA. Under the RCLA, claims are asserted against "contractors" not solely "builders" as under the TRCCA. "Contractor" under the RCLA includes "builder" as defined by the TRCCA and:

> . . . any person contracting with an owner for the construction or sale of a new residence constructed by that person or of an alteration of or addition to an existing residence, repair of a new or existing residence, or construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence. The term includes: (A) an owner, officer, director, shareholder, partner, or employee of the contractor; and (B) a risk retention group registered under Article 21.54, Insurance Code, that insures all or any part of a contractor's liability for the cost to repair a residential construction defect.[98]

The term "contractor" includes subcontractors or manufacturers; as you recall, claims against these parties are not subject to the TRCCA. Similar to the TRCCA, the RCLA does not apply to commercial structures or residential structures such as apartment complexes. As previously noted, the RCLA applies not only to single-family homes and duplexes, but also to owners of triplexes, quadruplexes, and condominiums.[99]

A. Notice of Defects and Offer of Repair Under the RCLA

If the TRCCA applies to a claim for construction defects, a homeowner is not required to give notice under the RCLA as long as the homeowner has gone through the TRCCA's SIRP. For all other claims to which the RCLA applies, the homeowner must follow the notice requirements under Section 27.004. Prior to a claimant seeking any damages for an alleged construction defect, they must first provide sixty (60) days notice and must "give written notice by certified mail, return receipt requested, to the contractor, at the contractor's last known address, specifying in reasonable detail the construction defects that are the subject of the complaint."[100]

During the thirty-five (35) days after receiving the notice, and on the contractor's written request, the contractor must be given a reasonable opportunity to inspect and have inspected the property to evaluate the nature and cause of the alleged defect and the nature and extent of necessary repairs.[101] The notice and an opportunity to inspect are mandatory requirements. If a contractor is not provided with notice and an opportunity to inspect the court must dismiss any claim that is filed.[102] If the TRCCA applies to a claim for construction defect, the contractor's opportunity to inspect occurs during the SIRP. No additional opportunity for inspection exists under the RCLA for TRCCA claims. The RCLA then allows a contractor to take reasonable steps to document the alleged defect.[103] If the claim is subject to the TRCCA, the contractor is entitled to make an offer of repair in accordance with the RCLA.[104]

[98] § 27.001(5).

[99] § 27.001(7).

[100] § 27.004(a).

[101] *Id.*

[102] § 27.004(d).

[103] *Id.*

[104] *Id.*; § 27.004(b).

B. Offer of Settlement Procedures Under the RCLA

If the TRCCA applies to a construction defect claim, the contractor can make a written offer of settlement under the RCLA within fifteen (15) days after the final, unappealable determination of a dispute under the TRCCA.[105] In cases where the TRCCA does not apply, the contractor can make a written offer of settlement forty-five (45) days after receiving the notice under section 27.004(a).[106] Any of the time limitations applicable to the RCLA can be amended by agreement between the parties.[107] The offer must be sent to the claimant by certified mail, return receipt requested.[108] The contractor has the following options for the written offer of repair:

> an agreement by the contractor to repair or to have repaired by an independent contractor partially or totally at the contractor's expense or at a reduced rate to the claimant any construction defect described in the notice and shall describe in reasonable detail the kind of repairs which will be made.[109]

If the claimant believes the offer of settlement is reasonable, the deadline to make the repairs is forty-five (45) days "after the date the contractor receives written notice of acceptance of the settlement offer, unless completion is delayed by the claimant or by other events beyond the control of the contractor."[110] If the claimant believes the offer of settlement is not reasonable, the claimant must "advise the contractor in writing and in reasonable detail of the reasons why the claimant considers the offer unreasonable" within twenty-five (25) days of receiving the offer. Not later than ten (10) days after the contractor receives notice that the claimant believes the settlement offer is unreasonable, "the contractor may make a supplemental written offer of settlement to the claimant by sending the offer to the claimant or the claimant's attorney."[111] An offer to settle that is not accepted within twenty-five (25) days of receipt is considered rejected.[112] An affidavit certifying rejection may be filed with the court or arbitrator and may be used by the trier of fact in determining the "reasonableness" of the offer of settlement.[113]

However, note that Section 27.004(m) requires as follows:

> a contractor who receives written notice of a construction defect resulting from work performed by the contractor or an agent, employee, or subcontractor of the contractor and creating an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable.[114]

If the contractor fails to cure the defect within a reasonable time, the homeowner can cure the defect and recover the reasonable cost of the repairs plus attorney's fees and costs from the contractor in addition to any other damages they may be entitled to under the RCLA.[115] If the

[105] § 27.004(b).

[106] *Id.*

[107] § 27.004(h).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] § 27.004(i).

[113] § 27.004(j).

[114] § 27.004(m).

[115] *Id.*

contractor performs repairs, they have the option of having the repairs inspected and documented.[116]

C. Offer of Repair Accepted for a Claim Which Qualifies for the TRCCA

If the TRCCA applies to the claim for alleged construction defects and the settlement offer is accepted, the contractor, after completion of the repairs and at the contractor's expense, must "engage the third-party inspector who provided the recommendation regarding the construction defect involved in the claim to inspect the repairs and determine whether the residence, as repaired, complies with the applicable limited statutory warranty and building and performance standards adopted by the commission."[117] The contractor gets an additional fifteen (15) days to complete cosmetic repairs that are necessary to complete the repairs.

The third-party inspector's determination of whether the repairs comply with the TRCCA's warranties and performance standards establishes a rebuttable presumption on that issue.[118] A party that wants to overcome that rebuttable presumption must meet a higher than usual evidentiary standard in order to do so. They must establish by clear and convincing evidence that the recommendation or ruling, whatever the case may be, is not consistent with the applicable warranty and building and performance standards, which are of course established by the Commission.[119]

D. Damages Under the RCLA

If a reasonable offer is rejected by a claimant or the claimant does not allow the contractor a reasonable opportunity to inspect or repair the defect pursuant to an accepted offer of settlement, the claimant cannot recover an amount in excess of (1) "the fair market value of the contractor's last offer of settlement" or (2) "the amount of a reasonable monetary settlement or purchase offer" by the contractor.[120] The claimant may also recover "only the amount of reasonable and necessary costs and attorney's fees . . . incurred before the offer was rejected or considered rejected."[121] If the contractor fails to give the claimant a reasonable offer, these limits do not apply.[122]

If no settlement offer is made or if the one made is not determined to be reasonable, the homeowner can recover other damages. However, there are still limitations on damages that can be recovered in a construction defect claim under the RCLA. Damages that are recoverable are limited to economic damages.

The economic damages under the SIRP and RCLA are the same. The damages available under the RCLA are limited to the following:

> (1) the reasonable cost of repairs necessary to cure any construction defect; (2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence; (3) reasonable and necessary engineering and consulting fees; (4) the reasonable expenses of temporary housing reasonably necessary during the repair

[116] § 27.004(k).

[117] § 27.004(l).

[118] *Id*.

[119] *Id*.

[120] § 27.004(e)(1).

[121] § 27.004(e)(2).

[122] § 27.004(f).

> period; (5) the reduction in current market value, if any, after the construction defect is a structural failure; and (6) reasonable and necessary attorney's fees.[123]

Economic damages under prior versions of the RCLA were limited to the reasonable costs to repair and cure the defect; reasonable expenses for temporary housing during the repair period; reduction in the market value to the extent the reduction was due to a structural defect; and reasonable and necessary attorney's fees.

In prior versions of the RCLA, if a contractor failed to make a reasonable offer, or failed to make a reasonable attempt to complete the repairs specified in the accepted offer, or failed to complete, in a good and workmanlike manner, the repairs specified in an accepted offer, the limitations on damages and defenses to liability did not apply. However, the total damages awarded in a suit subject to the RCLA were never to exceed the greater of the claimant's purchase price for the residence or the current fair market value of the residence without the construction defect. There was no limitation of damages to the reduction in the fair market value, if any, to the extent the reduction was caused by a structural failure. The damage limitations now apply to all claims under the RCLA and if the contractor's settlement offer is determined to be reasonable, the only damages available are the amount of the settlement offer and any fees and expenses up to that date.

Section 27.0042 gives the builder the opportunity to repurchase the home from the homeowner as an alternative under certain circumstances. The parties can execute a written agreement that provides "if the reasonable cost of repairs necessary to repair a construction defect that is the responsibility of the contractor exceeds an agreed percentage of the current fair market value of the residence, as determined without reference to the construction defects," the contractor may buy the home back.[124]

The home may not be repurchased if (1) "the residence is more than five years old at the time an action is initiated"; or (2) "the contractor makes such an election later than the 15th day after the date of a final, unappealable determination of a dispute" under the SIRP.[125] If the home is repurchased, the contractor must buy it at the original purchase price and the homeowner can recover reasonable attorney's fees and expert fees and reasonable costs to leave the home.[126] The purchase price is conditioned upon the homeowner giving the contractor "a special warranty deed to the contractor, free of all liens and claims to liens as of the date the title is transferred to the contractor, and without damage caused by the homeowner."[127]

Under the RCLA, once a suit is filed for damages exceeding $7,500, either the claimant or the contractor can file a motion to compel mediation of the dispute.[128] The motion must be filed not later than ninety (90) days after the date the suit is filed. Then within thirty (30) days of filing the motion, the court shall order the parties to mediate the claim.[129] The court shall order the parties to begin mediation of the dispute no later than thirty (30) days after the date the court enters its order mandating mediation. Each party is required to contribute to the cost of the mediation and to

[123] § 27.004(g)(1)-(6).

[124] § 27.0042(a).

[125] § 27.0042(b)(1)-(2).

[126] § 27.0042(c)(1)-(2).

[127] § 27.0042(c)(3).

[128] § 27.0041(a).

[129] § 27.0041(b).

participate, unless there is an agreement otherwise.[130]

IV. CONCLUSION

From the perspective of some, and certainly the builders, the Texas Legislature attempted to set forth a process by which homeowners could get a quick and efficient resolution concerning claims involving one of their most important and most expensive decisions of their lives, buying a home, when it enacted the TRCCA and RCLA. Opponents of the legislation see the TRCCA and the SIRP as an additional hurdle that homeowners must overcome to bring suit against a builder for construction defects. As construction practices become more complicated, there is a greater need for comprehensive regulation for both builders and homeowners.

The TRCCA may be the first step in creating a comprehensive regulation system for a system previously unimpeded by state interaction. For the first time Texas homeowners have uniform standard warranties and performance standards to use in their disputes over construction defects. Only time will tell whether the Commission will begin the process of requiring higher standards and qualifications for contractors or if the Commission will only act as the conduit through which contractors must register and through which the dispute resolution process flows.

[130] § 27.0041(c).

APPENDIX A

THE FOLLOWING IS A SUMMARY OF THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION'S WARRANTIES AND PERFORMANCE STANDARDS WHICH BECAME EFFECTIVE JUNE 1, 2005.

10 TEX. ADMIN. CODE § 304 (2005).

§ 304.2. General Provisions Applicable to all Residential Construction for New Homes, Material Improvements and Interior Renovations.

(a)(1) Builder's Work. The builder is responsible for all work performed under the direction of the builder for the period of the applicable warranty. The builder is only responsible for construction defects about which the builder receives notice on or before the second anniversary of the date of discovery of the alleged construction defect but in no event later than thirty days following the applicable warranty period stated in § 304.3(e) of this subchapter, unless otherwise expressly stated herein.

§ 304.3. Limited Warranties.

(a)(1) one year for workmanship and materials;

(a)(2) two years for plumbing, electrical, heating, and air-conditioning delivery systems;

(a)(3) ten years for major structural components of the home;

(a)(4) and ten years for the warranty of habitability.

(g)(1) Unless otherwise provided by a written agreement between the builder and the initial homeowner or by a manufacturer, a warranty period as described in this section for a new home begins on the earlier of the date of occupancy or transfer of title from the builder to the initial homeowner.

(g)(2) Unless otherwise provided by a written agreement between the builder and the homeowner, a warranty period as described in this section for an improvement other than a new home or for a partially built home, which by agreement between the homeowner and the builder, someone other than the builder will complete, begins on the date the improvement is substantially completed or the terms of the construction contract are substantially fulfilled.

§ 304.10. Performance Standards for Foundations and Slabs.

(a)(1) A crawl space shall be graded and drained properly to prevent surface run-off from accumulating deeper than two inches in areas 36 inches or larger in diameter. Exterior drainage around perimeter crawl space wall shall not allow water to accumulate within ten feet of the foundation for more than 24 hours after a rain except in a sump that drains other areas.

(a)(2) Water shall not enter through the basement or crawl space wall or seep through the basement floor.

(b)(1) Concrete floor slabs in living spaces that are not otherwise designed with a slope for drainage, such as a laundry room, shall not have excessive pits, depressions or unevenness equal to or exceeding 3/8 of an inch in any 32 inches and shall not have separations or cracks that equal or exceed 1/8 of an inch in width or 1/16 of an inch in vertical displacement. If a concrete floor slab in a living space fails to meet the standard stated.

(b)(2) Concrete slabs shall not have protruding objects, such as a nail, rebar or wire mesh.

(c)(1) Concrete corners or edges shall not be damaged excessively due to construction activities.

(c)(2) A crack in exterior concrete shall not cause vertical displacement equal to or in excess of 1/4 of an inch or horizontal separation equal to or excess of 1/4 of an inch.

(c)(3) The finish on exterior concrete shall not be excessively smooth, so that the surface becomes slippery.

(c)(4) Exterior concrete shall not contain a protruding object, such as a nail, rebar or wire mesh.

(c)(5) A separation in an expansion joint in an exterior concrete shall not equal or exceed ½ of an inch vertically from an adjoining section or one inch horizontally, including joint material.

(c)(6) A separation in a control joint shall not equal or exceed 1/4 of an inch vertically or ½ of an inch horizontally from an adjoining section.

(c)(7) Concrete stair steepness and dimensions, such as tread width, riser height, landing size and stairway width shall comply with the Code.

(c)(8) Handrails shall remain securely attached to concrete stairs.

(c)(9) Concrete stairs or stoops shall not settle or heave in an amount equal to or exceeding 3/8 of an inch. Concrete stairs or stoops shall not separate from the home in an amount equal to or exceeding one inch, including joint material.

(c)(10) A driveway will not have a negative slope unless due to site conditions, the lot is below the road.

(c)(11)Concrete floor slabs in detached garages, carports or porte-cocheres shall not have excessive pits, depressions, deterioration or unevenness.

§ 304.11. Performance Standards for Framing.

(a)(1) Walls shall not bow or have depressions that equal or exceed 1/4 of an inch out of line within any 32-inch horizontal measurement as measured from the center of the bow or depression or ½ of an inch within any eight-foot vertical measurement.

(a)(2) Walls shall be level, plumb and square to all adjoining openings or other walls within 3/8 of an inch in any 32-inch measurement.

(a)(3) A crack in a beam or a post shall not equal or exceed ½ of an inch in width at any point along the length of the crack.

(a)(4) A non-structural post or beam shall not have a warp or twist equal or exceeding one inch in eight-feet of length.

(a)(5) Exterior sheathing shall not delaminate or swell.

(a)(6) An exterior moisture barrier shall not allow an accumulation of moisture inside the barrier.

(b) A ceiling shall not bow or have depressions that equal or exceed ½ of an inch out of line within a 32-inch measurement as measured from the center of the bow or depression running parallel with a ceiling joist.

(c)(1) Under normal residential use, the floor shall not make excessive squeaking or popping sounds

(c)(2) Sub-floors shall not delaminate or swell to the extent that it causes observable physical damage to the floor covering or visually affects the appearance of the floor covering.

(c)(3) Sub-flooring shall not have excessive humps, ridges, depressions or slope within any room that equals or exceeds 3/8 of an inch in any 32-inch direction.

(d)(1) Stair steepness and dimensions such as tread width, riser height, landing size and stairway width, shall comply with the Code.

(d)(2) Under normal residential use, stairs shall not make excessive squeaking or popping sounds.

§ 304.12. Performance Standards for Drywall.

(a) A drywall surface shall not have a bow or depression that equals or exceeds 1/4 of an inch out of line within any 32-inch horizontal measurement as measured from the center of the bow or depression or ½ of an inch within any eight-foot vertical measurement.

(b) A ceiling made of drywall shall not have bows or depressions that equal or exceed ½ of an inch out of line within a 32-inch measurement as measured from the center of the bow or depression running parallel with a ceiling joist or within ½ of an inch deviation from the plane of the ceiling within any eight-foot measurement.

(c) A drywall surface shall not have a crack such that any crack equals or exceeds 1/32 of an inch in width at any point along the length of the crack.

(d) Crowning at a drywall joint shall not equal or exceed 1/4 of an inch within a twelve-inch measurement centered over the drywall joint.

(e) A drywall surface shall not have surface imperfections such as blisters, cracked corner beads, seam lines, excess joint compound or trowel marks that are visible from a distance of six feet or more in normal light.

(f) A drywall surface shall not be out of level, plumb or square (perpendicular at a 90-degree angle) such that there are variations in those measurements to wall or surface edges at any opening, corner, sill, shelf, etc. shall not equal or exceed 3/8 of an inch in any 32-inch measurement along the wall or surface.

(g) Nails or screws shall not be visible in a drywall surface.

§ 304.13. Performance Standards for Insulation.

(a) Insulation shall be installed in the walls, ceilings and floors of a home in accordance with the building plan and specifications and the Code.

(b) Blown insulation in the attic shall not displace or settle so that it reduces the R.-value below manufacturer's specifications, building plans and the Code.

(c) A gap equal to or in excess of 1/4 of an inch between insulation batts or a gap between insulation batts and framing members is not permitted.

(d) Insulation shall not cover or block a soffit vent to the extent that it blocks the free flow of air.

§ 304.14. Performance Standards for Exterior Siding and Trim.

(a)(1) Exterior siding shall be equally spaced and properly aligned. Horizontal siding shall not equal or exceed ½ of an inch off parallel with the bottom course or 1/4 of an inch off parallel with the adjacent course from corner to corner.

(a)(2) Siding shall not gap or bow. A siding end joint shall not have a gap that equals or exceeds 1/4 of an inch in width. Siding end joint gaps shall be caulked. A bow in siding shall not equal or exceed 3/8 of an inch out of line in a 32 inch measurement.

(a)(3) Nails shall not protrude from the finished surface of siding but nail heads may be visible on some products where allowed by the manufacturer's specifications.

(a)(4) Siding shall not have a nail stain.

(a)(5) Siding and siding knots shall not become loose or fall off.

(a)(6) Siding shall not delaminate.

(a)(7) Siding shall not cup in an amount equal to or exceeding 1/4 of an inch in a six-foot run

(a)(8) Siding shall not have cracks or splits that equal or exceed 1/8 of an inch in width.

(b)(1) A joint between two trim pieces shall not have a separation at the joint equal to or exceeding 1/4 of an inch in width and all trim joints shall be caulked.

(b)(2) Exterior trim and eave block shall not warp in an amount equal to or exceeding ½ of an inch in an eight-foot run.

(b)(3) Exterior trim and eave block shall not cup in an amount equal to or in excess of a 1/4 of an inch in a six-foot run.

(b)(4) Exterior trim and eave block shall not have cracks or splits equal to or in excess of 1/8 of an inch in average width.

(b)(5) Trim shall not have nails that completely protrude through the finished surface of the trim but nail heads may be visible on some products.

(b)(6) Trim shall not have a nail stain.

§ 304.15. Performance Standards for Masonry including Brick, Block and Stone.

(a) A masonry wall shall not bow in an amount equal to or in excess of one inch when meas Fred from the base to the top of the wall.

(b) A masonry unit or mortar shall not be broken or loose.

(c) A masonry mortar crack shall not equal or exceed 1/8 of an inch in width.

(d) A masonry unit or mortar shall not deteriorate.

(e) Masonry shall not have dirt, stain or debris on the surface due to construction activities.

(f) A gap between masonry and adjacent material shall not equal or exceed 1/4 of an inch in average width and all such gaps shall be caulked.

(g) Mortar shall not obstruct a functional opening, such as a vent, weep hole or plumbing cleanout.

§ 304.16. Performance Standards for Stucco.

(a) Stucco surface.; shall not be excessively bowed, uneven, or wavy.

(b) Stucco shall not be broken or loose.

(c) Stucco shall not have cracks that equal or exceed 1/8 of an inch in width at any point along the length of the crack.

(d) Stucco shall not deteriorate excessively.

(e) Stucco shall net have dirt, stain or debris on surface due to construction activities.

(f) Stucco surfaces shall not have imperfections that are visible from a distance of six feet under normal lighting conditions that disrupt the overall uniformity of the finished pattern.

(g) The lath shall not be exposed.

(h) A separation between the stucco joints shall not equal or exceed 1/16 of an inch in width.

(i) A separation between a stucco surface and adjacent material shall not equal or exceed 1/4 of an inch in width and all separations shall be caulked.

(j) Stucco shall not obstruct a functional opening, such as a vent, weep hole or plumbing cleanout.

(k) Stucco screed shall have a minimum clearance of at kaaat4 inches above the soil or landscape surface and at least 2 inches above any paved surface.

(l) Exterior Installation Finish Systems (EIFS) stucco screed shall clear any paved or unpaved surface by 6 inches.

§ 304.17. Performance Standards for Roofs.

(a) Flashing shall prevent water penetration.

(b) The roof shall not leak.

(c) A vent, louver or other installed attic opening shall not leak.

(d) A gutter or downspout shall not leak or retain standing water.

(e) Shingles, tiles, metal or other roofing materials shall not become loose or fall off in wind speeds less than those set forth in the manufacturer's specifications.

(f) A skylight shall not leak.

(g) Water shall drain from a built-up roof within two hours after cessation of rainfall.

(h) A roof tile shall not be cracked or broken.

(i) A pipe, vent, fireplace or other object designed to penetrate the roof shall not be located within the area of roof valley centerline without proper "cricketing" or other Code-approved water diversion methods.

(j) The exterior moisture barrier of the roof shall not allow moisture penetration.

§ 304.18. Performance Standards for Doors and Windows.

(a)(1) When closed, a door or window shall not allow excessive infiltration of air or dust.

(a)(2) When closed, a door or window shall not allow excessive accumulation of moisture inside the door or window.

(a)(3) Glass in doors and windows shall not be broken due to improper installation or construction activities.

(a)(4) A screen in a door or window shall fit properly and shall not be torn or damaged due to construction activities. A screen shall not have a gap equal to or exceeding 1/4 of an inch between the screen frame and the window frame.

(a)(5) There shall be no condensation between window and door panes in a sealed insulated glass unit.

(a)(6) A door or window latch or lock shall close securely and shall not be loose or rattle.

(a)(7) A door or window shall operate easily and smoothly and shall not require excessive pressure when opening or closing.

(a)(8) A door or window shall be painted or stained according to the manufacturers' specifications.

(b) A double hung window shall not move more than two inches when put in an open position.

(c)(1) A sliding door and door screen shall stay on track.

(c)(2) The spacing between an interior door bottom and original floor covering, except closet doors, shall not exceed 1.5 inches and shall be at least ½ of an inch. The spacing between an interior closet door bottom and original floor covering shall not exceed two inches and shall be at least ½ of an inch.

(c)(3) A door shall not delaminate.

(c)(4) A door panel shall not split so that light from the other side is visible.

(c)(5) A door shall open and close without binding.

(c)(6) A door shall not warp to the extent that it becomes inoperable. A warp in a door panel shall not equal or exceed 1/4 of an inch from original dimension measured vertically, horizontally or diagonally from corner to corner.

(c)(7) A storm door shall open and close properly and shall fit properly.

(c)(8) When a door is placed in an open position, it shall remain in the position it was placed, unless the movement is caused by airflow.

(c)(9) A metal door shall not be dented or scratched due to construction activities.

(d)(1) A metal garage door shall not be dented or scratched due to construction activities.

(d)(2) A garage door opener, if provided, shall operate properly in accordance with manufacturer's specifications.

(d)(3) A garage door shall not allow excessive water to enter the garage and the gap around the garage door shall not equal or exceed ½ of an inch in width.

(d)(4) A garage door spring shall operate properly and shall not lose appreciable tension, break or be undersized.

(d)(5) A garage door shall remain in place at any open position, operate smoothly and not be off track. If a garage door fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

§ 304.19. Performance Standards for Interior Flooring.

(a) Performance standards for ceramic tile, flagstone, marble, granite. slate, quarry tile other hard surface floors, except finished concrete floors, are located in § 304.20 of this subchapter.

(b)(1) Carpet shall not wrinkle and shall remain tight, lay flat and be securely fastened.

(b)(2) Carpet seams shall be smooth without a gap or overlap.

(b)(3) Carpet shall not be stained or spotted due to construction activities.

(c)(1) A finished slab, located in a living space that is not otherwise designed for drainage, shall not have pits, depressions or unevenness that equals or exceeds 3/8 of an inch in any 32 inches.

(c)(2) Finished concrete slabs in living spaces shall not have separations, including joints, and cracks that equal or exceed 1/8 of an inch in width or 1/16 of an inch in vertical displacement

(d)(1) Wood flooring shall not have excessive humps, depressions or unevenness that equals or exceeds 3/8 of an inch in any 32-inch direction within any room.

(d)(2) Wood flooring shall remain securely attached to the foundation or sub-floor unless the wood flooring is designed to be installed without nails, glue, adhesives or fasteners.

(d)(3) Wood flooring shall not have open joints and separations that equal or exceed 1/8 of an inch.

(d)(4) Strips of floorboards shall not cup in an amount that equals or exceeds 1/16 of an inch in height in a three-inch distance when measured perpendicular to the length of the board.

(d)(5) Unless installed as a specialty feature, wood flooring shall not have excessive shade changes or discoloration due to the construction activities of the builder.

(d)(6) Unless installed as a specialty feature, wood flooring shall not be stained, spotted or scratched due to construction activities of the builder.

(e)(1) Vinyl flooring shall be installed square to the most visible wall and shall not vary by 1/4 of an inch in any six-foot run.

(e)(2) The seam alignment in vinyl flooring shall not vary such that the pattern is out of alignment in an amount that equals or exceeds 1/8 of an inch.

(e)(3) Vinyl flooring shall remain securely attached to the foundation or sub-floor.

(e)(4) A vinyl floor shall not have a depression that equals or exceeds ½ of an inch in any six-foot run.

(e)(5) A vinyl floor shall not have a ridge that equals or exceeds ½ of an inch when measured as provided in this paragraph.

(e)(6) Vinyl floor shall not be discolored, stained or spotted due to the construction activities of the builder.

(e)(7) Vinyl flooring shall not be scratched, gouged, cut or torn due to construction activities.

(e)(8) Debris, sub-floor seams, nails and/or screws shall not be detectable under the vinyl floor from a distance of three feet or more in normal light.

(e)(9) Sub-flooring shall not cause vinyl flooring to rupture.

(e)(10)A seam in vinyl flooring shall not have a separation that equals or exceeds 1/16 of an inch in width.

§ 304.20. Performance Standards for Hard Surfaces, including Ceramic Tile, Flagstone, Marble, Granite, Slate, Quarry Tile, Finished Concrete or Other Hard Surfaces.

(a)(1) A hard surface shall not break or crack due to construction activities.

(a)(2) A hard surface shall remain secured to the substrate.

(a)(3) A surface imperfection in floor hard surface shall not be visible from a distance of three feet or more in normal light.

(a)(4) Color variations between field hard surfaces and trim hard surfaces should not vary excessively due to construction activities.

(a)(5) Hard surface areas shall not leak.

(a)(6) The surfaces of two adjacent hard surfaces shall not vary in an amount equal to or exceeding 1/16 of an inch displacement at a joint, with the exception of transition trim pieces.

(a)(7) Hard surface layout or grout line shall not be excessively irregular.

(a)(8) Hard surface countertops shall be level to within 1/4 of an inch in any six-foot measurement.

(b)(1) Grout shall not crack or deteriorate.

(b)(2) Grout shall not change shade or discolor excessively due to construction activities.

(c)(1) A concrete countertop shall not have excessive pits, depressions, or unevenness that equal or exceed 1/8 of an inch in any 32-inch measurement.

(c)(2) A concrete countertop shall not have separations or cracks equal to or exceeding 1/16 of an inch in width or 1/64 of an inch in vertical displacement.

(c)(3) A finished concrete countertop shall not be stained, spotted or scratched due to construction activities.

(c)(4) A concrete countertop shall not have a chipped edge that extends beyond 1/16 of an inch from the edge of the countertop due to construction activities.

(c)(5) A concrete countertop shall not change shade or discolor excessively due to construction activities.

§ 304.21. Performance Standards for Painting, Stain and Wall Coverings.

(a) Performance Standards for Caulking. Interior caulking shall not deteriorate or crack excessively.

(b)(1) Paint or stain shall not have excessive color, shade or sheen variation.

(b)(2) Paint shall cover all intended surfaces so that unpainted areas shall not show through paint when viewed from a distance of six feet in normal light.

(b)(3) Interior paint or stain shall not deteriorate.

(b)(4) Exterior paint or stain shall not deteriorate excessively.

(b)(5) Paint over-spray shall not exist on any surface for which it was not intended.

(b)(6) Interior varnish, polyurethane or lacquer finish shall not deteriorate.

(b)(7) Exterior varnish, polyurethane or lacquer finishes shall not deteriorate excessively.

(b)(8) Interior painted, varnished or finished surface shall not be scratched, dented, nicked or gouged due to construction activities.

(b)(9) A paint product shall perform as represented by the manufacturer to meet manufacturer's specifications for washability and/or scrubability.

(c)(1) A wall covering shall be properly secured to the wall surface and shall not peel or bubble.

(c)(2) Pattern repeats in wall coverings shall match.

(c)(3) A wall covering seam shall not separate or gap.

(c)(4) Lumps or ridges in a wall covering shall not be detectable from a distance of six feet or more in normal light.

(c)(5) Wall coverings shall not be discolored, stained or spotted due to construction activities.

(c)(6) Wall coverings shall not be scratched, gouged, cut or torn due to construction activities.

(c)(7) Wall coverings shall perform as represented by the manufacturer to meet manufacturer's specifications for washability and/or scrubability

§ 304.22 Performance Standards for Plumbing.

(a)(1) A fixture surface shall not have a chip, crack, dent or scratch due to construction activities.

(a)(2) A fixture shall not have tarnish, blemishes or stains unless installed as a specialty feature.

(a)(3) A fixture or fixture fastener shall not corrode.

(a)(4) A decorative gas appliance shall be installed in accordance with manufacturer's specifications and when so installed shall function in accordance with manufacturer's representations.

(a)(5) Fixtures shall be secure and not loose.

(a)(6) A fixture stopper shall operate properly and shall retain water in accordance with the manufacturer's specifications.

(a)(7) The toilet equipment shall not allow water to run continuously.

(a)(8) A toilet shall be installed and perform in accordance with the manufacturer's specifications.

(a)(9) A tub or shower pan shall not crack.

(a)(10)A tub or shower pan shall not squeak excessively.

(a)(11)A water heater shall be installed and secured according to the manufacturer's specifications and the Code.

(a)(12)A waste disposal unit shall be installed and operate according to the manufacturer's specifications.

(a)(13)A faucet or fixture shall not drip or leak.

(a)(14)A sump pump shall be installed in accordance with the manufacturer's specifications and shall operate properly when so installed.

(b)(1) A sewer gas odor originating from the plumbing system shall not be detectable inside the home under conditions of normal residential use.

(b)(2) A vent stack shall be free from blockage and shall allow odor to exit the home.

(b)(3) A water pipe shall not make excessive noise such as banging or hammering repeatedly.

§ 304.23. Performance Standards for Heating, Cooling and Ventilation.

(a)(1) A condensation line shall not be obstructed due to construction activities.

(a)(2) A drip pan and drain line shall be installed under a horizontal air handler as per the Code.

(a)(3) Insulation shall completely encase the refrigerant line according to Code.

(a)(4) An exterior compressor unit shall be installed on a stable pad that supports the unit and is no more than one inch out of level. The bottom of the exterior compressor unit support shall not be below ground level

(b)(1) An appliance shall be vented according to the manufacturer's specifications.

(b)(2) Back draft dampers shall be installed and function according to the manufacturer's specifications.

(c)(1) If the ductwork fails to meet the standard stated in of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c)(2) The flow of air, including its velocity, or the expansion of ductwork from heating and cooling may cause "ticking" or "crackling" sounds.

(c)(3) The homeowner shall not place any object on the ductwork.

§ 304.24. Performance Standards for Electrical Systems and Fixtures.

(a) Excessive air infiltration shall not occur around electrical system components or fixtures.

(b) A fixture or trim plate shall not be chipped, cracked, dented or scratched due to construction activities.

(c) A fixture or trim plate finish shall not be tarnished, blemished or stained due to construction activities.

(d) A fixture, electrical box or trim plate shall be installed in accordance with the Code and shall be plumb and level.

(e) Fixtures, such as lights, fans and appliances shall operate properly when installed in accordance with the manufacturer's specifications

(f) A smoke detector shall operate according to the manufacturer's specifications and shall be installed in accordance with the Code.

(g) An exhaust fan shall operate within the manufacturer's specified noise level.

§ 304.25. Performance Standards for Interior Trim.

(a)(1) An interior trim joint separation shall not equal or exceed 1/8 of an inch in width and all joints shall be caulked or puttied.

(a)(2) The interior trim shall not have surface damage, such as scratches, chips, dents, gouges, splits, cracks, warping or cupping that is visible from a distance of six feet or more in normal light due to construction activities.

(a)(3) A hammer mark on trim shall not be visible from a distance of six feet or more when viewed in normal light.

(a)(4) A nail or nail hole in interior trim shall not be visible from a distance of six feet or more when viewed in normal light.

(b) Performance Standards for Shelving. Shelving, rods and end supports shall be installed in accordance with the measurements stated in this subsection. The length of a closet rod shall not be shorter than the actual distance between the end supports in an amount equal to or exceeding 1/4 of an inch and shall be supported by stud-mounted brackets no more than four feet apart. The length of a shelf shall not be shorter than the actual distance between the supporting walls by an amount equal to or exceeding 1/4 of an inch and shall be supported by stud-mounted brackets no more than four feet apart. End supports shall be securely mounted. If the closet rods, shelving or end supports fail to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§ 304.26. Performance Standards for Mirrors, Interior Glass and Shower Doors.

(a) A mirror, interior glass or shower door shall not be loose and shall be securely mounted or attached to the supporting surface.

(b) A mirror, interior glass or shower door shall not be damaged due to construction activities.

(c) A shower door shall not leak.

(d) Imperfections in a mirror or shower door shall not be visible from a distance of two feet or more when viewed in normal light.

(e) When opening and closing, a shower door shall operate easily and smoothly without requiring excessive pressure.

§ 304.27. Performance Standards for Hardware and Ironwork.

(a)(1) Hardware finishes shall not be tarnished, blemished, corroded or stained due to construction activities, unless the finish is installed as a specialty feature.

(a)(2) Hardware shall function properly, without catching, binding or requiring excessive force to operate.

(a)(3) Hardware shall not be scratched, chipped, cracked or dented due to construction activities.

(a)(4) Hardware shall be installed securely and shall not be loose.

(b)(1) Interior ironwork shall not rust.

§ 304.28. Performance Standards for Countertops and Backsplashes.

(a)(1) A countertop or backsplash shall be secured to substrate in accordance with manufacturer's specifications.

(a)(2) For non-laminate countertops and backsplashes, the joints between countertop surfaces, between the countertop surface and the backsplash or side-splash and between adjoining backsplash panels may be visible, but shall not separate.

(a)(3) Countertops shall be level to within 1/4 of an inch in any six-foot measurement.

(a)(4) A countertop surface or edge shall not be damaged, broken, chipped or cracked due to construction activities.

(a)(5) A countertop shall not bow or warp in an amount equal to or exceeding 1/16 of an inch per lineal foot.

(b)(1) Laminate countertops and backsplashes shall not delaminate and shall remain securely attached to the substrate.

(b)(2) A seam in a laminate countertop or backsplash may be visible but shall not be separated or displaced.

(b)(3) A surface imperfection in a laminate countertop or a backsplash shall not be visible from a distance of three feet or more when viewed in normal light due to construction activities.

§ 304.29. Performance Standards for Fireplaces.

(a) A refractory panel shall not crack or separate.

(b) A fireplace door shall operate properly.

(c) A fireplace shall not have a gas leak.

(d) Gas logs shall be positioned in accordance with the manufacturer's specifications.

(e) A crack in masonry hearth or facing shall not be equal to or exceed 1/4 of an inch in width.

(f) A fireplace or chimney shall draw properly.

(g) A firebox shall not have excessive water infiltration under normal weather conditions.

(h) A fireplace fan shall not exceed the noise level established by the manufacturer's specifications.

§ 304.30. Performance Standards for Irrigation Systems.

(a) An irrigation system shall not leak, break or clog due to construction activities.

(b) An irrigation system shall be installed such that sprinkler coverage shall be complete and water shall not spray an unintended area due to construction activities.

(c) The irrigation system control shall operate in accordance with manufacturer's specifications.

§ 304.31. Performance Standards for Fencing.

(a) A fence shall not fall over and shall not lean in excess of two inches out of plumb due to construction activities.

(b) A wood fence board shall not be broken due to construction activities.

(c) A masonry unit or mortar in a fence shall not be broken or loose.

(d) A masonry wall shall have adequate weep holes in the lowest course as required by the Code to allow seepage to pass through the wall.

§ 304.32. Performance Standards for Yard Grading.

(b) Settling or sinking of soil shall not interfere with the drainage patterns of the lot or have a vertical depth of six inches or more.

§ 304.33. Performance Standards for Pest Control.

Eave returns, truss blocks, attic vents and roof vent openings shall not allow rodents, birds, and other similar pests into home or attic space.

Subchapter C. Performance Standards for Plumbing, Electrical, Heating and Airconditioning Delivery Systems Subject to a Minimum Warranty Period of Two Years.

§ 304.50. Performance Standards for Electrical Delivery Systems.

(a)(1) Electrical wiring installed inside the home shall be installed in accordance with the Code and any other applicable electrical standards and shall function properly from the point of demarcation, as determined by the respective utility.

(a)(2) Electrical wiring shall be capable of carrying the designated load as set forth in the Code.

(b)(1) The electrical panel and breakers shall have sufficient capacity to provide electrical service to the home during normal residential usage.

(b)(2) The electrical panel and breakers shall have sufficient capacity to provide electrical service to the home during normal residential usage such that a circuit breaker shall not trip and fuses shall not blow repeatedly under normal residential electric usage.

(c)(1) Electrical outlets with ground fault interrupters shall be installed and operate in accordance with the Code and manufacturer's specifications.

(d)(1) An outlet, doorbell or switch shall be installed in accordance with the manufacturer's specifications and the Code and shall operate properly when installed in accordance with the manufacturer's specifications and the Code.

(d)(2) A fixture, electrical box or trim plate shall be installed in accordance with the Code and manufacturer's specifications and shall be properly secured to the supporting surface.

(d)(3) A light shall not dim, flicker or burn out repeatedly under normal circumstances.

(e)(1) Wiring or outlets for cable television, telephone, ethernet or other services shall be installed in accordance with the Code and any applicable manufacturer's specifications.

(e)(2) Wiring or outlets for cable television, telephone, ethernet or other services inside the home or on the home side of the meter/demarcation point shall function properly when installed in accordance with the performance standard in paragraph (1) of this subsection.

§ 304.51. Performance Standards for Plumbing Delivery Systems.

(a)(1) Pipes shall be installed and insulated in accordance with the Code and manufacturer's specifications.

(a)(2) A water pipe shall not leak.

(a)(3) A gas pipe shall not leak, including natural gas, propane or butane gas.

(a)(4) Water pressure shall not exceed 80 pounds per square inch in any part of the water supply system located inside the home. Minimum static pressure at the building entrance for either public or private water service shall be 40 pounds per square inch in any part of the water supply system.

(a)(5) A sewer, drain, or waste pipe shall not become clogged or stopped up due to construction activities.

(b) A wastewater treatment system should be capable of properly handling normal flow of household effluent in accordance with the Texas Commission on Environmental Quality requirements.

§ 304.52. Performance Standards for Heating, Air Conditioning and Ventilation Delivery Systems.

(a) A refrigerant line shall not leak.

(b)(1) A heating system shall produce an inside temperature of at least 68-degrees Fahrenheit as measured two feet from the outside wall of a room at a height of three feet above the floor under local outdoor winter design conditions as specified in the Code.

(b)(2) An air-conditioner system shall produce an inside temperature of at most 78-degrees Fahrenheit as measured in the center of a room at height of five feet above the floor, under local outdoor summer design conditions as specified in the Code.

(b)(3) A thermostat reading shall not differ by more than 4-degrees Fahrenheit from the actual room temperature taken at a height of five feet above the floor in the center of the room where the thermostat is located.

(b)(4) Heating and cooling equipment shall be installed and secured according to the manufacturer's instructions and specification and shall not move excessively

(c)(1) A vent, grill or register shall operate easily and smoothly when applying normal operating pressure.

(c)(2) A vent, grill or register shall be installed in accordance with the Code and manufacturer's instructions and specifications and shall be secured to the underlying surface.

(d)(1) Ductwork shall be insulated in unconditioned areas according to Code.

(d)(2) Ductwork shall be secured according to the manufacturer's instructions and specifications and it shall not move excessively.

(d)(3) Ductwork shall be sealed and shall not separate or leak in excess of the standards set by the Code.

Subchapter D. Performance Standards for Foundations and Major Structural Components of a Home Subject to a Minimum Warranty Period of Ten Years.

§ 304.100. Performance Standards for Major Structural Components.

(a) Performance Standards for Slab Foundations.

(1) Slab foundations should not move differentially after they are constructed, such that a tilt or deflection in the slab in excess of the standards defined below arises from post-construction movement. The protocol and standards for evaluating slab foundations shall follow the "Guidelines for the Evaluation and Repair of Residential Foundations" as published by the Texas Section of the American Society of Civil Engineers (2002), hereinafter referred to as the "ASCE Guidelines" with the following modifications:

(A) Overall deflection from the original construction elevations shall be no greater than the overall length over which the deflection occurs divided by 360 (L/360) and must not have more than one associated symptom of distress, as described in Section 5 of the ASCE Guidelines, that results in actual observable physical damage to the home.

(B) The slab shall not deflect after construction in a tilting mode in excess of one percent from the original construction elevations resulting in actual observable physical damage to the components of the home.

(2) If measurements and associated symptoms of distress show that a slab foundation does not meet the deflection or tilt standards stated in paragraph (1) of this subsection, a third-party inspector's recommendation shall be based on the appropriate remedial measures as described in Section 7 of the ASCE Guidelines.

(b) Performance Standards for Major Structural Components of a Home other than Slab Foundations.

(1) Floor over pier and beam foundations.

(A) A floor over pier and beam foundation shall not deflect more than L/360 from its original construction elevations and have that movement create actual observable physical damage to the components of the home identifiable in Section 5.3 of the ASCE Guidelines.

(B) If a floor over pier and beam foundation deflects more than L/360 from its original construction elevation and the movement has created actual observable physical damage to the components of a home identifiable in Section 5.3 of the ASCE Guidelines, a third-party inspector's recommendation shall be based on applicable remedial measures as described in Section 7 of the ASCE Guidelines.

(2) Structural components.

(A) A defined structural component shall not crack, bow, become distorted or deteriorate, such that it compromises the structural integrity of a home or the performance of a structural system of the home resulting in actual observable physical damage to a component of the home.

(B) If a structural component of a home cracks, bows, is distorted or deteriorates such that it results in actual observable physical damage to a component of the home, the builder shall take such action as is necessary to repair, reinforce or replace such structural component to restore the structural integrity of the home or the performance of the affected structural system.

(3) Deflected structural components.

(A) A structural component shall not deflect more than the ratios allowed by the Code.

(B) If a structural component of the home is deflected more than the ratios allowed by the Code, the builder shall to repair, reinforce or replace such structural component to restore the structural integrity of the home or the performance of the affected structural system.

(4) Damaged structural components.

(A) A structural component shall not be so damaged that it compromises the structural integrity or performance of the affected structural system.

(B) If a structural component is so damaged that it compromises the structural integrity or performance of a structural system of the home; the builder shall take such action as is necessary to repair, reinforce or replace such structural component to restore the structural integrity of the home or the performance of the affected structural system.

(5) Separated structural components.

(A) A structural component shall not separate from a supporting member more than 3/4 of an inch or such that it compromises the structural integrity or performance of the system.

(B) If a structural component is separated from a supporting member more than 3/4 of an inch or separated such that it compromises the structural integrity or performance of a structural system of the home, the builder shall take such action as necessary to repair, reinforce or replace such structural component to re-establish the connection between the structural component and the supporting member and to restore the structural integrity of the home and the performance of the affected structural system.

(6) Non-performing structural components.

(A) A structural component shall function as required by the Code.

(B) If a structural component does not function as required by the Code, the builder shall take such action as is necessary to bring the variance within the standard stated in subparagraph (A) of this paragraph.