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BILL ANALYSIS

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Senate Bills 826, 827, and 828 (as introduced 10-19-05)

Sponsors: Senator Raymond E. Basham (S.B. 826)

Senator Burton Leland (S.B. 827)

Senator Hansen Clarke (S.B. 828)

Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 4-26-06

CONTENT

Senate Bill 826 would amend the Occupational Code to do the following:

- Increase the criminal penalties for a person engaging in a regulated occupation without a license or registration required under the Code.
- Allow a civil action to be brought against a person not licensed or registered as required under the Code, and prescribe a mandatory fine of \$5,000 to \$50,000 payable to the State, a prosecuting attorney, or a local unit's attorney.
- Provide for a three-year license cycle for residential builders.
- Specify activities by an unlicensed residential builder that would be a misdemeanor, and allow a person who suffered damages from a violation to bring a civil action.

Senate Bill 827 would amend the Revised Judicature Act to require a court to notify the Bureau of Commercial Services of the entry of a judgment for damages against a licensed residential builder; and include a violation of the Occupational Code's licensure and registration requirement as a crime for purposes of the seizure of proceeds of a crime.

Senate Bill 828 would amend the State License Fee Act to increase from \$40 to \$60 the yearly license fee for a residential builder or residential maintenance and alteration contractor, salesperson, or branch office; and

increase the fee for the complete builder or maintenance and alteration contractor examination from \$50 to \$100.

Senate Bill 826 is tie-barred to Senate Bills 827 and 828, which are tie-barred to Senate Bill 826.

Senate Bill 826

Licensing Violations

Under the Code, a person must not engage in or attempt to engage in the practice of an occupation regulated under the Code or use a title designated under the Code unless the person possesses a license or registration issued by the Department of Labor and Economic Growth (DLEG) for the occupation. A school, institution, or person must not operate or attempt to operate a barber college, school of cosmetology, or real estate school unless the school, institution, or person is licensed or approved by DLEG.

(The Code governs the licensure of the following: public accounting; collection practices; personnel agencies; barbers; cosmetology; hearing aid dealers; mortuary science; architects, professional engineers, and land surveyors; foresters; landscape architects; community planners; residential builders; real estate brokers and salespersons; real estate appraisers; and ocularists.)

A person, school, or institution that violates these provisions is guilty of a misdemeanor,

punishable by a maximum fine of \$500, imprisonment for up to 90 days, or both. A second or subsequent violation is a misdemeanor punishable, except as otherwise provided, by a maximum fine of \$1,000, imprisonment for up to one year, or both.

Under the bill, a person, school, or institution that violated the licensure or registration requirement would be guilty of a misdemeanor punishable by a maximum fine of \$2,000, imprisonment for up to 93 days, or both. A second or any subsequent violation would be a misdemeanor punishable, except as otherwise provided, by a maximum fine of \$5,000, imprisonment for up to one year, or both.

The bill would require a court, upon entering a conviction for a failure to be licensed or registered as required by the Code, to notify the Bureau of Commercial Services in DLEG.

Under the Code, notwithstanding the existence and pursuit of any other remedy, an affected person may maintain injunctive action to restrain or prevent a person from violating the Code's licensing requirements. If successful in obtaining injunctive relief, the affected person is entitled to actual costs and attorney fees. Under the bill, an affected person also could bring an action for a civil violation against a person not registered or licensed under the Code who was required to be licensed or registered. If the affected person prevailed, the court would have to assess a civil fine, payable to DLEG, the Attorney General, a county prosecutor, or an attorney representing a local unit of government, of at least \$5,000 but not more than \$50,000.

The Code defines "affected person" as a person directly affected by the actions of a person suspected of violating the Code's licensing requirements. The term includes a board established under the Code, a person who has used the services of the person engaging in or attempting to engage in an occupation regulated under the Code or using a title designated by the Code without being licensed or registered by DLEG, and a private association composed primarily of members of the occupation in which the person is engaging or attempting to engage or in which the person is using a designated title without being registered or licensed by

DLEG. Under the bill, DLEG also could be an "affected person".

Forfeiture/Administrative Sanctions

Under the bill, DLEG, the Attorney General, a county prosecutor, and an attorney representing a local unit of government could use the forfeiture provisions of Chapter 47 of the Revised Judicature Act for items seized and determined to be proceeds of a crime, substituted proceeds of a crime, or the instrumentality of a crime as those terms are defined under Section 4701 of the Revised Judicature Act.

Under Article 6 of the Code, a person, school, or institution that violates a section of the Code or a rule or order promulgated or issued under it must be assessed one or more of the following penalties:

- Placement of a limitation on a license or certificate of registration.
- Suspension of a license or certificate of registration.
- Denial of a license, certificate of registration, or renewal of a license or certificate of registration.
- Revocation of a license or certificate of registration.
- A civil fine payable to DLEG, not to exceed \$10,000.
- Censure.
- Probation.
- A requirement that restitution be made.

Under the bill, the \$10,000 civil fine payable to DLEG would apply in the case of a person licensed or registered under the Code. Additionally, any violation of the Code would have to include a requirement that restitution be made, based upon proofs submitted to, and the finding made by, the trier of fact and as provided by law.

Enforcement Action

Under the Code, DLEG may bring any appropriate action in the name of the people of the State to carry out and enforce the Code.

The bill, instead, would allow DLEG to bring any appropriate action, including mediation or other alternative dispute resolution, in the name of the people of the State to carry out and enforce the Code against a person practicing with or without a license.

The bill specifies that these provisions would not prohibit DLEG from bringing any civil, criminal, or administrative action for the enforcement of the Code's licensing requirements. The Department would have standing to bring an administrative action or directly bring an action in a court of competent jurisdiction regarding unlicensed practice of an occupation.

Residential Builder License

Under Article 24 of the Code, with certain exceptions, a person may not engage in the business or act in the capacity of a residential builder or a residential maintenance and alteration contractor or salesperson in the State without a license. The Department must require an applicant for a license to pass an examination establishing that the applicant has a fair knowledge of the obligations of a residential builder or residential maintenance and alteration contractor to the public and the applicant's principal, and the statutes relating to the applicant's licensure.

Under the bill, beginning the license cycle after the bill's effective date, DLEG would have to issue the license of a residential builder and residential maintenance and alteration contractor for a period of three years.

As part of a contract, a licensee would have to provide a copy of his or her individual license and any license issued to that person as a qualifying officer of another entity.

Qualifying Officer: Builder License

Under Article 24, if a corporation, partnership, or association applies for a license, the applicant must designate one of its officers, partners, members, or managing agent as a qualifying officer who, upon taking and passing the examination, and upon meeting all other requirements, will be entitled to a license to act for the corporation, partnership, or association. The bill would allow an entity other than a corporation, partnership, or association to designate a qualifying officer. Additionally, a qualifying officer would have to obtain a license under Article 24 as an individual. If an individual licensee were also a qualifying officer, the individual's name and license number would have to be listed on any

license issued to the individual as a qualifying officer.

Under the Code, a suspension, revocation, or denial of a license of an individual must suspend, revoke, or deny any other license held or applied for by that individual issued under Article 24. A suspension, revocation or denial of a license by DLEG may suspend, revoke, or deny any other license held or applied for under the article by the qualifying officer of a corporation, partnership, or other association whose license is suspended, revoked, or denied. Under the bill, any other license held or applied for by the qualifying officer would have to be suspended, revoked, or denied.

Complaints against Builders

Article 24 lists violations that, if committed by a licensee or applicant, are grounds for penalties under Article 6. Under the bill, a person required to be licensed under Article 24 also would be subject to the penalties.

The listed violations include the failure to furnish to a lender the purchaser's signed completion certificate executed upon completion of the work to be preformed under the contract in a maintenance and alteration contract. Under the bill would refer, instead, to a residential maintenance and alteration contract.

Under Article 24, upon receiving a building inspection report by a State or local building enforcement official authorized to do so under the Single State Construction Code Act, that verifies or confirms the substance of a complaint, DLEG must send by certified mail a copy of the verified complaint to both the complainant and the licensee. Under the bill, DLEG would have to mail a copy only to the licensee.

Additionally, under the bill, in any case in which the licensee or respondent failed to appear, participate, or defend any action, the Residential Builders' and Maintenance and Alteration Contractors' Board would have to issue an order granting by default the relief requested, with prejudice.

Additional Misdemeanors

Under the bill, an unlicensed person who committed any of the following acts would be guilty of a misdemeanor punishable by a

maximum fine of \$5,000, imprisonment for up to 93 days, or both:

- Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of a construction project or operation, and the funds or property application or use for any other construction project or operation, obligation, or purposes.
- Failure to account for or remit money coming into the person's possession that belonged to others.
- A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with the plans and specifications.
- A willful violation of the building laws of the State or of a political subdivision of the State.
- In a maintenance and alteration contract, failure to furnish to a lender the purchaser's signed completion certificate executed upon completion of the work to be performed under the contract.
- Acceptance of a commission, bonus, or other valuable consideration by a salesperson for the sale of goods or the performance of service specified in the article from a person other than the residential builder or residential maintenance and alteration contractor under whom the person was licensed.
- Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

The prohibited acts also would include failure to deliver to the purchaser the entire agreement of the parties including finance and any other charge arising out of or incidental to the agreement when the agreement involved repair, alteration, or addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination of residential and commercial structure, or building of a garage, or laying of concrete on residential property, or manufacture, assembly, construction, sale, or distribution of a residential or combination residential and

commercial structure that was prefabricated, preassembled, precut, packaged, or shell housing.

A person who suffered damage as a result of a violation by an unlicensed person would have a cause for action for damages. The action would have to be brought in a court of competent jurisdiction.

Other Provisions

Under the bill, in any action brought in a court of this State, restitution would have to be ordered, based upon proofs submitted to, and the finding made by, the court and as provided by law.

A person or qualifying officer for a corporation or a member of a residential builder or residential maintenance and alteration contractor could not impose or take any legal or other action to impose a lien on real property unless that person was licensed under Article 24 during the performance of the act or contract.

Senate Bill 827

The bill would amend the Revised Judicature Act to provide that, upon entry of a judgment for damages against a licensee under Article 24 of the Occupational Code on the basis of a violation of Section 2411(2), the court would have to notify the Bureau of Commercial Services in DLEG of the entry of that judgment and would have to convey a copy of that judgment. (Under Section 2411(2), a licensee or applicant who commits a violation listed in that section is subject to the penalties set forth in Article 6 of the Occupational Code.)

Under Chapter 47 of the Act, property that is the proceeds or instrumentality of a crime is subject to seizure by, and forfeiture to, a local unit of government or the State. The bill would amend the definition of "crime" in Chapter 47 to include a violation of Section 601 of the Occupational Code (which prohibits a person from engaging in a regulated occupation or using a designated title without being licensed or registered under the Code).

Senate Bill 828

The State License Fee Act lists the fees for a person licensed or seeking licensure as a

residential builder or residential maintenance and alteration contractor, salesperson, or branch office under Article 24 of the Occupational Code. The per-year license fee is \$40 through September 30, 2007, after which it will revert to \$30 (the fee assessed before October 1, 2003). The fee for the complete builder or maintenance and alteration contractor examination is \$50.

Under the bill, the license fee would be \$60 per year, and the complete builder or maintenance and alteration contractor examination fee would be \$100.

MCL 339.601 et al. (S.B. 826)
600.4701 et al. (S.B. 827)
338.2239 (S.B. 828)

Legislative Analyst: J.P. Finet

FISCAL IMPACT

Senate Bill 826

The bill would have an indeterminate fiscal impact on local government. There are no data to indicate how many offenders would be convicted of the misdemeanors. To the extent that the bill would increase incarceration time for offenders convicted of practicing without a license or operating an unlicensed institution or school, local governments would incur the costs of incarceration in local facilities, which vary by county. Local governments also would incur the costs of incarceration for offenders convicted of the proposed misdemeanors. Additional penal fine revenue would benefit public libraries. To the extent that the bill would increase restitution orders, local governments would incur increased administrative costs. To the extent that the bill would increase probation time for offenders who were unable to complete restitution payments during their sentence, or increase incarceration time for offenders whose probation was revoked for not making a good faith effort to comply with a restitution order, local governments would incur increased corrections costs.

The bill would result in additional workload for local prosecutors related to the ability to seek civil forfeiture.

Senate Bill 827

The courts could incur increased administrative costs as a result of the bill.

Senate Bill 828

According to the Department, there are 80,754 licensed residential builders in Michigan as of March 2006. The amount of restricted revenue that was collected from this occupation for FY 2004-05, which is the last complete fiscal year, was \$3,062,191.

The bill would change the current license fee from \$40 to \$60 (and Senate Bill 826 would change the license cycle from two years to three years). This fee increase would generate \$180 per licensee every three years compared with the \$120 that would be generated every three years under the current fee. This additional \$60 per licensee would generate an additional \$4.8 million every three years, or \$1.6 million annually given the number of licensees remains constant.

The bill also would increase the examination fee from \$50 to \$100. The amount of revenue generated from this fee depends on the number of examinations that are given each year.

Revenue from these fees is used to support the costs of the Department, and carryforward authorization is currently provided in Public Act 156 of 2005, the appropriation act for the Department of Labor and Economic Growth.

There would be no impact on the General Fund.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.