

The Construction Conversation

Ohio's Legislative, Administrative, and Judicial Two-Way Newsletter

April, 2019

A Service of Luther L. Liggett, **Graff & McGovern, LPA**
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Legislative: Design Professional Payment Assurance Program

Senate Bill 136 would create lien authority for Ohio Architects, Landscape Architects, Engineers, and Surveyors if unpaid by an owner of real estate under written contract to perform design services. (Cont'd page 2.)

Legislative: Roofing Contractors' License

Legislation to require a commercial roofing contractor to be licensed was re-introduced after four hearings in the prior legislative session, but ran out of time for passage in the House of Representatives. (Cont'd page 2.)

Judicial: Public Authority's Immunity in Proprietary Functions

Two Courts of Appeals addressed whether a local government working with sewer and water infrastructure is immune or liable for private property damage by their construction contractors. (Cont'd p. 2.)

Legislative: Public-Private Partnerships

With tight construction budgets for capital improvements throughout state and local government, House Bill 218 was introduced to encourage private financing for public facilities. (Cont'd p. 3.)

Administrative: Apprenticeship Sunset Review

The Ohio State Apprenticeship Council is on the list for the joint Sunset Review Committee, before which the

executive secretary testified to advocate for continued existence. (Cont'd p. 3.)

Judicial: Arbitration Enforceability Requires Hearing

A roofing contractor's inclusion of mandatory arbitration required a court hearing when the property owner demanded a jury trial, given confusion in the contract language. (Cont'd p. 4.)

Administrative: OFCC to Update Design Manual

The Ohio School Facilities Commission announced that it will update the Ohio School Design Manual for 2019, with major changes planned for 2020. (Cont'd p. 4.)

Administrative: OCILB Enforcement

The Ohio Construction Industry Licensing Board has developed a uniform enforcement Policy, while continuing to cite unlicensed contractors. (Cont'd p. 4.)

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Legislative: Design Professional Payment Assurance Program (Cont'd)

Jointly sponsored by Senators Jay Hottinger (R, Newark) and Vernon Sykes (D, Akron), the bill awaits committee assignment.

Design Professionals in the construction industry have limited options when a commercial real estate owner does not pay for plans and specifications.

Unlike construction contractors, the work of Architects, Landscape Architects, Engineers, and Surveyors does not improve the physical real estate, and therefore a Design Professional cannot file a mechanics' lien. Ohio is one of the few, if not the only state that offers no alternative payment protection.

The proposed Payment Assurance Program is modeled after the Brokers' Lien codified in R.C. 1311.86 first effective in 2013.

To avoid any conflict with the proposal, construction contractor mechanics' liens always take precedence over a design professional's lien, regardless of filing date.

The Design Professional lien will apply only to commercial property, and not to residential property and not to public construction. The Design Professional lien will be subordinate to any real estate mortgage previously filed.

This legislation is supported by the following organizations:

- American Institute of Architects, Ohio Society (AIA Ohio)

- Ohio Chapter of the American Society of Landscape Architects (OCASLA)
- American Council of Engineering Companies (ACEC)
- Professional Land Surveyors of Ohio

Legislative: Roofing Contractors' License (Cont'd)

Current House Bill 199 is sponsored by Representative Tom Patton (R, Strongsville), identical to prior HB 164. The bill awaits committee assignment.

Supported by the Ohio Roofing Contractors Association (ORCA), the bill received opposition only from a few individual roofing companies with anecdotal claims of excess government regulation.

For new licenses, a statute enacted last year requires that the Legislative Service Commission "shall issue a report that compares the regulatory scheme proposed in the legislation with the policies expressed in ... section 4798.02 of the Revised Code with respect to proposing the least restrictive regulation to protect consumers from present, significant, and substantiated harms that threaten public health, safety, or welfare."

Judicial: Public Authority's Immunity in Proprietary Functions (Cont'd)

In the first case, homeowners sued after a local sewer system repeatedly backed up due to aged infrastructure and flooding from the Ohio River.

The Court noted the statutory distinction between proprietary upkeep, maintenance, operation, and repair, for

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which the local government authority can be held liable for negligence.

In contrast, government efforts to design and construct the same infrastructure is a governmental function, for which the public authority is immune from lawsuit.

Since flooding damage resulted from the U.S. Corps of Engineers' elevation of the river's level, the Court held the local agency immune, notwithstanding its failure to update the design and operation to a functional level.

Bernard v. Cincinnati, 1st Dist. Hamilton, 2019-Ohio-1517.

In the second case, a city hired excavators to repair a water line. As required by statute, the city contacted the Ohio Utilities Protection Service (OUPS) before digging.

When excavation began, the excavator damaged a dresser coupling protruding from a natural gas service line, causing \$4,472.62 in damages. The City refused to pay for the repair.

The Court of Appeals agreed that repair of a water line is a proprietary function, and therefore not always an immune governmental function. However, since the city had followed the OUPS procedure, the city was not negligent, and therefore not liable.

East Ohio Gas Co. v. Cleveland, 8th Dist. Cuyahoga, 2019-Ohio-1248.

Legislative: Public-Private Partnerships (Cont'd)

House Bill 218 is sponsored by Representative Tom Patton (R,

Strongsville), and awaits committee assignment.

The legislation would permit public-private agreements related "to the design, build, financing, operation, or maintenance" of a public facility.

As a real estate device for the financing, the legislation would allow a lease for up to 40 years, with ownership by the private party for financing, after which term the constructed facility reverts to public ownership.

Neither public notice nor competitive bidding is required, although "a competitive basis" is required but undefined. Proposals would be exempt from public records disclosure as "trade secrets". The public authority may reimburse private parties for the proposal process.

If the public authority receives an unsolicited proposal, the public authority must advertise for competitors' proposals.

Any construction would require a surety's performance bond, but not Prevailing Wage.

Administrative: Apprenticeship Sunset Review (Cont'd)

Executive Secretary Patrick Reardon testified that Ohio hosts 600 program sponsors, 9,000 employers, and 18,000 apprentices currently in the system.

The Council promotes training programs through partnerships with industry, labor, educational, and government agencies. Typically, apprentices average a starting wage of \$15.93 up to \$27.30 upon graduation, across 235 occupations.

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Considering the abolishment of the Council, Reardon noted that federal law has required a state agency since 1957.

The Sunset Review Committee will issue its recommendations in December, 2019.

Judicial: Arbitration Enforceability Requires Hearing (Cont'd)

Arbitration is preferred in the law as a device for judicial expedience, but requires written consent by all parties.

In this case, the contractor's written contract included a statement of court jurisdiction, with arbitration on the back of the contract document, in conflict with each other. Additionally, the contractor used multiple names throughout the document, causing confusion.

The Court of Appeals reversed the trial court by requiring a trial of the factual issues raised by the contractor's use of confusing contract language.

Reznik v. OHY Canon Constr., 8th Dist.
Cuyahoga, 2019-Ohio-1350.

Administrative: OFCC to Update Design Manual (Cont'd)

Initially, the updates will include an estimate inflation rate of 4.34%, and the addition of a classroom program for cyber security instruction. The last comprehensive update took place in 2014.

Administrative: OCILB Enforcement (Cont'd)

Seeking uniform practices among the various construction trades sections, the Executive Secretary circulated a common

policy statement on penalties for licensed and unlicensed contractors, for the sections to use for final orders and late renewals. The Policy awaits final adoption by all sections, for consistency in leveling fines, suspensions, and revocations.

At the April meetings, the Electrical Section issued 8 notices of hearings for contractors either working without a license, or allowing unlicensed, independent contractors to work under their license although not employed by the licensed contractor.

Similarly, the Plumbing/Hydraulics Section issued 5 notices of hearings, and the HVAC/Refrigeration Section issued 5 notices of hearings for similar violations.

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The Construction Conversation

Call-In

on

Thursday, May 16, 2019

3:30 p.m.

Call in and Participate

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