



# **The Construction Conversation**

## **MCA of Ohio's Legislative, Administrative, and Judicial Two-Way Newsletter**

February, 2018

A Service of Luther L. Liggett, **Graff & McGovern, LPA**  
[www.GraffMcGovern.com](http://www.GraffMcGovern.com)

### **Legislative: WBE; EDGE, MBE Reciprocity**

Two new bills would require state agencies to require state agencies to set women-owned business procurement goals, and to require reciprocity with other states for EDGE and MBE certification. (Cont'd page 2.)

### **Administrative: PUCO Underground Utility Enforcement**

The PUCO is enforcing violations of the underground utility laws, through its Underground Technical Committee, with the majority of hearings being against utility companies themselves. (Cont'd page 2.)

### **Judicial: Mechanics' Lien Requires Proof of Claim**

Two new appellate case decisions detail basic tenets of Ohio's historic Mechanics' Lien law, including that the lien is not a self-affirming claim but only secures payment once the claim is proven otherwise. (Cont'd page 2.)

### **Legislative: Capital Projects Appropriations**

As required by the Ohio Constitution, legislation to appropriate funds for capital projects for the next biennium will be introduced in March, the single most significant legislation to be considered before the State Senators and Representatives recess for the November election campaign. (Cont'd p. 3.)

### **Administrative: OCILB Online Education Rules**

The Ohio Construction Industry Licensing Board will implement a rule for online or computer-based courses for continuing education, limiting such to interactive media, prohibiting mere DVD or VHS review. (Cont'd p. 3.)

### **Legislative: Licensure Subject to Review**

Senate Bill 255 (Robert McColley, R, Napoleon) would require that every licensing board's authority expires after five years unless affirmatively renewed by the General Assembly. (Cont'd p. 4.)

### **Administrative: Multi-Million Projects**

The State announced a Roofing project for \$2.6 million, and a new-build estimated at over \$30 million. (Cont'd p. 4.)

### **Legislative: Construction License Bills**

The General Assembly will consider licensing Home Inspectors and Interior Designers. (Cont'd p. 4.)

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## **Legislative: WBE; EDGE, MBE Reciprocity (Cont'd)**

State Representative Anne Gonzales (R, Westerville) introduced House Bills 492 and 493 to promote state contract preferences for disadvantaged businesses.

HB 492 if passed would require the Ohio Department of Administrative Services to establish agency procurement goals for contracting with women-owned business enterprises in the award of construction contracts.

HB 493 if passed would require the Ohio Department of Administrative Services to enter into agreements with other states, to allow Ohio certification as a Minority Business Enterprise or EDGE business to be certified automatically in the other states.

Of course, reciprocity also would require that Ohio automatically recognize businesses certified by other states as disadvantaged business enterprises.

Both bills are assigned to the House State and Local Government Committee, pending sponsor testimony.

## **Administrative: PUCO Underground Utility Enforcement (Cont'd)**

When the legislation passed in March, 2015, the construction industry expressed concern that utility companies would cite construction contractors, for which the Public Utilities Commission of Ohio would impose fines and other penalties for damaging underground utilities.

In 2017, the enforcement Committee held 43 hearings, and found violations of law in 29 cases. Only 9 cases were filed against construction contractors: 1 against an electrical contractor, 1 against a mechanical contractor, 1 against a landscaper, 1 against a construction manager at risk, and 5 against excavating contractors.

The Committee uniformly directed violators to implement an improvement plan and training, with no fine for a first violation.

The Committee cited the electrical contractor for a violation, after determining that the utility gave the electrical contractor a depth that the contractor relied upon, "and it turned out to be incorrect." The Committee found that the contractor was not hand-digging within the tolerance zone, and the law is silent on depth, which depth estimates are only approximate.

In 2016, the Committee imposed no fines. The following year, in a rare instance, the Committee assessed a \$500.00 penalty against WOW internet on October 12, 2017.

Separately, the Committee assessed a \$500.00 penalty against AT&T, stating that, "Education is the first priority for violators but this corrective action is not changing behavior so perhaps a fine is now what is needed."

<https://www.puco.ohio.gov/industry-information/industry-topics/damage-prevention/>

## **Judicial: Mechanics' Lien Requires Proof of Claim (Cont'd)**

In the first case, the Cuyahoga County Court of Appeals reversed on a contractor's and supplier's claims, as the lien claimants failed to prove the underlying claim. The Court specifically held:

- Merely admitting into evidence the sworn lien affidavit is not per se proof of the facts alleged that payment is due.
- The existence of a valid, enforceable claim is fundamental to the existence of a mechanics' lien. No claim, no lien.
- A dispute on the underlying claim requires trial, preventing summary judgment merely because

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the lien affidavit is proper.

*Flemco v. 12307 St. Clair, Ltd.*, 8<sup>th</sup> Dist. Cuyahoga, 2018-Ohio-588.

In a similar case, a trial court threw out a painter's mechanics' lien claim on motion, while proceeding to trial on the underlying claim.

The commercial owner asked the trial court to award sanctions against the contractor for fraud, as the owner had to bond off the mechanics' lien, interfering with the owner's bank financing.

The Cuyahoga County Court of Appeals held that the owner cannot claim fraud merely for the fling of a mechanics' lien.

The owner "cannot recover damages on the theory of fraud, based upon [the bank's] changing the terms of the loan with [owner], even if the lien was the cause of the bank's decision. The costs incurred by [owner], in defending and bonding off the lien, were not made in reliance upon any false statements by [the contractor.]

*McGarry & Con's, Inc. v. Construction Resources One*, 6<sup>th</sup> Dist. Sandusky, 2018-Ohio-528.

## **Legislative: Capital Projects Appropriations** (Cont'd)

State colleges and universities have requested \$400 million focused on renovations, repair, and expansions, and not for new construction.

Separately, two Democrats introduced House Bill 499 to establish a Pilot Program using budget stabilization funds to pay for infrastructure improvements. Sponsored by Representatives John Rogers (D, Mentor-on-the-Lake) and Jack Cera (D, Bellaire), the bill is assigned to the House Finance Committee pending sponsor testimony.

Of controversy with construction trade

associations, House Bill 471 would require all repair and renovation work on state buildings to proceed through a third-party administrator, prohibiting the Ohio Facilities Construction Commission from undertaking this work. Sponsored by Representative Anne Gonzales (R, Westerville), interested parties are working to amend the legislation to preserve construction law procedures for all work.

## **Administrative: OCILB Online Education Rules** (Cont'd)

The Board will approve online, computer-based courses only if the trades section determines that:

- the media requires participant interaction;
- the media terminates if the participant does not interact for 30 minutes;
- the media can verify the identity of the participant; and
- the media includes a timer to record course completion time.

## **Legislative: Licensure Subject to Review** (Cont'd)

SB 255 follows companion legislation, House Bill 289, in the House sponsored by Senator McColley when serving as a State Representative. In sponsor testimony, McColley states that his intent is to foster job creation by eliminating licenses which are unnecessary.

Assigned to the Senate Government Oversight and Reform Committee, SB 255 awaits sponsor testimony.

## **Administrative: Multi-Million Projects** (Cont'd)

The Ohio Facilities Construction Commission seeks a design professional for a 15-year-old roof on the Ohio Veterans Home in Georgetown, Ohio. Separately, OFCC will design

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an Electrical Upgrade, Floor Replacement, and Kitchenette Renovation. Total project cost is estimated at \$2,965,000.00. Proposals are due March 13, 2018.

Bowling Green State University's College of Business will take Construction Manager at Risk proposals for renovation of Hanna Hall. Total project cost is estimated at \$44,200,000.00. Proposals are due March 23, 2018.

<http://ofcc.ohio.gov/Opportunities.aspx>

## **Legislative: Construction License Bills (Cont'd)**

House Bill 211, sponsored by Representative Jim Hughes (R, Columbus), would create the Home Inspector Board for purposes of licensing. The bill is set for a vote in the House Economic Development, Commerce and Labor Committee.

House Bill 504, (D. Pelanda, R, Marysville) would provide a license for Interior Designers. The Ohio Board of Building Standards is proposed as the issuing agency

The legislation also provides for the signature of a licensed professional on plans and specifications.

The bill is assigned to the House Economic Development, Commerce and Labor Committee, with a first hearing for sponsor testimony scheduled.

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Join us in

**The Construction Conversation**

**Call-In**

on

**Thursday, March 15, 2018**

2:30 p.m.

Dial In: 805-309-0010

Access Code 754-477-909 #

Calendar for the Year:

Thursday, April 12, 2018

Thursday, May 17, 2018

Thursday, June 14, 2018

Thursday, July 12, 2018

Thursday, August 16, 2018

Thursday, September 13, 2018

Thursday, October 18, 2018

Thursday, November 15, 2018

Thursday, December 13, 2018

