

The Construction Conversation

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

January, 2019

A Service of Luther L. Liggett, **Graff & McGovern, LPA**
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Legislative: 133rd General Assembly

Ohio's new legislature began session for the next two calendar years, with eleven former legislators switching chambers as a result of term limits. At the same time, five new, statewide elected officials became Governor, Attorney General, Auditor, Treasurer, and Secretary of State. (Cont'd page 2.)

Administrative: Transportation Infrastructure Funding

Newly-elected Governor Mike DeWine (R, Yellow Springs) created the Ohio Governor's Advisory Committee on Transportation Infrastructure, while the Department of Transportation's proposed budget includes no new funding for major projects. (Cont'd page 2.)

Judicial: Time of Essence Implied in Contract Breach

A Court of Appeals held that a purchase order to a subcontractor constituted a written contract, with an implied "time is of the essence" term which supported liability for breach. (Cont'd p. 2.)

Legislative: Sunset Board Review Law

At the end of the prior legislative session, the Governor signed Senate Bill 255 into law. The new law requires each occupational licensing board to sunset unless affirmatively re-enacted. The bill also

created the Ohio Home Inspector Board. (Cont'd p. 3.)

Administrative: Workers' Compensation Debarment and Safety Grants

The Ohio Department of Administrative Services will debar participants who the Inspector General found to have colluded to hire one of their employees, for the position of information technology consultant at the Ohio Bureau of Workers' Compensation. (Cont'd p. 3.)

Judicial: Expert Witness Required in Workmanship Claim

A Court of Appeals held that a homeowner required an expert witness to prove allegations that concrete failed due to poor workmanship. (Cont'd p. 4.)

Legislative: Last-Session Legislation Likely to be Re-Introduced

The Temporary License for military members and the Interior Design License bills passed one chamber of the previous General Assembly, and therefore appear likely to see re-introduction at the urging of proponents. (Cont'd p. 4.)

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Legislative: 133rd General Assembly **(Cont'd)**

House Republicans still hold a 61-38 legislative majority, while Senate Republicans hold a 24-9 majority, enough if unified to override a gubernatorial veto. Over a quarter of Representatives are female and/or have never served as a legislator before.

The first order of business for the General Assembly was to elect leadership. The House elected former Speaker Larry Householder (R, Glenford), with split Republican and Democratic caucus votes. Normally, the majority party chooses their leader in a unanimous caucus vote, with an exception nearly a century ago. The Senate voted to return Larry Obhof (R, Medina) to serve as Senate President.

The House Speaker's election is expected to elevate some Democrats to leadership roles in the House of Representatives. Neither the House nor Senate has announced standing committee appointments yet. Legislators have not introduced substantive legislation pending committee assignments.

An early test of whether the House can work with a "bipartisan" leadership team will occur when the new Governor submits his operating budget, which the Ohio Constitution requires enacting no later than June 30, 2019.

Administrative: Transportation **Infrastructure Funding (Cont'd)**

The Transportation Review Advisory Council (TRAC) cannot move new projects into Tier 1 until revenue projections increase. Annual ODOT spending has decreased over the last four years (two

biennials) by \$700 million.

The Governor named to the study committee representatives of the County Engineers Association of Ohio, the International Union of Operating Engineers, and various members of Ohio industries. Their recommendations are due in mid-February.

Separately, the County Engineers also are part of a coalition, "Fix Our Roads Ohio" to urge the state to find new funding sources for transportation infrastructure.

Judicial: Time of Essence Implied in **Contract Breach (Cont'd)**

A prime contractor received an award from the Ohio Department of Transportation, and then subcontracted the drilling of holes for excavation bracing for a concrete box. As is typical in the construction industry, the subcontract was by written purchase order.

Nothing in the purchase order stated that "time is of the essence." Nevertheless, the trial court found that the prime contractor and subcontractor agreed that the drilling subcontractor should begin drilling immediately when the subcontractor mobilized.

But the subcontractor did not begin work for three days after mobilizing. In the interim, the prime contractor hired another driller to perform the work.

The subcontractor sued for breach. The Court of Appeals held that, while the parties entered into a written contract without the phrase, they agreed verbally to add that "time is of the essence" to their understanding.

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Accordingly, the subcontractor was in breach for not immediately performing upon mobilization.

S.P. Drilling Services, Inc. v. Cooper's Excavating, LLC, 4th Dist. Adams, 2019-Ohio-55.

Legislative: Sunset Board Review Law (Cont'd)

New Revised Code section 101.62 requires that,

“An occupational licensing board ... shall expire at the end of the thirtieth day of June of the following year after the board was triggered to expire. *** The board and the statutes shall continue to the extent the board and the statutes apply to performing functions other than licensing or regulating the licensing of an occupational license.*** An occupational licensing board may be renewed by enactment of a law that continues the statutes creating, empowering, governing, or regulating the board.”

One-fifth of all such boards shall expire each year, for a five-year cycle. It is unclear in what order the General Assembly will consider boards initially. The Ohio Construction Industry Licensing Board, along with the three design professional boards, are included in the expiration list for their licensing functions.

The Senate appointed the legislation's sponsor to the joint legislative Sunset Review Committee to consider Board renewals, along with two other Senators and three House appointees: Rep. Nino Vitale (R, Urbana), Chair; Sen. Kristina Roegner (R, Hudson), Vice Chair; Sen. Robert McColley (R, Napoleon), Sen. Cecil Thomas (D, Cincinnati), Rep. Scott

Wiggam (R, Wooster), and Rep. Brigid Kelly (D, Cincinnati).

House Bill 211 would have created the Ohio Home Inspector Board, sponsored by Representative Jim Hughes (R, Columbus.) After passing the House and Senate Transportation Committee, the legislature added the bill to Senate Bill 255, thus creating the Ohio Home Inspector Board.

Administrative: Workers' Compensation Debarment and Safety Grants (Cont'd)

Separately, the Bureau awarded almost \$1 million in Safety Grants to employers in 31 Ohio counties, including construction industry businesses seeking to reduce risk of injury.

- LM Construction in Belmont County, a drywall contractor, received \$35,000 for scissor lifts.
- Joe Little Excavating of Carroll County received \$20,000 for pipe threading machinery and a hydraulic ramp.
- Mack Iron Works of Erie County received \$6,100 for portable welding fume evacuation systems.
- Cretor Construction Equipment of Madison County received \$40,000 to purchase a line concrete placing system.
- Midwest Maintenance of Miami County received over \$12,000 for five dust collection systems in historical renovations.
- D & A Plumbing & Heating of Stark County received \$5,800 for two lift gates.

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- Underground Connections of Wayne County received \$40,000 for a hydro-jetter for cleaning sewer lines.

Further information for the matching grants application is on the Bureau's website.

Judicial: Expert Witness Required in Workmanship Claim (Cont'd)

A homeowner hired a concrete company to pour a new driveway. After construction, the parties agreed that water pooled under the cement, causing it to crack. The homeowner sued, claiming that the contractor should have installed expansion joints. The trial court found in favor of the homeowner, awarding damages.

The Court of Appeals reversed. In a claim for breach of workmanship against a contractor, the Court held that an expert is required to testify regarding professional standards of performance, unless the claimed error is within the general knowledge of a lay person.

“Performance in a workmanlike manner is work ‘equal to that customarily done by others in the same trade in the same community or the same type of work’ and is not ‘what either party individually expects or would like.’ “

Proof of a construction defect is not sufficient to create contractor liability without further proof that the defect resulted from the contractor not using ordinary care.

Reamensnyder v. Marino (11th Dist. Trumbull, 2018-Ohio-5336.

Legislative: Last-Session Legislation Likely to be Re-Introduced (Cont'd)

Companion legislation House Bill 716 and Senate Bill 320 each passed their originating chamber. The legislation would require licensing boards “to issue temporary licenses or certificates to members of the military and spouses who are licensed in another jurisdiction and have moved to Ohio for active duty.”

The House and Senate votes were unanimous, but neither bill made it through hearings in the other chamber. One possibility is to include such language in the 2019 operating budget, given the unanimous legislative support.

The legislation received significant opposition from certain professions, given that Ohio licensing boards provide reciprocity already to other state licenses with similar requirements. If another state does not require equivalent standards, opponents argue that such licensees should not receive an automatic license in Ohio.

House Bill 504 passed the House by a split vote of 73-14, proposing to create the Ohio Interior Design Examiners Board, which the current Architects-Landscape Architects' Boards would staff. The bill died with no Senate action.

Re-introduced legislation will face new requirements enacted in Senate Bill 255, the new Sunset Review law, which also prohibits new license boards, Revised Code section 103.26:

“With respect to legislation that has been introduced in the house of representatives or in the senate, which proposes to substantially change or enact an occupational regulation, the director of the

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legislative service commission shall issue a report of the legislation. *** A bill which proposes to substantially change or enact an occupational regulation shall not be favorably reported out of committee until after the committee members have received and considered the report provided under division (B) of this section, unless two-thirds of the members of the committee vote in the affirmative to favorably report the bill.”

The report must support the need for such a new license based on the same criteria as considered for board renewal, generally to protect the public safety and welfare without being anti-competitive.

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Join us in

The Construction Conversation

Luncheon & Call-In

on

Thursday, February 21, 2019

LIVE in Dayton, Ohio

11:30 a.m. Luncheon

12:00 p.m. Presentation

Engineers Club of Dayton
110 E Monument Ave, Dayton, OH 45402
Orville & Wilbur Wright Room

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