

The Construction Conversation

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

July, 2019

A Service of Luther L. Liggett, **Graff & McGovern, LPA**
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Legislative: Budget Bill Changes Administrative Regulations

The Ohio General Assembly passed the Operating Budget before leaving the Capitol for the summer. Included in the legislation is reduction of administrative rules, and extension of contractor debarment to any state contract. Amended Substitute House Bill 166 wrapped in a new version of Senate Bill 1. (Cont'd page 2.)

Administrative: Sunset Review

Two parallel tracks are operating to consider elimination of defunct boards, and licensure agencies not aimed at protecting the public health, safety or welfare. The Sunset Review Committee is considering 167 agencies, and the House State and Local Government Committee began licensure review. (Cont'd page 2.)

Judicial: Construction Statute of Repose Upheld

The Ohio Supreme Court ruled that the construction industry's Statute of Repose is constitutional in barring any action against a contractor or design professional, if filed "later than ten years from the date of substantial completion of such improvement." (Cont'd p. 2.)

Legislative: Construction License Legislation

Legislators belatedly introduced additional legislation to license Residential

Contractors, and to register (not license) Roofing Contractors, re-introducing similar initiatives from last session which did not pass but expired. Both bills must overcome the new prohibition of new licenses in Revised Code 101.62-101.65 and 4798.02. (Cont'd p. 3.)

Judicial: Public Agency Liability for Contractor's Injury

A Court of Appeals affirmed a trial court decision holding a public agency liable for a Roofing Contractor's accidental injuries, sustained when estimating a repair. (Cont'd p. 3.)

Legislative: Head Start on Capital Appropriations

The Ohio Senate unanimously passed an additional \$100 million in authority for the Ohio School Facilities Commission to issue bonds, Senate Bill 4 (M. Rulli, R, Salem; S. Kunze, R, Hilliard). (Cont'd p. 4.)

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Legislative: Budget Bill Changes **Administrative Regulations (Cont'd)**

That leadership initiative would have required elimination of an arbitrary third of all administrative rules. Such a broad requirement would apply to the International Building Codes incorporated by reference into Ohio law.

As enacted, new Revised Code 121.95 only requires that all state agencies inventory all existing rules containing the words “shall, must, require, shall not, may not, and prohibit”.

The law also prohibits any state agency from adopting any “new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions.”

The Budget Bill also clarifies construction contractor debarment under R.C. 153.02 to apply to all other state contracts, not just from the debarment agency.

The new laws go into effect after the 90-day period in which a referendum to repeal expires.

Administrative: Sunset Review (Cont'd)

The Sunset Review Committee is considering outdated boards to determine whether the agencies should continue in existence. The Committee will prepare a report of each board's activities with Committee recommendations, and deliver the report on or before December 31st each year to the Governor, Speaker of the House, and President of the Senate.

Separately, Revised Code 101.62-101.65 requires a standing committee to

determine whether each professional license required by law meets numerous criteria, including whether the laws, “provide for the least restrictive regulation by repealing the current regulation and replacing it with a less restrictive regulation that is consistent with the policies expressed in section 4798.02 of the Revised Code.”

Revised Code 4798.02 incorporates an overall philosophy, “to increase economic opportunities, promote competition, and encourage innovation.”

The law requires that one-third of all licensure agencies complete legislative review in 2019. The House State and Local Government Committee began with review of the Historical Boiler Licensing Board and the Ski Tramway Board.

It is unclear whether this Committee will review all licensing agencies, or in what order.

All new licensure legislation must meet similar criteria pursuant to Revised Code 103.26.

Judicial: Construction Statute of Repose Upheld (Cont'd)

The law expressly covers any claim for damages, “that arises out of a defective and unsafe condition of an improvement to real property.” Revised Code 2305.131.

In 2015, a local School District filed a lawsuit against its architect arising from alleged negligent design for the construction of a K-12 school building which was completed nearly thirteen years earlier in 2002.

The School argued that the Statute of Repose does not apply to actions for breach

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of contract, but only for personal injury actions (“tort”).

The School further argued that the Statute of Repose does not apply to the State, and that the contracts are State contracts due to the State funding of the construction.

Noting that prior case law limited the statute of repose to negligence, the Supreme Court found that the new statute is different and broader, such that prior court interpretations did not apply.

The Court found that the current Statute of Repose, limiting actions to 10 years after “substantial completion” or related to “warranty” are only conditions found in a contract, not in a duty for a negligence claim. Therefore, the law applies across the board to protect the construction industry.

New Riegel Local School Dist. v. Buehrer Group Architecture & Engineering, Inc.,
2019 -Ohio-2851.

Legislative: Construction License Legislation (Cont’d)

Neither bill was initiated by the respective industry trade association.

Senate Bill 176 (T. Schaffer, R, Lancaster) would amend Revised Code Chapter 4740, authority for the Ohio Construction Industry Licensing Board. The bill would establish a “universal license”, and a “residential license only”, making several other administrative changes.

Senate Bill 177 (J. Hottinger, R, Newark) would add a new roofing registration requirement, administered by the OCILB, more along the idea of

consumer protection. The new bill competes with House Bill 199 to create a full roofing contractor’s license, introduced in April, 2019 (T. Patton, R, Strongsville), and backed by the Ohio Roofing Contractors Association. That earlier legislation already has enjoyed two hearings before recess.

Judicial: Public Agency Liability for Contractor’s Injury (Cont’d)

Revised Code Chapter 2744 provides immunity to all public subdivisions for injury to persons or property in connection with a governmental or proprietary function.

However, the statute creates exceptions, including if the cause of injury is by the negligence of an employee. Only if the negligent act was within the discretion of the employee in deciding to acquire materials would the act be immune from lawsuit.

In this case, the Roofing Contractor fell through a skylight while examining the roof to prepare a bid for repairing or replacing. The skylight was painted the same color as the roof and looked identical.

The Court held that a concealed, hazardous condition created a duty in the public agency to disclose the danger. A routine maintenance decision requiring little judgment did not require the exercise of discretion.

Accordingly, the injured contractor could sue the public authority for his injuries.

Wright v. Williamsport, 2019-Ohio-2682.

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Legislative: Head Start on Capital Appropriations (Cont'd)

Both the House Primary and Secondary Education Committee and Finance Committee unanimously reported the bill, and the House informally passed the legislation. But the Rules Committee re-referred it back to Committee pending budget considerations.

The bill likely will pass Fall, 2019 given its bipartisan support. The Ohio Constitution requires a Capital Appropriations bill in 2020, which the legislature will pass before June 30th of next year, covering construction funding for all state public works.

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