The Construction Conversation

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

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Legislative: Payment Assurance Legislation for Design Professionals

Senator Jay Hottinger (R, Newark) and Senator Vernon Sykes (D, Akron) again will jointly re-introduce prior-session Senate Bill 136, to create lien rights for Design Professionals. (Cont'd page 2.)

Legislative: Regulatory Reduction

Senate Bill 9 will require reduction of state administrative rules, such as the Ohio uniform Building Codes. Highly opposed by state agencies, the legislation is assigned to the Senate Government Oversight and Reform Committee, where hearings will begin again. (Cont'd page 2.)

Legislative: Contract Statute of Limitations to Shorten

Senate Bill 13 would shorten the Statute of Limitations during which to bring a breach of contract claim from 8 years to 6 years. The legislation would not impair the construction Statute of Repose barring any actions from even accruing after 10 years. (Cont'd p. 3.)

Administrative: OCILB Enforcement

The Ohio Construction Industry Licensing Board met in December to consider enforcement of Ohio Revised Code Chapter 4740 in licensing construction trades contractors. (Cont'd p. 3.)

Judicial: Sunshine Law Applies to QBS Subcommittee

In a significant precedent, a Court of Appeals ruled that the "Sunshine Law", or Open Meetings Act, applies to a subcommittee formed by a Board of County Commissioners when considering Design Professionals for selection to design a $40 million public facility. (Cont'd p. 3.)

Judicial: Construction Promissory Note, Damages for Recklessness

A construction contractor asked a bar and restaurant owner to sign both a contract and promissory note, but failed to credit the amount of the note toward the contract work, arguing that it was for contractor financing and unrelated to the construction contract. (Cont'd p. 4.)

Judicial: Homebuilder Arbitration

A Court of Appeals upheld a contractor's inclusion of an arbitration clause as not unconscionable against a homeowner, where the arbitrator typically is associated with the construction industry. (Cont'd p. 4.)

Legislative: Payment Assurance Legislation for Design Professionals (Cont'd)

Referred to as the "Payment Assurance Legislation" or PAL, the Sponsors have circulated a request to other Ohio Senators to consider co-sponsorship. The bill should be re-introduced early February, then assigned to a Senate Committee for hearings.

In leadership, Senator Hottinger this session serves as President Pro Tempore, and Senator Sykes serves as ranking Minority Member on the Senate Finance Committee where the Operating Budget is considered.

In three Committee Hearings last session, the legislation heard no opposition. However, as with many bills in part due to the pandemic, the legislation did not get a vote out of Committee.

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: Regulatory Reduction (Cont'd)

Introduced by Robert McColley (R, Napoleon) and Kristina Roegner (R, Hudson) in the prior session as Senate Bill 1, this legislation passed the Senate and House in split votes, but could not emerge from Conference Committee to work out differences.

R.C. 121.95 currently provides, "a state agency shall review its existing rules to identify rules having one or more regulatory restrictions that require or prohibit an action and prepare a base inventory of the regulatory restrictions in its existing rules. Rules that include the words 'shall,' 'must,' 'require,' 'shall not,' 'may not,' and 'prohibit' shall be considered to contain regulatory restrictions."

As much of Ohio's building and fire codes follow national or international codes for uniformity in materials and enforcement, editing the codes would have an unintended effect.

The new legislation would extend the current law.

Last session, a Democrat State Representative introduced House Bill 517 to exempt building codes. The legislation did not move. The Ohio Building Officials Association may seek re-introduction of the exemption.

Legislative: Contract Statute of Limitations to Shorten (Cont'd)

Sponsored by Representative George Lang (R, West Chester), the bill passed the House unanimously and with only one Senate vote (procedural) from unanimously, but failed to achieve amendment concurrence before session's end.

Assigned to the Senate Judiciary Committee, SB 13 is scheduled for a second hearing and "Possible Vote" on February 2, 2021, a fast track given the requirement of three hearings in each chamber.

Administrative: OCILB Enforcement (Cont'd)

The Electrical Section fined two licensed electrical contractors $500.00 each for allowing an unlicensed contractor to perform work under the license. The Section fined another electrical contractor $1,000.00 for the same violation but while the license was suspended.

The Plumbing Section fined an unlicensed contractor $1,000.00. The Section also will hear a case in which a licensed contractor issued a 1099 to an independent, unlicensed contractor, a facial per se violation of law.

The HVAC/Refrigeration Section continued investigations, but did not resolve any cases at this meeting.

Each Section approved Reciprocity applicants from other states which allow Ohio contractors to practice there.

Each Section also approved test applicants, test scores, and issued opportunities for hearings to contractors with alleged violations.

The OCILB Executive Secretary reported the Board's opposition to Senate Bill 246 and House Bill 442, creating automatic reciprocity for out-of-state trades contractors even without reciprocal opportunities for Ohio contractors to practice in those other states. That effort succeeded.

Judicial: Sunshine Law Applies to QBS Subcommittee (Cont'd)

The Board of County Commissioners is the decision-making authority for constructing a courthouse renovation. The Board created a "Facilities Taskforce" which in turn created a Subcommittee. That Subcommittee met for the purpose of selecting an architectural firm for study and design of the new facility.

As public works, Ohio construction law requires design professional selection based only on qualifications and not bid out on price, pursuant to R.C. 153.65 et seq.

The Subcommittee argued that, since it was not a "decision-making body", the members could meet privately, and not

comply with the Open Meetings requirements of R.C. 121.22.

A local citizen sued to enforce the application of the law on the County in pursuing the construction. The local court dismissed the case, but the Court of Appeals reversed.

Noting that the Open Meetings Act language was applicable to any "public body" and not just to "decision-making" entities, the "sunshine" laws apply.

The Court of Appeals remanded the case back to the lower court, but the County appealed in a discretionary pleading to the Ohio Supreme Court.

Left to determine is whether the County legally may pay for work already performed without having followed the law.

St. ex rel.Maynard v. Medina Cty Facilities Taskforce Subcommittee, 9th Dist. Medina, 2020-Ohio-5561

Judicial: Construction Promissory Note, Damages for Recklessness (Cont'd)

When the contractor failed to finish on time, and owner failed to pay, both sued.

The Court of Appeals ruled that the promissory note was void as lacking consideration. If the owner's only obligation was to pay for the construction, then a loan either must be payment for the construction, or for nothing.

As to contractor delay, the facts proved that time was of the essence to the bar owner, to gain the holiday revenues on opening. Therefore, the contractor breached.

Because the court found the contractor to have been "cavalier and reckless" regarding time of completion, the court awarded Lost Profits to the bar owner. The proper calculation was to pro-rate what were reasonably-proven business losses during the time period when the contractor should have worked toward completion.

Bakhshi v Baarlaer, 2nd Dist. Montgomery, 2021-Ohio-13.

Judicial: Homebuilder Arbitration (Cont'd)

While typically more expensive than court, construction contractors tend to favor arbitration because the proceedings are not public, the hearing is expedited, the rules of court do not apply, and the arbitrator typically is a construction contractor or attorney familiar with construction disputes.

The homeowners contracted for construction of an addition in the contract amount of over $212,000.00.

After project completion, the homeowners would not pay, so the homebuilder filed a mechanics' lien. Arguing non-completion, the homeowners purportedly canceled the contract under Ohio's Consumer Sales Practices Act. Then the homeowners sued in court, notwithstanding the arbitration clause.

The contractor moved the trial court to stay the proceedings pending arbitration; the court granted the motion. The homeowners claimed that arbitration was unconscionable, and the provision should be voided.

The Court of Appeals found that the homeowners knew of the arbitration clause when reviewing contract terms, did not hire

an attorney to advise them, and otherwise agreed.

Likewise, on canceling the contract after-the-fact, the Court held that such a determination should be left to the arbitrator, given that arbitrability was included. The argument is bootstrapping, arguing a claim on the merits to disqualify the determining forum.

Sebold v. Latina Design Build Group, LLC, 8th Dist. Cuyahoga, 2021-Ohio-124.

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Join us in

The Construction Conversation

Call-In

on

Wednesday, February 10, 2020

3:00 p.m.

Join Zoom Meeting

https://us02web.zoom.us/j/83197965247?pwd=N3N6bWRENFBmYW1oNzMxYklROXd3Zz09

Meeting ID: 831 9796 5247
Passcode: 758087

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