



## **The Construction Conversation**

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

June, 2017

A Service of Luther L. Liggett, **Graff & McGovern, LPA**  
www.GraffMcGovern.com

#### **Legislative: Small Project School Funding Program**

Legislation creating the School Facilities Option Program passed the Senate unanimously, and is reported out of House Education Committee favorably. (Cont'd page 2.)

#### **Judicial: Arbitration Clause Not Automatic**

Two appellate courts have held that Arbitration required by language in a contract is not automatic, with the result that a construction contractor can lose significant rights if not diligent. (Cont'd page 2.)

#### **Administrative: Large School Project Seeks Two CM's at Risk**

North Royalton City School District seeks two Construction Managers at Risk for \$90 million in new and renovation construction of its school facilities. (Cont'd page 2.)

#### **Legislative: Workers Compensation Overhaul**

House Bill 269 if passed would change the name of the Ohio Bureau of Workers' Compensation to the Office of Worker Safety and Rehabilitation. (Cont'd page 3.)

#### **Legislative: Building Code Legislation**

The Senate Local Government Committee favorably reported Senate Bill 43, sponsored by Senator Kevin Bacon (R, Columbus), to allow Ohio's 32 "Home Rule Townships" in 12 counties to create their own Building Departments. (Cont'd p. 3.)

#### **Judicial: Construction Damages Limited**

A court of appeals has limited construction damages for faulty workmanship to the reasonableness of repairs. (Cont'd p. 4.)

#### **Administrative: OCILB Licensure Enforcement**

The Ohio Construction Industry Licensing Board continues to seek enforcement against a Kentucky-based contractor who repeatedly works by reference to another Ohio contractor's license. (Cont'd p. 4.)

#### **Legislative: Budget Includes Antitrust Review for Licensure**

Reacting to a U.S. Supreme Court decision, House Bill 49, the Budget Bill, includes a requirement for a separate appeal of any licensure board action if antitrust is alleged. (Cont'd p. 4.)

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## **Legislative: Small Project School Funding Program (Cont'd)**

As some schools do not qualify for the primary funding of the Ohio Facilities Construction Commission for a larger facilities project, sponsor Senator Randy Gardner (R, Bowling Green) introduced the legislation.

As proponents testified, “Senate Bill 8 offers districts the opportunity to access OSFC funds for smaller projects when it is not advantageous for the district to participate in a full facilities replacement or remodeling project.”

Under the new program, a school district may receive state funds in an amount of up to the greater of \$1 million or 10% of the state's share of the total project cost. The school must match the funding.

While Senate floor passage is expected, the Senate also added the legislation to HB 49, the Budget Bill, which is on its way to the Governor.

## **Judicial: Arbitration Clause Not Automatic (Cont'd)**

In one case, a subcontractor sued a prime contractor for failure to pay \$117,285.96. The prime contractor offered the defense of a “pay if paid” clause, claiming that the owner had not paid yet.

The subcontract included language allowing the prime contractor an option to select arbitration over court. However, the trial court denied arbitration, as the prime contractor had waited a year while negotiating payment from the owner.

The court of appeals affirmed, noting the distinction between a mandatory

arbitration clause, and a prime contractor's option to pursue arbitration. The option must be exercised within a reasonable time, or is waived.

*PS Commercial Play, LLC v. Harp Contrs., Inc.* 2017-Ohio-4011.

In a second case, homeowners sued a home construction contractor for defective work, having signed a Home Construction Agreement for construction of an addition. The Agreement included a mandatory arbitration clause.

A party may file a “motion to stay proceedings” while that party files for arbitration. A trial court need not provide a hearing before granting such a motion. Arbitration may or may not follow, depending on the parties' choice.

In contrast, a defendant may file a “motion to compel arbitration” under R.C. 2711.03. This forces the suing plaintiff to move the claims to arbitration. The statute expressly requires a hearing before a court can grant such a motion.

In this case, the trial court ordered arbitration without a hearing on the motion. The Court of Appeals reversed, sending the case back to the trial court.

*Kelsey v. Carrington Homes, Inc.* 2017-Ohio-4111.

## **Administrative: Large School Project Seeks Two CM's at Risk (Cont'd)**

The Project includes a new elementary school, an addition and renovation to the high school, and renovations to the middle school including HVAC and Roofing.

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The Project will be administered through the Ohio Facilities Construction Commission, although at this time the funding is all from local sources.

Further information can be found on the OFCC website and the North Royalton site at:

<http://www.northroyaltonsd.org/protected/ArticleView.aspx?iid=5PB0B0&dasi=3UBY>

## **Legislative: Workers Compensation Overhaul (Cont'd)**

Sponsor State Representative Mike Henne (R, Clayton) claims the bill as introduced would overhaul the system while remaining neutral in affecting worker benefits.

Of significant controversy is HB 49, the Budget Bill, authority to remove 2% of funding from Workers' Compensation and Industrial Commission revenues. As these revenues are generated from insurance premiums, transfer into the General Revenue Fund for State expenses has drawn significant opposition from major employer representatives and from labor.

HB 269 has 25 Republican co-sponsors, a sizeable effort. The new Office would create incentives for employers to use state programs to increase safety in high-risk professions such as construction. Currently, these programs are voluntary, such as the state-version of the federal Occupational Safety and Health Administration (OSHA).

Some benefit changes are proposed, such as eliminating wage replacement benefits after the age of retirement, and changing the formula for death benefits.

Representative Henne is an insurance agent by profession. He also introduced House Bill 268, which would create the self-insuring employers' guaranty fund, requiring some employers to contribute to the state program.

## **Legislative: Building Code Legislation (Cont'd)**

Currently, townships without a local county building department already may create a building department, as designated by the Ohio Board of Building Standards.

This legislation will allow townships in counties with a building department already, to create a duplicate, local building department. The rationale from proponent testimony is one of convenience.

The County Commissioners Association offered opposition, as duplicating services. The legislation awaits a Senate vote before proceeding to the House.

House Bill 127 would require certification of all welders for structural steel. The Building Code would include the following rules:

(1) All welders performing structural steel welding for the project have been tested by and hold a valid certification from an accredited testing facility.

(2) All structural steel welding performed for the project meets adequate welding standards.

(3) All structural steel welding inspections listed in the project's job specifications are completed by a certified welding inspector.

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Sponsored by Representative Rick Perales (R, Beavercreek), the legislation has stalled after two hearings in the House Economic Development, Commerce and Labor Committee.

## **Judicial: Construction Damages Limited (Cont'd)**

As part of the sale of real estate, seller agreed to repair the concrete parking lot, with funds placed in escrow. After repair and release of the money, the concrete deteriorated. Seller made no more repairs, so the owner hired another contractor.

The repair contractor went beyond the areas of original repair. Then the owner sued the seller for the cost, which the trial court awarded.

The Court of Appeals reversed, finding that “there was no testimony as to the reasonableness of the repairs performed.” Adding rebar and thicker concrete went beyond the original scope, constituting a betterment. Thus, the damages put the owner “in a better position than they would have been if the repairs had been done in a workmanlike manner.”

*Jalm Marion, LLC v. Fair Park Ents., Inc.*,  
2017-Ohio-4350.

In a second case decision, a contractor suing for damages received a default judgment due to the owner’s attorney failing to file an answer timely.

The trial court awarded damages against the owner without a hearing. The Court of Appeals reversed, noting that the contractor failed to document the damages in any of the pleadings. Accordingly, even in default, the owner was entitled to contest the amount of the award.

*M.R. Durant Elec., LLC v. Awesome87, LLC*, 2017-Ohio-4331.

## **Administrative: OCILB Licensure Enforcement (Cont'd)**

In an earlier instance, the Kentucky contractor used another contractor’s plumbing license from a licensed Ohio contractor. OCILB revoked that license.

In a second, repeated instance, the Kentucky contractor used another Ohio contractor’s HVAC license, which the OCILB is in the process of revoking.

The Board has fined the Kentucky contractor, but remains concerned how to stop the continuing activity.

## **Legislative: Budget Includes Antitrust Review for Licensure**

Based on the North Carolina Dental Board barring a teeth-whitening business, the U.S. Supreme Court held the action by dentists an anticompetitive act under color of state law.

Accordingly, Ohio will create a new process for licensure boards, including for Architects, Landscape Architects, Engineers, and trades contractors licensed by the Ohio Construction Industry Licensing Board.

Any licensee may appeal to Ohio’s Common Sense Initiative Office, headed by the Lieutenant Governor. The licensee may allege any anticompetitive effect of the licensure action, which the Office then must investigate.

Referral stops the licensure board from further action pending investigation. “If an ongoing action or an action proposed by a board or commission is referred to the

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office for review under this section, the board or commission shall cease the ongoing action or not take the proposed action until the office has approved of the action....”

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Join us in

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**Call-In**

on

**Thursday, July 20, 2017**

2:30 p.m.

TOPIC: General Assembly Legislation

Thursday, August 17, 2017

Thursday, September 21, 2017

Thursday, October 19, 2017

Thursday, November 16, 2017

Thursday, December 21, 2017

Dial In: 805-309-0010

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