



## **THE CONSTRUCTION CONVERSATION**

*Ohio's Legislative, Administrative, and Judicial*

***Two-Way Newsletter***

December, 2018

A Service of Luther L. Liggett, Graff & McGovern, LPA

[www.GraffMcGovern.com](http://www.GraffMcGovern.com)

### **Legislative: Big-Time Wrestling**

In a re-play of last summer's fight over electing a Speaker of the House, the Republican caucus set December 27, 2018 for a vote on the 2019 Speaker, before the new members take their seats. No candidate has a clear majority. (Cont'd page 2.)

### **Administrative: OSU Mega-Project**

The Ohio State University will select a Construction Manager at Risk to construct the West Campus Ambulatory Facility of the Wexner Medical Center for \$350 million in Columbus. (Cont'd page 2.)

### **Judicial: Administrative Remedy a Precedent to Litigation**

A Court of Appeals upheld dismissal of a case against a state agency challenging the agency's action as beyond the statute of limitations, because the challenge did not go through the administrative process first. Similar cases might include challenges to licensure actions or government actions to recover funds, as in this case. (Cont'd p. 2.)

### **Legislative: Occupational Boards Sunset Bill Enacted**

Senate Bill 255, to sunset each occupational board unless affirmatively re-enacted, passed the Senate and House, with ratification of all amendments, now awaiting the Governor's consideration. (Cont'd p. 2.)

### **Administrative: OCILB Enforcement**

The Ohio Construction Industry Licensing Board considered 18 disciplinary actions against trades contractors at its December meetings, approving reciprocity with numerous states. (Cont'd p. 3.)

### **Judicial: Partial Arbitration Stay**

A court of appeals upheld the stay of a trial court of a cross-claim, while allowing the remainder of the case to proceed in court, thus creating two parallel actions in litigation at once. The court held that arbitration requires an express agreement. (Cont'd p. 3.)

### **Legislative: Rare Veto-Vote Session**

Concerned about the need to override the Governor's veto of lately-passed bills, the House and Senate scheduled an unusual December 27<sup>th</sup> voting session. Unclear is whether legislators will show up during the holidays. The Governor already vetoed legislation which shifted the judicial burden of proof in gun cases, and is considering a veto of abortion legislation. (Cont'd p. 3.)

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## **Legislative: Big-Time Wrestling (Cont'd)**

Current Speaker Ryan Smith (R, Bidwell) leads in votes, but the former Speaker Larry Householder (R, Glenford) holds a voting bloc which refuses to compromise.

The rhetoric is harsh. Typically, each party caucus meets behind closed doors, and unites behind the candidate with the plurality of votes. But this year, those supporting Householder do not appear willing to concede.

This leaves an opening for Democratic State Representatives to try to cut a deal. Householder is perceived as pro-labor, a typical Democratic constituency, which may influence the outcome.

House Democrats elected Fred Strahorn (D, Dayton) as Minority Leader. Senate Republicans will re-elect Larry Obhof (R, Medina) as Senate President, and Senate Democrats elected Kenny Yuko (D, Richmond Heights) as Minority Leader for the next session.

The Senate will hold its first session day on January 7, 2019, while awaiting the Governor's inauguration January 14, 2019.

## **Administrative: OSU Mega-Project (Cont'd)**

CM at Risk proposals are due January 17, 2019, for a state-of-the-art diagnostic treatment center of 423,000 square feet. Pre-construction services, including design, will start in March, 2019.

For documentation, see:

<https://ofcc.ohio.gov/Opportunities2>

The project is part of the University's masterplan, Framework 2.0, a copy of which accompanies this Newsletter.

[https://pare.osu.edu/sites/default/files/framework2.0\\_final\\_plan\\_presentation.pdf](https://pare.osu.edu/sites/default/files/framework2.0_final_plan_presentation.pdf)

## **Judicial: Administrative Remedy a Precedent to Litigation (Cont'd)**

When the legislature enacts a comprehensive statutory or regulatory process to be reviewed by an administrative agency, a person may not short-cut that process by asking a court to intervene prior to exhausting the non-court, administrative process.

An exception to the exhaustion rule is when there is no administrative review process, or the process is unusually onerous or expensive. The person seeking court intervention has the burden to prove the exception, and must state the basis in the court pleading.

An "onerous" burden does not include the mere cost or inconvenience of going through the administrative process.

*OMG MSTR LSCO, LLC v. Dept. Medicaid*, (10<sup>th</sup> Dist. Franklin), 2018-Ohio-4843.

## **Legislative: Occupational Boards Sunset Bill Enacted (Cont'd)**

Unclear is whether the Governor might veto the legislation because of the difficulty it will cause in managing executive agency boards. Every year, 20% of all boards will expire, requiring affirmative renewal. At risk include the Architects, Landscape Architects, Engineers, Surveyors, and Ohio Construction Industry Licensing Boards.

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The legislation also prohibits creation of any new board until an independent study verifies that the intent is to protect the health and safety of the public, and is not enacted merely to hinder competition.

In a last-minute deal, the General Assembly “log-rolled” House Bill 211 into the passed version of the sunset legislation to prohibit new boards. The HB 211 language creates a new Ohio Home Inspector Board to license and regulate home inspections.

## **Administrative: OCILB Enforcement** (Cont’d)

The Board reported renewing 1,346 licenses in October, and 884 licenses in November, while issuing only 29 new licenses in October, and 16 new licenses in November.

The Electrical Section approved reciprocal licenses for contractors from Kentucky, West Virginia, South Carolina, Louisiana, and Tennessee.

The Plumbing/Hydronics Section approved reciprocal licenses for contractors from West Virginia, and Tennessee.

The HVAC/Refrigeration Section approved reciprocal licenses for contractors from Kentucky, West Virginia, and South Carolina.

## **Judicial: Partial Arbitration Stay** (Cont’d)

An electrical subcontractor further subcontracted work to another subcontractor, who later was removed from the job. The original first-tier subcontractor failed to pay the replacement second-tier-

subcontractor, who sued.

The general contractor asked the trial court to stay the proceedings pursuant to an arbitration clause in the contract with the first-tier electrical contractor. The trial court issued a partial stay, sending only the claims with the first-tier electrical contractor to arbitration.

Remaining were the original claims by the second-tier subcontractor and all other cross-claims, to be tried in court.

As the second-tier subcontractor had no contract with the general contractor, the second-tier subcontractor never agreed to arbitration. Therefore, the court of appeals upheld severing the actions.

*Settle-Muter Electric Ltd. v. Intertech Security, LLC* (10<sup>th</sup> Dist. Franklin), 2018-Ohio-4839.

## **Legislative: Rare Veto-Vote Session** (Cont’d)

Given the large number of bills passed, the Governor may consider other vetoes, such as Senate Bill 255 to sunset occupational licensing boards.

After the House passed HB 504 to create an Ohio Interior Design Examiners Board, the Senate held a first, sponsor hearing, but did not take further action. As the sponsor retires, it is unclear whether the legislation will find a new sponsor next session.

House Bill 716 passed the House unanimously, as did its companion Senate Bill 320 in the face of strong opposition from associations representing professionals. The legislation if enacted would license temporary licenses to military service

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persons moving to Ohio without any credentialing. The bill dies without further action. But the sponsor returns and will re-introduce it next session, particularly given the unanimous support.

Senate Bill 72 received a sponsor hearing to make Prevailing Wage an option, only. The sponsor returns next year, so likely he will re-introduce the bill.

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Join us in  
**The Construction Conversation**  
**Thursday, January 17, 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

Wright Room

**Call in and Listen**

12:00 p.m. Presentation

Dial In: 805-309-0010

Access Code 754-477-909 #

