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TO OUR MEMBERS AND FRIENDS:

OHIO GENERAL ASSEMBLY
SUBSTITUTE SENATE BILL 49:

**PAYMENT ASSURANCE LEGISLATION
FOR
OHIO DESIGN PROFESSIONALS**

A Legislative Update

July, 2021

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PAYMENT ASSURANCE LEGISLATION FOR OHIO DESIGN PROFESSIONALS

INTRODUCTION

Ohio recently enacted a lien law to secure payments for licensed design professionals including Architects, Landscape Architects, Engineers, and Surveyors. One of the last states to take this historic step, the Payment Assurance Legislation (PAL) takes effect on October 4, 2021.

PRIOR LAW

Ohio's original Mechanics' Lien Law passed in 1877, signed into effect by Governor Rutherford Hayes before traveling to Washington as President-elect. In 1896, the Ohio Supreme Court threw the law out as infringing on the right of parties to contract (even bad contracts.) In 1912, Ohio added the Mechanics' Lien to its new state Constitution, where it survives today:

Art. II § 33 Mechanics' and Builders' Liens Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material men, their just dues by direct lien upon the property, upon which they have bestowed labor or for which they have furnished material. No other provision of the constitution shall impair or limit this power.

Case law interprets the availability of the Mechanics' Lien as for only those trades contractors who improve the real estate. The primary purpose is to create a cause of action in the absence of contract privity with the land owner. Thus, a subcontractor with no prime contract can "leap-frog" the general contractor, and sue the owner directly. Seldom is the lien on the real estate foreclosed, although the encumbrance often is sufficient to motivate payment or bonding off, substituting cash security while the subcontractor's claim is litigated.

Because of the trades contractor's improvement, local property tax increases; the improvement is exempt from sales tax.

In contrast, a Design Professional's work is a service to the landowner or tenant, only. A survey, design drawings, or construction documents, by example, do not improve the land, nor increase the property tax valuation. If the owner sells the land, the Design Professional's work does not transfer automatically with the land transfer. Therefore, a Design Professional cannot file a Mechanics' Lien in Ohio.

The primary example creating the need for new law is when a developer employs various design professionals to prepare drawings and surveys, for purposes of seeking bank finance. The developer may not inform the design professionals of the lack of funding until late in the design process.

NEW LAW

Senate Bill 49 creates three new statutes, specifically creating the right to file a lien affidavit against the real estate by Architects, Revised Code 4703.20 to 4703.206; Landscape Architects, Revised Code 4703.54 to 4703.546; and Professional Engineers and Surveyors, Revised Code 4733.30 to 4733.306. Because the law requires a written contract with a person

owning an interest in commercial real estate, privity of contract exists, and no “leap-frog” right is required.

Introduced February 4, 2021 jointly by Senator Jay Hottinger (R, Newark) and Senator Vernon Sykes (D, Akron), the bill enjoyed bipartisan support from the beginning. First heard in the Senate Judiciary Committee, no opposition appeared after the required three hearings, and the bill passed on the Senate floor unanimously. 18 Senators joined as co-sponsors. Next heard three times in the House Commerce & Labor Committee, the bill passed on the House Floor by a vote of 90-3, with 26 Representatives joining as co-sponsors. Governor Mike DeWine signed the bill into law on July 1, 2021, effective 90 days thereafter (to give time for a popular referendum to repeal on the ballot.)

The legislation was supported by the following organizations through testimony and letters:

- American Institute of Architects, Ohio Society (AIA Ohio)
- Ohio Chapter of the American Society of Landscape Architects (OCASLA)
- American Council of Engineering Companies of Ohio (ACEC Ohio)
- Professional Land Surveyors of Ohio

Patterned after the Broker’s Lien Law, Revised Code 1311.85 et seq., SB 49 simplifies the lien process, with statutory language located in the licensure chapters of the affected professions.

The “lien” is created automatically when any licensed design professional “enters into a written contract for services to be provided with regard to any interest in commercial real estate”. Only the design professional named in the contract has the lien rights; no employee, agent, or independent contractor or subcontractor of the design professional can claim the lien, as without contract privity.

The lien is not available for public or residential real estate projects.

The lien only covers amounts due under the written contract, signed by the owner of the real estate interest. An “interest” includes a leasehold, but is limited to that tenant’s rights of use.

All mechanics’ liens take precedence for payment by foreclosing upon the secured real estate value. All recorded mortgages and liens also take precedence for payment before the Design Professional’s lien.

To perfect the lien, the design professional must sign a Lien Affidavit containing the statutory information, and record it with the County Recorder where the real estate is located. No deadline limits when the design professional must record a Lien Affidavit after payment is due; however, the longer one waits, the more likely other liens are filed, or the real estate interest is alienated. The Lien Affidavit must include:

- (a) The name of the design professional;
- (b) The name of the owner of the interest in the commercial real estate;
- (c) The name of the record owner of the commercial real estate if different than the owner;

(d) A legal description of the commercial real estate sufficient to reference the instrument by which the record owner took title and the permanent parcel number, if any; no metes and bounds description is required;

(e) The parties to, and date of, the contract;

(f) The amount of the architect's claim under the contract;

(g) A statement that the information contained in the affidavit is true and accurate to the knowledge of the architect.

(h) The affidavit shall be signed by the architect and notarized.

See attached Lien Affidavit example.

Not later than thirty days after recordation, the architect shall serve the recorded affidavit upon all parties listed in the affidavit by such delivery method as provides proof of receipt. Failure to serve shall not invalidate the lien, but a court may consider equitable remedies for such failure.

A person with an interest in the real estate may apply to court to substitute financial security in lieu of the lien, after which the lien is released.

The Design Professional must initiate litigation on the claim within two years after date of recordation, or the lien is extinguished. Any person with an interest in the commercial real estate subject to the lien may demand that the Design Professional file suit, and if not initiated within 60 days, the lien is extinguished.

Once the Design Professional receives payment, the Design Professional must file a lien release. Any person with an interest in the real estate may record an affidavit of satisfaction of the Design Professional lien.

CONCLUSION

The Payment Assurance Legislation for Ohio Design Professionals finally provides the opportunity to secure payment for design work, other-than with a traditional mechanics' lien. The process is simplified, and creates leverage for collecting for unpaid work.

For further information, contact:

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STATE OF OHIO :
County of _____ : ss.:

AFFIDAVIT OF [NAME]
Design Professional Lien

Now comes [name], and being first duly sworn, hereby states as follows:

1. I am over eighteen years old and competent to testify.
2. I am an Ohio-licensed Architect, filing this lien affidavit pursuant to Ohio Revised Code 4703.202.
2. I am an Ohio-licensed Landscape Architect, filing this lien affidavit pursuant to Ohio Revised Code 4703.542.
2. I am an Ohio-licensed Engineer, filing this lien affidavit pursuant to Ohio Revised Code 4733.302.
2. I am an Ohio-licensed Surveyor, filing this lien affidavit pursuant to Ohio Revised Code 4733.302.
3. I am party to a written contract for professional services signed by the owner of commercial real estate to which those services relate. The parties to, and date of, the contract are:
 4. The name of the owner, and record owner (if different), of the interest in the commercial real estate is:
 5. The legal description of the commercial real estate sufficient to reference the instrument by which the record owner took title, and the permanent parcel number are:
 6. The amount due of my claim under the contract is \$.

The information contained in the affidavit is true and accurate to the best of my knowledge. Further, Affiant sayeth naught.

[name]

Sworn to before me and subscribed in my presence by [name] this ____ day of ____, 2021.

Notary Public