



OHIO PUBLIC LAW UPDATE

Summer 2011

Squire, Sanders & Dempsey

Inside:

Budget Bill	2
Revenue Measures.....	2
Shared Services and Mergers	2
Public Records	2
Publication of Legal Notices and Advertisements	3
Fiscal Watch and Fiscal Emergency.....	3
Economic and Community Development.....	3
Prevailing Wage Requirements and Contracting Authority.....	3
Other Provisions	4
Recent Decisions of Interest	5

Budget Bill

The State Budget Bill (amended substitute Ohio House Bill 153) was signed by Governor John Kasich on June 30, 2011, with selected vetoes. The Bill contains the following provisions, among many others, with various effective dates:

Revenue Measures

- Reduces Local Government Fund distributions to 75% of FY 2011 levels for the period between August 2011 and June 2012 and to 50% of FY 2011 levels for all months in FY 2013, with certain protections for counties receiving less than \$750,000.
- Eliminates the estate tax beginning January 1, 2013.
- Accelerates the phase-out of reimbursements to local governments for tangible personal property tax losses and utility personal property tax losses and holds reimbursements at calendar year 2013 levels in subsequent years.

Shared Services and Mergers

- Permits shared services agreements under which a political subdivision agrees to exercise any power, perform any function or render any service for another contracting subdivision that the contracting subdivision is otherwise legally authorized to exercise, perform or render (except for the levying of a tax or the investing of public money). Applies tort liability laws to local governments and their employees when they are rendering services outside of their boundaries pursuant to a shared services agreement.
- Authorizes the creation of a joint police district by contiguous townships and municipalities.
- Authorizes the merger of one or more municipal corporations, whether adjacent to one another or not, with an adjacent unincorporated area of a township with approval by voters.

- Authorizes the merger of one or more townships by majority vote of the boards of township trustees or by initiative petition by electors and with approval by voters.
- Establishes the Local Government Innovation Program to be administered by the Ohio Department of Development and a local government innovation council (LGIC) for the purpose of making loans and grants to political subdivisions, with the LGIC to establish the criteria and competitive process for those awards.

Public Records

- Clarifies records retention procedures and the preparation of records retention and disposition schedules, and consolidates procedures for municipal corporations, townships, school districts, educational service centers, libraries and special taxing districts into one law.
- Limits the amount that can be recovered in forfeiture for a violation of the prohibition against the destruction or damage of public records to \$10,000, regardless of the number of violations; limits attorney fees to the amount recovered for the violation; precludes recovery in forfeiture by others for the same record once a person has already recovered for that record; imposes a five-year statute of limitations for a civil action for injunctive relief or forfeiture; states that a person is not considered "aggrieved" by a violation under the public records statute if "clear and convincing evidence shows that the request for a public record was contrived as a pretext to create potential liability" under the public records statute; and states that a person who brings a civil action under the public records statute waives the right "to decline to divulge the purpose for requesting the record."

Publication of Legal Notices and Advertisements

- Revises requirements for the publication of legal notices and advertisements, including requiring political subdivisions to publish public notices and legal advertisements on a newly established state public notice website and on a newspaper's website, if available.
- Requires each newspaper to establish a government rate for the publication of public notices and advertisements by political subdivisions.

Fiscal Watch and Fiscal Emergency

- Creates a "fiscal caution" designation for municipalities, counties and townships, and charges the Auditor of State with developing guidelines that would put political subdivisions into this designation by identifying practices and budgetary conditions that could result in a future declaration of fiscal watch or fiscal emergency.
- Revises certain fiscal watch and fiscal emergency provisions that apply to municipalities, counties and townships. These include permitting the State, at the request of the financial planning and supervision commission, to escrow any state funding (except for benefit assistance to individuals) for a political subdivision in fiscal emergency that fails to submit a financial plan or to substantially comply with one, and creating measures for the dissolution of municipalities or townships with populations of less than 5,000 that have been in fiscal emergency for at least four consecutive years and meet certain conditions.

Economic and Community Development

- Grants longer notice rights to joint vocational school districts (JVSDs) for tax increment financing (TIF) projects and provides that, if there is a compensation agreement with a school district for

a TIF project, a JVSD is to receive compensation at the same rate and under the same terms.

- Amends the JobsOhio program by removing the requirement that the Governor serve as a member and chairperson of the Board.
- Requires a comprehensive study of the Ohio Housing Finance Agency programs to be undertaken by a committee consisting of various State officials and members of the General Assembly.
- Expands the job retention tax credit.
- Extends the tax credit for rehabilitating historic buildings.
- Authorizes a nonrefundable personal income tax credit for eligible investors making a qualified investment in a defined small business enterprise.
- Extends the allowable term for ODOT public-private partnership agreements.
- Extends by two years the eligibility for a property tax exemption for a qualified energy project.
- Provides a one-year extension of the Enterprise Zone Program to October 15, 2012.

Prevailing Wage Requirements and Contracting Authority

- Gradually increases the monetary threshold for prevailing wage requirements for public improvements, other than for roads, sewers, ditches and related improvements, to \$125,000 in the first year, \$200,000 in the second year and \$250,000 in the third year for new construction, and to \$38,000 in the first year, \$60,000 in the second year and \$75,000 in the third year for reconstruction projects. There is no biennial adjustment for these amounts.
- Prohibits prevailing wage on public improvements by school districts and educational service centers.

- Provides that a contractor and subcontractor shall not be responsible for penalties for prevailing wage violations by their subcontractors if the contractor or subcontractor has made a good faith effort to ensure that its subcontractor complied with prevailing wage requirements.
- Provides that a contractor or subcontractor who underpays its employees is not subject to any further proceedings for prevailing wage violations if the underpayment is less than \$1,000 and full restitution is made to the affected employee.
- Requires an interested party who files a prevailing wage complaint with the Department of Commerce to allege a specific violation by a specific contractor or subcontractor. The complaint is to be made in writing, on a form furnished by the Department of Commerce, and is to include evidence sufficient to justify the complaint. The Director of Commerce is prohibited from investigating any complaint that fails to allege a specific violation, or that lacks sufficient evidence to justify the complaint.
- Exempts from prevailing wage requirements public improvements undertaken by or for port authorities.
- Eliminates the prevailing wage requirement for many economic development programs including for the Ohio Job Ready Site Program, projects funded under Chapters 122, 165 or 166 of the Revised Code, certain energy resource development projects, air quality projects funded by The Ohio Air Quality Development Authority and rail service projects funded by the Ohio Rail Development Commission.
- Authorizes public improvement contracts with construction managers at-risk with a guaranteed maximum price, and design-build firms through a competitive selection and ranking process:
 - Construction managers at-risk and design-build firms are required to provide surety bonds in accordance with rules to be developed by the Director of Administrative Services.
 - A public authority hiring a design-build firm must first hire a "criteria architect or engineer" to assist in preparing conceptual plans, specifications and design criteria, and to provide administrative assistance.
 - The criteria used by a construction manager at-risk and design-builder in selecting a subcontractor must be approved by the public authority; the criteria also must be consistent with rules to be established by the Director of Administrative Services.
- Allows for the award of a bid to a single general contractor in lieu of the requirement to award separate HVAC, plumbing and electrical bids.
- Permits a public authority to hire a design professional or design-builder without following the competitive selection process if the estimated fees are less than \$50,000 and the design firm meets certain qualification requirements.

Other Provisions

- Permits counties to issue general obligation bonds to finance the acquisition or construction of real property with a maximum maturity of up to 40 years, instead of 30 years.

- Permits a county to convey to a municipal corporation any water supply or sanitary facilities acquired or constructed by a county that are connected to facilities of the municipal corporation.
- Authorizes a board of county commissioners to require county offices to use centralized services for purchasing, printing, transportation, vehicle maintenance, revenue collection, mail operation and certain human resources services.
- Authorizes a municipality to grant a public parking franchise to a private or public entity to operate on- or off-street public parking facilities for a term of not more than 30 years.
- Prohibits a political subdivision from banning, prohibiting or otherwise restricting a food service operation based on the existence or nonexistence of certain food-based health disparities, and prohibits local legislation relating to the regulation of the provision of consumer incentive items at food service operations.

Recent Decisions of Interest

R.C. 2744.09(B), which contains the exceptions to political subdivision immunity, “removes immunity only as to the political subdivision and does not affect the statutory immunity of the fellow employee” of the political subdivision against whom an employee also brings a civil action. *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 128 Ohio St.3d 492, 2011-Ohio-1603 (Ohio Supreme Court)

“Because R.C. 321.38 does not require a complaint and hearing before authorizing a board of county commissioners to remove a county treasurer, it is incompatible with Section 38, Article II of the Ohio Constitution, and thus is unconstitutional on its face.” *State ex rel. Zeigler v. Zumbar*, Slip Opinion No. 2011-Ohio-2939 (Ohio Supreme Court)

“The destruction of a public record in violation of R.C. 149.351(A) gives rise to a forfeiture to any person who is ‘aggrieved’ by the destruction.” A requester of public records whose goal is to seek a forfeiture is not aggrieved. *Rhodes v. New Philadelphia*, Slip Opinion No. 2011-Ohio-3279 (Ohio Supreme Court) See “Public Records,” under “Budget Bill,” above, for recent statutory changes to R.C. 149.351.

Written notes referred to and taken by assessors of a city’s promotional examination and briefly in the city’s possession are not public records because the notes were for the assessors’ convenience, were related to the assessors’ purpose and were not collected to be preserved as public records but, instead, were immediately shredded. *Barnes v. Columbus, Ohio Civil Service Commission*, 2011-Ohio-2808 (Ohio App. 10th Dist.)

A city that inadvertently built outside of the easement granted by the affected property owner was not barred from acquiring that property through eminent domain, where the affected property owner was unable to show fraud, bad faith or abuse of discretion in the city’s determination of the necessity of the exercise of eminent domain. *Eschtruth Investment Co., LLC v. City of Amherst*, 2011-Ohio-3251 (Ohio App. 9th Dist.)

“The funds of an enhanced 9-1-1 system may not be used to establish and maintain a countywide community notification system to inform county residents of a public emergency.” 2011 Op. Att’y General No. 2011-014

Squire Sanders continues to be one of the leading public finance firms in the nation, ranked 5th nationally as bond counsel for 2010 by Thomson Reuters, with issues totaling more than \$13.5 billion.

In addition to bond counsel services, Squire Sanders also provides many other legal services to Ohio public sector clients, including economic development, tax increment financing, legislative counseling, special assessments, intergovernment and development agreements, real estate, construction and contracting, brownfields, environmental, litigation, labor, tax and employee benefits.



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