

# **The Construction Conversation**

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

February, 2021

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### **Legislative: Payment Assurance Legislation for Design Professionals**

On Tuesday, February 23, 2021, the Senate Judiciary Committee heard Sponsor Testimony from Senator Jay Hottinger (R, Newark) and Senator Vernon Sykes (D, Akron), who jointly re-introduced prior-session Senate Bill 136, to create lien rights for Design Professionals. (Cont'd page 2.)

### **Legislative: Building Code Concerns**

The legislature is considering statutory obstacles to uniform commercial building codes, allowing local building referenda for clean energy projects, and blocking adoption of national and international model codes. (Cont'd page 2.)

### **Legislative: Contract Statute of Limitations to Shorten**

Supported by businesses which use contract for the sale of goods and services, Senate Bill 13 would shorten the Statute of Limitations, requiring a person to allege a breach of contract claim in only 6 years, down from 8. The legislation would not impair the construction Statute of Repose barring any actions from even accruing after 10 years. (Cont'd p. 3.)

### **Legislative: Other Construction Bills**

Several trade associations are sponsoring legislation which would impact Ohio's Construction Industry, previously

introduced but which did not get passed. (Cont'd p. 3.)

### **Judicial: Contractor Entitled to Full Payment Notwithstanding Advertisement**

After signing a contract to install a roof and gutters, a homeowner deducted from payment a discount based on a later advertisement for new customer sales. (Cont'd p. 3.)

### **Legislative: Transportation Budget**

The House Finance Committee is ready to vote out House Bill 74, the Transportation Budget of \$4.1 billion for the fiscal year beginning July 1, 2021. (Cont'd p. 4.)

### **Judicial: City Sewer Immunity**

When a city sewer backed up into an apartment building, the owner's lawsuit for negligence was dismissed based on governmental immunity. (Cont'd p. 4.)

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

The Bill is co-sponsored by Senator Cecil Thomas (D, Cincinnati), Senator Hearcel Craig (D, Columbus), Senator Michael Rulli (R, Salem), Senator Kenny Yuko (D, Richmond Hts., Minority Leader), and Senator Bill Blessing (R, Cincinnati), the only licensed Engineer in the General Assembly.

Referred to as the “Payment Assurance Legislation” or PAL, the Committee Chair scheduled Proponent Testimony for March 2nd, at which the supporting association membership will testify.

Following supporters, the Committee Chair will schedule Opponent Testimony. In three Committee Hearings last session, the legislation heard no opposition. After a third hearing, the Committee may vote on the legislation, sending it to the Senate floor.

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: Building Code Concerns (Cont'd)**

On February 9, 2021, Senators Reineke (R, Tiffin) and Senator McColley (R, Napoleon), introduced SB 52 to impose township-level building code regulations on wind and solar projects, and subject those considerations to local referenda.

In addition to allow a referenda on code permitting, and Section 3 in the bill explicitly applies the statute retroactively, to “applications pending before OPSB” or a “state or county building authority.”

Such provisions would result in a lack of statewide consistent application of the Building Code, with an issued permit at risk of invalidation.

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The second legislative initiative expands upon current law. In rulemaking, R.C. 121.95 provides that, “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.”

Introduced by Senator McColley (R, Napoleon) and Senator Roegner (R, Hudson), Senate Bill 9 would require reduction of two administrative rules for every one rule enacted, such as the Ohio uniform Building Codes.

Highly opposed by state agencies, on February 24<sup>th</sup>, representatives of the Ohio Building Officials Association and Fire Chiefs testified against the legislation. Nevertheless, the Committee then voted the bill out (4-2, party lines), next to go to the Senate floor, and then to the House.

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 Ohio Building Officials Association is urging a legislative exception to the Ohio Board of Building Standards.

## **Legislative: Contract Statute of Limitations to Shorten (Cont’d)**

Sponsored by Senator George Lang (R, West Chester), the bill passed the General Assembly last session, but failed to achieve amendment concurrence before session’s end.

The Ohio Senate again passed the

bill unanimously on February 3<sup>rd</sup>, and the House passed the bill unanimously on February 25<sup>th</sup>, sending it to the Governor for signature in record time.

## **Legislative: Other Construction Bills (Cont’d)**

House Bill 68 is sponsored by Representative Jon Cross (R, Kenton) and Representative Bride Rose Sweeney (D, Cleveland), to require private owners to pay contractors within 30 days of an approved pay application, or bear the rate of 18% interest. Supported by the Mechanical Contractors Association of Ohio, the Bill is assigned to the House Commerce and Labor Committee, which will hold a second hearing March 3<sup>rd</sup>.

House Bill 88 is sponsored by Representative Tom Patton (R, Strongsville), to create an Ohio Construction Industry Licensing Board license for Roofing Contractors. Supported by the Ohio Roofing Contractors Association, the Bill is assigned to the House Commerce and Labor Committee, and enjoyed its first hearing on February 17<sup>th</sup>.

House Bill 146 is sponsored by Representatives Craig Riedel (R, Defiance) and Susan Manchester (R, Lakeview), to make Prevailing Wage optional for public subdivisions. Assigned to the House Commerce and Labor Committee, the sponsors will testify on March 3<sup>rd</sup>.

Senate Bill 64 is sponsored by Senator Jay Hottinger (R, Newark) and Senator George Lang (R, West Chester), and would regulate Roofing Contractors with consumer-oriented requirements, with registration by the OCILB. The Bill is assigned to the Senate Oversight and

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Government Reform Committee.

Senate Bill 56 is sponsored by Senator Bill Blessing (R, Cincinnati), to limit indemnification terms in Design Professional public construction contracts to the same conditions for which professional malpractice insurance is available. Supported by the American Council of Engineering Companies (ACEC), the Bill is assigned to the Senate Judiciary Committee, with no hearing scheduled yet.

## **Judicial: Contractor Entitled to Full Payment Notwithstanding Advertisement (Cont'd)**

The roofing contractor applied a 50% off magazine coupon for the gutters when signing a full-price contract for roof, heat cables, and gutters totaling over \$16,000.00.

When the work was complete, the homeowner agreed that the work was acceptable, but wrote a check for only \$8,500.00, with the notation "payment in full".

The homeowner explained that he had heard a radio advertisement for 30% off by the roofing contractor, and therefore applied that additional discount to the previously signed contracts, without the contractor's agreement.

R.C. 1301.13 of Ohio's Uniform Commercial Code provides that a conditional check may be cashed by the recipient contractor "under protest", to deny that an accord and satisfaction occurred.

The homeowner not having raised the "accord and satisfaction" claim of notating the check, the court ignored that argument, and found in favor of the roofing

contractor.

*JCASA, Ltd. V. Dean*, 2021-Ohio-380.

## **Legislative: Transportation Budget (Cont'd)**

This is part of the overall state Operating Budget in House Bill 110, also pending in House Finance Committee.

The Office of Budget and Management forecasts a flat Ohio economy for 2021, noting that, "As with GDP [Gross Domestic Product], job growth in Ohio, at least in sheer numbers, has generally lagged behind that of the country in recent years."

Yet the slow recovery has allowed the Governor to propose an Operating Budget of \$85.7 billion for the fiscal year beginning July 1, 2021.

Testifying on behalf of the County Engineers Association of Ohio, Executive Director Dean Ringle expressed concern of over-reliance on state and federal gas taxes, which represent "a shrinking share" of transportation spending, which challenges counties across Ohio.

## **Judicial: City Sewer Immunity (Cont'd)**

Rainwater overwhelmed the city's system, as is common in older infrastructure across the state. The Ohio Environmental Protection Agency became concerned.

Accordingly, the city rehabilitated the sewer pipes with a lining, rather than replace them. This required cutting holes into active laterals after installing the lining.

Because of debris blocking the lateral in front of the apartment building, the city mistakenly believed the lateral to be

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inactive, and did not cut a hole. Accordingly, raw sewage backed up into the apartment building.

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As the city is a political subdivision, it is entitled to general immunity against damages claims for injury or loss “allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.” R.C. 2744.02(A)(1).

But, the statute carves out an exception if “caused by the negligent performance of acts by public employees with respect to proprietary functions.

Accordingly, a city is immune from negligence claims that involve governmental functions but is not immune from negligence claims that involve proprietary functions.

Construction is a governmental function (immune) if it involves “[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement....” But the function is proprietary (liable) if it involves “[t]he maintenance, destruction, operation, and upkeep of a sewer system.” R.C. 2744.01(G)(2)(d).

The distinction requires factual findings by the court. In this case, the courts drew an analogy that the work was more akin to new construction, and therefore the city was immune in exercising a governmental function.

The courts did not mention the liability of the contractor for the installation.

*Eikenberry v. Municipality of New Lebanon,*  
2021-Ohio-453

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Join us in

## **The Construction Conversation**

### **Call-In**

on

**Thursday, March 11, 2020**

3:00 p.m.

Join Zoom Meeting

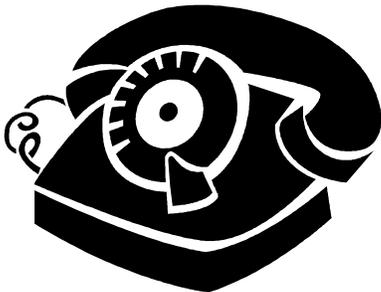
Topic: Construction Conversation

<https://us02web.zoom.us/j/85853378305?pwd=RmJkQ1d2Z0ZkZWYybnRlSDhkcCtEdz09>

Meeting ID: 858 5337 8305

Passcode: 144650

929-205-6099



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