

# **The Construction Conversation**

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

December, 2020

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### **Legislative: Delayed Capital Appropriation Passes**

In a year when tax revenues follow the course of the sagging economy, the Ohio General Assembly found \$2.1 billion for new construction by state agencies and colleges. The bill awaits the Governor's possible line-item veto and signature. (Cont'd page 2.)

### **Judicial: ADA Inapplicable to Design**

In a first impression for Ohio, a federal court has ruled that Design Professionals are not liable under federal enforcement of the Americans with Disabilities Act ("ADA") for design failures. (Cont'd page 2.)

### **Legislative: Lame Duck Limps to End**

The House scheduled a session date for Wednesday, December 30, 2020, in the hope of finishing pending business. The Senate is not scheduled. Overall, the General Assembly ends having introduced 1,194 bills, with the Governor only signing 59 bills. (Cont'd p. 3.)

### **Administrative: Transportation Infrastructure Ranking Drops**

A national study of highway infrastructure considering overall cost-effectiveness and condition moved Ohio

over five states to 13<sup>th</sup> worst in the nation, a direct result of construction funding deficiencies. (Cont'd p. 3.)

### **Judicial: City Cannot Avoid Street Maintenance**

The Supreme Court of Ohio ruled that the City of Cincinnati could not avoid its duty to maintain and repair streets by arguing that the streets never were "dedicated" in the 19<sup>th</sup> Century, an overt stretch as a result of low funding availability. (Cont'd p. 3.)

### **Judicial: Arbitration Waived by Failure to Cooperate**

A subcontractor filing a mechanics' lien did not have to wait for arbitration between the project owner and prime contractor, due to the owner's failure to pursue arbitration timely. (Cont'd p. 4.)

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## **Legislative: Delayed Capital Appropriation Passes (Cont'd)**

The bill incorporated numerous non-budget items known as “log rolling”, barred by the Ohio Constitution but seldom challenged. Originally, the bill was introduced for pandemic relief, but became the vehicle for numerous amendments of “must” legislation before the term ends.

\$452 million will go to local school construction, in addition to the earlier appropriation of \$300 million. These projects typically require matching local funds, and are administered through the Ohio Facilities Construction Commission.

OFCC announced that the total budgeted in its pipeline will reach \$3 billion in total value spent on new projects through June, 2021. OFCC also announced an update to the Ohio School Design Manual.

The Appropriation also set aside \$452 million for Ohio Colleges and Universities.

Ohio prisons will receive \$280.7 million for renovations.

Local infrastructure received \$280 million on top of an earlier \$255 million in Senate Bill 4.

Clean Ohio received \$62.5 million.

## **Judicial: ADA Inapplicable to Design (Cont'd)**

Typical to ADA enforcement, a disabled “checker” filed a complaint of limited access for wheelchairs, in violation of the ADA’s requirement that a hotel’s renovation design and construction created 82 illegal barriers.

The complainant sued the hotel, the general contractor, the architect and two engineers. The design professionals moved to dismiss, as they had no liability for the improper construction.

In an important precedent, the United States District Court, Northern Ohio held that Congress restricted ADA enforcement only to public accommodations and new commercial facilities, which fail “to design and construct facilities” readily accessible to disabled individuals. 42 U.S.C. 12183(a)(1).

Interpreting the phrase “design and construct”, the Court held that only owners, operators, lessors or lessees may be liable for both actions. A design professional has no control over construction, and therefore is not liable under the statutory wording.

The attorney who successfully represented the design professionals is Brian T. Winchester, of the law firm McNeal, Schick, Archibald & Biro Co., LPA, Cleveland, Ohio.

For more information, see:

*Mortland v Hotel Stow*, USDC ND, Case no. 5:19-cv-02019

## **Legislative: Lame Duck Limps to End (Cont'd)**

All legislation not passed by the start of next session expires. Typically, each chamber merely takes a break at the end of each day, not truly “adjourning” by scheduling another day. When the General Assembly agrees to end session, it adjourns “sine die” or without another day.

Legislation that almost made it includes:

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House Bill 159 to limit indemnity liability for design professionals passed the House Floor, but did not begin hearings in the Senate. Given bipartisan support, the legislation is likely to see reintroduction.

House Bill 199 to require a Commercial Roofing Contractor License passed the House, but enjoyed no hearings in the Senate. Given reintroduction in several sessions, the legislation is likely to be reintroduced.

House Bill 251 would reduce the Statute of Limitations for contract lawsuits to six years, down from eight. The legislation passed the House and Senate almost unanimously, but requires House concurrence to Senate amendments.

House Bill 258 would require State agencies to issue professional licenses to individuals who complete an apprenticeship program. An ideological bill, the legislation only received three House Committee hearings. But the sponsor will return in the new session.

House Bill 263 requires licensing agencies to specify criminal convictions which would terminate a professional license, eliminating the general categories currently in statute. Both chambers passed the bill almost unanimously, to send it to the Governor for signature.

House Bill 517 would exempt the Ohio Building and Fire Codes from rule review restrictions which interfere with uniform code adoption. The bill only had one hearing in the House. Because of the significant issue, we likely will see reintroduction.

Senate Bill 136 would establish a payment assurance program for registered

design professionals. Supported by the design industry and with no opposition, the bill likely will be reintroduced.

Senate Bill 246 would require that an agency issue a professional license if the applicant holds a similar license from another state. The legislation received ten hearings and failed to pass in the Senate, with no time to go through the House.

## **Administrative: Transportation Infrastructure Ranking Drops (Cont'd)**

The Reason Foundation ranked Ohio as 13<sup>th</sup> in overall fatalities, 19<sup>th</sup> in structurally-deficient bridges, 21<sup>st</sup> in traffic congestion, and 29<sup>th</sup> in urban and rural pavement condition.

Based on mileage, Ohio is the 10<sup>th</sup> largest highway system in the U.S. Neighboring Indiana and Pennsylvania ranked worse (Michigan and Kentucky better). This is in spite of a 9% Ohio funding increase to \$152 billion.

North Dakota, Missouri, and Kansas ranked as the best, with Alaska and New Jersey the worst.

Ohio's Joint Transportation Study Committee ended with approving a Final Report with no recommendation for funding changes. The Ohio Contractors Association recommended a switch to a vehicle-miles-traveled funding concept, which the Committee did not adopt.

The Ohio Turnpike and Infrastructure Commission approved its 2021 capital budget of \$205 million. The Commission reported 2020 completion of 16 bridge projects, and resurfacing of over 108 miles of roadway.

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## **Judicial: City Cannot Avoid Street Maintenance (Cont'd)**

A building owner in the Mount Terrace section of Cincinnati complained that the neighboring streets were in disrepair due to inadequate water drainage. The City disowned any responsibility, claiming that the City never passed an ordinance dedicating or accepting ownership.

The owner sued in an original action in mandamus, to which the lower court of appeals denied any relief on the argument that the streets were private, the City never having accepted ownership of the development.

The Supreme Court reversed, holding that the Platting Commission Act of 1871 (now Revised Code 723.03) automatically dedicated such streets, avoiding the need for a separate ordinance.

Dedication and acceptance are accomplished through the development's platting process, a separate means of statutory dedication. Accordingly, the City has responsibility to maintain the streets, and the Court should order it so.

*State ex rel. Delta Lookout, LLC v Cincinnati*, 2020-Ohio-5486.

## **Judicial: Arbitration Waived by Failure to Cooperate (Cont'd)**

A drywall subcontractor timely filed a mechanics' lien in 2017 on the construction of an "IHOP" restaurant. When the owner sold the property, the lien followed through to the new buyer.

The property owner and general contractor were in dispute about funds owed. When the property owner asked to

stay further collection action including lien foreclosure pending arbitration, the lower court granted a stay, putting on hold the subcontractor's efforts of payment.

But the owner refused to cooperate in arbitration, first not paying the required fee deposit, then changing legal counsel. This delayed the subcontractor's efforts further.

Accordingly, the subcontractor sued the owner and general contractor, upon which the Montgomery County Court of Appeals lifted the stay and eliminated arbitration as a condition precedent.

The Court noted that Ohio law routinely allows a party to waive arbitration. Given the owner's acts of refusal to participate, the owner waived arbitration. After waiting three years, the subcontractor could proceed to foreclose in court.

*Fayette Drywall, Inc. v Oettinger*, 2020-Ohio-6641.

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Join us in

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**Call-In**

on

**Wednesday, January 13, 2020**

3:00 p.m.

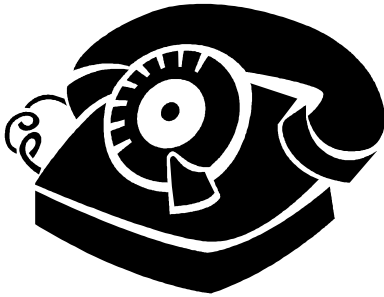
Join Zoom Meeting

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929-205-6099



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