

The Construction Conversation

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

February, 2023

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Legislative: Building Code Coordination

Legislation introduced both in the House and Senate would require that building inspectors and the Fire Marshal develop standards to coordinate enforcement of the Building Code. (Cont'd p. 2.)

Legislative: Expedited Board of Building Appeals Hearings

Reintroduced from last session is Senate Bill 41 by Senator Kristina Roegner (R, Hudson), to provide for expedited appeals from building inspections and occupancy permit denials. (Cont'd p. 2.)

Judicial: Sub vs. General Arbitration

In a rare appeal of an arbitration award, the Court of Appeals affirmed the Subcontractor's win, but upheld awarding attorney fees to the losing General Contractor. (Cont'd p. 3.)

Administrative: Agency Construction Funds

Numerous state agencies provide funding for construction projects, other-than for construction of their own work, to support infrastructure or other interests across Ohio. (Cont'd p. 3.)

Legislative: ODOT Budget

The Ohio House passed House Bill 23, the Transportation Budget, with a 25% increase in funding through federal Infrastructure funding, approximately \$3.7

billion annually. (Cont'd p. 3.)

Judicial: Homeowner's Inspection Controls

A Homeowner lost its claim against a Builder after failing to inspect the structure when purchased. The original property owner contracted with Home Builder to design and construct a new home. The permitted design included wood floors over joists visible in the unfinished basement. (Cont'd p. 4.)

Judicial: Mechanics' Lien Unproven

A bank foreclosure sale of a home does not automatically pay a mechanics' lien, without proof of the underlying claim by the contractor. The sale netted more than was owed to the bank, with sufficient funds to pay other lien holders, or to return such excess to the homeowner. (Cont'd p. 4.)

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Legislative: Building Code Coordination (Cont'd)

House Bill 65 was introduced by Representative Jamie Callender (R, Concord), and Senate Bill 67 was introduced by Senator Jerry Cirino (R, Kirtland).

Because local building departments require the local fire department informally to check off before issuing a building “permit”, there exists a common misperception about authority.

R.C. 3781.105 already requires the Board of Building Standards to certify individuals who design fire safety systems.

R.C. 3781.03(A) provides that the Fire Marshal shall enforce laws related to fire prevention. But this differs from enforcement regarding construction prior to the building department issuing a certificate of occupancy.

In contrast, R.C. 3781.03(B) provides that the building department shall enforce all laws “that relate to the construction, arrangement, and erection of all buildings or parts of buildings”.

Technically, nothing in the law requires a building “permit” or requires a contractor to “pull a permit”. R.C. 3791.04 requires a project owner to submit plans sealed by a licensed design professional for approval.

The legislation will receive its first hearing on March 1, 2023 before the Senate Veterans and Public Safety Committee.

Legislative: Expedited Board of Building Appeals Hearings (Cont'd)

The bill appeared last session as

somewhat of a “solution without a problem” because it was not introduced with construction industry support. Contractors expressed appreciation for expedited consideration, but were concerned of unintended consequences, including undue burden on members of the Boards of Building Appeals.

The difficulties appear to be worked out, as the Associated General Contractors, the Affiliated Construction Trades (ACT Ohio), and NECA Cleveland have testified in support.

Judicial: Sub vs. General Arbitration (Cont'd)

The General Contractor subcontracted the metal stud and drywall work. Subcontractor filed a mechanic’s lien when claiming non-payment for additional work. Pursuant to the subcontract, the claims went to three arbitrators, who awarded over \$102,000.00 to the Subcontractor plus interest.

Both parties claimed attorney fees. The panel found that the General Contractor had a good-faith basis for withholding payment, and therefore denied attorney fees to the Subcontractor.

However, the panel enforced the fee-shifting language of the subcontract to award over \$627,000.00 for the General Contractor’s attorney fees.

When reviewing an arbitration appeal, the court of appeals should respect the findings of fact, but reviews issues of law de novo. Review of contract language enforceability and whether the arbitrators exceeded their authority under the contract therefore are reviewable.

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Finding that the arbitrators' award was drawn from the essence of the parties' contract, the Court of Appeals affirmed the attorney fees award.

The "American Rule" is that each party bears the cost of their own attorney fees. The Court noted three exceptions: a statutory award, bad faith of the other party, or a contract provision.

Because the subcontract contained a very broad indemnification clause, the General Contractor had to pay the Subcontractor's claims, but received in return its Attorney Fees for having to defend against the Subcontractor.

Cleveland Construction, Inc. v. Ruscilli Construction, Inc., 10th Dist. Franklin, 2023-Ohio-363.

Administrative: Agency Construction Funds (Cont'd)

Ohio Water Development Authority: Awarded \$4.6 million in 6 low-interest loans to Ohio communities to improve wastewater and drinking water infrastructure.

Ohio Public Works Commission: Released \$7,057,668 for Clean Ohio Conservation Projects, with \$3 million going to Great Parks of Hamilton County, and \$1,447,000 to Hocking County.

Dept Development Building Demolition and Site Revitalization Program: 599 structures in 15 counties received funding, bringing the Program total to \$150 million allocated.

Ohio Facilities Construction Commission: Certified the 400th LEED Green Building School, Waynesville Elementary in Warren County.

Legislative: ODOT Budget (Cont'd)

\$2.2 billion will go towards pavement, \$717 million for bridges, \$360 million for safety upgrades, and \$579 million for large capacity projects.

The County Commissioners Association of Ohio lobbied to increase tripling the force account threshold, and raising the Competitive Bidding threshold to \$100,000.00, allowing for unbid and self-performed work.

The Transportation Review Advisory Council (TRAC) approved the annual list of projects to fund over the next 4 years, including more than \$390 million.

The ODOT and Kentucky Transportation Cabinet released the request for proposals to provide construction and design services for the Brent Spence Bridge, estimated at more than \$3 billion.

The legislation now proceeds to the Senate before going to the Governor for signature, or line-item vetoes.

Judicial: Homeowner's Inspection Controls (Cont'd)

During construction, the owner substituted tile without amendment of the plans, and installed by a third party. The first owner then sold the home to a new homeowner, who finished the basement.

When the tile and grouting cracked, the new homeowner sued the original Home Builder for negligence in workmanship, given that the parties had no contractual relationship.

Accordingly, the Court ruled that the 4-year Tort Statute of Limitations applied,

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not the contract 6-year statute. Yet, because the damage did not occur initially, the statute began only after the damage started.

Because the cracking was caused by the lack of bracing, the new homeowner and his agents could see that condition of construction, plainly visible in the unfinished basement. Accordingly, the Court granted summary judgment to the original Home Builder.

Varwig v. JA Doyle, LLC, 6th Dist. Lucas, 2023-Ohio-210.

Judicial: Mechanics' Lien Unproven **(Cont'd)**

In 2014, a mechanical contractor took a judgment for over \$26,000.00, and filed a lien against the residence in which the contractor had leased a furnace. In 2018, the mortgage bank foreclosed on its note, resulting in a sheriff's sale.

In 2021, the contractor filed a motion with the court for payment of the mechanics' lien out of excess funds. In 2022, the court granted payment to the contractor.

The homeowner appealed. The Court of Appeals held that the mere listing of a recorded lien is not per se proof of the facts alleged in the affidavit. Required is the contractor's proof at trial of the statutory compliance and validity of the mechanics' lien before payment is ordered.

Fifth Third Mortgage v. McElroy, 8th Dist. Cuyahoga, 2023-Ohio-76.

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Join us in

The Construction Conversation Call-In

on

Thursday, March 16, 2023

3:30 p.m.

Luther L Liggett is inviting you to a
scheduled Zoom meeting.

Join Zoom Meeting

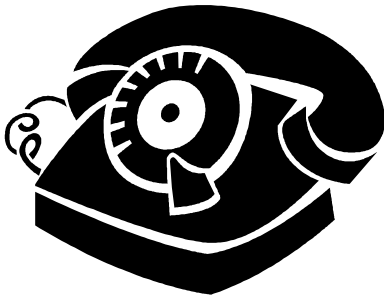
<https://us02web.zoom.us/j/89070398283?pwd=K242c2pKeUJXclNZNWRFQm5jb0orQT09>

Meeting ID: 890 7039 8283

Passcode: 401763

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