



The Construction Conversation

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

January, 2018

A Service of Luther L. Liggett, **Graff & McGovern, LPA**

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Legislative: Bill to Allow Third Party Management

New legislation proposes moving procurement for maintenance, repair, and retrofits from Ohio Facilities Construction Commission oversight to a private third-party under contract with the Department of Administrative Services. (Cont'd page 2.)

Administrative: Transportation Agencies Announce Funding

The Ohio Department of Transportation announced 12 new construction projects leveraging bond funding from the Ohio Turnpike and Infrastructure Commission. (Cont'd page 2.)

Judicial: Construction Statute of Repose Applies Against Public Agencies

In a landmark decision, the Fifth District Court of Appeals for Tuscarawas County issued its opinion that Ohio's Statute of Repose ends all rights to sue designers after ten years from the date of substantial completion. (Cont'd page 2.)

Legislative: Right-to-Work Initiatives

Maximum voter turnout will be sought for a "six-pack" ballot initiative in the 2020 Presidential Election, to change the Ohio Constitution eliminating closed union

shops by both private and public "Right-to-Work" initiatives. (Cont'd p. 3.)

Administrative: Prison Plumbing Projects

The Ohio Facilities Construction Commission will take competitive bids in February and March on three Plumbing Projects at state correctional facilities, base bids estimated at \$4.3 million. (Cont'd p. 3.)

Judicial: City Sewer Liability, Immunity Distinguished

The 11th District Court of Appeals for Lake County distinguished between fact situations when Ohio residents can sue a city for failure to maintain or repair its sewer system. (Cont'd p. 3.)

Legislative: Workers' Comp Group Self-Insurance

New legislation would require the Ohio Bureau of Workers' Compensation to write new rules allowing various employers to establish a self-insuring group for coverage. (Cont'd p. 4.)

Judicial: Arbitration Enforced

Two appellate courts have enforced arbitration in construction, even when using a fictitious business name. (Cont'd p. 4.)

The Construction Conversation

January, 2018

Page 2

Legislative: Bill to Allow Third Party Management (Cont'd)

House Bill 471, sponsored by Representative Anne Gonzales (R, Westerville) would eliminate OFCC oversight for any ODAS project to “maintain, repair, rehabilitate, remodel, renovate, enlarge, improve, alter, equip, furnish, paint, and decorate” any state agency building, including the design.

Given the broad definition, this authority effectively removes all but new construction from OFCC, including energy retrofits.

On January 1, 2018, ODAS renewed its unbid contract with IAP Government Services Group through 2019, to serve as a Third-Party Administrator of such construction, at a fee of 8.5% of each project's cost.

Construction industry trade associations are expressing concern that state design and bidding requirements do not appear expressly as requirements incorporated into the transfer of authority.

The legislation is assigned to the House Government Accountability and Oversight Committee. No hearings are scheduled yet.

Administrative: Transportation Agencies Announce Funding (Cont'd)

ODOT's Transportation Review Advisory Council (TRAC) approved \$58.8 million in new funding for projects in 9 different counties. Five projects are ranked as Tier I, three projects are Tier II, and one is Tier III.

The Turnpike issued revenue bonds this week for \$530 million in part to fund the ODOT projects.

Judicial: Construction Statute of Repose Applies Against Public Agencies (Cont'd)

The Court held that this law bars actions both in tort (personal injury) and in contract, a significant distinction that goes contrary to outdated Ohio Supreme Court precedent.

The Ohio Department of Transportation argued that the Statute of Repose only barred actions in tort, without a contract. Because ODOT had a contract with the design professional (as ODOT always does,) the Attorney General argued that the Statute of Repose does not apply to contract claims.

Further, the State argued that no time limitation bars government action, based on historic common law from England under a doctrine known as "nullum tempus occurrit regi" (time does not run against the king). The Court rejected both arguments.

On behalf of architects statewide, AIA Ohio filed an amicus curiae brief in support of this result. The Court's finding will serve as statewide precedent as the Ohio Supreme Court may consider the same issue in separate litigation. The Court's key finding is as follows:

"We find the stated concerns underlying enactment of the statute apply to actions brought against design professionals for injury to person or property caused by a defective or unsafe improvement to real property, whether such action sounds in tort or contract. In addition, the legislative history quoted above reflects an intent to

The Construction Conversation

January, 2018

Page 3

promote a greater interest than the four-year statute of limitations prescribed by *** the Revised Code. *** It matters not whether the action is brought in tort or contract, if the resultant damages are injury to property of the type set forth in R.C. 2305.131, the statute applies."

State of Ohio, Dept. Transportation v. Karl R. Rohrer Assocs., Inc., 2018-Ohio-65.

Legislative: Right-to-Work Initiatives (Cont'd)

State Representatives John Becker (R, Cincinnati) and Craig Riedel (R, Defiance) introduced six separate Constitutional amendments which, if passed by the General Assembly, will appear on the Presidential ballot in 2020.

The proposed amendments include:

- HJR 7, Public-Sector Open Shop ("Right-to-Work").
- HJR 8, Private-Sector Open Shop ("Right-to-Work").
- HJR 9, Prevailing Wage Repeal.
- HJR 10, Prohibit Project Labor Agreements.
- HJR 11, Union Re-certification annually.
- HJR 12, Prohibit Union Dues deduction for political use.

The House Government Accountability and Oversight Committee will hear testimony on the Resolutions, yet to be scheduled.

Administrative: Prison Plumbing Projects (Cont'd)

While listed as "General Trades", the projects relate solely to boilers and plumbing.

2/8/18	Mansfield	Showers	\$1.5 mil
2/20/18	Lucasville	Plumbing	\$1 mil
3/6/18	Dayton	Boilers	\$1.8 mil

In addition, OFCC seeks designer qualification proposals for two major school projects.

Wynford City Schools in Crawford County plans to build a new LEED Silver Middle/High School of over 73,000 square feet for an estimated \$20.3 million.

Northeastern Local Schools in Defiance County plans to build a new LEED Silver Middle/High School of 97,000 square feet for an estimated \$25.2 million.

For further information:

<http://ofcc.ohio.gov/Opportunities>

Judicial: City Sewer Liability, Immunity Distinguished (Cont'd)

After a series of sewage backups into hundreds of homes, a local resident brought a class-action suit against the city for negligence, asking for damages to their homes.

The city claimed immunity from damages claims on the basis that management of its sewer system is a governmental function.

The Court noted that R.C. 2744.01(C)(2)(I) includes project design and construction as governmental functions, and

The Construction Conversation

January, 2018

Page 4

therefore a city is immune from suits for damages during those construction processes.

However, once the project is complete, operating and maintenance of a sewer system is a proprietary function, subjecting the city to litigation.

Design professionals and contractors are involved in both phases. Accordingly, this decision distinguishes when a design professional or contractor might be liable to the city for indemnification, for failing to “maintain” a sewer system.

Ragazzo v. City of Willowick, 2017-Ohio-9337.

Legislative: Workers’ Comp Group Self-Insurance (Cont’d)

Representative Michael Henne (R, Clayton) introduced House Bill 459, to eliminate the requirement that an individual employer qualify individually to join a self-insurance group, opting out of premium payments to the Bureau.

Traditionally, the Bureau has denied unrelated employers without a substantial financial history from joining together when they would not qualify for self-insuring status individually.

The legislation is assigned to the House Insurance Committee, where the sponsor testified. “By allowing employers to group together, they can have the same characteristics of the employers that are self-insured.”

Judicial: Arbitration Enforced (Cont’d)

A homeowner contracted for a single-family home, which contract included an arbitration provision. When the homeowner sued for breach and fraud, the contractor moved for arbitration, which brings in construction-experienced arbitrators and waives certain legal rights and provisions, including trial by jury.

The homeowner denied formation of the contract in the first instance, because the contract used a name for the contractor which did not state the full corporate name correctly. The homeowner claimed this to be fraud in the inducement.

The 11th District Court of Appeals for Lake County held that, to avoid arbitration, the homeowner had to prove that the arbitration provision itself was fraudulently induced, and not the contract in general.

Koudela v. Johnson & Johnson Custom Builders, LLC, 2017-Ohio-9331.

In a second case, the 12th District Court of Appeals for Butler County held that an arbitration provision was enforceable by reading the entire contract and provisions, notwithstanding that the “box” for arbitration was not marked.

However, the contractor lost the arbitration right when waiting too long to claim arbitration, instead participating in the court proceedings initially. Thus, the contractor waived arbitration.

Patrick v. Dixie Imports, Inc., 2017-Ohio-9093.

Join us in

The Construction Conversation

Call-In

on

Thursday, February 15, 2018

2:30 p.m.

Dial In: 805-309-0010

Access Code 754-477-909 #

Calendar for the Year:

Thursday, March 15, 2018
Thursday, April 12, 2018
Thursday, May 17, 2018
Thursday, June 14, 2018
Thursday, July 12, 2018
Thursday, August 16, 2018
Thursday, September 13, 2018
Thursday, October 18, 2018
Thursday, November 15, 2018
Thursday, December 13, 2018

