

# **The Construction Conversation**

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

April, 2021

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

On April 20, 2021, the Senate Judiciary Committee unanimously voted out Senate Bill 49, to create lien rights for Design Professionals. Next stop: Ohio Senate Floor. (Cont'd page 2.)

### **Legislative: Construction Legislation on the Move**

The Ohio General Assembly started this year with active consideration of many bills impacting the Construction Industry. Two months remain before Summer Break. A list of pending legislation follows. (Cont'd page 2.)

### **Administrative: OFCC Approves \$336 Million for School Construction**

The Ohio Facilities Construction Commission approved matching State funds to local School budgets for six new construction projects across the State. (Cont'd p. 3.)

### **Administrative: White House Infrastructure Report**

The White House issued its Fact Sheet in support of its American Jobs Plan Infrastructure Funding Bill, specifically rating Ohio facilities. (Cont'd p. 3.)

### **Administrative: ODOT's Construction Season Begins**

The Ohio Department of Transportation announced the beginning of highway construction work for 2021,

including 956 projects costing \$1.92 billion. Ohio's Motor Vehicle Use Tax increased in 2019, which kept ODOT funding available in spite of a 2020 pandemic drop in travel by 15.5%. (Cont'd p. 3.)

### **Judicial: False Information Claim an Exception to Arbitration**

In a case where a school contracted for the construction of a swimming pool, a court of appeals denied referral to arbitration out-of-state on the basis of the contractor's initial false information in entering into the contract. (Cont'd p. 4.)

### **Judicial: Cross-Claim Interlocutory**

When a state agency sued an HVAC contractor, the contractor cross-claimed against the supplier. The court's dismissal of the supplier is interlocutory and not subject of appeal until the entire case is concluded, leaving the HVAC contractor to defend without the supplier in the same lawsuit. (Cont'd p. 4.)

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

No person expressed opposition to the legislation as of this date, referred to as the “Payment Assurance Legislation” or PAL.

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: Construction Legislation on the Move (Cont'd)**

HB 68, Prompt Pay for Private Construction Contracts, Rep. Jon Cross, R, Kenton. House Commerce & Labor Committee, 3 hearings.

HB 88, Commercial Roofing Contractors’ License, Rep. Tom Patton, R, Strongsville. House Commerce & Labor Committee, 1 hearing.

HB 146, Prevailing Wage Repeal, Rep. Craig Riedel, R, Defiance. House Commerce & Labor Committee, 1 hearing.

HB 181, Full License for Apprentices without other requirements, Rep. Jena Powell, R, Arcanum. House Commerce & Labor Committee, 1 hearing.

HB 203, Ohio License if licensed in another state, Rep. Jena Powell, R, Arcanum. House State & Local Government Committee, 1 hearing.

HB 247, Revise Plumbing Inspection Law, Rep. Tom West, D, Canton. House Health Committee, 1 hearing.

SB 9, Reduce Regulations 2-for-1, Sen. Robert McColley, R, Napoleon. Passed Senate, pending House Government Oversight Committee.

SB 52, Wind Turbine Setbacks, allowing local building code revisions, Sen.

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William Reineke, R, Tiffin. Senate Energy & Public Utilities Committee, 3 hearings.

SB 56, Indemnification Limitations in Design Professional Contracts, Sen. Bill Blessing, R, Cincinnati. Senate Judiciary Committee, 2 hearings.

SB 64, Regulate Roofing Contractors, Sen. Jay Hottinger, R, Newark. Senate Government Oversight & Reform Committee, 1 hearing.

SB 131, Ohio License if licensed in another state, Sen. Kritina Roegner, R, Hudson. Committee Senate Workforce & Higher Education Committee, no hearing.

SB 142, Residential Contractor License, Sen. Tim Schaffer, R, Fairfield. Senate Small Business & Economic Opportunity Committee, no hearing.

## **Administrative: OFCC Approves \$336 Million for School Construction (Cont'd)**

This is in addition to the current 96 projects in design phase, and 227 projects in construction, totaling almost \$3 billion in education infrastructure spending.

The six new projects include:

- \$88 million Cuyahoga Falls City Schools
- \$26 million Manchester Local Schools
- \$43 million Rolling Hills Local Schools
- \$62 million Triway Local Schools
- \$49 million United Local Schools

- \$65 million Valley View Local Schools

## **Administrative: White House Infrastructure Report (Cont'd)**

The Report included the following comments specific to Ohio.

- Ohio drivers pay \$506 per year in repair costs for driving on poor roads. The legislation includes \$115 billion for roads and bridges.
- Public transportation is insufficient, adding 76% to commute time. The legislation includes \$85 billion for public transportation.
- Internet is not available in 14% of Ohio households, with only one provider in 58% of the state. The legislation proposes \$100 billion for internet.
- Veterans' health care facilities serve more than 700,000 Ohioans. The legislation will add \$18 billion for VA facilities.
- Drinking Water Infrastructure in Ohio will require \$13.4 billion in the next 20 years. The legislation includes \$111 billion for clean water.

## **Administrative: ODOT's Construction Season Begins (Cont'd)**

Projects will include 876 bridges, \$540 million for Central Ohio, and 160 projects in Southwest Ohio. ODOT will complete the additional lane in both directions of I-70 between Dayton and Columbus. Also planned is widening I-71 to three lanes in each direction south of Franklin County to State Route 665.

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## **Judicial: False Information Claim an Exception to Arbitration (Cont'd)**

Soon after construction, the school found out that the plans should have been submitted to the local Department of Health for approval. Upon late submission, the Department denied a permit as non-compliant with Ohio law.

Because of the missing permit, the school could not use the pool, and abandoned the site. Upon suing for negligent misrepresentation in the sale (and not breach of contract), the contractor demanded arbitration in Pennsylvania.

The court held that the scope of the dispute does not fall within the terms of the contract, but go to the very creation of the contract based on false information. Therefore, the arbitration provision is unenforceable for that purpose.

*Little Aquanauts LLC v. Makovich & Pusti Architects, Inc.* 8<sup>th</sup> Dist. Cuyahoga, 2021-Ohio-942.

## **Judicial: Cross-Claim Interlocutory (Cont'd)**

The Ohio Facilities Construction Commission sued the HVAC contractor for breach of contract on a school project. The contractor purchased the materials from a manufacturer's representative, suing the manufacturer as supplier.

The court dismissed the complaint against the manufacturer, as the contractor lacked a subcontract directly with the supplier. It does not appear that the contractor sued the manufacturer's representative.

In the absence of a contract with the material supplier or manufacturer, the contractor does not enjoy privity, and therefore cannot sue under the Economic Loss Doctrine.

Upon dismissal, the contractor appealed. The Court of Appeals dismissed the appeal for lack of a final order. The contractor had adequate rights to defend against the underlying claim in the first instance, and later against the party from whom the contractor purchased the materials.

*Vaughn Industries, LLC v LG Electronics, Inc.*, 5<sup>th</sup> Dist. Richland, 2021-Ohio-1253.

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Join us in

**The Construction Conversation**

**Call-In**

on

**Thursday, May 13, 2021**

3:00 p.m.

Join Zoom Meeting

Topic: Construction Conversation

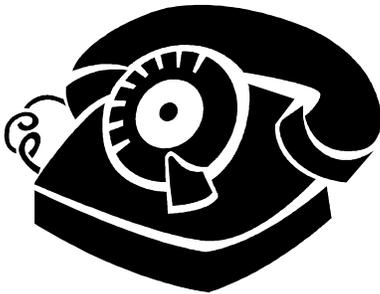
Join Zoom Meeting

<https://us02web.zoom.us/j/82334092764?pwd=K294Kys1eDhWdmcyaisrVFpIcGlqQT09>

Meeting ID: 823 3409 2764

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