

The Construction Conversation

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

February 2024

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Legislative: Capital Construction Funding

For local infrastructure projects to begin July 1st, the Ohio Public Works Commission will need an emergency clause if funds legislation does not pass by the end of March. (Cont'd p. 2.)

Judicial: State Agencies are One Party: State of Ohio

A Court of Appeals reversed the Ohio Court of Claims summary judgment, when a contractor sued for breach of contract, alleging tortious interference among separate state agencies. (Cont'd p. 2).

Administrative: Joint Purchasing Does Not Include Construction

For the seventh time in over 40 years, the Ohio Attorney General again issued a legal opinion that a Joint Purchasing Program cannot purchase "construction services". (Cont'd p. 3).

Judicial: Theft Claims Outside of Contract Breach

A commercial interior buildout contractor sued for breach when a nail salon customer refused to pay; customer filed counterclaims for breach and theft by deception when the contractor failed to credit a prior payment. (Cont'd p. 3).

Legislative: General Election to Determine House Speaker

In the Primary Election held Tuesday, March 19th, four incumbent

Republican House members lost to Republican challengers. All four had voted for Jason Stephens (R, Kitts Hill) for Speaker. (Cont'd p. 3).

Judicial: Party Not Bound by Complaint for Arbitration Demand

A building owner sued a roofing contractor in court without filing for mandatory arbitration as stated in the contract. When dismissing the complaint without prejudice, the owner maintained the right to enforce arbitration. (Cont'd p. 4).

Administrative: ODOT TRAC

The Transportation Review Advisory Council approved 18 major projects in 13 counties for funding of over \$127 million, with Tier I projects funded through Fiscal Year 2027, budgeting Design Development through Construction. (Cont'd p. 4).

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Legislative: Capital Construction Funding (Cont'd)

But the General Assembly will not return until the Governor's "State of the State" address April 10th.

House Bill 27 passed both the House and the Senate, with construction appropriations totaling \$1.37 billion. The legislation also includes a requirement that state colleges and universities provide a financial cost and aid disclosure form to full-time students as part of the student's initial financial aid packet.

Now, the House and Senate need to reconcile differences, most likely in a Conference Committee.

House Bill 2 passed the House with local earmarks, only* to be rejected by Senate leadership and therefore stalled.

Controversy surrounds the "One Time Strategic Community Investment Fund" to spend \$700 million on earmarked projects in 88 counties. The legislature set aside the funding in last year's Operating Budget. But Republican leadership disagree on how to select the projects across the state.

This will be the last biennium for the 10-year Ohio Public Works Commission program, requiring a subsequent Constitutional amendment vote for future bond financing and spending.

Judicial: State Agencies are One Party: State of Ohio (Cont'd)

A construction contractor entered into an agreement with the Ohio Department of Administrative Services ("DAS") to select construction contractors for state agencies based on "task orders" and not on

public bids. When the State canceled the agreement, the contractor sued.

The contractor alleged that the Ohio Facilities Construction Commission tortiously interfered with its business relationship and contract with DAS. The Court of Appeals found that the trial court erred by not considering factors outlined in Section 767 of the Restatement 2d of the Law on Torts for tortious interference.

Nevertheless, the Court of Appeals then upheld judgment for the State on the basis that two state agencies cannot "conspire" because they are the same party: the State of Ohio. A plaintiff must allege that an independent third party must interfere. The State as a single party cannot conspire with itself.

Separately, the Court of Appeals upheld the contractor's appeal for trial on breach of contract. The trial court dismissed the case on the basis that the contractor had not alleged sufficient facts prior to amendment of its complaint. Allowing amendment, the trial court could not rely on the interlocutory precedent that was not a final order.

Uniquely, suing the State for money damages is limited by a two-year statute of limitations, even for breach of contract which otherwise would be allowed within 6 years. The Court of Appeals recognized an exception, for a contract with "continuing performance". This allows for cumulative damages of successive, independent breaches (and not a single, early breach with continuing harm).

IAP v. ODAS, 10th Dist. Franklin, 2024-Ohio-824.

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Administrative: Joint Purchasing Does Not Include Construction (Cont'd)

Such cooperatives are operated by trade associations whose members are public subdivisions, thus avoiding competitive bidding under public works law.

Proponents of a change to R.C. 9.48 and R.C. 167.081 seek to avoid following construction competitive bidding laws by paying a premium to certain trade associations that offer “purchasing programs”. Their offerings typically are proprietary specifications by manufacturing vendors which seek to displace public notice or competition with Ohio construction trades contractors.

The latest Attorney General Opinion 2024-003 reaffirms the previous Opinion 2019-028, given the lack of any legislative action or statutory change.

House Bill 145 received a third hearing on June 20, 2023, and Senate Bill 23 was reported out of committee, to amend R.C. 9.48 to include construction. Numerous construction trades associations and design professionals testified in opposition.

Judicial: Theft Claims Outside of Contract Breach (Cont'd)

The parties entered into a written contract with four phases of payments after certain completions. Customer payments were partial or sporadic, including a landlord payment for tenant improvements. When the contractor did not receive full payment through phase two, contractor suspended work.

As a result, the project finished late, causing customer to pay additional rent.

Contractor further submitted an invoice for additional work beyond the agreed contract scope.

The contractor then denied receiving a partial payment, for which the customer produced a receipt. When the contractor cashed the customer’s final check, it bounced.

The trial court sent the contractor’s breach of contract claim to the jury, and the customer’s breach of contract and theft by deception to the jury.

The jury found the contractor entitled to damages for breach in the amount of its performance. The jury further found the contractor in breach for the delay, and awarded the customer additional rent.

Finally, the jury found that the contractor had received a payment without crediting the customer, constituting theft by deception, and awarding punitive damages and attorney fees.

Generally, the existence of a contract excludes tort claims. However, theft by deception is a statutory, intentional tort, and therefore outside of the contract rights. R.C. 2307.60 et seq.

Pham Constr. & Co. LLC v Tran, 5th Dist. Delaware, 2024-Ohio-634.

Legislative: General Election to Determine House Speaker (Cont'd)

All House Democrats voted for Speaker Stephens along with 22 Republicans, only a third of the Republican Caucus for a 4-vote margin. Only 13 of those Republican members will return next January 2025.

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Representatives Sara Carruthers (R, Hamilton), Jon Cross (R, Findlay), Brett Hillyer (R, Uhrichsville), and Gail Pavliga (R, Atwater) all lost re-election.

To retain the Speakership, Stephens will need a similar number of Republican and Democratic member votes.

However, three Republican incumbents are term-limited and a fourth ran for a Senate seat. This leaves four seats open either to a new Republican or Democratic victor, who has not voted for Speaker yet.

Senate President Matt Huffman (R, Lima) is unopposed to win a House seat, and is expected to challenge Speaker Stephens for the leadership role in January, 2025.

Judicial: Party Not Bound by Complaint for Arbitration Demand (Cont'd)

Owner contracted personally with a roofing contractor for a \$230,000.00 commercial roof. After completion, the roof became detached. Owner sought and received insurance proceeds for the loss.

The insurance company and the owner's company sued the contractor for indemnification and tort, alleging faulty workmanship. While attaching the contract, the parties did not allege breach of contract.

The roofing contractor issued discovery requests under judicial rules, which are not mandatory requirements in arbitration.

Subsequently, the owner initiated arbitration, and filed a suit requesting declaratory judgment to arbitrate the dispute based on the contract. The insurance company intervened.

The contractor objected to the second suit pending the first, so the parties to the first suit dismissed without prejudice. The contractor argued that the parties to the first suit did not seek arbitration, and therefore waived that right, seeking to avoid discovery.

The roofing contractor further argued that tort damages were excluded by the existence of the contract.

The Court of Appeals held that the parties to the first suit were not parties to the contract with the arbitration. Upon their dismissal without prejudice, the owner's arbitration demand became mandatory.

Guerrini v. Chanell Roofing & Home Improvement, 8th Dist. Cuyahoga, 2024-Ohio-585.

Administrative: ODOT TRAC (Cont'd)

TRAC Tier I includes Construction Funding; Tier 2 includes Design Development commitments prior to Construction, and Tier 3 are the earliest, including Right-of-Way acquisition.

\$15 million is designated for construction of the Central Ohio Transit Authority (COTA) bus rapid transit on West Broad Street in Fiscal Year 2026.

\$47 million in construction funding is designated for Fiscal Year 2025 beginning this July 1st, for a new interchange on State Route 33 and Pickerington Road in Fairfield County.

The full TRAC list can be found at:

www.transportation.ohio.gov/programs/trac

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Join us in

The Construction Conversation Call-In

on

Wednesday, April 17, 2024

3:30 p.m.

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

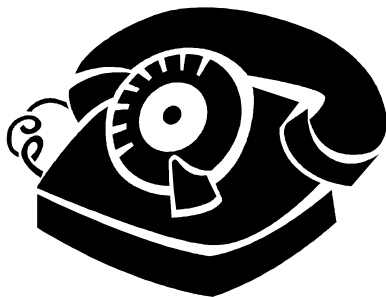
Topic: Construction Conversation
Time: Apr 17, 2024 03:30 PM Eastern Time
(US and Canada)

Join Zoom Meeting

<https://us02web.zoom.us/j/84728032512?pwd=d1RjcWsrSzVaV0dGQkhWNGRiYitiQT09>

Meeting ID: 847 2803 2512
Passcode: 843424

- +1 301 715 8592 US (Washington DC)



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