

The Construction Conversation

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

July 2024

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Legislative: Citizens Not Politicians

Led by the bi-partisan "Citizens Not Politicians" committee, the campaign for Ohio redistricting by a non-partisan commission turned in 731,306 signatures to place the Constitutional amendment on the November ballot. (Cont'd p. 2.)

Legislative: OSU Capital Plan

In requesting funding from the record \$4.2 billion Capital Appropriation passed in June, The Ohio State University submitted its own Capital Plan covering construction for its six campuses in the next six years. (Cont'd p. 2).

Judicial: "Handshake Deal" Not Barred by Statute of Frauds

After a trial court dismissed a buyer's lawsuit based on an oral agreement to acquire a building, the court of appeals reversed, finding that the statute of frauds does not require a writing for certain remedies. (Cont'd p. 2).

Judicial: Architect Must Defend Issues of Fact

An architect declared his contract with an owner to be in breach, and left the job. When the owner sued, the architect must go to trial when genuine issues of material fact remain. (Cont'd p. 3).

Legislative: County Contract Changes

The Ohio House unanimously passed House Bill 497 before recess, to make numerous changes to statutes relating to

county construction contracts. (Cont'd p. 3).

Legislative: Anti-Illegal Immigration Stalls with Construction Opposition

House Bill 327 passed the House with significant opposition from the construction industry, to require every nonresidential construction contractor to verify each new employee's work eligibility through the federal E-verify program and keep a record for three years. (Cont'd p. 4).

Legislative: Private Owner Prompt Pay

A 76-12 majority passed House Bill 203 to enact prompt payment requirements for private construction owners, similar to current requirements in the public sector and for subcontractors. (Cont'd p. 5).

Legislative: Roofing Projects

A feature to House Bill 2, the Capital Appropriations legislation, is new money for 37 roofing projects, totaling almost \$20 million. (Cont'd p. 5).

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Legislative: Citizens Not Politicians **(Cont'd)**

Ohio law requires only 413,487 signatures, or 10% of the votes cast in the most recent election for governor, and 5% of votes cast in 44 of Ohio's 88 counties.

The Ohio Ballot Board will determine the title and official language for the ballot.

If passed, the amendment would create a 15-member Citizens Redistricting Commission, a bipartisan group representing various geographic and demographic regions of Ohio. Membership would be through a bi-partisan Screening Panel. Party affiliation would be determined not only by primary voting history, but also campaign activity including contributions.

The Commission would be charged with drawing "fair and impartial" legislative districts, which would not discriminate against or favor any political party or politician.

Banned from participating would be current or former politicians, political party officials, and lobbyists.

In 1992, voters approved legislative term limits by over 66%. With today's broad, bi-partisan support, the redistricting amendment is expected to receive a similar reception at the ballot box.

Legislative: OSU Capital Plan (Cont'd)

The Capital Plan breaks down renovation and new construction on the OSU Campuses located in Columbus, Lima, Mansfield, Marion, Newark, and Wooster.

The projects also are broken down

by construction trade, including Roof, HVAC, and Elevator Replacements, Fire Suppression Systems, Plumbing Repair, Electrical Repairs, Building Envelope Repairs, Emergency Generator Replacements, Road and Bridge Improvements.

As one of the largest universities in the nation, OSU maintains "900 buildings, with over 39 million gross square feet of building space, a current replacement value of approximately \$18 billion, and total operating expenses of \$7.9 billion."

The Capital Plan covers 6 years, while the legislative appropriation only covers the current biennium through June, 2026. Construction funding comes from many sources, including bond financing and the State Capital Appropriation.

For the state legislative funding, OSU requested over \$80 million for the current biennium; the legislature appropriated over \$78 million in response. For the 6-year plan including all funding, OSU expects to spend over \$323 million for construction.

Judicial: "Handshake Deal" Remedy Not Barred by Statute of Frauds (Cont'd)

In an oral agreement to buy/sell the real estate and business of a tavern, the seller accepted payments, but then refused to transfer after the buyer made the final payment. The buyer sued, the court dismissed for lack of a writing.

Many construction parties start work on a mere oral agreement. While proof may be more difficult, the statute of frauds does not bar all remedies.

The failure to transfer real estate

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typically is enforced by an action for “specific performance”, i.e. transfer of the specific real estate parcel, because real property is unique. Accordingly, to avoid the lack of clarity of terms, R.C. 1335.05 requires such agreement to be evidenced by a writing for enforcement.

But, if the injured party only seeks money damages and not the real estate, then a writing is not required.

In this case, the buyer pleaded “promissory estoppel”, an equitable claim recognizing a quasi-contract based upon detrimental reliance of the seller’s oral promises.

A claim of promissory estoppel requires proof of: (1) a clear and unambiguous promise; (2) reliance on the promise; (3) the reliance is reasonable and foreseeable; and (4) the party relying on the promise was injured by his or her reliance.

The Court of Appeals held, “[T]he statute of frauds is completely inapplicable to a claim that looks only to equitable remedies where there is no attempt to enforce the invalid agreement involving transfer of real estate.”

Likewise, the statute of frauds does not preclude a claim for unjust enrichment.

In the construction industry, the absence of a written construction contract does not prevent the party who performed work from suing for money damages either under the quasi-contract theory of promissory estoppel or unjust enrichment.

Templeton v. Winner Ents., Ltd., 7th Dist. Mahoning, 2024-Ohio-2745.

Judicial: Architect Must Defend Issues of Fact (Cont’d)

A homeowner at Put-In-Bay hired a roofing contractor, and subsequently a window contractor, to address years of constant water intrusion.

To monitor the contractor, and to ensure that no further water intrusion would occur, the homeowner hired an architect to provide drawings and to oversee the construction work.

When the parties disputed the progress of the architect’s work, the architect resigned. The homeowner sued both contractors, and the architect for malpractice.

The architect moved for summary judgment, which the trial court granted, finding no allegations that the architect was at fault. The Court of Appeals reversed, finding that the architect did not demonstrate the complete absence of genuine issues of fact based on the homeowner’s complaint.

Accordingly, where the architect’s records are not clear, the owner may proceed to trial of the disputed facts.

Kaplan v. Hammond, 6th Dist. Ottawa, 2-24-Ohio-2492

Legislative: County Contract Changes (Cont’d)

R.C. 153.31 which requires the design-bid-build process for construction, will not apply to any “minor repair”, defined as “the reconstruction or renewal of any part of an existing building for the purpose of its maintenance when the work has limited impact on access, safety, or health.”

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"Minor repair" does not include any of the following: (1) The cutting away of any wall, partition, or portions of walls; (2) The removal or cutting of any structural beam or load bearing support; (3) The removal or change of any required element of accessibility, means of egress, or rearrangement of parts of a structure affecting the egress requirements; (4) The addition to, alteration of, replacement of, or relocation of any standpipe, water supply, sewer, drainage, drain leader, gas, soil, waste, vent or similar piping, electric wiring, mechanical work, or other work affecting public health or general safety.

Enacting a new section R.C. 307.901, a contract entered into by a county authority for the procurement of goods or services shall not include the following terms, or which terms otherwise are void ab initio:

(1) A provision that requires the county to indemnify or hold harmless another person; (2) A provision by which the county agrees to binding arbitration or any other binding extra-judicial dispute resolution process; (3) A provision that names a venue for any action or dispute against the county other than a court of proper jurisdiction in the county; (4) A provision that requires the county to agree to limit the liability for any direct loss to the county for bodily injury, death, or damage to property of the county caused by the negligence, intentional or willful misconduct, fraudulent act, recklessness, or other tortious conduct of a person or a person's employees or agents, or a provision that otherwise imposes an indemnification obligation on the county; (5) A provision that requires the county to be bound by a term or condition that is unknown to the county at the time of signing a contract, that

is not specifically negotiated with the county, that may be unilaterally changed by the other party, or that is electronically accepted by a county employee; (6) A provision that provides for a person other than the prosecuting attorney, or an attorney employed pursuant to section 305.14 or 309.09 of the Revised Code, to serve as legal counsel for the county; (7) A provision that is inconsistent with the county's obligations under section 149.43 of the Revised Code; (8) A provision that limits the county's ability to recover the cost for a replacement contractor.

These terms are common in many standard contracts such as for design professionals.

The bill will require three Senate committee hearings and a floor vote. Given the Senate's limited schedule after the November election, it may be too late for the bill to pass.

However, given its unanimous passage in the House, it is more likely that Senate leadership will force it through the Senate process.

Legislative: Anti-Illegal Immigration Stalls with Construction Opposition **(Cont'd)**

A "nonresidential construction contractor" is defined as any individual or company that is responsible for the means, method, and manner of construction, improvement, renovation, repair, or maintenance on a nonresidential construction project with respect to one or more trades.

The bill would void any contract for the construction or maintenance of a public improvement that fails to include the

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provision.

Assigning enforcement powers to the Attorney General, the bill would require a court to fine a violator, and disqualify the violator from participation in state contracts.

A construction coalition including the Mechanical Contractors Association of Ohio and the National Electrical Contractors Association submitted written opposition testimony, stating that, “[T]he bill in its current form places an undue burden on construction employers and will not achieve the sponsors’ stated goal of doing away with the illegal arrangements between employers and employees.”

Assigned to the Senate General Government Committee, the legislation may not have sufficient time after the legislature returns in November for three hearings and a floor session.

Legislative: Private Owner Prompt Pay (Cont’d)

The bill requires private owners to pay the prime contractor “thirty days after the work performed or materials furnished are certified as complying with the approved plans, drawings, specifications, or data by an architect registered under Chapter 4703. of the Revised Code or an engineer registered under Chapter 4733. of the Revised Code, or thirty days after receiving the request, whichever is later.”

Failure to do so imposes 18% interest and attorney fees upon the owner.

In bi-partisan sponsor testimony in the Senate, the legislators stated that, “This bill aims to get money flowing from, often-times, very large companies to Ohio contractors.”

The Senate Workforce and Higher Education Committee now needs to hold two more hearings before sending the bill to the floor. Of concern is the limited Senate schedule in November after the General Election.

Legislative: Roofing Projects (Cont’d)

This does not include reappropriations for unused funds designated in the prior biennium. Also not included is roofing incorporated into multi-trades projects.

Nineteen projects, including for colleges and universities total over \$19 million specifically for roofing, with the largest being \$8.5 million for OSU.

Another \$714,736 is appropriated for roofing for VFW Posts at 18 locations around Ohio.

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Join us in

The Construction Conversation Call-In

on

Wednesday, August 14, 2024

3:30 p.m.

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

Topic: August Construction Conversation
Time: Aug 14, 2024 03:30 PM Eastern Time
(US and Canada)

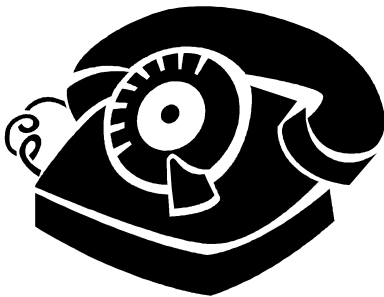
Join Zoom Meeting

<https://us02web.zoom.us/j/83610285158?pwd=jQUXWFK6B3K0GZ3WbSJYSI8dL8Fs.wm.1>

Meeting ID: 836 1028 5158

Passcode: 815282

646-931-3860 US



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