

The Construction Conversation

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

July, 2023

A Service of Luther L. Liggett, Attorney at Law
LLiggett@columbus.rr.com

Legislative: Constitutional Vote

Ohio will hold a Special Election on Tuesday, August 8, 2023 to consider raising the required vote for a Constitutional Amendment from 50% plus one vote, to 60% plus one, calculated to stop an abortion rights amendment on the November, 2023 ballot. (Cont'd p. 2.)

Judicial: Construction Statute of Repose Upheld

A Court of Appeals upheld the constitutionality of the Statute of Repose for the construction industry, dismissing an architect and contractor from a public school lawsuit brought more than ten years after completion. (Cont'd p. 2.)

Legislative: State Budget Construction Law

The State Operating Budget passed with two amendments and a line-item veto by the Governor which would have allowed an applicant to seek a building permit from any building department in the state. (Cont'd p. 2.)

Administrative: Water, Wastewater Projects

The Ohio Department of Development administers the Ohio BUILDS (Broadband, Utilities, and Infrastructure for Local Development Success) Program using Federal pandemic recovery funding, awarding \$114 million in June, and \$135 million in July. (Cont'd p. 3.)

Judicial: Contractor Liability for Subcontractor Injury

While typical subcontractors are independent, with no liability to the general contractor for worksite injuries, an exception arises when the general contractor exercises exclusive control. (Cont'd p. 3.)

Administrative: Highway Funding

The Ohio Department of Transportation announced spending \$90 million for Central Ohio roads, \$28 million to repair or replace aging Bridges across Ohio, and \$18 million for an additional 27 electric vehicle fast charging stations along Ohio Interstates. (Cont'd p. 4.)

Judicial: New Home Inspection May Require Expert

A new home buyer sued a homebuilder for failure to build in a workmanlike manner. The homebuilder's defense was that the home buyer had the opportunity to inspect before purchase. (Cont'd p. 4.)

The Construction Conversation

July, 2023

Page 2

Legislative: Constitutional Vote (Cont'd)

The Columbus *Dispatch* reported polling that, “A recent Suffolk University/USA TODAY Network poll found 57.6% of likely Ohio voters support the proposed reproductive rights amendment; 32.4% oppose it and 10% were undecided.”

The Republican super-majority in the General Assembly, over Democrat objections, voted to change the rules to put the abortion amendment out of reach.

Columbus Mayor Andrew Ginther explained the unintended consequences of raising the threshold: “If Issue 1 were law today, the minimum wage would be dollars lower; bonds for environmental conservation, low-income housing, and development would not exist; Ohio would not have an anti-monopoly clause; and there would be no term limits for Ohio’s governor.” Columbus *Dispatch*, July 27, 2023.

Citing public works construction funding, the American Institute of Architects, Ohio Society wrote, “If passed, this amendment will likely have a significant and devastating effect on the architecture profession by setting the threshold to approve project funding too high and making it too difficult to meet.” July 7, 2023.

Reviewing the likelihood of passage, the Columbus *Dispatch* reported polling that, “A USA TODAY Network/Suffolk University poll released Thursday found 57% of likely voters are against Issue 1, including some Republicans and opponents of abortion. Twenty-six percent back the

issue, while 17% are undecided with just weeks to go before the Aug. 8 election.”

Judicial: Construction Statute of Repose Upheld (Cont'd)

The novel issue not yet addressed by the Ohio Supreme Court is whether “the statute of repose requires that the claim must accrue within the ten-year period in order to avoid the statute’s procedural bar.”

The school construction project funded by the Ohio Facilities Construction Commission resulted in a new elementary school and a middle/high school, opened in January, 2008. Water leaks began immediately, followed by repairs. But, on May 24, 2018, the school’s expert issued a report citing design and construction defects as the cause.

The school sued the contractor and architect on April 5, 2019, more than a decade after project completion.

The Court of Appeals found that “accrual” within the ten-year period is not the trigger. The Statute of Repose bars commencement of any lawsuit ten years after substantial completion, without regard to the date of “accrual” of a claim.

Martins Ferry City School Dist. v. Colaianni Constr., Inc, MKC Architects, Inc., 7th Dist. Belmont, Case No. 19-CV-0132, 0133, 2023-Ohio-2285.

Legislative: State Budget Construction Law (Cont'd)

Rolled into the budget without allowing opposition testimony were House Bill 65 and Senate Bill 67, which triggered the option if the local building department “is unable to... issue a permit” in 5 days..

The Construction Conversation

July, 2023

Page 3

The Governor exercised his Constitutional authority of a line-item veto, drawing a box around this language, with a veto message that, “Allowing specific structures to be exempt from sprinkler requirements would deteriorate the impact of precautions meant to protect building occupants from fire hazards. Our current system is designed to have strict standards with the ability for local inspectors to issue variances from certain codes when appropriate, and this provision could result in a significant life safety risk to Ohioans.”

The Governor also vetoed the legislature’s attempt to remove the ODOT Director from the TRAC voting to prioritize highway funding for projects.

The Budget also changed the composition of the Board of Architects from five architects to four architects and a non-architect. This is calculated to avoid concerns of anti-trust licensure restrictions by the industry.

Finally, the bill also amended R.C. 153.12 to allow local governments to award a construction contract bid in excess of the cost estimate by not more than 20%, instead of the historical 10% excess.

Administrative: Water, Wastewater Projects (Cont’d)

In addition to water projects, the state distributed \$654,590.00 for six regional Broadband and 5G hubs. Each hub consists of two local Colleges, a Workforce Board, and a Local Community Action agency.

Round 4 of Water Infrastructure grants will support 70 projects in 58 counties.

Round 5 includes 44 municipal

Drinking Water projects, 44 County and municipal Wastewater projects, and 2 combined projects. By example, Greene County received \$5 million to build a new wellfield for its local supply.

For more information, see
<https://tinyurl.com/yueptd4r>

Judicial: Contractor Liability for Subcontractor Injury (Cont’d)

Many general contractors misclassify employees as “independent contractors” to avoid paying workers’ compensation and withholding taxes. State and federal law prohibit misclassification.

A homeowner employed a general contractor, who employed an individual as an “independent subcontractor” to hang drywall. That individual also “subcontracted” to another individual, a common practice to avoid employee liability including employment taxes. They testified that they were paid daily in cash, and had no written agreement.

The worker slipped off an unguarded balcony, sustaining injuries. The parties agreed that if anyone were responsible for the construction of a guardrail, it would be the general contractor’s carpenter, as the others were responsible only for hanging drywall.

The injured worker sued all parties for negligence, including the general contractor. Initially, the trial court dismissed the general contractor on the basis that the injured party was neither an employee or a direct subcontractor.

The Court of Appeals reversed. The issue for trial is whether the general contractor owed any duty to the

The Construction Conversation

July, 2023

Page 4

subcontractors to provide a safe worksite.

While this is similar to OSHA's mission, OSHA is limited to employer-employee relationships. Here, the issue is whether the general contractor owes a duty to a supposed independent subcontractor two tiers down.

Normally there is no duty owed. But the exception occurs where the general contractor either (1) directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, or (2) retains or exercises control over a critical variable in the workplace.

Thus, a material issue for trial existed to determine the role of the general contractor, which might lead to a finding of liability to the injured worker.

Kruthaup v. Schoen Builders, L.L.C., 6th
Dist. Wood, 2023-Ohio-2090

Administrative: Highway Funding **(Cont'd)**

This is in addition to 13 existing stations currently operating. Ohio is first in the nation to announce the program through the National Electric Vehicle Infrastructure (NEVI) Program.

In Central Ohio, the primary project will fund local roads with \$66 million. Discussion continues regarding upgrades to accommodate the Intel Project in Licking County.

The Bridge Program will fund up to 95 percent of costs for 24 specific bridges. The four largest awards were for \$2 million each.

Judicial: New Home Inspection May **Require Expert (Cont'd)**

Initially, the court dismissed the buyer's lawsuit on that basis. However, upon reconsideration, the Court of Appeals reversed.

"The fact that the joists were visible does not account for the fact that the weight resting upon the joists and the load-capability of those joists was an unknown issue at the time of purchase and therefore the load-bearing issue was not subject to proper analysis by means of sight alone."

A home buyer is not expected to go to extraordinary lengths. The issue for dismissal is "whether any reasonably available inspection (which does not include a structural engineer's inspection) could have revealed the fact that the floor joists were inadequate in their load-bearing capacity prior to their purchase of the home."

Varwig v. JA Doyle, L.L.C., 6th Dist. Lucas,
2023-Ohio-2251

The Construction Conversation

July, 2023

Page 5

Join us in

The Construction Conversation Call-In

on

Thursday, August 17, 2023

3:30 p.m.

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

Join Zoom Meeting

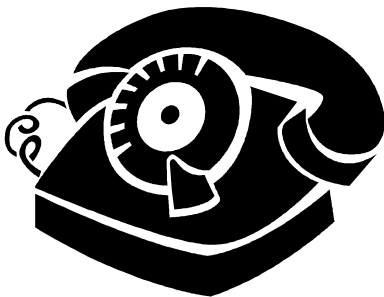
<https://us02web.zoom.us/j/82151537536?pwd=L3ZWS2JQZE1oM3F5RFB1Ti9wcmJSUT09>

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The Construction Conversation

July, 2023

Page 6