

# **The Construction Conversation**

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

September, 2021

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### **Legislative: Design Liability Bill on the Move**

Senate Bill 56 passed the Ohio Senate unanimously, and will have its second, Proponent Hearing this week, to prohibit contract indemnification beyond insurability for design professionals. (Cont'd page 2.)

### **Administrative: BWC Dividend**

Previously ineligible employers who did not perform their 2019 "true-up" timely, will receive \$30 million from the Bureau of Workers Compensation, assisting about 3,000 companies. (Cont'd p. 2.)

### **Judicial: Mootness Ends Legal Challenge**

By failing to apply to court for an injunction against a construction project at issue, the challengers waived their rights to a legal appeal of a development plan's zoning. (Cont'd p. 2.)

### **Legislative: Budget Numbers**

Ohio's \$162 billion operating budget, House Bill 110, was signed into law effective July 1, 2021 for the next two fiscal years. The largest single source of revenue is from the State Sales Tax, exceeding \$12 billion annually. (Cont'd p. 2.)

### **Administrative: ODOT Construction Projects Approved**

The Transportation Review Advisory Council (TRAC) approved \$292 million for new highway projects, after 2020 loss of revenues due to travel slowdowns from the

pandemic reduced motor vehicle fuel tax receipts. The funding is about 60% of the \$551 million requested in 36 new applications. (Cont'd p. 3.)

### **Judicial: Public Records Challenge Streamlined**

The process to challenge a public agency's refusal to release public records is streamlined with only a \$25.00 filing fee through an expedited process in the Ohio Court of Claims. Two amendments to the law take effect this month. (Cont'd p. 3.)

### **Judicial: Arbitration Term Enforced**

A Court of Appeals reversed a trial court to enforce the arbitration provision of a carpentry subcontract, on the basis that the trial court cannot decide arbitrability on issues which the arbitrator would decide. (Cont'd p. 3.)

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## **Legislative: Design Liability Bill on the Move (Cont'd)**

The Ohio General Assembly is returning for hearings after its Summer Recess.

Sponsored by Senator Bill Blessing, III (R, Cincinnati), the only licensed Professional Engineer in the legislature, the bill will be heard Tuesday, September 28<sup>th</sup> in the House Civil Justice Committee.

The American Council of Engineering Companies of Ohio (ACEC Ohio) is behind the initiative for the second session, running out of time during the prior term.

If passed, a public authority cannot require indemnification that exceeds only the design professional's proportionate share of tortious liability. This represents the actual activity which is insurable, eliminating liability caused by others.

After this week, the bill will need a third, Opponent hearing, and then move to the House floor for a vote. No opposition is expected.

## **Administrative: BWC Dividend (Cont'd)**

Citing a mere "compliance trap", the Bureau will send out these make-up funding automatically, without businesses applying.

Separately, BWC approved a 10% rate reduction for public employers, or a reduction of \$17 million.

Since 2019, BWC has authorized more than \$9.2 billion in dividends to employers across the state.

## **Judicial: Mootness Ends Legal Challenge (Cont'd)**

Neighbors of a detailed development plan appealed to the zoning board after approval by a local planning commission and design and construction board of review.

The appeal was timely, but without detail. When the neighbors failed to supplement their concerns, the zoning board dismissed the appeal. The construction contractors proceeded to pull permits and begin construction.

The neighbors did not preserve their rights by asking a court to stay all further proceedings. When the neighbors brought an action in mandamus to force a zoning hearing, the Court of Appeals dismissed the action on the basis of mootness. When "the appellant fails to obtain a stay... and construction commences, the appeal is rendered moot."

*St. ex rel. Wood v City of Rocky River,*  
Supreme Court, 2021-Ohio-3313.

## **Legislative: Budget Numbers (Cont'd)**

Personal Income Tax revenues follows at over \$10 billion per year, with an average of \$12 billion per fiscal year from federal grants. Non-General Revenue Funds account for pass-throughs and other receipts.

Medicaid and K through 12 Education account for most of the spending, averaging \$18 billion and \$14 billion per year respectively.

Over \$2 billion per year goes to each of Higher Education, Corrections (prisons), and all other general government.

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The State will spend \$350 million in Federal COVID funding, plus over \$152 million in related CARES Act funding for related costs.

## **Administrative: ODOT Construction Projects Approved (Cont'd)**

For Fiscal Year 2022 construction, the three largest projects include:

Summit	IR77, 277, 224	\$ 65.0
Clermont	East Corridor	\$ 38.0
Union	US 33, SR 161	\$ 11.3
		<hr/>
		\$ 114.3

For Fiscal Year 2023 construction, the three largest projects include:

Lucas	IR 475, US 20	\$ 79.0
Franklin	IR 70	\$ 73.0
Hamilton	IR 75	\$ 43.0
		<hr/>
		\$ 195.0

For more information, see “Final 2021-2024 Major New Construction Program List” at:

Transportation.ohio.gov

## **Judicial: Public Records Challenge Streamlined (Cont'd)**

Revised Code 149.43(B)(1) provides in relevant part: “[U]pon request by any person, a public office or person responsible for public records shall make copies of the requested public record available to the requester at cost and within a reasonable period of time.”

- The request need not be in writing.
- The agency cannot require a reason, or even the requester’s name.

- The agency cannot charge the cost of labor to prepare the request.

If a public agency fails to follow this law, the enforcement process is streamlined. The requester may file a Complaint on a form with the local Clerk of Courts, for a \$25.00 fee.

The Complaint is reviewed promptly by a Special Master of the Ohio Court of Claims, who issues a decision, which includes refund of the filing fee if records are granted.

While there are many exceptions to releasing records, the public agency must explain the basis of any refusal.

For further information, see the Ohio Attorney General’s “Yellow Book” for case examples of Ohio’s Sunshine Law:

<https://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/Sunshine-Laws-Publications/2021-Sunshine-Manual>

## **Judicial: Arbitration Term Enforced (Cont'd)**

The trial court had refused arbitration due to the condition precedent of mediation not being complete, a matter for the arbitrator and not relevant to jurisdiction.

All other questions become irrelevant once “arbitrability” is determined. The trial court must stay the court litigation so that arbitration can take its place.

*Michigan Timber & Truss v. Summit Bldg. Servs.*, 10<sup>th</sup> Dist. Franklin, 2021-Ohio-3158.

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Join us in

## **The Construction Conversation**

### **Call-In**

on

**Wednesday, October 13, 2021**

3:30 p.m.

Join Zoom Meeting

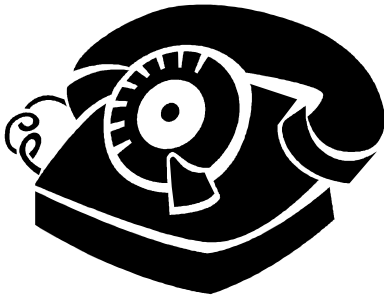
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