

# **The Construction Conversation**

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

March, 2020

A Service of Luther L. Liggett, **Graff & McGovern, LPA**  
www.GraffMcGovern.com

### **Legislative: General Assembly Shutdown**

The Ohio General Assembly is unlikely to remain active in session for the foreseeable future. Given an election year, legislators are unlikely to return in the summer and abandon an active re-election campaign in the district. (Cont'd page 2.)

### **Administrative: OFCC Issues Construction Protocol**

In compliance with the Department of Health's Stay at Home Order exemptions for certain construction, the Ohio Facilities Construction Commission issued an "Enhanced Safety Protocol" for public construction. (Cont'd page 2.)

### **Legislative: Emergency Law**

The General Assembly chose House Bill 197 which passed the House unanimously last Fall to add emergency legislation to address the pandemic. The law passed the Senate and then the changes by the House unanimously, signed by the Governor into law with immediate effect on March 27, 2020. (Cont'd p. 2.)

### **Administrative: ODOT Contracts**

The Ohio Department of Transportation deferred two major highway projects in Franklin and Hamilton County for a year, due to decrease of Fuel Tax Revenues as a result of travel restrictions. (Cont'd p. 2.)

### **Judicial: Contactor's Vicarious Liability**

### **for Subcontractor**

A court of appeals reversed a trial court on the issue of a prime contractor's vicarious liability for the negligence of a roofing subcontractor whose worker started a fire at a condominium. (Cont'd p. 3.)

### **Administrative: Insurance Grace Period and Coverage**

As a result of Ohio's business shutdown order, insurance coverage is at issue, along with an insurance company premium payment grace period. (Cont'd p. 3.)

### **Administrative: Exempt Businesses and Services in Construction**

The Ohio Department of Health's Stay-at-Home Order exempts businesses providing services necessary to maintain "Essential Infrastructure" including Construction. Essential businesses include Critical Construction Trades. (Cont'd p. 3.)

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## **Legislative: General Assembly Shutdown (Cont'd)**

Speaker Larry Householder announced that Representatives would work from home through at least May 4<sup>th</sup> consistent with the Department of Health's Stay-at-Home Order. But Statehouse officials privately estimate Ohio to "peak" with Covid19 cases around May 15<sup>th</sup>, with resolution several weeks later.

The virus being airborne, "social distancing" prevents the 133 House members from voting in the House chambers simultaneously.

Ohio's Constitution requires the legislature to pass the capital appropriation for the next two years by June 30, 2020. As even a re-appropriation bill (existing unspent funds renewed) is not introduced, it appears impossible to accomplish new legislation for new funding of new construction projects for the next two years.

Given business shutdowns and resulting tax revenue declines, the Speaker also expects a re-writing of the operating budget to reduce state government expenses while considering economic stimulus legislation.

## **Administrative: OFCC Issues Construction Protocol (Cont'd)**

The OFCC determined that "project continuation is based on each company's determination as to whether it is essential and is also subject to orders and restrictions of local health departments, local governments, and the Project Owner."

The Protocol requires among other requirements the testing of construction workers and a log upon arrival at a jobsite.

For the OFCC Protocol, see:

<https://ofcc.ohio.gov/Portals/0/xBlog/uploads/2020/3/30/OFCCEnhancedSafetyProtocolNotification.pdf>

## **Legislative: Emergency Law (Cont'd)**

Among other provisions, the legislation:

- Prohibits drinking water disconnects by a public water system;
- Grants authority to the Public Works Commission for schedule completion extensions;
- Extends professional licenses for those who cannot get them renewed;
- Allows local governments to hold public meetings remotely and with transparency;
- Provides funding for small businesses, such as day cares and services for the disabled;
- Suspends various Statutes of Limitations from running during the emergency.

While there is great interest in additional legislation, the practical difficulties of open committee hearings and voting make passage unlikely.

## **Administrative: ODOT Contracts (Cont'd)**

But ODOT did not cancel ongoing projects, "given the real possibility of a federal stimulus package which could include money for construction projects."

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ODOT issued an advisory that is useful for all construction projects, public and private. Contractors are going to request change orders for delay, and certain owners are going to claim breach of contract if contractors choose to avoid a work site.

The ODOT letter requires contractors to follow the contractual claim notification process, while ODOT considers changes to specifications.

For a copy of the March 24, 2020 letter, see:

<https://transportation.ohio.gov/wps/portal/gov/odot/working/announcements/02-potential-impacts-construction-contracts-3-24-2020>

## **Judicial: Contactor's Vicarious Liability for Subcontractor (Cont'd)**

The Court of Appeals for Franklin County held that it is a factual question under the doctrine of "respondeat superior" whether a contractor so controls the actions of an independent subcontractor so as to create an agency relationship, and be liable for the subcontractor's employees' negligence as though it were the contractor's own negligence.

Given various factual issues, the Court held that such a determination cannot be decided on summary judgment but must proceed to trial.

*State Farm Fire & Cas. Co. v. Capital Roofing*, 10<sup>th</sup> Dist. Franklin, 2020-Ohio-642

## **Administrative: Insurance Grace Period and Coverage (Cont'd)**

The Ohio Department of Insurance issued Bulletin 2020-07 to address delays in payment:

"The Superintendent hereby orders Insurers to provide their insureds with at least a 60-day grace period to pay insurance premiums so that insurance policies are not cancelled for nonpayment of premium during the state of emergency. The Superintendent hereby orders Insurers to provide their insureds with at least a 60-day grace period to pay insurance premiums so that insurance policies are not cancelled for nonpayment of premium during the state of emergency."

As businesses lose revenue, they read their business casualty provisions to include "acts of government," which might include Ohio's shut-down order.

However, insurance claims adjusters reject the claim, on the basis that the loss must be "direct." It is unclear what might be covered if lost business income is not a direct loss. Litigation is sure to follow.

## **Administrative: Exempt Businesses and Services in Construction (Cont'd)**

Not stated is whether those exempt activities must relate to "essential services," or whether the exempt projects or businesses may ignore the Order even for non-essential services.

Also unclear is whether design professionals are included, since not named expressly in the Order. However, to the extent the Essential Services need the design professionals, certainly the Order could be interpreted accordingly.

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The application of a business exercising an exemption and requiring employees to continue work opens liability concerns, including with OSHA safety requirements.

Owners further are demanding no work stoppage with threats of contract breach, creating construction claims for delay or compensation.

The Order will expire April 6, 2020, and undoubtedly the Director of Health will extend it, likely with modifications.

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Join us in

## **The Construction Conversation**

### **Call-In**

on

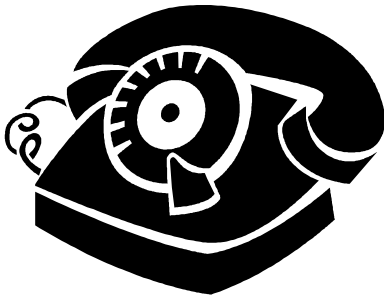
**Thursday, April 16, 2020**

3:30 p.m.

Call in and Participate

Dial In: 805-309-0010

Access Code 754-477-909 #



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