Ohio Utility Protection Law Undergoes Significant Changes

February 18, 2013

Reprinted from the Winter 2013 BrickerConstructionLaw.com Newsletter
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On December 20, 2012, Governor John Kasich signed Substitute House Bill 458 into law. This new law, which goes into effect on March 27, 2013 (just in time for the beginning of the construction season), makes significant changes to how contractors, project owners and utility owners must act to protect underground utilities during the design and construction of projects involving excavation.

Breaking Down the Barrier Between Public and Private Projects

The most radical provision in the new law is to strike from ORC 3781.27 the language exempting the more detailed sections of utility protection law (ORC 3781.27-32) from public projects, which were formerly exclusively governed by ORC 153.64. However, ORC 153.64 still exists and there are still some key differences between it and ORC 3781.25-32. For instance, ORC 153.64 still requires utility owners on a public project to indicate "the approximate depth" at which a utility was installed, while the new law seems like an attempt to dilute a utility owner's responsibility for marking depth on private projects. And ORC 153.64 still grants a contractor specific damages when a project owner fails to comply with the law.

Contractor Premarking

Now under ORC 3781.29(D), prior to calling in a request for marking, the excavator must premark the excavation area with white paint, flags, stakes or other approved methods. But the excavator is exempt from this requirement in any of the following situations:

1. When "the utility can determine the precise location, direction, size, and length of the proposed excavation" based on the information given by the excavator. But this puts the excavator in a catch-22 because the statute clearly requires that the excavation markings be made before the ticket is called in, and to determine if the description is good enough, clearly the ticket needs to be called in already. Perhaps the best practice will be for the excavator to simply mark the excavation area, especially when considering that irrespective of timing, it is the utility owner who gets to make the decision whether the ticket is clear enough without the marking.
2. When "the excavator and the affected utility have had an on-site, preconstruction meeting for the purpose of premarking the excavation site." As with any other construction meeting, whenever a contractor wishes to use this option, it should take great care to document the meeting and distribute minutes with an opportunity for all attendees to comment on the minutes.
3. "The excavation involves replacing a pole that is within five feet of the location of an existing pole."
4. "Premarking by the excavator would clearly interfere with pedestrian or vehicular traffic control." The statute does not indicate who gets to make the call regarding the interference — the utility owner or the contractor.

Large Projects

Previously, ORC 153.64(C) required utility marking to stay approximately two days ahead of excavation. Now, that language has been removed. Instead, under ORC 3781.28, "if an excavation will cover a large area and will progress from one area to the next over a period of time," the excavator is required to give written notice of its work, including scheduling information. Once a marking schedule is agreed to, then the "marking and notification requirements" of ORC 3781.29(A)(1) no longer apply. One problem with this is that ORC 3781.29(A)(1) includes no direct notification requirements for the excavator — it deals solely with a utility owner's obligation to mark its utilities within 48 hours of notice. Moreover, the new statute does not define "large area" or "a period of time," nor does it seem to appreciate the scheduling complexities of many projects and how schedules often change. Regardless, it is in the interest of both the contractor and the utility owner to memorialize the marking schedule with some type of formal acknowledgement.

Positive Response System

ORC 3781.26(D) now requires each utility owner that is a member the Ohio Utility Protection Service (OUPS) to participate in an automated "positive response system" whereby through OUPS, a utility owner is required to communicate directly to an excavator whether there is a conflict between the proposed work and the utility owner's infrastructure. Still, perhaps as a backup, under ORC 3781.29(A)(1), if the utility owner makes no marks within 48 hours, then "the utility is deemed to have given notice that it does not have any facilities at the excavation site." The positive response system is also the utility owner's opportunity to inform the excavator that "the markings may not be accurate." ORC 3781.29(A)(1).

Trenchless Technologies

Trenchless technologies have come a long way since Ohio's utility protection statutes were first put in place back in 1982 and 1989. Now, trenchless technology is specifically addressed by the new law. Under ORC 3781.30(B), every time the trenchless work crosses an existing utility, the existing utility must be "exposed . . . in a nondestructive manner to the installation depth of the new facility."

For parallel existing utilities, the existing utility must be exposed at the beginning and end of the trenchless work, except when the new work is within the "tolerance zone" (i.e. 18 inches) of the existing utility. In that case, the existing utility must be exposed every 100 feet.

Excavator Training

Now, under ORC 3781.261, any excavator, contractor or utility owner that uses OUPS must be trained in underground utility protection. But it suffices to simply be a member of OUPS or a "statewide association representing excavators," contractor or utility that provides training in underground utility protection.

Design Tickets

The role of OUPS and its member utilities during the design phase of a project has frequently been a source of confusion. It has not been uncommon for a designer to simply call in a ticket and then transfer the field markings onto the plans. That practice has now been codified, along with an alternative method. Both ORC 153.64(B)(2) and ORC 3781.27(C) give the option of either having the utilities marked in the field (presumably for later transfer onto plans) or having utility owners provide digital or paper drawings that are drawn to scale and include locatable items like poles, pedestals, curbs, sidewalks and pavement edges. That statute is not absolutely clear, however, on whose choice it is — the designer's or the utility owner's:

> If requested by the developer or the designer employed by the developer, each utility shall do one of the following in order to comply with the notification requirements . . .: [Mark in the field or provide plans.]

The Question of Depth

One of the most vexing questions has always been to what extent the utility owner must indicate the depth of its facility when responding to a ticket request. As mentioned above, ORC 153.64 still requires utility owners on a public project to indicate "approximate depth." For private projects, the requirement was never expressly codified, but one Ohio Court of Appeals has read the requirement into the private project statute. Now, the language that the Court of Appeals relied upon in ORC 3781.29(A)(1), (i.e. "the approximate location") has been stricken. And ORC 3781.29(B) has been changed to read (with new words underlined):

> Unless a facility actually is uncovered or probed by the utility or excavator, any indications of the depth of the facility shall be treated as estimates only.

This seems like an effort to relieve utility owners from responsibility for giving exact depths, but the courts will be the ultimate authority on whether the effort went far enough.

Conclusion

Utility protection during construction, especially in congested urban areas, has always been problematic. Even with a detailed statutory scheme buttressed by plenty of case law, there have always been great differences of opinion among project owners, utility owners and contractors regarding who is responsible for what. No doubt that will continue to be the case as the stakeholders work out the bugs in this new law.

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