



## Ohio Township Association

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## Legislative Update

Friday, September 4, 2009

MONDAY, AUGUST 31 2009

### **CONGRESS DEMOCRATS, AG SECRETARY DEFEND GLOBAL WARMING IN OHIO COAL COUNTRY**

ZANESVILLE - U.S. Sen. Sherrod Brown (D-Cleveland) said Monday a sweeping House-passed climate change bill is "absolutely not dead" in the Senate, but conditioned his support for it on protections against higher energy costs and job losses.

Sen. Brown joined U.S. Secretary of Agriculture Tom Vilsack and U.S. Rep. Zack Space (D-Dover) on a foray into the state's coal country with stops in Zanesville and Wintersville.

The trip was part of a series of community forums Mr. Vilsack is conducting in a national Rural Tour to highlight efforts of President Obama's administration to "rebuild and revitalize rural America."

Sen. Brown said media attention on the cap and trade energy bill, which cleared the House in late June on a 219-212 vote, faded in recent weeks as emphasis was placed on a proposed overhaul of the health care system. He said six Senate committees working on various parts of the global warming bill are to finish their work in late September.

"I think we have a reasonably good chance of passing legislation," Sen. Brown said. "I want to vote for the bill, but I won't vote for the bill until we make sure that any electricity price spikes are blunted."

Sen. Brown said six industries are particularly energy intensive: cement, glass, chemicals, steel, paper, and aluminum.

"Ohio is probably the only state ... that has major production in all six of those energy intensive industries. I think Congressman Space improved the bill a lot when it passed the House," he said.

"It's clear that with the loss of manufacturing jobs in Ohio and around the country that this bill has to focus on creating jobs. This climate change bill, this cap and trade bill, is a jobs bill. It will create jobs if we do it right. I'm optimistic we will," Sen. Brown said.

The Appalachian tour came days after residents received an issue advocacy mailing from the American Energy Alliance that blasted two-term Rep. Space over a vote "for job killing cap and trade legislation." Opponents allege the measure would lead to higher energy costs and fewer jobs.

Rep. Space acknowledged that his vote has been the source of "a lot of contention politically." He indicated the attention was appropriate, ranking the energy bill with health care in terms of present and future significance. He said he could not support the bill as initially introduced, but that improvements were made before the House vote.

"Here's what the bill does. It invests \$180 billion over the life of the bill in coal. That's an historic and unprecedented investment in coal so we can use Ohio coal after we clean it up," he said.

"The bill ... helps stimulate a new economic sector ... that is projected to create millions of jobs nationwide, and represents the first significant step in 30 years to deal with the nation's "cancerous dependence on foreign oil."

"The technology will be developed on energy production. Whether it's developed here as opposed to in China or India or other countries is going to be dependent upon whether or not we are aggressive in moving after it," Rep. Space said.

With two exceptions, members of the Ohio delegation in the U.S. House voted along party lines in approving the energy bill.

Republicans were unanimous in their opposition, branding the measure as a "national energy tax" that would have a negative impact on small business and middle class consumers.

Although Rep. Space joined other Democrats in supporting the measure, U.S. Reps. Charlie Wilson (D-St. Clairsville) and Dennis Kucinich (D-Cleveland) joined the GOP in opposition.

Rep. Wilson was in the audience for Monday's event, as were Director Robert Boggs of the Ohio Department of Agriculture, and First Lady Frances Strickland.

Secretary Vilsack said the bill represents as much as a \$20 billion income opportunity for agri-businesses.

"I will say that if we fail to step up on this issue there will be ramifications beyond just simply climate," he told reporters.

"I think it will impact potentially trade, I think it could potentially impact our capacity to move nations on other issues of importance to the security and safety of the United States," he said.

Sen. Brown said he believes the climate change bill could pass this year, but that enactment could wait until 2010 even though that is a congressional election year.

"I do subscribe on the health care bill to the theory that the drug companies and the insurance companies, the longer you wait the more they pour their lobbying money - \$1 million dollars a day - and bring legislation down because they have so much time to organize and spend so much special interest money," he said.

**Wintersville:** Later on Monday in Jefferson County, Secretary Vilsack focused on a \$10 million construction project intended to eliminate runoff from failing septic tanks and improve local water quality.

USDA Rural Development is providing a \$5 million loan, and a \$4.4 million grant, for the project made possible with federal stimulus money. About 350 users in Wayne and Cross Creek townships will benefit.

Mr. Vilsack cited the project as an example of the way stimulus funds were not only creating jobs but protecting the environment.

"As the Obama Administration continues working to rebuild and revitalize rural America, it is partnerships like this that can help solve this community's long-standing water quality and public health issues," he said in Wintersville.

Construction is expected to begin in Spring 2010 and take about 18 months to complete.

### **DISPUTE OVER SKILL GAMES ARRIVES AT SUPREME COURT AS JUSTICES PREPARE TO HEAR TRACK SLOTS FIGHT**

The Ohio Supreme Court - which hears arguments Wednesday in a case that seeks to scratch plans to install slot machines at horse racetracks - now has another gaming related matter pending before it.

Owners of a skill game amusement arcade in Pickaway County are asking justices to hear their challenge to a 2007 law enacted at the urging of former Attorney General Marc Dann and Gov. Ted Strickland.

The measure (HB177, 127<sup>th</sup> General Assembly) was intended to crack down on a proliferation of parlors with the electronic devices that resemble slot machines.

Pickaway County Skilled Gaming LLC operates "Spinners Skill Stop Game," a members-only organization with an arcade in Circleville that contains 150 skill-based amusement machines.

The General Assembly amended the anti-parlor provisions into a pending measure that increased from one to two the number of horse racing tracks one person could own.

Gov. Strickland signed the emergency legislation Oct. 25, 2007.

Although Spinners subsequently reopened after making changes to comply with the new law, the company said memberships declined.

Spinners filed a lawsuit contending the legislation was unconstitutional.

The 10<sup>th</sup> District Court of Appeals this summer struck down part of the statute that limited the wholesale value of merchandise prizes awarded from the games to no more than \$10.

At the same time, the appellate panel rejected Spinners' arguments that the law was unconstitutionally vague and that it violated the Constitution's single-subject requirement for legislation.

The Pickaway County business also challenges another provision in the law that prohibits customers from using cash, gift cards or certain other items in exchange for a non-cash prize as a reward for playing a skill machine.

Attorney Gail Zalimeni of Columbus, representing Spinners, said the provision unconstitutionally prohibits individuals from selling their property.

"No compelling governmental interest exists with respect to the restriction on disposing and/or purchasing of property received as a reward for playing a skill-based amusement game. The fundamental right to buy, hold, and sell property can not be violated just on the basis that the property may have been obtained from playing a game," Ms. Zalimeni said.

"This provision criminalizes the action of purchasing an item where the purchaser has no way of determining whether the prize was a reward for playing a skill-based amusement game," she said.

"An infinite number of transactions can be subject to criminalization including purchases at yard sales, estate sales, second-hand stores, and antique stores," Ms. Zalimeni said in an appeal memorandum filed late Friday.

Justices will decide later if they will accept the case for review or let the appellate court's ruling stand.

Meanwhile, the Supreme Court is to hear arguments Wednesday in a lawsuit that asks justices to declare part of the state budget enabling installation of slot machines at racetracks through the Ohio Lottery is subject to a statewide vote.

Gov. Strickland and the General Assembly proposed the expanded gambling to raise an estimated \$933 million to help balance the new two-year budget that took effect in July.

LetOhioVote, a ballot issue committee the state believes is funded by casino gambling interests, contends the track slots proposal should be subject to referendum.

On Tuesday, the court is to hear arguments in another high-profile case affecting the state's budget.

Justices will take up a challenge the Ohio Grocers Association and others have filed against application of the state's Commercial Activity Tax to the food industry.

### **AEP OHIO SEEKS FEDERAL STIMULUS FUNDS FOR SMART GRID PROJECT**

AEP Ohio announced Monday it has applied for \$75 million in federal stimulus money to assist with a smart grid program that would put more than 110,000 advanced energy meters in Ohio homes.

The project, known as gridSMART, is expected to create more than 500 jobs over three years, the utility said.

"Many in our sector are just installing smart meters, but our strategy goes beyond that," said Joe Hamrock, the company's president and chief operating officer. "Most important, we will give customers the tools and information needed to use electricity more efficiently while improving the efficiency of how we deliver electricity to our customers. These efficiencies will help our customers save money, reduce the power that we need to generate, cut emissions and also delay the need to build generation."

The company said it intends to target the \$150 million project in northeast central Ohio next year. It also includes the implementation of new distribution grid technology, distributed energy sources, hybrid vehicles and smart appliances, among other things.

The project involves several other organizations, including Battelle, General Electric, Pacific Northwest National Laboratory, Lockheed Martin and S&C Electric.

### **ATTORNEY GENERAL'S OPINIONS**

No. 2009-030. Requested by Lorain County Prosecuting Attorney Dennis P. Will. SYLLABUS:

1. Before an "agency or authority," as described in the final sentence of R.C. 5705.03(B)(3), requests a taxing authority to submit a tax levy to the electors, the agency or authority is required by R.C. 5705.03(B) to request and receive a certification of tax valuation and millage from the county auditor. There is no need or authority for the taxing authority to request an additional or alternate certification.
2. An "agency or authority" authorized to request a taxing authority to submit a tax levy on its behalf within the meaning of R.C. 5705.03(B)(3) includes the board of library trustees of a county, municipal corporation, school district, or township public library under R.C. 5705.23 and the board of health of a general health district under R.C. 3709.29. It does not include a county

MR/DD board, a county children services board, a community mental health board, an alcohol and drug addiction services board, or an alcohol, drug addiction, and mental health board.

No. 2009-031. Requested by Summit County Prosecuting Attorney Sherri Bevan Walsh. SYLLABUS:

A county that has adopted a final plan for the provision of wireless enhanced 9-1-1 under R.C. 4931.40-.70 may rotate on a monthly basis the public safety answering points that will receive moneys disbursed to the county from the wireless 9-1-1 government assistance fund under R.C. 4931.64(B).

TUESDAY, SEPTEMBER 1 2009

**FIGHT OVER APPLYING NEW STATE TAX TO GROCERS LEADS TO SMORGASBORD OF QUESTIONS FROM JUSTICES**

A lawsuit intended to free grocers from the state's new commercial activity tax (CAT) proved so tantalizing at the Ohio Supreme Court on Tuesday that each of the seven justices took a bite out of the case during oral arguments.

Attorney General Richard Cordray, personally representing the state at the court for the first time since his election to the post last November, barely completed his first sentence before questions from the bench began.

At issue is a lawsuit the Ohio Grocers Association filed to overturn application of the CAT to its members and food wholesalers. They contend it violates a provision of the Ohio Constitution that prohibits an excise tax on the sale or purchase of food. Mr. Cordray maintained the levy was not being imposed on food sales.

"The new franchise tax, known as the commercial activity tax or CAT, is paid by all Ohio businesses for the privilege of doing business in the state, and the measuring stick for the tax is based on gross receipts," he said.

**Justice Terrence O'Donnell:** "But the argument is then made that because it's a tax on the gross receipts, some of those receipts are derived from the sale of food commodities, and therefore it is a tax on that, though the statute says it's not a transactional tax."

**Mr. Cordray:** "That's the grocers argument, your honor, but it is out of step with more than a hundred years of case law from this court that distinguishes between a tax levied on sales or property ... or a tax on the privilege of doing business measured by some measuring stick, which may include some form of property, some form of sales."

Justice Maureen O'Connor said a review of case law reflected past instances in which taxes levied on the sale of food were eliminated.

However, she noted that those were taxes that would have been paid by individual citizens upon a transaction.

"It would have added to the price, the cost of securing that food. And here it's not borne by the average citizen to pay this tax. It is a corporate or a business tax that is again characterized as for the privilege of doing business in the state of Ohio," Justice O'Connor said.

Justice Paul Pfeifer pointed out the CAT already contains several exemptions, including one for financial institutions.

**Justice Pfeifer:** "The folks who sell or put together these derivatives are exempt from the tax altogether. They had a pretty good lobby."

**Mr. Cordray:** "Financial institutions are subject to a separate franchise tax ... ."

**Justice Pfeifer:** "I understand that. But there's a specific exemption for folks who do put together derivatives."

**Mr. Cordray:** "The legislature has within its power to tax and to levy exemptions from the tax."

Justice Judith Lanzinger, citing court rulings in 1965 and 1975, indicated that use of net income as a measurement would not automatically make a tax improper.

Gerhardt Gosnell II, representing the grocers, said the issue is whether the General Assembly can trump constitutional prohibitions so long as they describe a levy as a privilege tax in which the object - food sales - is described as measuring stick.

"This court should reject the legislature's attempt to circumvent the constitution and uphold what it has always said, that it is the substance of the tax that matters, not how it's labeled," Mr. Gosnell told the court.

**Justice Robert Cupp:** "How much is the consumer going to save if we decide that your argument is correct?"

**Mr. Gosnell:** "We don't know exactly how much the consumer will save, but we do know ... the expert said that from an economic perspective a tax on gross receipts, which is what the CAT is, is identical to a point of sale."

**Justice O'Donnell:** "But it isn't for those who don't have gross receipts that would exceed \$1 million, is it? Someone who sells \$50,000 a month has a gross receipt of \$600,000 and they pay a flat tax and that has nothing to do with the amount of gross receipts they have up to \$1 million. Isn't that true?"

**Mr. Gosnell:** "Yes. Under the statute your honor, assuming gross receipts are less than \$1 million, they pay a flat \$150 tax."

**Justice O'Donnell:** "So if an entity has \$600,000, or \$800,000, or \$999,000 in gross receipts they all pay the same tax. It has nothing to do with the sale."

**Mr. Gosnell:** "Your honor, the point of the constitutional provision is to ask what is being taxed, not the rate that's being taxed."

Prior to enactment of the broad based, low rate CAT, grocers were subject to the corporate franchise tax that was measured on the basis of either net income or net worth.

**Justice Stratton:** "Both net income and net worth depended on how much food they sold did it not?"

**Mr. Gosnell:** "Only, at the most, indirectly."

**Justice Stratton:** "And because that franchise tax included in some form or fashion, directly or indirectly, how much food they sold. But there was never any objection by the grocers to that tax, was there?"

**Mr. Gosnell:** "There was never an objection because there's a substantive difference."

Chief Justice Thomas Moyer said it was unclear whether each grocer in the state would pass along the CAT to consumers, presuming the court ruled in favor of the state.

"The grocer can choose to pass along that cost on paper products, can't they? We don't know that it's going to have any impact at all on the price of food," Justice Moyer said.

**Mr. Gosnell:** "The legal question is what is the object of the tax? That is the question. Is the object of the tax something that the Constitution forbids the legislature from taxing?"

**Justice Moyer:** "Well, the object of the tax is to say to grocers, like everyone else in business, this is the tax you pay for having the privilege of doing business in Ohio. Now, how is it measured? We've had cases ... which tell us how that franchise tax is measured. And I have a difficult time understanding why gross receipts cannot be the measurement."

Justices Pfeifer and O'Connor wondered if growers, processors and others in the food supply chain would also be exempt from the CAT if the court ruled in favor of grocers.

**Justice O'Connor:** "Would the farmer be relieved of the CAT tax?"

**Mr. Cordray:** "I believe that everyone whose receipts included any portion of food sales, under (plaintiffs) theory, would be relieved of the CAT tax by taking all of that out of the base. And if that was all there was, then they would be entirely relieved of it, yes."

Although the arguments marked Mr. Cordray's first appearance at the court since becoming attorney general, he was previously there on several occasions as State Solicitor under former Attorney General Lee Fisher.

Mr. Cordray also has argued six cases in front of the U.S. Supreme Court during his career.

Grocery owners, food wholesalers, and the association filed suit in Franklin County common pleas court seeking an order to prohibit application of the CAT to any of their gross business receipts stemming from the sale of food for off-premises consumption.

They also sought a refund of money already paid to the state under the CAT since 2005 when it took effect.

A ruling in favor of the grocers would cost the state \$188 million per year in lost revenue, plus at least \$355 million in refunds.

The trial judge ruled in favor of the state, holding that the constitutional provisions in dispute barred only a state sales tax on food.

The 10<sup>th</sup> District Court of Appeals overruled the trial court. It said that imposing the CAT on a grocer or food wholesaler, based on a percentage of business receipts from the sale of food, constituted an unconstitutional excise tax on the sale of food.

Justices took the case under advisement without indicating when they would announce a decision.

### **STRS PROPOSES BENEFIT CHANGES, HIGHER CONTRIBUTIONS TO BALANCE LIABILITIES**

Active teachers would contribute more toward their pension benefits and annual cost of living adjustments for retirees would be reduced under a plan approved Tuesday by the board of the State Teachers Retirement System.

The proposal, which increases the system's funding status by saving almost \$9 billion in future costs, also calls for increases in employer contribution rates, the tightening of retirement eligibility standards and changes in the way that benefits are calculated.

All of the proposed changes, which will be presented to the Ohio Retirement Study Council later this month, must be approved by the legislature and governor before taking effect.

A leader of a teacher stakeholder group said the changes are being rushed and it is possible his group will lobby against the proposal.

STRS Executive Director Michael Nehf said the changes would lower the system's funding period from infinity to 33.4 years - closer to the 30-year funding target that is in place for all state employee retirement systems.

STRS was funded over a 41.2 year period before the global market downturn that started last year.

The plan reduces the current 3% annual COLA to 2% for people who retire before July 1, 2011 and halves the COLA to 1.5% for those who retire after that date. Without cutting the COLA, the system said it would be unable to maintain a viable defined benefit plan for retirees.

The package generates additional money for the system by increasing employee contributions by 2.5% over five years starting on July 1, 2011. Employers would also see their contributions increase by 2.5% over five years beginning on July 1, 2016.

Those increases would boost employee contribution rates to 12.5% and employer contribution rates to 16.5%.

The plan also calls for:

- Final average salaries to be based on the teacher's five highest years of earnings
- Changing the benefit calculation formula
- Adjusting retirement eligibility

Bill Leibensperger, co-chair of Healthcare and Pension Advocates for STRS, expressed concerns about impact of the decision on teachers and the timing of the decision.

"There's a fundamental difference of opinion in the room," he said, noting that delaying related actions would also provide more time for the economy to recover. "It seems to me the more time we have to make this decision, the smarter it's going to be."

He expressed concerns about what recommendations might come out of the ORSC, and what shape a bill might take. "I fear that some kind of Frankenstein's monster is going to come out of this process and we're going to have to lobby against it," he said.

Mr. Leibensperger acknowledged that the board, system and interested parties have been reviewing the matter for some time, but said many individuals aren't aware of the debate. "Other people out there are still in complete denial," he said.

Added Ann Hanning, another HPA co-chair: "None of this makes anybody happy."

Mr. Nehf said the phasing-in of the changes gives Ohio's economy more time to recover, and gives school districts advance warning about new contribution obligations. Further, the approach addressing several fronts eliminates a need for more "drastic" changes in a single area.

The director added that the changes keep teachers in control of their retirement decisions, and will avoid a retirement "stampede" by veteran teachers.

Mr. Nehf said the plan also maintains the current 1% employer contribution to cover health benefits.

He cautioned, however, that other changes may be needed in the future. "When we make this decision, we're not done," he said.

Board member Craig Brooks observed that despite intentions, the plan is likely to drive an increase in retirements over the short term. "We can say we're not going to have it, but were going to have it," he said. "There's going to be some sort of stampede effect no matter what."

He also raised the prospect of the system providing some kind of temporary benefit to involved parties if it gets back to a 95% or 100% funding status.

Responded Mr. Nehf: "That would be a great goal, and I think staff would support that."

Board member Tim Myers asked about the possibility of having a COLA that could range from 1% to 3% per year, and letting the board set the rate based on system asset levels.

Members also asked about any legal impediments the system may face in enacting the plan, and were advised to review those issues in executive session.

Leaders of the state's four other public employee retirement systems are expected to present their plans for change to ORSC next week.

### **DWINDLING COUNTY REVENUES DRIVES COMMISSIONERS TO SEEK CONTROL OVER SPECIAL FUNDS**

Many of the same financial strains afflicting state government are also draining county coffers, prompting local officials to consider options that include sales tax increases and employee layoffs and furloughs.

The situation is dire, as reflected in Scioto County's recent "fiscal emergency" designation, and has the County Commissioners Association of Ohio asking the General Assembly to grant commissioners' authority to divert money from certain rotary funds, Executive Director Larry Long said in a recent interview.

"At least four of our five major sources of revenue are down. First and foremost, the sales tax," he said, noting more than half the 88 counties have already raised the sales and use tax up to the maximum 1.5% allowed under law.

County sales tax revenues generated about \$663.6 million during the first half of 2009, a decrease from \$709.8 million during the same time period in 2008, according to the Department of Taxation.

Several counties, including Mahoning, Lorain, and Gallia, will ask voters to approve sales tax increases in November, ODT said. Hancock County commissioners imposed a 0.5% increase last year, but agreed to ask voters this year whether to retain it.

Voters in Allen and Stark counties will have the option of repealing previously enacted 0.5% sales tax hikes in referenda elections, the agency said.

Besides waning sales tax income, counties are seeing declining fee revenues, investment interest, and state reimbursements through the Local Government Fund, which is directly linked to falling state tax revenues, Mr. Long said.

Property tax revenue is a "mixed bag" depending on where counties are on the reappraisal cycle, local housing markets, and delinquency rates, which have been rising steeply in many places, he said.

In addition to laying off county employees, commissioners are planning to make use of new authority to furlough employees that was included in the biennial budget ([HB 1](#)), he said. CCAO members have shown considerable interest in the new unpaid leave option.

The bleak financial outlook in many areas has inflamed tensions between county officials, he said, citing a case where a coroner sued commissioners claiming budget cuts interfere with the office's ability to perform its statutory obligations. "Now we don't have any money and we're going to be hiring lawyers to sue each other."

Other disputes occur more commonly when judges object to commissioners trying to reduce their employees' compensation, he said, noting courts have the authority to override such decisions.

One of the few bright spots was the legislature's decision to increase the state's public defender reimbursement rate in the biennial budget and to apply sales tax to managed care organizations, Mr. Long said.

CCAO plans to lobby this fall for another proposal that didn't get included in the budget, he said. Commissioners sought an amendment that would grant them authority to appropriate surplus money accruing in special funds maintained by county courts, treasurers, prosecutors, and sheriffs.

"There's a substantial concern out there that we have a number of special revenue funds that accumulate a lot of money at the same time the general fund is dying," he said. "We're going to have to find ways to do things more efficiently and have a better overall utilization of county tax money, whether it come from taxes or from fees."

The proposal would be much more restrictive than the authority the legislature has to raid state rotary funds and would only be available in a time of emergency when revenues have declined substantially, he said. Several funds would be off limits, such as those supported by voted levies, gas tax, and the real estate assessment fund.

In addition, the measure outlines a "complete and totally open process" that would require commissioners to notify affected officeholders and hold public hearings before transferring any money, he said.

Commissioners face challenges to passing the measure, which other county officials will likely oppose, Mr. Long allowed. "The legislature would like us to work things out. They don't like to solve fights in the county family."

### **INTRODUCED**

SB 165 OIL/GAS DRILLING (Niehaus) To revise the Oil and Gas Law. Am. & En. 1509.01, 1509.02, 1509.03, 1509.04, 1509.05, 1509.06, 1509.07, 1509.071, 1509.072, 1509.10, 1509.11, 1509.12, 1509.13, 1509.14, 1509.17, 1509.18, 1509.20, 1509.21, 1509.22, 1509.221, 1509.222, 1509.225, 1509.226, 1509.23, 1509.27, 1509.31, 1509.35, 1509.36, 5749.06, 1509.062, 1509.19, 1509.34, 1509.50, and 1571.18

WEDNESDAY, SEPTEMBER 2 2009

### **TRACK SLOTS PLAN TERMED 'AN END RUN' AROUND VOTERS AS OHIO SUPREME COURT HEARS CASE FOR, AGAINST REFERENDUM**

One Ohio Supreme Court justice said Wednesday the state's plan to install slot machines at horse racetracks seems like "an end run" around a public vote, while another said the slots could proceed even if rejected at a referendum.

Justices offered those views during oral arguments in a case in which slots opponents ask the court to give them 90 days in which to circulate petitions that would place the expanded gambling issue before voters in 2010.

The General Assembly specifically exempted from referendum a provision in the state budget that Gov. Ted Strickland sought in support of his order to the Ohio Lottery for installation of up to 17,500 video slot machines.

LetOhioVote.org filed a lawsuit in an attempt to overturn the provision for video lottery terminals at a statewide election.

Attorney Michael Carvin of Washington, D.C., the group's attorney, said the court has made clear in the past that laws are subject to referendum unless they plainly fall within certain constitutional exceptions.

"This court has frequently emphasized that the right to referendum is of paramount importance and an important check on the General Assembly because it preserves the right to self government," Mr. Carvin said.

"(We) have a clear legal right to referendum here because the VLT provisions are not appropriations, much less plainly appropriations," he said.

**Justice Terrence O'Donnell:** "So, isn't this really a question of whether or not the legislation, as enacted, is or is not an appropriation?"

**Mr. Carvin:** "Yes, I agree with that your honor. And our argument on that is that there is a fundamental and obvious difference between a law that authorizes gambling, as this does, and raises revenue, versus an appropriation, which is all about spending money. That's an obvious distinction."

**Justice O'Donnell:** "Apparently it's not so obvious to everybody."

Justice Paul Pfeifer said a VLT section that legislators inserted into the two-year state budget seemed meaningless, because the lottery already had authority to install the machines if it chose to do so.

"I'm suggesting even if you overturned it, the lottery commission could still do this," Justice Pfeifer said.

Mr. Carvin disagreed. He pointed out the new statute also bans political subdivisions from taxing licensed slots operators, and expressly requires the lottery commission to install the machines.

"Now, that's a change in the law because you've taken something that was in the lottery commission's discretion and made it mandatory," he said.

Mr. Carvin said that if the court rules in favor of the state, it will essentially have allowed the General Assembly "to eviscerate the referendum process" in the Ohio Constitution.

"Because all they need do, whether it's tort reform or anything else, is add a minor licensing procedure that brings in a few fees from the participants and then they can do this causal chain analysis that they're trying to advance here," he said.

**Chief Justice Thomas Moyer:** "I'm curious. What words should the General Assembly have used in this legislation to save it from a referendum?"

**Mr. Carvin:** "I don't think any words would save this from referendum because I don't think the General Assembly has any power to overturn the Constitution."

**Justice Moyer:** "Well, they appropriate funds, right?"

**Mr. Carvin:** "Yes, and we're not challenging the appropriation of funds. We're challenging the activity that's going to lead to the money that they hope will be eventually appropriated."

State Solicitor General Benjamin Mizer told justices the VLT provisions were "inextricably linked" to a \$2.3 billion appropriation in the bill for local school districts.

"The General Assembly was not, as Mr. Carvin suggests, just enacting a licensing fee in order to create an exemption from referendum," he said.

Justice Judith Lanzinger said the Constitution provides that changes in the permanent law of the state are subject to referendum under powers reserved to the people.

**Justice Lanzinger:** "Now, you know in 2006 in November, slot machines were defeated. So the idea was in November of 2006 it was put to the voters to determine whether they wished to have slot machines. They chose not to vote in favor of it, and here it appears that there seems to be somewhat of an end run around the idea of allowing the people to decide."

**Mr. Mizer:** "Yes, the people defeated a slots plan put on the ballot by private casinos who wanted the money to go to the private casinos. But the people have already approved the activities of the lottery commission and have already said that they want a lottery to exist."

**Justice Evelyn Stratton:** "Is it your client's position that they still have the right under the lottery commission authority and prior statutes to go forward with the slot machines despite the referendum?"

**Mr. Mizer:** "Our position ... is that the court should tailor its remedy and say that the lottery commission does have pre-existing authority so the appropriation can continue to go forward."

**Justice Stratton:** "And if we decline to answer that question, what is your client's position?"

**Mr. Mizer:** "I think then that would be a more difficult bridge that the governor would come to."

The state solicitor said denial of a referendum was not a complete evisceration of the power of Ohioans to express their disapproval of VLT gambling.

"The referendum power may not be available, but the initiative process is available. Moreover, this is a representative democracy," he said.

"And so, first of all, sometimes we trust our representatives to make decisions that may not be popular. And second, if they do abuse that trust then we can vote our representatives out," Mr. Mizer said.

The two-year state budget anticipates receipt of \$933 million in revenue from installation of slots at racetracks. Justices took the case under advisement without indicating when they would release an opinion.

### **OHIO ROUNDTABLE TO FILE NEW LAWSUIT AGAINST GOVERNOR'S LOTTERY SLOT MACHINE PLAN**

A nonprofit group consistently opposed to expanded gambling said Wednesday it would file a lawsuit in the Ohio Supreme Court to block installation of up to 17,500 slot machines through the state lottery at horse racetracks.

The Ohio Roundtable scheduled a media briefing for Thursday afternoon in Columbus to release details of the complaint.

It will name Gov. Ted Strickland, the Ohio Lottery Commission, and other state officials as defendants over what was described as "the unconstitutional expansion of the Ohio Lottery into the commercial use of slot machines at Ohio's racetracks."

Word of the legal action came on the same day justices heard oral arguments in another case against the slots proposal. The Ohio Roundtable said one focus of its new litigation would be on legislation that authorized the lottery to adopt regulations for operating the slots as a way to help balance the state's budget.

"Since 1990 over 10 million votes have been cast against casino gambling in Ohio," said David Zanotti, president and chief executive officer.

"The governor has cast aside all those votes and the results of four legal elections," Mr. Zanotti said in a news release.

U.S. Sen. George Voinovich (R-Cleveland) is to participate in the press event to outline concern about expansion of the lottery, and about Issue 3, a separate proposed constitutional amendment on the Nov. 3 ballot.

The amendment would authorize the construction of one full-service casino each in Cleveland, Columbus, Cincinnati, and Toledo.

The Ohio Roundtable said it rejects the "the premise that constitutional principles and the rule of law may be set aside for the short term purpose of balancing the state budget on the possibility that some Ohio citizens will be willing to gamble away scarce personal resources."

Voters have rejected statewide casino and track slots proposals on four occasions since 1990.

The most recent election occurred last November when a proposal to build a casino near Wilmington was defeated by a wide margin (38%-62%).

### **OHIO TO RECEIVE \$32 MILLION UNDER 42-STATE FRAUD SETTLEMENT WITH DRUGMAKER PFIZER**

A final settlement involving allegations of fraudulent marketing activities against drug manufacturer Pfizer Inc. was announced Wednesday. Attorney General Richard Cordray said Ohio would get \$32 million out of a total \$1 billion the company agreed to pay the federal government, 42 states and the District of Columbia.

The government payments will go to compensate costs that Medicare, Medicaid and other programs incurred as a result of the company's marketing activities involving the anti-inflammatory drug Bextra and other medications. In finalizing an agreement in principle announced earlier, Pfizer also agreed to pay \$1.3 billion in criminal penalties and plead guilty to a federal felony violation for misbranding Bextra.

Mr. Cordray said the total \$2.3 billion settlement is the largest of its kind involving health care fraud.

"I'm proud of the significant role that Ohio played in the resolution of the largest health care fraud case ever," Mr. Cordray said in a statement. "This outcome underscores my office's commitment to vigorously pursue those who defraud the Ohio Medicaid program."

In a separate case, Ohio also reached a settlement with Pfizer involving alleged violations of state consumer law, the AG announced. Under that agreement, the company will pay \$33 million to the 42 states and D.C.

The federal case ensued when the various government entities alleged Pfizer engaged "in a pattern of unlawful marketing activity to promote multiple drugs for certain uses that the Food and Drug Administration had not approved," the AG's office reported.

Those allegations included: marketing Bextra for conditions and dosages other than those for which it was approved; promoting the use of the antipsychotic drug Geodon for a variety of off-label conditions; selling the pain medication Lyrica for unapproved conditions; and making false representations about the safety and efficacy of the antibiotic Zyvox.

Additionally, the company was alleged to have provided illegal payments such as entertainment, cash, travel and meals to health care professionals to promote the prescribing of Bextra, Geodon, Lyrica, Zyvox, Aricept, Celebrex, Lipitor, Norvasc, Relpax, Viagra, Zithromax, Zoloft and Zyrtec.

"We regret certain actions taken in the past, but are proud of the action we've taken to strengthen our internal controls and pioneer new procedures so that we not only comply with state and federal laws, but also meet the high standards that patients, physicians and the public expect from a leading worldwide company dedicated to healing and better health," Pfizer Senior Vice President and General Counsel Amy Schulman said in a statement.

"Corporate integrity is an absolute priority for Pfizer, and we will continue to take appropriate actions to further enhance our compliance practices and strengthen public trust in our company."

Under a condition of the agreement, the U. S. Department of Health and Human Services Office of the Inspector General will monitor Pfizer's future marketing and sales practices.

The separate settlement with states, to be filed in Franklin County Common Pleas Court, resolves allegations of improper marketing of Geodon, the AG's office said. Along with the payments, Pfizer has agreed to change its marketing of the anti-psychotic drug by limiting its product sample distributions and not promoting it for off-label uses.

In addition, the attorney general's office said the company has agreed to post on its website until 2014 a list of physicians and related entities who received payments from Pfizer.

#### **PUCO APPROVES AT&T ALT REG REQUEST; UTILITY CALLS FOR REGULATORY REFORM AS LONG-AWAITED BILL INTRODUCED**

State utility regulators on Wednesday approved AT&T's request to enter a form of alternative regulation in three more areas, giving the telecom company flexibility in more than 99% of its Ohio exchanges.

The move, which impacts residents in Gallipolis, Norwich and Rushville, offers the company more flexibility in pricing auxiliary services in exchange for capping annual increases in basic local exchange service rates.

AT&T welcomed the action, and said the approval shows that it is time for a new form of regulating the industry.

"This ruling shows that AT&T Ohio's wireline telephone service is operating in a hyper-competitive market with an abundance of choice for consumers," said AT&T Ohio President Tom Pelto.

He said the decision, and the fact that AT&T has lost half of its lines to competitors, shows that competition in the industry is strong.

Mr. Pelto urged lawmakers to rewrite the rules for the telecom industry, saying Ohio has "telegraph-era regulations" in place. "It is time for the legislature to focus on economic development, jobs and investment that common sense regulation in this space would translate to."

The commission's action came shortly after a Republican senator offered legislation (SB 162) that adjusts telecom regulation.

"The telecom industry has the potential to provide a significant shot in the arm for Ohio's ailing economy, and the Legislature must do everything possible to ensure our state is in a strong position to compete with other states for new development and job opportunities," Sen. Steve Buehrer (R-Delta) said. "Indiana, Michigan, Tennessee and others have recognized the important economic impact of the telecom industry and have taken steps in recent years to streamline their regulatory climates. Now, Ohio must act."

"As the telecommunications industry continues to expand in Ohio, it is critical that our state's regulatory environment is fair, consistent and promotes competition between all phone providers in the state. This increased competition would help improve customer service, spur innovation and encourage companies to invest in new infrastructure and create high-tech jobs in Ohio's communities," the lawmaker added.

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**GOVERNOR NAMES COLLINS-TAYLOR DIRECTOR OF PUBLIC SAFETY DEPARTMENT**

Gov. Ted Strickland announced Thursday he has appointed Cathy Collins-Taylor, executive director of the Ohio Investigative Unit, to lead the Ohio Department of Public Safety.

Ms. Collins-Taylor has led OIU, a division of the cabinet-level agency, since 2007. She is a 26-year veteran of the Columbus Division of Police, where she was that agency's first female assigned to the motorcycle unit.

She succeeds Henry Guzman, who stepped down from his post last week amid a power struggle with State Highway Patrol Superintendent Richard Collins, who resigned at the governor's request. In the new role, the director will earn \$128,544 per year.

"Cathy is an experienced professional whose background in law enforcement and safety has prepared her to lead the Ohio Department of Public Safety," the governor said in a statement. "I am confident that Cathy will be able to work with the divisions within ODPS to ensure the agency is running effectively and efficiently, and with the safety and wellbeing of the public at its forefront."

OIU enforces liquor, food stamp and tobacco-related laws and provides professional assistance to law enforcement agencies.

The Columbus resident who also worked previously for Ohio Homeland Security, begins the new job on Sept. 19.

"I'm honored to accept this opportunity to lead an agency that I've called home for more than five years," she said in a statement released by the governor's office. "I look forward to continuing to work with the dedicated staff at the Department of Public Safety as we move forward with the department's critical mission of education, service and protection."

**ROUNDTABLE ASKS SUPREME COURT TO DECLARE SLOTS PLAN UNCONSTITUTIONAL; VOINOVICH CRITICIZES STRICKLAND**

The Ohio Policy Roundtable asked the Ohio Supreme Court today to strike down the state's plan to install up to 17,500 slot machines through the Ohio Lottery at seven horse racetracks.

Opponents of expanded gambling claimed in their lawsuit that the initiative Gov. Ted Strickland proposed, and the General Assembly supported in the state budget, is unconstitutional on three grounds:

- Authority to conduct a lottery, contained in the Ohio Constitution, does not authorize implementation and operation of video lottery terminals.
- Income from operation of VLTs would not be used to fund education, as the Constitution requires.
- Inclusion of the slot machine provisions in the state budget violates the Constitution's single subject rule for legislation.

The complaint for a declaratory judgment does not ask the court to put the case on an accelerated hearing schedule.

Attorney David Axelrod of Columbus said he did not think such a request was necessary at present.

"We think that it's prudent to wait until after the election and see what happens with the election. We certainly can invoke various processes to speed it up if we think that has to happen," he said at a news conference.

Gov. Strickland has issued emergency administrative rules to begin implementing the slots plan. Each track owner faces a Sept. 15 deadline for submitting the first of five \$13 million licensing payments to the lottery.

Operation of the video lottery terminals is expected to begin in May 2010, and raise a projected \$933 million during the two-year state budget that began in July.

David Zanotti, president and chief executive officer of the Roundtable, said "certainly sooner rather than later" would be the group's desire in proceeding with the litigation.

"As far as the timing, the sense that there's somehow a ticking clock or a time bomb involved in this once the money starts coming in," he said.

"I think we all agree that if we were to let this to go two, three, or four years it would get more difficult. Because as you all know the way this town works, when the money starts rolling in it gets difficult to make changes," Mr. Zanotti said.

U.S. Sen. George Voinovich (R-Cleveland), another long-time opponent of expanded gambling, joined Mr. Zanotti in lining up against both track slots and a competing Nov. 3 ballot issue.

The proposed constitutional amendment would authorize construction of four full-service casinos in Cleveland, Columbus, Cincinnati, and Toledo.

Sen. Voinovich characterized casinos and slot machines as an attack on families, and he criticized Gov. Strickland's move to expand lottery gambling.

"I thank God that Ohioans have seen through casino gambling and time and again have voted it down. They see it as it really is. Unfortunately, the proponents don't seem to be listening," he said.

Sen. Voinovich described as "greedy vultures" out-of-state gambling interests that back casino development in Ohio.

Backing the casino ballot issue are Penn National Gaming of Pennsylvania and Dan Gilbert, owner of the NBA Cleveland Cavaliers, operator of Quicken Loans Arena in Cleveland, and chairman of Quicken Loans.

"The other attack, sadly, is being brought on by our own state's governor, the same man who stood shoulder to shoulder with Ohioans to defeat the so-called 'Learn and Earn' proposal when he was running for governor in 2006," he said.

Sen. Voinovich acknowledged the state's 11.2% unemployment rate and sharp drop in tax revenues as a result of the recession. He said there also were economic problems when he first became governor.

"I have to say that their situation is a little more difficult than what I faced when I was governor, but I am familiar with the challenges," he said.

"But I think that if you look at what they're doing and you study our lawsuit, it's not only unconstitutional. It will cost the state more than it will bring in when balanced against the hurt it will do Ohio families and the social welfare costs the state will have to pay.

Gov. Strickland opposed a statewide ballot issue last November for construction of a single casino near Wilmington.

Sen. Voinovich said that based on his past comments, Mr. Strickland knows gambling is not in the best interest of Ohio families.

"These slots will run 24 hours a day and be available even to people today who can't buy alcoholic beverages. In other words, 18 year olds are going to be able to go in there and use those slot machines," the senator said.

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#### **RETIREMENT SYSTEMS PROPOSE SEVERAL CHANGES TO MEET FUNDING CHALLENGES**

The boards of four of Ohio's five public employee retirement systems have recommended a variety of ways to cut future costs, among them being a mix of contribution rate hikes, retirement eligibility changes and cuts in cost of living adjustments.

The options, approved in different forms by the leaders of the State Teachers Retirement System, Highway Patrol Retirement System, Police & Fire Pension Fund and School Employees Retirement System, will be formally presented to the Ohio Retirement Study Council next week.

The board of the Ohio Public Employees Retirement System - the state's largest fund - has not approved a plan to submit to the council, but has reviewed several similar steps that could be implemented to reduce expenses.

All systems were charged with having board-approved plans to the ORSC by Sept. 9.

While stressing that the system is sound and is able to pay its obligations for many years, OP&F proposed increases in the active member contribution rate from 10% to 12% and suggested boosting the police employer contribution rate from 19.5% to 24%, which would be even with fire employer contribution rates.

Further, rates for both police and fire employers would increase an additional 1% to 25%.

The OPF board also unanimously proposed increasing the service retirement age for new hires from 48 to 52, delaying the retiree COLA until age 55, excluding beneficiaries and changing the minimum deferred retirement option plan (DROP) to five years for new participants.

If all those measures are enacted by the legislature, the board also committed to basing final average salary determinations on the five highest years, rather than three, cutting the DROP interest credit rate from 5% to 3%, shifting 1.5% of the 6.75% dedicated to health care and tying health premiums to years of service for new retirees.

HPRS Director Dick Curtis said his board unanimously approved cutting COLAs from 3% to 2% for all but the oldest and less well-off retirees and determining final average salary on five years, rather than three, for troopers who retire after the start of 2015.

The plan also increases the COLA eligibility age from 53 to 60 for those who retire after the enabling legislation takes effect and directs less of the employer's contribution to health care benefits.

Mr. Curtis noted that the board will also ask the council to give it authority to seek and retain legal counsel on its own, conduct a independent review of the custodial role of the state treasurer and restore its ability to raise the employer contribution rate - a change that was included in the new state budget act.

The SERS board proposed three changes in retirement eligibility and said it would consider other options - including contribution rate hikes, COLA reductions and health care adjustments - if needed the eligibility changes don't keep the system within the 30-year funding period.

Under the SERS plan, those retiring after Aug. 1, 2015 would have to be 67 with 10 years of service or 57 with 30 years of service to avoid a reduction in pension benefits. Members could retire early - at a reduced benefit - at 62 with 10 years of service or at 60 with 25 years of service.

SERS said the changes met advocacy groups' goals of not overreacting to the current funding situation in a way that could have a negative impact on members and retirees for years to come.

OPERS said its board discussed a number of similar options, including adding two years to age and service eligibility requirements, changing the benefit formula and setting final average salary on employees' five highest years of earnings.

The board also signaled it would not seek increases in employer or employee contribution rates and would preserve its 3% COLA, except in years when the Consumer Price Index is less than 3%.

OPERS also noted that its board previously recommended other changes - involving the purchase of service credit and adjustments to its disability program - that require legislative approval.

Similarly, STRS approved a reduction in COLAs, increases in employer and employee contribution rates and other measures to increase its overall funding level.

### **STATE REVENUES SLIP SLIGHTLY BELOW ESTIMATES FOR AUGUST**

Strong income tax revenues compared to Office of Budget and Management estimates have kept state coffers in the black so far in fiscal year 2010 despite a sales tax slump that dragged down August numbers.

Offset partly by a boost in auto sales tax collections likely spurred by the federal "Cash for Clunkers" program, total sales taxes nevertheless came in \$9.4 million, or 1.6%, below OBM projections. That's because non-auto sales tax intake was \$18.5 million, or 3.7%, less than expected.

The other notable underage for the month was in kilowatt-hour taxes, which were down more than \$12 million, or 26.5% compared to estimates.

Total sales tax receipts for the month were about \$568 million, according to OBM revenue data released Friday. Auto sales accounted for more than \$91.5 million of the total and those tax receipts were 11% higher than anticipated.

By far the strongest category for the month was the personal income tax, which brought in \$497 million for the state and beat estimates by \$24.3 million, or 5.1%. Through the first two months of FY 2010 the category is running ahead of projections by nearly \$36 million, or 3.8%.

While total tax receipts for August were down about \$9.8 million, or 0.8%, year-to-date totals remain in the back by \$7.6 million, or 0.3%. July saw revenues beat estimates for the first time in nearly a year.

Amanda Wurst, spokeswoman for Gov. Ted Strickland, said overall projections remain on target and mirror trends seen in the first month of the fiscal year.

The state's tax intake, however, continues to significantly lag the performance of FY 2009 as expected. During the first two months of the current fiscal year the state collected a total of \$2.33 billion in taxes, which was almost \$300 million, or 11.4%, less than in July and August of the prior year.

### **STRICKLAND DEFENDS BUDGET CHOICES AGAINST VOINOVICH CRITICISM OVER SLOTS**

Democratic Gov. Ted Strickland on Friday defended his decision to balance the budget by expanding state lottery gambling, instead of raising taxes, against criticism from U.S. Sen. George Voinovich (R-Cleveland).

Mr. Voinovich, a former governor, assailed Mr. Strickland's policy choice at an event that marked filing of a lawsuit intended to block installation of up to 17,500 video slot machines at Ohio's seven horse racetracks.

Sen. Voinovich said he would have chosen instead to seek an increase in taxes had he been governor this year.

Asked about his predecessor's comment Friday, Gov. Strickland said he respected Sen. Voinovich and considered him a friend.

"My reaction is that the senator was governor, and now I'm the governor. Much of our budget was helped significantly with the federal stimulus dollars, which the good senator opposed," Mr. Strickland said.

"But the responsibilities of governing the state of Ohio now rest upon my shoulders and I made decisions which I think were in the best interests of the state of Ohio," he said.

"The fact that his opinion is different than what my final conclusion was is fine with me. I don't mind the senator saying that. But I'm not sure that he is fully aware of all of the circumstances that I face now," the governor said.

The Ohio Policy Roundtable on Thursday asked the Ohio Supreme Court to declare unconstitutional the track slots plan, for which the General Assembly approved enabling legislation.

Already awaiting a ruling from justices is a separate case in which other opponents have asked the court to permit a statewide vote on the slots proposal.

"I do not think that the (Roundtable) lawsuit has merit and I do not expect it to be successful. I expect us to prevail with both lawsuits," Gov. Strickland said.

"That's because I think we are on strong legal footing, and these lawsuits will not be determined to have legal merit and we will prevail," he said.

In outlining his opposition to gambling Thursday, Sen. Voinovich characterized slots and casinos as an attack on families that jeopardizes their "eternal happiness" as well as creating economic difficulties.

"If you think about the 'Our Father,' at the end it says ... 'lead us not into temptation but deliver us from evil,'" he said.

"I happen to believe that because we have been successful on four occasions in defeating gambling that we have avoided, or made possible avoiding, the temptation of getting involved with gambling in the state," Sen. Voinovich said.

"In other words, not only does it affect their temporal situation, but it also affects their, I think, eternal happiness," he said.

### **AGENCY BRIEFS: STATE LANDS FEDERAL FUNDS TO FIGHT H1N1; LAND USE GRANTS AVAILABLE**

The same week that a Columbus woman died after contracting the H1N1 flu, the state received an extra \$29.8 million in federal funds to help fight the health problem.

The funding, released by the U.S. Department of Health and Human Services, raises the state's allocation to \$50.7 million since July.

"This federal funding is proof positive of the importance given to planning and implementation efforts aimed at H1N1 flu," Ohio Department of Health Director Alvin D. Jackson said. "Ensuring the health and safety of all Ohioans during a pandemic of flu and other public health emergencies is a top priority for ODH and its partners."

Most of the first two rounds of funding were forwarded to the state's 131 local health departments.

Separately, ODH announced that Ohio's child immunization rates are the third highest in the United States.

The agency said almost 82% of children between 19 months and 35 months have received vaccinations against a series of preventable diseases. Only Louisiana and Massachusetts have higher rates.

Director Jackson said Ohio's ranking is good news for kids, and is based on strong partnerships. "Public and private health care providers and local, state and federal level public health agencies are working every day to ensure a healthy future for our children," he said.

**Ohio EPA:** The Ohio Lake Erie Commission and the Ohio Water Resources Council set an Oct. 16 deadline for communities to submit grant applications for funds to help encourage orderly growth and land use.

Two of the awards will support projects in Lake Erie tributary watersheds and the remaining six awards will cover the rest of Ohio.

"The benefits of balanced growth are enormous," OEPA Director Chris Korleski said. "We encourage communities to apply for these grants to help them coordinate water, wastewater, transportation and other infrastructure planning while protecting and restoring Ohio's watersheds."

More information on the grants, which are capped at \$100,000, is available online at [www.balancedgrowth.ohio.gov](http://www.balancedgrowth.ohio.gov)

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