COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

08CVH 09 13867

OHIO CONCRETE CONSTRUCTION ASSOCIATION **2600 Corporate Exchange Drive, Suite 165** **Columbus, OH 43231,**	:	**Case No.** _____ **Judge** _____
and	:	
HARPER CONSTRUCTION **1648 Petersburg Road** **Hebron, KY 41048,**	:	
Plaintiffs,	:	
v.	:	
OHIO DEPARTMENT OF TRANSPORTATION **1980 West Broad Street** **Columbus, OH 43223,**	:	
and	:	
E.S. WAGNER COMPANY **840 Patchen Road** **Oregon, OH 44706,**	:	
and	:	
JOHN R. JURGENSEN COMPANY **11641 Mosteller Road** **Cincinnati, OH 45241,**	:	
Defendants.	:	

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
2008 SEP 29 AM 8:40
CLERK OF COURTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PREAMBLE

This action arises from a challenge to the Ohio Department of Transportation's ("ODOT") decision to pursue an asphalt pavement option over a concrete pavement option with respect to its September 19, 2008 award of a contract for construction of a three-mile, multi-lane

highway bypass around Wilmington, Ohio (the "Wilmington Bypass"). As detailed below, in selecting the asphalt pavement option over the concrete option, ODOT intentionally picked a pavement product that is more expensive, less efficient, less durable, and more intrusive for the residents of Ohio than the concrete alternative. It did so in furtherance of a systematic and intentional bias in favor of asphalt over concrete, in violation of ODOT's statutory mandate and the public policy of Ohio, and at a substantial and unjustifiable cost to the taxpayers of Ohio.

THE PARTIES

1. Plaintiff The Harper Co. ("Harper"), is a corporation incorporated under the laws of Ohio. Harper, as set forth below, is a concrete subcontractor that sought to obtain work on the Wilmington Bypass project, and which supplied the concrete pavement proposal for the Wilmington Bypass project that Defendant ODOT ultimately rejected. As an Ohio taxpayer, the Harper Company also has suffered a direct injury as a result of the actions and policies of ODOT as described herein.

2. Plaintiff Ohio Concrete Construction Association ("OCCA") is an Ohio-based trade association, comprised of concrete construction contractors who do business in Ohio. OCCA's members are qualified to bid on construction projects with ODOT. In addition, OCCA member Harper sought to obtain work as a subcontractor on the Wilmington Bypass project. OCCA's principal office is in Columbus, Ohio.

3. Defendant ODOT is a department of the state of Ohio, with its principal office at 1980 West Broad Street, in Columbus, Ohio.

4. Upon information and belief, Defendant E.S. Wagner Co. ("Wagner") is an Ohio limited liability company, with its principal place of business in Oregon, Ohio. Wagner, as set

forth below, is a general contractor and the winning bidder with respect to the primary contract awarded by ODOT for construction of the Wilmington Bypass project.

5. Upon information and belief, Defendant John R. Jurgensen Company ("Jurgensen") is an Ohio corporation with its principal place of business in Cincinnati, Ohio. Jurgensen, as set forth below, is the subcontractor that supplied the asphalt design alternative bid for the Wilmington Bypass project, which Defendant ODOT ultimately accepted.

6. Venue is appropriate in this Court because Defendant ODOT has its principal office in Franklin County.

BACKGROUND

A. History Of ODOT's Pavement Selection Procedures And Legislative Direction Thereof.

7. Historically, beginning with the creation of the federal interstate highway system, major highways in the state of Ohio and, indeed, across the country had been constructed with concrete paving materials.

8. In the 1980s and 1990s, at a time when substantial reconstruction of interstates was undertaken, Ohio—under the direction of ODOT—switched primarily to asphalt despite the fact that asphalt was inferior to concrete in terms of durability, maintenance and longevity. ODOT purportedly switched to mostly asphalt paving materials during this period because it was less expensive in terms of up-front cost without taking into consideration the additional cost of maintenance and resurfacing costs.

9. In fact, concrete has proven to be significantly more durable, less intrusive to motorists from a maintenance perspective, and more cost-effective for Ohio taxpayers than its asphalt counterpart.

10. Nonetheless, even into the early years of the 21st century, ODOT was apparently happy with its pavement selection process, which favored less-efficient and less-durable asphalt pavement over concrete by an overwhelming margin. The Ohio legislature clearly was not.

11. In 2003, the Ohio General Assembly enacted legislation designed with the goal of changing ODOT's pavement selection procedures to create an *objective* process by which ODOT would estimate the overall life-cycle cost of all feasible pavement alternatives, and select the alternative that provides taxpayers with the best overall, long-term value for their money.

12. Specifically, in 2003 the General Assembly passed Amended Sub. House Bill 87, which included a provision requiring ODOT to contract with a neutral third-party consultant to conduct an analysis of ODOT's pavement selection process. The consultant was to evaluate ODOT's process with similar selection processes employed by other states, and to make recommendations to ensure the efficiency and objectivity of Ohio's pavement selection process. Section 12 of Am. Sub. H.B. 87 ("H.B. 87") provided:

> The Ohio Department of Transportation shall contract with a neutral third-party entity to conduct an analysis of the Department's pavement-selection process including but not limited to life cycle cost analysis; user delay; constructability and environment factors. The entity shall be an individual or an academic, research, or professional association with an expertise in pavement-selection decisions and shall not be a research center for concrete or asphalt pavement. The analysis shall compare and contrast the Department's pavement-selection process with those of other states and with model selection processes as described by the American Association of State Highway and Transportation Officials and the Federal Highway Administration.
>
> An advisory council shall be appointed to approve the scope of study and to select the neutral third-party entity. The advisory council shall consist of the following members:
>
> (1) The director of the Ohio Department of Transportation, who shall act as Chairman of the council;

(2) A member of the Ohio Society of Certified Public Accountants;

(3) A member of a statewide business organization representing major corporate entities from a list of three names submitted to and appointed by the Speaker of the House of Representatives;

(4) A member of the Ohio Society of Professional Engineers;

(5) A member of a business organization representing small or independent businesses from a list of three names submitted to and appointed by the President of the Senate;

(6) A representative of the Ohio Concrete Construction Association;

(7) A representative of Flexible Pavements Association of Ohio, Inc.

Members of the advisory council representing the Ohio Society of Certified Public Accountants, the Ohio Society of Professional Engineers, the small or independent businesses and the major corporate entities shall have no conflict of interest with the position. For purposes of this section, "conflict of interest" means taking any action that violates any provision of Chapter 102. or 2921. of the Revised Code.

The advisory council shall be appointed no later than July 31, 2003. Once appointed, the council shall meet, at a minimum, every thirty days. The council shall publish a schedule of meetings and provide adequate public notice of these meetings. The meetings are also subject to the applicable public meeting requirements. The council shall allow a comment period of not less than thirty days before issuing its final report. The report shall be issued on or before December 31, 2003. Upon issuing its final report, the council shall cease to exist.

The Department shall make changes to its pavement-selection process based on the recommendations included in the third-party entity's report.

[Emphasis added.]

13. Pursuant to H.B. 87, ODOT contracted with ERES Consultants of Champaign, Illinois, which conducted its third-party analysis of ODOT's pavement selection procedures. ERES issued its final report on December 12, 2003. A true and accurate copy of the ERES Final Report is attached hereto as Exhibit A, and is expressly adopted and incorporated herein ("ERES Report").

14. In its final report, ERES offered a number of specific recommendations for improving both the objectivity and efficiency of Ohio's pavement selection process. These included recommendations designed to ensure that ODOT adequately and objectively considers long-term costs, with respect to maintenance as well as disruption to motorists, in making its pavement selection decisions.

15. ERES specifically recommended that ODOT adopt a "traditional" Life Cycle Cost Analysis ("LCCA") approach for evaluating the total long-term costs of feasible pavement alternatives prior to sending projects out for bids. As ERES recognized, this approach would allow ODOT to "calculate a net present value that includes initial cost comprised of all differential ... costs between the pavement alternatives and the total discounted future ... costs *including all expected contract resurfacing and rehabilitation work.*" See ERES Report, at 33 (emphasis added).

16. According to ERES, the LCCA approach is designed to allow ODOT to make an *objective comparison* of the total life-cycle costs of various pavement alternatives, and to make the pavement selection process "more transparent and easier to explain and understand" than the more subjective system ODOT had previously employed. Id.

17. In short, ERES—at the direction of the General Assembly—determined that a traditional life cycle cost analysis system would provide ODOT with an objective method of

determining the overall cheapest and most durable pavement alternatives, both in terms of overall cost (initial *and* long-term) and in terms of overall disruption to motorists as a result of future maintenance requirements.

18. Following the issuance of the ERES report, the Ohio legislature codified its mandate to ODOT with respect to pavement selection, and specifically directed ODOT to "identify and promote longer pavement life spans to lessen user delays and the disruption to traffic on the state highway system." See Ohio Rev. Code § 5501.11(B), effective March 29, 2005.

19. In September 2006, ODOT adopted a new department policy purportedly implementing, in significant part, the recommendations of ERES, specifically with respect to Life Cycle Cost Analysis of alternative pavement options. A true and accurate copy of ODOT Policy No. 20-006(P) is attached as Exhibit B hereto, and is expressly adopted and incorporated herein.

20. In Standard Procedure No. 520-001(SP), promulgated under Policy No. 20-006(P), ODOT announced a "data-driven, objective, transparent and repeatable process to determine pavement type for major projects [that] largely conforms to the pavement type selection processes of the majority of the states included in the [ERES] study." A true and accurate copy of SP No. 520-001 is attached as part of Exhibit B hereto, and is expressly adopted and incorporated herein.

21. Pursuant to this Standard Procedure, ODOT purportedly committed, in instances where more than one pavement alternative proves feasible from an engineering standpoint, to conduct an LCCA of the various alternatives and to base its pavement selections on the results of such "objective" analysis.

22. Upon information and belief, the application of a similar objective process in other climatologically similar states, including Indiana, Michigan and Illinois, has led those states to select concrete as the most cost-effective and durable pavement option for large-scale highway projects.

23. The same, however, cannot be said for Ohio.

B. Despite Its Purportedly "Objective" Policy, ODOT Continues To Ensure That The Playing Field Is Tilted In Asphalt's Favor.

24. Notwithstanding its "objective" pavement evaluation policy, ODOT—in contrast to many of its counterparts in neighboring states—has continued to wage an intentional campaign to ensure that asphalt remains "king" in Ohio, despite the cost to Ohio's taxpayers both in terms of dollars and long-term disruption. Indeed, ODOT continues to intentionally adopt and/or employ policies and procedures designed to effectively exclude concrete as a viable alternative to asphalt, in Ohio. This institutional bias is reflected in several respects.

1. The Unilateral Asphalt Price Adjustment.

25. The first, and perhaps most glaring example, of ODOT's efforts to favor the asphalt industry is the *automatic price adjustment* for asphalt provided in ODOT's standard specifications, applicable to all state highway construction projects. This price adjustment, which applies only to asphalt and *not to concrete or other pavement types*, indemnifies asphalt contractors where the unit price of asphalt increases by more than five (5) percent over the unit price at the time of bidding.

26. A true and accurate copy of ODOT's Construction and Materials Specifications Item 401 ("Asphalt Concrete Pavements—General"), is attached as Exhibit C hereto, and is expressly adopted and incorporated herein. Item 401.20 of the Construction and Materials Specifications provides, in pertinent part:

> Asphalt Binder Price Adjustment. Any contract item specifying asphalt concrete is eligible for a price adjustment, if the Department's asphalt binder index shows the price for asphalt binders has *increased* or decreased in excess of 5 percent and the adjustment is more than $100 for any individual item.
>
> [Emphasis added.]

27. Notably, since at least 2001, the price of asphalt has risen each year, regardless of fluctuations in the price of asphalt's underlying petroleum base. In fact, an August 2008 summary of percentage changes in Producer Price Indexes for Construction Materials and Components, compiled by the Associated General Contractors of America from price data provided by the federal Bureau of Labor statistics, shows that the overall price of asphalt increased by *double-digit percentage points* in each year from 2002 through 2008, except in 2007, when the price increased by a mere 5.8 percent (still above the price adjustment level). The same summary shows that the overall price of asphalt in July 2008 represented a 290 percent increase over 2003 prices. A true and accurate copy of the Producer Price Index summary, available at http://www.agc.org (last checked Sept. 25, 2008), is attached hereto as Exhibit D, and is expressly adopted and incorporated herein.

28. The practical effect of this unilateral price adjustment, in light of the historical trend in asphalt pricing, is to provide asphalt contractors with a free ticket to bid a particular project at the then-current asphalt cost, without accounting for the risk associated with future price increases. Instead, such risk, indeed substantial likelihood, of future price increases is simply borne by the state and, ultimately, the taxpayers.

29. Given that actual paving work often does not begin until years after a project is bid, the magnitude of this unilateral benefit to asphalt contractors cannot be overstated.

30. Upon information and belief, in this construction year alone, ODOT's asphalt price adjustment policy has required ODOT to spend *millions of dollars in unbudgeted funds* to cover asphalt contractors' increased material costs. That is millions of dollars that asphalt contractors, thanks to ODOT's policy, did not have to worry about at the time they made their respective bids. And, as discussed in more detail below, it is millions of dollars that ODOT *did not consider* in determining whether to select asphalt as opposed to another pavement option, such as concrete.

31. Of course, concrete and other pavement type contractors are not provided with the same level of protection as their asphalt counterparts. Rather, in making their respective bids, concrete contractors are required to account for the risk of future price increases, and must allocate such risk as part of their bid. In other words, without the prospect of guaranteed indemnification with taxpayer funds, concrete contractors must build the risk of future price increases into their bid price calculations.

32. The result of this policy is an inherently unequal allocation of risk and cost among equally viable pavement alternatives. The actual and intended effect of this policy is to afford asphalt contractors a free ticket to bid a particular project at the lower, current price of asphalt, even where they know that their *actual price* will be significantly higher at the time paving work begins. Concrete contractors, on the other hand, are not afforded a similar subsidy.

33. In short, ODOT has created an uneven playing field and, ultimately, it is the taxpayers who are unwittingly charged with ensuring that the field remains tilted in asphalt's favor.

2. ODOT Does Not Account For The Asphalt Price Adjustment In Its Life Cycle Cost Calculations.

34. But the mere existence of the asphalt price adjustment only accounts for half of the equation. In an effort to make certain that asphalt is given every conceivable advantage, ODOT does not account for the asphalt price adjustment as part of its pre-bid LCCA calculations.

35. Indeed, ODOT's LCCA calculations, pursuant to Policy No. 20-006(P), make no account for future increases in the price of asphalt even though, as recent history shows, such increases *will drastically increase the total price paid by Ohio's taxpayers if asphalt is selected.*

36. In other words, in evaluating which pavement type to select among feasible alternatives, ODOT does not even consider the impact of future asphalt price increases, even though *it (and not the contractors) will be required to absorb the cost of such increases*. This policy effectively results in an apples to oranges comparison between a life cycle cost for asphalt premised on an estimated asphalt price that does not reflect *the actual price to be paid by the state*, and a life cycle cost for concrete based on an estimated bid price that will *bind the concrete contractor for the duration of the contract*.

37. In short, ODOT, on the taxpayers' dime, indemnifies asphalt contractors for the likelihood of significant future price increases, but does not hold asphalt to account for these future increases in considering *which pavement type to select in the first place*. This policy only further guarantees asphalt's favored status in Ohio, again at the taxpayers' expense.

3. ODOT's Intentional Manipulation Of Data/Calculations In Favor Of Asphalt.

38. Upon information and belief, ODOT has further sought to insure asphalt's institutional advantage by intentionally manipulating data and/or inputs it considers as part of

engineering and economic feasibility analyses. Upon information and belief, this includes, but is not limited to, initial serviceability and loss of support design input values that are not consistent with American Association of State Highway and Transportation Officials ("ASHTO") guidelines followed by other state agencies, as well as utilizing more liberal than conservative engineering judgment for soil strength design inputs to favor the use of asphalt.

39. Also upon information and belief, ODOT has, in at least one instance, manipulated information as part of an LCCA to favor the selection of asphalt, where it appeared that without such manipulation, the LCCA would otherwise require a decision favoring concrete.

C. The Wilmington Bypass Project Exemplifies ODOT's Intentional Asphalt Bias And Discrimination Against Concrete.

40. The Wilmington Bypass project exemplifies ODOT's intentional efforts to favor asphalt. Indeed, at both the LCCA stage and, ultimately, at the bidding and contracting stage of the Wilmington Bypass project, ODOT continues to demonstrate that there are no limits to its efforts to preserve asphalt's favored status in Ohio.

41. By way of background, the Wilmington Bypass project, as reflected in ODOT's August 20, 2008 proposal and the various addenda thereto, contemplates the construction of a 3.65-mile, multi-lane state highway near Wilmington Ohio. True and accurate copies of the August 20, 2008 Proposal for Project No. 080507, along with the five subsequent addenda thereto, are attached as Exhibits E and F hereto, and are expressly adopted and incorporated herein.

42. On September 10, 2008, ODOT received bids from general contractors that contained alternative proposals for concrete versus asphalt pavement options. The alternative pavement proposals were based on bids submitted to the general contractors by various pavement subcontractors.

43. Ultimately, on September 19, 2008, ODOT announced its decision to award the primary contract to Defendant Wagner and its election to pursue the asphalt design alternate.

44. Upon information and belief, Defendant Wagner's successful asphalt design alternate bid was premised on a subcontract proposal submitted to it by Defendant Jurgensen.

45. Wagner's concrete alternate design bid, which ODOT rejected, was based on a subcontract bid supplied to Wagner by Plaintiff Harper.

46. Although ODOT allowed submission of alternative bids for the project, as discussed below, its ultimate selection of asphalt pavement was never truly in doubt.

1. ODOT's Failure To Account For The Asphalt Price Adjustment In Its LCCA For The Wilmington Bypass.

47. ODOT conducted its original LCCA analysis for the Wilmington Bypass project in 2006. As part of this analysis, ODOT assumed a unit price of $70.24 for asphalt. A true and accurate copy of ODOT's original, 2006 LCCA for the Wilmington Bypass project is attached as Exhibit G hereto, and is expressly adopted and incorporated herein. This estimated unit price accounted for approximately 79 percent of the total initial construction cost of asphalt, for purposes of ODOT's LCCA calculations.

48. Based on this assumed price, ODOT calculated that the life cycle cost of asphalt would be approximately 16 percent less than concrete. This difference was based *entirely* on the assumed difference in up-front costs, even though the same LCCA revealed that the future maintenance costs for concrete were nearly $700,000 less than those estimated for asphalt.

49. Likewise, ODOT's LCCA for the Wilmington Bypass project did not consider potential costs for traffic control devices (such as pavement markings) for either asphalt or concrete.

50. ODOT's initial LCCA for the Wilmington Bypass project did not account for the asphalt price adjustment, let alone the exponential increase in petroleum and asphalt costs that ultimately occurred between 2006 and 2008, even before the project was actually bid.

51. In fact, the asphalt price ODOT ultimately awarded in September 2008 was more than $105, *nearly 50 percent higher than ODOT's LCCA per-unit estimate*. On the other hand, the actual bid price ODOT received for concrete in September 2008 was $32.44 per unit, $.17 less than it had estimated in the 2006 LCCA.

52. Nonetheless, on the basis of its unadjusted 2006 LCCA calculations, ODOT initially selected asphalt as the pavement type to be used on the Wilmington Bypass project.

2. ODOT Rigs The Alternative Bid Process After Realizing That Increases In Asphalt Costs Could No Longer Justify Its Original LCCA Calculations.

53. As noted above, by 2008, even before bidding began on the Wilmington Bypass project, it became clear that the unit price of asphalt was significantly higher than the figure ODOT used in its LCCA calculations. The price of concrete, however, had remained relatively constant.

54. Faced with the reality that its original calculations with respect to asphalt could no longer be justified, ODOT ultimately agreed to accept alternative bids for asphalt and concrete pavement types. But, as we now know, this concession did nothing to level the playing field.

55. Instead, even in allowing alternative bids, ODOT once again chose to create an unequal playing field and it established unequal specifications for the alternative asphalt and concrete bids. Such specifications imposed a disproportionate burden on concrete and ultimately drove up the up-front cost of concrete, thereby allowing ODOT to purportedly justify its preordained decision to select the asphalt alternative.

56. The specifications at issue required concrete bidders to incur significant additional costs for a top-of-the-line pavement marking system (i.e., typically "traffic control" items), and required concrete contractors—but not asphalt contractors—to account for an additional .50 inch of gravel aggregate base that was not part of the asphalt specifications. On the other hand, specifications for the asphalt alternative required a lower-priced pavement marking system, even though the same top-of-the-line pavement marking system required in the concrete alternative *could have been specified for the asphalt alternative*.

57. The addition of these unequal traffic control specifications, which were notably absent from ODOT's original LCCA, imposed approximately $184,000 in additional costs on concrete bidders. As a result of this newly-added cost, the actual concrete bid that ODOT received was $71,801.92 more than its asphalt counterpart. A true and accurate summary of the winning bidder's actual bid amounts for both asphalt and concrete pavement types is attached as Exhibit H hereto, and is expressly adopted and incorporated herein.

58. Absent these unequal traffic control specifications, however, the actual *up-front* bid price for concrete was *$112,268.31 lower than asphalt*—even without considering the asphalt price adjustment and the long-term cost savings associated with concrete, as documented in ODOT's initial LCCA.

59. Yet, even including the extra traffic control costs in the actual concrete bid, the initial $72,000 difference in up-front cost is off-set several times over by the $700,000 differential in long-term maintenance costs reflected in ODOT's initial LCCA (a differential that is likely even greater today given the recent increases in the price of asphalt). And, again, this analysis does not even account for the asphalt price adjustment, which will almost certainly result in an additional cost to the taxpayers when paving work actually begins.

60. Obviously, ODOT did not conduct an additional LCCA upon its receipt of the alternative bids. Nor did it otherwise account for potential future increases in the price of asphalt. Had it done so, or had it simply looked *at its original LCCA calculations* in light of the new asphalt prices, it would have concluded that concrete was the correct choice for this project.

61. Instead, ODOT simply ignored its own life cycle cost analysis and relied upon an artificially inflated upfront bid price to justify its pre-ordained selection of asphalt as Ohio's pavement of choice—at a significant cost to Ohio's taxpayers. In doing so, ODOT refused to select the lowest competent and responsible bidder.

62. Plaintiffs have been irreparably harmed and lack an adequate remedy at law.

COUNT ONE

(Declaratory Relief Pursuant to Ohio Rev. Code § 2721.01 et seq., and Rule 57 of the Ohio Rules of Civil Procedure As To The Illegality And Invalidity Of ODOT's Asphalt Price Adjustment and LCCA Policy and Procedure)

63. Plaintiffs reallege the foregoing paragraphs as if fully rewritten herein.

64. Pursuant to Section 5525.01 of the Ohio Revised Code, ODOT is required to award publicly bid contracts to the "lowest competent and responsible bidder."

65. The Ohio General Assembly, both in its enactment of H.B. 87 and in Section 5501.11(B) has made clear that ODOT is to ultimately determine the "lowest competent and responsible bidder" on the basis of a life cycle cost analysis that determines which of various feasible pavement materials is most cost effective and durable over the long run. These legislative enactments also establish the public policy of Ohio.

66. In both applying a unilateral price adjustment to asphalt as part of the bidding process and in failing to account for such price adjustment as part of its LCCA for the various

pavement alternatives, ODOT has run directly afoul of its legislative mandate with respect to pavement selection, and it has violated the public policy of Ohio as reflected above.

67. In addition, in continuing to employ these policies in violation of its legal obligations, ODOT has acted in an arbitrary and capricious manner and it has, thus, abused its discretion as a public department of the state of Ohio.

68. Plaintiff Harper, as an unsuccessful subcontractor, and Plaintiff OCCA, as a trade association representing Plaintiff Harper, among others, have been and continue to be directly impacted by the above-described ODOT policies and practices and, thus, a justiciable controversy exists. Plaintiffs have a legal interest in the controversy, and declaratory relief from this Court will resolve this controversy and eliminate uncertainty as to the legality of the specific ODOT policies and actions at issue in this case.

69. As alleged herein, a real, substantial, and immediate controversy is presented regarding the rights, duties, and liabilities of the parties. Plaintiffs therefore request declaratory judgment from this Court pursuant to Civil Rule 57 and Section 2721.01 et seq., of the Revised Code that (a) ODOT is obligated to select the pavement design alternative that is the lowest competent and responsible bidder; (b) ODOT's unilateral asphalt price adjustment and its failure to account for such adjustment as part of the LCCA process are illegal and invalid, inasmuch as they violate the Ohio Revised Code with respect to consideration of overall long-term costs of pavement materials as part of the bidding and contracting processes; (c) ODOT's unilateral asphalt price adjustment and its failure to account for such adjustment as part of the LCCA process are invalid because they are illegal and/or violate Ohio public policy as reflected in the above-described legislative mandates; (d) ODOT's unilateral asphalt price adjustment and its failure to account for such adjustment as part of the LCCA process constitute an abuse of

ODOT's administrative discretion, and for this additional reason, they are invalid; and (e) identification of the lowest competent and responsible bidder for projects where there is a paving component requires a LCCA and a comparison with the LCCA for alternative pavement designs.

COUNT TWO

(Declaratory And Injunctive Relief As To The Illegality and Invalidity of the Asphalt Portion of the Wilmington Bypass Contract)

70. Plaintiffs reallege the foregoing paragraphs as if fully rewritten herein.

71. As set forth above, the LCCA analysis and bid consideration policies and processes ODOT employed in ultimately selecting the pavement alternative for the Wilmington Bypass project are both illegal and contrary to Ohio public policy.

- ODOT failed to account for asphalt price increases in its LCCA calculations for the Wilmington Bypass project.
- ODOT failed to account for long-term cost savings of concrete in its analysis of the actual bids it received.
- ODOT selected the alternative that was more expensive and less durable.

In each of these respects, both individually and collectively, ODOT failed to fulfill its obligations under Ohio law (and to the Ohio taxpayers).

72. As a result, the asphalt aspect of the Wilmington Bypass contract awarded to Defendant Wagner is illegal and contrary to Ohio public policy, and that portion of ODOT's award constituted an abuse of ODOT's administrative discretion.

73. In addition, ODOT's imposition of unequal specifications on concrete and asphalt bidders, and its failure to consider the life cycle costs upon receipt of the actual bids (where such costs actually favored concrete by a wide margin), reflects an arbitrary and capricious, and unjustified exercise by ODOT of its administrative authority. As a result, its decision to award

the asphalt alternative on the basis of such unequal specifications constituted an abuse of its discretion.

74. As alleged herein, a real, substantial, immediate, and justiciable controversy is presented regarding the rights, duties, and liabilities of the parties with respect to the asphalt portion of the Wilmington Bypass contract. Plaintiffs therefore request declaratory judgment from this Court pursuant to Civil Rule 57 and Section 2721.01 et seq., of the Revised Code that the asphalt aspect of the Wilmington Bypass contract is void because it is illegal, contrary to public policy, and constitutes an abuse of ODOT's discretion.

75. Plaintiffs are also entitled to an order temporarily and permanently restraining and enjoining enforcement of the void asphalt portion of the Wilmington Bypass contract because it is illegal and constitutes an abuse of ODOT's discretion.

COUNT THREE

(Violation Of Equal Protection Clause)

76. Plaintiffs reallege the foregoing paragraphs as if fully rewritten herein.

77. For purposes of ODOT's LCCA calculations and consideration of alternative bids, asphalt and concrete are similarly situated because they constitute directly competitive pavement products and are substitutes for purposes of ODOT's pavement selection process.

78. For purposes of its LCCA and bid analysis policies and procedures, however, ODOT classifies these similarly situated products and the contractors that supply them differently in applying a price adjustment only to asphalt and in failing to account for the asphalt price adjustment as part of its LCCA calculations.

79. As a result of the different classifications of similarly situated competitors, ODOT evaluates the future cost of asphalt on the basis of an artificially low price calculation and asphalt

contractors are able to submit artificially low bids. Concrete contractors, on the other hand, are not afforded the same opportunity. These built in advantages have enabled asphalt to retain its dominance as the pavement type of choice for ODOT, at the expense of concrete and other similarly-situated pavement products and industries. ODOT further fails to apply an LCCA in identifying the lowest competent and responsible bidder. This failure further arbitrarily favors asphalt suppliers and contractors.

80. There is no rational justification for ODOT's disparate treatment of similarly situated and substitute pavement products and industries.

81. In addition, as part of its systematic practice of favoring asphalt over concrete, ODOT has exhibited intentional and purposeful discrimination against concrete and other pavement alternatives rooted in an institutional bias in favor of asphalt. The badges of this intentional discrimination include ODOT's unilateral price adjustment for asphalt, ODOT's failure to account for the price adjustment as part of the LCCA process, and in the unequal specifications imposed on the asphalt and concrete alternatives as part of the Wilmington Bypass project bidding process.

82. ODOT's unlawful, disparate treatment of concrete and asphalt competitors, and its intentional bias in favor of asphalt and intentional discrimination against concrete violate the equal protection clause of Ohio's constitution, Art. I § 2.

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

A. An order declaring:

(1) That ODOT is obligated to select the payment design alternative that is the lowest competent and responsible bidder;

(2) That ODOT's unilateral asphalt price adjustment and its failure to account for such adjustment as part of the LCCA process are illegal and invalid, inasmuch as they violate the Ohio Revised Code with respect to consideration of overall long-term costs of pavement materials as part of the bidding and contracting processes;

(3) That ODOT's unilateral asphalt price adjustment and its failure to account for such adjustment as part of the LCCA process are invalid because they are illegal and/or violate Ohio public policy as reflected in the above-described legislative mandates;

(4) That ODOT's unilateral asphalt price adjustment and its failure to account for such adjustment as part of the LCCA process constitute an abuse of ODOT's administrative discretion, and for this additional reason, they are invalid;

(5) That identification of the lowest competent and responsible bidder for projects where there is a paving component requires an LCCA and a comparison with the LCCA for alternative pavement designs; and

(6) That the asphalt aspect of the Wilmington Bypass contract is void because it is illegal, contrary to public policy, and constitutes an abuse of ODOT's discretion.

B. Temporary, preliminary, and permanent injunctive relief:

(1) Restraining and enjoining Defendants and their agents, servants, employees, attorneys, and those in active concert or participation with them from executing, implementing, and/or enforcing the asphalt portion of ODOT's Wilmington Bypass contract between ODOT and Defendant Wagner;

(2) Restraining and enjoining Defendant ODOT and its agents, servants, employees, attorneys and those in active concert or participation with it from awarding any other

contract for a project with a paving component unless the actual bid prices received are assessed pursuant to an LCCA and compared with the LCCA for alternative pavement designs; and

(3) Requiring ODOT to select the concrete alternative for the Wilmington Bypass project.

Respectfully submitted,

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