TESTIMONY IN SUPPORT OF H.B. 286

ON BEHALF OF THE OHIO AGGREGATES & INDUSTRIAL MINERALS ASSOCIATION

BEFORE THE OHIO HOUSE OF REPRESENTATIVES

CIVIL JUSTICE COMMITTEE

Chair Hillyer, Vice-Chair Grendell, Ranking Member Galonski and members of the House Civil Justice Committee. My name is Brian Barger and I am the legal counsel for the Ohio Aggregates & Industrial Minerals Association. On behalf of the Association, we offer our strong support for H.B. 286 and the amendment to return the status quo to certain proceedings under Chapter 2506 of the Revised Code.

Our membership is comprised of nearly 100 companies involved in the surface mining and annual production of nearly 100 million tons of construction aggregates and industrial minerals for use in everything from roads, bridges, roofing shingles, glass manufacturing, toothpaste, agricultural products, golf course sand, rubber, steel, automobile sound proofing materials, and many other uses. For example, asphalt roads are made of 95% aggregate while Portland cement concrete is about 85% aggregate. Every lane mile of interstate uses 38,000 tons of aggregate and every Ohioan uses approximately 10 tons of aggregate each year. Over 50% of the aggregates used in construction are paid for with tax dollars.

Further, the surface mining industry is highly regulated by a number of state agencies. In this regard, we support H.B. 286 as it seeks to decentralize the appeal process for most state agencies allowing such appeals to be brought in the county in which the business resides rather than requiring a business to file the appeal in Franklin County with the inevitable extra time, cost, and travel.

The OAIMA further supports the amendment as it returns the appeal of decisions of certain local boards and commissions to the status quo before the recent U.S. 6th Circuit decision in *Lavon Moore v. Hiram Township, Ohio*, 988 F.3d 353 (6th Cir. 2021). In *Moore*, the U.S. 6th Cir. held that an appellant must bring all claims arising out of the denial of a conditional use permit at the time the appellant files an administrative appeal under Chapter 2506 of the Ohio Revised Code (the "2506 appeal"). Chapter 2506 provides for the appeal of decisions from local boards and commission to a local court of common pleas for review. The most common type of such appeal is from a denial of a conditional use permit or variance from a local board of zoning appeals. These appeals must be filed within thirty days of the local board's decision.

The 2506 appeal allows the common pleas court to only affirm, reverse, vacate, or modify a decision of a local board, but does not allow for the award of money damages or other remedies. These appeals are routine and narrowly focused on the record developed before the local board. Unless there are exceptional circumstances, no new evidence is allowed. Typically, the local board is represented by the county prosecutor's office or in the case of a municipality, the

director of law. Because money damages is not an available remedy under the 2506 appeal, insurance counsel is rarely involved.

The common pleas court reviews the record of the proceeding before the board to determine if the decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by a preponderance of substantial, reliable, and probative evidence. The review by the common pleas court usually takes about nine months. The parties then have an automatic right to appeal the decision of the trial court to the court of appeals for that county. In my experience, having handled dozens of these appeals over the past thirty-some years, that is typically the end of the process. In a very few cases, other claims may be brought arising out of the denial, such as regulatory-taking claims, after the 2506 appeal process has been exhausted.

Consistent with the narrow and limited focus of a 2506 Appeal, Ohio courts of appeals have held that a decision in such an appeal does not bar a later action raising claims which could not be raised in the 2506 Appeal, such as a claim for money damages. *See, e.g., Board of County Commissioners v. Coppess*, 2d Dist. Clark No. 06-CA-125, 2008 WL 2390846 (June 13, 2008) (later suit seeking money damages not barred by prior 2506 Appeal); *Walters v. City of Brecksville*, 8th Dist. Cuyahoga No. 53660, 1988 WL 38111 (April 21, 1988) (same). Prior to *Moore*, federal district courts applying Ohio law reached the same conclusion. *See, e.g., Blue Rock Invs. v. City of Xenia, Ohio*, No. 3:17-CV-409, 2020 WL 1443369, at *5 (S.D. Ohio Mar. 25, 2020); *Negin v. City of Mentor, Ohio*, 601 F. Supp. 1502, 1504 (N.D. Ohio 1985).

However, in *Moore*, the 6th Circuit, wrongly interpreting Ohio law, has now held that an appellant must bring all possible claims arising out of the denial by the local board as part of the 2506 appeal or be barred from doing so later. This means that the routine and narrowly focused administrative appeals process under 2506 will now be a multi-headed legal proceeding in which the appellant will need to file a multi-count complaint asserting all possible causes of action, even though many such causes of action may not be ripe. For instance, it is likely that an appellant will need to assert all possible constitutional claims, including claims for takings, equal protection, procedural due process, and substantive due process, all seeking money damages under 42 U.S.C. §1983, as part of the simple notice of appeal. The *Moore* Court held that unless such causes of action are filed as part of the appeal, they will be barred under the doctrine of *res judicata.*

The practical import of this decision is many-fold: (1) it turns a fairly routine matter literally into a federal case, (2) it forces the appealing party to bring claims it might not otherwise decide to ever pursue, (3) it causes insurance counsel to be involved in the 2506 appeal process, thus driving up the cost of the appeal, (4) it increases the cost and time for the appeal for all parties because of the complexity of the litigation, including reams of discovery, and (5) it shortens the limitation period for takings or other constitutional claims from two or four years to only thirty days. I am sure there are many other negative consequences.

This amendment clarifies that a final judgment on the merits pursuant to a court's power of review under Chapter 2506 on claims brough under the applicable zoning power of a local government does not preclude later claims for damages, including claims brought under 42

U.S.C. §1983, even if *Moore's* interpretation of *res judicata* would otherwise bar the claim. It further clarifies that the Ohio General Assembly intends that the amendment override the U.S. 6th Circuit's decision in *Lavon Moore v. Hiram Township*.

This amendment will return the status quo to an administrative appeals process, which, until *Moore*, was well established, understood, and fair to all parties. As such, the Ohio Aggregates & Industrial Minerals Association strongly supports H.B. 286 and the amendment. I will gladly try to answer any questions you may have.