TESTIMONY IN SUPPORT OF SUB. H.B. 286

ON BEHALF OF THE OHIO AGGREGATES & INDUSTRIAL MINERALS ASSOCIATION

BEFORE THE OHIO SENATE JUDICIARY

COMMITTEE

Chair Manning, Vice-Chair McColley, Ranking Member Thomas, and members of the Senate Judiciary Committee. My name is Brian Barger and I am the legal counsel for the Ohio Aggregates & Industrial Minerals Association. On behalf of the Aggregates Association, we offer our strong support for Sub. H. B. 286 and the provisions governing claim preclusion in zoning appeals.

Our membership is comprised of nearly 100 companies involved in surface mining and the annual production of approximately 100 million tons of construction aggregates and industrial minerals for use in everything from roads, bridges, roofing shingles, glass manufacturing, toothpaste, agricultural products, sand for golf courses, rubber, steel, automobile sound proofing, 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 an interstate highway uses 38,000 tons of aggregate and every Ohioan uses approximately 10 tons of aggregate each year. Because over 50% of the aggregates used in construction projects are paid for with tax dollars, the industry works hard to ensure that the tax dollars are paying for actual construction and not unnecessary regulation and litigation.

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

The OAIMA further supports Sub. H. B. 286 because it returns the appeal of decisions of local zoning 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 are narrowly focused on the record developed before the local board. Unless there are exceptional circumstances, no new evidence is allowed in court.

Typically, the local board is represented by the county prosecutor's office, or in the case of a municipality, the director of law. Because an award of money damages is not an available remedy under the 2506 appeal, insurance counsel is rarely involved.

Under a 2506 appeal, 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. This review 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. 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.

Again, in *Moore*, the 6th Circuit, interpreting Ohio law, has now held that an appellant must bring all possible claims arising out of the local board's denial as part of the 2506 appeal. 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 5th amendment takings claims, equal protection, procedural due process, and substantive due process claims, 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 local matter literally into a federal case, (2) it causes insurance counsel to be involved in the 2506 appeal process, thus increasing attorney fees, (3) it increases the cost and time for the appeal for everyone because the routine has now become the complex, with voluminous discovery, motion practice and trial, and (4) it shortens the limitation period for bringing constitutional claims from either two or four years down to thirty days. I am sure there are many other negative consequences.

Sub. H.B. 286 clarifies that a final judgment on the merits pursuant to a court's power of review under Chapter 2506 on claims brought 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 the common law doctrine of *res judicata* would otherwise bar the claim. It further clarifies that the Ohio General Assembly intends these provisions in the bill to override the U. S. Sixth Circuit Court of Appeals decision in *Lavon Moore v. Hiram Township*.

Sub. H. B. 286 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 Sub. H. B. 286.

Thank you for the opportunity to testify today and I will gladly try to answer any questions you may have.