Northeast Ohio
Regional Sewer District

House Bill 64 – Eminent Domain
Opponent Testimony
Ohio House Civil Justice Committee – May 23, 2023

Chairman Hillyer, Vice Chair Mathews, Ranking Member Galonski, and members of the House Civil Justice Committee, thank you for providing me the opportunity to submit written testimony opposing HB 64, which modifies the law regarding eminent domain. My name is Kyle Dreyfuss-Wells, and I am the Chief Executive Officer of the Northeast Ohio Regional Sewer District (NEORSD).

NEORSD is a rate-payer funded political subdivision responsible for regional sewage treatment and stormwater management services to Cleveland and 61 surrounding suburban communities across 368 square miles of the Lake Erie watershed and portions of 4 counties. NEORSD's mission is to provide progressive regional management of sewage and stormwater that protects the environment and serves our community.

NEORSD's annual construction budget routinely exceeds $250 million with numerous sewer and stormwater projects. These projects typically require the acquisition of various property rights following engagement of appraisers, surveyors, title companies, and real estate agents, as required.

As currently drafted, HB 64 has excessively broad and sweeping impacts which will cause negative consequences for every type of property appropriation moving forward including infrastructure projects in urban communities, some of which are low income and are in dire need of sewer and stormwater infrastructure upgrades.

The first major concern in the bill is the language removing the presumption of necessity of a project from the appropriating agency and leaving it only to a judge to determine the necessity. To be clear – we have the highest and utmost respect for judges and understand their important role in making decisions on legal matters; however, their role in presiding over a court matter should not include the expectation that they should also serve as qualified single subject and technical matter experts. For example, our Shoreline Storage Tunnel project is a $201 million combined sewage overflow Consent Decree project that includes over $18 million of engineering design costs. It is a disservice to put a requirement on judges to then rule on the necessity of property needs for such a large and complicated project, potentially causing millions of dollars of expense to re-design.

At NEORSD, we use qualified engineers, real estate attorneys and appropriate external experts (i.e.: appraisers, surveyors, title companies, and real estate consultants) to determine which properties are definitively needed for our infrastructure projects. That property determination process is governed by the questions of the location of the problem, the condition and location of existing sanitary sewer and stormwater infrastructure, and, with respect to sanitary flows, how to efficiency convey those flows to one of three wastewater treatment plants.

Also concerning is the language increasing the level of the burden of proof required of the appropriating agency from a *preponderance* of the evidence to *clear and convincing* evidence. It makes appropriating agencies, who would be held to the higher standard of *clear and convincing evidence,* potentially responsible for various financial obligations of the owner (i.e. owner attorney's fees, costs, and expenses,

including appraisal and engineering fees). It also appears that this bill grants damages to the owner if the owner shows by a preponderance of the evidence that the appropriating agency used coercive actions. Most troubling, the term "Coercive action" is undefined, subjective, and will be endlessly litigated while significantly delaying important public improvement projects and unnecessarily adding significant acquisition costs to be borne by our ratepayers.

Changes to R.C. 163.21(C) are troubling in that the proposed language decreases the threshold to grant costs and fees to the owner from an award 125% greater than the last written good faith offer to 110% greater than said last written good faith offer. Very few jury awards are less than 110% of an appropriating agency's offer. This reduction is arbitrary, is lacking in reasonable explanation, and by adding additional acquisition costs, is unduly harmful to the ratepayers of the NEORSD, and, indeed, all taxpayers/ratepayers in Ohio.

The language proposed in R.C. 163.52(B) is concerning in that it grants an owner a cause of action against an acquiring agency for a violation of section 163.59. Much of the language of 163.59 is based upon reasonableness. The term "reasonable" is used five times in this subsection without being defined. Further, the level of evidentiary support required of a property owner to successfully litigate the cause of action is by a preponderance of the evidence.

It is suggested that the language proposed in R.C. 163.59(E) be changed from "conditions indigenous" to "latent conditions". Latent refers to something that exists but is hidden. Indigenous suggests something that is native.

The issue of inverse condemnation is a timely consideration here. It is just that the process be made simpler for the property owner. It is concerning for the NEORSD, however, that should an owner prevail in an inverse condemnation action that the owner will be awarded costs and expenses (163.62(B) as proposed). NEORSD has responsibility for maintaining many aged sewers in an older urban center that were constructed prior to the creation of the NEORSD. In some instances, no written document exists for these facilities. NEORSD should not be penalized for the lack of a written document for a facility that was constructed prior to the creation of the NEORSD. Further the language proposes that even in the case of a settlement of the proceeding, the owner will be awarded costs. This will add an unnecessary complication to settlement discussions and, most concerning, likely discourage settlement and encourage costly litigation.

In summary, this bill also will ultimately lead to more litigation and will clog the local courts over eminent domain disputes created by indistinct and vague word definitions in the bill. We believe there is a more precise approach to address and prevent situations that may have prompted this drafted legislation such as concerns about fairness of compensation offers.

Thank you again for providing us with the opportunity to submit testimony. If there are questions from members of the committee, please direct them to contact our Legislative Affairs Manager, Danielle Giannantonio, at giannantoniod@neorsd.org.