May 19, 2023

To: Ohio House Civil Justice Committee

Opponent Testimony re: H.B. 64

First and foremost, Cleveland Metroparks would like to thank Chairman Hillyer, Vice Chair Mathews, Ranking Member Galonski, and members of the House Civil Justice Committee for allowing us this crucial opportunity to express our concerns and work toward an amicable solution.

My name is Brian M. Zimmerman, and I am the Chief Executive Officer for Cleveland Metroparks. Our regional park system protects nearly 25,000 acres across 18 park reservations and 49 distinct communities in Northeast Ohio. We provide crucial services to every community in the region, connecting more than 19 million people annually to our parks, educational and recreational programs, golf courses, Cleveland Metroparks Zoo and Lake Erie. The Park District is not only essential for public health and wellness but is a major contributor to the regional economy. According to a study by The Trust for Public Land, Cleveland Metroparks collectively contributes $873 million in economic value by enhancing property values, reducing stormwater runoff, filtering pollutants from the air, attracting visitors, providing recreational opportunities for residents, contributing to the multimodal transportation network, improving community health, and boosting economic development. Cleveland Metroparks is also a point of pride for our region, having been named the "Best in Nation" among park systems, and is a significant factor in improving the quality of life for all in the region.

Background

Eminent domain is a land acquisition power provided for by both the Federal and Ohio Constitutions. This power is not absolute; it is strictly governed by State laws obligating adherence to strict procedure and provision of just compensation to landowners. For centuries, eminent domain has played a vital role in beneficial public works programs as a useful and diverse tool – a tool of last resort often avoided and sparingly used.

In fact, despite their frequent acquisition of parcels – sometimes as many as 20 to 30 per year – park districts generally do not utilize eminent domain. Even in cases where eminent domain is utilized, it is frequently employed as only a useful strategic tool. For example, Cleveland Metroparks resorted to the threat of use of eminent domain to compel response from an absentee, out-of-state railroad landowner whose inactivity was jeopardizing the Red Line Greenway and nearly $8,000,000 in federal funds associated with a Transportation Investment Generating Economic Recovery (TIGER) Grant. Cleveland Metroparks did not ultimately appropriate the property at issue, but by starting the process, got the out of state owner to negotiate an arms-length sale. Such infrequent, tactical use of eminent domain power is not the type of acquisition

HB 64 aims to curtail. Yet, park districts will still be significantly and adversely affected by HB 64. The legislature must not misconstrue eminent domain as a single-faceted David and Goliath-style imposition by the State and should reconsider the propriety of HB 64 in light of two considerations: (1) the diverse yet restricted nature of eminent domain as a tool of last resort, and (2) the substantial consequences likely to result from enacting HB 64.

Recreational Trails

HB 64 in its original state declared that the construction of recreational trails is not a "public use" for which property can be appropriated. This has the practical effect of prohibiting taking agencies from appropriating land with the purpose of constructing such a trail. On its face, this provision seems clear, but looking deeper reveals significant ambiguities.

First and foremost: what constitutes a recreational trail? This term is not defined in the context of eminent domain proceedings. Is a foot path a recreational trial, but a bike path allowing e-bikes not? Must the trail connect parks, forests, etc. to be a recreational trail, or can it stand on its own? This ambiguity alone calls into question the applicability of the proposed bill. Second, can a trail later be added to property which was acquired for some other public purpose without running afoul of HB 64's proposed language? For example, pursuant to § 1545.11 of the Ohio Revised Code, park districts may appropriate land to conserve natural resources. It is not uncommon to then later improve these conserved lands with a recreational trail – allowing Ohioans to enjoy our State's natural beauty. Will a later construction of a trail now prompt delayed litigation from a landowner to void the appropriation? If such is the case, then HB 64 succeeds, at worst, in incentivizing taking agencies to mislead as to the purpose of the taking, and at best, in hindering the ability of agencies to construct new trails for our families to enjoy and our communities to benefit from. And third, does this bill acknowledge and comport with precedent from Ohio's courts which recognizes that recreational trails conserve natural resources? If so, then are only park districts allowed to construct recreational trails on lands appropriated to conserve natural resources while other agencies are prohibited entirely from constructing recreational trails on lands appropriated for other purposes? Moreover, if HB 64 does away with this precedent, then what is the new state of the law?

Further, a ban on using eminent domain to construct trails jeopardizes projects which garner substantial federal funding for Ohio. Look no further than the TIGER Grant and Red Line Greenway referenced above. Had Cleveland Metroparks been unable to employ eminent domain in that situation, millions in federal funds may never have been granted, or perhaps worse, would have been wasted as a result of sunken costs and stalled construction.

Finally, the proposed, revised language stipulates that if the primary purpose of an appropriated parcel will be a recreational trail, then the public use requirement is not satisfied. Yet, there is no language within the statute which clarifies what constitutes a "primary purpose." Is there a threshold which must be met? Must some percentage of the land area be used for a purpose other than a trail to constitute a primary purpose? The lack of clarity here – as in other portions of the proposed language – encourages litigation if for no other reason than to allow a court to develop a body of precedent which explains what the Legislature meant with this language.

HB 64's treatment of recreational trails is undeniably ambiguous in light of these considerations. These ambiguities must be resolved to avoid detriment to Ohio's agencies, and more importantly, to Ohio's citizens.

Inverse Condemnation

The bill's ambiguities, unfortunately, do not end with recreational trails. Creation of the inverse condemnation cause of action is rife with similar uncertainties. More clarity is necessary to understand the scope of this new claim and determine if it is guided by the common law understanding of inverse condemnation, or the statutory understanding as codified in other jurisdictions. Moreover, further clarity is required to understand *which* procedural deficiencies in *which* factual scenarios will give rise to an inverse condemnation claim. The current breadth of the bill might recognize a claim in one of the many instances where a park district purchases a property from a landowner in an arms-length transaction. These transactions are sometimes for more or less than market value and are not based upon the stringent, procedurally mandated valuations and inspections that are typically required for federal transportation projects. Such purchases often accompany conservation projects funded by the State of Ohio through the Clean Ohio Conservation Fund, wherein federal transportation acquisition procedures are not followed. Are these sorts of transactions now a potential source of liability if strict procedures are not adhered to? Are these hundreds of millions of dollars of State investments now at risk?

These concerns are exacerbated by the retroactivity of HB 64. Because the legislature intends for this bill to apply to judgements and settlements occurring on or after January 1, 2019, agencies may now be exposed to four years' worth of litigation. Litigation which may not actually state a claim or may be misguided and frivolous in light of the bill's broad, ambiguous language.

The legislature must narrowly define the scope of the inverse condemnation action to combat this ambiguity. Further, a non-exhaustive list of exceptions to the cause of action – including an exception for the kind of arms-length, conservation-focused acquisitions referenced above – should be included in the bill to limit the scope of the claim consistent with the Legislature's intent.

Coercive Actions

As members of this committee have recognized, additional clarity is also required with respect to HB 64's anti-coercion provisions. While the bill is intended to adopt the types of coercive behavior already condemned by the common law, this is not clear from the language. Instead, the broad language lends itself to an equally broad interpretation of coercion which may prompt incessant litigation. An entity merely possessing the authority to pursue eminent domain may arguably have coercive power given the potential influence this authority may have on negotiations – even if the entity *never exercises the power*. Similarly, disparities in the size and influence of the parties or their respective bargaining power could be construed as coercive if they influence negotiations. If such is the case, nearly every property acquisition by an agency having the authority to pursue eminent domain could be challenged as coercive. This gives rise to several consequences including: (1) incentivization of litigation, thereby increasing the

probability of frivolous litigation, (2) overwhelming of the courts, raising concerns of judicial economy, and (3) deprivation of agencies' much needed funds as they are locked in legal disputes, thereby harming the public.

The Legislature should include a non-exhaustive list of recognized forms of coercion to be used as a guide by agencies, landowners, and courts alike. Further, the Legislature should follow this list with a narrow definition of "coercive action" to be referenced when complained-of conduct does not fall within the list of recognized forms of coercion but may warrant relief, nonetheless.

Attorney's Fees

Under the current language of this bill, attorney's fees awards are fundamentally changed. This gives rise to substantial potential hardship for agencies while simultaneously reducing the financial risk/burden assumed by landowners and further incentivizing litigation. HB 64 proposes a partial victory, total recovery standard under which a landowner must be awarded fees, costs, and expenses even if they are only partially successful in the action. This low threshold for recovery will act as an incentive for landowners to needlessly protest even necessary and reasonable takings. Landowners will still be compensated for their property, but will now also have the opportunity to exact a protracted reprisal on the taking agency with less risk to themselves as only a partial victory will negate the costs of this endeavor.

Termination of Presumptions and Tightening of the Burden of Proof

Several of HB 64's provisions evince an unnecessary and unfounded distrust of a taking agency's judgement in determining the needs of its constituents, specifically, and Ohio citizens, generally. It is a central pillar of American democracy that our democratic bodies are elected by the people to carry out the will of the people. The democratically elected bodies of Ohio, in tandem with their subsidiaries, are in the best position to: (1) determine the desires and needs of the community, (2) determine what projects or policies best meet these needs, and (3) determine what lawful means best effectuate these projects. HB 64's termination of the rebuttable presumption of necessity after the passing of a resolution of necessity runs afoul of these principles. Moreover, the additional shift to a "clear and convincing evidence" standard for issues of public use makes clear that the State government does not trust local governing bodies – which are in the best position to understand the unique factual circumstances underlying the necessity of appropriations – to handle their own matters.

The culmination of these provisions demonstrates a mistrust of taking agencies and represents an unwarranted intrusion into local governing bodies by the State government.

Conclusion

There can be no doubt that an individual's right to property is a bedrock principle of the United States. This right, like any right, is not absolute. When public need commands, and necessity justifies, land may be appropriated through adherence to well-defined eminent domain proceedings and fair compensation to the owner. HB 64 does not achieve the goals of the Legislature here. Rather, HB 64,

i. Aims to address a problem which is far less widespread than perceived, and does so ineffectively;
ii. Inadvertently impairs agencies, causing significant collateral damage and ultimately harming Ohioans;
iii. Has the practical effect of incentivizing litigation, thereby increasing the probability of frivolous litigation which burdens our courts; and
iv. Halts social progress, directly by stalling ongoing projects and jeopardizing future federal funding, and indirectly by deterring the undertaking of future projects which may require land appropriation.

For the foregoing reasons, we respectfully request that the Legislature reconsider the propriety of this bill and whether it is tailored to achieve its goals.

Once again, thank you for this crucial opportunity to express our concerns and open communication to work toward an amicable, cooperative solution.

Thank you for the opportunity to provide this testimony.

Sincerely,

Brian M. Zimmerman
Chief Executive Officer
Cleveland Metroparks