



Delaware County Commissioners

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HOUSE CIVIL JUSTICE COMMITTEE

SUB. HOUSE BILL 64 -- OPPONENT TESTIMONY

May 23, 2023

Aric I. Hochstettler
Deputy County Administrator and General Counsel

To Chair Hillyer, Vice Chair Matthews, Ranking Member Galonski, and Members of the House Civil Justice Committee. My name is Aric Hochstettler, and I am Deputy County Administrator and General Counsel for the Delaware County Board of Commissioners (the "Board"). Prior to my current role with the Board, I served as a Delaware County Assistant Prosecuting Attorney, and since November 2006, I have personally represented the Board in all appropriation matters. Thank you for the opportunity to provide testimony stating the Board's position in regard to House Bill 64. The Board would like to express appreciation to the bill's sponsors, Representatives Creech and Kick, for inviting the Board to participate in interested party meetings and for considering the Board's concerns in the substitute bill. Despite these efforts, the Board continues to have serious concerns with the bill and is opposed to the bill in its current form. The bill contemplates a broken system for the appropriation of property, also known as eminent domain, but the Board respectfully asserts that the current laws adequately protect private property rights, while securing appropriating authorities' ability to acquire property necessary for public use. Any need for improvements within the existing laws should not disturb that delicate balancing of vital interests.

Delaware County has been, for some time, the fastest growing county in the State of Ohio, leading to the need for many public infrastructure improvements to address increases in population, development pressures, and concerns for the safety of the traveling public. The Board has met this challenge in a conservative manner, limiting costs to the taxpayers while also respecting private property rights. In Delaware County, appropriation of property is utilized appropriately as a last resort. Since November 2006, the Board has acquired thousands of parcels of property, and fewer than one hundred resulted in filing an appropriation complaint with the court, with only three proceeding to trial. Good faith negotiation, as already required by Ohio law, is the norm in Delaware County.

In its current form, House Bill 64 will unnecessarily punish Delaware County and its taxpayers, along with the vast majority of appropriating authorities throughout the State of Ohio that are good actors. House Bill 64 includes provisions that would place appropriating authorities in untenable negotiating positions, undoubtedly leading to increased litigation and costs for all parties, as well as many fewer negotiated acquisitions. The bill also makes changes to the burden of proof and attorney fees provisions in appropriation cases, which will incentivize litigation and make it unduly burdensome to proceed with necessary public improvement projects. In short, a vote in support of House Bill 64 is a vote against fiscal responsibility, against responsible development, and against safer transportation infrastructure.

The Board supports and respects private property rights, and the Board's members take seriously their oaths to support the Constitution of the United States of America and the Constitution of the State of Ohio, which include constitutional protections for private property and its owners' rights. Accordingly, the Board recognizes that some common sense amendments could address the proponents' concerns about abuses in the current appropriation process. If House Bill 64 is adopted, it should only be adopted if amended to focus the legislation on addressing those legitimate concerns without unintended consequences. To that end, the Board states the following positions:

1. The Board supports reasonable restrictions on the use of eminent domain for recreational trails. Any restrictions must, however, account for the inclusion of trails, paths, or sidewalks as components of road improvements, such as projects utilizing the Federal Highway Administration's Complete Streets approach. Otherwise, projects could be ineligible for federal funding or canceled altogether. The substitute bill text attempts to address this concern, but additional amendments are necessary to avoid litigation regarding the scope of the pertinent definitions.
2. The Board supports the requirement that all offers be made in writing, but an exception should be made for offers made in the course of mediation. The Board strongly opposes any provision that would make settlement offers admissible as evidence. The confidentiality of settlement communications is a hallmark of the rules of evidence and civil litigation practice. Parties settle disputes for many reasons other than the merit of their positions (e.g., avoiding the costs of litigation, maintaining positive relationships, fostering the spirit of compromise, etc.). Opening all appropriating authority offers to admissibility in evidence will have very clear consequences: fewer settlement offers and increased litigation. That might serve trial attorneys well, but it is a disservice to property owners and taxpayers. Parties should have full freedom to negotiate in good faith without fear of offers becoming binding, for all intents and purposes, even if rejected.
3. The Board supports a direct, statutory cause of action for inverse condemnation; provided, however, the statute providing that cause of action is appropriately drafted in light of Ohio's well-developed eminent domain jurisprudence. At present, inverse condemnation requires a writ of mandamus to force an appropriating authority to commence appropriation proceedings. The existing process is unnecessarily complicated and results in duplicative litigation. A new direct cause of action should not make the cure worse than the disease, however, by incentivizing frivolous litigation. Therefore, the

Board supports a provision for the award of reasonable fees, costs, and expenses to the appropriating authority if an owner fails to meet their burden in an inverse condemnation action. This part of the bill also requires additional detailed legal analysis and further discussion to limit unintended consequences.

4. The Board supports providing an enforcement mechanism for violations of R.C. 163.59. Again, in order to avoid duplicative litigation, a claim of violation should be barred if not brought during the pendency of an appropriation proceeding or inverse condemnation proceeding.
5. The Board opposes the proposed changes to the burden of proof for an appropriating authority's determination of necessity and public use.
6. The Board opposes the proposed changes to provisions for the award of attorney fees and expenses but could support common sense adjustments that give due regard to an appropriating authority's last good faith offer. An appropriating authority should also not be required to pay fees and expenses if successful, even in part, in an appeal.

The Board is thoughtful in its approach to property acquisition, being sensitive to all competing interests. Similarly, the Board is thoughtful in its positions in regard to House Bill 64 and urges a common sense approach to considering any changes to current appropriation laws, which requires balancing those same competing interests: private property rights; fiscal responsibility; stewardship of taxpayer dollars; coordinated development; and public safety.

Chairman Hillyer and members of the Committee, thank you again for the opportunity to provide testimony on this very important matter. I would be happy to address any questions about the bill or the Board's positions stated herein.

Respectfully submitted,



Aric I. Hochstettler
Deputy County Administrator and General Counsel
Delaware County Board of Commissioners