IN THE SUPREME COURT OF OHIO

Shelly Materials, Inc.	:	
Appellant-Appellant,	:	Case No. 2018-0237
vs.	:	On Appeal from the Portage County Court of Appeals, Eleventh Appellate District
City of Streetsboro Planning and Zoning Commission, et al.,	:	Court of Appeals
	:	Case No.: 2017-P-0025
Appellees-Appellees.		

BRIEF OF AMICI CURIAE OHIO CHAMBER OF COMMERCE; NAIOP OF OHIO, INC.; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; OHIO CHEMISTRY TECHNOLOGY COUNCIL; OHIO AGGREGATES AND INDUSTRIAL MINERALS ASSOCIATION; THE NATIONAL STONE, SAND AND GRAVEL ASSOCIATION; FLEXIBLE PAVEMENTS OF OHIO; OHIO READY MIXED CONCRETE ASSOCIATION; OHIO FORESTRY ASSOCIATION; OHIO HOME BUILDERS ASSOCIATION; AND OHIO CONTRACTORS ASSOCIATION, IN SUPPORT OF APPELLANT

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I. INTRODUCTION

The Ohio Chamber of Commerce, the NAIOP of Ohio, Inc., the National Federation of Independent Business, the Ohio Chemistry and Technology Council, the Ohio Aggregates and Industrial Minerals Association, the National Stone, Sand and Gravel Association, Flexible Pavements of Ohio, the Ohio Ready Mixed Concrete Association, the Ohio Forestry Association, the Ohio Home Builders Association, and the Ohio Contractors Association respectfully submit this brief in support of Appellant as amici curiae (collectively "Amici"). Amici are divided into two distinct groups: (a) those concerned with the impact of the Court of Appeals' decision on Ohio's infrastructure; and (b) those concerned with keeping Ohio a commerce-friendly state.

A. INFRASTRUCTURE AMICI

The Amici in this group (collectively, "Infrastructure Amici") all provide service and support to those Ohio businesses which build the state's infrastructure, commercial buildings, and housing. These industries are not always the most popular with an ever-changing public opinion but they do create and maintain the state's complex infrastructure and are indispensable to all Ohio citizens.

The Ohio Aggregates and Industrial Minerals Association ("OAIMA") is a trade association representing the interests of Ohio's non-coal mining industries. Mineral aggregates typically mined in Ohio include limestone, sand, and gravel. Other non-coal minerals mined in Ohio include salt and clay. The OAIMA is comprised of about one hundred members directly engaged in the production of minerals. The OAIMA member companies produce approximately ninety percent of the aggregates and industrial minerals mined in Ohio, such as sand and gravel, limestone aggregates, salt, clay, gypsum, industrial sand, building stone, lime, cement, and recycled concrete.

Statewide, the mineral and aggregate industry employs nearly 5,000 Ohioans and results in the indirect employment of another 40,000 Ohioans in supporting industries. Combined, production of crushed stone, sand and gravel, and supporting industries contribute an annual total of $38 billion to the national economy. In Ohio, the industry's non-fuel raw mineral production alone is valued at over $1 billion dollars. The asphalt paving and aggregate industries are highly interdependent, as nearly 95% of asphalt is comprised of aggregate materials.

The National Stone, Sand and Gravel Association ("NSSGA") is a national organization comprised of stone, sand and gravel producers and the equipment manufacturers and service providers which support the industry. These members are responsible for the essential raw materials found in every home, building, road, bridge, and public works project and represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced in the United States on an annual basis.

Flexible Pavements of Ohio ("Flexible") is a non-profit business association comprised of approximately 90 producers, contractors, consultants, and manufacturers engaged in the Ohio asphalt pavement construction industry that live and work in every county in Ohio. The industry directly employs 6,000 Ohioans with a total payroll exceeding $300 million. The industry indirectly creates and maintains thousands more Ohio jobs. Millions of Ohioans drive every day on roads that have been paved by Flexible's members.

The Ohio Ready Mixed Concrete Association, a/k/a/ Ohio Concrete ("Ohio Concrete") is a non-profit trade association representing the concrete producers, the concrete contractors, the cement industry, and various other supporting associated members in the state of Ohio. Concrete is an integral part of Ohio's sustainable development. Produced locally, from abundant natural resources, concrete is completely recyclable and offers many energy-efficient products including

fuel efficient pavements and energy saving buildings. The concrete industry generated approximately 35 billion dollars to the national economy in 2015. The Ohio concrete construction industry directly or indirectly generated close to 67,000 jobs in 2015 and made a direct or indirect contribution of 14 billion dollars in state revenue. Ohio produced 11.5 million cubic yards of concrete in 2015, 4th in the nation, and had a 941 million dollar payroll. Ohio Concrete members produce concrete, aggregates, and other essential building materials used in the construction industry in the state of Ohio, and directly employ over 6,000 Ohioans and thousands more indirectly.

Together, NSSGA, Flexible, Ohio Concrete, and OAIMA members support infrastructure development throughout the nation and Ohio through the use of sustainable and recyclable materials. In fact, many of the major users of aggregate, asphalt, and concrete are the state, counties, townships, and municipalities, which depend on Flexible, Ohio Concrete, and Ohio Aggregates members to supply products and services efficiently and cost effectively using environmentally sound processes. Aggregates mined in Ohio and asphalt produced in Ohio generally stay in Ohio and support the state economy.

The Ohio Forestry Association ("Forestry") supports the management of Ohio's forest resources to promote the general welfare of the people and private enterprise of the state of Ohio. Its membership is comprised of forest landowners, loggers, sawmillers, paper companies, secondary wood manufacturers, professional foresters, forestry equipment dealers, and other service providers. Ohio's forest industry generates over $26 billion in total economic activity for the state and employs over 122,000 people in 463 sectors of Ohio's economy. These workers earn over $6.5 billion in wages and benefits. Ohio's forest land covers over 8 million acres, or 31% of the land base. Of that, 5.8 million acres is held by 336,000 non-industrial private landowners.

The Ohio Home Builders Association ("OHBA") is a 4,500-member trade association serving home builders, remodelers, land developers, and associate members promoting affordable housing opportunities for all Ohioans. The association serves its membership through education and encouraging proactive involvement on state issues impacting the production of affordable housing. OHBA represents an industry that creates significant economic growth in Ohio.

As the only statewide association representing the residential construction and land development industry, OHBA has unique insight into the practical reality of the home building industry. OHBA can offer valuable perspective on the level of impact promoting certainty and predictability in the land development and building process can have on its membership and their ability to provide affordable housing opportunities in Ohio, as well as the vital role the residential construction industry plays in the Ohio economy. The membership's goal is to provide safe, quality, affordable housing to all citizens of this great state.

Ohio Contractors Association ("OCA") is a non-profit business association representing approximately two hundred contractors and three hundred related suppliers and service providers for the heavy highway and utility construction industries. These companies rely heavily on products sourced from Ohio's mining industry for the purposes of asphalt, concrete, and varying types of fill materials. Members of OCA construct, on average, 85 percent of the Ohio Department of Transportation's capital improvement program each year and an equivalent percentage of public highway and bridge construction work made available through local government sources.

Infrastructure Amici's members are located throughout Ohio's 88 counties and run the gamut in size and organization; some members are individuals, others are small, family-owned companies, and others are multi-national corporations. Despite these differences, Infrastructure Amici's members have at least one unifying characteristic - - clear land-use rules, and application

of these rules are a necessity, particularly when the real property happens to be near a populated area or is a use deemed unwelcome by some faction of the public. Infrastructure Amici's members must be able to operate in an environment of regulatory and statutory certainty, fairness, and predictability in order to provide the infrastructure development needed in Ohio to remain viable and growing businesses. The issues presented by Appellant Shelly Materials, Inc. ("Shelly") affect the entire administrative process under the Revised Code, and how courts should interpret their role and function vis-à-vis local political agencies, clarity of purpose, and fair and consistent application of the law, is of substantial concern to Infrastructure Amici's members and all Ohio businesses.

B. BUSINESS AMICI

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse business advocacy organization. The Ohio Chamber of Commerce represents members of virtually every industry throughout Ohio, including retail, transportation, manufacturing, healthcare, and others. The Ohio Chamber of Commerce promotes and protects the interests of more than 8,000 business members by promoting a business-friendly climate in Ohio aimed to benefit not only the member businesses but their patrons and employees. All Ohio businesses are impacted by the condition of Ohio's infrastructure, whether engaged in its creation, maintenance and repair, or simply as a user of a road or highway. Ohio's infrastructure is the foundation of economic growth of Ohio as a state and economic prosperity of all Ohioans. The Ohio Chamber of Commerce understands and acknowledges the importance of maintaining a strong infrastructure foundation and joins in this brief with those organizations directly impacted by adverse and improper administrative decisions, in order to protect all Ohio businesses and citizens.

The NAIOP of Ohio, Inc. ("NAIOP") is the Ohio chapter of NAIOP (fka National Association of Industrial and Office Properties). NAIOP was founded in 1967 and is the leading organization for developers and owners of and investors in office, industrial, retail, and mixed-use real estate. NAIOP helps its over 19,000 members to create commercial real estate solutions to meet the changing demands for how people work, live, shop, and play.

The National Federation of Independent Business ("NFIB") has spent 75 years dedicated to being the voice of small business. NFIB advocates in every state and Washington, D.C. to work to keep America's small businesses strong and independent. It is critical to NFIB and its members that all laws be applied fairly, equitably, and in a manner that is both predictable and just.

Ohio Chemistry and Technology Council ("OCTC") represents the second largest manufacturing industry in Ohio, whose members directly employ 43,650 people and indirectly contribute 131,400 jobs to the economy. For every chemistry industry job in Ohio, an additional 2.9 jobs are created within the state along with 59,170 jobs generated in the plastics and rubber products industry. OCTC's members employ Ohio citizens at an average wage 39% higher than the average manufacturing wage and these jobs generate $3.5 billion in earnings and generate over $1.3 billion in federal, state, and local taxes.

This group (collectively "Business Amici") and their memberships have a strong interest in making Ohio a commerce-friendly state that is not subject to the vagaries of the NIMBY movement. Although Ohio businesses recognize the need for federal, state and local government regulations, they also recognize that if any political subdivision is left unchecked, business owners can be deprived of their property rights through the retroactive application of new laws and regulations. Laws and land-use regulations must be applied fairly, lawfully, and consistently to ensure the business community the predictability essential to economic growth. The Ohio courts

serve as a necessary check and balance to the oftentimes arbitrary and capricious nature of local land-use decisions.

II. STATEMENT OF THE FACTS

Amici adopt the statement of the facts set forth in the Merit Brief filed by Appellant Shelly Materials, Inc. ("Shelly").

III. ARGUMENT

A. INFRASTRUCTURE CONSIDERATIONS

The importance of our state's infrastructure needs cannot be overstated. In the American Society of Civil Engineering's (ASCE) most recent 2017 report, a number of Ohio's infrastructural shortcomings were identified showing that 6.9% of Ohio's bridges are "structurally deficient," which equates to a staggering 1,942 bridges that are in requisite need of repair.[1] The state of Ohio also has 362 high hazard dams, 38 hazardous waste sites on the National Priorities List, and 17% of Ohio's public roads have been designated as being in "poor condition," equating to 122,926 miles of road that need repair.[2] TRIP, a national transportation research group, also released a 2018 report stating that through 2040, Ohio will need approximately $55 billion dollars to maintain the efficiency and quality of its roads, yet "only $41 billion is anticipated to be available."[3] ASCE's 2017 report also found that Ohio will need to invest approximately $12.2 billion in drinking-water infrastructure over the coming 20 years, in addition to another $14.58 billion in

[1] American Society of Civil Engineers, *2017 Infrastructure Report Card, Ohio Infrastructure Overview* (2017), https://www.infrastructurereportcard.org/state-item/ohio/ (accessed July 11, 2018).
[2] *Id.*
[3] TRIP, *Modernizing Ohio's Transportation System: Progress and Challenges in Providing Safe, Efficient, and Well-Maintained Roads, Highways and Bridges,* at 2 (2018), available at http://www.tripnet.org/docs/OH_Progress_and_Challenges_TRIP_Report_June_2018.pdf (accessed July 11, 2018).

wastewater infrastructure also over a period of the next 20 years.[4] Furthermore, there is a $683 million dollar gap in "estimated school capital expenditures," and Ohio also has $23.71 million dollars of "unmet needs for its parks systems."[5]

With respect to Ohio's roads specifically, it has been estimated as recently as June of 2018 that "driving on rough roads costs Ohio motorists a total of $3.5 billion annually in extra vehicle operating costs."[6] These costs incur in the form of "accelerated vehicle depreciation, additional repair costs, and increased fuel consumption and tire wear,"[7] affecting both businesses that require transport, and individual motorists. Research also indicates that Ohio's roadway designs have contributed to serious and fatal traffic crashes in Ohio, reaching a staggering $3.9 billion dollars in economic costs;[8] in the years of 2012-2016 alone, "5,360 people were killed in Ohio traffic crashes."[9] Furthermore, "the fatality rate on Ohio's non-interstate rural roads in 2016 was approximately two-and-a-half times higher than on all other roads in the state."[10]

Ultimately, when a jurisdiction fails to invest in, and maintain its infrastructure, that jurisdiction can be expected to experience derivative negative impacts, and a "cascading impact on the nation's economy, negatively affecting business productivity, gross domestic product (GDP), employment, personal income, and international competitiveness."[11]

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[4] *See* American Society of Civil Engineers, *supra* note 1.
[5] *Id.*
[6] TRIP, *supra* note 3, at 1.
[7] *Id.*
[8] *Id.* at 2.
[9] *Id.* at 6.
[10] *Id.* at 7.
[11] Economic Development Research Group, Inc., *Failure to Act: The Impact of Current Infrastructure investment on America's Economic Future* at 4 (2013), available at https://www.asce.org/uploadedFiles/Issues_and_Advocacy/Our_Initiatives/Infrastructure/Content_Pieces/failure-to-act-economic-impact-summary-report.pdf (accessed July 11, 2018).

Americans use a wide variety of mined products, including both fuel and non-fuel minerals. According to the Mineral Information Institute, in 2005 the average American used 25,380 pounds of non-fuel minerals, including, among others, sand and gravel, stone, cement, iron ore, and salt. Ohio's extractors of industrial minerals obviously play an important role in the economy of the state by providing the raw materials necessary for maintenance and construction of the state's infrastructure needs, which includes the state's roads, bridges, sewers, and buildings in both the public and private sectors.

Limestone, sand, and gravel are the state's most fundamental infrastructure building materials. For instance, concrete is made up of eighty-five percent aggregates while asphalt is comprised of approximately ninety-five percent aggregates. It is important to note that more than fifty percent of all aggregates are purchased with tax dollars.

The ability to open new mines or replenish aggregate reserves at existing mine sites is critical to the industry's ability to furnish the necessary "building blocks." All aggregate operations must periodically obtain new land for reserves. If a company cannot replenish its mineral reserves, eventually banks will not lend the company the money it needs in order to stay competitive and to meet the ever-growing regulatory requirements. To say the least, the aggregates industry is capital intensive. For instance, a new front-end loader may cost as much as $1,000,000. Additionally, as technology is updated, a company must be able to find capital to purchase competitive equipment. Without the ability to stay competitive, the company will eventually close and a local market will not be served.

Understandably, the cornerstone of any aggregate operation is having an adequate supply of zoned and permitted reserves of limestone or sand and gravel. Typically, a mining operation needs twenty to thirty years of reserves for mine planning and financial purposes. Without an

adequate reserve profile, mining operations cannot justify investing the tremendous capital dollars necessary to maintain and purchase equipment and to meet the ever-increasing cost of regulatory compliance. Consequently, land-use issues are of prime importance to the industry.

In addition, aggregate operations are unique in that they can only be located where there is a sufficient quantity of stone, at a depth that is economically feasible to recover, that is of a quality that meets the Ohio Department of Transportation specifications, and is located near a market area. If any one of these factors is missing from the equation, then that site cannot be considered. Therefore, the siting criteria for aggregate operations are stringent from the outset matching site location criteria with local zoning, and the number of viable sites shrinks dramatically.

As stated above, the proximity of the aggregates to a market area is vital due to the high cost of transporting this material. Studies show that a ton of aggregate approximately doubles in price for every ten miles it must be transported. This fact, coupled with the fact that more than fifty percent of all aggregates are purchased with tax dollars, raises significant public policy concerns.

Nearly every facet of the aggregates industry is regulated by a federal, state or local agency. The Ohio Department of Natural Resources ("ODNR"), Division of Mineral Resources Management is the primary regulator for Ohio's aggregate industry and the regulatory program is unique to Ohio and involves no federal oversight. The ODNR regulates every step of the surface mining process, including placement of overburden, blasting, dewatering, prevention of off-site impacts, and ultimately, the reclamation of the property. The ODNR has the power to enforce R.C. 1514 and, through the orders of its Chief, the ODNR has the power to shut down mining operations until compliance by the mine operator is achieved.

The Ohio Environmental Protection Agency ("OEPA") also regulates the surface mining industry through the issuance of various permits, including air and water quality permitting and enforcement of environmental regulations. The Ohio Department of Commerce, Division of the State Fire Marshal and the Bureau of Underground Storage Tank Regulations ("BUSTER") regulates the safe operation of underground storage tanks and supervises appropriate investigations and cleanup of suspected and confirmed releases from such tanks to protect human health and preserve the environment for the citizens of Ohio. The United States Environmental Protection Agency, Spill Prevention, Control and Countermeasures helps facilities to prevent a discharge of oil into navigable waters or adjoining shorelines, and the U.S. Army Corps of Engineers, in conjunction with the OEPA, has a responsibility to delineate wetlands on both private and public lands before any mining activity or the placing of fill material may occur. A comprehensive mine safety program is enforced by the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA") to regulate both the actual premises and conditions of the mine operation and the physical effects of mining on employees. Local governments also participate in mine regulation, mainly through the County Engineer and Ditch Maintenance, which helps to control drainage from mine property.

Despite the obvious importance of Ohio's mining operations and the stringent regulations already in place, persons and groups dedicated to preventing industry expansion continue to trumpet the now all too familiar battle cry of "Not in my backyard." This phenomenon is being fueled in significant part by the ever-outward march of suburbanization to once remote, rural areas. In order for the industry to remain viable, there must be adequate reserves available for extraction; without such reserves, the extraction of aggregate minerals will slowly and surely cease in Ohio.

B. BUSINESS CONSIDERATIONS

Businesses understand and accept that they have certain obligations that come with the privilege of doing business in Ohio. It is of equal importance that the state provides clear and consistent rules that are applied fairly and without bias. Businesses need a stable climate in which to grow and prosper and cannot be subject to laws retroactively applied or any type of regulation that results in an unjust denial of the right to use one's property in an otherwise lawful manner. Today's political climate can lead local political subdivisions to submit to pressure from a small faction of the community and without adequate judicial oversight, and Business Amici are concerned there will be stifling effects on Ohio business development.

In today's age of social media and instant communication any small group can create enough of a digital mob to generate outrage against any activity deemed unwanted or unpopular. Several opposition groups can cause great problems, however, because an activity deemed unpopular such as sand and gravel mining is vitally important to the state's economy. This natural dichotomy between those who develop land and those who seek to prevent growth and change can only be regulated by an unbiased judiciary enforcing the laws written by the General Assembly. If the lower courts are restricted from reviewing the decisions of local political subdivisions on the whole record and forced to accept the planning committee's interpretation of the facts as conclusive, then Ohio businesses will be subject to the whims of a local community and will have no recourse in Ohio's courts against unfair or biased opinions.

As written, R.C. 2506.04 assigns the review of the whole record to the common pleas court. When any court oversteps or eschews its authority, uncertainty in the business community, confusion and concerns impede business development. A court of common pleas is required to examine all of the evidence and determine whether there was a preponderance of substantial and

probable evidence to support the decision. The court of appeals, is then limited to determining if the common pleas court decision was an abuse of discretion. The court of appeals does not have the authority to review the entire record and review the lower court's decision for anything other than an error of law or abuse of discretion. Allowing a court of appeals to encroach on the powers of the lower court in reviewing appeals pursuant to R.C. 2506 will hamper business growth by creating further uncertainty within the legal process.

Shelly's experience in Streetsboro illustrates two scenarios that all too often threaten infrastructure and business development projects: 1) A permit is denied by a biased agency of a political subdivision which raises pretexts for denial but its actual motivation is unlawful; and, 2) An agency of a political subdivision, responsible for holding a permit application adjudicatory hearing, dismisses the credibility of expert witnesses called by the applicant, and instead denies a permit based on unsworn public comments from opponents, unsubstantiated speculations and unqualified personal views of the agency members themselves. In either scenario, amici members have no effective recourse unless courts have authority to reverse the denial.

The Streetsboro Commission's decision encompassed both of the illustrations mentioned above and was "correctly rejected by the lower court as not supported by the evidence, since an administrative determination cannot rest upon 'inferences improperly drawn from the evidence adduced.'" *Shelly Materials, Inc. v. City of Streetsboro Planning & Zoning Comm'n*, 2017-Ohio-9342, ¶ 43, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111-112, 407 N.E.2d 1265 (1980). Further, "comments or questions made by a zoning appeals or commission members do not constitute evidence and a commission's decision must be supported by, and limited to, evidence in the record other than the members' personal statements or beliefs." *Id*. at ¶46 citing *Kuhns v. Kent*, 11th Dist. Portage No. 2010-P-0002, 2010-Ohio-5056, ¶19; *Cooper State Bank v.*

Columbus, 10th Dist. Franklin Nos. 14AP-414 and 14AP-415, 2015-Ohio-2533, ¶31. The Portage County Court of Common Pleas recognized the flaws in the Commission's decision and properly reversed. Upon appeal to the Eleventh District, the administrative appeals process, as it was designed by the General Assembly, broke down. The Portage County Court of Common Pleas reviewed the record, determined that the Commission's motivation was arbitrary, capricious, and was, in reality, retroactive rezoning of the property. The lower court properly reversed the Commission's decision. It was the Eleventh District, however, that ignored the Commission's attempt at retroactive rezoning and found the Commission's decision to be supported by a preponderance of substantial, reliable, and probative evidence.

Local political subdivisions are not allowed to rezone any property on a retroactive basis. *Gillespie v. City of Stow*, 65 Ohio App.3d 601, 607-608, 584 N.E.2d 1280 (1989). In *Gillespie*, the local zoning code allowed for mini-malls to be conditionally permitted, but when Gillespie applied for a permit, the council denied the permit because a mini-mall was no longer desired for the proposed location. *Id*., 607. The Ninth District Court of Appeals, following *Gerzeny v. Richfield Twp.*, 62 Ohio St.2d 339, 342, 405 N.E.2d 1034, 1036-1037 (1980) held that because a use was no longer desired was not a basis for denying a permit because such authority had not been vested in the council. *Id*. "A use which the Code conditionally permits can not be a non-permitted use." *Id*. at 608.

This principle is one on which Ohio businesses must be able to rely in order for some consistency and surety in making development plans. If a community may deny a conditional use permit in contravention of its zoning code simply because the use is "no longer desired," then businesses will have no possible way to plan, develop, and grow in Ohio.

C. AMICI'S ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITIONS OF LAW

1. Proposition of Law No. 1: An administrative decision that is unconstitutional, illegal, arbitrary, capricious, unreasonable, cannot be affirmed simply because it is supported by the preponderance of the evidence, nor can an unsupported decision be affirmed simply because it is not illegal or arbitrary; rather, a common pleas court must reverse if it finds any one of the statutory grounds for reversal of an administrative decision.

The merit brief filed by Shelly explains the necessary legal principles underlying Proposition of Law No. 1 and Amici will not reiterate the well-briefed argument set forth by Shelly. Nevertheless, Amici wants to stress how important it is to their businesses' critical mission of building and maintaining Ohio's infrastructure to have clear rules governing the appeal and review of land-use decisions made by political subdivisions. This Court should reinforce Proposition of Law No. 1 so that parties and courts throughout Ohio know that whenever an agency of a political subdivision demonstrates "unlawful motivation", such as Streetsboro's desire to ban surface mining retroactively, to deny a permit application, the local decision should be reversed on appeal.

The General Assembly gave Ohio courts great latitude in reviewing the quasi-adjudicatory land-use decisions of political subdivisions. Local boards of zoning appeals, planning commissions, and other administrative agencies are often composed of lay people who must act in emotionally charged political situations. The broad review powers given to the courts through R.C. 2506 provide a necessary check on the oftentimes arbitrary and capricious decisions reflecting local public sentiment instead of objective consideration of land-use permits. Without proper judicial oversight, those land-use applicants are vulnerable to local interests and have no effective recourse in Ohio courts.

The judiciary is intended to be a neutral arbiter and interpreter of Ohio law. In this case, it is clear from the record that the Streetsboro Planning and Zoning Commission had a political

agenda in mind when it denied Shelly's conditional use permit. The Portage County Court of Common Pleas examined the entire record presented and determined that the Commission's decision was arbitrary, capricious, unreasonable, and unsupported by the preponderance of reliable, probative, and substantive evidence. The analysis performed by the common pleas court was exactly the type contemplated by R.C. 2506.04.

It is the essence of the arbitrary nature of local land-use boards that impedes the efforts by Amici. As the common pleas court found, nothing Shelly could have said or done was going to lead to the Commission approving the conditional use Application. The Commission was echoing public sentiment which is permissible for a legislative body but wholly impermissible for a quasi-judicial tribunal. The common pleas court, recognizing the Commission had unlawful motivations, called foul. The Court of Appeals' dissent also called out the Commission Decision as a thinly veiled attempt to apply the recent Zoning Code change retroactively:

> This clearly erroneous and legally feckless analysis indicates that this decision was made with the recent changes to the zoning provisions, prohibiting such permits, in mind. Such analysis is wrong as a matter of law. Other members noted they agreed with his statements…. There is little question that this improper consideration impacted the overall Commission proceedings….

(Id. at App. Pg. 15-16, ¶¶44-45.)

The Eleventh District, however, disregarded the Commission's improper motivation which the Trial Court had found made the Commission Decision unconstitutional, illegal, arbitrary and capricious. Therefore, in order to provide clear guidance and security for Ohio's businesses, the Amici members ask that this Court reverse the Eleventh District's erroneous decision and reinstate the full decision of the common pleas court, to establish the principle that a local body's unlawful motivation is a separate ground for reversal.

2. Proposition of Law No. 2: It is the proper function of the Court of Common Pleas in an appeal under Ohio Revised Code §2506.01 to evaluate the character of evidence to determine if it was "substantial, reliable, and probative."

The General Assembly wisely entrusted common pleas courts with the exclusive responsibility under R.C. 2506.04 to determine whether a local agency's decision was "unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." Trial judges are well versed in determining weight and quality of evidence. They are not subject to the same political pressures as are local agencies and they can and do often apply legal principles correctly but in ways that may be unpopular with certain groups. In this case, Shelly presented thorough evidentiary support for its claim that the property values of nearby landowners and the area as a whole would not be diminished by the granting of the conditional use permit. There was no sworn testimony to the contrary heard or considered. Instead of basing its decision on the expert testimony presented regarding property values, the Commission decided to rely on the members' own personal opinions and, although they had no expertise in the subject of real estate appraisals, the members decided their own "unsubstantiated speculations" were more accurate than that of the expert with 30 years of experience.

Pursuant to R.C. Chapter 2506 and the case law interpreting this statute, it is erroneous and arbitrary and capricious for a local official to give more weight to speculative fears and hostile lay opinions expressed in unsworn statements at a public hearing, than to thorough scientific and professional analysis by geologists, hydrologists, environmental scientists, safety experts and real estate appraisers. Unfortunately, the Eleventh District turned this well settled law upside down by endorsing the zoning Commission's reliance on unsworn unsubstantiated fears that property values would be harmed and by finding it "justifiable" that the Commission gave zero weight to a professional real estate appraiser with over 30 years' experience. The real estate appraiser

researched, analyzed and prepared an 86-page appraisal titled, "The Evaluation of the Effect of Surface Mining Operations on Residential Property Values" and testified in the conditional use hearing that in his expert professional opinion, Shelly's proposed use would have "no adverse effect" on property values in the vicinity of the project, and "will not materially affect the overall property values for the local area." As set out in detail in the Merit Brief filed by Shelly Materials, Inc., the Commission members pointed to speculative reasons to discount the credibility of the expert testimony because they personally believed differently, and the Eleventh District majority erroneously held that the Commission has this unfettered prerogative. Because land-use permits usually depend on expert testimony, the same fate is likely for any new surface mine, asphalt or concrete plant, or lumber mill which an amici member seeks to build to supply raw materials for Ohio's infrastructure, unless the Supreme Court of Ohio reverses the Eleventh District decision and holds clearly that a lay opinions of local officials cannot as a matter of law be given more weight than those of a qualified expert.

The Supreme Court of Ohio has interpreted R.C. 2506.04 to empower a Court of Common Pleas to weigh the evidence in the record to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision. *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St. 2d 202, 207, 389 N.E.2d 1113, 1117 (1979). The Court said that "The key term is 'preponderance.' If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand." *Id.* But the *Dudukovich* decision (like other decisions of this Court) does not clarify how a reviewing court is supposed to distinguish evidence that is "substantial, reliable, and probative" from evidence that is not.

The Supreme Court of Ohio gave some guidance in *Dudukovich*, but left a need for further clarification. *Dudukovich* arose from an employment termination decision by Lorain Metropolitan Housing Authority (LMHA), and an appeal hearing before the board of directors of LMHA. The evidence presented to support the discharge consisted of the unsworn testimony of the executive director of LMHA and some exhibits. The Court reasoned: "Since the admission of this evidence was not objected to, it 'may properly be considered and given its natural probative effect as if it were at law admissible, **the only question being with regard to how much weight should be given thereto**.'" *Dudukovich,* quoting *State v. Petro*, 148 Ohio St. 473, 76 N.E.2d 355 (1947), paragraph eight of the syllabus (emphasis added).

After reviewing the record, the Court of Common Pleas reversed the board's decision and ordered that Dudukovich be reinstated in her position. The Court of Appeals affirmed the judgment of the Court of Common Pleas, as did the Supreme Court, which explained:

> **[S]imply because such evidence had to be considered as admissible does not mean that the Court of Common Pleas was bound to find that it was reliable and substantial proof** of the charges against [Dudukovich]. In actuality, the evidence in the record that would support a finding of malfeasance by Dudukovich in her job performance is inconclusive, at best. The evidence pertaining to the first charge against her consists of subjective judgments of third parties, not present at the hearing. The inherent unreliability of such evidence should be apparent. The evidence relating to the other charges is even more circumspect.

Dudukovich, 58 Ohio St. 2d 202, 208, 389 N.E.2d 1113, 1117 (1979) (emphasis added). The Supreme Court therefore affirmed the trial court's reinstatement of Dudukovich because it was arbitrary and capricious for LMHA to rely on unreliable evidence.

Ohio Courts of Appeals, however, continue to grapple with how much weight should be given to unsworn or unsubstantiated non-expert testimony, such as the Streetsboro Commission accepted, particularly when offered in opposition to a land-use permit. Ironically, the Eleventh

District Court of Appeals itself has published a decision that goes in depth to analyze unreliable evidence that should be given no weight in a R.C. 2506.04 review. See *Adelman Real Estate Co. v. Gabanic*, 109 Ohio App. 3d 689, 694–96, 672 N.E.2d 1087, 1090–91 (1996). In *Adelman*, the court sounded a warning that was inexplicably disregarded by the same court in deciding Shelly's appeal:

> The fact that adjudicatory hearings are to be open to the public does not result in their transformation into legislative public hearings with the corresponding right to receive input of public comment at that time. The ploy of swearing in the members of the public does not alter the fact that the bulk of these witnesses are merely offering their subjective and speculative comments and unsubstantiated opinions. Such testimony cannot rise to the level of the reliable, probative, and substantial evidence required under *Kisil* and *Dudukovich* unless there are facts included as part of those opinions."

The Court of Appeals in *Adelman* expressed a need for further Supreme Court clarification to guide R.C. 2506.04 review:

> **It is unfortunate that the Supreme Court of Ohio did not provide more guidance concerning what it considered to be a preponderance of reliable, probative and substantial evidence in *Community Concerned Citizens, Inc*.** However, the court did indicate that 'the record shows cumulative, *direct evidence* of traffic and related safety problems * * *.' ….
>
> 66 Ohio St.3d at 456, 613 N.E.2d at 584. This was the only reference as to what it was that the court found to be sufficient; there was no mention of the underlying evidentiary facts which led to this conclusion.
>
> Nevertheless, the use of the phrase 'direct evidence' would indicate that something more than speculation or opinion is required. Traditionally, direct evidence is viewed as the opposite of circumstantial evidence. It is complete in itself and does not require additional facts or inferences to make it sufficient as proof of a fact. It must therefore be presumed that *Community Concerned Citizens* had such 'direct evidence.'

Id., citing *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals,* 66 Ohio St.3d at 456, 613 N.E.2d at 584 (emphasis added). The court in *Adelman* noted that the Board of Zoning Appeals record contained no testimony from anyone in a position to speak authoritatively

to any of the "concerns" raised at the hearings. *Adelman*, 109 Ohio App.3d 689, 695. The court struggled to balance an architect's sworn testimony against unsworn "subjective" concerns:

> Everything in opposition to the request was voiced in terms of very subjective language, such as 'might,' 'potential,' 'feels,' and 'wondered.' The only substantive concern addressed was whether there was a potential problem with the accessibility of the property to emergency vehicles. The specific problem was that the two preexisting primary buildings were only sixteen feet apart instead of the presently required fifty feet. **The architect's response** was that there were three other methods of access to the property and that the driveway would be monitored to prevent parking there. It was his testimonial opinion that there was no problem with emergency access.
>
> This was the pattern for every concern voiced. A hypothetical concern was raised and either appellants or their architect had a specific solution. There was no apparent rebuttal. While the findings of fact set forth by the board outline several potential legitimate concerns, the record provides little or no factual support as previously discussed.

The in-depth analysis in *Adelman* illustrates the need for the Supreme Court of Ohio to clarify evidentiary standards to be applied under R.C. 2506.04.

Ohio appeals court Judge Whiteside eloquently described the pitfalls of allowing the adjudicatory hearings prescribed for conditional use permits to turn into the legislative public hearings prescribed for applications for rezoning.

> In other words, there is no public hearing upon an application for a variance or an application for a conditional use permit but, instead, an adjudication hearing, which is open to the public. A public hearing is one where members of the general public may speak and express their views on the question of governmental, political and policy considerations as to whether certain legislation should be adopted. Adjudication hearings, however, are not subject to such public comment but, instead, involve the determination of rights of specific persons and whether such rights should be granted based upon evidence (not public opinion) presented at the hearing….
>
> Accordingly, in the limited weighing of the evidence to be undertaken by the common pleas court, consideration must be given to the nature of the evidence, including the question of whether it was given under oath and was subject to cross-examination.

In re Rocky Point Plaza Corp., 86 Ohio App.3d 486, 491-93, 621 N.E.2d 566, 569-70 (1993). Similar to *Rocky Point, Adelman* and *Dudukovich*, the Portage County Court of Common Pleas found that at the "public hearing" in Streetsboro, which was not even recorded, the Commission heard unsworn testimony from a variety of members of the public opposed to the proposed Shelly surface mine that Commission member John Randolph described that "testimony" as "highly emotional" and not "scientific data."

What the Commission did improperly was to blend the legislative and adjudicatory processes; the former offers an opportunity for the public opinion and very limited judicial oversight, whereas the latter actually requires the consideration and evaluation of sworn testimony and properly presented evidence. By having a "public comment meeting," the commission was able to use opinion testimony and public fears and bias to taint the quasi-adjudicatory process. This resulted in a decision denying Shelly's conditional use application. Insubstantial and unreliable evidence was a basis of the Commission's decision according to the Court of Appeals dissenting opinion:

> "The Commission, comprised of laymen, essentially determined that it knew more about property valuation than an appraiser with 30 years of experience. In so doing, the members themselves acted as witnesses, advancing their own opinions, without any supporting evidence, above that of the expert."

December 29. 2017, Opinion at pp. 11-12.

3. Proposition of Law No. 3: It is not the function of a Court of Appeals in an appeal under Ohio Revised Code §2506.01 to review the common pleas court's judgment *de novo*. Rather, its review under R.C. §2506.04 is limited to "questions of law." R.C. §2506.04.

It is of critical importance that each court involved in a R.C. 2506 appeal follow the precise rules established for it by the General Assembly. It is the common pleas court that is charged with reviewing the entire record and determining if there was substantial evidence to support a decision that was not arbitrary, capricious, or unreasonable. Once this is accomplished, an appellate court

has a much more restricted role and may only reverse a common pleas court decision if the appellate court finds an abuse of discretion.

The Eleventh District's Finding in this case was made outside the boundaries proscribed in R.C. 2506.04. The Eleventh District wandered out of its designated lane, encroached on the role given to the common pleas court, and reviewed the commission's decision to determine if the commission's weighing of the evidence was correct. This analysis is far different than evaluating whether or not the common pleas court abused its discretion. The Eleventh District shattered the bounds of its scope of review and in so doing left the business community very uncertain regarding future R.C. 2506 appeals. In order to reinstate and clarify the proper standards of review for appellate and common pleas courts pursuant to R.C. 2506, the Amici members ask that the Eleventh District's decision be reversed.

IV. CONCLUSION

Infrastructure Amici's members build and maintain the infrastructure all Ohio citizens use every day. The need for clear rules and consistent application of the laws written governing the land use critical to Infrastructure Amici's business interests is paramount. Further, Business Amici, and the business community at large, require some measure of certainty when doing business within this state and cannot be left to the whims of small but vocal factions of the public which wield disproportionately powerful influence over agencies of political subdivisions. If the Eleventh District's decision is not overturned, the business community will lose certain safeguards put in place by the Ohio General Assembly intended to avoid this precise consequence.

For these reasons, Amici members request that the Eleventh District's decision be overturned and the Portage County Court of Common Pleas' decision reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **Brief Of Amici Curiae Ohio Chamber Of Commerce; NAIOP Of Ohio, Inc.; National Federation Of Independent Business; Ohio Chemistry Technology Council; Ohio Aggregates And Industrial Minerals Association; The National Stone, Sand And Gravel Association; Flexible Pavements Of Ohio; Ohio Ready Mixed Concrete Association; Ohio Forestry Association; Ohio Home Builders Association; And Ohio Contractors Association, In Support Of Appellant** was mailed this 16th day of July, 2018, to Reginald S. Jackson, Jr., Esq., Brian P. Barger, Esq., Barry W. Fissel, Esq., Eastman & Smith Ltd., One SeaGate, 24th Floor, P.O. Box 10032, Toledo, Ohio 43699-0032, attorneys for appellant; and to Paul A. Janis, Esq., City of Streetsboro, 9184 State Route 43, Streetsboro, Ohio 44241, attorneys for appellees.

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