IN THE SUPREME COURT OF OHIO

COLUMBUS BITUMINOUS CONCRETE CORPORATION, *et al.*	:	
	:	Case No. 2018-1008
Appellants-Appellants,	:	
	:	On Appeal from the Pickaway County Court of Appeals, Fourth Appellate District
v.	:	
HARRISON TOWNSHIP BOARD OF ZONING APPEALS, *et al.*	:	Court of Appeals Case No. 17CA0015
Appellees-Appellees.	:	

MERIT BRIEF OF AMICI CURIAE, THE OHIO AGGREGATES AND INDUSTRIAL MINERALS ASSOCIATION; FLEXIBLE PAVEMENTS OF OHIO; OHIO READY MIXED CONCRETE ASSOCIATION; AND OHIO CONTRACTORS ASSOCIATION IN SUPPORT OF APPELLANTS

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STATEMENT OF INTERESTS OF AMICI

The Fourth District Court of Appeals decision in this case impacts more than just the parties in this litigation. All members of Amici Curiae, The Ohio Aggregates and Industrial Minerals Association ("Ohio Aggregates"), Flexible Pavements of Ohio ("Flexible"), Ohio Ready Mixed Concrete Association, a/k/a/ Ohio Concrete ("Ohio Concrete"), and Ohio Contractors Association ("OCA") have a significant interest in the outcome of this case because they depend on a ready and cost-effective supply of raw materials that come from surface mining. The Amici Curiae respectfully ask the Supreme Court of Ohio to reverse the Pickaway County Court of Appeals decision in this case because it eviscerates the special legislative process for surface mining that the Ohio legislature enacted in R.C. 519.02(A) (and R.C. 303.02). This special process recognizes that over 50% of aggregate minerals are purchased with tax dollars for publicly funded construction projects. http://www.oaima.org/aws/OAIMA/pt/sp/about_factsheet. Without special protection limiting township and county zoning authority to "only" public health or safety and not "public convenience, comfort, prosperity, or general welfare," surface mine operators will be faced with unintended burdens to obtain a conditional use permit from a township board of zoning appeals in order to begin a new surface mining operation or add reserve acreage to an existing operation.

All Ohioans have an interest in, benefit from and depend on infrastructure and an affordable, steady supply of the aggregates necessary for its construction. The Amici in this group (collectively, "Infrastructure Amici") are those Ohio businesses which build the state's infrastructure. These industries are not always the most popular with fickle public opinion, but they are necessary to the creation and maintenance 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. By far, the largest customers of the industry are the Ohio DOT and all political subdivisions including counties and townships.

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.

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 – to remain viable and growing businesses Infrastructure Amici's members must operate in an environment of regulatory and statutory certainty, fairness, and predictability in order to provide the infrastructure development needed in Ohio. The issues presented by Appellants Columbus Bituminous Concrete Corporation and Shelly Materials, Inc. (collectively "CBCC") affect whether local county and township boards of zoning appeals have authority to deny conditional use permits for surface mining based on "public convenience, comfort, prosperity, or general welfare." In this case, the Fourth District Court of Appeals held that when a board of township trustees adopts "general welfare criteria" that are not related to public health and safety for all conditional uses in the township, a board of zoning appeals may nonetheless use those general welfare criteria as the sole basis to deny a conditional use permit for mining. This construction and application of R.C. 519.141(A) is contrary to the state policy to encourage aggregate mining and production and directly contrary to the General Assembly's express limitation on the jurisdiction of townships to regulate mining "only in the interest of public health or safety." R.C. 519.02(A) (emphasis added).

The Infrastructure Amicus Curiae therefore respectfully request that this Court reverse the decision of the Fourth District Court of Appeals, and make it clear, with uniform application throughout the state, that townships, including their trustees and boards of zoning appeals, can regulate surface mining that is subject to regulation under R.C. Chapter 1514 only in the interest of public health or safety. R.C. 519.02, 519.141. Interests of "public convenience, comfort, prosperity, or general welfare" cannot lawfully be considered by township trustees in adopting zoning regulations, and consequently cannot be considered by a board of zoning appeals applying a local zoning resolution to deny a conditional use permit for sand and gravel mining.

STATEMENT OF CASE AND FACTS

Amicus adopts and incorporates by reference the Statement of the Case and Facts in the Memorandum filed by Columbus Bituminous Concrete Corporation and Shelly Materials, Inc.

LEGAL ARGUMENT

The appealed decisions of the Harrison Township Board of Zoning Appeals, the Pickaway County Court of Common Pleas, and the Fourth District Court of Appeals each disregarded the explicit limitation in the last sentence of the township zoning enabling statute R.C. 519.02(A). There are three reasons the Court of Appeals erred in its statutory construction: 1) it negated the last sentence of R.C. 519.02(A) limiting township trustee regulatory authority over surface mining to "health or safety", 2) it expanded board of zoning appeals' authority contrary to Ohio law, and 3) it misconstrued R.C. 519.141 erroneously holding in effect that it supersedes the enabling statute R.C. 519.02(A). The Infrastructure Amici agree with Appellants that Proposition of Law No. 1 is a correct statement of Ohio law.

> **Proposition of Law No. 1: A township's jurisdiction to regulate surface mining activities permitted and regulated under Chapter 1513. or 1514. through zoning is strictly limited to matters of public health or safety, whether mining is a permitted use or conditional use under the township zoning resolution. R.C. 519.02. A township may not regulate mining in the interest of general welfare, directly or indirectly, through the creation of general zoning criteria that apply to all permitted or conditionally permitted uses in the township, including mining. R.C. 519.02, 519.14, and 519.141.**

Townships, unlike municipalities, have no inherent home rule or police powers; instead, townships enjoy only those powers expressly delegated to them by the General Assembly. In that townships are creatures of statute, their authority to adopt zoning legislation is likewise defined by the Ohio General Assembly. See, *Bd. of Twp. Trustees of Bainbridge Twp. v. Funtime, Inc.*, 55 Ohio St.3d 106, 108, 563 N.E.2d 717 (1990), citing *Yorkovitz v. Bd. of Twp. Trustees of Columbia*

Twp., 166 Ohio St. 349, 142 N.E.2d 655 (1957). In other words, the zoning authority possessed by townships is strictly limited to that which is expressly outlined by the General Assembly.

Chapter 519 of the Ohio Revised Code is entitled "Township Zoning" and contains R.C. 519.02 and 519.121, the only enabling legislation that grants authority to boards of township trustees to regulate land use by zoning resolution. There is no other section in Chapter 519, or anywhere else whatsoever in the Revised Code, that authorizes township trustees to regulate land use other than R.C. 519.02 (and 519.021 for "planned-unit development" which is inapplicable to this appeal). At the time R.C. 519.02 was adopted and prior to its amendment in 2004, this section read:

> For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan regulate....

Contrary to popular belief among township officials at least, R.C. 519.02 did not originally authorize a township trustees to zone for the purpose of promoting the general welfare, regardless of the proposed use of a property.

Applying the original version of R.C. 519.02, several authorities had specifically addressed the issue of zoning for the purpose of promoting the general welfare of a township. In *Long v. Bd. of Twp. Trustees, Liberty Twp.,* the legislative authority of the township adopted an amendment to its zoning resolution that sought to protect certain scenic areas along the Olentangy River. *Long v. Bd. of Twp. Trustees, Liberty Twp.*, 5th Dist. Delaware App. No. 95CA-E-06-037, 1996 WL 488026 (May 24, 1996). In addition to scenic protection, preserving the township tax base and property values were among the enumerated purposes of the amendment. The court noted that the objectives sought by the amended zoning resolution were in the nature of a general welfare function not included within the powers conferred upon townships pursuant to R.C. 519.02.

Consequently, the court struck down the township zoning resolution because the General Assembly has only authorized townships to zone for the purpose of promoting the public health, safety and morals of the community and not the general welfare of the township. Id.

In *Fischer Dev. Co. v. Union Twp.*, the court struck down the denial of a rezoning application where the township's action was based on the impermissible goal of preserving local property values. *Fischer Dev. Co. v. Union Twp.*, 12th Dist. Clermont App. No. CA99-10-100, 2000 WL 525815 (May 1, 2000). The court based its decision on the same rationale as the *Long* court, specifically that townships may only zone for the purpose of promoting the public health, safety, and morals of the township and not for general welfare purposes. Id.

Effective in 2004, the enabling statute for township zoning R.C. 519.02 was amended by 2003 Am. Sub. H.B. No. 148. Although the legislature expanded township trustees' authority to regulate for general welfare over most uses, the amendment contained an explicit exception for the purpose of continuing unaltered the historic health and safety limitation on regulation of coal or surface mining. The 2004 amendment added two provisions that can be properly understood only when read together. The General Assembly enlarged township zoning authority in new language that reads:

> **Except as otherwise provided in this section**, in the interest of the public convenience, comfort, prosperity, or general welfare, the board by resolution, in accordance with a comprehensive plan, may regulate….

but the same amendment added the last sentence of R.C. 519.02(A) which provides:

> **For any activities permitted and regulated under Chapter 1513. or 1514**. of the Revised Code and any related processing activities, the board of township trustees may regulate under the authority conferred by this section **only** in the interest of public health or safety.

R.C. 519.02(A) (emphasis added). The last sentence of R.C. 519.02(A) carves out certain uses from the expanded new scope of the enabling statute. Excluded from the expanded "general welfare" regulatory authority are all activities permitted and regulated under R.C. 1513 (coal mining) or R.C. 1514 (surface mining) and associated processing activity. By explicit language in the amended enabling statute, the authority of a board of township trustees to regulate coal mining and surface mining is limited to public health or safety, just as it was before the 2004 amendment. There is no question that the General Assembly intended the last sentence of R.C. 519.02(A) to create an explicit exception to township zoning for "general welfare" because the new "general welfare" language in R.C. 519.02 is preceded by "Except as otherwise provided in this section…." Other sections of R.C. Chapter 519 govern various other topics including procedures for adopting zoning resolutions and for holding meetings, but there is no other section in Chapter 519 that grants authority to township trustees to regulate surface mining by zoning resolution other than the last sentence of R.C. 519.02(A).

If the General Assembly had not added the last sentence to R.C. 519.02(A) to limit county and township zoning authority to "only" interests of health and safety, county and township officials could pass zoning regulations regulating surface mining based on "public convenience, comfort, prosperity, or general welfare." Because of the necessity to have a steady supply of construction aggregates, the General Assembly did not want aggregate operations subject to "public convenience, comfort, prosperity, or general welfare" considerations. But the Pickaway County Court of Appeals decision erroneously circumvents the last sentence of R.C. 519.02(A).

1. Erroneous Disregard of Explicit Limitation in R.C. 519.02(A)

While the Court of Appeals focused on the authority of the township board of zoning appeals ("BZA") under R.C. 519.141 to apply "public convenience, comfort, prosperity, or general

welfare" standards to the Appellants' conditional use application, the first level of scrutiny should have focused on the question "Does a board of township trustees have authority to regulate surface mining beyond the interest of public health and safety?" According to the enabling statute R.C. 519.02(A) the clear answer is "no."

Boards of township trustees have no statutory authority whatsoever to adopt regulations applicable to surface mining other than that which they receive under the last sentence of R.C. 519.02(A). This Court has established, that "townships of Ohio have no inherent or constitutionally granted police power, the power upon which zoning legislation is based. Whatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute." *Yorkovitz v. Bd. of Twp. Trustees of Columbia Twp.*, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957). Since the zoning authority of Ohio's township trustees is strictly statutory, this is an absolute jurisdictional limitation on these local governments. Any zoning rule or resolution that violates this explicit statutory command of the General Assembly is invalid and unenforceable. *Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 583 N.E.2d 302 (1992).

Because of the General Assembly's explicit limitation for surface mining and related processing activities, a board of township trustees has statutory authority under R.C. 519.02(A) to adopt by zoning resolution regulations "only in the interest of public health or safety." All regulations in a zoning resolution that promote interests other than health or safety, such as "public convenience, comfort, prosperity, or general welfare" are, as a matter of law, inapplicable to surface mining. If a board of trustees were to adopt regulations on surface mining that go beyond

health or safety, those regulations would be ultra vires and have no force of law. *Newbury Twp., supra.*

Of all the possible uses of land in townships, the legislature chose only four uses deserving of special mention in R.C. 519.02: adult entertainment establishments, planned-unit developments, coal mining, and surface mining. The only possible legislative intent discernible in the last sentence of R.C. 519.02 is to explicitly limit township trustees' authority to impose zoning regulations on surface mining. The driving motivation for this limitation is the public policy of the State of Ohio to encourage aggregate production. The General Assembly has recognized the critical importance of the location and operation of aggregate mines and their related processing activities to the economic well-being of the State of Ohio and its citizens. R.C. 5.2274. Aggregates provide the essential building materials for the state's public infrastructure and public and private development.

The siting and operation of new mines in the state often gives rise to local opposition who ironically want the benefits of the production of aggregates but do not want these operations in their communities. As a result, the General Assembly limited the jurisdiction of townships and counties to regulate mining and any of its related processing activities through its local zoning resolution "only in the interest of public health or safety." 2003 Am. Sub. H.B. No. 148 (emphasis added). The legislature placed the same limitation on county zoning in R.C. 303.02 and township zoning in R.C. 519.02(A). In that same amendment, the General Assembly expressly limited the power of townships and counties to regulate mining "only in the interest of public health or safety" making it clear, as to mining, counties and townships may not consider general welfare or any other interests. Those jurisdictional limitations were the same before the 2004 amendment gave township trustees general-welfare zoning authority for uses other than coal and surface mining.

2. Erroneous Expansion of BZA Authority Beyond the Statutory Limits That Constrain Township Trustees

The Court of Appeals decision did not comment on how the authority of township trustees differs significantly from the power of a board of zoning appeals. "Powers of township boards of zoning appeals" are specifically defined in R.C. 519.14. The powers of a township BZA in R.C. 519.14 do not include enactment of zoning regulations through a resolution; zoning power is a legislative function granted exclusively to the board of township trustees under R.C. 519.02 and then, only by the process set forth in R.C. 519.12. A board of township trustees acts in legislative capacity; whereas, the BZA serves an administrative adjudicatory function and may only administer that which the legislative authority enacts. With respect to surface mining, that authority is limited by the enabling statute to public health or safety.

Another important distinction in township zoning is that a land use, including mining, can be allowed either as a "permitted use" or as a "conditional use" in a local zoning resolution. A "permitted use" is allowed as a matter of right in a zoning classification where it is designated. If mining is "permitted" there is no public hearing or special permit required, simply compliance with all local "health and safety" zoning regulations as well as all local, state and federal regulations and licensure requirements. In contrast, when mining is a "conditional use" under a local zoning resolution, a quasi-judicial hearing before an administrative board (the board of zoning appeals or "BZA") is required along with a special zoning permit for mining. In this case, mining was allowed in agricultural districts in Harrison Township only as a conditional use in the zoning resolution, which is often the only way mining is permitted in a county or township.

The General Assembly understood this distinction and not only imposed limitations on the zoning authority of trustees in the enabling statute R.C. 519.02(A) but also imposed additional limitations on the authority of a township BZA when considering conditional uses for mining.

> If the board [of zoning appeals] considers conditional zoning certificates for activities that are permitted and regulated under Chapter 1514. of the Revised Code or activities that are related to making finished aggregate products, the board shall proceed in accordance with section 519.141 of the Revised Code."

R.C. 519.14. Section 519.141(A) of the Revised Code limits the jurisdiction and power of a township board of zoning appeals. When a BZA "considers conditional zoning certificates for activities that are permitted and regulated under Chapter 1514. of the Revised Code or activities that are related to making finished aggregate products, the board **shall not** consider or base its determination on matters that are regulated by any federal, state, or local agency." R.C. 519.141(A) (bold added). The statute also limits BZA authority by vesting the authority to evaluate and designate local roads for mining activities in the county engineer and county commissioners based upon a strict statutory procedure and criteria; although the township trustees or applicant may appeal the county's decision. R.C. 519.141(B) and (C).

The Pickaway County Court of Appeals decision erroneously approves of a BZA imposing general-welfare regulations on surface mining, which directly conflicts with township trustee statutory authority to adopt surface mining regulations "only in the interest of public health or safety." The Court of Appeals decision allows a BZA to do what trustees are prohibited from doing – consider interests other than health and safety. The Court of Appeals' misinterpretation of R.C. 519.141 allows a BZA to deny a conditional use permit on general welfare grounds, when boards of township trustees do not even have statutory authority to impose such regulations on surface mining. If a zoning resolution directly imposed general welfare regulations on surface mining, the resolution would be legally invalid (*see Newbury Twp., supra*.), yet the Court of Appeals erroneously holds that a BZA can deny a conditional use permit based on a general welfare regulation that cannot legally be adopted in the first place. According to the Court of Appeals'

incongruous statutory interpretation, if the township trustees do not make general welfare regulations on conditional uses specifically applicable to mining, a board of zoning appeals can apply them to mining and prohibit it.

Two other appellate districts have correctly held that even when mining is a permitted as a "conditional use" under the township or county zoning resolution, a township or county board of zoning appeals has no authority to regulate mining in the interest of general welfare. Any general welfare criteria contained within the township or county zoning resolution cannot be applied to mining and, as to mining uses, is void. *Highlanders Ent., LLC v. Chester Twp. Bd. of Zoning Appeals*, 5th Dist. Morrow No. 2009CA0001, 2009-Ohio-3402 (as to townships) and *Shamrock Materials, Inc. v. Butler Cty. Bd. of Zoning,* 12th Dist. Butler No. CA2007-07-172, 2008-Ohio-2906 (as to counties). In those cases, the Fifth and Twelfth District Courts of Appeals each held that the General Assembly's express limit on the jurisdiction of townships to consider only "public health or safety" for mining activities adopted in R.C. 519.02 and 303.02 prohibited boards of zoning appeals from considering any general welfare factors in zoning for mines, even when mining was a conditional use. Those courts properly held boards of zoning appeals could not consider general-welfare interests such as decreases in property values when applied to surface mining. The Pickaway County Court of Appeals considered and erroneously rejected both cases claiming they did not apply because neither court expressly cited R.C. 519.141 (or R.C. 303.141), though the 2004 amendments to R.C. Chapter 519 were in effect at the time both cases were decided.

3. Erroneous Holding That R.C. 519.141 In Effect Supersedes R.C. 519.02(A)

The Pickaway County Court of Appeals decision is tantamount to holding that R.C. 519.141 supersedes R.C. 519.02(A). The standard of review on appeal of a question of law,

including a question of statutory interpretation, is de novo with no deference given to the lower court's decisions. *Turner v. CertainTeed Corp.,* Slip Opinion No. 2018-Ohio-3869, 2018 WL 4627703 (September 27, 2018), ¶11 citing *Ceccarelli v. Levin,* 127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342, ¶8. The Court of Appeals failed to follow the applicable rules of construction for zoning ordinances:

> All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning restrictions are in derogation of common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. **Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed.**

Byers DiPaola Castle v. Ravenna City Planning Comm., 2011-Ohio-6095, ¶ 62, 2011 WL 5903942 (November 28, 2011) citing *Saunders v. Clark Cty. Zoning Dep't.*, 66 Ohio St. 2d 259, 261, 421 N.E.2d 152 (1981) (emphasis added); see also *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, at ¶ 34 (ambiguity in zoning regulations construed in favor of the property owner).

There is ample language in the three special sections of Chapter 519 that apply to surface mining for the Supreme Court to conclude that the legislature intended township zoning regulation of surface mining to be "only in the interest of public health or safety." For example, when a township BZA considers a conditional zoning certificate application for proposed surface mining, R.C. 519.141 places limitations on BZA powers in several ways:

- The BZA "shall not consider or base its determination on matters that are regulated by any federal, state, or local agency." R.C. 519.141(A)
- The BZA "shall not require the identification of specific roads, as otherwise authorized in division (A)(3) of section 303.141 of the Revised Code." *Id*. at (C).

- The BZA may not require the identification of specific roads in accordance with 303.141 (B) for transfer of unfinished aggregate material between facilities, loading or unloading of finished aggregate product within a ten-mile radius of a surface mining operation, or other uses listed in R.C. 519.141(C). Id. at (C)(1)-(3).

Much of the language in R.C. 519.141 indicates a legislative intent to treat surface mining applications in a manner different than other uses by eliminating or limiting some of the BZA's usual powers.

The linchpin of the reasoning of the Court of Appeals decision is the second sentence of R.C. 519.141(A). When read in context, however, including subsection (A)(8), the intent of the second sentence of R.C. 519.141(A) is not difficult to discern:

> **519.141 Conditional zoning certificates for surface mining activities.**
>
> (A) If a township board of zoning appeals considers conditional zoning certificates for activities that are permitted and regulated under Chapter 1514. of the Revised Code or activities that are related to making finished aggregate products, the board shall not consider or base its determination on matters that are regulated by any federal, state, or local agency. However, the board may require **as a condition of the approval** of a conditional zoning certificate for such an activity compliance with any general standards contained in the zoning resolution that apply to all conditional uses that are provided for in the zoning resolution and, except as provided in division (C) of this section, **may require any specified measure, including, but not limited to, one or more of the following**:
>
> (1) Inspections of nearby structures and water wells to determine structural integrity and water levels;
>
> (2) Compliance with applicable federal, state, and local laws and regulations;
>
> (3) Identification of specific roads in accordance with division (B) of section 303.141 of the Revised Code to be used as the primary means of ingress to and egress from the proposed activity;
>
> (4) Compliance with reasonable noise abatement measures;
>
> (5) Compliance with reasonable dust abatement measures;

> (6) Establishment of setbacks, berms, and buffers for the proposed activity;
>
> (7) Establishment of a complaint procedure;
>
> (8) **Any other measure reasonably related to public health and safety**.

The legislature plainly intended to empower a township BZA to "require any specified measure" listed in (A)(1) through (A)(7), or any "other measure reasonably related to **public health and safety**." The intent to incorporate a "health and safety" limitation on BZA authority is entirely consistent with the last sentence of the current version of R.C. 519.02(A) which provides:

> For any activities permitted and regulated under Chapter 1513. or 1514. of the Revised Code and any related processing activities, the board of township trustees may regulate under the authority conferred by this section only in the interest of public health or safety.

When construing R.C. 519.141, the Court of Appeals took out of context the phrase "compliance with any general standards contained in the zoning resolution that apply to all conditional uses," not only failing to preserve internal consistency with the enabling statute R.C. 519.02(A) but failing to read this phrase in the context of the beginning of the sentence and the end of the sentence. Looking at the beginning of the second sentence, it does not read "as a condition for denial" but "as a condition of the approval." The sentence does not identify standards for denial of a permit, but standards for "the approval." In fact, the entire section 519.141 deals with identifying the standards that a BZA may or may not require "compliance with" as conditions on the proposed use when it grants "approval" of a conditional use certificate.

Moreover, the Court of Appeals does not discuss the context of the end of the second sentence in R.C. 519.141(A) that follows the scrutinized phrase "compliance with any general standards contained in the zoning resolution that apply to all conditional uses." The Court of Appeals does not note that the second sentence of R.C. 519.141(A) continues all the way through

(A)(8) "any other measure reasonably related to public health and safety." The word "other" in this catch-all phrase in (A)(8) reveals the legislature's view that all of the "other" standards referred to in the entire second sentence of 519.141(A) are also "related to health and safety." When the scrutinized phrase is read together with (A)(8) its intent is consistent with the enabling statute – it reads "compliance with any general standards contained in the zoning resolution that apply to all conditional uses" "reasonably related to health and safety." When read in context and in its entirety, the second sentence of R.C. 519.141(A) does not express an intent to circumvent or supersede R.C. 519.02(A).

The Court of Appeals especially misinterpreted the word "however" at the beginning of the second sentence of R.C. 519.141(A). As the name "conditional use" implies, when a BZA approves a conditional use permit, oftentimes the permit is issued on the condition that compliance with specified measures is required of the applicant. The word "however" in the second sentence of .141(A) draws a distinction between "matters that are regulated by any federal, state, or local agency" which may not lawfully be required by the BZA, and other measures "reasonably related to public health and safety" which may be required of the applicant as "conditions" of the BZA's approval. The first sentence of R.C. 519.141(A) states measures that are off-limits for the BZA even if in the zoning resolution, and the second sentence lists measures that "may" be required. Any "general standards contained in the zoning resolution that apply to all conditional uses" may be required of surface mining, provided the standards do not exceed the limitations in R.C. 519.02(A).

The Court of Appeals, holding that "general standards contained in the zoning resolution that apply to all conditional uses," may be the basis of a permit denial by a township BZA would be justified only if:

- The second sentence of R.C. 519.141(A) were re-written by the legislature to read: "**Notwithstanding the limitation on township trustee zoning authority under R.C. 519.02(A),** general standards contained in the zoning resolution that apply to all conditional uses **may be grounds for denial** of a conditional use permit for activities that are permitted and regulated under Chapter 1514. of the Revised Code or activities that are related to making finished aggregate products."

or

- The last sentence of R.C. 519.02(A) were re-written by the legislature to read: "**Except as determined by the board of zoning appeals when considering a conditional use application under R.C. 519.141(A)**, for any activities permitted and regulated under Chapter 1513. or 1514. of the Revised Code and any related processing activities, the board of township trustees may regulate under the authority conferred by this section only in the interest of public health or safety."

However, as the Supreme Court can read, the bold language was not included in either R.C. 519.02(A) or R.C. 519.141(A). The "health and safety" limitation of the enabling statute R.C. 519.02(A) is reiterated in 519.141(A)(8) at the end of the very sentence at issue; therefore, there is no reason for the Court to hold that the legislature intended to give a township BZA power under R.C. 519.141(A) to circumvent or supersede the "health and safety" limitation on township trustee zoning power that is explicit in the last sentence of the enabling statute R.C. 519.02(A).

Therefore, because this case involves misinterpretation of statutory township zoning authority as applied to surface mine permit applications throughout the State of Ohio, it is of public and great general interest requiring reversal.

CONCLUSION

The Infrastructure Amici, on behalf of their members, and on behalf of all Ohioans who depend on infrastructure, urge the Court to reverse the decision of the Fourth District Court of Appeals in this case, and repudiate its findings. Amici urge this Court uphold the legislative intent of the statutes of this state and find that when a township board of zoning appeals considers conditional

zoning certificates for mining activities that are permitted and regulated under Chapter 1514 it may not apply "public convenience, comfort, prosperity, or general welfare" standards.

A reversal of the Court of Appeals decision is vital to the ability of the members of the Infrastructure Amice to locate the supply of aggregates in reasonable proximity to where infrastructure needs are concentrated. Unless overturned, the Court of Appeals decision authorizes a township (or county) BZA to deny a conditional use certificate for surface mining based on the BZA's determination of "public convenience, comfort, prosperity, or general welfare," even though in R.C. 519.02(A) the General Assembly codified a strict limitation on township zoning: "For any activities permitted and regulated under Chapter 1513. or 1514. of the Revised Code and any related processing activities, the board of township trustees may regulate under the authority conferred by this section only in the interest of public health or safety."

Respectfully submitted,

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CERTIFICATE OF SERVICE

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