

Is New Aggregate Mining
Legislation Under “mining”
Township Zoning Authority?

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Those of you who have followed the proposed legislation dealing with the Aggregate Mining industry over the past two years may be tempted to answer the question posed in our title with a resounding “yes”. However, the real answer may very well be a resounding “no,” due to the adoption of House Bill 443 (“HB 443”) in the waning days of the 126th General Assembly. In fact, the newly enacted legislation begs a new question—is a township’s zoning authority affected at all? The answer depends wholly on whether or not a township wishes to treat aggregate mining as a conditional use under its zoning resolution.

Background

In 2005, the Ohio Aggregates and Industrial Minerals Association (“OAIMA”) began to push for amendments to the county and township zoning laws, presumably driven by the desire to expand the opportunities for their industry. This desire manifested itself in proposed Senate Bill 191 (“SB 191”) and companion House Bill 400 (“HB 400”). These bills would have tied the hands of township zoning officials by requiring them to allow aggregate mining as either a permitted use or a conditional use if aggregate is present anywhere in the township. The Ohio Township Association (“OTA”) expressed reservations about these bills, due primarily to the concern that the legislation would preempt or specify exactly how the land use issue of zoning for aggregate mines would be managed at the county and township levels. Perhaps most troubling to townships was the fact that this new legislation would have taken away the right of referendum from township residents where the permitting of aggregate facilities was involved, especially in residential areas where aggregate is present. Although the OTA attempted to work with all parties to find a mutually beneficial way to make it easier to site additional aggregate mining facilities, and suggested many possible revisions to the bills, SB 191 and HB 400 were simply too restrictive and unreasonably limited the ability of township trustees to protect residential areas.

House Bill 443

Due in large part to the efforts of the OTA, the legislation that was enacted does not include many of the controversial portions of SB 191 and HB 400. Effective _____, HB 443 provides guidance for townships that choose to treat aggregate mining as a conditional use under their zoning schemes, but unlike SB 191 and HB 400, it does not mandate that townships must treat aggregate mining as either a permitted or conditional use. In short, the new law will *only* affect those townships that classify aggregate mining as a conditional use under their zoning resolutions.

The new law, rather than restricting townships, actually offers additional tools that allow for greater control in zoning for aggregate mines. Ohio Revised Code Section 519.14, which defines the authority given to township boards of zoning appeals, has been amended to provide that if a township zoning

resolution treats activities related to making finished aggregate products as a conditional use, then the board of zoning appeals must proceed according to Section 519.141.

Newly enacted Section 519.141 gives a board of zoning appeals the authority to grant conditional use permits for aggregate mining on the basis of general standards contained in the zoning resolution, provided that these general standards apply to all conditional uses. An example of such general standards that would be permissible under the new legislation can be found in a zoning resolution where the issuance of any conditional use permit requires that any proposed “use will be harmonious and in accordance with general objectives, or with any specific objective of a comprehensive plan or zoning resolution”; “be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing and intended character of the general vicinity”; and “not be hazardous or disturbing to existing or future neighboring uses.”

Section 519.141 also grants a board of zoning appeals the authority to require that an applicant meet any combination of seven specific conditions before granting a conditional use permit for aggregate mining, as well as the broad authority to consider “any other measure reasonably related to public health and safety.” Specific measures that townships may require as a condition of the approval of a conditional zoning certificate for aggregate mining under Section 519.141 are as follows:

- Inspections of nearby structures and water wells to determine structural integrity and water levels;
- Compliance with applicable federal, state, and local laws and regulations;
- 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;
- Compliance with reasonable noise abatement measures;
- Compliance with reasonable dust abatement measures;
- Establishment of setbacks, berms, and buffers for the proposed activity;
- Establishment of a complaint procedure;
- Any other measure reasonably related to public health and safety.

In order for townships to require any of the conditions found in Section 519.141, they must amend their zoning resolutions to include such conditions. Ultimately, the conditions set forth in HB 443 allow boards of zoning appeals to address many of the adverse impacts associated with the operation of aggregate mining facilities and the effect such facilities may have on township residents.

Another facet of the new legislation that may be particularly beneficial to townships that choose to treat aggregate mining as a conditional use is the ability of the county engineer and county commissioners to require the identification of specific haul routes to be used as the primary means of ingress and egress from the aggregate mining operation. The process to be followed by the county in designating haul routes under the new law is found in Ohio Revised Code Section 303.141. The procedure for designating haul routes may be summarized as follows:

- Prior to the submission of an application for a conditional zoning certificate for aggregate mining, an applicant is required to send written notice to the county engineer of the applicant's intent to apply for such zoning certificate.
- Not later than 14 days after receipt of the written notice, the county engineer must establish the time, date and location of a meeting with the applicant, and give notice of such meeting to both the applicant and township fiscal officer.
- At the meeting, the applicant must explain the proposed location of the activity or expansion of an existing activity, the anticipated amount of aggregate material to be shipped from the activity, and the anticipated primary market areas for the finished aggregate products leaving the activity.
- Not later than 30 days after the meeting, the county engineer must submit a written recommendation of specific roads to be used as the primary means of ingress to and egress from the proposed activity, based upon factors listed in the statute, to the board of county commissioners.
- At the next regularly scheduled meeting of the board of county commissioners after receipt of the written recommendation, the board must adopt the recommendation, or adopt it with modifications, as provided in the statute. The board then sends written notice of the adoption of the recommendation or recommendation with modification to the county board of zoning appeals.
- There is an appeals process provided for in the statute, as well as certain limited exceptions where identification of specific roads is not required.

By requiring the aggregate operator to identify its haul routes as part of the conditional use criteria, a township can now protect not only their residents from potentially hazardous conditions, but also their roads which can be easily damaged by the heavy loads hauled to and from these types of facilities.

House Bill 443 does place some restrictions on townships choosing to treat aggregate mining as a conditional use. First, a township board of zoning appeals is not allowed to consider or base its determination for a conditional use permit on matters that are regulated by any federal, state, or local agency. Second, although a township can now play a role in requiring the designation of haul routes, it is the county and not the township that sets these routes. Third, if

a township does choose to treat aggregate mining as a conditional use, then they will lose the right of referendum that may have been available if treated as a permitted use.

Alternative to Treating Aggregate Mining as a Conditional Use

Townships that did not treat aggregate mining as a conditional use prior to the effective date of the new legislation will be unaffected by the changes in the law. For example, townships are still free to treat aggregate mining as a permitted use in a certain district or districts, and require a rezoning of a potential site if a proposed operation is not located in a permitted district. This method of zoning for aggregate mining may be desirable to those townships that want to preserve the right of referendum of any rezoning decisions. However, townships treating aggregate zoning as a permitted use will not be authorized to require the designation of haul routes, as is provided under the new law.

Treatment of Existing Aggregate Mining Operations

One important question that arises is how a township that incorporates the new law into their zoning resolution should treat existing aggregate mining operations that want to expand after the zoning resolution has been amended. Arguably, the answer depends on the nature of the conditional use permit that was originally granted to the aggregate mining operation. For example, if an aggregate mining facility conditional use permit was approved as a “blanket approval” for an entire parcel without any limiting conditions, the expansion arguably may be permitted without the aggregate mining entity having to go through the township’s revised conditional use process. On the other hand, if a conditional use permit was granted for a facility based upon a detailed site plan limiting the mining operation to a very specific area, for any expansion to occur outside of the detailed site plan the entity would seemingly need to apply for a modified conditional use permit under the amended zoning resolution. This latter scenario is supported by the language in the new legislation that describes the obligations of an applicant for a conditional use permit under the road haul designation process based upon proposed activities that are to be “located or expanded.” It is a good idea to check with your county prosecutor or legal counsel should questions arise on the treatment of existing aggregate mining operations after the new law takes effect.

Recommendations

Ultimately, townships will need to decide for themselves how to treat aggregate mining operations in terms of zoning. It is recommended that townships deciding to continue, or to begin, to treat aggregate mining as a conditional use, act expediently to amend their zoning resolutions to incorporate the criteria set forth in the new legislation. Amending the process by which conditional use permits are granted for aggregate mining operations will offer

flexibility in the standards that may be considered in granting such permits, and will allow townships to take advantage of the ability to set designated haul routes. Once again, if you already treat aggregate mining as a permitted use and wish to continue to do so, you are unaffected by the new legislation.