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TO: Chairman Ron Young
Ohio House Economic Development, Commerce, and Labor Committee

FROM: Ohio Municipal League
Josh Brown, Esq.
Director of Communications

Dear Chairman Young and Members,

We testify today in opposition to House Bill 128. This is special interest legislation that would allow a construction company to do an end-around their local building inspection enforcement. If the company does not like the inspection they received, under this bill they can simply call another inspector to do it.

Our objections to the bill are: 1) building officials are law enforcement officers who protect the safety of people in Ohio—undermining their authority is a safety hazard, 2) building inspections are a core authority of municipal government, 3) the need to keep local inspections local, and 4) there are adequate accountability measures in place and timeliness of inspections is an issue we hope to resolve with using the bill's expedited arbitration process, but only in lieu of the third-party proposal in the bill, not in addition to it.

1) Building Officials / Inspectors Are Law Enforcement Officers

Municipal building departments are charged with enforcing state building laws and rules, local ordinances, and approved plans relevant to particular projects. Their job is to make sure the buildings are built according to the law and the approved plans.

Proponents have argued that building departments should compete with each other, effectively creating a free market in law enforcement. However, nobody seriously believes that law enforcement officers should compete with each other to enforce the law. Citizens are not consumers of law enforcement. In fact, quite the opposite.

In Federalist #51, James Madison wrote, "If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." We have this in current law through: 1) the Ohio Board of Building Standards oversight of the inspection process, and 2) the local controls that require a head Building Official to approve of inspections done by Building Inspectors on site.

We urge this General Assembly not to pass a law that would undermine law enforcement in an effort to accommodate special interests. Adam Smith wrote in "The Wealth of Nations," which is the foundational book to modern free market economics, "The interest of [businessmen] is always in some respects different from, and even opposite to, that of the public ... The proposal of any new law or regulation of commerce which comes from this order ... ought never to be adopted, till after having been long and

carefully examined ... with the most suspicious attention. It comes from an order of men ... who have generally an interest to deceive and even oppress the public.”

2) Building Inspection Authority is a Core Home Rule Authority

Section 3 of Article XVIII of the Ohio Constitution reads as follows, “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” The second power granted in Section 3 of Article XVIII is the power to adopt and enforce local police, sanitary, and other similar regulations that are not in conflict with general laws. “Police power” has been defined as the authority to make regulations for the public health, safety, and morals and the general welfare of society.”¹

There are issues that are clearly Home Rule and there are gray areas in the law. This is not a gray area. There is no authority that is more central to local control than the ability of local law enforcement to enforce the law, especially laws that protect the safety of people in a municipality. Even if a company is being treated unfairly, the General Assembly should not pass unconstitutional bills that undermine the authority of local governments to exercise their core functions.

3) The Need to Keep Local Inspections Local

Often, approval of construction requires a knowledge of local conditions. First, building officials and inspectors enforce local ordinances that outside inspectors would be unfamiliar with. Second, local conditions have to be understood for many of these inspections. For example, to approve of construction, an inspector may need to be familiar with local flooding issues, soil issues, and chemicals emitted in the area, just to name a few. Only a local building department can determine when they need to personally inspect a project, and when they can accept the inspection of a third-party that they direct.

4) Accountability of Local Inspectors and Officials & Timeliness Issues

In cases where a law enforcement official (in this case a building inspector or official) acts inappropriately, there is a process for disciplining that person and his/her department through the Ohio Board of Building Standards. Our understanding is that the proponents feel this process is adequate, but has some problems.

The sole proponent of this bill complained that timeliness and retaliation are the problem with existing remedies. The original form of this bill dealt with neither, and the current form addresses neither with the third-party part of the bill (which is the offending part). First, there is no assurance that a third-party end around the local building authority will be any quicker than the current process. Secondly, the law already forbids building departments from enforcing the law improperly to retaliate against a party for availing themselves of administrative and legal process.

However, the OML made a suggestion to the bill’s sponsor, Representative Kristina Roegner, to deal with the timeliness issue. Near the end of the bill you will find a section creating an expedited arbitration process. We want to thank Representative Roegner for including this before introducing the bill. This process is based on the process for temporary restraining orders that the Judge would issue in court. It creates a very quick system for providing accountability in a very short time frame.

The expedited arbitration process deals with both the major concerns that the proponents of this bill have. However, we must stress—this expedited arbitration process suggestion was offered **in lieu** of the third-party process, not in addition to it. The third-party inspector process addresses neither of the proponents’ major concerns, while the expedited arbitration process addresses both.

¹ *Miami County v. Dayton* (1915), 92 Ohio St. 215.

Response to Other Issues Raised in the Sole Proponent Testimony

1. Proponent: “everything HB 128 provides for is presently occurring today . . . There will be opponents of HB 128 who will claim it weakens the police powers of their cities. I would ask them, if it is ok to voluntarily outsource inspections why is it wrong to codify the practice, let the state write rules to oversee its practice, and allow the entire state to benefit?”
 - We would add “with a key distinction.” Although it is true that third-parties may do building inspections currently, they are done at the direction of the local building department.
 - Private companies simply cannot direct who will enforce the laws they are required to comply with.

2. Proponent: “some departments are not willing to admit that their departments lack the professional expertise to inspect a unique and complicated aspect of a specific project”
 - It is not for the private company to decide whether the inspector and/or building official has the requisite expertise. It is the building department’s responsibility to protect the safety of the people in the jurisdiction and they can decide for themselves whether they need to bring in another person to consult on this type of issue.
 - Keep in mind that this is partially the company’s responsibility. They need to adequately prepare for and explain issues when there are inspections that require advanced expertise.

3. Proponent: “HB 128 requires an inspection be conducted within twenty-four hours. The current four-day standard is not a competitive standard.”
 - We address timeliness of inspections above. However, keep in mind that timeliness of inspections is partially a responsibility of the company. Scheduling of inspections should occur in advance; i.e., the company should, in advance, schedule for completion of the inspected elements and arrival of the inspector at the same time.
 - Delays due to disapproved work are inevitable, even under HB 128. The building department’s job is to ensure that the plans are followed. In doing this, building departments certainly help companies comply with the law and the designs, and that is part of their duty. However, their paramount responsibility is to safety, not speediness.