TESTIMONY BEFORE THE OHIO HOUSE STATE AND LOCAL GOVERNMENT COMMITTEE

H.B. 121

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On behalf of the
OHIO MUNICIPAL LEAGUE

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Chairman Anielski, Vice Chair Hambley, Ranking Member Holmes and members of the House State and Local Government Committee, my name is Brian Barger and I am testifying on behalf of the Ohio Municipal League. I appreciate the opportunity to offer testimony today.

The League represents the collective interests of Ohio's cities and villages before the General Assembly. Of Ohio's 931 municipalities, 733 of them are members of OML. A little bit about my background: I am a former Assistant City Law Director and a former Assistant Village Solicitor. I have been practicing law in Ohio for 34 years and I have both defended and sued local governments over a variety of matters, including construction contracting.

In my testimony today, I will not be focusing on the relative merits of any particular construction material nor will I focus on who will win and who will lose any particular lawsuit brought against a local government or its engineer. That is a red herring argument because no one can really predict how courts are going to interpret a new requirement imposed upon local governments. In that light, I note that one law firm that did opine on who might win and how to defend such lawsuits, made the following qualification: "The opinions expressed herein assume the proper application by a judicial or administrative body and precedential Ohio case law and Ohio Attorney General opinions." Well sure, but that is really the rub

of it and proper application to one attorney is the flip side of extending or creating new case law to another attorney.

Again, it is a red herring argument because the vast majority of lawsuits are neither won nor lost. Statistics in Ohio show that well over 90% of cases are not tried. I believe that number is 97% in Franklin County. Those cases are either settled or resolved through summary judgement with some just being dismissed by the parties. We all know what "settled" means. Summary judgement is a legal mechanism whereby the courts will apply the law to agreed-upon facts. Even if the parties agree on the law to be applied, it is rarely the case when technical experts are involved that there will be agreed-upon facts. One expert is going to testify the outcome will be X, while the other experts is going to testify the outcome will be Y. Consequently, it is certainly doubtful that with this new standard, and the number of undefined terms, that any party will prevail on summary judgement. This means, these cases either have to settle or go to trial. I can tell you from experience that construction cases are typically expensive lawsuits.

So, instead of discussing who might win and who might lose, I will direct my remarks to the very predictable consequences should this legislation be adopted. Specifically, the bill, in its as introduced form, places new requirements on local governments and introduces new terminology to the decision-making process. At its heart, this bill requires that: "A public authority shall consider all piping materials for the construction, development, maintenance, rebuilding, improvement, repair, or operation of a water or waste water project."

The phrase "consider all piping materials" may seem straightforward, but the bill does not define, nor can it ever adequately define, the term "consider" in terms of this mandate. Consequently, we look to outside sources. For instance, Black's Law Dictionary defines "consider" as meaning "to think about, or to ponder or study and to examine carefully." I believe we can all sit here and "think about" what level of "pondering" is necessary to "examine carefully" the relative merits of various piping materials. I will be surprised if we have unanimity.

Likewise, "construction", "development", "maintenance", "rebuilding", "improvement", "repair" and "operation" are not defined terms and thus, will be subject to litigation until case law provides a clarity for varying fact patterns. In

fact, "water" and "wastewater projects" are not defined in the bill, and those too will likely be the subject of litigation.

Those supporting this bill seem to think that local officials and their engineers are resistant to considering certain piping material because local officials may have a preference for certain materials for certain types of projects. Another way to look at this is that these local officials and their engineers are very familiar with the conditions on the ground or in the ground, as the case may be, in their communities. Accordingly, I read with interest testimony offered in the Senate supporting S.B. 95, the companion to this legislation. That testimony focused on what legal defenses an engineer might have when sued under this bill, including the defense that the engineer relied upon generally accepted standards. The testimony then offered as example the Recommended Standards for Wastewater facilities, 2014 Edition, Section 33.7. That standard states, "any generally-accepted material for sewers may be given consideration, but the material selected should be adapted to local conditions, such as: character of industrial wastes; possibility of septicity; soil characteristics; exceptionally heavy external loadings, abrasion, corrosion, or similar problems." (Emphasis added.)

So the question really boils down to: who knows the local conditions better, the local engineering department with its history and knowledge of its system, local soil characteristics, loading demands, and similar operating parameters, or a pipe manufacturer seeking to sell his wares?

We have been provided with a copy of the proposed amendment to this bill. As you know, amendments can be used as a vehicle to work through problematic language brought forward by interested parties. If that is the purpose of this amendment, it misses the mark. This amendment creates a different and worse set of circumstances for municipalities than the as-introduced version of the bill.

The amendment states, "No public authority shall prohibit the use of reasonable piping materials, based on sound engineering principles, in the construction, development, maintenance, rebuilding, or improvement of a water waste water projects that is funded whole or in part with state funds."

Now we have introduced yet more terms which lawyers will fight over for years. For instance, “reasonable piping materials” jumps to the forefront. The word “reasonable”, in lawyer-speak, is a money word. Lawyers will fight over what is “reasonable” forever. Likewise, “sound engineering principles” is going to be the subject of much litigation.

In summary, it seems to me that H.B. 121 is premised on a few basic assumptions – none of which, I think, are true. First, the bill assumes local officials, whether it is the elected representatives, the in-house municipal engineer, or a consulting engineer, are not informed as to current materials available for use in their community. Second, local officials are immune from or do not care about the consequences of providing costly and underperforming basic municipal services, so they do not care if their projects cost more and breakdown. And finally, the bill assumes local officials must be coerced to consider alternatives. Remove any of these assumptions and the rational for this bill falls apart. Add in the cost and distraction of litigation to address a problem that does not exist, and it seems to me that instead of expanding the buying power of a tax dollar, we are taking a step in the wrong direction.

Thank you for the opportunity to testify today, and on behalf of the Ohio Municipal League, and its 733 member communities, we urge you to oppose H.B. 121.