APRIL 10, 2017

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OHIO MUNICIPAL LEAGUE/OHIO ATTORNEYS' ASSOCIATION REPORT ON UPDATING MUNICIPAL HOME RULE IN ARTICLE XVIII OF THE OHIO CONSTITUTION

PRESENTED TO: GOVERNOR ROBERT TAFT, MEMBER, OHIO CONSTITUTIONAL MODERNIZATION COMMISSION'S, EDUCATION, PUBLIC INFORMATION, AND LOCAL GOVERNMENT COMMITTEE.

PRESENTED BY: OHIO MUNICIPAL LEAGUE AND THE OHIO MUNICIPAL ATTORNEYS ASSOCIATION
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OHIO MUNICIPAL LEAGUE/OHIO ATTORNEYS' ASSOCIATION REPORT ON UPDATING MUNICIPAL HOME RULE IN ARTICLE XVIII OF THE OHIO CONSTITUTION

CHARGE AND COMPOSITION OF THE OML/OMAA COMMITTEE

CHARGE: March 10, 2017, Governor Robert Taft, a member of the Constitutional Modernization Commission, asked the Ohio Municipal League ("OML") to review Article XVIII (Home Rule) of the Ohio Constitution and suggest any amendments that might be appropriate.

COMMITTEE FORMED: Honoring that request, as General Counsel for the OML, Garry E. Hunter, Esq. formed a committee to: (1) Study Article XVIII of the Constitution of Ohio; (2) Promote an exchange of experiences and suggestions respecting desired changes in Article XVIII; (3) Consider the problems pertaining to the amendment of Article XVIII; and, (4) Make recommendations to the Ohio Constitution Modernization Commission's Education, Public Information, and Local Government Committee.

Mr. Hunter constituted the committee with members of the OML and the Ohio Municipal Attorneys Association ("OMAA"). The Committee comprises Garry E. Hunter, Esq., OML/OMAA General Counsel, Chair; E. Rod Davisson, Esq., Village Administrator Obetz, Vice Chair; Kent Scarrett, OML Executive Director; Ed Albright, OML Deputy Executive Director; Stephen J. Smith, Jr., Esq. and Thaddeus M. Boggs, Esq., of the Frost, Brown, Todd Law Firm in Columbus; Thomas Schmitt, Esq., Assistant Law Director, City of Westerville, Metz, Bailey, McLoughlin Law Firm; Paul G. Bertram, III, Esq., Director of Law, City of Marietta; Darren Shulman, Esq., City Attorney, City of Delaware; and, Les S. Landen, Esq., Director of Law, City of Middletown.

We the above-listed, after assiduous effort and consideration of the task assigned, and on behalf of Ohio's 935 municipalities and the 7,546,538 Ohioans residing therein, respectfully submit this report for your consideration.

Sincerely,

Garry Hunter, Esq.
Chairperson
General Counsel, Ohio Municipal League

E. Rod Davisson, Esq.
Vice Chairperson
Village Administrator, Village of Obetz

EXECUTIVE SUMMARY

Below, for the convenience of the Commission, we have included the current language and proposed revisions for Article XVIII, Section 3 of the Ohio Constitution.

CURRENT LANGUAGE OF ARTICLE XVIII, SECTION 3 OF THE OHIO CONSTITUTION ENACTED IN 1912:

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.

PROPOSED MODERNIZATION LANGUAGE OF ARTICLE XVIII, SECTION 3 OF THE OHIO CONSTITUTION TO CLEAR UP CONFUSION OVER THE INTENT OF THE ORIGINAL 1912 CONSTITUTIONAL CONVENTION LANGUAGE:

Municipalities shall have authority to exercise all powers of local self-government.[1] ~~and~~ Municipalities shall also have the authority[2] to adopt and enforce within their territorial limits such local police, sanitary and other similar regulations as are not in direct conflict with general laws. The General Assembly cannot interfere with powers granted to municipal corporations by the Ohio Constitution unless the Constitution sanctions the interference.[3] These exercises of municipal authority are self-executing, and no municipality shall be required to adopt a charter in accordance with Sections 7 and 8 of this Article XVIII to exercise this authority.[4]

STUDYING THE PAST TO FORM A FOUNDATION FOR THE FUTURE

The Committee intensely studied the historical backdrop of Article XVIII to understand the circumstances and choices that produced the current version of Article XVIII, which has remained unaltered since its adoption by the Constitutional Convention of 1912—more than 100 years ago. The Committee evaluated the current version of the Article washed in the light of the lives and needs of modern-day Ohioans as contrasted with the circumstances of Ohioans before economic globalization; before widespread automation; before the cell phone (1983), the computer (1975), and the television (1927).

To begin, the delegates of the 1912 Constitutional Convention set out three goals for implementing Home Rule in Ohio as explained then by Professor Knight of The Ohio State University:

1) "First, to make it possible for different cities in the state of Ohio to have, if they so desire, different forms and types of municipal organizations;"
2) "The second thing, and **the main thing**, which the proposal undertakes to do **is to get away from what is now the fixed rule of law**, seemingly also required by the constitution, **that municipal corporations**, like all other corporations, **shall be held strictly within the limit of the powers granted by the legislature to the corporation**, and that no corporation, municipal or otherwise, may lawfully undertake to do anything which it has not been given specifically the power to do by the constitution or the lawmaking body;"
3) "In the third place the proposal expressly undertakes to make clearer, or make broader, the power of municipalities to control, either by leasing, constructing or acquiring from corporations now owning or operating the public utilities within the corporation and serving the corporation, the water supply, the lighting and heating supply and the other things—without specifying—which come within the purview of municipal public utilities, thus removing once and for all, all legitimate questions as to the authority of municipalities to undertake and carry on essential municipal activities." [1]

"These three things are the fundamental things which are undertaken by the proposal, and these three things taken together certainly constitute what may be termed, and rightly

[1] Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912, Day 64, Municipal Home Rule, Page 1433 (emphasis added).

termed, municipal home rule." Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912, Day 64, Municipal Home Rule, Page 1433. Importantly:

> The proposal does not undertake, your committee believes, to detach cities from the state, but **it does undertake to draw as sharply and as clearly as possible the line that separates general state affairs from the business which is peculiar to each separate municipality**, be it a city or a village, in the' state, and to leave the control of the state as large and broad and comprehensive in the future as it has been in the past with reference to those things which concern us all in the state of Ohio, whether we live in cities or in rural districts, and, on the other hand, to confer upon the cities for the benefit of those who live in the cities control over those things peculiar to the cities and which concern the cities as distinct from the rural communities. Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912, Day 64, Municipal Home Rule, Page 1433.

The 1912 delegates struggled mightily with the desire to strike that delicate balance between creating self-determining municipalities without making them sovereign. They recognized the need to align the powers of American cities with the great cities of Europe—a proposition exponentially more important now in a global economy. Delegate Smith lamented, "Why are we behind the great European cities in the matter of municipal government? Is it because democracy has fallen down in our cities? No, it is because the city is not a democracy; because we have never had democracy in American cities. We have never had representative government in our cities in Ohio."[2] Smith went on to explain that "We in Ohio cities are not allowed to make progress; we are not allowed to solve our own problems; we are hampered by the state legislature. I tell you the state of Ohio and all the other states have treated their cities much as Great Britain treated the colonies before the revolution. We want and need some measure of home rule."[3]

Despite a general sense of enthusiasm and vigor among the delegates over the prospect of Home Rule in Ohio, there was a shadow blanketing the convention. A great specter loomed, threatening the adoption of Home Rule and creating trepidation among the delegates—Prohibition. The battle over control of liquor rights was sanguine and influential among the delegates. The "Wets" and the "Drys" had begun to stake out territory and each tried to influence the convention to its benefit. Delegate Harris exasperatedly explained, "I object strenuously to the liquor fight, either in favor of the wets or the drys, being brought in here and

[2] Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912, Day 65, Municipal Home Rule, Page 1464.
[3] Id. at 1464.

incorporated in our proposal."[4] Thus, the stage was set whereby the delegates desired to create a true Home Rule without inserting language that gave some advantage to either the Wet or Dry camps lest Home Rule be rejected by the people of Ohio being viewed as an extension of the Wet/Dry fight. The pragmatism of the convention ended up working in that Home Rule—albeit in a watered-down version—was adopted by the people of Ohio.

The delegates recognized that the shackles of the Wet/Dry fight required the deletion of language that, although necessary for the proper boundaries of state powers to interfere with municipal laws, would have drawn Home Rule into the Prohibition fight. During the debate that ultimately led to removing the words "affecting the welfare of the state as a whole" from describing the "general laws" mentioned in Section 3, Delegate Smith opined upon the result:

> I am afraid this won't do much. **I am afraid the courts may say to cities you can't legislate on this or that matter because this is a matter that concerns the welfare of the state as a whole.** It is hard to think of something that does not concern the welfare of the state as a whole, but your committee felt that those words ought to go in to be a notice or warning to the court, so that when they come to interpret it they will say, "We think the Convention meant that the city should have some freedom." I hope, therefore, you will give us this much home rule. I want the members of this Convention to see justice done to the cities. The farmer is just as much interested in good city government in the cities as the citizens of cities themselves are. The good of the cities is the good of the whole state.[5]

Delegate Professor Knight summarized the goal of his colleagues:

> I repeat, to draw as sharply and as definitely as possible, a line between those two things and to leave the power of the state as broad hereafter with reference to general affairs as it has ever been, and to have the power of the municipalities on the other hand as complete as they can be made with reference to those things which concern the municipalities alone, always keeping in mind the avoidance of conflict between the two so far as possible.[6]

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[4] Id. at 1467.

[5] Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912, Day 65, Municipal Home Rule, Page 1464.

[6] Id. at 1464.

With the potential cataclysm of the Prohibition fight looming, the delegates adopted the following form of Article XVIII, Section 3:

CURRENT LANGUAGE OF ARTICLE XVIII, SECTION 3 OF THE OHIO CONSTITUTION ENACTED IN 1912:

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.

Unfortunately, in the 100 years since the adoption of the foregoing language, there have been many opportunities for mistakes and misinterpretation. A few of those are fundamental in nature and the OML/OMAA seeks to clarify the original language to conform to the intent of its drafters. Expressing loyalty to the history and intent of Home Rule in Ohio, the OML/OMAA has identified three goals of the citizenry of the State of Ohio that can be resolved with the adoption of five discrete issues.

GOALS OF OHIO CITIZENS

1. POWERS OF THE GOVERNMENT SHOULD REST WITH THE GOVERNED.

It is axiomatic that local government allows for better access and more opportunity from the constituency. That is not to say that there is no role for state and federal forms of government—there are. However, every citizen is primarily affected by our local and immediate surroundings on a daily basis. Humans want to have a say in how the world around them is organized and operates. It is commonsensical that they should have the ability to affect their surroundings; and, the best opportunity to be heard and to enjoy that level of participation comes in the form of an empowered local government. Delegate Crosser explained, "I contend that the natural and correct method proceeds upon the theory that municipalities exist first and provide for a government suited to themselves, and that for their own mutual welfare, and also for the welfare of the intervening territory, general governments should be established, but which should exercise authority only in regard to matters of a general nature. As the federal

government in its relation to the states has only such powers as are specifically granted to it by the people of the states, so it should be with the state in relation to municipalities."[7]

2. OHIO CITIES MUST BE NIMBLE TO SUCCEED IN A GLOBAL ECONOMIC DEVELOPMENT COMPETITION.

Economic Development is critical to the survival and well-being of the people of the United States. The concept should be in the top of the minds of all citizens that work for the government at every level. There exists no reasonable argument against having hyper- flexible, nimble, empowered municipalities when it comes to their powers to attract and retain jobs and development for the people of the State of Ohio. There are 935 municipalities with 7,546,538 residents in our state. The overwhelming majority of the employed public in this state works in a city or village. If nothing else, the locations of those businesses are a natural effect of municipal utility and transportation infrastructure that businesses need to operate. To that end, in order to maximize Ohio's potential to compete globally for development and jobs for our citizens, we must ensure that municipalities have the tools they need to build communities that are attractive to businesses by ensuring municipalities' unhampered ability to control their infrastructure, funding, operation, and power to respond to the needs of business.

3. OHIO SHOULD TAKE ADVANTAGE OF THE EFFICIENCY AND RESPONSIVENESS OF MUNICIPAL GOVERNMENT.

It is logical that Municipal government is efficient and responsive because of its size and closeness to the people of Ohio. The State of Ohio's per capita spending is $5,389 with per capita tax collections of $2,330.[8] Comparatively, municipal per capita spending ranges from $271 to $1,249 with smaller municipalities on the lower end of the scale.[9] Municipal per capita taxes range from $75 to $856—again with smaller municipalities on the lower end of the scale.[10]

Recapitulating, we should work to ensure that Ohioans have municipal governments that are accessible, powerful, efficient, and responsive. To that end—and consistent with the needs of Ohioans and the intent of the Constitutional Convention of 1912—we propose the following clarifications to Article XVIII of the Ohio Constitution.

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[7] Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912, Day 65, Municipal Home Rule, Page 1483.
[8] https://ballotpedia.org/Ohio_state_budget_and_finances
[9] http://www.ohiotownships.org/sites/default/files/Report.pdf (Page 7).
[10] Id. at 9.

ISSUES REQUIRING ATTENTION OF THE COMMISSION

1. MUNICIPALITIES HAVE TWO SEPARATE CONSTITUTIONAL POWERS IN SECTION 3:

Section 3 creates two distinct powers, which are separate and unequal. (1) The unfettered power of local Self-government. (2) And, the limited power of police, sanitary and similar regulations.

Therefore, Section 3 should be read in two parts that were intended to create separate and not equal powers. The first power is the power of "local self-government." The beginning of Section 3 reads, "Municipalities shall have authority to exercise all powers of local self-government…" In explaining that power, Ohio's Legislative Service Commission elucidated, "The Ohio Supreme Court has set forth a three-step home rule analysis concerning many of the concepts addressed thus far. The first step is to determine whether the local ordinance is an exercise of local self-government or an exercise of local police power. **If the ordinance relates solely to matters of local self-government, the analysis ends because the Ohio Constitution authorizes a municipal corporation to exercise all powers of local self-government within its jurisdiction.**"[11] We believe that to be an accurate rendition of the law; however, as the LSC pointed out, "A word of caution: some of the numerous court cases interpreting home rule powers may appear to conflict with the general principles stated in this paper. Although the courts have established some basic principles regarding home rule powers, they are not always consistently applied."[12]

To the extent confusion has arisen in Ohio jurisprudence, it is appropriate to clarify the separation between the power of local self-government and the police powers. That is easily achieved with an appropriately added period in Section 3.

2. CONFLICT APPLIES ONLY TO POLICE POWER:

The conflict analysis employed by some courts does not apply to the exercise of local self-government; it only applies to police power issues. The Ohio Supreme Court in *State ex rel. Morrison v. Beck Ener. Corp. 143 Ohio St. 3d 271 (2015) held:*

> Article XVIII, Section 3…gives municipalities the "broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide

[11] Ohio Legislative Service Commission, *Members Only, Municipal Home Rule**, (January 26, 2010) http://www.lsc.ohio.gov/membersonly/128municipalhomerule.pdf, Volume 128, Issue 8, Page 5-6, (accessed January 26, 2010) (emphasis added).
[12] Id. at 1.

> nature or interest." *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203, 212, 80 N.E.2d 769 (1948).
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> The Home Rule Amendment does not, however, allow municipalities to exercise their police powers in a manner that "conflict[s] with general laws." Article XVIII, Section 3; see also *State ex rel. Mill Creek Metro. Park Dist. Bd. of Commrs. v. Tablack, 86 Ohio St. 3d 293, 296, 1999 Ohio 103, 714 N.E.2d 917 (1999).* Therefore, a municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.
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> *Mendenhall v. City of Akron, 117 Ohio St. 3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17. Id. At 275. See Also, Canton v. State,* 95 Ohio St.3d 149, 2002-Ohio-2005. By way of example, the Ohio Supreme Court held that a municipal charter provision that sets forth the form of a circulator affidavit prevails over a conflicting state statute. See *State ex rel Murray v. Scioto Cty. Bd. Of Elections*, 127 Ohio St.3d 280, 2010-Ohio-5846. Similarly, the Ohio Supreme Court also held that a municipal ordinance regarding its employee's military leave was adopted pursuant to its constitutional home-rule authority, and thus it prevailed over conflicting state law. *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. v. Sidney*, 91 Ohio St.3d 399, 402 (2001).

3. LEGISLATIVE PREEMPTION DOES NOT EXIST, EXCEPT WHERE SO AUTHORIZED BY THE OHIO CONSTITUTION.

Legislative preemption is the improper and incorrect assumption that the General Assembly is automatically entitled to deference over conflicting municipal ordnance simply because the Assembly has enacted a law on a certain matter. The power of the State Legislature is derived from the Constitution. *See Prigg v Penn., 41 U.S. 539 (1843).* Municipalities exercise power by constitutional grant and that power is not subject to the preemption by the legislature, except where the Ohio Constitution so provides. *Legislative Service Commission Report titled, Municipal Home Rule, Vol. 128, Issue 8, pp. 7-8,* provides the exceptions where the state legislature may enact regulations that preempt Home Rule:

> In addition to the limitations in Article XVIII of the Ohio Constitution mentioned above, there are other limitations on a municipal corporation's exercise of home rule powers. A municipal corporation may be limited by the United States Constitution or relevant federal laws. Also, provisions of other articles of the Ohio Constitution limit the exercise of municipal home rule powers. Several sections in the Ohio Constitution limit municipal power to tax and incur debt. Section 2 of Article XII prohibits the taxation of property in excess of 1% of its true value (ten mills per

dollar) unless laws are enacted authorizing the levy of taxes beyond that limitation, either when approved by a vote of the electorate or when provided for by the charter of a municipal corporation. The General Assembly has enacted legislation authorizing both of these exceptions to this constitutional ten-mill limitation: R.C. 5705.07 authorizes a levy of taxes beyond the ten-mill limitation, and R.C. 5705.18 authorizes a municipal corporation to provide in its charter for a limitation other than the ten-mill limitation. On the other hand, Section 6 of Article XIII requires the General Assembly to restrict a municipal corporation's powers to tax, assess, borrow money, contract debt, and loan its credit in order to prevent the abuse of these powers. Section 13 of Article XVIII also authorizes the General Assembly to pass laws to limit the power of municipal corporations to levy taxes and incur debt and, further, allows the General Assembly to require reports from municipal corporations as to their financial condition and transactions, to provide for the examination of municipal vouchers, books, and accounts, and to provide for the examination of public undertakings conducted by a municipal authority. Section 6 of Article VIII prohibits any "city" or "town" from passing laws to become a stockholder in any joint stock company, corporation, or association whatever or to raise money for, or loan credit to or in aid of, any of those entities. (This does not prohibit the insuring of public buildings or property in mutual insurance associations or companies.) However, the Ohio Supreme Court held in 1989 that the lending of credit for a public welfare purpose (in that case, subsidized housing), not a business purpose, did not violate this constitutional provision. Additional constitutional provisions address a variety of other restrictions on municipal home rule powers. Article IV creates the judicial branch of government, preventing municipal corporations from establishing courts or judgeships.

Section 1f of Article II reserves for the citizens of each municipal corporation the right to initiative and referendum on all legislative matters. This right cannot be eliminated by a municipal corporation, but the procedures to effectuate this right may be provided for in a municipal charter. Section 10 of Article XV requires appointments and promotion in the civil service of cities according to merit and fitness. There is, however, no such requirement for villages. While the Revised Code provides for a

municipal civil service in cities, a city may provide for a civil service in its charter instead of following those Revised Code provisions as an exercise of its constitutional local self-government powers. But in some form, a city must provide for a civil service that meets Article XV's constitutional standards. Finally, Section 34 of Article II provides that no provision of the Ohio Constitution impairs or limits the power of the General Assembly to pass laws that fix and regulate the hours of labor, establish a minimum wage, or provide for the comfort, health, safety, and general welfare of all employees. The Ohio Supreme Court has held that laws passed by the General Assembly establishing the Prevailing Wage Law, the Collective Bargaining Law, the Police and Fire Pension Fund, and a law generally prohibiting residency requirements for political subdivision employees are applicable to municipal corporations under this provision, overriding any municipal home rule powers. It is worth noting, however, that the Court decision upholding the Collective Bargaining Law had an arduous history in which the tensions between Section 34 of Article II and the constitutional home rule provisions were extensively discussed. This case was heard twice by the Court with different results each time. Both times the decision had four justices supporting the majority opinion, three dissenting. The first decision, in 1988, supported the exercise of home rule powers, saying Section 34 of Article II applied only in very limited circumstances. Upon reconsideration, the Court held in 1989 that Section 34 of Article II applied, overriding the constitutional home rule provisions. And more recently, in 2009, the Ohio Supreme Court gave Section 34 of Article II a very expansive application to uphold state law restricting local residency requirements. These cases illustrate the occasional unpredictability of the holdings of Ohio courts in cases involving municipal home rule issues.

4. STATEMENT OF STATEWIDE CONCERN IS NOT DISPOSITIVE.

A legislative statement that a matter is of statewide concern does not mean the subject matter is not a matter of local self-government. This is a judicial decision. *Am. Fin. Sevs. Ass'n. v. City of Cleveland, 112 Ohio St. 3d. 170 (2006).*

5. POWERS ARE SELF-EXECUTING.

The powers granted in Section 3 are self-executing irrespective of whether, or not, a municipality has adopted a charter under Section 7 of Article XVIII. Pursuant to Article XVIII Home Rule applies to both statutory and charter municipalities; however, courts have held charter municipalities may enact both procedural and substantive laws, while statutory municipalities may enact only substantive laws. *Local Tele Co. v. Cranberry Mut Tel Co., 102 Ohio St. 524 (Home Rule Powers Self Executing, 1921).*

For discussion that Home Rule applies to both Statutory and Charter municipalities, see Legislative Service Commission Report titled, Municipal Home Rule, Vol. 128, Issue 8, p. 3, " It is a common misconception that only chartered municipalities have home rule authority. All cities and villages have home rule authority derived directly from the Ohio Constitution and not from a charter. A charter is not necessary for the exercise of police powers. A charter is, however, needed to exercise some, but not all, aspects of local self-government. In *Northern Ohio Patrolmen's Benevolent Ass'n v. Parma, 61 Ohio St. 2d 375 (1980*), the Ohio Supreme Court held that a non-chartered municipal corporation must follow the procedure prescribed by state statutes in matters of local self-government, but may enact an ordinance that is substantively at variance with state law in such matters. So a charter is not necessary in order to exercise a substantive power of local self-government, but the procedures used to exercise such a power require a charter if they vary from state law. Municipal corporations that do not adopt a charter must follow the procedures provided in state law for the exercise of local self-government matters."

PROPOSED MODERNIZATION LANGUAGE OF ARTICLE XVIII, SECTION 3 OF THE OHIO CONSTITUTION TO CLEAR UP CONFUSION OVER THE INTENT OF THE ORIGINAL 1912 CONSTITUTIONAL CONVENTION LANGUAGE:

Municipalities shall have authority to exercise all powers of local self-government.[1] ~~and~~ Municipalities shall also have the authority[2] to adopt and enforce within their territorial limits such local police, sanitary and other similar regulations as are not in direct conflict with general laws. The General Assembly cannot interfere with powers granted to municipal corporations by the Ohio Constitution unless the Constitution sanctions the interference.[3] These exercises of municipal authority are self-executing, and no municipality shall be required to adopt a charter in accordance with Sections 7 and 8 of this Article XVIII to exercise this authority.[4]

RATIONALE FOR CHANGES:

1. Period Added.

2. To emphasize there are two different powers, a period was added and a new sentence made.

3. This language states the obvious and is taken from the Ohio Legislative Services Commission brief, titled: Municipal Home Rule, p. 1. Vol. 128, Issue 8, January 26, 2010.

4. The 1912 Home Rule Language clearly applies to both statutory and charter municipalities, however, courts have held that charter municipalities have both substantive and procedural Home Rule powers while statutory municipalities have substantive, but not procedural powers. This language makes the original 1912 intent clear.

APPENDIX A—BACKGROUND HISTORY OF HOME RULE IN OHIO BEFORE 1912

Ohio's first constitutional convention was held in 1802. This constitution placed all power for local government in the hands of the State Legislature. The power was exercised by special legislation.[13]

"By 1838 the burden of this special legislation had become so great that another general law was passed "for the regulation of incorporated towns." This act provided "that for the good order, regulation and government of all towns incorporated after the taking effect of this act" such towns should follow its provisions. The new law contemplated the enactment of special charters, but provided the details of town organization, which could be incorporated by reference into subsequent acts of incorporation. The act dealt with suffrage, elections, officers, powers, oath of office, taxation, licensing of liquor sellers, improvement of streets and alleys, judicial powers of the mayor, use of the county jail, etc."[14]

"The Second Constitutional Convention of Ohio met at Columbus on May 6, 1850, to prepare a new constitution for a state which had completely outgrown the document framed forty-eight years before. After two months of work, the Convention recessed from July 9 to December 2 because of a cholera epidemic then raging in the state. Their place of meeting after the recess was moved to Cincinnati. The convention completed its work and adjourned sine die on March 10, 1851. **One of the serious problems that faced the delegates at the convention was that of freeing the legislature of the state of the onerous task of enacting special laws**. **A part of this problem was that of the incorporation of cities and towns and the continual amendment of these charters to meet the needs of an expanding urban civilization.** The Convention was not unanimous in its desire to eliminate these special laws. In Committee of the Whole on June 3, 1850, a proposed Section 36 of Article II of the draft was stricken out. It provided that "the General Assembly shall provide for the creation and government of municipal corporations by general and uniform laws." ' It was suggested this matter was being dealt with in another committee, the one oh Corporations other than Banking, and this proved to be true. Mr. James W. Taylor of Huron and Erie, in the course of the debate, said, "It has been frequently said that three-fourths of the laws of Ohio are special and local in their nature. . . We have a twofold abuse in this state-local interference by the central government, and an omnibus of local

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[13] *Symposium: the Ohio Constitution—Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of its Bicentennial: Ohio's Constitution: An Historical Perspective. 51 Clev. St. L. Rev. 357, p. 364 (2004). Municipal Government in Ohio Before 1912, 9 Ohio St. L Journal No. 1, p. 2 (1948)*

[14] *9 Ohio St. L. Journal No. 1, p. 6.*

legislation vested in the court of common pleas."[15] The Constitutional Convention of 1850-51 approved the new constitution at Cincinnati on March 10, 1851. It was submitted to the voters and approved.[16]

"As finally approved, this constitution, which still is the fundamental law of Ohio, contained two provisions relating to municipal government. The first one, most specific, was Article XIII, Section 6. "The General Assembly shall provide for the organization of cities and incorporated villages, by general laws. . . .The second, less direct, is Section 1 of the same article, "The General Assembly shall pass no special act conferring corporate powers." Apparently, the future of local government was to rest upon general laws passed by the Assembly. The appellation of "town" was dropped, presumably to avoid confusion with townships and the term "Village" appeared for the first time as of general application."[17]

"The first general law for the organization of "cities and incorporated villages," enacted May 3, 1852, provided "that all corporations which existed when the present constitution took effect, for the purposes of municipal government, either general or special, and described or denominated by any law then in force as cities, towns, villages or special road districts shall be and they are hereby organized into cities and incorporated villages... and all laws now in force for the organization and government of any such municipal corporations shall be, and they are hereby repealed. . . ." "Cities were, divided by the act into two classes-those of the first class including all those whose population was over 20,000, and those of the second class, including all others. Villages became cities when they had a population of 5,000 at any federal census. The effect of the new constitution was immediate and drastic. Only 24 special and local laws were passed in 1852, occupying 47 pages, while the general laws included 348 pages.[18]

"The general law of 1852 was amended on March 25, 1854, to make the advancement of a village to a city or a city of the second class to a city of the first-class dependent upon, the approval of the local council. Similar amendments to -various sections of the general law are found in the session laws for the remainder of the nineteenth century. There is exhibited a strong tendency toward special legislation through a refinement of the system of classification. As cities grew and became more numerous their -problems began to differentiate them one from another.[19]

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[15] *Id. At p. 8.*
[16] *Id. At pp. 8-9.*
[17] *Id. At p. 9.*
[18] *Id.*
[19] *Id.*

"Having rejected a proposed new constitution in 1874, Ohioans voted against holding a convention at all when the issue came up in 1891. By 1909, the agitation for social and political reform associated with Progressivism had reached such a peak that the general assembly submitted a referendum on holding a constitutional convention to the voters a year earlier than required.[20] . . . "For a decade, Progressives, led by Tom Johnson, the mayor of Cleveland, had been trying to open the political system. Johnson and other Progressives, such as Cincinnati clergyman Herbert Bigelow, were strong supporters of governmental reforms such as the initiative and referendum and municipal home rule.[21]

"Political reformers formed the Ohio Progressive Constitutional League to advocate on behalf of candidates who would support the initiative, referendum, recall, and municipal home rule. In Cincinnati, representatives from businesses, clubs, trade associations, and trade unions joined to organize a slate of reform candidates. . . . With such an array of Progressive forces enlisted in the campaign to elect delegates, the resulting convention had a distinctively Progressive character."[22]

"Urban home rule proved divisive. The 1851 Constitution required the legislature to provide for the organization of cities and the incorporation of villages. Another part of the constitution required that all laws be uniform. The Supreme Court had sustained legislation that had classified cities according to population and then treated them differently on that basis. This approach resulted in a range of types of city organization even for cities with similar populations. For example, Cleveland had a strong mayor, while Cincinnati had a figurehead mayor with a powerful city council and board of administration. In a suit instigated by traditional political leaders to clip the wings of Progressive mayors—especially Cleveland's Tom Johnson—the Ohio Supreme Court in 1902 had invalidated all city charters for violating the constitutional requirement of uniformity of laws. The court then had delayed execution of its order to give the boss-dominated legislature time to pass a new municipal code. Progressives, who predominated in some cities, especially Cleveland, now pushed hard for home rule to reverse their earlier defeat."[23]

"The "liquor question" figured into the debates. " Drys" did not want home rule to be used by cities to overturn state laws permitting subdivisions to ban the sale of alcoholic beverages. They were able to pass a proviso that no municipal laws could conflict with the general laws of

[20] Symposium: Ohio Constitution (supra) at pp. 381-2.
[21] *Id.*
[22] *Id. At p. 383-4.*
[23] *Id. At p. 386.*

the state. Both Republicans and Democrats generally supported home rule; it was primarily the rural delegates who expressed concern over its effect on local option."[24]

[24] *Id.*

APPENDIX B – HOME RULE OUTSIDE OHIO

The origin of home rule is an ancient concept intended merely to allow local governments to operate more effectively.[26] Even the Magna Carta included a provision that "the city of London shall have all its ancient liberties and its free customs as well by land as by water." *Id.*

In the United States, the colonists showed their dedication to independence and fear of centralized governments through inherent assumptions of home rule. However, in a line of cases dating back to 1868, state decisions viewed municipal corporations as statutory creatures owing their existence to their state legislatures. Known as "Dillon's Rule" after the Iowa Supreme Court Justice John Dillon who articulated the theory, it suggested that a municipality could only act under express authority from the legislature. Just three years later, Judge Thomas Cooley of the Michigan Supreme Court counteracted Dillon's Rule with the Cooley Doctrine, defining home rule as the legal premise that localities have the inherent right for self-governance.

In 1906, Oregon was among the first to pass home rule amendments to a state constitution. Provisions of Article XI permit the voters of a municipality to adopt charters or an act of incorporation "subject to the Constitution and criminal laws of the state of Oregon" and preserved to cities the exclusive power to regulate the sale of liquor.

However, the 1960s yielded a watershed of home rule provisions. In 1966, Massachusetts not only separated from Dillon's Rule, but also passed a home rule amendment to its constitution. The first section of Amendment 89 states its intention "to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government." Notably, section 6 of the Amendment identifies a municipality's authority to adopt, amend, and repeal ordinances and bylaws for all areas that were not reserved to the state legislature, and further provided that the local authority applies whether or not the municipality has adopted a charter. Among other states, Alaska also provides in Article 10, Section 11 that legislative powers are self-executing.

A century after creating Dillon's Rule, Iowa found it excessively burdensome, and amended its constitution to explicitly abolish it and provide home rule. Interestingly, the home rule issue won decisively by more than a 30% margin of the votes in the 1968 general election, while future President Nixon only carried 53% of the vote.[27] Found in Section 38A of the Iowa constitution, municipal corporations were granted authority "to determine their local affairs and government," and "the rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state."

In 1972, Montana adopted a completely new constitution that included Article XI on local government. Like Alaska and Massachusetts, certain legislative, administrative, and other

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[26] John R. Nolon,*The Erosion of Home Rule through the Emergence of State-Interests in Land Use Control*, 10 Pace Envtl. L. Rev. 497, 505-506. (1993); citations omitted.

[27] State of Iowa Canvass of the Vote General Election November 5, 1968, issued by Melvin D. Synhorst, Secretary of State, available at https://sos.iowa.gov/elections/pdf/results/60s/1968gencanv.pdf

powers provided or implied by law were automatically granted to municipalities upon incorporation, and those that adopt a charter are entitled to self-government and the exercise of "any power not prohibited by the constitution, law, or the charter."

Approximately 40 states have some form of home rule, and quick review suggests that at least nine states have both overruled Dillon's Rule while also having explicit home rule recognition. Nevada is moving towards these ranks with the July 2015 passage of a state bill providing limited home rule. Momentum also continues in West Virginia, where its 5-year long home rule pilot program is due to end this year, after having revoked Dillon's Rule by legislation in 1969.

Even on an international level, the importance of municipal home rule has garnered significant attention. About a decade ago, the United Nations Human Settlements Programme, UN-Habitat, published "International Guidelines on decentralization and the strengthening of local authorities." [28] In those guidelines and other reports, the organization recognized a common characteristic worldwide: local governments have a direct relationship to their citizens, and thus they must be empowered to efficiently act and respond to their constituents in order to provide stability and legitimacy. UN Habitat recognizes that "Strong and capable local governments are the key levers to ensure strong … development, accountable and transparent city management, and a dynamic multi-stakeholder engagement. They have *the proximity and legitimacy*, … to effectively manage, govern, and lead the development…."[29]

[28] http://www.cities-localgovernments.org/committees/dal/Upload/news/ladsguidelines.pdf
[29] UN-Habitat, https://unhabitat.org/governance/, last accessed 7 April 2017.