

 *Protecting Ohio's Families*



Ohio Attorney General's Office

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**2015** OHIO  
ECONOMIC  
DEVELOPMENT  
**MANUAL**

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**MIKE DEWINE**

★ OHIO ATTORNEY GENERAL ★

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# Ohio Economic Development Manual – 2015

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**Dear Fellow Ohioans,**



Economic development is the engine that helps power Ohio's prosperity.

A variety of economic development tools — from tax incentives, loans, and grants, to transportation, zoning, and land-use planning — are useful for retaining and spurring the growth of large and small Ohio businesses.

Working with economic development professionals from throughout the state, my office has created the Ohio Economic Development Manual to help current and prospective business owners, local governments, and economic development practitioners better understand the legal landscape of economic development in Ohio.

We hope the manual will be a valuable resource for anyone with questions about the legal framework for economic development in Ohio and for those who are looking for innovative ways to use economic development tools to retain established businesses and lure new ones. The manual contains practical examples of how various economic development tools have been used in projects throughout the state.

I hope that the Ohio Economic Development Manual is a useful reference as we work together to foster the growth of the state's high-performance economy in the 21st century.

Very respectfully yours,

A handwritten signature in blue ink that reads "Mike DeWine".

Mike DeWine  
Ohio Attorney General

## **About this Manual**

The Ohio Economic Development Manual is a legal primer on economic development in Ohio. It provides readers with the legal foundation for many of the State's most useful and powerful economic development tools. It was developed as a resource for economic development professionals, business owners, elected officials, and other interested persons.

This manual addresses some of the biggest issues in economic development, covering everything from the constitutional authority for economic development to the specific incentives themselves. Each chapter addresses a discrete issue area, which is analyzed through its legal framework. The manual uses footnotes, which can help direct readers to additional resources to further their study.

Because economic development is an ever-changing industry, this manual is just a starting point for each reader's research. It is not a comprehensive resource for every statute, case, or Attorney General opinion relating to economic development. Furthermore, it does not provide all of the specific details or requirements of each program, nor does it say how to apply for them.

For helpful links, corrections, updates, and the most recent edition of this manual, visit the Attorney General's website. To offer feedback, corrections, examples or suggestions, e-mail us.

[www.OhioAttorneyGeneral.gov/EconomicDevelopment](http://www.OhioAttorneyGeneral.gov/EconomicDevelopment)

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**The manual should not replace legal advice obtained for a specific situation. The Ohio Attorney General's Office does not provide legal advice through its publications.**

**This manual covers information through Ohio's 130<sup>th</sup> legislative session and is current as of July 2015.**

# OHIO ECONOMIC DEVELOPMENT MANUAL

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**Chapter One:**  
**Introduction to Ohio Economic Development**

**Key Points:**

- The Ohio Constitution and current state law provide the legal authority for state and local governments to operate economic development programs.
- There have been a number of changes to the Ohio Constitution over the years that directly impact economic development.
- While the Constitution provides a number of limitations on the State’s involvement with private business, Article VIII, Section 13 permits certain activities for economic development.
- Ohio’s local governments, municipalities, townships, and counties all implement economic development programs by virtue of their home rule powers.

Economic development has for decades been a state and local function—the job of cities, townships, counties and state governments. State governments use state laws and programs to create high-wage jobs and capital investment. Ohio’s economic development efforts are focused not just on industries but on specific occupations, including global investment, white collar and corporate headquarters facilities, and, of course, manufacturing jobs.<sup>1</sup>

Ohio and its local government and private sector partners implement the state’s economic development program in a variety of ways including preparing sites for development through land use planning, annexation, eminent domain, and infrastructure finance; addressing the challenge of workforce development; implementing tax policy that lowers the cost of doing business for targeted companies; and addressing larger quality of life issues that make the Buckeye State a place people want to live, work, and play.

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<sup>1</sup> JobsOhio, Industries, <http://jobs-ohio.com/industries>.

## **The Ohio Constitution and Economic Development**

The Ohio Constitution provides the ultimate authority for state government and local government to promote economic development. The Ohio Constitution limits how far state and local government may go to support economic development and use public funds to that end.

### **Separation of Public and Private Enterprise – 1851 to 1964**

“From the beginning, government has played a part in Ohio’s economic development.”<sup>2</sup> After becoming a state in 1803, the prosperity of heavily agricultural Ohio depended on easy access to markets—good roads, canals, and railroads.<sup>3</sup> In 1825, after the success of the Erie Canal in New York, the Ohio General Assembly authorized the state to borrow money, secured by its full faith and credit, for construction of the Miami and Ohio Canals, among other state projects.<sup>4</sup> Following these improvements to infrastructure (and demand from areas of the State not served by these projects), the General Assembly passed the Loan Law of 1837, *requiring* the State to give financial aid to private companies.<sup>5</sup> At that time, the Ohio Constitution had no provisions that prevented this type of joint public-private enterprise.

But the wisdom of this type of economic development financing was soon called into question. The Loan Law set no limits on the amount of Ohio’s investment in these private enterprises. Oversight and careful project review was also lacking—the Loan Law required assistance to sometimes ill-advised projects and left the State vulnerable to fraud. Even after the repeal of the Loan Law, local governments continued to fund, and purchase stock in, private railroad companies.<sup>6</sup> Between 1825 (when Ohio began publicly funding infrastructure projects) and 1830, the state debt ballooned from \$400,000 to \$4,333,000.<sup>7</sup> After passage of the Loan Law (later known as the “Plunder Law”), the state debt more than doubled again, exceeding \$12 million by 1840.<sup>8</sup>

“The public began to bemoan the taxes imposed on them for the benefit of private companies and the losses incurred by the state when subsidized corporations failed.”<sup>9</sup> Public sentiment grew into widespread opposition to the public funding of “speculation,” and the

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<sup>2</sup> Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective*, 16 U.Tol.L.Rev. 405, 407 (1985).

<sup>3</sup> See *Citizens Word v. Canfield Twp.*, 152 Ohio App.3d 252, 2003-Ohio-1604, ¶ 14 (7th Dist.).

<sup>4</sup> Gold, 16 U.Tol.L.Rev. at 408.

<sup>5</sup> *Id.* at 408–409.

<sup>6</sup> See *Citizens Word* at ¶ 14; see also *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 7–8 (9th Dist. 2001).

<sup>7</sup> In 2015 dollars, this figure would well exceed \$105 million.

<sup>8</sup> Gold, 16 U.Tol.L.Rev. at 409. To put this figure in perspective, in 2015 dollars, the state debt ultimately exceeded \$290 million.

<sup>9</sup> *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 464 (1999), citing *id.* at 407–423.

taxation of all Ohioans for the direct benefit of only a few wealthy individuals, corporations, and localities.<sup>10</sup> The call came for a state constitutional convention, in part to amend the Ohio Constitution to place restrictions on the lending of public aid to private enterprise.<sup>11</sup>

The 1851 convention adopted several sections that separated public funding (at both the state and local levels) from private enterprise and prohibited state projects that involved the creation of debt. Section 1 of Article VIII set a state debt ceiling of \$750,000.<sup>12</sup> Sections 4 and 6 of Article VIII prohibited state and local governments from making a gift or loan of state credit “in aid of” corporations or from becoming a stockholder in any company or association.<sup>13</sup> Section 6 of Article XII prohibited the State from ever contracting a debt for internal improvement. The convention did not adopt a debt limit for political subdivisions, however.<sup>14</sup> The constitutional amendments assembled at the 1851 convention were adopted by Ohio voters on March 10, 1851.<sup>15</sup>

### **Evolution of Modern Economic Development Principles**

Despite two subsequent constitutional conventions,<sup>16</sup> these constitutional provisions remained substantively the same for more than 160 years. But over the decades, the staunch opposition to public-private relationships began to fade. State and local government engaged in certain types of economic development projects, which the Ohio Supreme Court found to be constitutional. For example, state agencies issued revenue bonds for improvements projects (bonds paid solely from revenues from the project), because these bonds were not a prohibited state debt.<sup>17</sup> Private, nonprofit corporations were used to administer public funds for public

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<sup>10</sup> Gold, 16 U.Tol.L.Rev. at 413–414.

<sup>11</sup> *Id.*

<sup>12</sup> The Ohio Supreme Court held that Sections 1 through 3 of article VIII and Section 6 of article XII did not apply to political subdivisions. *Cass v. Dillon*, 2 Ohio St. 607 (1853).

<sup>13</sup> Interestingly, some opponents supported the state ban on public-private enterprise but opposed the local ban, arguing that local governments should not be denied “the humble privilege of helping themselves with their own money.” Gold, 16 U.Tol.L.Rev. at 416.

<sup>14</sup> By not including municipal debt limitations in the Ohio Constitution, the legislature could authorize further municipal construction of water and gas works. Gold, 16 U.Tol.L.Rev. at 421–22.

<sup>15</sup> *Ohio Acad. of Trial Lawyers* at 465.

<sup>16</sup> The Ohio Constitution requires the issue of whether to call a constitutional convention to be put before the voters every 20 years. Ohio Constitution, Article XVI, Section 3. Constitutional conventions were therefore convened in 1871 and 1912. Currently, the Ohio Constitution is again under review, but by statute, headed by the Ohio Constitutional Modernization Commission. See R.C. 103.61–103.67.

<sup>17</sup> *Kasch v. Miller*, 104 Ohio St. 281 (1922) (statute authorizing state superintendent of public works to acquire property and issue bonds for public works construction to “encourage and promote commerce, manufacturing, and other public purposes”); see also *State ex rel. State Bridge Comm. of Ohio v. Griffith*, 136 Ohio St. 334 (1940).

purposes.<sup>18</sup> Economic development projects that involved the sale or lease of real property to private businesses were also upheld.<sup>19</sup> Because the property was sold or leased at value, although financed with tax revenues or bonds, the projects did not constitute a loan of aid or credit to a private business.

Still, in 1964 the Ohio Supreme Court struck down a law that established a state agency called the Ohio Development Financing Commission.<sup>20</sup> This agency was created to sell revenue bonds and loan the proceeds to private corporations whose commercial projects could not be financed through “ordinary financial channels.” The court held that these loans would effectively be extensions of credit by the State in violation of Article VIII, Section 4 of the Ohio Constitution. Public credit could not be loaned to private corporations for profit, even for public purposes, such as increasing employment opportunities.<sup>21</sup>

But many lawmakers and public officials believed that such a financing agency was necessary to make Ohio a competitor in attracting industrial development. Governor James A. Rhodes led an effort to pass a constitutional amendment, adopted by popular vote in 1965, to add Section 13 of Article VIII to the Ohio Constitution and reenact the statute struck down by the Ohio Supreme Court.<sup>22</sup> As discussed below, Section 13 allows both state and local governments to borrow money, issue bonds, make loans and guarantees, and otherwise lend their aid and credit to private businesses. The assistance must be for industry, commerce, distribution, or research. Tax revenues may not be pledged or obligated for the payment of bonds or other obligations.<sup>23</sup>

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<sup>18</sup> *State ex rel. Pugh v. Sayre*, 90 Ohio St. 215 (1914) (nontax revenues); *State ex rel. Leaverton v. Kerns*, 104 Ohio St. 550 (1922) (donation of tax revenue to county agricultural society); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955) (donation of public funds to veterans societies).

<sup>19</sup> *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13 (1953) (approving Ohio municipalities’ participation in slum-clearing and redevelopment funded by the National Housing Act, which allowed cities to purchase and clear slum properties, then sell them to private developers); *State ex rel. McElroy v. Baron*, 169 Ohio St. 439 (1959) (finding lease to private corporations for adequate rental of publicly owned and controlled port facilities that were devoted to a public purpose did not constitute a prohibited loan of “aid or credit,” even though taxes had been levied and bonds issued to finance the facilities).

<sup>20</sup> *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 47–48 (1964).

<sup>21</sup> *Id.*

<sup>22</sup> Gold, 16 U.Tol.L.Rev. at 448.

<sup>23</sup> The Ohio Supreme Court has held that tax revenues cannot be promised or earmarked specifically to meet financial obligations under this section. See *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St.2d 34, 39–40 (1966) (upholding a statute that authorized a state agency to guarantee loans but that did not specify payment *only* from non-tax sources); *State ex rel. Duerk v. Donehey*, 67 Ohio St.2d 216 (1981) (upholding pledge of receipts from liquor sales for state obligations because not raised by taxation); *State ex rel. Ryan v. City Council*, 9 Ohio St.3d 126 (1984) (striking joint venture for urban renewal with private enterprise where a fund created by special tax levy to meet bond obligations).

## **Current State of the Ohio Constitution: Public Debt**

The Ohio Constitution permits the State to incur debt “to cover casual deficits or failures in revenues, or to meet expenses not otherwise provided for” but with several limitations.<sup>24</sup> The total amount of debt is capped at \$750,000,<sup>25</sup> and the State cannot assume the debts of any county, city, town or township, or of any corporation.<sup>26</sup>

Revenue that has been appropriated for the current biennium is not state debt within the meaning of these sections.<sup>27</sup> “Special fund” revenue bonds are also not subject to the debt limits of Article VIII.<sup>28</sup> This type of revenue bond is paid only through the funds generated by the particular project it finances. As the Ohio Supreme Court put it, “[w]here the entire improvement is to be paid for by the issue and sale of bonds in the name of the state, and the principal and interest are to be paid entirely out of the revenues derived from the improvement . . . a state debt is not thereby incurred within the purview of the state constitution . . . .”<sup>29</sup> The Ohio Supreme Court has interpreted this “special fund” exception narrowly. More recent cases suggest that this exception may apply only where “tangible, income-producing property whose income was then pledged to retire the bonds” is at issue.<sup>30</sup>

Over the years, many additional constitutional provisions have been passed that allow the creation of certain kinds and amounts of debt. For example, Ohio may borrow money and issue bonds or other obligations to:

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<sup>24</sup> Ohio Constitution, Article VIII, Section 1.

<sup>25</sup> *Id.* An exception to this is debt incurred to repel invasion, suppress insurrection, or defend the state in war. Ohio Constitution, Article VIII, Section 2.

<sup>26</sup> Ohio Constitution, Article VIII, Section 5. Again, there is an exception for debts incurred to repel invasion, suppress insurrection, or defend the state in war. Ohio Constitution, Article VIII, Section 2. Also, school districts are not included within this prohibition. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶¶ 69–72.

<sup>27</sup> *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450 (1960); *see also* 1996 Ohio Atty.Gen.Ops. No. 96-060 (concluding that a hold-harmless or indemnification clause in a contract to which the treasurer of state is a party and that imposes a financial obligation upon the treasurer or the state must comply with the state debt limitations by 1) imposing an obligation only for the biennium in which the contract is executed, 2) not imposing a financial obligation for any period beyond that biennium, and 3) specifying a maximum amount for which the treasurer or the state is obligated, which must be available and appropriated before the contract’s execution).

<sup>28</sup> 1933 Ohio Atty.Gen.Ops. No. 33-800 (concluding obligations of the State, to be satisfied from revenues or profits accruing to the State in the operation of, or as an outgrowth of, the property or project for which the obligation was created is not a “debt” as that term is used in Ohio Constitution); *see also State ex rel. Pub. Institutional Bldg. Auth. v. Griffith*, 135 Ohio St. 604 (1939), paragraph one of the syllabus.

<sup>29</sup> (Emphasis added.) *Kasch v. Miller*, 104 Ohio St. 281 (1922), paragraph one of the syllabus.

<sup>30</sup> *State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 426–427 (1987) (refusing to apply special fund exception to “surcharge” on current employer contributions); *see also State ex rel. Pub. Institutional Bldg. Auth. v. Neffner*, 137 Ohio St. 390, 399 (1940) (striking down scheme to issue bonds to construct an institution that were paid through revenues received for rent of the facility because “those bonds do[] become the ultimate obligation of the state” where the state treasury is now deprived of the “substantial [rental] funds”).

- Acquire or refurbish buildings for certain state institutions, educational facilities, and offices;<sup>31</sup>
- Acquire and construct highways on the state highway system;<sup>32</sup> and
- Pay project costs for environmental and related conservation, preservation, and revitalization purposes.<sup>33</sup>

Relatedly, issuance of state debt paid from the state’s general fund is subject to a 5% cap.<sup>34</sup> The Ohio Constitution establishes an annual debt service limitation that applies to any future issuance of state direct obligations payable from either the general revenue fund (“GRF”) or net state lottery proceeds. Generally, new obligations may not be issued if the combined debt service (the money required to pay principal, interest, and other amounts payable on debts) for that fiscal year would exceed 5% of the total of estimated GRF revenues and net state lottery proceeds. Like the state debt cap, this provision is designed to keep the State’s debt obligations in line with state revenues.

### **Current State of the Ohio Constitution: Lending of Aid or Credit and Economic Development**

Article VIII, Sections 4 (state) and 6 (local) were adopted “to prohibit private interests from tapping into public funds at the taxpayers’ expense” and to prevent the resulting burden on taxpayers when publicly subsidized corporations fail or default.<sup>35</sup> These sections contain two prohibitions: (1) they forbid the government from the giving or loaning of government credit or aid to a private business enterprise; and (2) they bar joint ownership between government and a private enterprise.

For the purposes of these sections, the Ohio Supreme Court has defined the lending of government credit to include offering “the ability to borrow or borrowing power (i.e., the ability to acquire something tangible in exchange for a promise to pay for it).”<sup>36</sup> Local agreements that effectively constitute loans are also prohibited. For example, a statute that authorized a municipality to refurbish private railroad tracks with public money raised by the sale of

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<sup>31</sup> Ohio Constitution, Article VIII, Section 2e.

<sup>32</sup> Ohio Constitution, Article VIII, Section 2g.

<sup>33</sup> Ohio Constitution, Article VIII, Section 2o. Although authorized by the Ohio Constitution, the bonds authorized in this section 2o were to fund the Clean Ohio program, which was administered by the Ohio Development Services Agency, but is no longer funded.

<sup>34</sup> Ohio Constitution, Article VIII, Section 17 (approved by Ohio voters in November 1999).

<sup>35</sup> *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St.3d 37, 40 (2000).

<sup>36</sup> *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 47 (1964).

municipal bonds violated Article VIII, Section 6.<sup>37</sup> In that case, even the government’s police powers (that is, the need to respond to “public necessities” like failing railroad tracks) did not justify the use of public money for the benefit of private individuals or companies.<sup>38</sup>

Public funds also cannot be used to secure private obligations. For example, the Ohio Supreme Court invalidated an ordinance that allowed Cincinnati’s transit commission to contract with two private railway companies to operate a railway that was constructed and owned by the city.<sup>39</sup> The ordinance provided that the gross proceeds from the railway operation (i.e. rentals, fees, incomes, earning, and revenues) would be distributed to pay off both the existing obligations of the company and all “securities hereafter issued by it.”<sup>40</sup> The court found that this arrangement “is the exact thing which the Constitution expressly prohibits” because the city was pledging income earned from its property to secure the private rail company’s existing debt obligations and future securities.<sup>41</sup>

In a more recent case, the Ohio Supreme Court invalidated an ordinance authorizing the city of Warren to enter a reimbursement agreement with two private developers.<sup>42</sup> The agreement provided that the City would construct a public street and related improvements to serve a subdivision, with the costs of construction paid by bonds backed by tax revenue. In exchange, the subdivision developers agreed to reimburse the City at 80%.<sup>43</sup> The court held that this arrangement violated Article VIII, Section 6.<sup>44</sup> Although the developers were required to pay a portion of the debt incurred by the City each time one of its subdivision homes were sold, the entire debt was due in 15 years regardless of how many homes were sold.<sup>45</sup> Therefore, the arrangement ultimately left taxpayers with a debt should the developers become insolvent, bankrupt, or unable to pay at the end of 15 years.

The term “joint venture” is not used in the Ohio Constitution, but courts have interpreted Article VIII, Sections 4 and 6 to bar state and local governments from entering into a

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<sup>37</sup> *City of Cincinnati v. Harth*, 101 Ohio St. 344 (1920), syllabus; see also *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 51–52 (1964) (explaining that a loan of credit of the state violates Article VIII, Section 4, even if the State incurs no actual debt from the giving or loaning of such credit; the sale of revenue bonds to raise money “necessarily involves a borrowing of money even though no indebtedness of the state results. If the bonds are not paid, the borrowing power of the state will as a result be adversely affected . . .”).

<sup>38</sup> *Harth* at 352–53.

<sup>39</sup> *State ex rel. Campbell v. Cincinnati St. Ry. Co.*, 97 Ohio St. 283 (1918).

<sup>40</sup> *Id.* at 307.

<sup>41</sup> *Id.* at 308–309. Note that the *contract* between the city and rail companies did not violate the Ohio Constitution, as the court found that “the property of the city is, and will be separate and distinct from that of the company.” *Id.* at 306. Rather, it was the distribution of the gross receipts from the city’s property that violated Section 4.

<sup>42</sup> See *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St.3d 37 (2000).

<sup>43</sup> *Id.* at 41.

<sup>44</sup> *Id.* at 42.

<sup>45</sup> *Id.* at 41.

joint venture with a private organization.<sup>46</sup> This prohibition is designed to bar joint *ownership* between government and private entities, not to preclude *all relationships* between government and private enterprises.<sup>47</sup> Joint ownership in violation of Sections 4 or 6 occurs when the government is “the *owner* of part of a property which is owned and controlled in part by a corporation or an individual”<sup>48</sup> or when the government and a private enterprise join their property rights “to produce the integral whole.”<sup>49</sup> Courts have found that no joint ownership exists when there is “no commingling whatever of public and private property in a single enterprise,”<sup>50</sup> or when “ownership of public property is kept ‘separate and distinct’ from privately owned property.”<sup>51</sup>

For example, an Ohio Environmental Protection Agency contract with a private corporation to build and operate a mandatory E-check program (to comply with the federal Clean Air Act), was not an impermissible joint venture. According to the reviewing court, a joint venture involves only the merging of property interests. But the property interests of both parties in this case were separate and distinct, so the parties did not share “a community of interest in the purpose of the undertaking.”<sup>52</sup> Neither party was able to direct or manage the actions of the other. The court also stressed that there was no agreement between the State and the private corporation to share profits and losses but only to split a vehicle inspection fee. The fee amount was established by the State and collected by the private corporation to cover its costs for administering vehicle inspections, and the balance was remitted to the State for administrative uses. The court emphasized that “it is not unconstitutional for the state to enter into a contract and receive a percentage of a corporation’s gross revenues or earnings.”<sup>53</sup>

The Ohio Supreme Court has repeatedly stated, however, that “Sections 4 and 6 of Article VIII have not been applied to programs undertaken for public welfare.”<sup>54</sup> That is, the prohibition against lending credit does not apply to aid given to non-profit corporations for a

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<sup>46</sup> *Walker v. City of Cincinnati*, 21 Ohio St. 14 (1871); see also *State ex rel. Ryan v. City Council*, 9 Ohio St.3d 126 (1984).

<sup>47</sup> See *C.I.V.I.C. Group* at 40 (explaining that Sections 4 and 6 of Article VIII “forbid[] the union of public and private capital or credit”).

<sup>48</sup> (Emphasis added.) *Alter v. Cincinnati*, 56 Ohio St. 47, 64 (1897).

<sup>49</sup> *State ex rel. Eichenberger v. Neff*, 42 Ohio App.2d 69, 75 (10th Dist. 1974).

<sup>50</sup> *State ex rel. McElroy v. Baron*, 169 Ohio St. 439, 444 (1959).

<sup>51</sup> *Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App.3d 1, 10 (9th Dist. 2001), citing *State ex rel. Campbell v. Cincinnati St. Ry. Co.*, 97 Ohio St. 283(1918).

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.* at 12.

<sup>54</sup> *State ex rel. Tomino v. Brown*, 47 Ohio St.3d 119, 122 (1989) (lending of city’s credit through sale of subsidized public housing was for a “public welfare purpose, and not a business purpose” and thus “not prohibited by Section 6 of Article VIII”); see also *State ex rel. McElroy v. Brown*, 169 Ohio St. 439, 444 (1959) (acquisition and leasing of land to private companies by Toledo Port Authority did not violate Section 6, Article VIII because they were “all made in carrying out the public purpose of the Authority and to effectuate its plan of development of the Port”).

public purpose<sup>55</sup> but only to private businesses operated for profit.<sup>56</sup> The court has stated, despite the prohibitions of Sections 4 and 6, “that the appropriation of public money to a private corporation to be expended for a public purpose is a valid act of the legislative body.”<sup>57</sup> Courts generally give broad discretion to the legislative authorities (at the state or local level) to decide what constitutes a public purpose.<sup>58</sup>

Direct investment in for-profit organizations is a different matter, however. Even nonprofit corporations that invest in private, for-profit enterprise may not qualify for the public organization exception. The Ohio Supreme Court struck down a statute authorizing the State, through the Ohio Development Financing Commission, to issue bonds both directly to private corporations and to a nonprofit community improvement corporation, which, in turn, issued funds to private for-profit organizations.<sup>59</sup> The court found that the state had impermissibly loaned its credit to private corporations. This was true even for loans to the nonprofit corporation because that money was ultimately used to invest in private, for-profit organizations.<sup>60</sup> According to the Court, “[t]he fact, that in each instance there may be a public purpose for making the loan (i.e., to increase employment), does not affect the fact that in each instance credit is being given either to or in aid of a private corporation for profit.”<sup>61</sup>

Article VIII, Section 13 provides a constitutional exception to the prohibitions of Article VIII, Sections 4 and 6. This section authorizes government “to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment and facilities within the State of Ohio for industry, commerce, distribution and research” as well as to “make or guarantee loans and to borrow money and issue bonds or other obligations” for these purposes, when the objective is economic development.<sup>62</sup> The

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<sup>55</sup> *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 66 (“Section 4 Article VIII has generally been interpreted to prohibit lending the state’s credit to private business enterprises, but not to organizations created for a public purpose, even if they are corporations.”).

<sup>56</sup> *See State ex rel. Leaverton v. Kerns*, 104 Ohio St. 550 (1922).

<sup>57</sup> *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 150–51 (1955).

<sup>58</sup> *State ex rel. McElroy v. Baron*, 169 Ohio St. 439, 444 (1959) (noting that because “[t]he determination of what constitutes a public purpose is primarily a legislative function,” the General Assembly’s determination “should not be reversed except in instances where such determination is palpably and manifestly arbitrary and incorrect”); *see also* 1996 Ohio Atty.Gen.Ops. No. 96-060.

<sup>59</sup> *Saxbe v. Brand*, 176 Ohio St. 44 (1964).

<sup>60</sup> *Id.* at 48.

<sup>61</sup> *Id.* at 48. The Ohio Attorney General has also issued opinions supporting the view that assistance given to nonprofit corporations for the purpose of assisting private for-profit corporations violates Article VIII, Section 4 of the Ohio Constitution. *See* 1985 Ohio Atty.Gen.Ops. No. 85-0111.

<sup>62</sup> *State ex rel. Eichenberger v. Neff*, 42 Ohio App.2d 69, 77 (10th Dist. 1974).

heart of the terms “proper public purpose” and “public interest,” as used in this section, is the creation or preservation of jobs and employment opportunities.<sup>63</sup>

Courts have found this exception to apply to several types of economic development projects. For example, the construction of for-profit, low- and moderate-income rental housing, funded by county economic development bonds, met this exception because the exchange of rent money falls under the definition of “industry and commerce.”<sup>64</sup> The construction of a medical facility also met this exception because the facility would provide an ongoing exchange of goods and services.<sup>65</sup> Farming has also been found to be “industry and commerce.”<sup>66</sup>

The Ohio Attorney General has concluded that grants made to a non-profit corporation to provide loans to private, for-profit enterprises qualifies for this exception, when the funds are to be used for the acquisition of property for industry, commerce, distribution, or research to improve the economic welfare of the people of the state.<sup>67</sup> The Ohio Attorney General has also concluded that the definition of “property” in Section 13 includes intangible property, like patents and copyrights.<sup>68</sup>

But the construction of projects that benefit only private interests, as opposed to the broader interests of “industry, commerce, distribution, and research” in the State, do not fall under this exception. For example, construction of a street that would benefit only private property owners would not fall under the exception of Article VIII, Section 13.<sup>69</sup>

### **Local Government and Home Rule in Ohio**

Ohio has four types of local government units: counties, townships, charter municipalities, and non-charter (or statutory plan) municipalities.<sup>70</sup> Municipalities are further classified as villages or cities, depending on population: cities have a population of more than 5,000 residents, and villages have populations under 5,000 residents.<sup>71</sup>

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<sup>63</sup> *Stark Cty. v. Ferguson*, 2 Ohio App.3d 72, 77 (5th Dist. 1981).

<sup>64</sup> *State ex rel. Lake Cty. Bd. of Commrs. v. Zupancic*, 62 Ohio St.3d 297, 301 (1991).

<sup>65</sup> *Stark Cty.* at 76; *see also* 1981 Ohio Atty.Gen.Ops. No. 81-095 (concluding a board of county commissioners may issue bonds under the authority provided in Article VIII, Section 13 and R.C. Chapter 165 for the purpose of acquiring, constructing, enlarging, improving or equipping a nursing home).

<sup>66</sup> *State ex rel. Preble Cty. Bd. of Commrs.v. Mong*, 12 Ohio St.3d 66, 67 (1984); *see also* 1983 Ohio Atty.Gen.Ops. No. 83-094 (concluding Article VIII, Section 13 may be utilized to finance agricultural economic development).

<sup>67</sup> 1998 Ohio Atty.Gen.Ops. No. 98-034, at 8–9.

<sup>68</sup> *Id.* at 12–14.

<sup>69</sup> *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St.3d 37, 41–42 (2000).

<sup>70</sup> Shwab, *Crossing the Home-Rule Boundaries Should Be Mandatory: Advocating for a Watershed Approach to Zoning and Land Use in Ohio*, 58 Clev.St.L.Rev. 463, 482–83 (2010).

<sup>71</sup> Ohio Constitution, Article XVIII, Section 1.

## **Municipalities and Home Rule**

Ohio delegates much of its police power (the authority to make regulations for the “public health, safety, morals, and welfare” of society<sup>72</sup>) to local governments.<sup>73</sup> This is known as “home rule” authority, the idea that local affairs should be determined by local governments. This concept “is deeply engrained in the politics of Ohio’s local governments,” and the constitutional grant of home rule powers is a distinct characteristic of Ohio municipalities.<sup>74</sup>

Municipalities in Ohio derive their home rule power from Article XVIII, Section 3 of the Ohio Constitution (often referred to as the Home Rule Amendment). The Home Rule Amendment was proposed at the 1912 constitutional convention, and Ohio voters overwhelmingly approved it. Before adoption of the Home Rule Amendment, Ohio municipalities operated as “creatures of the state,” able to exercise only those powers specifically granted by the General Assembly.<sup>75</sup>

An Ohio municipality may choose to adopt a charter, which operates as a sort of local constitution, under Article XVIII, Section 7 of the Ohio Constitution.<sup>76</sup> The organization of a municipal government that does not adopt a charter falls under the general state laws that govern the organization of cities and villages.<sup>77</sup> A charter is not necessary for the exercise of police powers but is needed to exercise some aspects of local self-government. Without a charter, a municipality must follow the *procedure* prescribed by state statutes in matters of local self-government (although any ordinance it passes, following the statutory procedures, can vary from state law).<sup>78</sup>

Chartered or not, *all* Ohio cities and villages have home rule authority derived directly from the Ohio Constitution. The Home Rule Amendment grants municipalities two distinct powers: the power of local self-government and the exercise of local police power not in conflict with general laws of the State.<sup>79</sup> These home rule powers allow Ohio municipalities to undertake economic development projects to serve their residents. For example, the city of

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<sup>72</sup> Defining police power, the U.S. Supreme Court has included “[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.” *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>73</sup> Shwab, 58 Clev.St.L.Rev. at 482–83.

<sup>74</sup> *Id.* at 485, 492.

<sup>75</sup> *Id.* at 485.

<sup>76</sup> Ohio Constitution, Article XVIII, Sections 2, 7; *see also* Ohio Constitution, Article XVIII, Sections 8, 9 (providing the procedures for adoption and amendment of a municipal charter).

<sup>77</sup> *See* R.C. Title 7.

<sup>78</sup> *N. Ohio Patrolmen’s Benevolent Assn. v. Parma*, 61 Ohio St.2d 375 (1980).

<sup>79</sup> Ohio Constitution, Article XVIII, Section 3.

Toledo established a Municipal Jobs Creation Tax Credit program to create jobs and increase its tax base. The program authorizes the mayor and city council to pass ordinances granting credits against municipal income taxes to qualifying businesses.<sup>80</sup>

Generally speaking, an Ohio municipality has the power to regulate its own internal matters within its territorial boundaries.<sup>81</sup> For example, courts have found that matters relating to the internal organization of a municipal corporation to be a matter of local self-government.<sup>82</sup> In contrast, courts have found that municipal ordinances that have an effect *outside* the territory of a municipal corporation, like detachment of municipal territory,<sup>83</sup> are not a proper exercise of local self-government.

Sometimes state law and municipal ordinances conflict. If a municipal ordinance relates solely to a matter of local self-government, then the state law will not invalidate it.<sup>84</sup> But municipal laws exercising municipal *police powers* may not conflict with general state laws.

Home rule police power recently came to the forefront in Ohio over debates surrounding oil and gas development. Ohio law gives the State “sole and exclusive authority” to regulate the permitting, locating, and spacing of oil and gas wells and production within the State.<sup>85</sup> Many Ohio municipalities, however, adopted their own ordinances, regulating oil and gas production within their borders. The Ohio Supreme Court had to decide whether these local oil and gas ordinances were a valid exercise of home-rule power, prevailing over the statewide law.<sup>86</sup>

The court followed a specific test: “[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.”<sup>87</sup> Zoning and permitting are considered exercises of police power. The state oil and gas law is also a law of general concern, even though not every corner of Ohio is viable for oil and gas development;

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<sup>80</sup> For more information about this program, or to apply, visit city of Toledo, Municipal Jobs Creation Tax Credit (MJCTC) Program, [http://toledo.oh.gov/services/development/programs/municipal-jobs-creation-tax-credit-\(mjctc\)](http://toledo.oh.gov/services/development/programs/municipal-jobs-creation-tax-credit-(mjctc)). Additional information about state and local tax incentives for economic development can be found in [Chapter 4](#).

<sup>81</sup> *Vill. of Beachwood v. Bd. of Elections of Cuyahoga Cty.*, 167 Ohio St. 369, 371 (1958); *see also State ex rel. Evans v. Moore*, 69 Ohio St.2d 88, 89–90 (1982). The General Assembly may grant municipal corporations authority outside their borders. *See, e.g.*, R.C. 711.09 (Platting Law granting municipal corporations power to enact subdivision regulations that apply, in some cases, as far as three miles outside the municipal borders).

<sup>82</sup> *See, e.g., Hile v. City of Cleveland*, 107 Ohio St. 144 (1923), paragraph two of the syllabus.

<sup>83</sup> *Vill. of Beachwood* at 371–72.

<sup>84</sup> A municipality’s constitutional power to exercise all powers of local self-government within its jurisdiction cannot be abridged by statute. *See Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043.

<sup>85</sup> *See* R.C. 1509.02.

<sup>86</sup> *State ex rel. Morrison v. Beck Energy Corp.*, 2015-Ohio-485.

<sup>87</sup> *Id.* at ¶ 15.

the law applies equally to all municipalities and grants the same obligations and privileges to every potential oil and gas developer. Finally, the court found that the state law and local ordinances directly conflicted because the local ordinances prohibited what the state law specifically allowed. Ultimately, the court decided that the local ordinances were not valid exercises of home rule power and had to give way in the face of the state regulatory system.<sup>88</sup>

The Ohio Constitution also specifically grants municipal corporations the right to operate utilities.<sup>89</sup> This authority, unlike the other home rule powers, can extend beyond the borders of a municipal corporation. But not every issue that touches on utility operation falls under municipal home rule powers. For example, fluoridation of the municipal water supply is a matter of public health—a police power—rather than a municipal water utility matter.<sup>90</sup> More information about municipally owned utilities can be found in [Chapter 2](#) and [Chapter 9](#).

## **Counties**

The county is the basic political unit of Ohio, and its history extends back centuries.<sup>91</sup> Ohio’s counties exist to administer state policies at the local level.<sup>92</sup> County form and function are determined by state law, and the county must look to the State for any legislative response to county needs or problems.<sup>93</sup>

Non-home rule counties in Ohio are decentralized in structure and have sometimes been described as “labyrinthine.”<sup>94</sup> County government, excluding the judiciary, consists of eleven elected officials: three county commissioners,<sup>95</sup> an auditor,<sup>96</sup> a clerk of courts,<sup>97</sup> a recorder,<sup>98</sup> a coroner,<sup>99</sup> an engineer,<sup>100</sup> a prosecutor,<sup>101</sup> a sheriff,<sup>102</sup> and a treasurer.<sup>103</sup> All

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<sup>88</sup> *Id.* at ¶ 34. But see ¶38 for additional context.

<sup>89</sup> Ohio Constitution, Article XVIII, Sections 4, 6.

<sup>90</sup> *Canton v. Whitman*, 44 Ohio St.2d 62 (1975).

<sup>91</sup> Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 U.Dayton L.Rev. 533, 536 (1994).

<sup>92</sup> *Id.*

<sup>93</sup> See Ohio Constitution, Article X, Section 1 (describing the organization and government of counties).

<sup>94</sup> Cianca, 19 U.Dayton L.Rev. at 539.

<sup>95</sup> The county commissioners are not the head of county government or a legislative body, like the Ohio General Assembly. Rather, they administer the operation of the county and the various boards and commissions under their control. See *generally* R.C. Chapter 307.

<sup>96</sup> The chief financial officer of the county. See R.C. Chapter 319.

<sup>97</sup> The chief administrative officer of the county courts, which include the county court of common pleas, any municipal courts, and any mayor’s courts. See R.C. Chapter 2303.

<sup>98</sup> The county recorder records all deeds, mortgages, plats, leases, powers of attorney, liens, and proceedings of annexations and municipal incorporations. See R.C. Chapter 317.

<sup>99</sup> The Coroner determines the cause of any death not due to natural causes, conducts autopsies, and supervises the county morgue and laboratory. See R.C. Chapter 313.

<sup>100</sup> The Engineer administers the construction and maintenance of the county road and bridge system. See R.C. Chapter 315.

11 elected officials are equal in status and are sovereign in their jurisdictions, which are established by state law.<sup>104</sup>

Unlike municipalities, Ohio counties do not have any inherent home-rule powers. But Article X of the Ohio Constitution grants counties the right to *adopt* home rule. By ratifying a home rule charter, a county can effectively become self-governing. This power does have some limits; the Ohio Constitution requires that a county home rule charter continue to provide for the performance of all duties and the exercise of all powers that state law vests in counties and county officers.<sup>105</sup>

Home rule counties can choose the scope of the home-rule power they wish to assume. A home-rule charter may simply reorganize the structure of county government, preserving the county's dependence on the State for its legislative needs.<sup>106</sup> A charter may go further, however, and vest the county with some or all of the powers given by the State to municipalities. These municipal powers, in turn, may be exercised concurrently by the county (municipal authority will supersede county authority) or exclusively by the county (county authority supersedes authority of municipalities).<sup>107</sup>

Finally, a home rule charter may organize a county as a municipal corporation.<sup>108</sup> If a home rule charter incorporates the county as a municipal corporation, this new entity becomes a hybrid of city and county with both sets of powers.<sup>109</sup> As of 2015, only Summit<sup>110</sup> and Cuyahoga<sup>111</sup> Counties have adopted home-rule charters. But both counties have utilized the county charter government to promote economic development in a variety of ways.<sup>112</sup> For

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<sup>101</sup> The Prosecuting Attorney prosecutes all actions in which the state is a party, acts as chief legal counsel to the county, and investigates the commission of crimes within the county. See R.C. Chapter 309.

<sup>102</sup> The chief law enforcement officer of the county. See R.C. Chapter 311.

<sup>103</sup> The Treasurer collects county and some state taxes, invests county funds, and disburses county funds upon authorization from the Auditor. See R.C. Chapter 321.

<sup>104</sup> Cianca, 19 U.Dayton L.Rev. at 537.

<sup>105</sup> Ohio Constitution, Article X, Section 3 (amended 1933 to permit home rule option); see also 1985 Ohio Atty.Gen.Ops. No. 85-039, at 2-138 .

<sup>106</sup> Cianca, 19 U.Dayton L.Rev. at 549, citing Charter of Summit County, Ohio (Nov. 6, 1979).

<sup>107</sup> Ohio Constitution, Article X, Section 3.

<sup>108</sup> *Id.*

<sup>109</sup> Cianca, 19 U.Dayton L.Rev. at 549.

<sup>110</sup> Charter of Summit County, Ohio (Nov. 6, 1979), available at <http://www.conwaygreene.com/summit.htm>.

<sup>111</sup> Charter of Cuyahoga County, Ohio (Jan. 1, 2010), available at <http://council.cuyahogacounty.us/en-US/Charter-CuyahogaCounty.aspx>.

<sup>112</sup> Information about the Cuyahoga County Department of Development can be found at <http://development.cuyahogacounty.us>. Information about the Summit County Department of Community and Economic Development can be found at <https://co.summitoh.net/index.php/departments/community-a-economic-development/economic-development>.

example, Summit County has established a revolving loan fund to support or establish businesses in the county, for the purpose of creating and retaining jobs.<sup>113</sup>

In addition, under Revised Code 307.07, the board of county commissioners, by resolution, may create an office of economic development, to develop and promote plans and programs designed to assure that county resources are efficiently used, economic growth is properly balanced, and county economic development is coordinated with the State and other local governments. For this purpose, the board may appropriate (1) moneys from the county general fund or (2) under Revised Code 307.64, moneys derived from a tax levied under division (EE) of Revised Code 5705.19. The appropriated funds may be used for the creation and operation of the office, for any economic development purpose of the office, and to provide for the establishment and operation of a program of economic development, including to support a county land-reutilization corporation organized under Revised Code Chapter 1724.

### **Townships**

Townships were the first form of local government in Ohio; with the formation of the Ohio Territory under the Northwest Ordinance of 1787, six-mile township squares were used as the primary means of establishing local civil governments and their territorial boundaries.<sup>114</sup> Today, townships are statutory local governments, exercising only the powers specifically delegated to them by the Ohio General Assembly.<sup>115</sup> Since the adoption of the 1851 Ohio Constitution, the basic form of civil township government has remained relatively unchanged. Townships are governed by a three-member board of trustees, which is the legislative authority for the township.<sup>116</sup> The township fiscal officer (formerly referred to as the clerk), is independent of the trustees and keeps records of township proceedings and fiscal accounts.<sup>117</sup>

In June 1991, the Ohio General Assembly enacted a law authorizing townships to adopt limited home rule.<sup>118</sup> Ohio is unique in allowing townships limited home rule. In general, home-rule townships may exercise all the powers of local self-government not in conflict with general laws, including the adoption of local police, sanitary, and similar regulations. Home-rule townships may not create criminal offenses or impose criminal penalties, establish or revise road construction standards, or enact regulations affecting subdivisions, water, sewers, or

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<sup>113</sup> For more information, visit <https://co.summitoh.net/index.php/departments/community-a-economic-development/economic-development/revolving-loan-fund>.

<sup>114</sup> These survey townships were created as the United States expanded. The federal government used survey townships to survey and sell public land, as well as to designate property ownership. See Ohio History Connection, *Township*, <http://www.ohiohistorycentral.org/w/Township?rec=2190>.

<sup>115</sup> R.C. 503.01.

<sup>116</sup> See generally R.C. Chapter 505.

<sup>117</sup> See generally R.C. Chapter 507.

<sup>118</sup> See generally R.C. Chapter 504.

drainage.<sup>119</sup> When township resolutions conflict with municipal ordinances or resolutions, the latter prevail, and when township and county resolutions conflict, the former prevails.<sup>120</sup>

Over Ohio's history, at least 1,340 townships have existed within the State.<sup>121</sup> While they all operate under the basic form of township government, they vary in the size, population, annual operating budget, and range of services offered to their residents. Townships most commonly provide residents with services such as road maintenance, cemetery management, police and fire protection, emergency medical services, solid waste disposal, and zoning.

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<sup>119</sup> R.C. 504.04(B).

<sup>120</sup> R.C. 504.04(D).

<sup>121</sup> See Ohio History Connection, *Township*, <http://www.ohiohistorycentral.org/w/Township?rec=2190>. Townships are sometimes annexed into a municipality as a town or city develops and expands. For example, Mill Creek Township in Hamilton County, Ohio was absorbed by several cities, most notably Cincinnati, through annexation, acquisition, or other means. *Id.*

**Chapter Two:**  
**Economic Development and Special Purpose Entities**

**Key Points:**

- Ohio municipal corporations, townships, and counties may use specialized entities, referred to as special purpose entities, to facilitate economic development.
- Ohio has a statewide economic development program through a private economic development corporation known as JobsOhio that works with regional and local partners and the Ohio Development Services Agency to offer a variety of incentives to businesses.
- Established under Ohio law, the governing boards of these special purpose entities often consist of public and private experts or stakeholders in proposed economic development projects and regional cooperation plans.
- Often, these board members have particular expertise and are appointed to their positions to improve efficiency in bringing projects to the market in a timely manner.

Ohio law provides for the creation of special purpose entities and other economic development entities, which provide additional tools for growth. Special purpose entities are statutory entities that allow local governments to act individually or with other local governments to improve their communities. Importantly, the design of these entities enable local governments to have the authority to make these improvements more expediently and for less cost than they would otherwise be able to do. These entities often have a market focus, timing, and sense of urgency to bring a project to market. Those factors may align more favorably with a county, city, or township government, whose focus is on governmental operations and not only on economic or project development.

Special purpose entities include port authorities, joint economic development districts, municipal utility districts (including previously existing joint economic development zones), transportation improvement districts, community improvement corporations, community urban redevelopment corporations, development corporations, new community authorities, and community entertainment districts. Additionally, local chambers of commerce or private nonprofit corporations or foundations may perform many of the same services to advance economic development in an area. Also, a county office of economic development could be used instead of, or in addition to, these entities. County offices of economic development are authorized in Revised Code 307.07 and are discussed in more detail in [Chapter 1](#).

Each special purpose entity facilitates is intended to benefit one or more specific types of projects through its unique organization and powers. For example, a city may create a community urban redevelopment corporation to demolish vacant buildings in a blighted area of the city. The city would follow the process in the statute governing community urban redevelopment corporations to organize this corporation. This statute provides for the exercise of powers consistent with the corporation's public purpose to remediate blight, including, for example, a process to enable the corporation to demolish vacant buildings and clear land using powers that the city may not otherwise possess or cannot timely use.<sup>122</sup>

This chapter discusses various entities used in economic development, how they are governed and organized, and their powers and purposes.

### **JobsOhio**

The most recent addition to Ohio's economic development landscape is JobsOhio. JobsOhio is a nonprofit corporation created by statute to promote economic development, job creation, job retention, job training, and the attraction of business to Ohio.<sup>123</sup> JobsOhio's economic development efforts focus on developing jobs in a range of industry sectors that produce high-wage jobs, including advanced manufacturing in the aviation, automotive, aerospace, food production, distribution, and logistics sectors; advanced services, including the financial service sector and others; energy, including the shale and petrochemical sectors; and technology, including information technology and biohealth sectors.<sup>124</sup> JobsOhio is an important force for economic development across Ohio and, by law and contract, now undertakes many of the former Department of Development's obligations (now called the Ohio Development Services Agency).<sup>125</sup>

JobsOhio is controlled by a board of directors appointed by the governor and is specifically removed from the definition of a public office under certain laws.<sup>126</sup> Today, JobsOhio is wholly funded by proceeds from the spirituous liquor enterprise formerly owned by the State.<sup>127</sup> This enterprise, per authorizing law, was purchased from the State by JobsOhio,

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<sup>122</sup> See R.C. Chapter 1728.

<sup>123</sup> R.C. 187.01.

<sup>124</sup> JobsOhio, Industries, <http://jobs-ohio.com/industries>.

<sup>125</sup> R.C. 187.04(A); R.C. 187.01(F)(3).

<sup>126</sup> R.C. 187.01(B); 187.03(A).

<sup>127</sup> R.C. 4313.02(A). However, upon its initial formation, JobsOhio did accept start-up funds from private donations.

through its nonprofit affiliate the JobsOhio Beverage System, as an exclusive franchise in 2013.<sup>128</sup>

The Ohio legislature requires JobsOhio to undergo an annual financial audit by an independent certified public accounting firm (that is selected in consultation with the Ohio Auditor of State) and a supplemental compliance and control review by that independent accounting firm and the Ohio Auditor of State.<sup>129</sup>

Under Revised Code 122.011(C) and 187.04, JobsOhio and the Ohio Development Services Agency (“ODSA”) are required to enter into a service agreement whereby JobsOhio



agrees to carry out certain duties enumerated in statute as powers of ODSA. This service agreement is entered into every biennium as required by statute, and contains the negotiated scope of work describing in more detail what JobsOhio will do in conjunction with ODSA. One of the primary focuses of JobsOhio is to develop and execute a strategic plan for economic development in Ohio. JobsOhio does this by working with a network of regional partners, all of whom are also private nonprofit organizations. The regional partners are tasked with helping coordinate the county, city, and township collaboration in economic

development projects. The JobsOhio regional network currently includes Columbus 2020 (Central Ohio), Team NEO (N.E. Ohio), Appalachian Partnership for Economic Growth (S.E. Ohio), Dayton Development Coalition (Western Ohio), Regional Growth Partnership (N.W. Ohio), and REDI Cincinnati (S.W. Ohio). This relationship is discussed in more detail in [Chapter 5](#).

Under the service agreement with ODSA, JobsOhio is the “forward face” for economic development. This means it is responsible for meeting with companies, structuring deals, conducting due diligence, handling applications for assistance, and recommending the incentives to be awarded by ODSA for various projects (although awards can also come from local and regional entities as well). JobsOhio negotiates the incentives with companies to either retain them in Ohio or attract them to Ohio, but all taxpayer-funded awards at the state level are approved by ODSA. JobsOhio also has its own funds (from the liquor franchise) that can be awarded to companies. However, sometimes only local or regional funds, or other non-monetary assistance, will be put into a project.

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<sup>128</sup> R.C. 4313.02(A). Under pre-existing law, the state had operated the sale and distribution of spirituous liquor. See *Sansea, Inc. v. Mahoning Cty. Bd. of Elections*, 113 Ohio App.3d 351, 353 (7th Dist. 1996).

<sup>129</sup> R.C. 187.01(J).

## **Ohio Development Services Agency**

ODSA remains an active player in Ohio’s economic development process. The Revised Code provides specific services that ODSA, through its Director, must provide, including to “develop and promote plans and programs designed to assure that state resources are efficiently used, economic growth is properly balanced, community growth is developed in an orderly manner, and local governments are coordinated with each other and the state.”<sup>130</sup> To accomplish this goal, ODSA, working in conjunction with JobsOhio:

- serves as a clearinghouse for economic development information and data;
- prepares and activates plans for the retention, development, expansion, and use of the resources and commerce of the State;
- assists and cooperates with federal, state, and local governments to foster economic development;
- fosters research and development and community development and develops recommendations for administrative or legislative actions;
- provides technical assistance to state departments, political subdivisions, regional and local planning commissions, tourist associations, councils of government, community development groups, and community action agencies to foster economic development;
- studies existing structures, operations, and financing of regional or local government and those state activities that involve significant relations with regional or local governmental units, and recommends to the governor and to the general assembly such changes in these provisions and activities as will improve the operations of regional or local government;
- provides loan servicing for the loans purchased and loan guarantees provided before October 15, 2007; and
- allocates funds from the national recovery zone economic development bond limitation.<sup>131</sup>

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<sup>130</sup> R.C. 122.011.

<sup>131</sup> *Id.*

ODSA administers several programs separate from JobsOhio. ODSA supports the award of tax credits from the Tax Credit Authority; implements state grants or tax credits for the Ohio New Markets Tax Credit Program, Ohio Historic Preservation Tax Credits; operates a range of programs to promote energy efficiency, Minority Business Enterprise (“MBE”), and export assistance; implements the Ohio Third Frontier technology commercialization program; supports travel and tourism and development in Ohio’s Appalachian Counties; and performs many other functions.<sup>132</sup>

ODSA also provides an important service to communities by acting as a pass-through entity for millions of dollars of federal funds Ohio receives from the Department of Energy and the Department of Health and Human Services. For example, ODSA assists with the administration of the Winter Crisis Program, which helps low-income individuals maintain heating in their residences during the winter months.<sup>133</sup>

ODSA operates a MBE program that focuses on promoting business opportunities for minority-owned businesses.<sup>134</sup> Many opportunities arise from the State’s aspirational goal of having minority businesses supply 15% of the products and services purchased by state agencies.<sup>135</sup> In FY 2014, Ohio spent more money with minority-owned businesses than ever before.<sup>136</sup> Additionally, ODSA provides the Minority Business Bonding Program to provide bid, performance, and payment surety bonds to help MBEs obtain bonding through standard surety companies. ODSA also provides funds for MBEs through the Minority Business Direct Loan Program that provides fixed, low-interest loans to state-certified MBEs that are purchasing or improving fixed assets and creating or retaining jobs.<sup>137</sup>

Small businesses also have access to various support programs through ODSA. There are 38 Small Business Development Centers (“SBDC”) providing free, confidential, one-on-one business advising, management training, educational programs, and technical assistance. The Ohio SBDC Network also includes specialty International Trade Advisors (discussed in more detail in [Chapter 11](#)) and Manufacturing and Technology Small Business Development Centers. Additionally, in 2013, ODSA was awarded \$18 million from the U.S. Department of Treasury

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<sup>132</sup> Ohio Development Services Agency, 2014 Annual Report, available at <http://development.ohio.gov/files/reports/2014DEVAnnualReport.pdf>.

<sup>133</sup> See [http://development.ohio.gov/is/is\\_heapwinter.htm](http://development.ohio.gov/is/is_heapwinter.htm).

<sup>134</sup> See

<http://das.ohio.gov/Divisions/EqualOpportunity/MBEEDGECertification/UnderstandingMBE/tabid/181/Default.aspx>.

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<sup>135</sup> House Bill 584 (December 17, 1980) established the MBE program which mandated that state agencies set aside 15% of their annual purchases for certified minority-owned businesses.

<sup>136</sup> See <http://www.cincinnati.com/story/money/2014/08/25/minority-business-spending-ohio/14587927/>.

<sup>137</sup> Ohio Minority Business Direct Loan Program, [http://www.development.ohio.gov/bs/bs\\_ombdlp.htm](http://www.development.ohio.gov/bs/bs_ombdlp.htm).

from the Small Business Credit Initiative.<sup>138</sup> ODSA used this program to assist small businesses having trouble obtaining financing from the private sector to expand and create jobs. This money was used for:

- The Collateral Enhancement Program, which provides lending institutions with cash collateral deposits for additional collateral support for loans made to small businesses.<sup>139</sup>
- The Capital Access Program, which lessens a bank's risk by having ODSA make a deposit of 10%, 50%, or 80% of the loan amount.<sup>140</sup>

### **Port Authorities**

Ohio port authorities are finance corporation mechanisms that are attractive to municipal corporations, townships, counties, and regions because they can support a broad range of projects necessary for a region's economic development. A port authority serves all of the territory of any political subdivision or subdivisions that created it, but its service territory cannot overlap with another port authority.<sup>141</sup> Port authority statutory powers support operations as diverse as:

- operating riverports, lakeports, airports, and other transportation facilities;
- operating business incubators;
- hosting Small Business Administration small business development centers; and
- providing for financing of projects, such as industrial parks, parking garages, energy projects, public infrastructure, real estate development;
- contracting with political subdivisions and using tools such as bond funds to provide credit enhancement that lower project financing costs.<sup>142</sup>

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<sup>138</sup> See <http://www.bizjournals.com/columbus/blog/2014/04/ohio-makes-18m-available-for-small-business.html>.

<sup>139</sup> See Collateral Enhancement Program, [http://development.ohio.gov/bs/bs\\_cep.htm](http://development.ohio.gov/bs/bs_cep.htm).

<sup>140</sup> See Ohio Capital Access Program, [http://development.ohio.gov/bs/bs\\_ocap.htm](http://development.ohio.gov/bs/bs_ocap.htm).

<sup>141</sup> R.C. 4582.05.

<sup>142</sup> Ohio Economic Development Association ("OEDA") Annual Summit, *The Changing Role of Port Authorities in Ohio Economic Development* (Oct. 23, 2014), available at <http://www.ohioeda.com/Resources/Documents/Thursday%20145%20Dublin%20OEDA%20Ports-Panel-FINAL.pdf>.

As an example of the broad range of Port Authority purposes and operations, Toledo and its surrounding county, Lucas County, created the Toledo/Lucas County Port Authority, which manages two airports, a seaport, rail station, and a foreign trade zone.<sup>143</sup> Additionally, the Toledo/Lucas County Port Authority promotes economic development through grants and loans and provides, among other options, financing for infrastructure, small business, and redevelopment.<sup>144</sup>

Port authorities are not always located near a body of water or “port” – they are a finance corporation with a broad set of purposes. A port authority’s broad set of “authorized purposes” include the following: (1) activities that enhance, foster, aid, provide, or promote transportation, economic development, housing, recreation, education, governmental operations, culture, or research within the jurisdiction of the port authority; or (2) activities authorized by Sections 13 and 16 of Article VIII of the Ohio Constitution,<sup>145</sup> including to

- create or preserve jobs and employment opportunities,
- improve the economic welfare of the people of the State,
- control air, water, and thermal pollution,
- dispose of solid waste,<sup>146</sup> or
- enhance the availability of adequate housing and improve the economic and general well-being of the people of the State.<sup>147</sup>

Port authorities have broad powers to facilitate public-private cooperation. The list of port authority powers is extensive and includes

- the power to issue revenue bonds beyond the limit of bonded indebtedness,<sup>148</sup>
- the ability to receive and accept from any state or federal agency grants and loans and accept aid or contributions,<sup>149</sup>

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<sup>143</sup> See Toledo/Lucas County Port Authority, Maritime Services, <http://www.toledoportauthority.org/Services/MaritimeServices.aspx>.

<sup>144</sup> See Toledo/Lucas County Port Authority, Economic Development, <http://www.toledoportauthority.org/en-us/services/economicdevelopment.aspx>.

<sup>145</sup> R.C. 4582.01 and 4582.21.

<sup>146</sup> Ohio Constitution, Article VIII, Section 13.

<sup>147</sup> Ohio Constitution, Article VIII, Section 16.

<sup>148</sup> R.C. 4582.31(A)(8).

- the ability to charge, alter, and collect rentals and other charges for the use or services of their facilities,<sup>150</sup> and
- the power to establish bond funds.<sup>151</sup>

The Warren County Port Authority is innovative in fostering public-private cooperation. In 2012, the Port Authority took advantage of its exemption from state sales tax and changes in prevailing wage requirements to negotiate the complex ground lease for a \$15 million FedEx terminal in Lebanon. Similarly, the Port Authority uses these incentives to assist small business startups and ventures by not only providing them with this same access to funding, but also providing free seminars on small business development.

Any political subdivision creating a port authority may appropriate and expend its own public funds to finance or subsidize the port authority.<sup>152</sup> Port authorities serve as conduits for financing for property holdings and industrial revenue bonds, essentially what community improvement corporations (discussed below) used to handle.

Port authorities can enter into cooperative agreements with other political subdivisions whereby the port authority can exercise any power, perform any function, or render any service, for the other political subdivision, as provided by the cooperative agreement.<sup>153</sup> Through these cooperative agreements, a port authority may receive revenues that are sufficient to secure the payment of debt service on port authority revenue bonds that are issued for a particular project. The net indebtedness incurred by a port authority may never exceed 2% of the total value of all property within the territory comprising the port authority (as listed and assessed for taxation).<sup>154</sup> In addition to project revenues such as loan payments or lease payments, the cooperative agreements permit the port authority to collect other revenues such as payments in lieu of taxes (“PILOT”s) (tax-increment financing) and special-assessment payments (Property Assessed Clean Energy (“PACE”) or other special improvement district projects). (These programs are discussed in more detail in [Chapter 7 & Chapter 9](#).)

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<sup>149</sup> R.C. 4582.31(A)(20).

<sup>150</sup> R.C. 4582.31(A)(23).

<sup>151</sup> R.C. 4582.31(A)(11).

<sup>152</sup> R.C. 4582.25(A).

<sup>153</sup> R.C. 4582.17(B) and 4582.431(B).

<sup>154</sup> R.C. 4582.06(A)(3); 4582.31(A)(7).

Jergens, Inc. is an example of a Port Authority's ability to structure a taxable manufacturing bond issue. The project was financed by the Cleveland-Cuyahoga County Port Authority.<sup>155</sup> The manufacturer of fasteners and tooling components needed financing to build a \$9 million, 92,000-square-foot production-and-office complex on a former brownfield.<sup>156</sup> The Cleveland-Cuyahoga County Port Authority supported Jergens by issuing \$5,720,000 in taxable revenue bonds.<sup>157</sup>



Among the powers of a port authority is the power to buy, construct, maintain, lease, and sell interest in personal or real property.<sup>158</sup> Port authorities have often entered into capital leases in the financing of an economic development project. These leases have a lower project cost because of a sales tax exemption. Ohio exempts construction materials from sales tax (at both the county and state level), when they are used in constructing a port facility financed with a port-authority capital-lease structure.<sup>159</sup> This exemption is discussed in more

detail in Chapter 4.

An example of the benefit of this sales tax exemption is illustrated by a capital lease entered into by the Columbus-Franklin County Finance Authority several years ago. The construction cost of the project was \$35 million, construction material cost was \$17.5 million, and Franklin County's sales tax at the time was 6.75%. If the project had used conventional financing for the project, \$1,190,000 sales tax would have been paid. Since the capital lease structure was used, the project saved \$960,000 in sales tax.<sup>160</sup>

A port authority's power to assemble a wide array of sources of public and private revenues to secure its revenue bonds is a useful tool. Port authorities issue revenue bonds on a taxable or tax-exempt basis under the Internal Revenue Code of 1986.

<sup>155</sup> Cleveland-Cuyahoga County Port Authority, Development Finance, Testimonials, <http://www.portofcleveland.com/development-finance/testimonials>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> R.C. 4582.06(A)(12) and 4582.31(A)(4), (16).

<sup>159</sup> R.C. 4582.46.

<sup>160</sup> Ohio Economic Development Association (OEDA) Annual Summit, *The Changing Role of Port Authorities in Ohio Economic Development* (Oct. 23, 2014), available at <http://www.ohioeda.com/Resources/Documents/Thursday%20145%20Dublin%20OEDA%20Ports-Panel-FINAL.pdf>.

Examples of a port authority's role in financing public and private cooperative efforts can be found in the variety of transactions accomplished by the Port of Greater Cincinnati Development Authority. These include: community revitalization; public finance; Brownfield redevelopment; and parking facilities.<sup>161</sup> Fountain Square is the symbol of Cincinnati and has been so since 1871.<sup>162</sup> Working with Fountain Square developer Cincinnati Center City Development Corporation ("3CDC"), the Cincinnati Port Authority served as a conduit issuer of debt to refinance the bonds needed to launch the nearly \$50 million redevelopment.<sup>163</sup>

### **Creation and Organization of a Port Authority**

Port authorities are both corporate and politic.<sup>164</sup> Two statutory structures underlie Ohio port authorities: one for those created before July 9, 1982, and one for those created after July 9, 1982. To create a port authority, a municipality must act through an ordinance, a township must act through resolution of its trustees, and a county must act by resolution of the county commissioners.<sup>165</sup> A board of directors governs a port authority,<sup>166</sup> and the number of board members, their appointments, terms of office, qualifications, removal, and filing of vacancies are set by statute.<sup>167</sup> To take action, a majority of the board (or quorum) must vote affirmatively on the action.<sup>168</sup> Vacancies on the board will not prevent the formation of a quorum.<sup>169</sup>

The members of a board of directors have immunity from civil liability, meaning that no directors may be personally liable for any monetary damages that arise from actions taken in performing their official duties.<sup>170</sup> For example, officers of the Columbiana County Port Authority were immune from liability for attempting to stop the abandonment of a railroad in their jurisdiction because they acted within the scope of their official duties.<sup>171</sup> But directors

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<sup>161</sup> See Port of Greater Cincinnati Development Authority, <http://www.cincinnatiport.org/about>.

<sup>162</sup> See Port of Greater Cincinnati Development Authority, <http://www.cincinnatiport.org/wp-content/uploads/Fountain-Square.pdf>.

<sup>163</sup> *Id.*

<sup>164</sup> R.C. 4582.21(A).

<sup>165</sup> R.C. 4582.02 and 4582.22(A).

<sup>166</sup> R.C. 4582.03 and 4582.27.

<sup>167</sup> R.C. 4582.03(A) and 4582.27.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> R.C. 4582.031 and 4582.271.

<sup>171</sup> See *Railroad Ventures, Inc. v. Drake*, 138 Ohio App.3d 315 (7th Dist. 2000).

may be liable if their actions were not performed in good faith, involved intentional misconduct, or involved a knowing violation.<sup>172</sup>

### **Certain Characteristics of Port Authorities**

To finance its projects with the proceeds of revenue bonds, the board of directors of a port authority must adopt a resolution to issue revenue bonds.<sup>173</sup> The board of directors may secure these bonds through a trust agreement but may not pledge general credit or taxing power of the port authority for payment of debt charges on these bonds.<sup>174</sup> For example, in 2005, an Ohio court of appeals determined that the Toledo/Lucas County Port Authority was within its statutory authority to contract with a private developer to build residences using funding that came from issuing revenue bonds and levying special assessments as a lien on the property. The court reasoned that the funding did not come from general public tax money.<sup>175</sup>

Additionally, any political subdivision within a port authority's jurisdiction may appropriate and expend public funds not otherwise appropriated to finance or subsidize the authorized purposes of the port authorities.<sup>176</sup> This power is important because port authorities often receive funding from the State and its local governments. This funding supplements project revenues used to pay debt service on port authority revenue bonds.

Port authorities may contract to create, construct, alter, or repair its facilities, but if that cost exceeds \$100,000, they must provide public notice. The project will be subject to competitive selection unless otherwise exempted.<sup>177</sup> Port authorities, may, under cooperative agreements, procure goods and services for contracting subdivisions.<sup>178</sup>

### **Special Improvement Districts**

A special improvement district ("SID") can be created when a community desires public improvements and services above and beyond those that are currently provided by the township or municipality.<sup>179</sup> Property owners can petition their local legislative authority to establish a SID.<sup>180</sup> If the petition is approved, the property owners within the district's borders

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<sup>172</sup> R.C. 4582.031 and 4582.271.

<sup>173</sup> R.C. 4582.06(A)(4).

<sup>174</sup> *Id.*

<sup>175</sup> See *Westfield Franklin Park Mall, LLC v. Toledo/Lucas Cty. Port Auth.*, 6th Dist. Lucas No. L-04-1380, 2005-Ohio-5248.

<sup>176</sup> R.C. 4582.023.

<sup>177</sup> R.C. 4582.12(A)(2)(a).

<sup>178</sup> *Id.*; see also R.C. 4582.17(B).

<sup>179</sup> R.C. 1710.02(A).

<sup>180</sup> *Id.*

will pay special assessments (similar to and collected at the same time as taxes) to pay costs of services and public improvements in accordance with the SID plan.<sup>181</sup>

To form a district, at least 60% of the owners of real property that fronts to any public improvement (e.g., roads, alleys, etc.) within the district must petition the local legislative authority for the SID.<sup>182</sup> Alternatively, at least 75% of the owners of the land area within the proposed SID must petition for its creation.<sup>183</sup> Residents may submit the petition themselves, or a nonprofit corporation may do so. The petition may include an initial plan for the public improvements to be completed within the district.<sup>184</sup>

Once the SID and initial plan are approved, each participating township and municipality must levy a special assessment to pay for the costs of the initial plan.<sup>185</sup> The levy must be for no more than 10 years from the date of the plan's approval.<sup>186</sup> The services or improvements included in the initial plan will be deemed a special benefit to property owners within the district.<sup>187</sup> These services, however, must be in addition to any public improvements or services provided by participating political subdivisions.<sup>188</sup> Because a SID is not a political subdivision—it is a public agency and a public authority<sup>189</sup>—participating subdivisions may not rely on it to provide basic services. This means that a political subdivision may not reduce or fail to increase any public improvements or services provided or to be provided by the participating political subdivision.<sup>190</sup>

Each SID must be governed by a board of trustees of a nonprofit corporation.<sup>191</sup> If a nonprofit organization owns property within the proposed SID, their board may govern the district. This role may be supplemental to their charitable purposes.<sup>192</sup> If a nonprofit organization does not exist, one must be created in accordance with Revised Code Chapter 1702.<sup>193</sup> The nonprofit organization must draft articles of incorporation that include

- the name of the district and each political subdivision the district lies in;

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<sup>181</sup> *Id.*; R.C. 1710.02(F).

<sup>182</sup> R.C. 1710.02(E).

<sup>183</sup> *Id.*

<sup>184</sup> R.C. 1710.02(F).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (stating that plans including special energy improvement projects may be for longer durations).

<sup>187</sup> R.C. 1710.02(F).

<sup>188</sup> R.C. 1710.08.

<sup>189</sup> R.C. 1710.02(B).

<sup>190</sup> R.C. 1710.08.

<sup>191</sup> R.C. 1710.02(A).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*; R.C. 1710.02(D).

- a description of the territory of the district, with sufficient specificity that a property owner may determine if their property lies within the district;
- the process for amending the articles of incorporation;
- the purpose in creating the district; and
- a description of how the district’s purpose improves its public health, safety, peace, convenience, and welfare.<sup>194</sup>

The board must have at least five directors.<sup>195</sup> The local legislative authority may appoint at least one member. The municipal executive of each municipal corporation in which the SID lies must also serve as a member.<sup>196</sup> The remaining board members must be members of the district.<sup>197</sup> Each property owner within a SID is a member of the district.<sup>198</sup> No parcel of real estate may be included in more than one district, unless the owner of the property files a written consent.<sup>199</sup>

If an initial plan was not submitted with the petition to create the SID, the board of directors must then create and implement an improvement plan in line with the property owners’ wishes.<sup>200</sup> The board may develop one or more improvement plans that benefit all or any part of the district. Each improvement plan must set forth the specific public improvements or public services to be provided, the area the services will be provided to, and the method of assessment to be used.<sup>201</sup> Each plan must also indicate the time period assessments are to be levied and if public services are included in the plan, the period of time the services are to remain in effect.<sup>202</sup> Plans for public improvements may include the planning, design, construction, reconstruction, enlargement, or alteration of any public improvements, and the acquisition of land for the improvements.<sup>203</sup> Revised Code 1710.07 details what may be included in the cost of any public improvements or public services plan of a SID.

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<sup>194</sup> R.C. 1710.02(D)(1)-(4).

<sup>195</sup> R.C. 1710.04(A).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> R.C. 1710.03(A); see R.C. 1710.06(C) (requiring a special assessment on all real property within the SID).

<sup>199</sup> R.C. 1710.02(A).

<sup>200</sup> For an example of a SID improvement plan, see “SID Services Plan 2011-2015,” Downtown Dayton Special Improvement District, <http://www.downtowndayton.org/pdfs/SIDServicesPlan20112015.pdf>.

<sup>201</sup> R.C. 1710.06(A).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

The board must submit each new plan to the appropriate legislative and executive authorities, which can review the plan, amend the plan, and submit the plan as a petition to members of the district. Once the petition is signed as provided by statute, it may be submitted to each legislative authority, which are required to approve or reject the petition within 60 days after receiving it. If the petition is approved by the legislative authority of each participating political subdivision, the plan contained in the petition will be effective according to statute.<sup>204</sup> Then the board must carry out the improvement plan. To achieve this goal, the board may operate like any corporation formed under Revised Code Chapter 1702, which includes the authority to contract with entities and convey property on behalf of the property owners.<sup>205</sup> A participating political subdivision of a SID may also issue bonds and notes in anticipation of collecting the special assessments.<sup>206</sup>

More than one SID may be created within a participating political subdivision, but all territory in a district must be contiguous. The only exception is if all parcels within the SID contain at least one special energy improvement.<sup>207</sup> Church and public property, including federal, state, and local lands, cannot be included in a SID unless the religious or public institutions specifically request in writing that the property be included. Religious and public property may also be included in a SID if the property owner is a member of the existing qualified nonprofit corporation creating the district.<sup>208</sup>

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<sup>204</sup> R.C. 1710.06(B).

<sup>205</sup> R.C. 1710.02(G).

<sup>206</sup> R.C. 1710.12.

<sup>207</sup> R.C. 1710.02(A).

<sup>208</sup> *Id.*

Cleveland has created a SID covering more than 250 properties in its downtown area. Established in 2004, the SID—which is slightly smaller than the boundaries of the downtown region—covers the Historic Gateway Neighborhood, the Historic Warehouse District, Playhouse Square, Flats Oxbow, and the Campus District.<sup>209</sup> Property owners within these areas have contracted with the Downtown Cleveland Alliance (“DCA”), a nonprofit corporation, to manage the SID as mandated in Revised Code 1710.02(A).<sup>210</sup> In addition to special assessments on property owners within the SID, local business owners and philanthropic organizations have contributed additional funds to improve the safety and cleanliness of the downtown region.<sup>211</sup> To achieve this goal, DCA operates the Ambassador Program. DCA Ambassadors, dressed in bright yellow shirts, are dispatched nearly 24 hours a day throughout downtown. These ambassadors clean streets, collect trash, remove graffiti, perform safety patrols, and provide social services to the homeless.<sup>212</sup> The Ambassador Program has helped to make downtown Cleveland a safer, more beautiful area for residents and visitors.

SIDs are valuable tools that cities can utilize to improve central business districts. SIDs can be easily tailored to meet the needs of the communities they cover, making them useful tools for any sized community.

### **Community Urban Redevelopment Corporations**

Municipal corporations may create community urban redevelopment corporations (“CURC”s) to target blighted areas of their communities. They are either for-profit or nonprofit corporations<sup>213</sup> that redevelop certain blighted urban areas by acquiring and maintaining a project.<sup>214</sup> They operate under a “community development plan.”<sup>215</sup> A community development plan must be approved by the governing body of the municipal corporation where such blighted area is situated. The plan must include an agreement for the sale or lease of all or a portion of the land included in the redevelopment to the CURC.<sup>216</sup>

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<sup>209</sup> “Special Improvement District (SID),” Downtown Cleveland Alliance, <http://www.downtowncleveland.com/about-us/special-improvement-district.aspx>.

<sup>210</sup> *Id.*

<sup>211</sup> See [www.downtowncleveland.com/get-involved/dca-membership.aspx](http://www.downtowncleveland.com/get-involved/dca-membership.aspx).

<sup>212</sup> See “Ambassadors Downtown,” Downtown Cleveland Alliance, [www.downtowncleveland.com/ambassadors/ambassador-impact.aspx](http://www.downtowncleveland.com/ambassadors/ambassador-impact.aspx).

<sup>213</sup> R.C. 1728.02(A)(2).

<sup>214</sup> R.C. 1728.01(B).

<sup>215</sup> R.C. 1728.01(D).

<sup>216</sup> R.C. 1728.01(F)(1).

To establish a CURC, articles of incorporation must be filed with the Ohio Secretary of State. Specifically, the articles must state that the objective of the corporation is (1) to operate as a CURC and (2) to initiate and conduct projects for the clearance, replanting, development, and redevelopment of blighted areas within municipal corporations.<sup>217</sup> They must also include a declaration that the corporation has been organized to serve a public purpose.<sup>218</sup>

The improvements made in the development or redevelopment of a blighted area under the community redevelopment statute are declared to be a public purpose. With the approval of the board of education of the city, local, or exempted village school district within the territory where the improvements will be made, the assessed valuation of the improvements exempted from taxation may exceed 75%, but not 100%.<sup>219</sup> When a city demonstrates a clear purpose to use land acquired as part of an urban renewal plan, the land is to be used for a public purpose and is exempt from real property tax.<sup>220</sup> The exemption will not last any longer than 30 years for one-, two-, or three- family residential dwelling units, and 20 years for all other uses of the improvements.<sup>221</sup>

The CURC contracting with an impacted city will pay an annual service charge in lieu of taxes on the improvements that are exempted from taxation under Revised Code 1728.10. Similar to payments in lieu of taxes required to be paid in connection with a TIF as discussed in [Chapter 7](#), the annual service charge will be assessed and paid in two equal installments at the same time and in the same manner as real property taxes. The service charge will be deposited into the municipality's urban tax equivalent fund. The amount of the annual service charge will be set forth in the financial agreement. The service charge will not exceed the annual amount of real property taxes that would have been charged against the percentage of such improvements exempted from taxation had that percentage not been exempted from taxation. The county treasurer may secure the service charge payments by a lien on the exempted improvements. Such a lien will attach, and may be perfected, collected, and enforced, in the same manner as a mortgage lien on real property. This lien will otherwise have the same force and effect as a mortgage lien on real property.

An application for a project to be handled by the CURC must include evidence the project is supported by a financial agreement between the CURC and the municipal corporation.<sup>222</sup> Importantly, the project must be fully complete within 20 years.<sup>223</sup> If the CURC

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<sup>217</sup> R.C. 1728.08(A)(2).

<sup>218</sup> R.C. 1728.08(A)(3).

<sup>219</sup> R.C.1728.10(A).

<sup>220</sup> *Cincinnati v. Limbach*, BTA No. 87-G-320 (June 8, 1990).

<sup>221</sup> R.C. 1728.10(B) and 1728.12.

<sup>222</sup> R.C. 1728.07(A)-(J).

cannot complete the project, the municipality must complete the project.<sup>224</sup> If a CURC wishes to transfer its project to another CURC, it may do so only with the consent of the municipal corporation.<sup>225</sup>

A CURC, through its board of directors,<sup>226</sup> may acquire land from a local municipal corporation through sale or lease,<sup>227</sup> and may also acquire public or private property, by purchase or otherwise.<sup>228</sup> A municipal corporation has eminent domain powers for urban renewal and slum or blight removal, which it may use in connection with a CURC project.<sup>229</sup> The municipal corporation may then sell or lease the land to the CURC.<sup>230</sup> A municipal corporation may issue bonds to pay costs of an urban renewal project and enter all necessary contracts.<sup>231</sup>

Several CURCs exist throughout Ohio, especially in its urban centers.<sup>232</sup> A benefit of these corporations may be that once they begin improving otherwise blighted areas, the community urban redevelopment corporations can sometimes kick start development that may not have otherwise occurred and sell their development plans to buyers.

For example, the Vine Street Community Redevelopment Corporation near the University of Cincinnati created a portfolio to transform old structures into retail and housing and were able to sell that portfolio to a consortium for further development<sup>233</sup>

By creating strategic plans to address and combat urban blight, through community urban redevelopment corporations, communities can see dramatic upswings in even the most devastated areas. By addressing blight from bottom-up—by retaining jobs and creating greater economic opportunities in areas—urban districts suffering from blight can see economic growth and even economic success.

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<sup>223</sup> R.C. 1728.07.

<sup>224</sup> R.C. 1728.08(B).

<sup>225</sup> R.C. 1728.04(B).

<sup>226</sup> R.C. 1728.02(A).

<sup>227</sup> R.C. 1728.03.

<sup>228</sup> R.C. 1728.05.

<sup>229</sup> *AAAA Ent., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157 (1990).

<sup>230</sup> R.C. 1728.03.

<sup>231</sup> R.C. 725.05 and 725.10.

<sup>232</sup> See <https://www.uc.edu/af/commdev.html> for community development around the University of Cincinnati area; see also <http://downtowncolumbus.com/home/about-us/cddc-capitol-south/> for development around the downtown Columbus area.

<sup>233</sup> See <https://www.uc.edu/af/commdev/VCURC.html>.

In Cincinnati's Over-The-Rhine neighborhood, the Over-The-Rhine Brewery District Urban Development Corporation is heavily investing in the area's renaissance. During the early 1800s, Over-The-Rhine was home to thousands of German immigrants. Over time, the once working-class neighborhood fell into severe economic distress, suffering from rampant crime and a nearly 60% poverty rate by the turn of the 21st century.<sup>234</sup> Through the work of a CURC and 3CDC, the downtown Cincinnati economic development corporation, Over-The-Rhine has experienced an economic revitalization. The area is now home to a variety of restaurants, bars, shops, and luxury housing units.<sup>235</sup> As a result, the area is also experiencing less crime. Since 3CDC and the Over-The-Rhine Brewery District Urban Development Corporation began investing in the area in the early 2000s, crime rates have plummeted 50%.<sup>236</sup> As young professionals flock to neighborhoods like Over-The-Rhine for its comparatively inexpensive rent and hip atmosphere, corporations are similarly attracted to these regions. General Electric recently announced that it will move to a new facility downtown.<sup>237</sup>

### **Joint Economic Development Options**

Joint economic development options may be used to create or preserve jobs and employment opportunities and to increase investment and cooperation between two or more contracting subdivisions. Joint economic development options allocate the financial and budgetary burdens, risks and benefits as agreed between the contracting parties.<sup>238</sup> The parties pool and share resources, including income taxes if authorized to be levied by the district's board under the contract. There are two types of joint economic development options: joint economic development districts and municipal utility districts.

### **Joint Economic Development Districts**

Joint economic development districts ("JEDD"s) are created and organized through contracts between two or more contracting parties under three sets of statutes.<sup>239</sup> Two of these statutes, Revised Code 715.70 and Revised Code 715.71, apply only to

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<sup>234</sup> "Over-The-Rhine," Cincinnati Center City Development Center, <http://www.3cdc.org/where-we-work/over-the-rhine/>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Sharon Coolidge, Dan Horn and Bowdeya Tweh, "GE chooses The Banks for new operations," *The Cincinnati Enquirer* (June 19, 2014).

<sup>238</sup> R.C. 715.71(B).

<sup>239</sup> R.C. 715.70, 715.71, and 715.72–.84.

- municipal corporations and townships within a county that has adopted a charter (currently only Cuyahoga and Summit counties),
- municipal corporations and townships with an airport that is owned by the municipal corporation and located outside its territorial boundaries,
- municipal corporations and townships that are part of or contiguous to a transportation improvement district and have entered into a JEDD contract before November 15, 1995, and
- municipal corporations that have previously entered into a contract creating a JEDD, even if the territory to be included in the district does not meet the requirements relating to owning an airport.<sup>240</sup>

The third statute, Revised Code 715.72–.81, applies to municipal corporations and townships that are located in the same county or in adjacent counties.<sup>241</sup>

For example, in 2010, Pickaway County and the City of Columbus created a JEDD to cooperate to expand commercial and industrial development in the area south of Rickenbacker International Airport. That JEDD is estimated to bring in 15,000 to 20,000 jobs to central Ohio in the next 30 years.

Revised Code 715.70 JEDDs, 715.71 JEDDs, and 715.72–.81 JEDDs each have various procedural requirements and steps relating to, among other items, public hearings,<sup>242</sup> notices,<sup>243</sup> submission of petitions and signed statement of property owners,<sup>244</sup> referendums on actions of boards of township trustees,<sup>245</sup> and elections before the time when a contract is approved and a JEDD created.<sup>246</sup>

JEDD contracts generally provide for the amount or nature of the contribution of each municipal corporation and township to the development and operation of the district. The contracts may provide for sharing the costs of operating and improving the district. The contributions may be in any form to which the contracting municipal corporations and

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<sup>240</sup> R.C. 715.70(A).

<sup>241</sup> R.C. 715.72(B).

<sup>242</sup> R.C. 715.70(D)(2), 715.71(C), and 715.75.

<sup>243</sup> *Id.*

<sup>244</sup> R.C. 715.70(C)(1)(a), 715.70(C)(1)(b)(4), and 715.76(F) & (G).

<sup>245</sup> R.C. 715.70(D)(3) and 715.77(A)(4).

<sup>246</sup> R.C. 715.71 and 715.77.

townships agree. The contributions may include the provision of services, money, real or personal property, facilities, or equipment.

The contract may provide for the parties to share revenue from taxes levied on property by one or more of the contracting parties. In addition, contracts may provide for new or additional services, or facilities, including expanded or additional capacity for or other enhancement of existing services or facilities.<sup>247</sup>

A district is governed by a board of directors. The contract enumerates the specific powers, duties, and functions of the board of directors of the district and provides for the determining procedures that are to govern the board.<sup>248</sup> The contract may also authorize the board of directors to levy an income tax to facilitate the district's purposes, including economic development.<sup>249</sup>

The Concord-Painesville JEDD incentivizes businesses to locate within their JEDD using a lower cost of electricity that can be provided through Painesville City's electric power utility. The JEDD advertises City of Painesville electricity, often at a significant discount as compared to other providers. The JEDD also advertises lower water utility rates as well as tax increment financing for public infrastructure improvements. In 1994, as another example, Akron became the first community in Ohio to establish township-wide JEDDs. Akron is a part of four JEDDs: Bath-Fairlawn-Akron JEDD, Copley-Akron JEDD, Coventry-Akron JEDD, Springfield-Akron JEDD, which are an alternative to annexation. These JEDDs provide a way to partner with township neighbors in encouraging planned suburban growth.

### **Municipal Utility Districts**

Municipal utility districts have replaced joint economic development zones as of January 1, 2015 and joint economic development zones created before that date automatically have been converted to municipal utility districts.<sup>250</sup> Municipal utility districts allow two or more municipal corporations to contract whereby they agree to share in the costs of improvements for an area or areas located in one or more of the contracting municipalities. They designate the area as a municipal utility district to facilitate new or expanded growth for commercial or economic development.<sup>251</sup> The contract should set forth the contributions that each municipal corporation will make toward the municipal utility district.<sup>252</sup> The contributions may include the

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<sup>247</sup> R.C. 715.74, 715.70, and 715.71.

<sup>248</sup> R.C. 715.70(F), 715.71(G), and 715.74(B).

<sup>249</sup> R.C. 715.74(C)(1), 715.71(G), and 715.70(F).

<sup>250</sup> R.C. 715.691 and 715.84(J).

<sup>251</sup> R.C. 715.84(B).

<sup>252</sup> R.C. 715.84(C).

provision of services, money, or equipment. The contract may provide for the contracting parties to distribute among themselves, in the manner they agree to, any municipal income tax revenues derived from the income earned by persons employed by businesses that locate within the district and from the net profits of such businesses.<sup>253</sup> Before each municipal corporation can enact ordinances ratifying the contract, they must submit it to the public for hearing and submit it to the electors for an affirmative vote.<sup>254</sup>

### **Community Improvement Corporations**

Community improvement corporations (“CIC”s) are nonprofit corporations, created by statute as either economic development corporations or county land reutilization corporations (also known as land banks). One advantage to these types of corporations is that they may attract private capital, as these corporations are statutorily required to maintain the confidentiality of financial and proprietary information, as discussed in more detail in Chapter 13.<sup>255</sup> Some may have tax-exempt status with the IRS. CICs can be funded through a variety of sources, including donations, membership fees, application fees, as well as through state and federal grants. CICs, through their governing boards, can contract with the federal government, the state or any political subdivision, county officers, and any other party, whether nonprofit or for-profit.<sup>256</sup> CICs may end up serving in a leadership role in some areas to promote local economic development initiatives.

To facilitate its purposes and generate revenue, CICs have broad authority, including borrowing money by means of loans, lines of credit, or any other financial instruments or securities. This borrowing may occur through issuing bonds, debentures, notes, or other evidences of indebtedness, whether secured or unsecured. The CIC may secure them by mortgage or other lien on its property.<sup>257</sup> CICs are often involved in acquiring, selling, or leasing property owned by political subdivisions that the local government wants to offer for development. Importantly, in order for a CIC to be able to sell real property transferred to it by a local government, the CIC must be the designated agency for that government, must have an agreement with that government, and may sell lands or interests only in lands owned by that government entity.<sup>258</sup> Transactions can often be accomplished through the CIC with fewer restrictions than governmental entities (for example, competitive bidding requirements).<sup>259</sup>

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<sup>253</sup> *Id.*

<sup>254</sup> R.C. 715.84(D)–(F).

<sup>255</sup> R.C. 1724.11.

<sup>256</sup> R.C. 1724.02(O).

<sup>257</sup> R.C. 1724.02(A)(1).

<sup>258</sup> 2014 Ohio Atty.Gen. Ops. No. 14-003.

<sup>259</sup> *See. e.g.,* R.C. 307.86.

## **Economic Development Corporation**

Economic development corporations, the most common form of CIC, are formed to advance, encourage, or promote the industrial, economic, commercial, and civic development of a community.<sup>260</sup> An example of a CIC generating revenue for a project is the use of revenue bonds to finance the acquisition and construction of an office building containing rental space for physicians, dentists, a pharmacy, and a laboratory.<sup>261</sup>

The articles of incorporation of an economic development CIC must specify the territory where it proposes to operate because the territory of multiple CICs cannot overlap.<sup>262</sup> A CIC may be designated as an agent by a county, one or more townships, one or more municipalities, two or more adjoining counties, or any combination of them. When a CIC is designated by a political subdivision, it becomes the agent to promote and encourage the establishment and growth of industrial, commercial, distribution, and research facilities in the jurisdiction. While a CIC can serve multiple counties, if it does, the county or other political subdivisions cannot designate the multi-county CIC as its agent, nor can a county designate more than one CIC as its agent.<sup>263</sup> If a CIC is designated as the agent of a political subdivision, Revised Code 1724.10(B)(1) requires that not less than 40% of the directors of the CIC be elected or appointed officials of the designated political subdivision(s). This requirement generally subjects a CIC to open meetings laws (as discussed in [Chapter 13](#)).

As one example of CIC activities in Ohio, the Hocking County CIC has created a revolving loan fund for any start up or existing business located in Hocking County.<sup>264</sup> Funds may be used for working capital, purchase of real estate, repair of equipment, inventory and supplies, furniture and fixtures, leasehold improvements, insurance premiums, and fees and licenses.<sup>265</sup>

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<sup>260</sup> R.C. 1724.01(B)(1).

<sup>261</sup> *Cty of Stark v. Ferguson*, 2 Ohio App.3d 72 (5th Dist. 1981).

<sup>262</sup> 1970 Ohio Atty.Gen. Ops. No. 70-007.

<sup>263</sup> 1963 Ohio Atty.Gen. Ops. No. 63-600.

<sup>264</sup> See Hocking County Community Improvement Corporation, Incentives, <http://www.hockingcountycic.com/pages/advantages.html>.

<sup>265</sup> *Id.*

### **County Land Reutilization Corporation (“Land Bank”)**

County land reutilization corporations are a form of CIC, (first authorized in Ohio in 2009) that facilitate the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property. They will often hold and manage the property and work to clear the title of the property, which promotes economic and housing development in the county or region.<sup>266</sup> In 2012, the Ohio Attorney General’s Office allocated \$75 million won in a settlement against mortgage companies for defrauding Ohioans to the State’s land banks in the “Ohio Attorney General’s Moving Ohio Forward Program.”<sup>267</sup> Until September 2015, land banks could be formed only in counties with populations greater than 60,000, but the Ohio legislature voted to eliminate that threshold, thereby extending land-banking authority to every Ohio county.<sup>268</sup>



Land Banks can engage in code enforcement and nuisance abatement, including cutting grass and weeds, boarding up vacant or abandoned structures, and demolishing condemned structures on properties subject to a delinquent tax or assessment lien or property for which a municipal corporation or township has contracted with the land bank to provide code enforcement or nuisance abatement assistance.<sup>269</sup>

To advance its purposes, a land bank can request by resolution that the board of county commissioners pledge revenues to secure borrowings by the corporation as well as request the board of county commissioners to issue notes and municipal corporations to issue bonds for public infrastructure improvements.<sup>270</sup>

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<sup>266</sup> R.C. 1724.01(B)(2).

<sup>267</sup> See <http://www.ohioattorneygeneral.gov/Media/News-Releases/December-2012/Attorney-General-DeWine-Praises-Efforts-of-City-of>.

<sup>268</sup> Western Reserve Land Conservancy, All Ohio counties are now eligible to form land banks, <http://wrlandconservancy.org/articles/2015/08/03/all-ohio-counties-are-now-eligible-to-form-land-banks/>.

<sup>269</sup> R.C. 1724.02(J).

<sup>270</sup> R.C. 1724.02(A)(2).

Through the “Ohio Attorney General’s Moving Ohio Forward Program,” the several land banks throughout Ohio were able to demolish derelict housing to build new housing, expand parking, and create open lots for community gardening.<sup>271</sup> In Mahoning County, a blighted home was bulldozed to create an ADA-accessible house for a retired Marine staff sergeant and his family.<sup>272</sup> In Lucas County, new low-income homes were built where abandoned housing once stood.<sup>273</sup> In Trumbull County, abandoned lots were converted to greenspaces and gardens.<sup>274</sup> The Cuyahoga County Land Bank administered the largest number of funds in the State, \$23 million, a combination of local funds and \$11,850,744 from the Ohio Attorney General’s Office, in Cuyahoga County’s attempt to tackle the estimated 100,000 abandoned properties in need of demolition.<sup>275</sup> Similarly, the Hamilton County Land Bank has administered the \$5.8 million raised by Hamilton County and money from the Ohio Attorney General’s Office to demolish abandoned property in and around Cincinnati.<sup>276</sup>

### **Development Corporations**

Development corporations are for-profit corporations governed by boards of directors and formed by ten or more persons to develop and stimulate industry, business, and agricultural prosperity of the state. Development corporations also locate funders for industry, business, and agricultural undertakings.<sup>277</sup> They may (1) employ personnel and make contracts;<sup>278</sup> (2) borrow money and issue bonds or other obligations;<sup>279</sup> (3) make loans to specified persons or bodies;<sup>280</sup> (4) acquire, hold, operate, maintain, improve, lease, transfer, encumber, or otherwise dispose of property;<sup>281</sup> (5) cooperate with state bodies concerned with economic development and other government agencies;<sup>282</sup> and (6) take means necessary or convenient to carry out its powers.<sup>283</sup>

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<sup>271</sup> Ohio Attorney General’s Office Moving Ohio Forward Demolition Grant Program, Program Summary (2012-2014).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> R.C. 1726.02(C).

<sup>278</sup> R.C. 1726.04(A), (E).

<sup>279</sup> R.C. 1726.04(B).

<sup>280</sup> R.C. 1726.04(C).

<sup>281</sup> R.C. 1726.04(D)–(G).

<sup>282</sup> R.C. 1726.04(H).

<sup>283</sup> R.C. 1726.04(I).

## **New Community Authorities**

A new community authority is created to encourage the orderly development of well-planned, diversified, and economically sound new communities.<sup>284</sup> “New communities” are communities, and additions to existing communities, planned to include industrial, commercial, residential, cultural, educational, or recreational facilities.<sup>285</sup> A new community authority is a body corporate and politic, governed by a board of trustees.<sup>286</sup> New community authorities and their board of trustees are charged to implement programs to develop a new community characterized by well-balanced and diversified land use patterns. These programs include land acquisition and land development, the acquisition and maintenance of “community facilities”, and the provision of services.<sup>287</sup>

The Liberty Community Infrastructure Financing Authority in Delaware County is an example of a “community authority” created under Revised Code Chapter 349,<sup>288</sup> and has financed the building of facilities and development in the city of Powell and Delaware County.

The community facilities that are developed as part of a new community development program include all property and structures, including related furnishings, to be owned and maintained under the program or to further community activities. These facilities may be public, community, village, neighborhood, or town buildings, centers and plazas, auditoriums, day care centers, recreation halls, educational facilities, health care facilities, telecommunications facilities, recreational facilities, natural resource facilities (including parks and other open space land), lakes and streams, cultural facilities, community streets and off-street parking facilities, pathway and bikeway systems, pedestrian underpasses and overpasses, lighting facilities, design amenities, or other community facilities, and buildings needed for water supply or sewage disposal installations, or energy facilities.<sup>289</sup>

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<sup>284</sup> R.C. 349.01(A)–(B).

<sup>285</sup> R.C. 349.01(A).

<sup>286</sup> R.C. 349.01(D).

<sup>287</sup> R.C. 349.01(B).

<sup>288</sup> The Liberty Community Infrastructure Financing Authority, [http://lcifa.org/html/what\\_is\\_lcifa.html](http://lcifa.org/html/what_is_lcifa.html).

<sup>289</sup> R.C. 349.01(I).

The Northern New Community Authority in Delaware County entered into a cooperative in 2013 to improve the Glenn Parkway between U.S. Route 36 and 37 to Curve Road for residential development. Similarly, the Bridge Street New Community Authority is developing walkable, urban-style neighborhoods with residential and commercial space in the city of Dublin.<sup>290</sup> The Jeffery Place New Community Authority in the city of Columbus is also developing urban community living near the downtown.<sup>291</sup>

Importantly, new community authorities encourage private enterprise as well as the cooperation between the developer of the new community and the new community authority to carry out a new community development program.<sup>292</sup> In this context, a “developer” means any person who owns or controls, through leases of at least 75 years' duration, options to purchase, the land within a new community district as well as any municipal corporation, county, or port authority that owns the land within a new community district, or can acquire such land, either by voluntary acquisition or condemnation to eliminate slum, blighted, and deteriorated areas.<sup>293</sup>

To generate revenue for the costs of the new community program and its related projects, new community authorities have several options. New community authorities may charge service and user fees, rentals, and other charges,<sup>294</sup> issue bonds,<sup>295</sup> and may invest funds.<sup>296</sup>

A new community authority can levy a community development charge.<sup>297</sup> The community development charge is a dollar amount that is determined based on one or a combination of the following: (1) the assessed valuation of real property in the new community district at the time of sale, lease or other conveyance by the developer or new community authority (similar in effect to a real property taxes, special assessments or payments in lieu of taxes); (2) the incomes (similar to an income tax) of the residents of property in the district if such property is residential; (3) the profits or gross receipts, or other revenues of any businesses located in the district (similar to a business gross receipts tax); and (4) a uniform or

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<sup>290</sup> Bridge Street Brief, located at [www.bridgestreet.dublinohiousa.gov/2015/wp-content/uploads/2015/05/Bridge-Street-NCA-Brief.pdf](http://www.bridgestreet.dublinohiousa.gov/2015/wp-content/uploads/2015/05/Bridge-Street-NCA-Brief.pdf).

<sup>291</sup> Columbus City Council, Resolution No. 050X-2004 (passed March 9, 2004).

<sup>292</sup> R.C. 349.02.

<sup>293</sup> R.C. 349.01(E).

<sup>294</sup> R.C. 349.06(E) and 349.07.

<sup>295</sup> R.C. 349.08--11.

<sup>296</sup> R.C. 349.12.

<sup>297</sup> R.C. 349.01(L).

other fee on each parcel of real property owned, sold, or conveyed.<sup>298</sup> A community development charge is often included as a covenant running with the land in deeds, land contracts, leases, and other instruments or conveyance for transfers of real property in the new community authority.<sup>299</sup>

The New Albany Community Authority levies a community charge from properties within its district of the village of New Albany, the city of Columbus, and Plain Township.<sup>300</sup> The Community Authority uses the charge to cover the construction cost of the new local high school, road construction, and fire station funding, including a new ladder truck.<sup>301</sup>

When any community development charge is not paid when due, the new community authority may certify the community development charge to the county auditor. The auditor will enter the unpaid charge on the tax list and duplicates of real property opposite the parcel against which it is charged and will certify the charge to the county treasurer for collection as if it were unpaid taxes. An unpaid community development charge is a lien on property against which it is charged from the date the charge is entered on the tax list. It will be collected in the manner provided for the collection of real property taxes. Once the charge is collected, it will be paid immediately to the new community district.<sup>302</sup>

The lien is important because many covenants running with the land include agreements of the owner to pay annually or semiannually the community development charge for the benefit of the new community authority. This charge is to cover the cost of developing community facilities, the debt service thereof, and any other cost incurred by the authority in the exercise of its powers. In essence, the community development charge secures bond, notes, or other obligations issued by the new community authority to pay costs of its community development program. The statute provides guidance on the issuance of bonds and notes, including refunding bonds,<sup>303</sup> the security of bonds by trust agreements,<sup>304</sup> the rights of bondholders,<sup>305</sup> and the investment of funds by the authority and distribution of the income.<sup>306</sup>

New community authorities have important limits on their authority. For example, they have no power or authority over zoning or subdivision regulation, provision of fire or police

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<sup>298</sup> *Id.*

<sup>299</sup> R.C. 349.07.

<sup>300</sup> About the New Albany Community Authority, [www.newalbanycommunityauthority.org](http://www.newalbanycommunityauthority.org).

<sup>301</sup> *Id.*

<sup>302</sup> R.C. 349.07.

<sup>303</sup> R.C. 349.08.

<sup>304</sup> R.C. 349.10.

<sup>305</sup> R.C. 349.11.

<sup>306</sup> R.C. 349.12.

protection, or, unless such services cannot be obtained from other existing political subdivisions, water supply or sewage treatment and disposal.<sup>307</sup> Additionally, their police powers should not conflict with those of other entities because the police powers of municipal corporations, townships, counties, zoning boards, or other local government agencies trump those of the new community authorities.<sup>308</sup>

### **Community Entertainment District**

Property owners of entertainment, retail, educational, sporting, social, cultural, or arts establishments in close proximity to each other may elect to create a community entertainment district.<sup>309</sup> The main benefit of these districts is the ability to more easily obtain alcohol permits and to allow open container alcohol consumption within the districts.<sup>310</sup> Designated districts must be bounded and contain at least 20 contiguous acres.<sup>311</sup> In order to establish an entertainment district, property owners must submit an application to the mayor of the municipal corporation or board of trustees of the township in which it is located.<sup>312</sup> Within 30 days of receipt of the application, the mayor or board of trustees must make a recommendation and publish the recommendations, legislative authority, and date and location of public hearing once a week for two weeks in a newspaper of general circulation in the area.<sup>313</sup> Within 75 days of receipt of the application, the legislative authority must, by resolution or ordinance, approve or disapprove the application and a local election may be held within that district.<sup>314</sup> Alternatively, a municipal corporation or township may designate property as a community entertainment district pursuant to a joint economic development contract pursuant to R.C. Chapter 715.<sup>315</sup>

The Arena District in downtown Columbus is an entertainment district that includes an indoor/outdoor music pavilion, the Huntington baseball stadium, the Nationwide Arena hockey rink, as well as bars and restaurants.

### **Economic Development Foundations**

The federal Internal Revenue Code also provides tax exempt status to a nonprofit organization of business leagues, chambers of commerce, boards of trade, and similar

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<sup>307</sup> R.C. 349.05.

<sup>308</sup> R.C. 349.05.

<sup>309</sup> R.C. 4301.80(A).

<sup>310</sup> *Id.*; R.C. 4301.62, 4303.208, and 4301.82 (as enacted in 2015 by H.B. 47).

<sup>311</sup> R.C. 4301.80(B)(6).

<sup>312</sup> R.C. 4301.80(C).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> R.C. 4301.80(D).

organizations.<sup>316</sup> A business league is an association of persons with a common business interest—usually a trade or professional association.<sup>317</sup> The purpose of the business league must be to improve one or more lines of business—for the purpose of promoting that common business interest.<sup>318</sup> Importantly, a business league cannot engage in a regular business of the kind ordinarily carried out for profit.<sup>319</sup> For example, owners of small businesses within a section of a city may form a small business association in order to promote shopping at small businesses, but not promote shopping at any one particular member business.

Chambers of commerce are usually composed of the merchants and trades people in a geographic area, but rather than promoting one or more lines of business, they promote common economic interests of all commercial enterprise in that area.<sup>320</sup> Chambers of commerce are run by boards of directors and often provide resources and benefits to their members, as well as a business directory for the area they serve. Relatedly, boards of trade are often made up of similar lines of business, usually to promote the line of business, but also to regulate it.<sup>321</sup>

For example, the Lima/Allen County Chamber of Commerce benefits its members, in part, by advocating for local businesses in legislation and development issues, including taking action on the Procter and Gamble warehouse expansion, supporting legislation relating to the City of Lima Billboard legislation, and studying an Allen County sales tax proposal.<sup>322</sup>

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<sup>316</sup> See [https://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Types-of-Organizations-Exempt-under-Section-501\(c\)\(6\)](https://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Types-of-Organizations-Exempt-under-Section-501(c)(6)).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> See <https://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Chamber-of-commerce-and-board-of-trade>.

<sup>321</sup> *Id.*

<sup>322</sup> About the Chamber, [www.limachamber.com/index.php/who-we-are/about-the-chamber/](http://www.limachamber.com/index.php/who-we-are/about-the-chamber/).

**Chapter Three:**  
**Land Use Regulation and Economic Development**

**Key Points:**

- Ohio’s local government can regulate land use through zoning, annexation, and eminent domain. These tools enable communities to develop a plan for growth and development, attract investors, and ensure a viable community for residents. When matched with a comprehensive land use master plan, land use regulation creates a predictable business climate under which public and private sector developers can operate.
- Ohio’s zoning laws, which identify the type of economic activity permitted at a site, have operated for nearly 100 years. These laws are authorized by state statutes empowering local government to develop and implement local zoning codes and create methods of enforcement that provide needed flexibility.
- Annexation is the legal process by which property is transferred from one local government jurisdiction to another.
- Eminent domain is the power of the government to take private property for public use with compensation provided to the landowner. Under Ohio law, economic development is not a permitted “public use” to justify a taking.

Land use regulation, implemented through zoning codes, annexation, and eminent domain, provides a public good.<sup>323</sup> Common uses organized through zoning codes can have greater value when grouped together—research centers are often more valuable when linked together at a common site.<sup>324</sup> Zoning regulation can protect the rights and property values of neighboring property owners in ways that private negotiations between property owners often do not. Zoning regulation through a comprehensive land use master plan and zoning code creates a predictable business climate under which public and private-sector developers know where and what type of development can happen. Therefore, it is essential that economic development professionals and business leaders understand the specific local zoning laws and applicable time frames that may impact proposed development projects.

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<sup>323</sup> See generally Pigou, *The Economics of Welfare* (London, MacMillan, 1932).

<sup>324</sup> See Bailey, *Note on the Economics of Residential Zoning and Urban Renewal*, 35 *Land Economics* 288–292 (1959).

A simple and predictable annexation process can enhance economic development by providing new land for new development in an established city.<sup>325</sup> Annexation provides additional tax revenues for municipalities. These revenues provide for the development of city services and may reduce the cost of borrowing through lower bond ratings. Growth corridors built through annexation for established cities ensure economic activity beyond the traditional urban core.<sup>326</sup>

### **History of Ohio Zoning Law**

Zoning has been a tool for regulating land use in Ohio since early in our country's development. Zoning has evolved over the years, but it continues to be at the heart of today's land-use issues. In Ohio, the power to regulate land use is delegated by the state to local governments as a police power. Zoning serves to regulate land use, prevent conflict over land use, and allow for growth and development in a rational manner. Zoning seeks to use land for its most suitable purpose; promote health and safety; maintain or enhance property values; protect the environment; manage traffic, population density, and aesthetics; and attract business and industry.

Zoning, which has emerged as the primary method of land use control in the United States, has its roots in Ohio. In 1915, Cincinnati attorney Alfred Bettman was involved in drafting pioneering planning-and-zoning legislation. A precursor to today's zoning laws, the legislation introduced by Bettman before the Ohio General Assembly authorized municipalities to create citizen-dominated planning commissions to create plans for their communities.<sup>327</sup> The Cincinnati Plan created in 1925 became the first comprehensive plan to be adopted by a planning commission of a major American city.<sup>328</sup> Bettman is also credited with being one of the principal drafters of "A Standard State Zoning Enabling Act" in 1924 and "A Standard City Planning Enabling Act" in 1928 for the U.S. Department of Commerce, which served as model zoning legislation for the United States.<sup>329</sup>

The City of Cincinnati's zoning ordinance underwent state constitutional challenge in 1925, in the case of *Pritz v. Messer*. The plaintiff, Emilia Pritz, brought an action seeking an injunction against adjacent property owner Frank Messer to prevent him from erecting an apartment building that violated Cincinnati's zoning ordinance.<sup>330</sup> Defendant Messer argued

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<sup>325</sup> See Muller & Dawson, *The Economic Effects of Annexation: A Second Case Study in Richmond, Virginia* (Washington, D.C., The Urban Institute, 1976).

<sup>326</sup> See Rusk, *Cities Without Suburbs* (Washington, D.C., The Woodrow Wilson Center Press, 1993).

<sup>327</sup> *Ohio Planning and Zoning Law*, Section 3:3 (2015 Ed.).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Pritz v. Messer*, 112 Ohio St. 628 (1925).

that the restrictions imposed by Cincinnati's zoning ordinance constituted a taking of private property without due compensation and due process of law in violation of both the Ohio and United States Constitutions.<sup>331</sup> The Ohio Supreme Court found that the enabling statutes enacted by Ohio and the authority granted to local governments through the home-rule provision of Article XVIII of the Ohio Constitution authorized the restrictions set out in Cincinnati's zoning code as a function of local self-government.<sup>332</sup>

Shortly after the Ohio Supreme Court's ruling in *Pritz*, the U.S. Supreme Court considered whether a local government was authorized to enact comprehensive zoning legislation. This constitutional challenge looked to the northern part of Ohio, where the landmark case of *Village of Euclid, Ohio v. Ambler Realty Co.* originated.<sup>333</sup> The *Euclid* Court's decision established the basic legality and constitutionality of zoning and gave rise to the widespread use of zoning throughout the United States.<sup>334</sup> This case served as a green light for local governments to adopt zoning and broaden its scope.

### **Delegation of Planning and Zoning Powers to Local Governments**

Ohio, through its Constitution and enabling statutes, has delegated most of its police-power authority to regulate land use to local governments. As a result, Ohio's planning and zoning is regulated by counties, townships, charter municipalities, and noncharter or statutory-plan municipalities. The authority to legislate land-use control is permissive, and local governments are under no obligation to engage in planning and zoning.

#### **Municipal Planning and Zoning**

Article XVIII, Section 3 of the Ohio Constitution, known as the home-rule amendment, allows municipalities to adopt a home-rule charter. This charter is the functional equivalent of a constitution and establishes in broad strokes how the municipality will be organized and how it will exercise its powers of self-governance, including planning and zoning regulation. Municipalities that have such charters are *not* required to follow the Revised Code with respect to enacting, amending, or administering zoning ordinances. Instead, they follow the procedures set out in their charter. When there is no charter or ordinance or a city's charter is silent on zoning regulation, however, the city must follow the specifics of the law as established by

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<sup>331</sup> *Id.* at 636.

<sup>332</sup> *Id.* at 637.

<sup>333</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>334</sup> For a full history and chronology of this case, see Michael Allan Wolf, *The Zoning of America: Euclid v. Amber* (2008).

Revised Code Chapter 713. This Chapter is also followed by noncharter municipalities and villages.<sup>335</sup>

To guide growth and development and set the framework for zoning regulation, statutory municipalities may establish a planning commission.<sup>336</sup> Local-level planning commissions involve elected officials and citizens who may “make studies, maps, plans, recommendations and reports concerning the physical, environmental, social, economic, and governmental characteristics, functions, services, and other aspects” of their geographic area.<sup>337</sup> Planning commissions are also responsible for initial review of new zoning ordinances or amendments to existing zoning ordinances.

A planning commission’s structure depends on how the city or village is organized. The duties of the municipal planning commission are set forth with some specificity in Revised Code 713.02 and include the responsibility to (1) make plans and maps of the municipality and land outside the municipality that is reasonably related; (2) preserve landmarks; (3) engage in zoning and platting; and (4) review public construction of buildings, streets, utilities, and public housing.<sup>338</sup> The planning commission may “frame and adopt a plan for dividing the municipal corporation or any portion thereof into zones or districts”; set limits on the height, bulk, and location of buildings; and establish set back lines, area and dimensions of yards, courts, and other open spaces, and limit uses for buildings, other structures, and premises in the established zones.<sup>339</sup>

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<sup>335</sup> See *Morris v. Roseman*, 162 Ohio St. 447, 451–452 (1954).

<sup>336</sup> R.C. 713.01.

<sup>337</sup> R.C. 713.23.

<sup>338</sup> R.C. 713.02.

<sup>339</sup> R.C. 713.06 and 713.07–.10.

<b>Traditional Euclidian Zoning Neighborhood Components</b>
<b>Housing subdivisions</b>
<b>Shopping centers, composed of single-use retail buildings, usually a single story with exclusive parking areas</b>
<b>Office/business parks, also single use and served by exclusive parking areas</b>
<b>Civic institutions, such as churches, schools, and libraries, generally large and separated from other uses and served by exclusive parking areas</b>
<b>Roadways, connecting these separated land uses and designed exclusively for the use of automobiles</b>

Beyond the general principles of planning, noncharter municipalities and villages who engage in zoning must follow Revised Code Chapter 713. Once a municipal zoning commission prepares and adopts a zoning plan or amendment, it is certified to the legislative body, and a public hearing is required to be held after appropriate notice.<sup>340</sup> During the notice period, all associated text, maps, and plans must be placed on file with the legislative authority and available for public inspection.<sup>341</sup> After notice and public hearing, the legislative body may vote on the ordinance. If the ordinance as proposed and approved by the zoning commission is voted on by the legislative body, a simple majority vote is all that is needed for passage. But, if the ordinance has been amended or altered by the legislative authority, three-fourths of the membership must approve it for it to be passed.<sup>342</sup>

Authority to enforce building-and-zoning-code laws by statutory municipalities is granted by Revised Code 713.11. This provision permits the creation of positions for code inspectors and provides for the option of creating a board of zoning appeals to hear and decide appeals from administrative determinations of zoning enforcement and to grant or deny requests for variances and conditional use permits. This administrative body is responsible for deciding appeals based on the denial of building permits.<sup>343</sup> The code contemplates that villages

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<sup>340</sup> R.C. 713.12.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> R.C. 713.11.

may contract with counties to have the counties provide administration of zoning ordinances, hear zoning appeals, and authorize variances.<sup>344</sup>

### **County Planning and Zoning**

Cities and villages derive their authority to form planning commissions from Revised Code 713.01 or, when applicable, their adopted charter. Likewise, the enabling statutes permit counties to establish county planning commissions to carry out planning activities or requires that they do so upon petition of a majority of the municipal planning commissions in that county.<sup>345</sup> In combination, counties, townships, and municipalities may create regional planning commissions.<sup>346</sup> County planning commissions and regional planning commissions have the same planning powers.<sup>347</sup>

While planning guides the development and preservation goals of a community, zoning provides the specific regulations that have been adopted by the community to advance and protect public health, safety, and general welfare. As with planning, the Revised Code enables counties to enact zoning ordinances.

The authority for counties to enact zoning legislation comes from Chapter 303 of the Revised Code, while townships get their authority from Chapter 519. Despite certain limitations and exceptions outlined in the Chapter, both counties and townships are permitted to “regulate by resolution, in accordance with a comprehensive plan” the following:

- Location
- Height
- Bulk
- Number of stories
- Size of buildings and other structures, including tents, cabins, and trailer coaches
- Percentages of lot areas that may be occupied
- Set back building lines
- Sizes of yards, courts, and other open spaces
- Density of population

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<sup>344</sup> *Id.*

<sup>345</sup> R.C. 713.22.

<sup>346</sup> R.C. 713.21.

<sup>347</sup> R.C. 713.23.

- Uses of buildings and other structures, including tents, cabins, and trailer coaches
- Uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the county
- Landscaping and architectural standards (excluding exterior building materials in the unincorporated territory of the county)<sup>348</sup>

In addition to the regulations above, the Chapter permits counties and townships to “divide all or any part of the unincorporated territory of the county into districts or zones of such number, shape, and area as the board determines” providing that the adopted regulations are “uniform for each class or kind of building or other structure or use throughout any district or zone.”<sup>349</sup>

While the grant of power to counties and townships is essentially the same, the organizational structure varies somewhat. In counties, county commissioners are responsible for zoning. In townships, the board of township trustees holds this responsibility. Before exercising their zoning authority, county commissioners and township trustees must adopt a resolution to proceed on their own initiative or due to a properly signed petition presented by voters.<sup>350</sup> If either a county or township engages in zoning, the appropriate board must create and establish a zoning commission consisting of “five members who reside in the unincorporated area” of the county or township to be zoned.<sup>351</sup>

The zoning commission must with prepare a plan that includes texts and maps for all zoning additions or amendments.<sup>352</sup> Before certifying its recommendations for a zoning plan to the township trustees or county commissioners, the zoning commission must hold at least one public hearing in each township affected by the zoning proposal.<sup>353</sup> Following public hearing, the proposal must be submitted to any relevant county or regional planning commission in existence for approval, disapproval, or suggestions.<sup>354</sup> If the submitted plans are disapproved or any material changes are suggesting by the county or regional planning commission, another public hearing must be held in each township affected by the proposed changes.<sup>355</sup> Once the zoning commission has completed its recommendations, it must certify the plan to the board of commissioners or the board of township trustees.<sup>356</sup>

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<sup>348</sup> R.C. 303.02 and 519.02.

<sup>349</sup> *Id.*

<sup>350</sup> R.C. 303.03 and 519.03.

<sup>351</sup> R.C. 303.04 and 519.04.

<sup>352</sup> R.C. 303.05 and 519.05.

<sup>353</sup> R.C. 303.06 and 519.06.

<sup>354</sup> R.C. 303.07 and 519.07.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

The county commissioners or township trustees are required to hold a public hearing after receipt of the certified zoning plans from the zoning commission.<sup>357</sup> Once certified by the zoning commission, the county commissioners or township trustees have no authority to change the text or maps submitted without first submitting those changes to the zoning commission, who can approve, disapprove, or make alternative suggestions. If other changes are suggested by the zoning commission, a second public hearing is required. If the zoning commission rejects the changes outright, those provisions may only be passed by the board of commissioners or township trustees by a unanimous vote.<sup>358</sup> Once a recommended zoning plan is adopted by the board of county commissioners or township trustees, it must be submitted to a vote of the “electors residing in the unincorporated area of the [county or township] included in the proposed plan of zoning for their approval or rejections at the next primary or general election, or a special election may be called for this purpose.”<sup>359</sup>

Counties or townships that adopt zoning regulations are also required to appoint a five-member board of zoning appeals.<sup>360</sup> The board of zoning appeals hears and decides appeals when it is asserted an error has been made by an administrative official in the processes or procedures associated with the zoning ordinances.<sup>361</sup> The board of zoning appeals grants or denies variances and requests for conditional zoning.<sup>362</sup>

The board of county commissioners or township trustees is permitted to establish a system of zoning certificates and to create a position of county zoning inspector.<sup>363</sup> The office of the zoning inspector is in charge of the day-to-day enforcement of zoning regulations, including the review of zoning applications, on-site inspections, investigation of violations, maintenance of necessary records, and proposal of zoning code amendments as necessary.

### **Planned-Unit Development**

Both counties and townships are empowered to adopt planned-unit development (PUD) regulations as part of their zoning code.<sup>364</sup> A PUD is defined as “a development which is planned to integrate residential, commercial, industrial, or any other [land] use.”<sup>365</sup> These

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<sup>357</sup> R.C. 303.08 and 519.08.

<sup>358</sup> R.C. 303.09 and 519.09.

<sup>359</sup> R.C. 303.11 and 519.11.

<sup>360</sup> R.C. 303.13 and 519.013.

<sup>361</sup> R.C. 303.14 and 519.14.

<sup>362</sup> *Id.*

<sup>363</sup> R.C. 303.16 and 519.16.

<sup>364</sup> R.C. 303.022 and 519.021.

<sup>365</sup> *Id.*

special regulations will apply to a property only “at the election of the property owner” and cannot be imposed by the government.<sup>366</sup>

PUDs are a development tool used by property developers to provide flexibility for new construction in a community. Developing property using PUD regulations allows a developer to mix uses. PUD regulations may already be built into a community’s zoning code or they may be permitted through conditional or special-use permits.

### **Zoning-Code Enforcement Issues**

Even the most thoughtfully crafted zoning ordinances can result in circumstances where the strict enforcement of the ordinance is undesired by the owner of the property. Upon application by the property owner, the applicable code sections permit counties, townships, and municipalities to grant “variances.”<sup>367</sup> Simply stated, a variance permits a property owner to use his property in a manner that would otherwise be prohibited by zoning regulations. The Ohio Supreme Court held that “[a] variance is intended to permit amelioration of strict compliance of the zoning ordinance in individual cases. It is designed to afford protection and relief against unjust invasions of private property rights and to provide a flexible procedure for the protection of constitutional rights.”<sup>368</sup> Ohio courts have upheld the constitutionality of both use and area variances.

A use variance permits a property owner to use a parcel of land in a manner inconsistent with the particular use of surrounding property as zoned. Once granted, a variance may be permanent and “run with the land”; in other words, it is transferred when title to the property is transferred.<sup>369</sup> But, variances may also be set to expire at a certain time or by the terms of the zoning ordinance.<sup>370</sup> One example of a litigated use variance is *Schomaeker v. First National Bank of Ottawa*.<sup>371</sup> In *Schomaeker*, a use variance was granted to permit a bank to establish a parking lot in a residential district on the other side of an alley from the bank’s property.<sup>372</sup> Although they do occur, use variances are controversial, and some zoning ordinances have expressly prohibited them.<sup>373</sup>

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<sup>366</sup> *Id.*

<sup>367</sup> R.C. 303.13 et seq. (counties), 519.13 et seq. (townships), and 713.11 et seq. (municipalities).

<sup>368</sup> *Consolidated Mgt., Inc. v. City of Cleveland*, 6 Ohio St.3d 238, 240 (1983), citing *Nunamaker v. Jerusalem Twp. Bd. of Zoning Appeals*, 2 Ohio St.3d 115 (1982).

<sup>369</sup> *E.g., State ex rel. Casale v. McLean*, 58 Ohio St.3d 163 (1991), and *Fox v. Johnson*, 28 Ohio App.2d 175 (7th Dist. 1971).

<sup>370</sup> *See Scarnecchia v. Austintown Twp.* 7th Dist. Mahoning No. 04-MA-253, 2005-Ohio-4504.

<sup>371</sup> *Schomaeker v. First Nat. Bank of Ottawa*, 66 Ohio St.2d 304 (1981).

<sup>372</sup> *Id.* at paragraph 3 of the syllabus.

<sup>373</sup> *See Mobil Oil Corp. v. City of Rocky River*, 38 Ohio St.2d 23, 31–33 (1974) (Corrigan, J., concurring) (discussing the City of Rocky River’s ordinance prohibiting use variances).

The burden of establishing the appropriateness of a use variance rests with the individual property owner. The standard for establishing this burden may be detailed in the applicable zoning ordinance. The Ohio Supreme Court has held that variance-seeking property owners must demonstrate that an “unnecessary hardship” exists.<sup>374</sup>

The other type of variance that a property owner may seek is an “area variance.” An area variance relates to departures from size and setback requirements. This type of variance is held to a lesser standard, and Ohio courts have held that property owners need only demonstrate that the zoning ordinance creates “practical difficulties” for the burdened parcel.<sup>375</sup> Elaborating on the practical difficulties test in considering area variances, the court hearing *Duncan v. Middlefield* stated:

While existing definitions of “practical difficulties” are often nebulous, it can safely be said that a property owner encounters “practical difficulties” whenever an area zoning requirement (e.g., frontage, setback, height) unreasonably deprives him of a permitted use of his property. The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable. The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of practical difficulties. A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions. *Kisil [v. Sandusky]* (1984), 12 Ohio St.3d 30, 33, 465 N.E.2d 848]; cf. *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 452 N.E.2d 1287.

The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with

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<sup>374</sup> See, e.g., *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (184); *Duncan v. Middlefield*, 23 Ohio St.3d 83, 86 (1986).

<sup>375</sup> *Duncan* at 85–86.

knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance. See, generally, 3 Anderson, *American Law of Zoning* (2 Ed.1977), Variances, Section 18.47 et seq.; *Wachsberger v. Michalis* (1959), 19 Misc.2d 909, 191 N.Y.S.2d 621.<sup>376</sup>

The decision of a board of zoning appeals to grant or deny a request for variance is an administrative action and a final order that can be appealed under Revised Code 2506.04, after exhausting all administrative remedies. Upon review, the court of common pleas may overturn a decision of the board of zoning appeals if the decision is “unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.”<sup>377</sup>

Unlike a variance, a conditional use is allowed under the existing zoning ordinance, but it requires that the property owner meet specific conditions. The board of zoning appeals in a county or township is authorized to grant conditional zoning certificates under the zoning ordinances.<sup>378</sup> Municipalities also can permit conditional zoning.<sup>379</sup>

The zoning ordinance establishes the standard for granting the conditional-use permit. The board of zoning appeals’ has discretion to interpret and apply the standards set out by the ordinance. The Supreme Court of Ohio held that the decision to deny a conditional-use application is “administrative in nature.”<sup>380</sup> As such, courts defer to the decision of the administrative body and review the decision only to determine whether the decision was arbitrary, capricious, or unreasonable.

### **Zoning Applications in Ohio**

The traditional approach to zoning, heralded by Alfred Bettman and his colleagues in the early 1920s, relied heavily on dividing communities into distinct “zones” and limiting land use in

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<sup>376</sup> *Id.* at 86.

<sup>377</sup> *Butz v. Danbury Twp.*, 186 Ohio App.3d 7, 2010-Ohio-179 (6th Dist.).

<sup>378</sup> R.C. 303.14(C) and 519.14(C).

<sup>379</sup> R.C. 713.07, 713.10, and 713.11(A).

<sup>380</sup> *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452, 455 (1983).

each zone type.<sup>381</sup> This pattern of separating residential, commercial, industrial, and agricultural districts created predictable development patterns and protected private-property rights.

### **Traditional Zoning in Rural Communities**

An example of a traditional zoning code in a rural community is the one enacted by Fayette County, a rural county in southwest Ohio with a population of approximately 29,000. Fayette County's zoning resolution was adopted in May 2007.<sup>382</sup>

Under the authority granted by Chapter 303 of the Revised Code, the Fayette County zoning code establishes an office of the Zoning Inspector, the Rural Zoning Commission, and the Board of Zoning Appeals and mandates zoning certificates. The code refers to the official zoning map of the county that establishes 11 distinct districts, including a planned-unit development district. Each of these districts includes permitted uses, accessory uses, and conditional uses. In addition, each district includes development requirements such as a minimum lot area, width, front yard depth, side yard width, rear yard depth, building height, landscaping, and lighting. Fayette County's zoning code outlines the procedures for appealing a zoning decision, application for a variance, and approval for conditional uses.

### **Urban Overlay Districts**

Traditional zoning has been criticized for its lack of flexibility and contribution to suburban sprawl. To overcome limitations inherent to Euclidean zoning, planned urban development or urban overlay districts have become popular in cities. By creating urban overlay districts, cities can maintain their base zoning code and impose additional zoning standards within designated zones. This enables cities to create mixed-use zones, increase walkability, and improve the aesthetics of a community without overhauling the entire zoning code.

The city of Columbus adopted the Urban Commercial Overlay ("UCO") in 1999, which now applies to 20 urban commercial corridors and intersections within 6 miles of downtown Columbus. As stated in the code:

The purpose of the [UCO] is to regulate development in specifically designated areas in order to protect, re-establish and retain the unique architectural and aesthetic characteristics of older urban commercial corridors. Such corridors are typically

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<sup>381</sup> This approach to zoning has come to be known as Euclidean zoning, so named because of the landmark Supreme Court case of *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 351 (1926), which held such zoning to be constitutional.

<sup>382</sup> Fayette County's zoning code can be found online at <http://www.fayette-co-oh.com/zoning.html>.

characterized by pedestrian-oriented architecture, building setbacks ranging from zero to ten feet, rear parking lots, commercial land uses, a street system that incorporates alleys and lot sizes smaller than one-half acre.

The provisions of the UCO are intended to encourage pedestrian-oriented development featuring retail display windows, reduced building setbacks, rear parking lots, and other pedestrian-oriented site design elements. Use of this overlay also serves as a means of implementing key policy recommendations of neighborhood plans and design studies.<sup>383</sup>

The UCO's standards are set out in the Columbus Code of Ordinances at 3372.601–3372.698. Within these sections, the designated areas are identified, as are the circumstances under which the code provisions will apply and the extent of that application. For instance, new construction is subject to all of the requirements of the zoning overlay. But there is limited application to alteration of existing buildings, and routine maintenance of property is completely exempt. The code establishes setback requirements and building design standards. It also addresses graphics, landscaping and screening, lighting, parking and circulation, site lighting, and drive-thru uses.

### **Central Business Districts**

Cities both large and small frequently use zoning codes to create Central Business Districts. These zoning codes can help concentrate a large portion of business and commerce into one single area. In larger cities, zoning codes can allow for a higher concentration of buildings and taller heights. For example, Cleveland permits buildings up to 900 feet in their downtown business districts, while structures in other areas of the city may not surpass 35 feet.<sup>384</sup> In smaller cities, business district zoning may be geared toward preserving the historical character of the area, rather than allowing for larger buildings. For example, Celina, located in Mercer County, encourages “the functional grouping of those commercial, residential, and accessory establishments supporting the preservation of the historic character” of its central business district.<sup>385</sup>

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<sup>383</sup> Columbus Code of Ordinances 3372.601. The Columbus Code of Ordinances is available at [https://www.municode.com/library/oh/columbus/codes/code\\_of\\_ordinances](https://www.municode.com/library/oh/columbus/codes/code_of_ordinances).

<sup>384</sup> Cleveland, Ohio Code of Ordinances § 353.01(b).

<sup>385</sup> Celina, Ohio Code of Ordinances § 1667.01, available at <http://www.ci.celina.oh.us/docs/CelinaZoningCode.pdf>.

### **Mixed-Use Districts**

Taking the planning overlay a step further, some communities are implementing mixed-use districts. These districts layer compatible land uses, public amenities, and utilities together to create walkable neighborhoods where people can live, work, and play. An example of a mixed-use district is Cleveland's Midtown Mixed-Use District ("MMUD"), which includes Euclid Avenue, the main street that runs through the city's mid-town districts. The MMUD is established under Chapter 344 of the Codified Ordinances of the City of Cleveland.<sup>386</sup>

The MMUD divides the midtown area into four sub-areas designated by street corridors. Higher density is encouraged in each of these areas, and a different mix of uses is permitted in each, including residential, retail, commercial, light industrial, and auto-oriented retail. The building and design requirements established by the MMUD are particular to each sub-area and are detailed and specific. They include building and parking setbacks, building width and height requirements, and landscaping and lighting mandates.

### **Form-Based Zoning Code**

Some critics maintain that overcoming the limitations of single-use zoning by adopting planned-unit development or enacting overlay districts or special zones can lead to confusion and result in a zoning map and zoning code that is hard to follow and difficult to interpret. Some planning professionals advocate abandoning the traditional zoning code altogether and adopting a mixed-use zoning ordinance that more clearly meets the needs of the community vision.

Form-based code is one approach to zoning that does not rely on use-specific districts. Form-based code is concerned with the structure of the built environment and regulates building scale, building facades, and public space. Common elements of a form-based code are a plan or map of the regulated area designating the locations where different standards apply, standards applicable to public spaces, and outlined processes for administering the standards and a review process.

The city of New Albany has adopted a form-based code called the Urban Center Code ("UCC").<sup>387</sup> The UCC addresses the development of streets, blocks, buildings, open space, and parking and how those elements relate to the surrounding environment. The UCC was drafted to further the community's development vision as outlined in the Village Center Master Plan.

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<sup>386</sup> The Codified Ordinances of the City of Cleveland are available at [http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland\\_oh/codifiedordinancesofthecityofcleveland?f=template\\_s\\$fn=default.htm\\$3.0\\$vid=amlegal:cleveland\\_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland_oh/codifiedordinancesofthecityofcleveland?f=template_s$fn=default.htm$3.0$vid=amlegal:cleveland_oh).

<sup>387</sup> More information about New Albany's form-based code, a copy of the code, and the regulating map is available at <http://www.newalbanyohio.org/government/community-development/zoning/urban-center-code>.

## Eminent Domain

Eminent domain is the power of the federal, state, and local governments to take private property for public use.<sup>388</sup> This power is granted by the Fifth Amendment to the U.S. Constitution and Article I, Section 19 of the Ohio Constitution. It has long been established that the power to exercise eminent domain requires that the private property be taken for a public use with just compensation paid to the property owner.<sup>389</sup>

Whether economic development is a sufficient public purpose to justify the use of eminent domain was addressed by the U.S. Supreme Court in *Kelo v. City of New London, Conn.*<sup>390</sup> In this case, the city of New London undertook a city-wide redevelopment plan to create jobs and improve the overall economic condition of the critically distressed city.<sup>391</sup> To advance the effort, the City authorized the New London Development Corporation, a nonprofit entity, to acquire property through eminent domain.<sup>392</sup> There were no allegations that the properties at issue were blighted.<sup>393</sup>

In reviewing the case, the Supreme Court found that the takings were valid and equated the requirement of “public use” with “public purpose” in holding that takings based on economic development goals were constitutional.<sup>394</sup> Further, the *Kelo* Court recognized that the properties at issue were not blighted but still held that the takings were constitutional.<sup>395</sup> Although the *Kelo* decision seems to give a green light to economic development as the basis for eminent domain, the Court was sharply divided, and the dissenting judges came out strongly against the validity of such takings.<sup>396</sup>

Shortly after the *Kelo* decision, the Ohio Supreme Court was given the opportunity to decide whether economic development alone justified the taking of private property in the case of *City of Norwood v. Horney*.<sup>397</sup> The city of Norwood, like the city of New London, was using the power of eminent domain to advance economic development objectives in private-to-private transactions.<sup>398</sup> The appeals court sided with the city of Norwood and held that the city of Norwood’s decision to appropriate private property because it would likely become blighted

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<sup>388</sup> See *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>389</sup> *Id.* at 36.

<sup>390</sup> *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

<sup>391</sup> *Id.* at 472–475.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* at 475.

<sup>394</sup> *Id.* at 484–490.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 494–523.

<sup>397</sup> *City of Norwood v. Horney*, 110 Ohio St.3d 353 (2006).

<sup>398</sup> *Id.* at 356–359.

was justified as a public use.<sup>399</sup> The appeals court further equated the public use requirement with public welfare.<sup>400</sup>

The Ohio Supreme Court rejected the view of the *Norwood* appellate court and held that local governments cannot use eminent domain solely for purposes of economic development.<sup>401</sup> Ultimately, the *Norwood* decision severely limited private-to-private eminent domain transfers in Ohio unless the subject properties were blighted.

In 2007, the Ohio General Assembly responded to the *Kelo* and *Norwood* decisions by amending Revised Code 163.01, Ohio's basic appropriations statute.<sup>402</sup> This amendment created a uniform approach to eminent domain to be applied by local governments throughout the state. As part of this amendment, the Ohio General Assembly specifically defined "public use" as:

- (1) "Public use" does not include any taking that is for conveyance to a private commercial enterprise, economic development, or solely for the purpose of increasing public revenue, unless the property is conveyed or leased to one of the following:
  - (a) A public utility, municipal power agency, or common carrier;
  - (b) A private entity that occupies a port authority transportation facility or an incidental area within a publicly owned and occupied project;
  - (c) A private entity when the agency that takes the property establishes by a preponderance of the evidence that the property is a blighted parcel or is included in a blighted area.
- (2) All of the following are presumed to be public uses: utility facilities, roads, sewers, water lines, public schools, public institutions of higher education, private institutions of higher education that are authorized to appropriate property under section 3333.08 of the Revised Code, public parks, government buildings, port authority transportation facilities,

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<sup>399</sup> *Id.* at 359–361 & 371–72.

<sup>400</sup> *Id.* at 371–372.

<sup>401</sup> *Id.* at 378.

<sup>402</sup> Am.Sub.S.B. No. 7, Section 1 (2007).

projects by an agency that is a public utility, and similar facilities and uses of land.<sup>403</sup>

The General Assembly also added a new code section defining “blighted area” and “blighted parcel.”<sup>404</sup> Further removing any question of whether property can be taken for purely economic reasons, as part of these extensive definitions, it included that:

When determining whether a property is a blighted parcel or whether an area is a blighted area or slum for the purposes of this section, no person shall consider whether there is a comparatively better use for any premises, property, structure, area, or portion of an area, or whether the property could generate more tax revenues if put to another use.<sup>405</sup>

The *Kelo* decision is thus null in Ohio. The amended eminent domain statute eliminates economic development as a justification for an appropriation and further eliminates any chance that local governments will try to bootstrap their economic-development goals to claims of blighted conditions that do not meet the criteria set out in the statute.

### **Annexation**

Annexation is a legal process by which land located in an unincorporated area may become part of a neighboring city or village. Annexation enables economic development by bringing land into a local government territory so services such as water and sewer can be provided. To qualify for annexation, the unincorporated land must be immediately contiguous to the existing city’s or village’s boundaries. Ohio’s annexation law, which underwent major reform in 2001, is codified in Chapter 709 of the Revised Code.

There are five distinct paths to annexation in Ohio. These include:

- (1) **Regular Annexation**—This method is initiated by the owners of real property immediately contiguous to a municipality and requires the “signatures of a majority of the owners of real estate in the territory proposed for annexation.”<sup>406</sup> Once properly signed by the required number of owners, the petition is filed with the county commissioner’s office. The statute specifies notice requirements that must be met before a public hearing. Before becoming

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<sup>403</sup> R.C. 163.01(H).

<sup>404</sup> R.C. 1.08.

<sup>405</sup> R.C. 1.08(C).

<sup>406</sup> R.C. 709.02.

effective, the petition must be approved by the county board of commissioners and by the municipality to which the land will be annexed.<sup>407</sup>

- (2) Type 1 Expedited Annexation—Initiated by the owners of real property immediately contiguous to a municipality and contains all of the signatures of the affected property owners in the territory proposed for annexation. This type of petition must include an annexation agreement or a cooperative economic development agreement signed by the township and the municipality. Because all affected parties are involved in the agreement, no notice or public hearing is required, and the petition must be approved as a matter of right.<sup>408</sup>
- (3) Type 2 Expedited Annexation—Analogous to Type 1 Expedited Annexation, this method requires all property-owner signatures but is unique because the land will not be excluded from the township. The land is subject to the taxing authority of the township and the adjacent municipality. Once filed, if the township and city both agree to the annexation, the board of county commissioners must approve the petition without a hearing. The petition is then submitted to the city council for review.<sup>409</sup>
- (4) Type 3 Expedited Annexation—This method is only permitted when there exists a “significant economic development” project is authorized by the state of Ohio. This method requires signatures of all the property owners and agreement that the property will not be excluded from the township unless an annexation agreement or cooperative economic development agreement provides otherwise. This type of annexation may require hearings before being granted.<sup>410</sup>
- (5) Annexation by Petition of a Municipality—Annexation may be initiated by a municipality for contiguous land owned by the municipality, the county, or the state.<sup>411</sup>

In *Sugarcreek Twp. v. Centerville*, the Ohio Supreme Court considered the effect of Ohio’s TIF statute upon land subject to Type 2 Annexation, which permits a township to continue to receive tax revenue on property that was annexed by a municipality.<sup>412</sup> The Court determined that the municipality could adopt a TIF plan under Revised Code 5709.40 “that temporarily exempts from city and township property taxes a portion of the improvements

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<sup>407</sup> *Id.*

<sup>408</sup> R.C. 709.021–.022.

<sup>409</sup> R.C. 709.023.

<sup>410</sup> R.C. 709.024.

<sup>411</sup> R.C. 709.13–.16.

<sup>412</sup> *Sugarcreek Twp. v. Centerville*, 133 Ohio St.3d 467 (2012).

made to the annexed property to encourage the annexed property's economic development."<sup>413</sup> For further discussion on TIFs, see [Chapter 7](#).

Annexation is used by municipalities for many reasons. It allows a city to expand its existing infrastructure to contiguous land to supply businesses and residents with municipal utility services and other public services like police and fire protection. Annexation can also be used to promote economic development. By annexing undeveloped land in adjacent townships, municipalities can participate in economic development projects that create housing and jobs and improve the economy of the community.

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<sup>413</sup> *Id.* at syllabus.

## **Chapter Four:** **State of Ohio Tax System**

### **Key Points:**

- Taxing authority in Ohio is controlled by the Ohio General Assembly.
- The three primary types of revenue-generating taxes for state government are the Commercial Activity Tax, the individual income tax, and sales and use tax.
- Ohio's legislature has enacted a variety of programs that extend tax credits, abatements, and exemptions, which are intended to spur businesses to create or retain jobs, or otherwise invest in Ohio's economy.

Taxes fund the operation of government but also raise the cost of doing business in a community. The components of state tax policy include the type of taxes charged, rates charged, exemptions, abatements, and credits provided. Most states use economic development tax incentives to retain and attract companies in order to spur job creation, to encourage capital investment, and to lessen the cost of doing business. Tax incentives often support successful job training, urban redevelopment initiatives, and job creation activity across many industries.

Typical incentives are tax exemptions, abatements, and credits.<sup>414</sup> Many tax incentives are tied to performance targets: the incentive is received only if the company meets the job creation or capital investment goal promised to the state or local government.<sup>415</sup> For instance, to attract and retain high-wage manufacturing industries, tax credits could be offered to a company only for the purchase of manufacturing equipment.

### **Legal Foundation for State Taxing Authority**

The state's taxing authority rests in the Ohio Constitution's conferral of general legislative power upon the General Assembly.<sup>416</sup> The power to tax lies exclusively with the

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<sup>414</sup> National Conference of State Legislatures, *Tax Expenditure Budgets and Reports: Best Practices*, available at [http://www.ncsl.org/documents/task\\_forces/Tax\\_Expenditure\\_Report.pdf](http://www.ncsl.org/documents/task_forces/Tax_Expenditure_Report.pdf).

<sup>415</sup> R.C. 122.17.

<sup>416</sup> *Saviers v. Smith*, 101 Ohio St. 132 (1920), citing Ohio Constitution, Article 2, Section 1.

General Assembly under this general legislative grant in the state constitution.<sup>417</sup> In addition to this general legislative grant of power, the Ohio Constitution specifically authorizes the General Assembly to impose taxes on (1) decedents' estates or the right to receive or succeed to such estates, (2) incomes, and (3) the production of coal, oil, gas, and other minerals.<sup>418</sup> The power to tax real property derives from Article 12, Section 2 of the Ohio Constitution. The General Assembly additionally is authorized to sustain excise taxes and succession taxes.<sup>419</sup>

### **State of Ohio Tax System**

Revenue to support Ohio's governmental operations comes from a variety of sources. The largest portion of this revenue comes from the general unrestricted taxes imposed by the state. Ohio also receives money through special fees, the sale of goods and services, and from the federal government. The Ohio Department of Taxation administers and enforces 25 different state and local taxes, including the state and school district individual income taxes, state and local sales taxes, and an array of business and excise taxes, all of which generate nearly \$30 billion annually to support many functions of state and local government.<sup>420</sup> Ohio's general revenue fund ("GRF") currently receives the greatest amount of revenue from the sales and use tax (37.67%), followed by the individual income tax (33.96%), and the commercial activity tax (6.8%).<sup>421</sup>

#### **Commercial Activity Tax**

The primary tax paid by businesses for the privilege of engaging in business in Ohio is the Commercial Activity Tax ("CAT"). The CAT is not a net income tax but is measured by the taxable gross receipts from sales made in Ohio. It is imposed on businesses, whether or not located in Ohio, if they otherwise meet the minimum thresholds for doing business in Ohio.<sup>422</sup>

The CAT was enacted in 2005 as part of a major tax reform effort that phased out the corporate franchise and the personal property taxes paid by businesses.<sup>423</sup> The CAT is a broad-based, low-rate tax, imposed on most businesses with more than \$150,000 in taxable gross

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<sup>417</sup> Ohio Constitution, Article 2, Section 1; *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 22.

<sup>418</sup> Ohio Constitution, Article 12, Section 3.

<sup>419</sup> Ohio Constitution, Article 2, Section 1; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229 (1904); *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314 (1895).

<sup>420</sup> Ohio Department of Taxation, 2014 Annual Report at 10, Table 3 (Collections for Taxes Administered by the Ohio Tax Commissioner), available at [http://www.tax.ohio.gov/Portals/0/communications/publications/annual\\_reports/2014\\_Annual\\_Report/2014\\_AR%20Final%20021315.pdf](http://www.tax.ohio.gov/Portals/0/communications/publications/annual_reports/2014_Annual_Report/2014_AR%20Final%20021315.pdf).

<sup>421</sup> *Id.*

<sup>422</sup> R.C. Chapter 5751.

<sup>423</sup> Ohio Department of Taxation, 2014 Annual Report, at 41–46.

receipts in a calendar year. The tax applies to sole proprietors, partnerships, and corporations, and to service providers such as attorneys, doctors, and accountants.<sup>424</sup>

Revenue derived from the CAT is deposited in the commercial activities tax receipts fund. The Department of Taxation is paid a small percentage, 0.85%, to defray its administrative costs. The remaining funds go first to the CAT motor fuel receipts fund. The remaining moneys are allocated to the GRF and other funds directed toward local governments and school districts, both of which had depended on the eliminated personal property tax.<sup>425</sup>

### **Individual Income Tax**

The individual income tax is levied on every individual, trust, and estate that (1) resides in Ohio and (2) that earns or receives income in Ohio or otherwise has a connection with Ohio sufficient to meet the constitutional limits for imposition of the tax.<sup>426</sup> The tax also applies to everyone, regardless of their states of residence, who receive an Ohio lottery prize or casino gaming winnings.<sup>427</sup> The Ohio individual income tax is computed by applying certain statutory additions and subtractions to the taxpayer's federal adjusted gross income.<sup>428</sup> The tax has graduated rate brackets, depending on income ranges. In 2014 the low rate was 0.528% on income up to \$5,200, with a maximum rate for income over \$208,500 of 5.333%.<sup>429</sup>

The individual income tax had been the single largest source of state tax revenue before reductions to this tax were adopted in legislation beginning in 2005.<sup>430</sup> The most recently enacted budget provided an additional rate reduction of 6.3% across all tax brackets for taxable years beginning in 2015.<sup>431</sup> In addition to these general rate reductions, the General Assembly has enacted a Small Business Investor Income Tax Credit, exempting the first \$250,000 of a taxpayer's business income from taxation and applying a flat 3% rate on all business income exceeding the exempt amount. This credit has the stated purpose of encouraging new capital investment in small businesses in Ohio.<sup>432</sup>

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<sup>424</sup> *Id.* at 41.

<sup>425</sup> *Id.* at 43.

<sup>426</sup> R.C. 5747.02.

<sup>427</sup> *Id.*

<sup>428</sup> R.C. 5747.01 et seq.

<sup>429</sup> Ohio Department of Taxation, 2014 Annual Report at 64; R.C. 5747.02.

<sup>430</sup> *Id.*; Ohio Department of Taxation, 2013 Annual Report, available at [http://www.tax.ohio.gov/Portals/0/communications/publications/annual\\_reports/2013\\_annual\\_report/2013\\_AR\\_internet.pdf](http://www.tax.ohio.gov/Portals/0/communications/publications/annual_reports/2013_annual_report/2013_AR_internet.pdf).

<sup>431</sup> Am.Sub.H.B. No. 64 (2015); R.C. 5747.02.

<sup>432</sup> *Id.*; Am.Sub.H.B. No. 59 (2013); R.C. 5747.81.

## Sales and Use Tax

The sales and use tax is the primary source of revenue for the state government. It is also a significant source of revenue for county governments and regional transit authorities that levy so-called “piggyback” taxes. County governments were authorized by statute in 1967 to levy additional sales tax. The additional piggyback tax for regional transit authorities was enacted in 1974.<sup>433</sup> All of Ohio’s counties levy the piggyback tax, ranging from 0.5% to 1.5%.<sup>434</sup> In addition, eight transit authorities levy an additional piggyback tax of up to 1%.<sup>435</sup> Thus, although the state sales-and-use-tax rate is 5.75%, the actual rate paid on a taxable transaction can be as high as 8%.

Not all purchases are subject to the sales and use tax. Many exemptions and exclusions have been enacted over the 80 years that the tax has been in effect. One important exemption allows manufacturers to purchase tangible personal property to be used or consumed in the manufacturing process, free from the Ohio sales and use tax.<sup>436</sup> This sales tax exemption constitutes a \$1.8 billion savings for Ohio manufacturers and is the largest state tax exemption offered.<sup>437</sup> The Administrative Code contains instructive examples of when the manufacturing process ends and what is exempt from sales/use tax. For example, property eligible for the exemption includes production machinery and equipment that make the product, materials handling equipment (i.e., forklifts, cranes) that move the product through a continuous production process, catalysts, solvents and other consumables that interact with the product and are integral to the manufacturing operation, fuel, power, electricity consumed to power manufacturing equipment, and equipment and other property used to manufacture production equipment.<sup>438</sup>

Some of the exemptions provide relief to industries that are important to Ohio’s economy (for example, purchases used in agriculture; purchases of property and services by electricity providers and purchases made by charities or educational institutions).<sup>439</sup>

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<sup>433</sup> Ohio Department of Taxation, 2014 Annual Report at 101.

<sup>434</sup> *Id.* at 189.

<sup>435</sup> *Id.*

<sup>436</sup> Ohio Adm.Code 5703-9-21.

<sup>437</sup> Ohio Tax Expenditure Report, FY 2016-2017 Operating Budget, Ohio Office of Budget and Management, [http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State\\_of\\_Ohio\\_Budget\\_Tax\\_Expenditure\\_Report\\_FY-16-17.pdf](http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State_of_Ohio_Budget_Tax_Expenditure_Report_FY-16-17.pdf).

<sup>438</sup> Nevers, *Ohio Manufacturing Exemptions: Caustic Solutions and Harsh Decisions*, available at <http://www.salestaxsupport.com/blogs/state/ohio-oh/ohio-manufacturing-exemptions-caustic-solutions-harsh-decisions>.

<sup>439</sup> *Id.* at 103; Ohio Tax Expenditure Report, FY 2016-2017 Operating Budget, Ohio Office of Budget and Management, [http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State\\_of\\_Ohio\\_Budget\\_Tax\\_Expenditure\\_Report\\_FY-16-17.pdf](http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State_of_Ohio_Budget_Tax_Expenditure_Report_FY-16-17.pdf); R.C. 5739.02.

While Ohio provides many sales tax exemptions that reduce the cost of doing business, other provisions subject certain purchases of services used in business to the tax. For example, Ohio levies the sales tax on purchases of employment services.<sup>440</sup> Sales tax applies to the price charged by the employment service provider in cases where the personnel supplied are paid by the service provider and perform work or labor under the purchaser's supervision or control.<sup>441</sup> An important exception to this tax is for personnel who are provided under a contract of at least one year, where it is specified that each employee covered by the contract is being supplied on a permanent basis.<sup>442</sup> It is not sufficient to simply have these terms in the employment contract; the Ohio Supreme Court has held that the Tax Commissioner may examine the facts and circumstances of the assignment, to ensure that the actual practice of the parties conforms with the terms of the contract.<sup>443</sup>

Sales tax also is imposed on the purchase of data processing and electronic information services used in business.<sup>444</sup> Thus, the outsourcing of payroll processing and similar computer services is subject to the tax, as well as purchases of services that provide access to remote computers to permit the examination or acquisition of data, or the placement of data for retrieval by designated recipients.<sup>445</sup> Businesses that subscribe to stock quote services, online legal research services, or other kinds of information services that are accessed online will pay sales tax on the price of these services. Other services that are taxable include building maintenance and janitorial services, and electronic publishing services used in business.<sup>446</sup>

### **Tax Expenditures**

The tax revenue that the state loses in granting tax credits and exemptions is often referred to as a tax expenditure.<sup>447</sup> This represents the off-budget "spending" of the foregone tax revenue. Some of these tax expenditures are dedicated to social goals (childcare credit; earned income credit). Others are more business directed, intended to foster growth of certain industries (renewable energy, manufacturing, housing). Most states, including Ohio, issue tax-

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<sup>440</sup> R.C. 5739.01(B)(3)(k).

<sup>441</sup> R.C. 5739.01(JJ); *Moore Personnel Serv., Inc. v. Zaino*, 98 Ohio St.3d 337 (2003).

<sup>442</sup> *Id.*

<sup>443</sup> *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1; *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423 (2012).

<sup>444</sup> R.C. 5739.01(B)(3)(e)

<sup>445</sup> R.C. 5739.01(Y)

<sup>446</sup> R.C. 5739.01(B)(3)(j) and (u).

<sup>447</sup> Tax expenditures are also made through the use of deductions, credits, exclusions and other tax preferences. See National Conference of State Legislatures, *Tax Expenditure Budgets and Reports: Best Practices*, available at [http://www.ncsl.org/documents/task\\_forces/Tax\\_Expenditure\\_Report.pdf](http://www.ncsl.org/documents/task_forces/Tax_Expenditure_Report.pdf).

expenditure reports.<sup>448</sup> Many tax-policy organizations, or “think tanks,” have urged the adoption of periodic reviews of tax expenditures to ensure that the anticipated benefits from the expenditures justify the loss of revenue. Ten states and the District of Columbia have enacted laws that require or enhance regular evaluation of tax incentives. Ohio does not have a program of this type.<sup>449</sup>

### **Sales Tax Exemptions**

The general rule in Ohio is that tax is charged on all retail sales unless there is a specific statutory exemption.<sup>450</sup> Exemptions from taxation must be narrowly construed against the granting of the exemption, because “taxation is the rule, and exemption is the exception.”<sup>451</sup> Because the exemption is created by legislative grace, the taxpayer must be able to show that it fits squarely within the statutory language.<sup>452</sup>

The Revised Code sets forth numerous categories of tax exemptions.<sup>453</sup> Because exemptions are created by statute, they also may be eliminated or modified by the General Assembly. For example, during a budget crunch, the General Assembly might suspend an exemption for a period of time to generate additional revenue.

Certain sales tax exemptions have existed for decades, and industries rely on them in their budgetary planning. Examples of these long-established exemptions include purchases of property and services used or consumed to produce a product by manufacturing,<sup>454</sup> for use or consumption in an agricultural operation,<sup>455</sup> and sales or purchases of prescription drugs and equipment.<sup>456</sup> These are just a few of the many exemptions from sales tax that exist, but they are mentioned because they provide a significant benefit to those industries.

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<sup>448</sup> R.C. 5703.48; Ohio Office of Budget and Management, *Tax Expenditure Report: The State of Ohio Executive Budget, Fiscal Years 2016-2017*, available at [http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State\\_of\\_Ohio\\_Budget\\_Tax\\_Expenditure\\_Report\\_FY-16-17.pdf](http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State_of_Ohio_Budget_Tax_Expenditure_Report_FY-16-17.pdf).

<sup>449</sup> The Pew Charitable Trusts, *State Make Progress Evaluating Tax Incentives* (Jan. 21, 2015), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/01/tax-incentive-evaluation-law-state-fact-sheets>.

<sup>450</sup> R.C. 5739.02(A).

<sup>451</sup> *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102 (1990).

<sup>452</sup> *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423 (2012).

<sup>453</sup> R.C. 5739.02(B).

<sup>454</sup> R.C. 5739.02(B)(42)(g).

<sup>455</sup> R.C. 5739.02(B)(17).

<sup>456</sup> R.C. 5739.02(B)(18) and (19).

The most utilized sales tax exemption allows manufacturers to purchase free of tax those items used in a manufacturing operation to produce a product for sale.<sup>457</sup> Not everything that a manufacturer purchases is exempt: only those items that are used during the manufacturing operation where materials are converted or transformed into a different state or form or in preparing the raw materials for the manufacturing process qualify for the exemption.<sup>458</sup> The Department of Taxation has issued a rule that provides clarification and examples of the application of the exemption to common activities of manufacturers.<sup>459</sup>

Another exemption of particular import to businesses that develop new products is the sales-tax exemption for purchases of capitalized equipment used in conducting qualified research and development.<sup>460</sup> This exemption covers purchases of machinery and equipment that is used primarily for designing, creating, or formulating new or enhanced products or manufacturing processes. It also applies to purchases of equipment used for the general conduct of scientific or technological inquiry or experiments in the physical sciences, with the goal of increasing scientific knowledge that can be used for new products.<sup>461</sup> The exemption provides significant savings for companies undertaking research and development activities in Ohio<sup>462</sup> because it applies to both direct research and to pure research.<sup>463</sup> “Direct research” refers to research conducted to design, create, or formulate new or better products, equipment, or processes.<sup>464</sup> “Pure research” refers to scientific or technological inquiry and experimentation in the physical sciences.<sup>465</sup>

Port Authorities are exempt from sales tax and have the ability to leverage their tax exempt status to aid in economic development. A port authority can purchase construction materials free of sales tax, allowing it to construct a building at a reduced cost. The port authority owns the property but leases it to a company that serves as the port authority’s agent to construct the building with the purchased construction materials. This reduces the cost of construction, which benefits the development of the site. Similarly, a port authority may facilitate development at its site by constructing a facility free of sales tax and then leasing it to a business that wishes to occupy the facility. This frees the business from the burdens of

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<sup>457</sup> R.C. 5739.02(B)(42)(g); Ohio Office of Budget and Management, *Tax Expenditure Report: The State of Ohio Executive Budget, Fiscal Years 2016-2017*, available at [http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State\\_of\\_Ohio\\_Budget\\_Tax\\_Expenditure\\_Report\\_FY-16-17.pdf](http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State_of_Ohio_Budget_Tax_Expenditure_Report_FY-16-17.pdf).

<sup>458</sup> R.C. 5739.01(S).

<sup>459</sup> O.A.C. 5703-9-21.

<sup>460</sup> R.C. 5739.02(B)(42)(i).

<sup>461</sup> *Id.*; R.C. 5739.01(GG) and (HH).

<sup>462</sup> Ohio Development Services Agency, Business/Entrepreneurship and Business Assistance Centers, [http://development.ohio.gov/bs/bs\\_rdste.htm](http://development.ohio.gov/bs/bs_rdste.htm).

<sup>463</sup> R.C. 5739.01(HH) (defining “qualified research and development equipment”).

<sup>464</sup> R.C. 5739.01(GG) (defining “research and development”).

<sup>465</sup> *Id.*

financing the construction of the building and allows it to account for its lease payments as an operating lease expense. The real property exemption may not be available, depending on the term of the lease, and this cost would need to be part of the business planning.<sup>466</sup>

Another sales tax exemption that is attractive to certain retail businesses exempts purchases of items that are primarily used for storing, transporting, mailing, or handling purchased sales inventory in a warehouse, distribution center, or similar facility if the inventory is primarily distributed out of the state to retail stores of the owner of the facility.<sup>467</sup> Thus, the purchase of forklifts or other material moving equipment for use in this type of facility may be exempt, whereas the purchase of the same type of forklift used in a warehouse of a facility operated by an unrelated entity would be subject to tax. Entitlement to a sales tax exemption is very fact-dependent and often is controlled by the use of the item purchased, rather than the nature of the item.

Most sales-tax exemptions can be claimed by the purchaser by providing a form called a “certificate of exemption” to a vendor, setting forth the reason why the purchase is exempt.<sup>468</sup> The form can be a “blanket” certificate of exemption, informing the vendor that all of its purchases qualify for exemption. This form would be appropriate when the purchaser is exempt because of the nature of its activity, like a charitable organization or a school. If the business makes purchases from a vendor that are not always exempt, then the business would provide a unit certificate of exemption for each purchase that is exempt. There are other exemption certificates for specific uses, which can be accessed from the Ohio Department of Taxation’s website.<sup>469</sup>

### **Ohio Exemption Certification Programs**

Other exemption programs require the purchaser to obtain a certification before the exemption may be claimed. These programs offer exemption from both sales and real property taxation and are connected to specific development projects or activities. One program provides both real property and sales tax exemptions for purchases related to environmental and energy objectives.<sup>470</sup> This program applies to four kinds of facilities: those used to control air or noise pollution; those used for energy conversion; those used for thermal efficiency improvement; or those used as an industrial water pollution control facility.<sup>471</sup> Businesses seeking an exemption under this program file an application with the Tax Commissioner.

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<sup>466</sup> R.C. 4582.20; R.C. 5739.02(B)(13).

<sup>467</sup> R.C. 5739.02(B)(2)(j).

<sup>468</sup> R.C. 5739.03.

<sup>469</sup> Ohio Department of Taxation, Tax Forms, <http://www.tax.ohio.gov/Forms.aspx>.

<sup>470</sup> R.C. 5709.20–5709.28.

<sup>471</sup> *Id.*

Depending on the type of facility for which exemption is sought, the Tax Commissioner then refers the application to either the director of the Ohio Environmental Protection Agency or the director of the Development Services Agency for review.<sup>472</sup> These agencies provide a technical review of the application and the description of the equipment that will be used in the projects to determine whether the property is primarily designed, constructed, installed, or used in an exempt manner.<sup>473</sup> The respective agencies will then provide the Tax Commissioner with an opinion and recommendation regarding the property shown on the application.<sup>474</sup> The Tax Commissioner then makes a final determination, specifying the specific items of equipment or parcels of real property that are exempt under the certification of the project and provides the certificate of exemption to the business.<sup>475</sup>

Another exemption program is geared to support the development of alternative energy systems.<sup>476</sup> An outright exemption from real property taxation is provided to solar and wind energy facilities of 250 kilowatts or less.<sup>477</sup> Larger facilities may qualify for exemption from real property taxation and the public utility personal property tax for its equipment that is used in a qualified energy project utilizing renewable energy, clean coal technology, or advanced nuclear technology.<sup>478</sup> To obtain exemption for a larger project, the owner must file an application with ODSA.<sup>479</sup> The application must identify each county and the taxing units in a county where any tangible and real property that is part of the project will be located. The application must show the permanent parcel numbers for each parcel of real property on which any portion of the project is located.<sup>480</sup> It also must contain the legal description for the property involved and provide a mailing address for the board of county commissioners and taxing authority of each taxing unit where the project is located.<sup>481</sup>

These application requirements are necessary because exemption from taxation for large renewable energy, clean coal, advanced nuclear, and cogeneration technology projects requires approval from the board of county commissioners of each county where the project is located.<sup>482</sup> The boards of such counties may adopt a resolution rejecting the application or may

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<sup>472</sup> R.C. 5709.211.

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> R.C. 5709.22.

<sup>476</sup> R.C. 5709.53.

<sup>477</sup> *Id.*

<sup>478</sup> R.C. 5727.75; Ohio Development Services Agency, Business/Business Grants, Loans and Tax Credits, [http://development.ohio.gov/bs/bs\\_gepte.htm](http://development.ohio.gov/bs/bs_gepte.htm).

<sup>479</sup> R.C. 5727.75(B), (C), (E), and (G).

<sup>480</sup> Ohio Adm. Code 122:23-1-03(C).

<sup>481</sup> *Id.*

<sup>482</sup> R.C. 5727.75(B), (C), and (E).

fail to adopt a resolution approving the application. But the failure of one county to allow the exemption does not affect the exemption from taxation in any other county that permits it.<sup>483</sup>

These large projects additionally require the applicants to provide for the training and equipping of local emergency responders and to repair roadway infrastructure following the construction of the project.<sup>484</sup> If the director of ODSA determines that the project meets the requirements for exemption, the director will certify the project as a “Qualified Energy Project.”<sup>485</sup> Qualified Energy Projects will remain exempt from taxation so long as the project is completed within the statutory deadlines, meets an Ohio employee requirement, and continues to meet several ongoing obligations, including providing ODSA with project information annually.<sup>486</sup> Potential applicants should review the application instructions and answer the preliminary questions to determine whether they should file an application to become a “Qualified Energy Project.”<sup>487</sup>

Ohio also provides a sales and use tax exemption for purchases of certain items that will be used at an eligible data center, which is a computer data center business operated by one or more taxpayers that will make a capital investment of at least \$100 million at the site within a specified period of time, and that will pay annual wage compensation of at least \$1.5 million to employees at the site.<sup>488</sup> To receive this exemption, the business must file an application with the Tax Credit Authority requesting the authority to enter into an agreement authorizing a complete or partial sales and use tax exemption on purchases of data center equipment and related installation and repair services. The application is reviewed by the director of budget and management, director of development services, and the tax commissioner for assessment of the economic impact that the center will have on the state and its political subdivisions. The director of ODSA then submits a summary of their determinations and recommendations to the tax credit authority.<sup>489</sup>

If the authority determines that the project is meritorious, it then enters into an agreement with the applicant that includes a detailed description of the capital investment project, including expenditures, the annual compensation to be paid to workers at the site, and an estimate of the amount of income taxes that would be withheld from employee

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<sup>483</sup> *Id.*

<sup>484</sup> R.C. 5727.75(F).

<sup>485</sup> *Id.*

<sup>486</sup> R.C. 5727.75(E), (F), and 5727.75(F)(6).

<sup>487</sup> Ohio Development Services Agency, Business/Business Grants, Loans and Tax Credits, [http://development.ohio.gov/bs/bs\\_qepte.htm](http://development.ohio.gov/bs/bs_qepte.htm).

<sup>488</sup> R.C. 122.175(A)(5).

<sup>489</sup> R.C. 122.175(C).

compensation.<sup>490</sup> The agreement also sets forth the percentage of the sales and use tax exemption that may be taken and the length of time that the exemption will be available. Recipients must file an annual report with the director of ODSA, showing their capital expenditures, withholding, and other information that the director requires. After reviewing the annual reports, the director issues certificates to the taxpayers verifying their compliance and finding that they remain eligible for the exemption specified in the agreement.<sup>491</sup>

## **Tax Credits**

Tax credits are granted to, and used by, private developers, investors, and companies to reduce their tax liability in exchange for activities that may promote economic growth or contribute to a societal goal designated by the General Assembly. Tax credits can be targeted to a wide variety of subject areas, such as renewable energy, employee training, or purchases of technology. A tax credit may provide offsets to income, property, CAT, or sales taxes as specified by the statute that creates the program. Ohio provides several kinds of credits, among them the historic structure rehabilitation credit,<sup>492</sup> the enterprise zone employee credit,<sup>493</sup> the commercial activity tax (first \$1 million of taxable gross receipts),<sup>494</sup> and the job creation credit.<sup>495</sup>

Credits may be refundable or renewable. Refundable tax credits can reduce tax owed to below \$0 and result in a payment to the taxpayer in excess of the taxpayer's own tax liability. Examples of refundable tax credits that may be applied to a taxpayer's CAT liability are the refundable jobs creation credit<sup>496</sup> and the credit for unused net operating loss deductions.<sup>497</sup> Nonrefundable tax credits cannot reduce a taxpayer's tax owed below \$0. Some nonrefundable credits permit the taxpayer to "carry forward" the unused amount of the credit to offset income earned in subsequent years. Ohio has enacted a wide range of tax credit programs with goals to spur economic development.

The Research and Development Investment Tax Credit is a non-refundable tax credit that can be taken against the taxpayer's CAT tax liability.<sup>498</sup> The credit equals 7% of the qualified research expenses in excess of the taxpayer's average investment in qualifying

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<sup>490</sup> R.C. 122.175(E).

<sup>491</sup> *Id.*

<sup>492</sup> R.C. 5726.52 and 149.311.

<sup>493</sup> R.C. 5709.66(B).

<sup>494</sup> R.C. 5751.03(C).

<sup>495</sup> R.C. 5747.058 and 122.17.

<sup>496</sup> R.C. 5751.50.

<sup>497</sup> R.C. 5751.53.

<sup>498</sup> R.C. 5751.51.

research expenses over the three preceding taxable years.<sup>499</sup> The credit may be claimed on the taxpayer's CAT return; there is no requirement for prior approval, although the claimed credit is subject to audit. Any excess credit not used for the taxable year in which it is earned may be carried forward for up to seven years.<sup>500</sup> To qualify for the credit, the taxpayer must invest in "qualified research expenses," which are defined in Section 41 of the Internal Revenue Code.<sup>501</sup> Qualifying expenses fit into two categories: in-house research expenses, such as wages and supplies, and contracted research expenses.<sup>502</sup>

The InvestOhio program provides a non-refundable personal income tax credit to investors who provide cash to a qualifying Ohio small business to acquire an ownership interest in the company. The qualifying small business must reinvest the cash into one or more of the five categories of allowable expenses within six months of its receipt of the funds. The investor must retain his or her ownership share of the business for two years before the credit can be claimed. The small business must retain the property that it purchased with the invested cash for the same two-year holding period.<sup>503</sup> The amount of the credit that can be awarded under this program is 10% of the amount invested, up to a maximum of \$1 million.<sup>504</sup>

To participate in this program, both the investor and the small business must register for InvestOhio through the Ohio Business Gateway. A pool of money is appropriated in each biennium to fund the tax credits, and no otherwise qualifying credits will be issued once that pool is depleted. The credits are awarded on a first-come, first-served basis, and applications are processed in the order of the transaction ID.<sup>505</sup> All applications and their corresponding investments must occur within the same Ohio fiscal biennium.

The Ohio New Markets Tax Credit program encourages investors to fund businesses in low-income communities.<sup>506</sup> These "new markets" are traditionally underserved by private sector capital. This lack of capital deters entrepreneurs and impedes growth, despite promising opportunities for investment and business expansion.<sup>507</sup> The program awards tax-credit-allocation authority to Community Development Entities ("CDE"), which act as an intermediary between investors and projects. The investor provides cash to a CDE in exchange for the tax

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<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> *Id.*

<sup>502</sup> Ohio Development Services Agency, Business/Entrepreneurship and Business Assistance Centers, [http://development.ohio.gov/bs/bs\\_rditcredit.htm](http://development.ohio.gov/bs/bs_rditcredit.htm).

<sup>503</sup> R.C. 122.86(D).

<sup>504</sup> R.C. 122.86(B); R.C. 5747.81(B).

<sup>505</sup> Ohio Adm. Code 122:24-1-04.

<sup>506</sup> R.C. 5725.33, 5726.54, 5729.16, and 5733.58.

<sup>507</sup> Ohio Development Services Agency, Business/Business Grants, Loans and Tax Credits, [http://development.ohio.gov/cs/cs\\_onmtcredit.htm](http://development.ohio.gov/cs/cs_onmtcredit.htm).

credit (39% of their investment claimed over seven years). The CDEs use the invested money for projects in the low-income areas, such as providing low-interest business loans. Ten million dollars in tax-credit-allocation authority is available to CDEs each year.

Qualified CDEs annually must apply to and receive approval from the Tax Credit Authority, and the ODSA typically makes its awards within a few months of the end of the application period.<sup>508</sup>

The New Markets Tax Credit has financed a number of projects throughout the state. In Columbus, the program financed the Gay Street (downtown) and Whitney Young (near east side) condominiums, the King Lincoln Gateway (near east side), the Point of Pride building in the Linden area, St. Joseph's Montessori School in Italian Village, and the Morse Heaton Complex at Northland.<sup>509</sup> In Cleveland, the program financed the Lutheran Metropolitan Ministries facility; redevelopment of "The 9," buildings at the intersection of E. Ninth St. and Euclid Ave, including a grocery, office, and retail space; and Broken Connections, an emergency residential and support facility for homeless and street youth.<sup>510</sup> Cincinnati projects include the 21C Museum Hotel, the City Gospel Mission, and the Mercer Commons affordable housing project.<sup>511</sup> More recently, the program has supported the investment of more than \$12.8 million into five different businesses in low-income communities throughout the state.<sup>512</sup>

The Job Creation Tax Credit ("JCTC") is overseen by the Ohio Tax Credit Authority and has existed since 1993. The JCTC is a refundable tax credit that is generally available to companies creating at least 10 new jobs within three years, with a minimum annual payroll of \$660,000 and that pay at least 150% of the federal minimum wage.<sup>513</sup> Following a recent change in Ohio law, the tax credit is now measured as a percentage of employee payroll for all new employees hired under the program and is applied toward the company's CAT tax liability.<sup>514</sup> Ohio companies must negotiate through JobsOhio to gain this tax credit from the Ohio Tax Credit Authority as part of an interstate corporate site location project. As the Ohio Job Creation Tax Credit is not available to retail institutions or many other companies in the

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<sup>508</sup> *Id.*

<sup>509</sup> Bell, *Ohio Version of New Markets Tax Credit Incentive Aims to Duplicate Program's Success*, Columbus Business First (Sept. 13, 2010), available at <http://www.bizjournals.com/columbus/stories/2010/09/13/story7.html>.

<sup>510</sup> Finance Fund, 2014 Annual Report, available at <http://www.financefund.org/userfiles/files/Other%20Documents/2015%20Annual%20Report-Street%20Stories.pdf>.

<sup>511</sup> Cincinnati Center City Development Corporation, Completed Projects, <http://www.3cdc.org/our-projects/completed-projects>.

<sup>512</sup> Ohio Development Services Agency, 2014 Annual Report at 5, available at <http://development.ohio.gov/files/reports/2014DEVAnnualReport.pdf>.

<sup>513</sup> <http://jobs-ohio.com/why-ohio/incentives>.

<sup>514</sup> *Id.* More details regarding this change to Ohio law is described later in this chapter.

service industry, Ohio manufacturers often greatly benefit from this tax credit program. Eighty-five million is allocated for the Ohio Job Creation Tax Credit in FY 2016.<sup>515</sup>

The credit rate and term are determined by the Tax Credit Authority based on a number of factors, including but not limited to the number of jobs to be created, the new payroll to be generated by the project, the fixed asset investment in the project, and the extent of interstate competition for the project.<sup>516</sup> A business must apply for the credit and be approved by the Tax Credit Authority before committing to the project.<sup>517</sup>

All recognized business entities are eligible for the credit, including a C-corporation, sole proprietorship, limited liability company, partnership, or an S-corporation.<sup>518</sup> The potential taxpayer must be subject to insurance premiums, state income, or commercial activity taxes to receive the benefit of the JCTC. Specific guidance as to the distribution of JCTC assistance through a pass-through entity is provided under Revised Code Section 122.17(J).<sup>519</sup>

The Job Creation Tax Credit was modified in the budget bill for the 2016-2017 biennium passed in June 2015.<sup>520</sup> Three significant changes were made to the program:

- First, the tax-credit calculations will now be based on employee payroll, rather than state income-tax withholdings.<sup>521</sup> Agreements for tax credits that were approved in 2014 or 2015 may be modified by mutual agreement to provide for a payroll calculation, rather than income-tax withholdings calculation, for years following the modification.<sup>522</sup>
- Second, tax-credit agreements that were negotiated before the change in law, but that do not take effect until 2016, will also include a withholding-adjustment factor. This factor considers income-tax decreases enacted since June 29, 2013, and adjusts for future income-tax rate increases or decreases.<sup>523</sup>

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<sup>515</sup> Ohio Office of Budget and Management, Ohio Tax Expenditure Report, FY 2016-2017 Operating Budget, available at [http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State\\_of\\_Ohio\\_Budget\\_Tax\\_Expenditure\\_Report\\_FY-16-17.pdf](http://obm.ohio.gov/Budget/operating/doc/fy-16-17/State_of_Ohio_Budget_Tax_Expenditure_Report_FY-16-17.pdf).

<sup>516</sup> *Id.*

<sup>517</sup> R.C. 122.17(C).

<sup>518</sup> Ohio Development Services Agency, Job Creation Tax Credit Program (JCTC) for Projects Approved After October 17, 2009, available at <https://development.ohio.gov/files/bs/JCTCSummary.pdf>.

<sup>519</sup> *Id.*

<sup>520</sup> Am.Sub.H.B. No. 64 (2015).

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

- Third, additional provisions have been added to require a taxpayer to pay back a portion of previously claimed tax credits, i.e., a “clawback.” These provisions allow for a clawback if a taxpayer fails to meet job creation, payroll, or investment requirements, or fails to substantially maintain the number of new full-time employees or amount of payroll required at any time during the Job Creation Tax Credit agreement.<sup>524</sup> A taxpayer that files for bankruptcy and either fails to (1) maintain operations at the project site for the requisite time period or (2) meet its job creation, payroll, or investment requirements, is subject to a clawback of 100% of any credits claimed.<sup>525</sup> These clawback provisions apply to Job Creation Tax Credit agreements executed after January 1, 2014, as well as to any agreements amended to conform with the new calculation methods.<sup>526</sup>

The Ohio Historic Preservation Tax Credit Program provides a tax credit to help finance the private redevelopment of historic buildings.<sup>527</sup> The program is highly competitive and receives applications bi-annually.<sup>528</sup> Over the multiple funding rounds, tax credits have been approved for 256 projects to rehabilitate 350 historic buildings in 49 different Ohio communities.<sup>529</sup> The program is projected to leverage more than \$3.8 billion in private redevelopment funding and federal tax credits directly through the rehabilitation projects.<sup>530</sup>

The Ohio Historic Preservation Tax Credit Program provides a state tax credit for up to 25% of qualified rehabilitation expenditures incurred during a rehabilitation project.<sup>531</sup> Applicants are eligible for no more than \$5 million in tax credits unless approved as a “catalytic project.”<sup>532</sup> A catalytic project is the rehabilitation of an historic building that is anticipated to foster economic development within the surrounding 2,500 feet.<sup>533</sup> The tax credit can be applied to financial institutions tax, foreign and domestic insurance premiums, or individual income taxes.<sup>534</sup>

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<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

<sup>526</sup> *Id.*

<sup>527</sup> R.C. 5726.52 and 149.311.

<sup>528</sup> Ohio Development Services Agency, Community/Community Grants, Loans, Bonds, and Tax Credits, [http://development.ohio.gov/cs/cs\\_ohptc.htm](http://development.ohio.gov/cs/cs_ohptc.htm).

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> R.C. 149.311(A)(10).

<sup>534</sup> R.C. 5729.16 and 5733.58.

Owners and long-term lessees of historically designated buildings who undertake a rehabilitation project may apply for the credit.<sup>535</sup> A building is eligible if it is individually listed on the National Register of Historic Places; contributes to a National Register Historic District, National Park Service Certified Historic District, or Certified Local Government historic district; or is listed as a local landmark by a Certified Local Government. Properties that will be used as a single-family residence or multi-family residential condominiums are not eligible.<sup>536</sup>

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<sup>535</sup> Ohio Development Services Agency, Community/Community Grants, Loans, Bonds, and Tax Credits, [http://development.ohio.gov/cs/cs\\_ohptc.htm](http://development.ohio.gov/cs/cs_ohptc.htm).

<sup>536</sup> *Id.*

## **Chapter Five:** **Local Incentives**

### **Key Points:**

- Economic development is enhanced by laws and programs initiated and administered at the local level.
- The legal authority to award local economic development tax incentives rests with local public officials who serve in 4,000 Ohio municipal, township, and county governments.
- Local real estate tax abatements, local tax credits, and other local incentives are designed to reduce the tax burden on companies that agree to create or retain jobs or make a capital investment in a local community.
- Ohio is one of a handful of states that permits municipalities to levy an income tax. Ohio cities and villages are authorized to use local tax credits to reduce the municipal income tax paid by companies and their workers as an economic growth tool.

Companies choose a specific location based upon the assets of a region and the cost of doing business in that location.<sup>537</sup> Communities and states often launch business retention and attraction programs that include promoting lower tax rates and infrastructure development that complement the area's existing strategic resources such as a port or industry cluster.<sup>538</sup> Regions and states must address the cost of doing business to attract or retain a company, because not every region or city has a deep water port, billion-dollar manufacturing facility, world-class global airport, or other game-changing community asset.

### **Ohio's Local Economic Process**

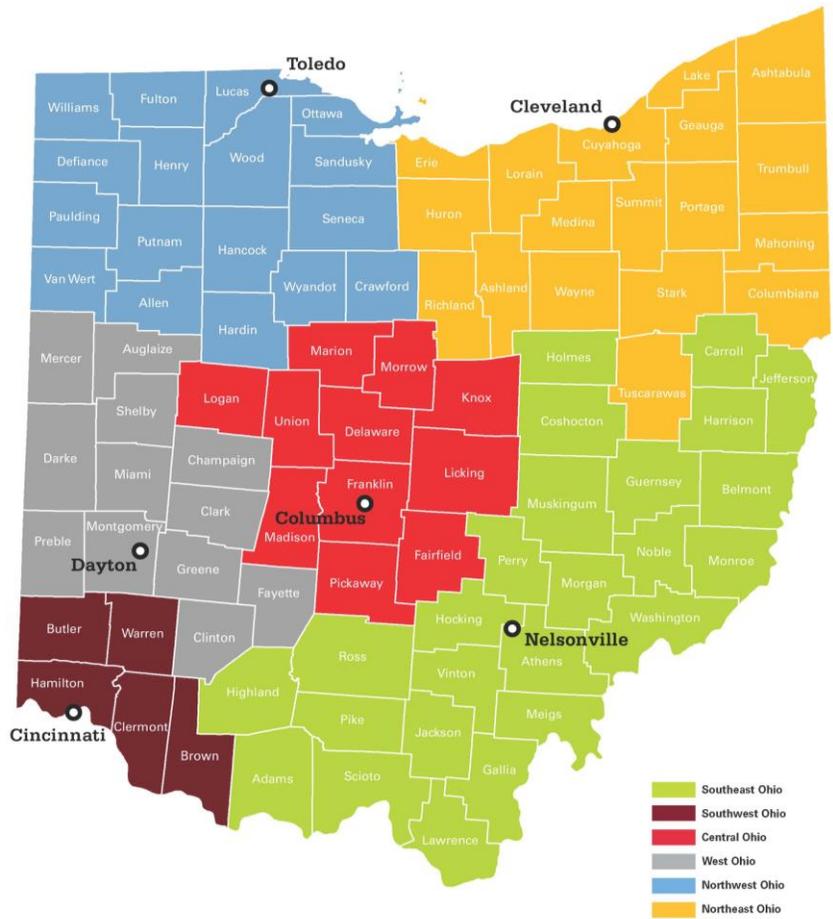
Local private-sector nonprofits, which are often trade associations organized as chambers of commerce, as well as nonprofit foundations, typically provide leadership and funding for a region's economic growth. Local government and local elected officials also play a role in local economic development since they have relationships with many of the

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<sup>537</sup> See generally Thisse, *Location Theory, Regional Science and Economics*, 27 J. Regional Science 519–528 (1987).

<sup>538</sup> See generally Wilson, *Competing for Jobs: Local Taxes and Incentives*, Federal Reserve Bank of San Francisco, Economic Letter, February 23, 2015, <http://www.frbsf.org/economic-research/publications/economic-letter/2015/february/jobs-state-tax-incentives-economic-growth>.

organizations and award many of the local incentives given to companies. However, local governments and elected officials cannot control the various private nonprofits in the region. Ohio also has a system of multi-county, regional economic development organizations that have a fee-for-service contractual relationship with JobsOhio. The JobsOhio regional network includes Columbus 2020 (Central Ohio), Team NEO (Northeast Ohio), Appalachian Partnership for Economic Growth (Southeast Ohio), Dayton Development Coalition (West Ohio), Regional Growth Partnership (Northwest Ohio) and REDI Cincinnati (Southwest Ohio). Contact information for each of these entities is located on the AGO’s website.<sup>539</sup>

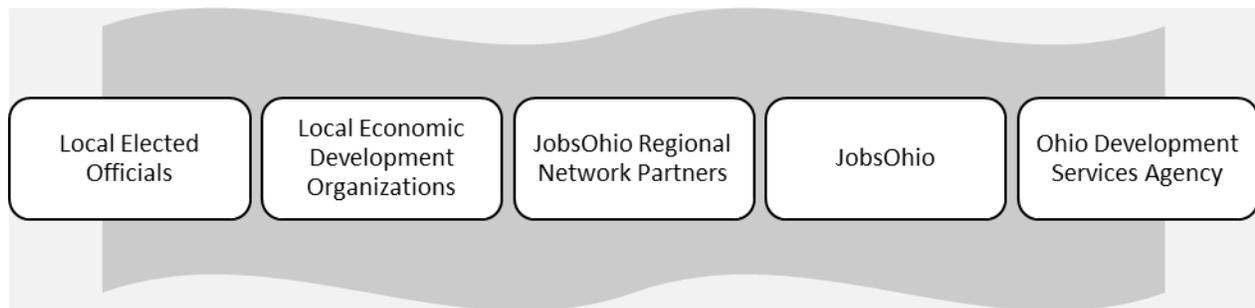


These regional economic development organizations often serve as the first point of contact for companies considering a job retention or expansion project in Ohio. However, any organization depicted below could be the first point of contact for a company. Local and regional organizations work together with company representatives or their corporate site location specialists, to identify potential sites for development and engage local government

<sup>539</sup> The current version of this information can be found by clicking the JobsOhio Network link at [www.ohioattorneygeneral.gov/EconomicDevelopment](http://www.ohioattorneygeneral.gov/EconomicDevelopment).

leaders who can offer local tax incentives and other assistance, including non-incentive benefits like bus routes and traffic light patterns that are also important to companies. JobsOhio network partner staff will also determine whether they believe a project is appropriate for JobsOhio or Ohio Development Services Agency (“ODSA”) funds and assist with that application process.

### Ohio’s Economic Development Players



### **Economic Development Performance and Compliance Reviews**

Since economic development in Ohio occurs at so many levels within the state, it is important that all of the various entities involved in economic development take steps to ensure that companies are living up to their commitments when they are given economic development incentives. In some cases, these steps are required by statute. For example, the Ohio Attorney General’s Office is responsible under Section 125.112(G) of the Ohio Revised Code, for making a determination as to whether entities receiving state awards have complied with the terms and conditions of those awards. This determination required by statute is in addition to the efforts by the ODSA and JobsOhio to monitor the performance of entities receiving assistance from either (or both) entities.

### **Legal Authority for Local Government Involvement in Economic Development**

The Ohio Constitution authorizes local governments to engage in economic development-related activity, as well as for Ohio to empower local governments to engage in economic development activity for the State. This local government authority and empowerment is called home rule authority, and is set forth in Ohio’s Constitution:

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.<sup>540</sup>

<sup>540</sup> Ohio Constitution, Article XVIII, Section 7.

As discussed in Chapter 1, Ohio is among a majority of states in the union providing for home rule authority. The power of self-government permits select local governments organized under a municipal or county charter form of government to enact their own methods to retain and attract companies within their borders and to otherwise foster economic development:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities.<sup>541</sup>

As with many other economic development activities of Ohio, Article VIII, Section 13 of the Ohio Constitution provides authority for the State to empower local governments to implement economic development on behalf of the State.

### **Local Government Tax Structure**

Local governments play a large role in retaining and attracting jobs and capital investment in Ohio. According to the United States Census Bureau, Ohio ranks fifth among the states in number of local governments, with 3,842 active as of June 30, 2012.<sup>542</sup> Ohio is served by 88 county governments who operate based upon a county-authorized sales and property tax; 937 municipal (city and village) governments who operate based upon a municipal income tax and property tax; 1,308 township governments who operate based upon a property tax; and 668 public school districts who operate based upon a property tax and/or income tax.<sup>543</sup>

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<sup>541</sup> Ohio Constitution, Article VIII, Section 13.

<sup>542</sup> U.S. Census Bureau, *Individual State Descriptions: 2012*, at 224 (September 2013), available at <http://www2.census.gov/govs/cog/2012isd.pdf>.

<sup>543</sup> *Id.*

Taxes or fees may also be levied by a range of joint governmental entities or specific use governmental entities throughout Ohio including the following:<sup>544</sup>

board of county hospital trustees	convention facilities authorities
county bridge commissions	county emergency planning districts
county hospital commissions	county law library resource boards
county road districts	county transit systems
county tuberculosis control units	countywide emergency management agencies
general health districts	joint county and county alcohol, drug addiction, and mental health service districts
joint county emergency medical services districts	joint county public defender commission
joint county tuberculosis clinics	joint detention and juvenile facilities districts
joint sewer districts	multi-county law library resources commissions
port authorities serving a single county	regional authorities for emergency management (serving two or more counties)
sewer districts	solid waste management districts
veterans service commissions	city bridge commissions
city health districts; city sewer districts (sanitary and storm)	city water supply districts
joint economic development districts	joint municipal improvement districts
joint sewer districts	rapid transit commissions
resort area taxing districts	special improvement districts
union cemetery boards	township fire districts
joint township cemeteries	joint township police districts
lighting unincorporated districts	township road districts
township police districts	

In Ohio, the income of companies is taxed at the local government level by municipalities, villages, joint economic development districts or areas, and school districts, but business personal property (including inventory) is exempt from taxation.<sup>545</sup> Ohio is one of a handful of states that permits its municipalities to charge an income tax. Economic competitors such as Texas and Florida not only do not have a state income tax but also do not permit local governments to charge an income tax. Real property can be taxed at the local level based upon the taxable value of land, buildings, and improvements (the market value of which is set by the county auditor), with a statewide assessment rate set at 35% of market value.<sup>546</sup> A county sales-and-use tax can be levied on top of the state sales tax by county government and local transit

<sup>544</sup> *Id.*

<sup>545</sup> See Jobs-Ohio, *State, Local Tax Structure*, [http://jobs-ohio.com/images/tax\\_comparisons.pdf](http://jobs-ohio.com/images/tax_comparisons.pdf).

<sup>546</sup> *Id.*

districts; however, as discussed in Chapter 4, many businesses receive sales-tax exemptions from the State.<sup>547</sup> A personal income tax on a company's workforce may also be levied by municipal governments and local school districts at a flat rate.<sup>548</sup>

### **Definitions of Local Tax Abatement and Tax Credit**

Ohio local governments are empowered to award specific tax incentives based upon the dictates of the Ohio Revised Code or in certain circumstances under a municipality's home rule authority as granted by the Ohio Revised Code. These tax incentives, in general, are either tax abatements or tax credits. Tax abatement is a reduction in taxes a taxpayer is required to pay. Unlike a tax credit, tax abatements result from an exemption of all or a portion of the assessed value of property that is owned by a taxpayer from taxation for a number of years. In essence, the taxpayer does not pay taxes on the exempted amount of such property for those years. Local legislative bodies that award tax abatements for a company promising job creation also reduce the amount of taxes received by other taxing entities, such as school districts, libraries, police and fire, etc., as a result of the exemption of property from taxation. Therefore, in many cases, school district approval of tax abatements is required by statute. Local governments cannot vary the effective tax rate, which prevents a situation where property remains taxable but at a different tax rate in effect for the district.<sup>549</sup> However, it is common for companies and local school districts to enter into side agreements that provide for some level of payment in lieu of taxes to the local schools.<sup>550</sup>

A tax credit is a reduction in taxpayer liability levied by the government. Tax credits are either non-refundable or refundable. Refundable tax credits require that the government make an actual payment of the credit amount owing to a taxpayer as calculated under the applicable tax credit law even if the taxpayer does not have a tax liability, *i.e.*, no taxes are owed for that calendar or fiscal year. With a non-refundable tax credit, the government levying the tax need not pay the taxpayer the amount of the credit if the taxpayer has no tax liability owing to the government levying the tax. The credit is limited to only that which is otherwise owing to the government levying the tax, but sometimes the credit can be carried forward and be applied to amounts due by the taxpayer in the future. Whether a local or state government awards tax credits on refundable or non-refundable terms is a policy decision that is ultimately developed into law.

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<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> See 1989 Ohio Atty.Gen. Ops. No. 89-013, at 4-5. This effectively prohibits applying a tax abatement of a certain amount for real property taxes and then using a different amount for school district taxes, for example. The taxes must be proportionately reduced or eliminated.

<sup>550</sup> Mike Lloyd, *The Ohio Enterprise Zone Program*, Ohio State University Extension Office, CDFS-1552-08 (2008).

Local government tax credits most often relate to a refund in the municipal income tax that companies and their employees pay to a local government or school district. No approval of the school district is required for these Ohio municipal income tax credits. In addition, Ohio municipal tax credits related to job creation or retention or Joint Economic Development Districts can be matched with the Ohio Job Creation or Job Retention Tax Credits. However, municipalities often enact their own version of a local job creation tax credit based upon their home rule authority.

### **Local Government Tax Abatement Programs**

Enterprise Zones and Community Reinvestment Areas (“CRA”s) are two of Ohio’s local government property tax abatement programs.

#### **Enterprise Zones**

The Ohio Enterprise Zone Program allows local governments to offer tax abatements on parcels of land as a tool to retain and attract companies to that location where a new investment is made. The original purpose of the program was to encourage businesses to establish, expand, renovate, and occupy facilities and to create jobs within economically distressed areas.<sup>551</sup> The program was set to sunset but is operating under a continuing resolution in the Fiscal Year 2016-17 Budget Bill.<sup>552</sup> Currently, more than 40 states, including Ohio, offer some variation of this program.<sup>553</sup> As of July 2015, Ohio had 992 active local enterprise zone agreements spread among 362 active enterprise zones throughout the state.<sup>554</sup> Urban, suburban, and rural communities all use Enterprise Zones to promote economic growth.

Ohio does not permit the use of Enterprise Zones for retail projects, except in areas designated as impacted cities under Revised Code 1728.01.<sup>555</sup> Ohio law permits two types of enterprise zones: limited and full authority.<sup>556</sup> Limited authority enterprise zones do not need to be in economic distress but do need approval from the director of the ODSA for an Ohio business to move from an existing Ohio location into another enterprise zone and receive a tax abatement.<sup>557</sup> Relocation waivers will be granted when an issuance of a waiver is absolutely

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<sup>551</sup> See 1981-1982 Ohio Laws, Part II, 2480 (Am.Sub.H.B. 351, eff. March 17, 1982).

<sup>552</sup> Main Operating Budget, H.B. 64, effective June 30, 2015.

<sup>553</sup> Pulsipher, *Evaluating Enterprise Zones* (Feb. 26, 2008), available at National Conference of State Legislatures, <http://www.ncsl.org/programs/econ/evalentzones.htm>.

<sup>554</sup> Ohio Development Services Agency, Business/Tax Incentives, <http://development.ohio.gov/OTEISearch/ez/selection.aspx?County=All&Company=>.

<sup>555</sup> R.C. 5709.65; R.C. 5709.61(C).

<sup>556</sup> See generally R.C. 5709.62.

<sup>557</sup> R.C. 5709.633.

necessary to attract or retain employment opportunities in the State and the request also meets one of the following factors:<sup>558</sup>

- (1) The project site where operations will be discontinued cannot accommodate expansion plans;
- (2) Market conditions dictate a relocation for the business to remain competitive, such as new or modified customer contracts, changes in production methods, loss or impending loss of an existing contract, changes in ownership or company control that result from a decision by owners or officers located outside of Ohio; or
- (3) There is a consolidation of operations to a single facility (or such consolidation is imminent).

Full-authority enterprise zones are located in areas of economic distress and do not need a relocation waiver from ODSA.

Ohio Enterprise Zone's create four levels of tax abatements: (1) principal city or urban-cluster-city distressed zone; (2) principal city or urban-cluster-city nondistressed zone; (3) county-designated nondistressed zone; and (4) county-designated distressed zone. The property in question must be located in a distressed zone to be deemed a "full authority" Ohio Enterprise Zone.

Local governments initiate the enterprise zone process by designating parcels of land as an enterprise zone and then gaining approval for this designation from ODSA.<sup>559</sup> Certification as a full-authority enterprise zone is based upon whether the parcels meet statutory requirements such as:

- having a population of at least 4,000 residents in counties with a population of more than 300,000 or a minimum population of 1,000 residents in all other Ohio counties,
- within a municipality or Appalachian region, having an average unemployment rate at least 125% of the state average,
- being in or near vacant commercial or industrial structures, decreasing population, and low income areas or located within one or more adjacent city, local, or exempted village school districts, and

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<sup>558</sup> R.C. 5709.633(B).

<sup>559</sup> See generally R.C. 5709.62 and 5709.69.

- the income-weighted tax capacity of each of which is less than 70% of the average of the income-weighted tax capacity of all city, local, or exempted village school districts in the state.<sup>560</sup>

Any form of corporation may receive the benefit of an Ohio enterprise zone tax exemption and the company facilities eligible for the tax exemption include the land, building, machinery, equipment, and other materials.<sup>561</sup> Certain events trigger the enterprise zone tax exemptions to commence, including company creation, expansion, or facility renovation and occupation. Facility expansion involves the addition of land, buildings, machinery, or equipment that equal 10% of the market value of the facility; renovations must equal at least 50% of the value of the facility; and occupations expenditures must include 20% or more of the market value of a vacant facility.<sup>562</sup>

Both municipalities and county governments may create enterprise zones.<sup>563</sup> Ohio enterprise zone tax abatements exempt a portion of the area from property taxes and are generally granted for the creation or expansion of companies as well as the renovation and occupation of existing business sites.<sup>564</sup> By statute, these enterprise zone agreements cannot last for more than 15 years.<sup>565</sup> Importantly, if the legislative authority revokes its designation of a zone or ODSA's director revokes the zone's certification, any entitlements granted under the agreement continue for the number of years specified in the agreement.<sup>566</sup> While tangible personal property taxes were phased out in 2009,<sup>567</sup> the statutes still include provisions for tangible personal property.<sup>568</sup>

Ohio enterprise zones established by a municipality can enter into agreements to exclude up to 75% of the assessed value of real property first used in business at the project site as a result of the agreement.<sup>569</sup> The tax abatement can exceed 75% in any year (1) if the average percent exempted during all years the enterprise zone agreement with a particular company is in effect does not exceed 60% or (2) if the board of education of the school district where the enterprise zone is located approves the excess percentage.<sup>570</sup>

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<sup>560</sup> R.C. 5709.61.

<sup>561</sup> *Id.*

<sup>562</sup> *Id.*

<sup>563</sup> R.C. 5709.62 (municipalities) and R.C. 5709.63 (counties).

<sup>564</sup> R.C. 5709.62(C).

<sup>565</sup> R.C. 5709.62(C) and R.C. 5709.63(B).

<sup>566</sup> R.C. 5709.62(F).

<sup>567</sup> Mike Lloyd, *The Ohio Enterprise Zone Program*, Ohio State University Extension Office, CDFS-1552-08 (2008).

<sup>568</sup> *See, e.g.*, R.C. 5709.62(C)(1)(a) and 5709.63(B)(1)(b)(i). The tangible personal property concept has been excluded from subsequent discussion in this chapter to avoid confusion.

<sup>569</sup> R.C. 5709.62(C)(1).

<sup>570</sup> R.C. 5709.62(D).

County commissioners may designate one or more areas in one or more municipal corporations or in unincorporated areas of the county as proposed enterprise zones and exempt a portion of the area from property taxes in the enterprise zone but only with consent of the legislative authority of each impacted city or township.<sup>571</sup> Enterprise zones established by counties can enter into agreements to exempt up to 60% of the assessed value of real property.<sup>572</sup> The property can be abated for up to 15 years. The tax abatement can exceed 60% in any year if (1) the average percent exempted during all years the enterprise zone agreement with a particular company is in effect does not exceed 50% or (2) if the board of education of the school district where the enterprise zone is located approves the excess percentage.<sup>573</sup>

Remediation of an environmentally contaminated facility site may also trigger the enterprise zone tax exemption. Municipalities may enter into agreements to exempt from real property taxes 50% of the assessed value of the real property of the facility before remediation and 100% of the increased assessed value of the real property for up to 15 years.<sup>574</sup> To receive this enterprise zone tax exemption, a company must (1) remediate an environmentally contaminated facility, (2) spend at least 250% of the true value in money of the real property of the facility before remediation to establish, expand, renovate, or occupy the remediated facility, and (3) hire new employees or preserve employment opportunities for existing employees at the remediated facility.<sup>575</sup>

Under certain circumstances, both municipalities and counties can enter into an agreement to grant a 100% real property tax exemption if an entity is purchasing and plans to operate a large manufacturing facility that has ceased operation or announced its intent to cease operations.<sup>576</sup>

Ohio enterprise zone awards made by local jurisdictions must be accompanied by an enterprise zone agreement between the company and the local government. Ohio enterprise zone agreements are required to be in writing and address the following:

- (1) The names of all parties to the agreement;
- (2) A description and planned timing of the economic investment by the company, including capital and job creation and payroll data;

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<sup>571</sup> R.C. 5709.63(A). However, it is important to note that county commissioners do not have the ability to abate local real estate taxes for a private business outside of their statutory authority under R.C. 307. See 2012 Ohio Op. Atty. Gen. No. 2012-030.

<sup>572</sup> R.C. 5709.63(B).

<sup>573</sup> R.C. 5709.63(C).

<sup>574</sup> R.C. 5709.62(C)(2).

<sup>575</sup> *Id.*

<sup>576</sup> R.C. 5709.62(C)(3) and R.C. 5709.63(B)(2).

- (3) A description of real property to be exempted from taxation under the agreement;
- (4) The percentage of the assessed valuation of the real property exempted from taxation and the period for which the exemption is granted;
- (5) Certification that the company is not tax delinquent;
- (6) Agreement that the enterprise zone can be revoked if the company fails to meet its job-creation and capital-investment obligations;
- (7) Agreement that the company must submit required data to the local tax incentive council;
- (8) Agreement that the enterprise zone must be formally agreed to by the municipal or county legislative authority and that it is not transferrable unless agreed to by the same legislative authority; and
- (9) Agreement that the company shall repay the tax benefit gained if their job creation numbers are not 75% of the number estimated in the enterprise zone agreement.<sup>577</sup>

ODSA and the Ohio Department of Taxation must receive copies of all enterprise zone agreements and school board compensation agreements. Companies can only receive the enterprise zone tax abatement if they apply for and receive a tax incentive certificate from the director of ODSA.<sup>578</sup> Local governments are required to form a tax-incentive review council to annually review the effectiveness of all enterprise zone tax abatements.<sup>579</sup>

An example of an Ohio enterprise zone follows.

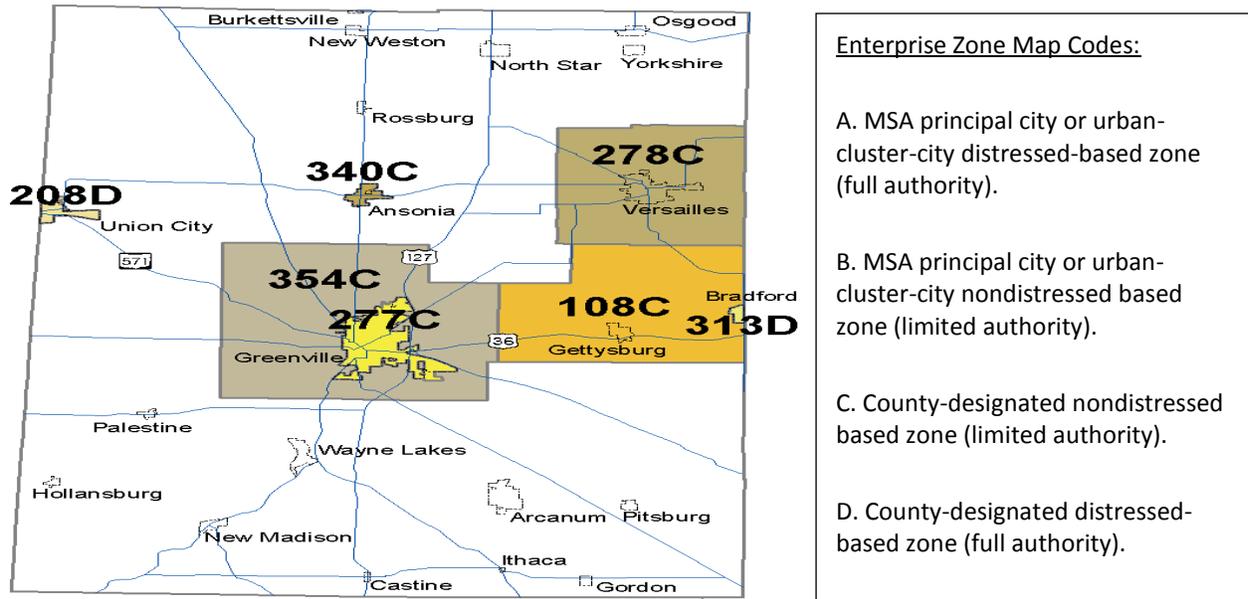
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<sup>577</sup> R.C. 5709.631.

<sup>578</sup> R.C. 5709.631 and 5709.64.

<sup>579</sup> R.C. 5709.85.

## Darke County, Ohio Enterprise Zones<sup>580</sup>



Darke County is a rural Ohio county in far Western Ohio on the border of Indiana. Darke County, as the map above illustrates, has multiple enterprise zones designated across the county. At least two companies have enterprise zone agreements filed with the ODSA. The Andersons Marathon Ethanol, LLC facility gains tax advantages from its location in the Greenville, Ohio enterprise zone #277.<sup>581</sup> The Andersons Marathon Ethanol, LLC is a manufacturing facility with \$28 million real property and \$85 million personal property investments.<sup>582</sup> The enterprise zone agreement provided a 2-year, 75% tax abatement for the real-property investment and a 10-year, 75% tax abatement for the personal-property investment.<sup>583</sup> Thirty-five full-time, permanent jobs providing over \$1.6 million in payroll resulted from this Darke County 2006 enterprise zone agreement.<sup>584</sup>

### Community Reinvestment Area

The Ohio Community Reinvestment Area (“CRA”) program provides a real property tax exemption for businesses who commit to renovate existing or construct new buildings and

<sup>580</sup> Ohio Development Services Agency, Business/Tax Incentives, Darke County, <http://development.ohio.gov/OTEISearch/ez/selection.aspx?County=Darke>.

<sup>581</sup> Ohio Development Services Agency, Business/Tax Incentives, The Andersons Marathon Ethanol LLC, <http://development.ohio.gov/OTEISearch/ez/agreement.aspx?Agreement=277-06-02>.

<sup>582</sup> *Id.*

<sup>583</sup> *Id.*

<sup>584</sup> *Id.*

develop housing.<sup>585</sup> Local municipalities or counties may use the Ohio CRA program to designate areas in order to encourage revitalization of the existing housing stock and development of new structures.<sup>586</sup> A “community reinvestment area” is defined as:

an area within a municipal corporation or unincorporated area of a county for which the legislative authority of the municipal corporation or, for the unincorporated area, of the county, has adopted a resolution under Ohio law describing the boundaries of the area and containing a statement of finding that the area included in the description is one in which housing facilities or structures of historical significance are located and new housing construction and repair of existing facilities or structures are discouraged.<sup>587</sup>

Ohio CRAs are in two distinct categories: Pre-1994 and Post-1994.<sup>588</sup> Pre-1994 Ohio CRAs provide a 100% real-property tax exemption for residential, commercial, or industrial projects and do not require approval for this abatement from the local school board.<sup>589</sup> Pre-1994 CRA’s were established directly by municipalities or counties and did not need the director of ODSA’s authorization at that time. In these types of CRAs, local jurisdictions do not have the flexibility to restrict the type of projects - residential, commercial, or industrial - eligible under the program, nor does it grant local jurisdictions the ability to grant an exemption of less than 100%. Pre-1994 Ohio CRAs can be amended only twice after July 1994 to retain operation under the old legislation—any additional amendments will invoke the Post-1994 CRA rules.<sup>590</sup>

Post-1994 CRA’s require the exemption percentage and term for commercial and industrial projects to be negotiated on a project specific basis (residential percentages are set when the CRA is established).<sup>591</sup> If the proposed real-property tax exemption is greater than 50%, it requires local school district approval unless the local legislative authority decides that at least 50% of the amount of the taxes “lost” by the school district will be made up by other taxes or payments available to the school district.<sup>592</sup> As of July 2015, Ohio local governments

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<sup>585</sup> Ohio Development Services Agency, Business/Business Grants, Loans and Tax Credits, The Ohio Community Reinvestment Area, [http://development.ohio.gov/bs/bs\\_comreinvest.htm](http://development.ohio.gov/bs/bs_comreinvest.htm).

<sup>586</sup> R.C. 3735.66.

<sup>587</sup> R.C. 3735.65(A).

<sup>588</sup> Ohio Development Services Agency, Business/Business Grants, Loans and Tax Credits, The Ohio Community Reinvestment Area, [http://development.ohio.gov/bs/bs\\_comreinvest.htm](http://development.ohio.gov/bs/bs_comreinvest.htm).

<sup>589</sup> *Id.*

<sup>590</sup> *Id.*

<sup>591</sup> R.C. 3735.66.

<sup>592</sup> R.C. 3735.671.

have 886 active CRA areas in place.<sup>593</sup> About 40% of these agreements are Pre-1994 agreements.<sup>594</sup>

As detailed in the following chart, the tax-abatement term of an Ohio CRA varies depending upon the type of project involved:

**Ohio CRA Tax Abatement Term by Project Type<sup>595</sup>**

<b>Residential Remodeling (2 units or less; minimum \$2500)</b>	<b>Up to 10 years as defined in CRA legislation</b>
<b>Residential Remodeling (more than 2 units; minimum \$5000)</b>	Up to 12 years as defined in CRA legislation
<b>Commercial and Industrial Remodeling (minimum \$5000)</b>	Up to 12 years as defined in CRA legislation
<b>Residential New Construction</b>	Up to 15 years as defined in CRA legislation
<b>Commercial and Industrial New Construction</b>	Up to 15 years as defined in CRA legislation

Much like the Ohio enterprise zone program, the Ohio CRA program results in an exemption from real-property taxation of all or a portion of the assessed valuation of select parcels of land in a geographically distressed area for an agreed-upon term negotiated on a project-specific basis. Ohio law:

- (1) authorizes municipalities and counties to negotiate Ohio CRA agreements with companies,
- (2) requires ODSA to review the negotiated agreement to ensure compliance,
- (3) requires local governments to file annual reports of CRA use with ODSA and the board of education in each school district where the agreement applies,

<sup>593</sup> Ohio Development Services Agency, Business/Tax Incentives, <http://development.ohio.gov/oteisearch/CRA/selection.aspx?County=All&Company=>.

<sup>594</sup> *Id.*

<sup>595</sup> R.C. 3735.67(D).

- (4) requires a company to give notice when it plans to relocate from an existing Ohio site to a CRA where the company is seeking an incentive, and
- (5) permits the local government to revoke an Ohio CRA tax abatement if the company in question fails to fulfill its agreed-upon economic commitments (or if ODSA notifies the local government of a violation of the agreement following its review).<sup>596</sup>

The development of housing is the primary difference between an Ohio CRA and an Ohio Enterprise Zone property-tax exemption. Retail or other nonmanufacturing projects are eligible for the Ohio CRA program.<sup>597</sup> Therefore, the Ohio CRA program can be used to address larger quality of life issues related to neighborhood development such as restaurant and housing development strategies.

To form an Ohio CRA, the legislative authorities of municipalities and counties may survey housing within their jurisdictions and after the survey may adopt resolutions describing the boundaries of the CRA. These resolutions must contain the conditions required by Revised Code 3735.65(B), *i.e.*, a statement of finding that (1) the area included in the CRA boundary description has housing facilities or structures of historical significance and (2) new housing construction and repair of existing facilities or structures are discouraged.<sup>598</sup> Following this survey, the legislative authorities of municipalities or counties must adopt resolutions describing the boundaries of CRA meeting the statutory conditions.<sup>599</sup> When a CRA is properly established under Revised Code 3735.66, it will continue to exist despite changes in conditions in the area that occur after it is established.<sup>600</sup> The legislative authority may require that only new structures or remodeling classified as to use as commercial, industrial, residential, or some combination are eligible for the tax abatement offered through the CRA, but if it does not include that stipulation, all new structures and remodeling are eligible.<sup>601</sup> The legislative authority's CRA resolution must be published in a newspaper of general circulation in the municipality or county once a week for two consecutive weeks.<sup>602</sup> These local governments need to appoint a housing officer to coordinate the CRA and petition the director of the ODSA for the CRA certification.<sup>603</sup> A community-reinvestment-area housing council must also be appointed by local government officials and make annual inspections of the local Ohio CRA

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<sup>596</sup> See generally R.C. 3735.65, 3735.66, 3735.671, 3735.672, 3735.673, and 3735.68.

<sup>597</sup> R.C. 3735.66.

<sup>598</sup> R.C. 3735.66.

<sup>599</sup> *Id.*

<sup>600</sup> 1987 Ohio Atty.Gen. Ops. No. 87-047 at 1.

<sup>601</sup> R.C. 3735.66.

<sup>602</sup> *Id.*

<sup>603</sup> *Id.*

properties. The council is required to submit an annual report to the ODSA director summarizing the activities and projects for which an exemption has been granted in that area.<sup>604</sup>

A critical issue is the relocation of existing Ohio companies from one location in Ohio to another location with an established CRA where the company requests a tax abatement. ODSA adopted regulations pertaining to companies that relocate within state boundaries.<sup>605</sup> A “relocation” is defined as “the transfer by a business entity of employment positions or taxable personal tangible property assets from one Ohio political subdivision to another” and includes the transfer of jobs or taxable personal tangible property assets from one political subdivision to another in Ohio.<sup>606</sup> But, several actions by companies do not constitute a “relocation,” including when:

- Jobs are transferred from one Ohio site to another but are replaced within three years;
- Taxable personal tangible property assets are transferred from one Ohio facility to another Ohio facility, but the business installs replacement assets of equal or greater value and of compatible type;
- Jobs or taxable personal tangible property assets are transferred within the same political jurisdiction; and
- Jobs or taxable personal tangible property assets are transferred from one Ohio jurisdiction without a CRA to a second site with CRA benefits.

Ohio is full of examples of CRAs. Lake County, Ohio is bounded on the north by Lake Erie. Lake County has 16 CRAs throughout the county in cities and townships. Only six of these CRAs are Post-1994 in nature. Many cities and townships in Lake County have multiple CRAs within their jurisdiction. There are multiple active CRAs in Lake County and the Niyati Enterprise, LLC is an example of an active Lake County CRA Agreement. The Niyati Enterprise, LLC CRA agreement was reached in 2014 and is not set to expire until December 31, 2025. Niyati Enterprise, LLC’s CRA agreement anticipates investments just under \$1 million and the creation of nearly 50 full-time and part-time jobs. This CRA provides a 50% real-property tax abatement for 10 years.<sup>607</sup>

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<sup>604</sup> R.C. 3735.69.

<sup>605</sup> Ohio Adm. Code 122:9-1-02.

<sup>606</sup> *Id.*

<sup>607</sup> Niyati Enterprise LLC Agreement #14-100, Agreement Summary from ODSA Website. <http://development.ohio.gov/oteisearch/CRA/selection.aspx?County=Lake>.

### Ohio Enterprise Zone v. Community Reinvestment Area Program Comparison

<u>Element</u>	<u>Ohio Enterprise Zone</u>	<u>Ohio CRA</u>
<b>Tax Incentive Type</b>	Property Tax Abatement on parcels of land	Property Tax Abatement on parcels of land
<b>Industry Focus</b>	Industrial & Office	Industrial, Office, Retail, and Housing
<b>Governing Law</b>	Ohio Revised Code 5709.61-.69	Ohio Revised Code 3735.65-.70
<b>Administered</b>	Local Political Jurisdiction	Local Political Jurisdiction
<b>Term</b>	Up to 15 Years	Up to 10-15 Years
<b>Incentive Granted</b>	Up to 75% tax abatement without school board approval Up to 100% tax abatement with school board approval	Up to 100% tax abatement with Pre-1994 CRA without school board approval Up to 50% tax abatement with Post-1994 CRA without school board approval and 100% with school board approval
<b>Relocation of Jobs</b>	Notice to and Waivers from ODSA Required	Notice to ODSA Required
<b>Process</b>	Local Government Ordinance Creating EZ, Certification of EZ by ODSA, and Agreement with Company	Housing Study, Local Government Ordinance Creating CRA, Eligibility Determination of CRA by ODSA and Agreement with Company if for commercial or industrial property.

## **Local Economic Development Tax Credits**

Tax credits are an additional local economic development incentive to promote job creation and capital investment. Local tax credits are authorized by both state legislation and Ohio home rule authority.

The Revised Code permits a municipality to grant a refundable or nonrefundable credit against its tax on income to a company in exchange for the creation of jobs within the city.<sup>608</sup> The local tax credit must be measured as a percentage of the new income tax revenue that the municipal corporation derives from new job creation for a term of 15 years or less. The legislative authority of the municipality must adopt an ordinance and enter into a tax credit agreement with the company. The agreement must outline all the conditions of the incentive. Often, municipalities create standards for when they will award municipal job-creation tax credits.

For example, Kent, Ohio requires the company in question to pay well above the federal minimum wage; be a company that is non-retail in nature; be a company headquarters, a manufacturing, science and technology, research and development company, or a distribution facility; create at least 25 new jobs over three years; commit to retaining the current number of employees; make a substantial fixed-asset investment in land, building, machinery/equipment, or infrastructure; be economically sound and viable; show that the project has not already begun; demonstrate that the tax credit is a "major factor" in its decision to expand or locate in the municipality; and agree to maintain operations at the project site for at least twice the term of the tax credit or up to 20 years.<sup>609</sup>

Ohio law also permits municipalities to offer a similar tax credit for the retention of jobs within their jurisdiction.<sup>610</sup> Finally, Ohio law permits a municipality to award a tax credit against its municipal income tax to a resident who works in a Joint Economic Development Zone to the same extent it grants a credit against its income tax to its residents employed in another municipality.<sup>611</sup>

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<sup>608</sup> R.C. 718.15.

<sup>609</sup> See City of Kent, Job Creation Tax Credit Administrative Guidelines, <http://www.kentohio.org/citydep/comdev/econ/JCTC-ADMIN.pdf>.

<sup>610</sup> R.C. 718.151.

<sup>611</sup> R.C. 718.16.

The city of Toledo provides an example of a municipality using an array of tax credits to rebate a portion of its municipal income tax in exchange for job creation and capital investment. The Toledo Municipal Job Creation Tax Credit provides a negotiated tax credit on the city's income tax that a company or its employees would pay to the City. Toledo's Municipal Job Creation Tax Credit set the following guidelines to determine which companies are eligible for an award:

- The company's projects must be approved by Ohio's Job Creation Tax Credit Program;
- The company must create a minimum of 25 new, full-time jobs within three years, paying 150% of the state minimum wage or \$10.57 an hour per job; and
- The company must be relocating within the city/state in a Toledo or Federal Enterprise Zone and seeking a project site for expansion purposes for a term twice the length of the incentive period.<sup>612</sup>

The maximum Toledo Municipal Job Creation Tax Credit is 40% of the Toledo payroll taxes of eligible full-time employees per year for up to 10 years.<sup>613</sup> Also, a maximum tax credit of 80% of the municipal payroll taxes of eligible full-time employees per year, for up to 10 years, for businesses within the Enterprise Communities jurisdiction is authorized.<sup>614</sup> Several examples of the Toledo Municipal Job Creation Tax Credit have contributed to economic expansion projects in Toledo. In 2011, Chrysler announced a \$500 million, 1,105-job expansion project for the Toledo North American Assembly Plant—more commonly known as the Jeep Plant.<sup>615</sup> This Jeep expansion was supported by \$10 million in Ohio Job Creation Tax Credits plus \$2 million in workforce training incentives.<sup>616</sup> The Toledo Municipal Job Creation Tax Credit also supported the Jeep expansion decision through a 40%, 10-year tax credit against the municipal income tax for the new 1,105 jobs created for the project.<sup>617</sup>

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<sup>612</sup> City of Toledo, Municipal Job Creation Income Tax Credit MJCTC Guidelines, <http://toledo.oh.gov/media/34405/Municipal-Jobs-Creation-Tax-Credit-MJCTC-Guidelines.pdf>.

<sup>613</sup> *Id.*

<sup>614</sup> *Id.*

<sup>615</sup> See Toledo Free Press, Municipal Job Creation Tax Credit, <http://www.toledofreepress.com/tag/municipal-job-creation-tax-credit>.

<sup>616</sup> *Id.*

<sup>617</sup> *Id.*

Toledo also offers a Toledo Expansion Initiative (“TEI”) program to spur job growth. TEI grants are based upon the actual growth in payroll income-tax revenue retained by Toledo over Expected Revenue Benchmarks—in essence, a three-year average of past taxes generated by the company for the City.<sup>618</sup> In Industrial, Technology, and Downtown TEI Zones, grant awards are 30% of the growth of yearly municipal income taxes actually paid to and retained by the City based upon Expected Revenue Benchmarks.<sup>619</sup> But nonmanufacturing companies located in “Industrial Zones” are eligible only for a 10% grant.<sup>620</sup> Commercial TEI Zones grant awards are limited to 20% of the growth of yearly municipal income taxes actually paid to and retained by the City based upon Expected Revenue Benchmarks.<sup>621</sup> In all other areas of Toledo, the grant awards are limited to 10% of the growth of yearly municipal income taxes actually paid to and retained by the City based upon Expected Revenue Benchmarks.<sup>622</sup> An additional 10% grant award goes to companies that spend at least 15% of its expenditures on product research and development.<sup>623</sup> The TEI can provide manufacturing companies or companies spending at least 15% of its yearly expenditures on product research and development activities with larger grants.<sup>624</sup> As the Toledo TEI incentive is a government grant, it works well with other local incentive programs such as tax abatements.<sup>625</sup>

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<sup>618</sup> City of Toledo, Toledo Expansion Incentive (TEI) Program Guidelines, <http://toledo.oh.gov/media/29827/Toledo-Expansion-Incentive-TEI-Guidelines.pdf>.

<sup>619</sup> *Id.*

<sup>620</sup> *Id.*

<sup>621</sup> *Id.*

<sup>622</sup> *Id.*

<sup>623</sup> *Id.*

<sup>624</sup> *Id.*

<sup>625</sup> *Id.*

**Chapter Six:**  
**Issuing State and Local Obligations to Finance Ohio’s Economic Development**

**Key Points:**

- The ability of Ohio’s state agencies and political subdivisions to issue state and local obligations to finance economic development is an important tool for economic development.
- A variety of entities are authorized to issue debt in Ohio, ranging from statewide offices to local governments.
- Debt issuances can finance both traditional governmental projects and economic development projects.
- State political subdivisions may issue or incur obligations ranging from general obligation bonds pledging the full faith and credit and taxing power of the issuing authority to certain revenue bonds and lease obligations (subject to annual appropriation), as well as certain other types of bonds or obligations.
- The Ohio Constitution has placed limits on the total amount of debt that can be issued in the State.

Access to capital is a critical issue for many companies trying to manage growth and survive in the global marketplace. Companies need this capital for a range of business expenses like facility and equipment purchases, and local governments need capital to fund related infrastructure needs like roads, water, and sewer. Responding to these capital needs, Ohio and its local governments established a variety of ways to provide public financing for economic development projects.

**Legal Authority to Issue Debt to Finance Infrastructure and Economic Development**

For debt or other obligations to be issued or incurred by state agencies or the State’s political subdivisions, constitutional and statutory authority must permit the issuance.<sup>626</sup> In addition, the funds derived from the issuance of debt or other obligations may be used only for those purposes enumerated in the authorizing constitutional or statutory provision.<sup>627</sup> The

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<sup>626</sup> *Allard v. Bd. of Edn. of Madison Twp., Rural School Dist.*, 101 Ohio St. 469, 471–72 (1920).

<sup>627</sup> *State ex rel. Lake Cty. Bd. of Commrs. v. Zupancic*, 62 Ohio St.3d 297 (1991).

**issuing authority** must determine if the purpose is consistent with the provisions under which the debt was issued or incurred.<sup>628</sup> The State and its local political subdivisions issuing debt and other obligations to fund infrastructure and economic development must be aware of their obligations and roles in this process.

### **Ohio Constitution**

Like all State action, the Ohio Constitution provides the authority to issue debt to finance the costs of an economic development project. As discussed in more detail in [Chapter 1](#), the first Ohio Constitution, drafted in 1802, contained no caps on how much debt could be incurred by the state or any political subdivision. State debt ballooned and became debilitating. To curb corruption and state debt, the 1851 Ohio Constitution limited the amount of debt that could be incurred. Article VIII of the Ohio Constitution has been said to be expressing the concern of “placing public tax dollars at risk to aid private enterprise.”<sup>629</sup> Currently, Article VIII, Section 1 provides that “the state may contract debts to supply casual deficits or failures in revenue . . . .”<sup>630</sup> Similarly, Article VIII, Section 5 prohibits the state from assuming the debt of any of its political subdivisions—unless it is assumed to protect the state during war.<sup>631</sup>

While the Constitution limits how much and what kind of debt the state and local political subdivisions can incur, exceptions permit debt to be issued in certain instances for certain public purposes. The most significant constitutional provision authorizing state debt is Article VIII, Section 13: Economic Development. Section 13 permits the state and its political subdivisions to borrow money by issuing bonds or other obligations to “create or preserve jobs and employment opportunities, [and] to improve the economic welfare of the people of the state . . . .”<sup>632</sup> Indeed, Section 13 further states that this authority is “determined to be in the public interest and a proper public purpose . . . .”<sup>633</sup> Arguably, almost any state or local debt or obligation incurred for a public purpose (e.g., public roads, sewers, water, schools, etc.) could be said to affect the state’s growth and its economic development. Article VIII, Section 13 exempts certain types of revenue debt from state debt limits—while simultaneously prohibiting “moneys raised by taxation” from being obligated or pledged to repay the revenue debt.<sup>634</sup>

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<sup>628</sup> *State ex rel. Bowman v. Bd. of Commrs. of Allen Cty.*, 124 Ohio St. 174 (1931).

<sup>629</sup> *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St.3d 111, 114 (1991).

<sup>630</sup> Ohio Constitution, Article VIII, Section 1 (capping the aggregate amount of “such debts . . . [to] never exceed seven hundred and fifty thousand dollars”).

<sup>631</sup> Ohio Constitution, Article VIII, Section 5.

<sup>632</sup> Ohio Constitution, Article VIII, Section 13.

<sup>633</sup> *Id.*

<sup>634</sup> *Id.* General obligation debt typically does not constitute “moneys raised by taxation.” See *State ex rel. Ryan v. City Council of Gahanna*, 9 Ohio St.3d 126, 129 (1984).

Article VIII, Section 13 was passed by the electors in 1965 to allow limited state and local government participation in private enterprise. The purpose of Article VIII, Section 13 is to allow local and state governmental entities to give financial assistance to private industry or other governmental entities to create and preserve employment within Ohio.<sup>635</sup> This section works with—and is an exception to—other constitutional provisions that limit public-private participation in economic development projects. For example, Article VIII, Section 4 prohibits the state from becoming a joint owner or stockholder in any individual association or corporation.<sup>636</sup> Article VIII, Section 6 prohibits passing any law that would authorize private interests from tapping into public funds at the taxpayers' expense.<sup>637</sup> Article VIII, Section 13 has tempered these prohibitions by permitting revenue debt of the state and local governments to be issued to pay certain costs of privately owned projects. This debt is permitted as long as the bond or other obligation incurred by the State or local government furthers “industry, commerce, distribution and research,” no money raised by taxation is obligated or pledged and the obligations effect the necessary requirements to promote the creation and preservation of jobs and to improve the economic welfare of the state.<sup>638</sup>

A number of Ohio courts have addressed the scope of Article VIII, Section 13. “Commerce,” for example, has been expanded to mean “[t]he exchange of goods, productions, or property of any kind” and also includes “service industries that for some time have formed a substantial part of our state’s and nation’s economies.”<sup>639</sup> The Ohio Supreme Court, however, has limited this broad principle when it only benefits residential property owners (insisting that it must benefit industry or commerce).<sup>640</sup> Courts look for economic development that provides

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<sup>635</sup> *The Sylvania Savings Bank v. Cty. of Richland*, 5th Dist. Richland No. 2015, 1982 WL 3022, at \*2 (June 11, 1982), citing *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St.2d 34 (1966).

<sup>636</sup> Ohio Constitution, Article VIII, Section 4.

<sup>637</sup> Ohio Constitution, Article VIII, Section 6 (“No laws shall be passed authorizing any county, city, town or township . . . to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association . . .”); see also *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St.3d 37, 40 (2000); *Westfield Franklin Park Mall, LLC v. Toledo/Lucas Cty. Port Auth.*, 6th Dist. Lucas No. L-04-1380, 2005-Ohio-5248, ¶ 16. In *Westfield Franklin Park Mall*, the Sixth District Court of Appeals found that a port authority is permitted to lend aid to a private party so long as it is excepted from the state debt limits under Article VIII, Section 13. *Id.* at ¶¶ 19–23.

<sup>638</sup> Article VIII, Section 13 of the Ohio Constitution specifically permits “the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instruments” to “acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the state of Ohio for industry, commerce, distribution, and research, to make or guarantee a loan and to borrow money and issue bonds or other obligations to acquire money” for such purposes.

<sup>639</sup> (Emphasis deleted.) *State ex rel. Bd. of Cty. Comms. v. Zupancic*, 62 Ohio St.3d 297, 301 (1991). See also *State ex rel. Bd. of Cty. Comms. of Preble Cty. v. Mong*, 12 Ohio St.3d 66, 67 (1984) (finding that farming fell within the definition of “commerce” under Article VIII, Section 13 of the Ohio Constitution).

<sup>640</sup> *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St.3d 37, 42 (2000).

continuous commerce, rather than simply a one-off instance of commerce.<sup>641</sup> Any economic development must be “in the public interest and [for] a proper public purpose.”<sup>642</sup> Proper public purpose, however, is not synonymous with “public use” as used in the eminent domain context.<sup>643</sup>

### **Uniform Public Securities Law**

Revised Code Chapter 133 is the Uniform Public Securities Law of Ohio. It authorizes political subdivisions and taxing authorities to issue general obligation bonds, certain revenue bonds, bond anticipation notes, and other obligations to pay costs of permanent improvements, and in limited circumstances, for other purposes such as to fund current expenses. Revised Code 133.15 provides broad taxing authority to issue “securities” to pay for all (or any portion of) the costs of a permanent improvement authorized, which is the most common reason for the issuance of securities.<sup>644</sup> A permanent improvement is generally any property or asset with an estimated life of five years or more, e.g. a “capital improvement.” Revised Code Chapter 133 defines “securities” as “bonds, notes, certificates of indebtedness, commercial paper, and other instruments in writing, . . . [and] anticipatory securities.”<sup>645</sup>

The most frequently issued obligations in Ohio are general obligation bonds and bond anticipation notes. Article XII, Section 11 of the Ohio Constitution requires that the legislation authorizing the general obligation bonds or bond anticipation notes must provide for levying and collecting taxes in an amount sufficient to pay the interest on the bonds and to provide a sinking fund for the final payment of the bonds’ principal.<sup>646</sup> The issuing authority does not have to levy the sinking fund tax required by Article XII, Section 11 if other funds are available to pay the debt charges. Often municipal income taxes or other revenues are used to pay the debt charges.<sup>647</sup> In addition, Revised Code 133.18 (relating to voted bonds) in accordance with Article XII, Section 2 requires the taxing authority to levy annually an amount necessary to pay debt charges on voted general obligation bonds. This levy is unlimited to rate and amount.<sup>648</sup>

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<sup>641</sup> *Compare Stark Cty. v. Ferguson*, 2 Ohio App.3d 72, 76 (5th Dist. 1981) (finding that a long-term facility that provided medical and dental services rose to the level of commerce) *with State ex rel. Brown v. Beard*, 48 Ohio St.2d 290, 291–292 (1976) (holding that construction of a low-income housing unit failed to reach commerce as intended in Article VIII, Section 13).

<sup>642</sup> Ohio Constitution, Article VIII, Section 13.

<sup>643</sup> *City of Dayton v. Kuntz*, 2d Dist. Montgomery No. 10513, 1988 WL 28104 (Mar. 3, 1988), fn. 6.

<sup>644</sup> R.C. 133.15; *see also* Ohio Municipal Advisory Council, *Municipal Debt in Ohio: The Guide* 5–6 (2013).

<sup>645</sup> R.C. 133.01(KK).

<sup>646</sup> Ohio Constitution, Article XII, Section 11.

<sup>647</sup> R.C. 133.05(B)(7).

<sup>648</sup> R.C. 133.23; *see also Municipal Debt in Ohio* at 6–7.

Revised Code Chapter 133 also authorizes political subdivisions to issue securities that are secured by taxes, special assessments, and certain other revenues. For example, Revised Code 133.081 permits a county to issue sales-tax-supported bonds to finance permanent improvements (these, however, are special obligations not general obligations).<sup>649</sup> Counties may also issue revenue bonds to pay improvement costs of sewer district facilities, hospital facilities, off-street parking facilities, or an arena or convention center.<sup>650</sup> Similarly, Revised Code Chapter 504 permits townships to issue general obligation bonds to pay costs of water or sewer services and requires that the securities be issued subject to Chapter 133.<sup>651</sup>

### **Industrial (Economic) Development Revenue Bonds**

As noted above, Article VIII, Section 13 of the Ohio Constitution acts as an exception to Sections 4 and 6 of Article VIII (which prohibit lending to private entities) to allow limited state and local participation in private enterprise.<sup>652</sup> Article VIII, Section 13 states that “[l]aws may be passed to carry into effect” its purpose. Revised Code Chapter 165, regarding industrial development bonds, was enacted under this authority.

Revised Code 165.02 states that “Section 13 of Article VIII, Ohio Constitution, is in part implemented by this chapter in furtherance of the public purposes of the state to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the state.”<sup>653</sup> This section uses much of the same language used in Article VIII, Section 13 regarding the permitted purposes to issue bonds.<sup>654</sup> Chapter 165 industrial development bonds are “intended solely for the benefit of Ohio industry by supplying a source of capital to Ohio businesses, thereby providing jobs and economic development within the state.”<sup>655</sup> Historically, Chapter 165’s authority provided a financing mechanism for issuing revenue bonds secured by loan or lease payments from private businesses. These businesses enter into loan agreements or leases with the issuing authority to finance economic development improvements.<sup>656</sup>

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<sup>649</sup> R.C. 133.081.

<sup>650</sup> See R.C. 133.08(B)(1)–(5).

<sup>651</sup> R.C. 504.18 and 504.20.

<sup>652</sup> For a discussion of lending aid and credit in Article VIII, Sections 4 and 6, see [Chapter 1](#), “Introduction to Ohio Economic Development.”

<sup>653</sup> R.C. 165.02.

<sup>654</sup> Compare Ohio Constitution, Article VIII, Section 13 with R.C. 165.02 and 165.03.

<sup>655</sup> *Master Consolidated Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 582 (1991).

<sup>656</sup> See, e.g., *State ex rel. Lake Cty. Bd. of Commrs. v. Zupancic*, 62 Ohio St.3d 297 (1991), syllabus (highlighting that a county board of commissioners had authorized \$3.1 million dollars in “economic development” bonds as a loan for the construction of a for-profit apartment complex).

Chapter 165 authorizes issuing “revenue” bonds by the state, counties, and municipal corporations. Holders of revenue bonds issued under Chapter 165 (as well as certain other sections of the Revised Code) are secured by the pledge of “revenues” received by these governmental issuers under leases and loan agreements for payment of the debt charges. Since the original enactment of Chapter 165, economic development revenue bonds have been authorized to be issued by other state and local issuers, such as the Treasurer of State<sup>657</sup> and Port Authorities.<sup>658</sup> Some procedural requirements to issuing industrial development revenue bonds under Chapter 165 are not present with other economic development revenue bond statutes.<sup>659</sup> As a result, economic development revenue bonds are being issued using statutory authority other than Chapter 165. Small issue industrial development revenue bonds may be issued to finance only manufacturing facilities, rather than a larger range of economic development facilities. Before enactment of the Internal Revenue Code of 1986, Chapter 165 industrial development revenue bonds had been used often to finance a larger range of economic development facilities.

In a recent Ohio Attorney General Opinion, the Ohio Attorney General addressed whether a lease or loan agreement is necessary when a private corporation is required to make payments to the board of county commissioners to fully cover the debt charges on securities issued under Revised Code Chapter 165.<sup>660</sup> The Attorney General opined that while at first glance Chapter 165 may appear to require the private corporation benefiting from the sale of county economic development revenue bonds to pay the debt charges on the bonds in full, an examination of Chapter 165 indicates that a full-payment arrangement is permitted but not mandated. The Attorney General stated that a county may issue bonds secured by a pledge of the county’s non-tax revenues (e.g., condemnation and insurance proceeds, fines, fees, forfeitures, investment earnings), so long as moneys raised by taxation are not obligated or pledged to the payment of debt charges on the bonds. Thus, if loan payments or lease payments are not received by the governmental issuer in an amount sufficient to pay debt charges on its bonds, the bondholder can look to the governmental issuer’s pledge of its own non-tax revenues to satisfy that debt service on the economic development revenue bonds, guarantee, or other obligation. The Attorney General opined that as a matter of law, an issuer

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<sup>657</sup> R.C. 166.08.

<sup>658</sup> R.C. 4582.06 and 4582.31.

<sup>659</sup> For example, approval of the proposed project by a community improvement corporation (CIC) designated by the issuer under Revised Code Section 1724.10 as its agent for industry, commerce, distribution, and research and providing for approval of a plan by the governmental issuer that has been prepared by the CIC. R.C. 165.01(D).

<sup>660</sup> 2004 Ohio Atty.Gen.Ops. No. 2004-005.

may pledge or obligate its non-tax revenue to pay debt service or to provide grants, rather than loans, for portions of projects.<sup>661</sup>

### **Volume Cap**

Revenue bonds issued under Ohio Revised Code Chapter 165 and other bonds under other sections of the Revised Code can be taxable bonds or “tax-exempt bonds”.<sup>662</sup> In general, the holder of a state and local government bond does not include in gross income the interest paid on that bond.<sup>663</sup> This exclusion of interest from gross income, however, does not relate to a private activity bond (“PAB”) unless that bond is a “qualified bond.”<sup>664</sup> A PAB is a bond that meets certain tests when (1) the security for payment includes payments received from private persons or security interests granted by private persons in private property, such as mortgages, and (2) the project financed with bonds is used in a trade or business.<sup>665</sup> Since Article VIII, Section 13 of the Ohio Constitution permits revenues to be received from private persons under leases or loan agreements, economic development bonds are typically PABs, and for the PABs to be tax-exempt, they must be “qualified bonds.” If a PAB is not a “qualified” bond, the PAB is a taxable bond.

The requirements for a PAB to be a “qualified” bond are set forth in Sections 141 to 147 of the Internal Revenue Code, including exempt facility bonds under Section 142 (airports, docks, multifamily housing, etc.), Section 143 “Qualified Mortgage Bond” (e.g., bonds issued by the Ohio Housing Finance Agency), Section 144 “Qualified Small Issue Bonds,” and Section 145 “Qualified 501(c)(3) Bonds.” Ohio Revised Code Chapter 165 revenue bonds are often issued by counties and other governmental issuers to pay costs of facilities for use by nonprofit borrowers and lessees as qualified 501(c)(3) bonds. As discussed above, “commerce” under Ohio Revised Code Chapter 165 is defined broadly enough to often include the “commerce” of nonprofit schools and other charitable entities that offer similar services as for-profit providers of the same or similar services.<sup>666</sup>

To be “qualified,” many PABs must also be issued in accordance with an allocation of the state’s ceiling for private activity bonds under Section 146 of the Internal Revenue Code. The

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<sup>661</sup> See generally *City of Norton v. Limbach*, 65 Ohio App.3d 709, 716 (holding that it is properly left to the legislative body to decide “whether the proposed bond issue or the underlying Project is wise, or even fiscally sound”); *Cty. of Stark v. Ferguson*, 2 Ohio App.3d 72, 77 (“The determination of whether the authorization of such bonds should be made in the public interest is essentially a political question, properly decided by the legislative and executive branches of government.”).

<sup>662</sup> 26 U.S.C. 103(a).

<sup>663</sup> *Id.*

<sup>664</sup> 26 U.S.C. 103(b)(1); 26 U.S.C. 141.

<sup>665</sup> 26 U.S.C. 141.

<sup>666</sup> *State ex rel. Bd. of Cty. Commrs. v. Zupancic*, 62 Ohio St.3d 297, 301 (1991).

amount of the private activity bond state ceiling allocated to the states is based upon that state's population.<sup>667</sup> Ohio determines the methodology for allocating Ohio's state ceiling or volume cap.<sup>668</sup> Under Rule 122-4-02 of the Ohio Administrative Code, the allocation of volume cap is calculated as follows:<sup>669</sup>

- Multi-family Housing (15% allocation up to \$120 million, whichever is less),
- Single-family housing (\$300 million allocation available for the Ohio Housing Finance Agency),
- Exempt facilities (10% allocation up to \$100 million, whichever is less),
- Qualified small issue (10% allocation up to \$100 million, whichever is less, for manufacturing companies), and
- Student loan bonds (10% allocation up to \$120 million, whichever is less).

Certain PABs, such as qualified 501(c)(3) bonds, are eligible to be a tax-exempt bond under the Internal Revenue Code without an allocation of Ohio's volume cap.<sup>670</sup> Finally, amounts of the allocations made under Rule 122-4-02 may be transferred, and retransferred, by the Director of ODSA, with advice from the committee formed pursuant to Revised Code 133.021, from one category to any other category of allocation. Any transfer made must be evidenced by written order of the Director, be based on the relative needs for allocation among the categories of allocations, and be made with the objective of maximizing utilization of the state ceiling.<sup>671</sup>

There is a significant limitation on what constitutes a "qualified" small issue bond under Section 144(a) of the Internal Revenue Code, which used to be one of the most prominent tax-exempt bonds under Ohio Revised Code 165. Section 144 of the Internal Revenue Code now permits small issue bonds to be "qualified" only if they are issued to finance manufacturing facilities. Previously, qualified tax-exempt bonds were issued under Ohio Revised Code 165 to finance all types of nonmanufacturing facilities, including retail facilities. This limitation to manufacturing facilities is another reason for a decline in bonds issued under Revised Code 165.

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<sup>667</sup> 26 U.S.C. 146(d).

<sup>668</sup> R.C. 133.021.

<sup>669</sup> See Ohio Development Services Agency, Business Volume Cap, [http://development.ohio.gov/bs/bs\\_volume.htm](http://development.ohio.gov/bs/bs_volume.htm)

<sup>670</sup> 26 U.S.C. 145.

<sup>671</sup> Ohio Adm. Code 122-04-02(B).

## **Economic Development Programs**

Revised Code Chapter 166 governs certain economic development programs. As recognized by the General Assembly in Revised Code 166.02, “many local areas throughout the state are experiencing economic stagnation or decline,” and economic development programs are needed to “constitute deserved, necessary reinvestment by the state in those areas, materially contribute to their economic revitalization, and result in improving the economic welfare of all the people of the state.”<sup>672</sup> The power to develop and implement these economic development programs rests with the director of development.<sup>673</sup>

Revised Code 166.03 created the facilities establishment fund, which is part of the State treasury and consists of obligations and proceeds and moneys from a variety of Chapter 166 sources.<sup>674</sup> The Ohio Enterprise Bond Fund (“OEBF”) was created as a credit enhancement program to allow nonprofit and for-profit borrowers to access national capital markets through bonds issued under the OEBF program.<sup>675</sup> This program enables borrowers to utilize the OEBF’s credit rating to achieve a lower cost of funds (lower or fixed interest rates, longer repayment terms, etc.).<sup>676</sup>

Chapter 166 also authorizes the research and development loan fund, which is part of the state treasury<sup>677</sup> and allows the lending of funds to pay costs of eligible research and development projects.<sup>678</sup> The logistics and distribution infrastructure fund, created in the state treasury,<sup>679</sup> permits the director of development to loan money in this fund to “persons for the purpose of paying allowable costs of eligible logistics and distribution projects.”<sup>680</sup>

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<sup>672</sup> R.C. 166.02(A).

<sup>673</sup> R.C. 166.02(B). See R.C. 166.02(B)(1)–(9) for the list of tools the Director of Development may use to further the economic welfare of the State.

<sup>674</sup> R.C. 166.03(A) (“There is hereby created the facilities establishment fund within the state treasury, consisting of proceeds from the issuance of obligations as specified under section 166.08 of the Revised Code; the moneys received by the state from sources specified in section 166.09 of the Revised Code; service charges imposed under sections 166.06 and 166.07 of the Revised Code; any grants, gifts, or contributions of moneys received by the director of development services to be used for loans made under section 166.07 of the Revised Code or for the payment of the allowable costs of project facilities; and all other moneys appropriated or transferred to the fund.”).

<sup>675</sup> See Office of the Ohio Treasurer, Ohio Enterprise Bond Fund, [http://www.tos.ohio.gov/investor/ohio\\_enterprise\\_bond\\_fund](http://www.tos.ohio.gov/investor/ohio_enterprise_bond_fund).

<sup>676</sup> *Id.*

<sup>677</sup> R.C. 166.20.

<sup>678</sup> R.C. 166.21.

<sup>679</sup> R.C. 166.26(A).

<sup>680</sup> R.C. 166.25(A).

## **The Ohio Enterprise Bond Fund and Port Authority Bond Funds**

OEBF Bonds are secured by a system of pooled debt service and reserve accounts. These accounts secure payment of debt service on not just one economic development revenue bond issue, but multiple economic development revenue bond issues, each secured by that same system of accounts. Because of the common system of accounts, rating agencies such as Moody's Investors Service, Standard and Poor's, and Fitch Investors Service rate these OEBF and port authority bond funds based upon the strength of the pooled system, rather than on the credit of the individual borrower or lessee.

Within the system of pooled debt service and reserve accounts, there is a general priority of payments in the event of default. As each OEBF-secured bond is issued by the State to benefit a particular contracting party, that contracting party (borrower or lessee) is required to fund a Primary Reserve Account. The funding amount equals 10% of the original principal amount of bonds relating to their project.<sup>681</sup> This reserve can be funded with bond proceeds, cash, or an acceptable letter of credit. This Primary Reserve Account is one of the first sources of payment for creditors, such as a bond trustee, in the event of a default by that borrower/lessee on its project (typically in making loan or lease payments). The Primary Reserve Account is intended to provide the Ohio Department Services Agency (or a port authority's trustee with port authority bond funds) with sufficient time to restore delinquent payments, or if the a trustee holds a first mortgage and security interest on the assets financed with bond proceeds, the Ohio Development Services Agency takes control of the assets and either finds alternate users or sells the assets.

The OEBF is also secured by the State through a pledge of loan repayments it receives under the Chapter 166 Direct Loan Program. These loan repayments are another source of payment in the priority of payments after execution by a trustee or creditor against the contracting party's Primary Reserve Account in the event of default.<sup>682</sup> Depending upon the type of project being financed or the credit history of a borrower or lessee, some additional credit enhancement may be required. These enhancements may include personal and corporate guarantees, additional letters of credit, and key-man life insurance policies. Any additional credit enhancements provided by a borrower or lessee will be used, to the extent available, to cure a default in that party's loan or lease payments before using the party's Primary Reserve Account and the other Bond Fund Program Accounts. These other Bond Fund Program Accounts include Primary Reserve Accounts of non-defaulting contracting parties,

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<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

which is the final source of payment in the priority of payments under the pooled system of debt service and reserve.

Although created using local funding different than those used by the State to fund the OEBF system, port authority bond funds are similarly structured, created, and funded using local resources that result in an investment grade credit rating from one or more of the national rating agencies.

### **Authorized Issuers**

In general, a security or obligation issued by the state or its political subdivisions must be authorized by an issuing or taxing authority. The many issuing authorities authorizing debt and other obligations of the state and its political subdivisions include the State's Director of Development,<sup>683</sup> the Treasurer of State,<sup>684</sup> the legislative authority of a city,<sup>685</sup> a board of county commissioners,<sup>686</sup> and the board of directors of a port authority.<sup>687</sup> Similarly, a taxing authority can be the legislative authority of a city, a board of education for a school district, or a board of township trustees.<sup>688</sup>

### **Ohio Public Facilities Commission**

Revised Code Chapter 151 creates the Ohio Public Facilities Commission and authorizes its ability to issue bonds to pay for authorized projects and facilities. The Commission was created as a "corporate and politic" body of the state to issue the state's general obligation debt. Commission obligations are tax supported and are funded by an appropriation mechanism in the biennial operating budget. Under its statutory authority, the Commission may issue bonds to pay for certain projects receiving state support, including coal development,<sup>689</sup> infrastructure,<sup>690</sup> natural resources,<sup>691</sup> common schools,<sup>692</sup> institutions of higher education,<sup>693</sup> conservation,<sup>694</sup> research and development,<sup>695</sup> and site development.<sup>696</sup>

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<sup>683</sup> R.C. 165.01(E) ("Issuing authority' means in the case of the state, the director of development . . .").

<sup>684</sup> R.C. 166.08(A)(4) ("Issuing authority' means the treasurer of state, or the officer who by law performs the functions of such officer.").

<sup>685</sup> R.C. 165.01(E) ("Issuing authority' means . . . in the case of a municipal corporation, the legislative authority thereof . . .").

<sup>686</sup> *Id.* ("Issuing authority' means . . . in the case of a county, the board of county commissioners . . .").

<sup>687</sup> R.C. 4582.71(A)(2) ("Issuing authority' means a port authority . . . that issues or issued obligations to fund one or more loans to the program fund.").

<sup>688</sup> R.C. 133(NN).

<sup>689</sup> R.C. 151.07.

<sup>690</sup> R.C. 151.08.

<sup>691</sup> R.C. 151.05.

<sup>692</sup> R.C. 151.03.

<sup>693</sup> R.C. 151.04.

The Commission is an agency and instrumentality of the State<sup>697</sup> that “shall consist of, in each case ex officio, the governor, the treasurer of state, the auditor of state, the secretary of state, the attorney general, and the director of budget and management.”<sup>698</sup>

As a general obligation bond issuer,<sup>699</sup> Commission obligations are secured by the state’s general revenue fund.<sup>700</sup> through deposits, for example, into the common schools capital facilities bond service fund,<sup>701</sup> the higher education capital facilities bond service fund,<sup>702</sup> the natural resources projects bond service fund,<sup>703</sup> the coal research and development bond service fund,<sup>704</sup> and the state capital improvements bond service fund.<sup>705</sup> In these instances, the General Assembly annually appropriates funds for lease payments so that state agencies can lease facilities from the Commission. The Commission acts as the lessor, and the agencies act as the lessee. The Commission, in turn, uses the payments received from the leases to pay debt service on bonds it issued.

In addition to issuing bonds to pay costs of capital facilities, the Ohio Public Facilities Commission can issue obligations for other purposes. For example, the Commission can issue obligations to pay for the “cost of conservation projects.”<sup>706</sup> Under Revised Code 151.09, the Commission may issue general obligation bonds of the state to pay costs of conservation projects. Funds in the Clean Ohio Conservation Fund created by R.C. 164.27 are made available to local governments to provide funds for remediation of contaminated lands for future economic development. Similarly, the Commission can issue obligations and bonds to pay costs of sites and facilities under Division (B)(3) of Article VIII, Section 2p of the Ohio Constitution, which permits funds to be used to advance job-ready sites for economic development.<sup>707</sup>

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<sup>694</sup> R.C. 151.09.

<sup>695</sup> R.C. 151.10.

<sup>696</sup> R.C. 151.11.

<sup>697</sup> R.C. 151.02(A).

<sup>698</sup> R.C. 151.02(B).

<sup>699</sup> See *infra*, Treasurer of State also issues general obligation bonds that have an additional pledge of highway user receipts.

<sup>700</sup> R.C. 151.02(A); see also Office of Budget and Management, Ohio Public Facilities Commission, <http://obm.ohio.gov/BondsInvestors/publicfacilities.aspx>.

<sup>701</sup> R.C. 151.03.

<sup>702</sup> R.C. 151.04.

<sup>703</sup> R.C. 151.05.

<sup>704</sup> R.C. 151.07.

<sup>705</sup> R.C. 151.08.

<sup>706</sup> R.C. 151.09. The “cost of conservation projects” includes “related direct administrative expenses and allocable portions of the direct costs of those projects of the department of agriculture, the department of natural resources, or the Ohio public works commission.” R.C. 151.09(A)(1).

<sup>707</sup> R.C. 151.11(B).

## **Treasurer of State**

Revised Code Chapter 154 grants the Treasurer of State the authority to issue obligations, subject to appropriation from the General Assembly, for the capital facilities of mental hygiene and retardation,<sup>708</sup> state-supported-and-assisted institutions of higher education,<sup>709</sup> parks and recreation,<sup>710</sup> cultural and sports facilities,<sup>711</sup> and housing of branches and agencies of state government.<sup>712</sup>

## **Ohio Water Development Authority**

The Ohio Water Development Authority (“OWDA”) is a body both corporate and politic, constituting an agency and instrumentality of the state and performing essential governmental functions and public purposes of the state.<sup>713</sup> The OWDA consists of eight members. Five members are appointed by the governor for eight-year, staggered terms, with the advice and consent of the State Senate. In addition, the director of natural resources, the director of environmental protection, and the director of development are ex-officio members, entitled to vote and participate in OWDA activities on an equal basis with other members.<sup>714</sup>

The OWDA’s powers include:

- the power to (1) receive and accept from any federal agency, subject to the approval of the governor, grants for or in aid of any water development project or for research and development regarding waste water or water management facilities; and (2) receive and accept aid or contributions from any source of money, property, labor, or things of value to be used only for the purposes for which the grants and contributions are made;
- the power to engage in research and development regarding waste water or water management facilities;

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<sup>708</sup> R.C. 154.02(A)(1); *see also* Office of the Ohio Treasurer, Mental Health Facilities Improvement Fund, [http://www.tos.ohio.gov/Investor/mental\\_health](http://www.tos.ohio.gov/Investor/mental_health).

<sup>709</sup> R.C. 154.02(A)(2); *see also* Office of the Ohio Treasurer, Board of Regents Community and Technical College Credit Enhancement, [http://ohiotreasurer.gov/Investor/Board\\_of\\_Regents\\_Credit\\_Enhancements](http://ohiotreasurer.gov/Investor/Board_of_Regents_Credit_Enhancements).

<sup>710</sup> R.C. 154.02(A)(3); *see also* Office of the Ohio Treasurer, Parks & Recreation Improvement Fund, [http://www.tos.ohio.gov/Investor/parks\\_recreation](http://www.tos.ohio.gov/Investor/parks_recreation).

<sup>711</sup> R.C. 154.02(A)(4)–(5); *see also* Office of the Ohio Treasurer, Cultural and Sports Facilities Building Fund, [http://www.tos.ohio.gov/Investor/cultural\\_sports](http://www.tos.ohio.gov/Investor/cultural_sports).

<sup>712</sup> R.C. 154.02(A)(6); *see, e.g.*, Office of the Ohio Treasurer, Adult Correctional Building Fund, [http://ohiotreasurer.gov/Investor/Adult\\_Correctional\\_Facilities](http://ohiotreasurer.gov/Investor/Adult_Correctional_Facilities).

<sup>713</sup> R.C. 6121.02.

<sup>714</sup> *Id.*

- the power to acquire public or private lands through the right of condemnation and to make and enter into all contracts and agreements and execute all instruments necessary or incidental to carrying out its powers;
- the power to issue revenue bonds and notes of the State;
- the power to charge, alter, and collect rentals and other charges for the use of services of any water development project; and
- the power to do all acts necessary or proper to carry out the powers expressly granted in Chapters 6121 and 6123 of the Revised Code.

OWDA and local government agencies can cooperate in acquiring, constructing, and financing projects and can enter into agreements necessary for such cooperation.

The OWDA has both bond-funded and non-bond-funded programs that provide loans and grants to political subdivisions and local government agencies. Bond-funded programs include the Fresh Water Programs and the Water Pollution Control Loan Fund Program.<sup>715</sup> The Fresh Water Program provides funding to political subdivisions and local government agencies for the costs of wastewater treatment facilities, interceptor sewer facilities, sewage collection facilities, and water supply and distribution facilities.<sup>716</sup>

In connection with OWDA’s Water Pollution Control Loan Fund Program, Title VI of the Federal Water Pollution Control Act (the “Clean Water Act”), provides for the State to receive capitalization grants from the United States Environmental Protection Agency (“USEPA”). These federal moneys (the “Federal Share”) are deposited in state water pollution control revolving loan funds. These funds are to be used to provide loans and other forms of financial assistance (other than grants) to communities and agencies.<sup>717</sup> But to receive the federal funds, states must agree to a local match. In Ohio’s case, it must deposit funds into the Water Pollution Control Loan Fund generally equal to at least 20% of the total of all USEPA payments to the State (“State Match”).<sup>718</sup> The State Match has been previously funded with general fund appropriations, proceeds of the sale of State Match Revenue Bonds, and interest earnings on those proceeds.<sup>719</sup> The Water Pollution Control Loan Fund is to be used to fund the following:

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<sup>715</sup> See Ohio Water Development Authority, <http://www.owda.org/owda0001.asp?PgID=homepage>.

<sup>716</sup> For the official statement relating to the issuance and sale of \$137,990,000 Ohio Water Development Authority Water Pollution Control Loan Fund Refunding Revenue Bonds, Series 2014B, see <http://emma.msrb.org/ER822653-ER640900-ER1042762.pdf>.

<sup>717</sup> *Id.*

<sup>718</sup> *Id.*

<sup>719</sup> *Id.*

(1) construction of publicly owned wastewater treatment works by municipal corporations, other political subdivisions, and interstate agencies having territory in Ohio; (2) implementation of nonpoint source pollution management programs; and (3) development and implementation of estuary conservation management programs.<sup>720</sup>

The OWDA has implemented several bond-funded and non-bond-funded programs that are designed to assist local government economic development efforts. These programs include the Local Economic Development Loan Program. This program makes loans to political subdivisions for water and wastewater improvement projects that are recommended and requested by the Ohio Development Services Agency based upon expected economic development benefits. They also include the Brownfield Program discussed in more detail in Chapter 9 of this Manual. Under the State’s Voluntary Action Program, the Brownfield Program authorizes the OWDA to make loans to finance “voluntary actions” for remediation of property contaminated by hazardous substances or petroleum.<sup>721</sup>

### **Ohio Air Quality Development Authority**

The Ohio Air Quality Development Authority (“OAQDA”) is a body both corporate and politic. It is an agency and instrumentality of the State and performing essential governmental functions and public purposes.<sup>722</sup> The OAQDA consists of seven members. Five members are appointed by the governor, with the advice and consent of the State Senate. In addition, the directors of environmental protection and health are ex-officio members of the OAQDA.<sup>723</sup>

The OAQDA’s powers include the power to:

- (1) make loans and grants to governmental agencies for acquiring or constructing air quality projects;
- (2) acquire, construct, maintain, or contract for operation by a person or governmental agency air quality projects;
- (3) make available the use or services of any air quality project to one or more persons or agencies;

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<sup>720</sup> *Id.*

<sup>721</sup> *Id.*

<sup>722</sup> R.C. 3706.02.

<sup>723</sup> *Id.*

- (4) issue air quality revenue bonds and notes and air quality revenue refunding bonds of the state, payable solely from revenues as provided in Revised Code 3706.05;
- (5) acquire by gift or purchase, hold, and dispose of real and personal property in the exercise of its authority and performance of its duties; and
- (6) enter into all contracts and execute all instruments necessary or incidental to performing its duties and executing its powers.<sup>724</sup>

The OAQDA's powers also include powers directly related to issuing bonds and other obligations for industry, commerce, distribution and research.<sup>725</sup> In particular, regarding the financing of projects for industry or research, including public utility companies, under lease or loan agreements, the OAQDA can (1) make loans to acquire or construct the project and mortgages or other security interests to secure such indebtedness, (2) sell such projects, (3) grant a mortgage, lien, or other encumbrance on, or pledge or assignment of, or other security interest for any part of the project funds established with the issuance of bonds, (4) provide that the interest on such bonds may be at a variable rate, and (5) contract for acquiring or constructing such project and for the lease, sale, or other disposition of the project without necessity for competitive bidding or performance bonds.<sup>726</sup>

Property comprising a project is not subject to taxes or assessments for so long as the bonds or notes issued to finance the costs of such project are outstanding.<sup>727</sup>

The OAQDA, with the approval of the controlling board, may provide grants from money in the advanced energy research and development fund and may lend money in the advanced energy research and development taxable fund created under Revised Code 3706.27 to pay allowable costs of eligible advanced energy projects.<sup>728</sup> In determining the eligible advanced energy projects to be assisted and the nature, amount, and terms of assistance to be provided for an eligible advanced energy project, OAQDA must consult with appropriate governmental agencies, including local political subdivisions.<sup>729</sup>

OAQDA also administers the Qualified Energy Conservation Bonds ("QECB") program in Ohio. A QECB is a bond that enables qualified states like Ohio and local government issuers to

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<sup>724</sup> R.C. 3706.04.

<sup>725</sup> R.C. 3706.041.

<sup>726</sup> *Id.*

<sup>727</sup> *Id.*

<sup>728</sup> R.C. 166.30.

<sup>729</sup> *Id.*

borrow money at attractive rates to fund energy conservation projects. A QECB is a lower-cost bond-financing tool because the U.S. Department of the Treasury subsidizes the issuer's borrowing costs.<sup>730</sup> The OAQDA-administered QECB program has been used by Ohio local governments and public universities to finance the installation of energy-conserving measures equipment in publicly owned buildings. Under the OAQDA's QECB financing package, OAQDA authorizes Air Quality Development Bonds for issuance as a Series A federally tax-exempt bond and a Series B QECB federal tax-credit bond. Combining funding from the two separate sources results in a lower, "blended" interest rate for the participating entity.<sup>731</sup>

### **Municipalities, Counties, School Districts, Townships**

As noted above, Revised Code Chapter 133 authorizes political subdivisions of the State to issue securities. The authority to issue obligations is vested within a political subdivision's taxing authority.<sup>732</sup> Taxing authority within Chapter 133 includes a board of county commissioners, a city council, a school board of education, a board of trustees for a fire district, a township hospital board, and a board of township trustees, among others.<sup>733</sup> Each of these issuers possesses their own inherent statutory authority to issue obligations to fund a variety of governmentally owned projects that may be deemed to be economic development because of the public investment in the infrastructure of roads, education, sewers, water, etc. Revised Code Chapter 133 outlines the authority of each of these taxing authorities to issue debt for particular purposes.

### **Port Authorities**

As discussed in Chapter 2, port authorities in Ohio can issue revenue obligations to fund a variety of projects pertaining to economic development. Port authorities are also authorized to issue voted bonds for the "acquisition, construction, furnishing, or equipping of any real or personal property . . . related to, useful for, or in furtherance of any authorized purpose, in compliance with Chapter 133 of the Revised Code. . . ."<sup>734</sup> These bonds may be issued only after a vote of those residing within the territory of the port authority. The net indebtedness incurred by a port authority may never exceed 2% of the total value of all property within the territory comprising the port authority (as listed and assessed for taxation).<sup>735</sup> Indeed, port authorities are granted broad power to issue revenue bonds for research and development. But the activities must "enhance, foster, aid, provide, or promote transportation, economic

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<sup>730</sup> 26 U.S.C. 54(D).

<sup>731</sup> [https://www.irs.gov/irb/2009-16\\_irb/ar10.html](https://www.irs.gov/irb/2009-16_irb/ar10.html)

<sup>732</sup> See generally R.C. Chapter 133.

<sup>733</sup> R.C. 133.01(NN).

<sup>734</sup> R.C. 4582.06(A)(3) and 4582.31(A)(7).

<sup>735</sup> *Id.*

development, housing, recreation, education, governmental operations, culture, or research within the jurisdiction of the port authority.”<sup>736</sup> Consistent with Article VIII, Section 2p of the Ohio Constitution, port authorities may issue obligations for economic development purposes.<sup>737</sup>

### **Types of Ohio Debt Permitted**

Ohio law restricts the types of debt that the state or political subdivisions can issue. An obligation that is subject to an annual appropriation—for example, lease obligation or fractionalized interest in public obligation—is *not* debt. Any obligation that lasts longer than and binds the issuing authority over more than one fiscal year is debt.

In general, in Ohio any individual parcel of taxable property cannot be taxed at more than ten mills in any given year without a vote of the people.<sup>738</sup> A mill is the equivalent of \$1 per \$1,000 of taxable (assessed) value. In addition, the Ohio Constitution provides a limit on unvoted taxation.<sup>739</sup> Revised Code 133.18 authorizes voted bond issues outside the ten mill limitation imposed by law.<sup>740</sup> A bond authorized to be issued by the affirmative vote of electors may be issued and the levy for debt service may be greater than 10 mills.<sup>741</sup>

### **General Obligation Bonds**

General obligation bonds pledge the full faith and credit and taxing power of the entity issuing the general obligation bonds to purchasers of the bonds.<sup>742</sup> Accordingly, the State and political subdivisions must use funds from whatever source is available to pay the interest on the bonds and to repay the principal to the investors.<sup>743</sup> So if a general obligation bond is issued, the governmental agency can use existing assets and revenue to repay the debt. If those funds are not enough to repay the debt, the State or political subdivision must pay debt charges through raising revenues or otherwise finding the necessary funds (including the levy of property taxes which is required by Article XII, Section 11 of the Ohio Constitution to be

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<sup>736</sup> R.C. 4582.01(B)(1) and 4582.21(B)(1). *See also* Ohio Constitution, Article VIII, Section 2p.

<sup>737</sup> Ohio Constitution, Article VIII, Section 2p.

<sup>738</sup> R.C. 5705.02 (naming this concept the “ten-mill limitation”).

<sup>739</sup> Ohio Constitution, Article XII, Section 2 (“No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation.”).

<sup>740</sup> R.C. 133.18(B)(4).

<sup>741</sup> R.C. 5705.02.

<sup>742</sup> R.C. 133.01(Q).

<sup>743</sup> Fisher, *State & Local Public Finance* 235 (2007).

extended and levied on the tax duplicate by issuing general obligation bonds).<sup>744</sup> Because general obligation bonds are issued with the pledge of the full faith and credit and taxing power of the government securing bondholders, general obligation bonds are seen by investors as less risky, more secure forms of debt. As a result, interest rates for general obligation bonds are often the most favorable to the issuing government, as opposed to revenue obligations typically associated with economic development.

In Ohio, general obligation (“GO”) bonds are the most frequently issued obligations by the State and its political subdivisions.<sup>745</sup> These bonds are most often issued for non-economic development project public purposes. Taxing authorities must follow certain requirements for GO bonds to be valid and binding obligations. First, the legislation under which the indebtedness is incurred must provide for levying and collecting annual taxes in an amount sufficient to pay the interest on the bonds *and* to provide a sinking fund for the final redemption of the obligation at maturity.<sup>746</sup> Similarly, unvoted general obligation bonds may not be issued if the real or anticipated debt charges from issuing unvoted general obligation bonds or notes would result in a levy for debt charges exceeding ten mills—i.e., in violation of the ten-mill limitation imposed by law.<sup>747</sup> These unvoted, GO bonds are called limited tax bonds—as they are subject to the statutory ten-mill limitation. Conversely, a voted GO bond is called an unlimited tax bond because there is no limitation on the amount or rate of the levy of taxes to pay debt service.

Bondholders are not without remedies in the rare event that an issuing entity fails to pay debt service on a GO bond (when the issuing authority defaults). If a bondholder has not received payment that is due, then a taxpayer or bondholder may file a petition for a writ of mandamus.<sup>748</sup> In doing so, a court may issue the writ of mandamus compelling the county auditor to “levy and assess upon the taxable property . . . the taxes required by law, or by the judgment or order of such court, to be levied and assessed for such purposes, and to place such taxes” for collection by the county treasurer.<sup>749</sup>

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<sup>744</sup> *Id.*; Ohio Constitution, Article XII, Section 11 (“No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.”).

<sup>745</sup> Ohio Municipal Advisory Council, *Municipal Debt in Ohio: The Guide* 6 (2013).

<sup>746</sup> *State ex rel. City of Portsmouth v. Kountz*, 129 Ohio St. 272, 276 (1935).

<sup>747</sup> *Id.* (“Such provision, however, cannot legally be made if the proposed taxation, when added to the taxation already existing, exceeds 1 per cent. of the valuation of the taxable property.”).

<sup>748</sup> R.C. 2731.14.

<sup>749</sup> *Id.*

GO bonds are subject to both direct<sup>750</sup> as well as the indirect debt limitations discussed above in connection with the ten-mill limitation imposed by law. Therefore, if GO bonds are issued to finance publicly owned infrastructure benefitting (directly or indirectly) an economic development purpose, there may be less available debt capacity within the direct and indirect debt limitations for other non-economic development purposes. GO bonds are an attractive choice for investors because they are issued with a pledge of the full faith and credit of the governmental issuer. Similarly, GO bonds can be attractive to political subdivisions because the interest rates paid to investors are often the lowest of all types of debt because the bondholders are the most secure.<sup>751</sup> If an economic development project's owner benefits as a result of a public agency issuing GO bonds rather than revenue bonds (discussed below) to finance infrastructure, this benefit must be weighed against the impact of the public agency not having the unvoted general obligation debt capacity to finance non-economic development purposes.

### **Revenue Bonds**

Another source of long-term debt available for issuance by the State and its political subdivisions are revenue bonds. These bonds, unlike GO bonds, do not carry the pledge of the full faith and credit of the government. When a government agency issues revenue bonds, the particular source of that revenue is established, and the revenues from that particular source are pledged to pay the interest and principal to the bondholders.<sup>752</sup> This means that if the specified revenue source is insufficient (i.e., insufficient to pay debt service and payments cannot be made) a bondholder's recourse to the issuing authority is to the revenues, funds, and properties pledged to repayment of the revenue bonds.<sup>753</sup> Understandably, investors view revenue bonds as riskier than GO bonds because the return of their principal and the payment of interest is less secure than with a GO bond or note.<sup>754</sup>

Revenue bonds are issued by a variety of state and local issuers in Ohio.<sup>755</sup> For example, the Ohio Turnpike and Infrastructure Commission is statutorily authorized to issue revenue bonds to pay for turnpike projects or infrastructure projects.<sup>756</sup> Consistent with the mechanics

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<sup>750</sup> See, e.g., R.C. 133.04–.07.

<sup>751</sup> A governmental agency, for example, could view a general obligation bond as less attractive than a revenue bond because if the revenue source for the general obligation bond is insufficient, the agency would be required to use sources of governmental revenue budgeted for other purposes or even potentially raise taxes in order to pay the interest and principal on the general obligation bond.

<sup>752</sup> Fisher, *State & Local Public Finance* at 235.

<sup>753</sup> *Id.*

<sup>754</sup> *Id.*

<sup>755</sup> See, e.g., R.C. 133.08 (“County revenue securities”), 133.081 (“Issuing sales tax supported bonds of county”), and 133.082 (“Securities issued in anticipation of taxes collected”).

<sup>756</sup> R.C. 5537.08.

of revenue bonds, the authorizing statute states that the payments for the bond will come only from the pledged revenue (in this case, tolls).<sup>757</sup> Similarly, authorized issuers may be permitted to issue industrial development (revenue) bonds. These bonds, authorized by statute through Article VIII, Section 13, allow authorized issuers to issue bonds to “acquire by purchase, construct, reconstruct, enlarge, improve, furnish, or equip one or more projects or parts thereof, . . . including providing moneys to make loans to others for such purposes.”<sup>758</sup> Importantly, the statute provides that the principal and interest must be made solely from the revenues securing the bonds.<sup>759</sup>

In practice, these statutes and principles authorize, for example, a municipality to issue airport revenue bonds to pay costs of an airport project. When the municipality issues its revenue bonds, it could provide that revenues from the operation of the airport would be the source of revenue for repayment of the bonds. If, however, the revenues from the operation of the airport were not as high as expected, the holders of the city’s airport revenue bonds might not receive payment on the interest or principal (because the only revenue pledged to be used for repayment are the airport revenues). Contrast this revenue bond example with the GO bonds described above. If a general obligation bond was issued to fund the airport project, even if the airport operations revenues did not provide enough revenue to repay bondholders their interest and principal, the obligation would be secured by the full faith and credit and taxing power of the city. The issuing authority would be *required* to find other revenues or resources to repay the bondholders both their interest and principal, including proceeds of the levy of taxes on real property.

Similar to GO bonds, revenue bonds are subject to mandamus actions (a court action ordering a person to perform a public duty) in instances of default. Industrial development bonds secured by a trust agreement, for example, are subject to a writ of mandamus “[i]n the event of default in any payments required to be made by the bond proceedings.”<sup>760</sup> In addition, “[a]ny holder of bonds issued pursuant to Chapter 165 of the Revised Code . . . may by any suitable form of legal proceedings, protect and enforce any rights under the laws of this state . . . .”<sup>761</sup>

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<sup>757</sup> R.C. 5537.08(A).

<sup>758</sup> R.C. 165.04. This is the same language found in Article VIII, Section 13 of the Ohio Constitution.

<sup>759</sup> *Id.*

<sup>760</sup> R.C. 165.05(B)(3).

<sup>761</sup> R.C. 165.06.

## **Limits on Issuing Debt**

When subdivisions issue obligations to finance economic development, many utilize their authority to tax property within their jurisdiction. These taxes typically raise revenue to service the various obligations issued. As noted, all property in Ohio is subject to a ten-mill limitation, absent a vote of the electors in that subdivision consenting to additional taxation. So, when subdivisions issue GO bonds and are required to include in the authorizing legislation a levy of taxes to pay debt service, they must do so within the confines of statutory limits on debt.

### **Voted Debt vs. Unvoted Debt**

When the State or a political subdivision decides to issue bonds to finance economic development (or for any reason), it must be keenly aware of direct and indirect debt limitations of issuing general obligation debt versus revenue bonds. Again, Ohio's indirect debt limitation or the ten-mill limitation prohibits taxable real property in *any* subdivision or other taxing unit from having taxes levied upon it exceeding ten mills in a given year without a vote of the people.<sup>762</sup>

Unvoted GO bonds, notes, or other obligations can be incurred by an issuing authority without the vote of the people, but subject to the ten-mill limitation for the payment of bond service charges.<sup>763</sup> Unvoted debt charges are combined with the taxes levied by all political subdivisions.<sup>764</sup> So, a single parcel of real property—whether in Cuyahoga County or Vinton County—can only be taxed (without a vote authorizing otherwise) at ten mills by the county, the township, the school district, the city, or other overlapping taxing authority. As described above, unvoted bonds pledge the full faith and credit of the taxing authority that issues the debt but within the ten-mill limitation imposed by law.<sup>765</sup>

If any political subdivision wishes to incur debt whose debt service will cause one parcel in the overlapping subdivisions of the issuing authority to exceed ten-mills, the taxing authority must seek approval and authorization “by a vote of the people under the law applicable thereto.”<sup>766</sup> A GO bond issued with such a vote of the people is called “voted debt.”<sup>767</sup> This vote and authorization removes limitations on the applicable tax rate that can be levied for the

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<sup>762</sup> R.C. 5705.02.

<sup>763</sup> *Id.* (noting that the “aggregate amount of taxes . . . shall not in any one year exceed ten mills . . . except for taxes specifically authorized to be levied in excess thereof”).

<sup>764</sup> *Id.*

<sup>765</sup> R.C. 5705.02; Ohio Constitution, Article XII, Section 2.

<sup>766</sup> R.C. 5705.07.

<sup>767</sup> R.C. 5705.02; Ohio Constitution, Article XII, Section 2.

payment of debt charges. Thus, voted debt (which requires the consent of the people through a vote on the question of issuing bonds) has *no* limit; unvoted debt has the ten-mill limitation.<sup>768</sup>

### **Direct and Indirect Debt Limit**

Article XII, Section 11 of the Ohio Constitution requires that whenever indebtedness from bonds is incurred by the State or its political subdivisions, a tax must be levied to provide a sinking fund to retire the debt.<sup>769</sup> This constitutional provision, in conjunction with Article XII, Section 2 (limiting the tax on property to 1% of its value) and Revised Code 5705.02 (ten-mill limitation), results in an indirect debt limitation.<sup>770</sup> This indirect debt limitation prevents political subdivisions from incurring unvoted, general obligation debt where the aggregate unvoted millage issued by the subdivision, taken in sum with the overlapping subdivisions' issued debt, would be greater than ten-mills.<sup>771</sup>

While the indirect debt limitation of ten mills applies to all property in Ohio, there is also a direct debt limitation on the incurrence of GO bonds. This limit is based upon the outstanding principal amount of all GO bonds not exceeding a stated percentage of the assessed valuation of the issuing authority as outlined in Revised Code Chapter 133 for various types of subdivisions (e.g., municipalities, counties and school districts). For example, municipalities cannot incur unvoted debt exceeding 5.5% of a municipality's assessed valuation or a combined voted and unvoted debt that exceeds 10.5% of its assessed valuation.<sup>772</sup> For counties, the amount of unvoted debt cannot exceed 1% of its assessed valuation, and then, dependent on that tax valuation of the county, either 3%, 1.5%, or 2.5% of voted and unvoted debt.<sup>773</sup> School districts in Ohio cannot exceed 1/10 of 1% of tax valuation in unvoted debt nor exceed 4% or 9% (depending on which classification in the statute the district falls under) of tax valuation in unvoted and voted debt.<sup>774</sup> Finally, townships' debt cannot exceed 5% of its tax valuation (unless it is a limited home rule government under to Revised Code Chapter 504, in which case it cannot exceed 10.5% of its tax valuation).<sup>775</sup>

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<sup>768</sup> *Id.*

<sup>769</sup> Ohio Constitution, Article XII, Section 11.

<sup>770</sup> Ohio Municipal Advisory Council, *Municipal Debt in Ohio: The Guide* 41 (2013).

<sup>771</sup> *Id.*

<sup>772</sup> R.C. 133.05(A).

<sup>773</sup> R.C. 133.07(A) & (B) (for county with tax valuation under \$100,000,000, unvoted and voted debt cannot exceed 3% of the valuation; for a county with a tax valuation between \$100,000,000 and \$300,000,000, unvoted and voted debt cannot exceed \$3,000,000 plus 1.5%; and, for a county with tax valuation over \$300,000,000, unvoted and voted debt cannot exceed \$6,000,000 plus 2.5%).

<sup>774</sup> R.C. 133.06(A)–(C).

<sup>775</sup> R.C. 133.09(A) & (B).

**Chapter Seven:**  
**Investing in Ohio’s Infrastructure**

**Key Points:**

- As a major industrial state with multiple urban and rural regions, Ohio’s infrastructure system of roads, highways, bridges, railroads, power, water, sewer and telecommunications systems connect large cities with sprawling farmlands.
- Industry needs the State’s infrastructure to link it with local and global customers and its supply chain.
- Ohio’s Tax Increment Financing (“TIF”) and Transportation Improvement Districts (“TID”) are two infrastructure finance tools that can be used to develop the critical infrastructure that industry needs to succeed.
- A range of state programs fund various forms of infrastructure to help spur economic development across the State.

Ohio’s infrastructure incentives can affect the state’s economic development success. Infrastructure investment often spurs productivity and economic growth.<sup>776</sup> Infrastructure investments support:

- the expansion of manufacturing output and job growth,<sup>777</sup>
- the economic success of a region by connecting that region with new and bigger markets, and
- urban and suburban centers while also eliminating the economic isolation of rural communities.<sup>778</sup>

This chapter details a variety of ways to invest in and improve infrastructure. How communities use these tools, however, may vary drastically. Some communities may leverage these tools for

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<sup>776</sup> See Munnell, *How Does Public Infrastructure Affect Regional Economic Performance?*, New Eng.Econ.Rev. 11–32 (Sept./Oct. 1990).

<sup>777</sup> Deno, *The Effect of Public Capital on U.S. Manufacturing Activity: 1970 to 1978*, 55 S.Econ.J. 400–411 (1988).

<sup>778</sup> See Berry & Parr, *Market Centers and Retail Location Theory and Applications* (1988).

community development. Community development is any activity to build a stronger community, such as constructing a park. More beautified communities often attract more residents and investment, which can benefit the economy. Other communities may use these tools for pure economic development, such as extending water, sewer, electric, and roads to a planned business site. The way these tools are used depends greatly on an individual community's needs.

### **Types of Infrastructure**

Infrastructure is far more than just roads. It includes systems of transportation, communication, and utilities.<sup>779</sup> Transportation infrastructure includes roads, rail networks, airports, waterways, ports, and public transit.<sup>780</sup> Communications infrastructure includes cable (high bandwidth and fiber optic) that can carry audio, video, and data information; satellites and radio and microwave antenna; and mobile phone networks.<sup>781</sup> For many communities, fiber optic cable is a powerful tool to attract businesses. Local governments are investing in fiber networks that often help them negotiate better rates for companies who use these networks as an integral part of their business operations.<sup>782</sup> Utilities include electric and gas, water, and sewer lines.<sup>783</sup>

Investment in infrastructure can help spur economic growth.<sup>784</sup> This growth can, in turn, lead to greater employment opportunities.<sup>785</sup> The following economic development tools enable communities of all sizes to invest in their infrastructure to attain these economic benefits.

### **Highway Funding**

The Ohio Department of Transportation (“ODOT”) is a major part of the state’s effort to provide the roads, highways, and bridges needed to connect with global markets. Ohio is blessed with a comprehensive system of interstate highways, state routes, and local roads that connect communities and interstate locations.

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<sup>779</sup> International Economic Development Council, *Economic Development Reference Guide*, at 30, available at [http://www.iedconline.org/clientuploads/Downloads/IEDC\\_ED\\_Reference\\_Guide.pdf](http://www.iedconline.org/clientuploads/Downloads/IEDC_ED_Reference_Guide.pdf).

<sup>780</sup> *Id.*

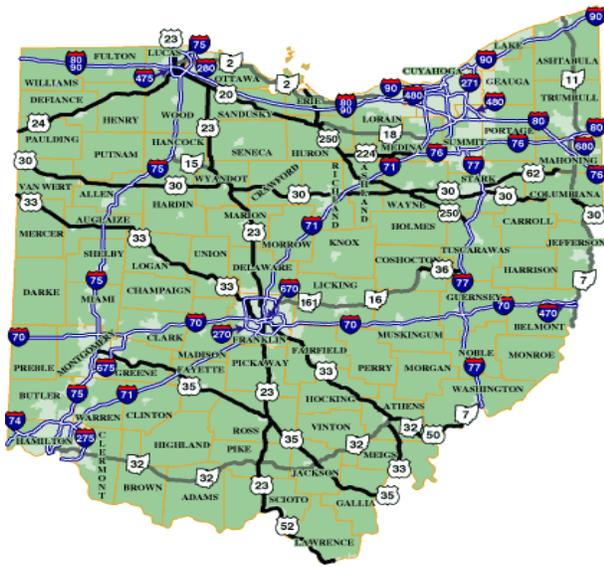
<sup>781</sup> *Id.*

<sup>782</sup> Examples include the Dublink system in Dublin, Ohio and the development of WeConnect, a municipal Community Data Center in Westerville, which was developed to support local businesses and provide them with data center space and low-cost broadband access. See <http://www.connectionsmaehere.com/index.html>.

<sup>783</sup> *Id.*

<sup>784</sup> Bivens, *The Short- and Long-Term Impact of Infrastructure on Employment and Economic Activity in the U.S. Economy* (Jul. 1, 2014), available at the Economic Policy Institute, <http://www.epi.org/publication/impact-of-infrastructure-investments>.

<sup>785</sup> *Id.*



For many communities, roadway construction begins with a local Council of Governments. Councils of governments—also called regional councils, regional commissions, and planning commissions—are formed when the governing bodies of two or more counties, municipalities, or townships enter into agreement with one another.<sup>786</sup> These groups “coordinate and streamline statewide services at the regional level, leverage federal resources, and serve as stewards of Ohio’s limited resources.”<sup>787</sup> They can help communities locate

funding sources and develop plans that meet state and federal requirements. Many councils have significant experience in transportation and environmental matters, so they can help communities navigate the many regulatory frameworks and funding sources.

Similar organizations exist for urbanized areas and large cities. Metropolitan Planning Organizations (“MPO”) are required under federal law for any urbanized area exceeding 50,000 persons and for any large city between 25,000 and 50,000 people that lies outside an urbanized area.<sup>788</sup> To receive federal transportation dollars, each qualifying region and large city must establish an MPO and carry out the mandated planning process.<sup>789</sup> MPOs consist of locally elected officials, operators of major modes of transportation, and state officials.<sup>790</sup> Ohio has 17 MPOs and five large cities outside of MPOs.<sup>791</sup> Ultimately, these organizations serve as conduits for federal funding and prioritize transportation projects for their region.

The Ohio Department of Transportation’s Transportation Review and Advisory Council (“TRAC”) provides funding to major transportation projects based upon the economic

<sup>786</sup> R.C. 167.01.

<sup>787</sup> “OARC and Transportation,” Ohio Association of Regional Councils, *available at* [http://regionalcouncils.org/index.php?option=com\\_content&view=article&id=12&Itemid=32](http://regionalcouncils.org/index.php?option=com_content&view=article&id=12&Itemid=32).

<sup>788</sup> 23 U.S.C. § 134.

<sup>789</sup> Ohio Department of Transportation, “Ohio MPO and Large City Capital Program: SFY 2015 Summary,” July 2015, <http://www.dot.state.oh.us/Divisions/Planning/SPR/StatewidePlanning/Documents/SFY%202015%20Capital%20Program%20Final%20Report.pdf>, at 3.

<sup>790</sup> “Division of Planning: Statewide Planning & Research, Metropolitan Planning,” Ohio Department of Transportation, *available at* [http://www.dot.state.oh.us/Divisions/Planning/SPR/StatewidePlanning/Pages/MPO\\_Planning.aspx](http://www.dot.state.oh.us/Divisions/Planning/SPR/StatewidePlanning/Pages/MPO_Planning.aspx).

<sup>791</sup> Ohio Department of Transportation, “Ohio MPO and Large City Capital Program: SFY 2015 Summary,” July 2015, <http://www.dot.state.oh.us/Divisions/Planning/SPR/StatewidePlanning/Documents/SFY%202015%20Capital%20Program%20Final%20Report.pdf>, at 3.

development potential and the need for roadway infrastructure to make the potential a reality. A nine-member TRAC Board reviews funding applications annually and votes to prioritize funding for “Major New Capacity” projects based upon a three-tier system.<sup>792</sup>

### TRAC Three-Tier System

<b>Tier I</b>	The group of projects recommended for construction during the upcoming four-year construction period.
<b>Tier II</b>	The group of projects recommended for additional environmental, design, or right-of-way development activities necessary before the projects would be available for construction.
<b>Tier III</b>	The group of projects with previous phases funded for construction as Tier I Projects placed in Tier III status are part of a long-range funding plan to advance multiple phase projects.

Major New Capacity projects are defined as those projects greater than \$12 million that increase the capacity of a transportation facility or reduce congestion. These projects include new interchanges proposed for economic development or local access, any significant interchange modifications, bypasses, general purpose lane additions, intermodal facilities, major transit facilities, or Intelligent Transportation Systems (“ITS”).<sup>793</sup> Projects unlikely to gain TRAC funding include widening a road from 10-foot lanes to 12-foot lanes, purchasing buses or other rolling stock, resurfacing projects, local road improvements, and turn-lane improvements.<sup>794</sup> TRAC funding is available for public agencies.<sup>795</sup>

TRAC funding is based upon a 100-point scoring system that reviews transportation factors, economic factors, local investment factors, and project-funding plan.<sup>796</sup> The transportation factors vary depending upon whether the project involves a roadway, transit, or freight project. Roadway Projects will be reviewed for the volume/capacity ratio of the traffic, safety concerns, average daily truck traffic, cost/benefit ratio, and air quality.<sup>797</sup> Transit Projects will be reviewed based upon ridership/capacity, capacity increases, vehicle miles travel

<sup>792</sup> Ohio Department of Transportation, TRAC Project Application Guidelines for the Major New Capacity Program (May 2015), available at [http://www.dot.state.oh.us/trac/2015TRACAPPS/2015\\_TRAC\\_APP\\_%20GUIDANCE.pdf](http://www.dot.state.oh.us/trac/2015TRACAPPS/2015_TRAC_APP_%20GUIDANCE.pdf).

<sup>793</sup> *Id.* at 2.

<sup>794</sup> *Id.* at 2–3.

<sup>795</sup> *Id.* at 3.

<sup>796</sup> Ohio Department of Transportation, TRAC Transportation Factors, <http://www.dot.state.oh.us/trac/Pages/TRAC-Application-Toolkit-Transportation-Factors.aspx>.

<sup>797</sup> *Id.*

reductions, and cost/vehicle mile-reduction comparison. Finally, freight projects will look at the intermodal freight congestion, capacity increases, truck reduction, and cost/truck reduction comparison.<sup>798</sup> The economic factors that will be reviewed include the number of jobs retained and created, Gross State Domestic Product increased, and the economic distress of the region.<sup>799</sup> TRAC will review the “dollar value of local existing, built-out attributes such as the percentage of acres served by local streets, water and sewer, and electricity, square-footage of industrial, warehouse, commercial and institutional buildings, the percentage of road routes served by fixed transit routes, and the percentage of square footage of existing buildings that are currently vacant.”<sup>800</sup> In addition, TRAC’s local investment review will consider the monetized public investment value or new, nonproject infrastructure commitments and private investments in the existing facilities with a five-year time horizon.<sup>801</sup>

**Current TRAC Tier I Funding Priorities**<sup>802</sup>

<b>Project</b>	<b>Description</b>	<b>TRAC Project Funding Plan</b>
Cuyahoga Opportunity Corridor	Construction of Quebec Avenue to US 322	\$15.7 million
Summit I-76/I-77	Main/Broadway Demo	\$1.5 million
Lorain US 202/SR 113	Widen Center Ridge- Demo	\$1.5 million
I-270/US 33 Phase 3	1-270/US 33 Tree Cutting	\$300,000
Lucas I-75/I-475	I-75/I-475 Interchange Phase 2	\$121 million
Franklin US 33/Winchester Road	Interchange Upgrade	\$37.3 million
Lucas I-75	Widen I-75 in Toledo Phillips to I-280	\$67.2 million
I-270/US 33 Phase 1	I-270/US 33 Dublin Interchange Upgrade	\$48.4 million

<sup>798</sup> *Id.*

<sup>799</sup> *Id.*

<sup>800</sup> *Id.*

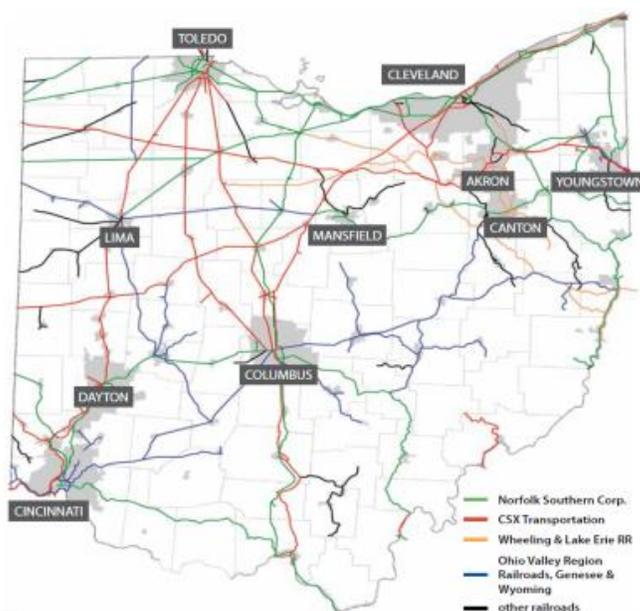
<sup>801</sup> *Id.*

<sup>802</sup> Ohio Department of Transportation, 2015–2018 Major New Program List, available at [http://www.dot.state.oh.us/trac/TRAC%20List/FINAL\\_2015-2018\\_MAJOR\\_NEW\\_PROGRAM\\_LIST\\_2.26.15.pdf](http://www.dot.state.oh.us/trac/TRAC%20List/FINAL_2015-2018_MAJOR_NEW_PROGRAM_LIST_2.26.15.pdf).

The Ohio Department of Development has an annual Roadwork Development Fund (known as the “629” fund), which is governed and controlled by the state treasury.<sup>803</sup> This program provides grant assistance to communities to fund public roadway improvements associated with retaining or attracting business to Ohio. These funds can be used for construction, reconstruction, maintenance, or repair of public roads that provide access to public airports or are located within a public airport.<sup>804</sup> These funds can also be used to cover engineering and design costs. Additionally, the funds can be used for projects involving manufacturing, research and development, corporate headquarters, and distribution activity.<sup>805</sup> Local governments, port authorities, and companies are all eligible to apply for a 629 grant. Projects funded by a 629 grant must create and retain jobs to remain eligible.<sup>806</sup> Each fiscal year, approximately \$15 million is budgeted for 629 grants.

### **Railroad Funding**

Ohio’s network of railroad lines continues to support the state’s economic development. Ohio’s network includes 34 freight railroads and 5,288 rail miles, ranking the state 6th and 4th in the nation, respectively.<sup>807</sup> Ohio is also home to 12 rail-intermodal yards that can connect rail, road, and air transportation networks to distribute billions in goods throughout the nation.<sup>808</sup>



Ohio has a limited budget with which to develop railroad funding through the Ohio Rail Development Commission (“ORDC”). During fiscal years 2013 and 2014, ORDC funded 28 rail-related economic development projects supporting more than 16,000 Ohio jobs and leveraging \$75.2 million in additional state investment.<sup>809</sup> The grants are very small in nature, less than a million dollars, and do not meet

<sup>803</sup> R.C. 122.14.

<sup>804</sup> R.C. 122.14.

<sup>805</sup> Roadwork Development, [http://www.development.ohio.gov/cs/cs\\_r629.htm](http://www.development.ohio.gov/cs/cs_r629.htm).

<sup>806</sup> Roadwork Development, [http://www.development.ohio.gov/cs/cs\\_r629.htm](http://www.development.ohio.gov/cs/cs_r629.htm).

<sup>807</sup> Ohio Rail Development Commission, Annual Report 2013–2014 at 8, available at <http://www.dot.state.oh.us/Divisions/Rail/Documents/13-14-ORDC-Annual-Report.pdf>.

<sup>808</sup> *Id.* at 9.

<sup>809</sup> *Id.* at 1.

the demand for funding requests. Demand in 2013-2014 was just over \$23 million for ORDC funds and this far exceeded the \$2 million dollar fund budget.<sup>810</sup>

### **Water and Sewer Line Funding**

The Ohio Water Development Authority (“OWDA”) provides a variety of funds to improve water and sewer lines, which are essential to expanding infrastructure. The Sewer and Water Pollution Control Project Loan is a loan designed to help with the planning, design, and construction of drinking water, wastewater, or storm water infrastructure.<sup>811</sup> There is no maximum loan amount, and the interest rates are available in two forms, a below-market rate and a reduced rate for communities that qualify based on economic need and size. Storm water projects can be financed through OWDA to help with storm-water treatment, storm-water sewer lines, and projects aimed at the separation of sanitary sewer and storm-water facilities.<sup>812</sup> Privately owned water facilities may be eligible for tax-exempt financing through OWDA. These projects are funded through private industrial revenue bonds, and the proceeds of the sale are to be used for sewage facilities, solid-waste facilities, facilities that furnish potable water, and facilities for the disposal of hazardous waste.<sup>813</sup> The brownfield loan program also offers below-market rate loans to assess and clean up brownfield properties.<sup>814</sup> A brownfield is real property where the expansion, redevelopment, or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.<sup>815</sup> The program is open to public and private entities to help pay for assessments, demolition, cleanup, and consultant costs related to the site. Up to \$500,000 is available for assessments, and up to \$5 million is available for clean-up.<sup>816</sup>

During 2014, the OWDA provided loan funds for environmental infrastructure projects in 64 of Ohio’s 88 counties and financed over \$614 million in loans for 248 water, wastewater, stormwater, and brownfield projects.<sup>817</sup> In its 46-year history, this was OWDA’s fourth largest funding level.<sup>818</sup> The largest Fresh Water loan in 2014 was made to the city of Fremont for \$58,068,001 to replace the existing plant that was originally built in 1946.<sup>819</sup> This Fresh Water

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<sup>810</sup> *Id.*

<sup>811</sup> Ohio Water Development Authority, Summary List, Drinking Water Projects, <http://www.owda.org/owda0001.asp?PgID=pi-summary>.

<sup>812</sup> *Id.*

<sup>813</sup> *Id.*

<sup>814</sup> *Id.*

<sup>815</sup> *Id.*

<sup>816</sup> *Id.*

<sup>817</sup> Ohio Water Development Authority, 2014 Annual Report, available at <http://www.owda.org/owda-doc/AnnualReport2014.pdf>.

<sup>818</sup> *Id.*

<sup>819</sup> *Id.*

loan enabled economic development with a new water plant that will increase capacity from 10 million gallons per day to 24 million gallons per day.<sup>820</sup> OWDA has funded \$12 billion in environmental infrastructure projects for Ohio’s local governments.<sup>821</sup> OWDA’s Fresh Water Fund awarded over \$227 million in 2014—a 54% increase over 2013.<sup>822</sup> In May 2014, the OWDA issued over \$333 million in Ohio WPCLF Revenue Bonds Series 2014 to make loans to local governments for wastewater infrastructure projects under the WPCLF Program.<sup>823</sup>

### **Industrial Parks**

Ohio’s industrial parks utilize each of these infrastructure types to attract and retain industries. Industrial parks are sites zoned, designed, and built specifically for manufacturing facilities and companies within the manufacturing supply chain. Ohio and its local governments have a range of tools that can be used to create industrial parks.

Manufacturers can take advantage of the extensive development of already-existing industrial parks in Ohio. These sites offer modern necessities like water, sewer, electric, and broadband access while providing access to transportation and the same tax incentives found throughout the state.

Holmes County provides an effective solution to obstacles associated with locating to a semi-rural area. Holmes County offers a number of well-developed industrial parks and is home to Loudonville Industrial Park (housing companies like Mansfield Plumbing and PV Communications) and Straits Industrial Park, home to five local manufacturing plants (including Save N’ Serve and Grace Automation).<sup>824</sup>

### **Infrastructure and Economic Development Tools**

Many communities may be deterred from investing in infrastructure because of the high costs involved in those investments. Funding and constructing infrastructure can be expensive and time intensive. The economic benefit can take years to appear, and the construction process can cause inconvenience and even disruption to business. Nonetheless, research shows that improvements to infrastructure can promote economic growth.<sup>825</sup> A variety of tools allow communities of all sizes to invest in their infrastructure.

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<sup>820</sup> *Id.*

<sup>821</sup> *Id.*

<sup>822</sup> *Id.*

<sup>823</sup> *Id.*

<sup>824</sup> [http://www.holmescountydevelopment.org/industrial\\_business\\_parks](http://www.holmescountydevelopment.org/industrial_business_parks).

<sup>825</sup> Calderon & Serven, *The Effects of Infrastructure Development on Growth and Income Distribution 2* (2004) (summarizing studies on infrastructure’s impact on economic growth).

## **Tax Increment Financing**

Tax Increment Financing (“TIF”) is an economic development tool that enables local governments to finance public infrastructure improvements and, in select circumstances, privately owned economic development projects and residential projects.<sup>826</sup> TIF is an economic development tool that can be used by municipalities,<sup>827</sup> townships,<sup>828</sup> and counties.<sup>829</sup> As discussed below, there are parcel TIFs and incentive district TIFs. In addition, TIFs are authorized to be created under an urban renewal plan for “blighted” areas<sup>830</sup> and for projects performed by an urban redevelopment corporation.<sup>831</sup>

Creating a TIF begins with the local legislative authority. The local legislative authority must, by ordinance or resolution, declare improvements to certain parcels of real property within its jurisdiction to be a public purpose.<sup>832</sup> The legislative declaration may vary for each TIF but generally includes the following:

- (1) the time frame the TIF or incentive district will be in place;
- (2) the percentage of improvements that will be exempted from real property taxation;
- (3) a list of improvements to be made and a declaration that any improvements to private property within the specified area serve a public purpose;
- (4) at least one project either planned or currently underway that will depend on the improvements proposed in the resolution;
- (5) the boundaries of the district; and
- (6) whether payments in lieu of taxes (“PILOT”s) will be required of the owner of the exempted real property and the amount of PILOTs and other funds required to be paid to the municipality, county, or township in connection with the public infrastructure improvement.<sup>833</sup>

Once the TIF is established by legislative action, the political subdivision may begin collecting moneys to fund infrastructure improvement. TIFs are not tax increases. Rather, they

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<sup>826</sup> R.C. 5709.40(B).

<sup>827</sup> R.C. 5709.40-.41.

<sup>828</sup> R.C. 5709.73-.74.

<sup>829</sup> R.C. 5709.77-.81.

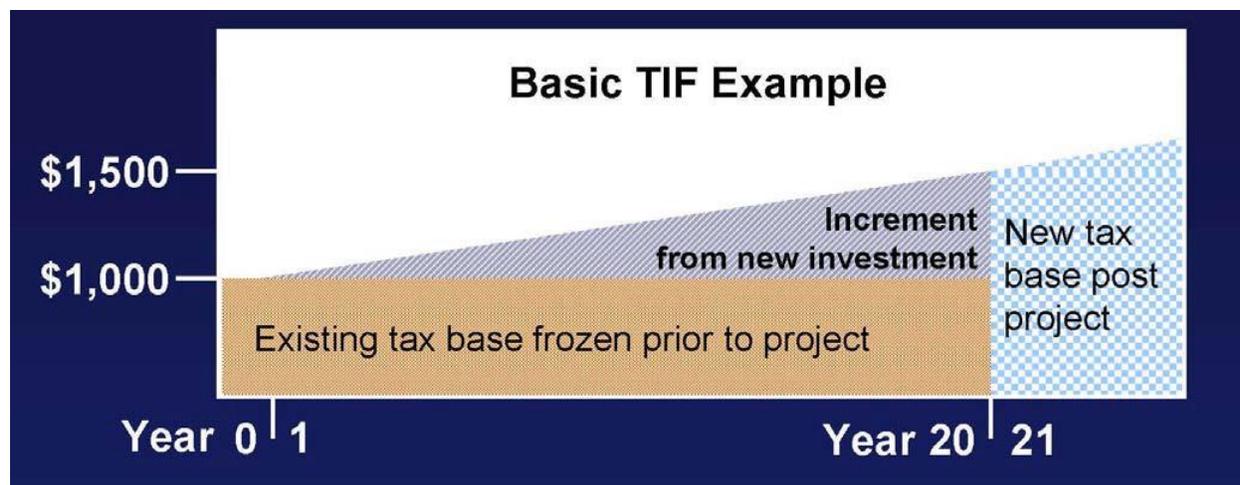
<sup>830</sup> R.C. Chapter 725.

<sup>831</sup> R.C. Chapter 1728

<sup>832</sup> R.C. 5709.40-5709.43 (municipalities), 5709.77-5709.81 (counties); and 5709.73-5709.74 (townships).

<sup>833</sup> R.C. 5709.40(C)(1), (C)(1)(3)(a), and 5709.43(A).

capture increases in the taxable value of real property. A TIF works by exempting from real property taxation the increase in assessed valuation resulting from an improvement to the real property.<sup>834</sup>



As improvements are made to the property, its value— and therefore the taxable value—should increase. TIFs, however, exempt the increase in assessed valuation of real property at its unimproved value, i.e., the value before enactment of the TIF ordinance or resolution. The government creating the TIF may require the owner of the real property to make PILOTS.<sup>835</sup> A PILOT is a payment made by the owner of real property that is the difference between (1) the taxes the owner would have paid if the improvements to real property had not been exempted minus (2) the taxes the owner pays based on the assessed value of the unimproved real estate that has not been exempted from real property taxation by the TIF.<sup>836</sup> PILOTS are not taxes, but they are collected at the same time and in the same manner as property taxes.<sup>837</sup> Any PILOTS received by the government are placed into a special fund.<sup>838</sup> The fund is then used to support and subsidize projects serving a public purpose, such as road construction and improvements to water, communication, or sewage lines.<sup>839</sup>

### **Various forms of TIFs**

Local governments can enact TIFs on a single piece of property or multiple pieces of property. Large tracts, not exceeding 300 contiguous acres, can be aggregated to create an

<sup>834</sup> Ohio Development Services Agency, Tax Increment Financing: General Purpose (Parcel), at 1, available at [https://development.ohio.gov/files/bs/TIF\\_Summary.pdf](https://development.ohio.gov/files/bs/TIF_Summary.pdf).

<sup>835</sup> R.C. 5709.42(A), 5709.74(A), and 5709.79(A).

<sup>836</sup> *Id.*

<sup>837</sup> *Id.*

<sup>838</sup> R.C. 5709.43(A).

<sup>839</sup> R.C. 5709.40(A)(7).

Incentive District TIF.<sup>840</sup> Both TIFs for individual parcels and incentive districts must serve a public purpose.<sup>841</sup> A TIF created for a specific individual parcel can fund improvements only to that specific parcel.<sup>842</sup> For public infrastructure improvements to directly benefit a single parcel, the improvement must place additional demand on public infrastructure.<sup>843</sup>

TIFs, under certain circumstances, may be enacted for improvements to purely private property. Improvements to residential parcels may be declared a public purpose if the parcel is located in a blighted area of an impacted city.<sup>844</sup> A blighted parcel is a parcel that has one or more of the following characteristics:

- (1) The structure is dilapidated, unsanitary, unsafe, or vermin infested and has been labeled unfit for human habitation by a housing authority;
- (2) The property poses a direct threat to public safety or health in its current condition;
- (3) Delinquent taxes exceed the fair market value of the land; or
- (4) It satisfies any two characteristics of R.C. 1.08(B)(2).<sup>845</sup>

TIFs consisting of more than one parcel of property are called Incentive District TIFs. The incentive district may not exceed 300 contiguous acres, enclosed by a continuous boundary.<sup>846</sup> Additionally, the incentive district must have one or more of the following characteristics:

- (1) More than half of the residents' incomes in the district are less than 80% of the median income of the residents in the political subdivision where the TIF district is located;

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<sup>840</sup> R.C. 5709.40(A)(5).

<sup>841</sup> R.C. 5709.40(A)(7) (defining "public infrastructure improvement" as "public roads and highways; water and sewer lines; environmental remediation; land acquisition, including acquisition in aid of industry, commerce, distribution, or research; demolition, including demolition on private property when determined to be necessary for economic development purposes; stormwater and flood remediation projects, including such projects on private property when determined to be necessary for public health, safety, and welfare; the provision of gas, electric, and communications service facilities, including the provision of gas or electric service facilities owned by nongovernmental entities when such improvements are determined to be necessary for economic development purposes; and the enhancement of public waterways through improvements that allow for greater public access").

<sup>842</sup> R.C. 5709.40(B).

<sup>843</sup> Kral, McElroy, & Rossman, *Tax Increment Financing in Cleveland 8* (2009), available at Council of Development Finance Agencies, <http://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=tifcleveland.html>.

<sup>844</sup> R.C. 5709.40(B).

<sup>845</sup> R.C. 1.08(B)(1).

<sup>846</sup> R.C. 5709.40(A)(5).

- (2) The average unemployment rate over the last year for the district is equal to 150% of the average rate of unemployment for Ohio over the same year;
- (3) More than a quarter of the population living in the district has an income below the federal poverty line;
- (4) The district is blighted;
- (5) The district is located in a substantially distressed area;
- (6) A certified engineer certifies that the public infrastructure in the district is inadequate to meet the potential development needs of the district; or
- (7) The district consists of entirely unimproved land.<sup>847</sup>

PILOTs may be used to pay the costs of housing renovations and public infrastructure provided the parcels of real property are used by the public for industrial or commercial purposes.<sup>848</sup> District funds do not have to be used on every parcel; rather, the funds can be used for improvements to a single parcel if the parcel is located in the district.

### **Tax Benefit of TIFs**

Local legislative authorities may exempt up to 75% of the value of improvements to real property from taxation for up to ten years.<sup>849</sup> This real property tax exemption includes the portion of real estate taxes that would otherwise be paid to levy-funded entities (for example, senior services, school districts, children’s services, and alcohol, drug and mental health services). Consequently, these entities will not experience the property value increase in funding unless special agreements are reached. In general, any government desiring to exempt more than 75% of the value of the improvements from real property taxation must receive prior approval from the local board of education or the county commissioners.<sup>850</sup> If the local school board agrees, a political jurisdiction may exempt up to 100% of the improvements for up to 30 years.<sup>851</sup> Finally, the jurisdiction that authorizes the tax incentive must specify the rate and the length of the property tax exemption.<sup>852</sup>

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<sup>847</sup> *Id.*

<sup>848</sup> R.C. 5709.40(C).

<sup>849</sup> R.C. 5709.40(B), (C)(4); 5709.73(B), (C)(4); 5709.78(B), (C)(4).

<sup>850</sup> *Id.*

<sup>851</sup> *Id.*

<sup>852</sup> *Id.*

If the owner of the real property is required to pay PILOTs, these PILOTs are paid to the county treasurer and are distributed by the county treasurer to the political subdivision enacting the TIF. This political subdivision deposits the PILOTs into the applicable tax-equivalent fund.<sup>853</sup> These PILOTs represent a cash flow for the term of the TIF. There does not always have to be a bond issue related to PILOTs. PILOTs are a cash flow.

PILOTs may be used to pay project and other TIF costs directly on an annual basis, or the annual cash flow of these PILOTs may be “leveraged” into a bond issue to borrow funds “up front” to pay project costs. If bonds are issued, bonds secured by these PILOTs may be issued by the political subdivision enacting the TIF or paid to another political subdivision such as a port authority under a cooperative agreement to secure port authority revenue bonds. The cooperative agreement entered into by the port authority, the political subdivision enacting the TIF, and the developer of the TIF project paying the PILOTs may require that the developer petition for a special assessment. The special assessment will be certified for collection only if PILOTs are not collected in an amount sufficient to pay bond service charges on bonds (e.g., the assessed value of the project does “increase” to the level anticipated or the developer does not pay PILOTs because of financial difficulties, etc.).<sup>854</sup> The cash flow of the PILOTs are a means to pay principal of and interest on those bonds.<sup>855</sup> The cooperative agreement may also require that the developer provide guarantees or other credit enhancement to secure the payment of bond service charges until sufficient “seasoning” of the PILOTs assures their continued availability to pay holders of bonds secured by the PILOTs over the term of the bonds. The political subdivision may also arrange with the developer to have the developer fund the project costs upfront (i.e., there is no bond issue, and the developer will be reimbursed over time as TIF funds are collected).<sup>856</sup>

### **Active TIFs around Ohio**

As of June 2015, Ohio’s three most populous counties—Cuyahoga, Franklin, and Hamilton—have a total of 420 active TIFs.<sup>857</sup> Examples of TIFs in urban areas used for infrastructure development tied to economic development projects are widespread.

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<sup>853</sup> R.C. 5709.80(A).

<sup>854</sup> R.C. 5709.81(A).

<sup>855</sup> R.C. 5709.40(H).

<sup>856</sup> *Id.*

<sup>857</sup> Ohio Development Services Agency, Business/Tax Incentives, <http://development.ohio.gov/OTEISearch/tif/default.aspx>.

Columbus is a case study in the successful use of TIFs. More than 20 district TIFs are located over the downtown Columbus area, with nearly 40 more in outlying areas. These district TIFs have been used to construct roads, parking garages, shopping centers, residential units, and sports arenas.<sup>858</sup>

### **Downtown Columbus**

In 2008, the Columbus City Council approved overlaying a district TIF on 735-acres of the central city. The Council's initial goal was to generate funds to create additional parking downtown, as several lots had been lost to development.<sup>859</sup> So far, the TIF has generated millions for construction and improvements to the central business district. In 2014 alone, this TIF generated \$1,818,933 for the city.<sup>860</sup> Two large Downtown Columbus parking garages have thus far been built with these TIF proceeds.

### **The Arena District**

Columbus has also used TIFs to develop the areas surrounding the central business district. In 1997, Columbus City Council approved a TIF for 75 acres covering the former Ohio Penitentiary. With \$600 million in public and private funds, Nationwide Realty Investors converted this land into the Arena District.<sup>861</sup> The Arena District houses Nationwide Arena, home of the Columbus Bluejackets, a professional hockey team in the National Hockey League. The Arena District also houses thousands of feet of retail, restaurants, office space, and nearly half a dozen residential structures.<sup>862</sup> This area, funded through a TIF, has attracted major corporations and young professionals back to downtown Columbus, helping to revitalize a once empty part of town.

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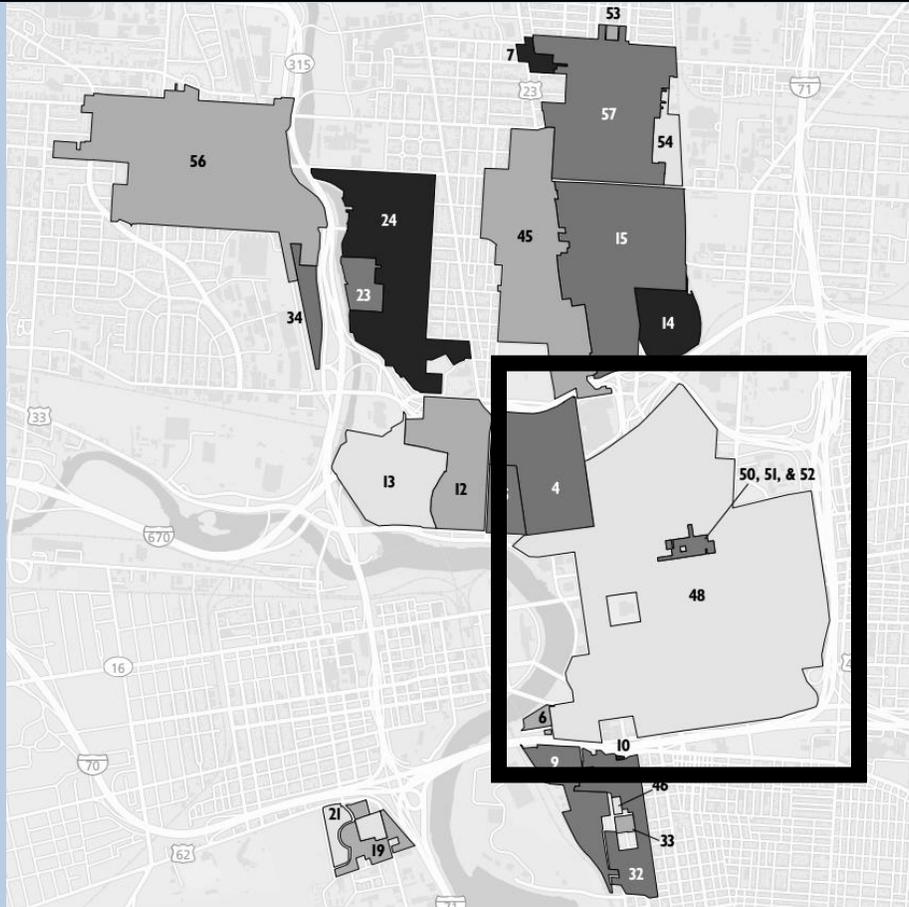
<sup>858</sup> City of Columbus Economic Development, *City of Columbus Tax Increment Finance Areas*, available at [http://www.columbusgachamber.com/ICLCpercent202013/TIFpercent20Areaspercent20\(2012\).pdf](http://www.columbusgachamber.com/ICLCpercent202013/TIFpercent20Areaspercent20(2012).pdf) (see map above).

<sup>859</sup> Lee, *New Property Tax District to Keep Revenue in Downtown Columbus*, NBC4 News (Jul. 8, 2008), available at <http://www.nbc4i.com/story/20726059/new-property-tax-district-to-keep-revenue-in-downtown-columbus>.

<sup>860</sup> Dorrian, *Comprehensive Annual Financial Report for the Fiscal Year Ended December 31, 2014*, City of Columbus, 254, available at [https://columbus.gov/uploadedFiles/Columbus/Elected\\_Officials/City\\_Auditor/Reports/CAFR/2014\\_CAFR.pdf](https://columbus.gov/uploadedFiles/Columbus/Elected_Officials/City_Auditor/Reports/CAFR/2014_CAFR.pdf).

<sup>861</sup> Pramik, *Urban Hot Spot Alters Columbus*, National Real Estate Investor (Jan. 1, 2007), available at [http://nreionline.com/industrynews/real\\_estate\\_urban\\_hot\\_spot](http://nreionline.com/industrynews/real_estate_urban_hot_spot).

<sup>862</sup> *Id.*



**Columbus' Downtown TIF Districts:** The above image identifies Columbus' downtown incentive district TIF's, with the Downtown TIF (identified with the black rectangle) being the largest. All the income derived from this district TIF will be earmarked to improve public services and facilities downtown, without raising taxes.

### **Easton Town Center**

A TIF was used to develop Easton in Columbus, Ohio. Easton is a comprehensive mixed-used development in Franklin County. Easton includes a major fashion and shopping center, multiple office buildings, and residential units spread across this development. Easton includes several parking garages and required substantial infrastructure development to create this jobs and entertainment district.

A TIF was a major tool used to fund the infrastructure for this development. The original Easton TIF provided a 100% of “non-school” TIF with revenues committed to project over 30 years.<sup>863</sup> The city of Columbus agreed to use “best efforts” to finance \$26 million in infrastructure improvements.<sup>864</sup> In June 1999, the city of Columbus issued over \$30 million in TIF Revenue Bonds to finance the needed infrastructure.<sup>865</sup> Not all went as planned with the Easton TIF. The original Easton TIF provided \$26 million for multiple parking garages and a tax abatement for “non-retail” properties.<sup>866</sup> The tax abatements hampered revenue flow. Revenues in 1999 were less than \$300,000 and the debt service in 2000 would exceed \$1.5 million.<sup>867</sup> Columbus used a “back loaded” debt structure to enable debt service to grow as revenues grow. This permitted Columbus to maximize benefit of TIF payments on “non-retail” components when the tax abatement expired but required Columbus to borrow \$2.2 million to pay interest through 2000 to provide time for revenues to “ramp up.”<sup>868</sup> But Columbus did not take on any of the development risk as the developer obtained a letter of credit to secure the debt. The letter of credit was required for principal plus 225 days of interest and has to remain in place until the TIF revenues equal or exceed 1.5X maximum annual debt service for two consecutive years, no single taxpayer accounts for more than 20% of annual TIF payments, and the top five taxpayers do not account for more than 45% of annual TIF payments.<sup>869</sup> Based on this structure, the bond issue received a triple-A rating.<sup>870</sup> In 2004, Columbus and the developer wanted to issue additional bonds and were forced to refinance \$36.4 million in refunding bonds.<sup>871</sup> This amount included \$15 million of additional Easton improvements and \$5 million of “remote” improvements (other locations in Columbus) on subordinated basis.<sup>872</sup>

In large part because the TIF was able to provide the needed infrastructure, in particular the parking decks, Easton is a major economic success for Central Ohio. Currently, Easton has 1.7 million square feet of developed space including 1.5 million square feet in retail, 215,000 square feet in office, and over 180 retail stores and 500 residential units.<sup>873</sup>

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<sup>863</sup> Headen, *TIF Financing: A Neighborly Perspective*, available at Council of Development Finance Agencies, <http://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=PEDAHeaden.html>.

<sup>864</sup> *Id.*

<sup>865</sup> *Id.*

<sup>866</sup> *Id.*

<sup>867</sup> *Id.*

<sup>868</sup> *Id.*

<sup>869</sup> *Id.*

<sup>870</sup> *Id.*

<sup>871</sup> *Id.*

<sup>872</sup> *Id.*

<sup>873</sup> See Steiner & Associates, Easton Town Center Fact Sheet, <http://www.steiner.com/Projects/EastonTownCenter/FactSheet.aspx>.

## **Transportation Improvement Districts**

A transportation improvement district (“TID”) is a political subdivision, as well as a corporate entity, organized to finance, construct, maintain, repair, or operate a transportation improvement project.<sup>874</sup> A TID may be created by a board of county commissioners.<sup>875</sup> The commissioners can structure the board in one of two ways. The board of trustees governing the TID can consist of no fewer than 12 members, identified in R.C. 5540.02(C)(1).<sup>876</sup> Alternatively, the board of trustees for the TID may include:

- (1) five members appointed by the county commissioners;
- (2) one nonvoting member appointed by the Speaker of the House of Representatives;  
and
- (3) one nonvoting member appointed by the President of the Senate.<sup>877</sup>

The board of trustees for a TID must control transportation projects in a way that promotes economic development, strengthens neighborhoods, and creates jobs.<sup>878</sup> A TID project can include improvements to streets, highways, parking facilities, freight rail tracks and necessarily related freight rail facilities, or other transportation projects that are newly constructed or improved.<sup>879</sup> It can also include administrative, storage, and other buildings or properties that the district considers necessary for the operation of the TID.<sup>880</sup> TIDs may also control all rights and property that the district must acquire for the construction, maintenance, or operation of the project.<sup>881</sup>

The board of trustees of a TID can enter into all contracts necessary or incidental to the performance of its functions and execution of its powers.<sup>882</sup> It can maintain funds.<sup>883</sup> Further, TIDs can purchase, construct, maintain, repair, sell, exchange, police, operate, or lease projects.<sup>884</sup> TIDs can also issue bonds under Section 13 of Article VIII of the Ohio Constitution.<sup>885</sup>

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<sup>874</sup> R.C. 5540.02(B).

<sup>875</sup> *Id.*

<sup>876</sup> R.C. 5540.02(C)(1).

<sup>877</sup> R.C. 5540.02(C)(2).

<sup>878</sup> R.C. 5540.02(A) & (B).

<sup>879</sup> *Id.*

<sup>880</sup> *Id.*

<sup>881</sup> R.C. 5540.01(C).

<sup>882</sup> *Id.*

<sup>883</sup> R.C. 5540.03(A)(6) & (8).

<sup>884</sup> R.C. 5540.03(A)(5).

<sup>885</sup> *Id.*

The board of trustees of a TID may issue bonds to pay all or a portion of the costs of a project.<sup>886</sup> Each bond must be dated, list an interest rate, and have a final maturity date that does not exceed 30 years from the issue date.<sup>887</sup> This process is determined by the TID board during the bond proceedings. The bonds may be sold through a competitive bid process or at private sale as determined by the board.<sup>888</sup> The proceeds of the sale of the bonds may be used only to fund projects for which the bond was issued.<sup>889</sup> The revenue bonds are not considered a debt and are not secured by the State or any political subdivision.<sup>890</sup>

An example of the public benefits of one TID project is the Clermont County Transportation Improvement District. This project includes the reconstruction and widening of the Eastgate Boulevard structure over SR 32, the relocation of the existing westbound entrance and exit ramps from SR 32 to Eastgate North Drive instead of Eastgate Boulevard, and the reconstruction of the westbound loop ramp from Eastgate Boulevard to SR 32.<sup>891</sup> This project was completed only through the use of a TID that raised the \$10 million needed for construction.



### **TID ODOT Grant Funding**

The board of a TID may apply to ODOT for grant funding. During fiscal year 2015-16, ODOT is offering \$3.5 million in competitive grant funding to support TIDs. To apply for ODOT funding, the TID must be registered with ODOT. To be approved for registration, the TID must designate a project or program of projects by board resolution, and:

- (1) must have facilitated aggregate funding totaling at least \$10 million within the eight-year period commencing January 1, 2005; or

<sup>886</sup> R.C. 5540.03(A)(12).

<sup>887</sup> R.C. 5540.60(A).

<sup>888</sup> R.C. 5540.06(C).

<sup>889</sup> R.C. 5540.06(D).

<sup>890</sup> R.C. 5540.09(A).

<sup>891</sup> See The Eastern Corridor, SR 32 Improvement, Eastgate Area Overview, <http://easterncorridor.org/projects/sr-32-eastgate/sr-32-eastgate-project-overview>.

- (2) must have facilitated aggregate funding totaling at least \$15 million since the commencement of the TID; or
- (3) must facilitate \$10 million aggregate funding and have the County Engineer where the TID is located attest by sworn affidavit that the TID-designated projects total a minimum of \$10 million and that the TID is facilitating a portion of funding for the project or program of projects.<sup>892</sup>

TID funds from ODOT cannot exceed \$250,000 or 25% of the total cost of the project. The project must have additional sources of funding, and any TID grant money that is awarded cannot be used to pay administrative costs.

Currently, only 20 TIDs are registered with the Department of Transportation. Some county engineers see the program as unnecessary bureaucracy and red tape.<sup>893</sup> Others see it as a boon for their county. Montgomery, Butler, and Warren County TIDs have developed well over \$480 million in transportation projects.<sup>894</sup> Among these projects was an I-75 interchange at Austin Boulevard, on the Warren County-Montgomery County line.<sup>895</sup> Since the interchange was completed in 2010, multiple housing complexes, retail stores, restaurants, and commercial office space have been constructed along the interchange.<sup>896</sup> This development has created hundreds of jobs in the region.<sup>897</sup>

### **Infrastructure Funding Methods**

Outside of traditional funding mechanisms like the proceeds from the federal and state gas tax, various funding methods in Ohio help spur infrastructure and economic development throughout the state.

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<sup>892</sup> Ohio Department of Transportation, Transportation Improvement Districts, <https://www.dot.state.oh.us/Divisions/JobsAndCommerce/Pages/TID.aspx>; Ohio Department of Transportation, Transportation Improvement District Annual ODOT Grant Program, available at <https://www.dot.state.oh.us/Divisions/JobsAndCommerce/TID%20Resources/SFY16%20Program%20Summary%20and%20Application%20Directions.pdf>.

<sup>893</sup> Budd, *Transportation Districts Tap \$480M for Area Work*, Dayton Daily News (June 4, 2012), available at <http://www.daytondailynews.com/news/news/local/transportation-districts-tap-480m-for-area-work-1/nPR2J>.

<sup>894</sup> *Id.*

<sup>895</sup> *Id.*

<sup>896</sup> Blizzard, *\$24M Austin Park Plan Progressing*, Dayton Daily News (Dec. 6, 2014), available at <http://www.mydaytondailynews.com/news/news/24m-austin-park-plan-progressing/njLst/#fc0926b3.3638282.735827>; Budd, *Austin Landing Plans Spread to Springboro*, Dayton Daily News (Jan. 19, 2015), available at <http://www.mydaytondailynews.com/news/news/local/austin-landing-plans-spread-to-springboro/njqk5/#cd2fefda.3638282.735827>.

<sup>897</sup> Christ, *Regional Guide: Interchange Opens Way for Austin Landing to Thrive*, Cincinnati Business Courier (Jan. 20, 2012), available at <http://www.bizjournals.com/cincinnati/print-edition/2012/01/20/regional-guide-interchange-opens-way.html?page=all>.

### **Alternative Storm Water Infrastructure Loan Program**

The Alternative Storm Water Infrastructure Loan Program (“ASWILP”), funded through ODSA, offers below-market interest rate loans for projects that promote economic development in an environmentally friendly manner. A government entity can receive up to \$5 million in loan funds for a single project. These funds can be used to pay for design, demolition, construction, materials, and administrative costs associated with the project.<sup>898</sup> The ASWILP process involves a pre-application meeting with ODSA and the potential borrower, followed by submitting an application to ODSA. That application is reviewed and initial loan terms by ODSA are proposed. ODSA may then choose to recommend the loan to the OWDA whose board determines whether to approve of the loan.<sup>899</sup>

### **State Infrastructure Bank**

The State Infrastructure Bank’s (“SIB”) goal is to contribute to the economic revitalization of Ohio and to improve the economic welfare of all Ohio citizens.<sup>900</sup> The SIB consists of four funds:

- (1) The highway and transit infrastructure fund;
- (2) The aviation infrastructure bank fund;
- (3) The rail infrastructure bank fund; and
- (4) The infrastructure bank obligations fund.<sup>901</sup>

The fund is authorized under Federal Title XXIII Highway Funds. SIB’s objective is to encourage public and private investment in transportation facilitates, to develop financing tactics to expand the availability of funding resources for infrastructure development, to reduce state costs of infrastructure, and to improve the efficiency of Ohio’s transportation system.<sup>902</sup> Further, the SIB provides financial assistance like loans, loan guarantees, letters of credit, leases, interest rate subsidies, and debt service reserves to public and private entities for qualified projects.<sup>903</sup> A qualified project is determined by the director of transportation and must be a public or private transportation project. These projects can include planning,

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<sup>898</sup> Ohio Department of Development, Community/Community Grants, Loans, Bonds, and Tax Credits, Alternative Stormwater Infrastructure Loan Program, [http://development.ohio.gov/cs/cs\\_altstormwater.htm](http://development.ohio.gov/cs/cs_altstormwater.htm).

<sup>899</sup> *Id.*

<sup>900</sup> R.C. 5531.09(A).

<sup>901</sup> R.C. 5531.09(E).

<sup>902</sup> R.C. 5531.09(B).

<sup>903</sup> *Id.*

environmental impact studies, construction, resurfacing, and rehabilitating highways, public transit, aviation, rail, or other transportation projects eligible for public financing.<sup>904</sup>

In 2014, ODOT's SIB achieved a record-breaking year.<sup>905</sup> It exceeded the previous record from 2004 by \$21.5 million by providing 18 loans totaling \$59 million and four bond issuances totaling \$17.7 million.<sup>906</sup> Since its inception, the Ohio SIB has issued 168 loans and seven bond issuances totaling \$534.7 million.<sup>907</sup>

### **Ohio Public Works Commission**

Annually, the Ohio Public Works Commission ("OPWC") provides grant and loan programs for local communities for infrastructure improvements.<sup>908</sup> The State Capital Improvements Program ("SCIP") was created in 1987 through a constitutional amendment allowing the state to use general revenues to provide debt relief and bonds up to \$120 million.<sup>909</sup> Political subdivisions can apply for SCIP loans to fund improvements for roads, bridges, culverts, water supply systems, wastewater systems, storm water collection systems, and solid waste disposal facilities.<sup>910</sup> OPWC also funds the Revolving Loan Program ("RLP"). This program funds loans through loan payments made under the State Capital Improvements Program.<sup>911</sup> Because the program is funded by loan repayments from projects approved under SCIP, it can provide below market-rate loans.<sup>912</sup> This process also makes the amount of loan funds available variable from year to year.<sup>913</sup> Both the RLP and SCIP loans can be for up to 100% of the cost of the project.<sup>914</sup>

Every year, OPWC funds hundreds of local infrastructure projects. Funding for local projects in Franklin County late in 2013 offers a typical example replicated across Ohio. On December 13, 2013, the OPWC's Public Works Integrating Committee awarded over \$29 million

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<sup>904</sup> R.C. 5531.09(D).

<sup>905</sup> Ohio Department of Transportation, State Infrastructure Bank, Annual Financial Report, Federal Fiscal Year 2014, <http://www.dot.state.oh.us/Divisions/Finance/SIB%20Annual%20Statements/2014%20SIB%20Annual%20Report.pdf>.

<sup>906</sup> *Id.*

<sup>907</sup> *Id.*

<sup>908</sup> Ohio Public Works Commission, Capital Improvements Report (May 2004), available at <http://www.pwc.state.oh.us/Documents/CIRManual.pdf>.

<sup>909</sup> *Id.*

<sup>910</sup> Ohio Department of Transportation, Local Funding Options and ODOT Capital Programs, available at [https://www.dot.state.oh.us/Divisions/Planning/LocalPrograms/LTAP/Documents/Local\\_Funding\\_Options\\_and\\_ODOT\\_Capital\\_Programs.pdf](https://www.dot.state.oh.us/Divisions/Planning/LocalPrograms/LTAP/Documents/Local_Funding_Options_and_ODOT_Capital_Programs.pdf).

<sup>911</sup> *Id.*

<sup>912</sup> *Id.*

<sup>913</sup> *Id.*

<sup>914</sup> *Id.*

to 11 District 3/Franklin County projects through the SCIP and the LTIP for Program Year 28 (2014).<sup>915</sup>

**2014 Franklin County Ohio OPWC Funded Projects<sup>916</sup>**

<b>Community</b>	<b>Project</b>	<b>Total Project Cost</b>	<b>Total Project Award</b>
Whitehall	Hamilton Rd Improvement	\$1,877,564	\$1,877,564
Bexley	E. Broad Street Comp Improvements	\$5,193,745	\$4,999,999
Obetz	Obetz Industrial Park Road Improve	\$1,999,505	\$1,999,505
New Albany	Beech Road Widening S of Jug St	\$1,700,000	\$995,000
Westerville	S. State Street/Schrock Rd Intersection Improvement	\$10,652,854	\$8,380,600
Grandview Hts	Grandview Yards Infrastructure Improvement- Phase 4	\$6,908,832	\$3,792,838
Franklin Co Engineer	Alkire Road at Demorest Road	\$3,496,000	\$996,000
Blendon	Residential Repaving	\$664,346	\$431,346
Columbus	Hard Road Phase A: Sawmill to Smoky Row	\$15,915,825	\$1,999,999
Franklin Co Engineer	Winchester Pike at Bixby/Brice	\$5,794,000	\$2,142,000
Franklin Co Engineer	Hayden Run Blvd	\$8,782,000	\$1,929,155
	<b><u>Total Awards:</u></b>	<b>\$62,984,671</b>	<b>\$29,544,006</b>

<sup>915</sup> See Mid-Ohio Regional Planning Commission, *OPWC's Public Works Integrating Committee Awards Over \$29 Million to 11 Projects*, available at <http://www.morpc.org/pdf/2013PWICawardsover29MinOPWCFunds.pdf>.

<sup>916</sup> *Id.*

## **Governor's Office of Appalachia**

The Governor's Office of Appalachia partners with organizations, agencies, and individuals to foster positive economic growth and improve the quality of life for all citizens living in the region. One of the ways they assist with infrastructure efforts is through the Appalachian Local Access Road Program. The Appalachian Local Access Road program provides matching funds for preliminary engineering, purchase of right-of-way, and initial construction of eligible access-road projects. Eligible access-road projects link businesses, communities, and residents to the Appalachian Development Highway System and to other key parts of the region's transportation network with the construction of local access roads compatible with local development plans and related to employment opportunities and the stimulation of economic development.<sup>917</sup>

## **Ohio Department of Transportation**

ODOT's Ohio Airport Grant Program provides financial assistance to publicly owned airports in Ohio that do not receive FAA passenger or air cargo entitlements.<sup>918</sup> The grant's goal is to improve safety at Ohio's general aviation airports and maintain the infrastructure of Ohio's general aviation system.<sup>919</sup> The grant funds may be used for airport pavement resurfacing, obstruction removal, and marking.<sup>920</sup> ODOT will provide up to 90% of eligible costs for construction only.<sup>921</sup> Funding amounts are approximately \$1 million, and the application process is available annually.<sup>922</sup>

ODOT's Jobs & Commerce Division is a unique offering by Ohio to help companies with relocation and expansion projects. It provides assistance in planning and executing infrastructure projects. This can include technical and financial support, routing analysis, site analysis, and multi-partner strategy sessions to solve transportation issues and promote economic growth for the state and region.

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<sup>917</sup> Ohio Development Services Agency, Governor's Office of Appalachia, [http://development.ohio.gov/cs/cs\\_goa\\_grantprocess.htm](http://development.ohio.gov/cs/cs_goa_grantprocess.htm).

<sup>918</sup> Ohio Department of Transportation, Ohio Airport Grant Program, Fiscal Year 2016, <http://www.dot.state.oh.us/Divisions/Operations/Aviation/Pages/OhioAirportGrantProgram.aspx>.

<sup>919</sup> Ohio Department of Transportation, Ohio Airport Grant Application Procedure Fiscal Year 2016, available at <http://www.dot.state.oh.us/Divisions/Operations/Aviation/Documents/Airport%20Grant%20Program/Grant%20Procedure%20FY16.pdf>.

<sup>920</sup> Ohio Department of Transportation, Ohio Airport Grant Program, Fiscal Year 2016, <http://www.dot.state.oh.us/Divisions/Operations/Aviation/Pages/OhioAirportGrantProgram.aspx>.

<sup>921</sup> *Id.*

<sup>922</sup> *Id.*

Annually, ODOT publishes a “program resource guide” that discusses various infrastructure programs. These programs include aviation, bridges and roads, major new capacity projects, multi-modal, transit, and other Ohio agency infrastructure programs. The guide discusses the purpose of the program, its funding amount, applicant eligibility, the application process, the application selection process, a contact person, and a link to the application.<sup>923</sup>

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<sup>923</sup> See Ohio Department of Transportation, Program Resource Guide 2014, available at <http://www.dot.state.oh.us/Divisions/Planning/LocalPrograms/Documents/ODOT%20Program%20Resource%20Guide.pdf>.

## **Chapter Eight:** **Workforce Development**

### **Key Points:**

- Ohio's workforce pipeline begins with its comprehensive system of primary and secondary education.
- Ohio has an extensive network of public colleges and universities, as well as regional campuses, community colleges, and adult education centers.
- Ohio directly supports workforce development through a variety of programs either funded or administered by the state.
- Partnerships with the private sector present another option to ensure that workers receive the skills and training needed for today's jobs.

Workforce development is an essential component of Ohio's economic development program. The retirement of the Baby Boom generation combined with changing skill requirements for jobs has created greater emphasis on the need to provide prepared workers for employers. The national workforce data is informative:

- 600,000 open skilled manufacturing jobs exist;<sup>924</sup>
- 50% of the energy industry's 5,000,000 pool of skilled workers will retire within a decade;<sup>925</sup>
- 56% of information technology executives say their largest barrier to success is a lack of skilled staff;<sup>926</sup> and

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<sup>924</sup> Deloitte Development LLC & The Manufacturing Institute, *Boiling Point? The Skills Gap in U.S. Manufacturing 2, 8* (2011), available at [http://www.themanufacturinginstitute.org/~/\\_media/A07730B2A798437D98501E798C2E13AA.ashx](http://www.themanufacturinginstitute.org/~/_media/A07730B2A798437D98501E798C2E13AA.ashx).

<sup>925</sup> Mullaney, *Want a Job? Look to the Energy Field*, USA Today (Sept. 30, 2012).

<sup>926</sup> See CompTIA, *State of the IT Skills Gap* (Feb. 2012), available at Wired, [http://www.wired.com/wp-content/uploads/blogs/wiredenterprise/wp-content/uploads/2012/03/Report\\_-\\_CompTIA\\_IT\\_Skills\\_Gap\\_study\\_-\\_Full\\_Report.sflb\\_.pdf](http://www.wired.com/wp-content/uploads/blogs/wiredenterprise/wp-content/uploads/2012/03/Report_-_CompTIA_IT_Skills_Gap_study_-_Full_Report.sflb_.pdf).

- 500,000 nurses and 125,000 doctors will be needed by 2020.<sup>927</sup>

Conventional thinking about workforce development has evolved over time from a problem-focused approach, addressing issues such as the need for more employees in a particular industry, to a more holistic approach that tries to strategically consider the overall needs of a region. The many stakeholders in the workforce development process include educational institutions, public and private service providers, communities, and employers. Although defined in several ways, modern workforce development has been described as “the coordination of public and private-sector policies and programs that provides individuals with the opportunity for a sustainable livelihood and helps organizations achieve exemplary goals, consistent with the societal context.”<sup>928</sup> To meet the challenges and opportunities of a constantly evolving global economy, old theories of workforce development are also evolving.

### **Primary and Secondary Education**

Ohio workforce development begins with the education of the state’s children through the state’s primary and secondary schools.

#### **Constitutional Framework for School Funding**

Ohio’s primary and secondary education system has its genesis in Article VI of the Ohio Constitution. Section 3 of Article VI directs the General Assembly to provide “for the organization, administration and control of the public school system of the state,” and Section 4 provides for both a “state board of education” and a “superintendent of public instruction.” With regard to funding, Section 2 of Article VI states that the General Assembly “shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the State.”

Public school districts in Ohio are funded through a combination of state funds, local sources such as property taxes (and in some cases income taxes), and federal funds. The amount of state funds that a district receives is based on a formula that relies on the student enrollment and the property wealth of the district.<sup>929</sup>

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<sup>927</sup> See Buerhaus, Auerbach, Staiger & Muench, *Projections of the Long-Term Growth of the Registered Nurse Workforce: A Regional Analysis*, 31 *Nursing Economics* 13–17 (2013); Association of American Medical Colleges, *How to Fix the Doctor Shortage*, [https://www.aamc.org/advocacy/campaigns\\_and\\_coalitions/fixdocshortage](https://www.aamc.org/advocacy/campaigns_and_coalitions/fixdocshortage).

<sup>928</sup> See Haralson, *What Is Workforce Development?* (2010), available at <https://www.stlouisfed.org/publications/bridges/spring-2010/what-is-workforce-development> (quoting Jacobs & Hawley, *Emergence of Workforce Development: Definition, Conceptual Boundaries, and Implications*).

<sup>929</sup> See <http://education.ohio.gov/Topics/Finance-and-Funding/Overview-of-School-Funding>.

In a series of decisions referred to as *DeRolph*, the Ohio Supreme Court addressed the constitutionality of Ohio’s system for financing its elementary and secondary public schools.<sup>930</sup> Issued in 1997, *DeRolph I* declared unconstitutional various aspects of Revised Code Chapters 3313, 3317, and 3318. After *DeRolph I*, the General Assembly enacted significant changes to the school-funding system. These changes were considered in *DeRolph II*. While recognizing that a “good faith attempt to comply with the constitutional requirements has been mounted,” the Supreme Court in *DeRolph II* concluded that still more was required to comply with the requirements of Article XI, Section 2 of the Ohio Constitution.<sup>931</sup> In *DeRolph III*, the Supreme Court deviated from its prior rulings by dictating the specific legislative changes the General Assembly needed to make. In 2002, *DeRolph IV* vacated *DeRolph III* and reaffirmed the basic holdings of *DeRolph I* and *DeRolph II*—namely, a “complete systematic overhaul of the school-funding system” is required—but the General Assembly must come up with the specific legislative fix.<sup>932</sup> Since *DeRolph IV*, Ohio’s school funding system has continued to evolve and be a topic of significant debate.<sup>933</sup>

### **Current Organization and Trends**

The Ohio Department of Education (“ODE”) oversees the State’s K-12 education system, which consists of 611 public school districts, 49 joint vocational school districts, and around 395 public community (i.e., charter) schools. This system enrolls approximately 1.8 million students and graduates 123,000 students each year.<sup>934</sup> All told, ODE received approximately \$11.9 billion in funding in fiscal year 2015. In the biennial budget just passed, that amount is \$10.7 billion and \$11.1 billion for fiscal years 2016 and 2017, respectively.<sup>935</sup>

School choice is a growing trend in Ohio. The General Assembly first authorized charter schools in 1997. Charter schools are public, nonprofit, and nonsectarian. Charter schools in Ohio schools operate independently of any school district. Rather, charter schools operate under a contract with a “sponsoring entity” whose authority is established either in statute or by ODE. Primary responsibility for overseeing and providing guidance to charter schools resides

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<sup>930</sup> The Supreme Court of Ohio issued four main decisions between 1997 and 2002: *DeRolph v. State*, 78 Ohio St.3d 193 (1997) (“*DeRolph I*”); *DeRolph v. State*, 89 Ohio St.3d 1 (2000) (“*DeRolph II*”); *DeRolph v. State*, 93 Ohio St.3d 309 (2001) (“*DeRolph III*”); and *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750 (“*DeRolph IV*”).

<sup>931</sup> *DeRolph II* at 36.

<sup>932</sup> *DeRolph IV* at ¶ 5.

<sup>933</sup> Additional information and resources regarding various aspects of Ohio’s school funding system can be found at <http://education.ohio.gov/Topics/Finance-and-Funding>.

<sup>934</sup> See Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Education)* 1–2 (Feb. 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/edu.pdf>.

<sup>935</sup> See Legislative Service Commission, *Budget in Detail, H.B. 64 of the 131st General Assembly, As Enacted (with FY 2015 Actual Expenditures)* 32 (July 7, 2015), available at <http://www.lsc.ohio.gov/fiscal/bid131/budgetindetail-hb64-en-with-fy2015actuals.pdf>.

with ODE’s Office of Community Schools.<sup>936</sup> Since the 1998–1999 school year, the number of charter schools has increased from 15 to around 395, and the number of full-time equivalent students attending charter schools has increased from 2,242 to 120,826.<sup>937</sup> This latter number represents around 7% of the total public school enrollment in Ohio.

In addition to charter schools, Ohio facilitates school choice through a variety of voucher programs. By far the largest such program is Ohio’s Educational Choice Scholarship (“EdChoice”) Program. In place since the 2006–2007 school year, the EdChoice Scholarship program provides private school scholarships to students from underperforming public schools. The program provides up to 60,000 EdChoice scholarships to eligible students.<sup>938</sup>

ODE also oversees Ohio’s educational service centers (“ESC”s) and the regional service



system. ESCs can be traced back to 1914, when the General Assembly created “county school districts.” In 1995, the General Assembly renamed the county school districts as ESCs; the legislation also promoted a role change for ESCs from that of imposing standardization on small, rural districts to providing large-scale support and special programs to a wider variety of school districts. In 2003, and consistent with Ohio’s efforts to promote increased accountability, the General Assembly gave individual

school districts the authority to leave their current ESC and join any adjacent ESC.<sup>939</sup>

<sup>936</sup> See Ohio Department of Education, *2013–2014 Annual Report: Ohio Community Schools 5*, available at <http://education.ohio.gov/getattachment/About/2014-Annual-Reports/Ohio-Community-Schools-Annual-Report.pdf.aspx>.

<sup>937</sup> *Id.*, p. 19–20.

<sup>938</sup> *Id.*, p. 7–8.

<sup>939</sup> See Ohio Educational Service Centers Association, About OESCA, available at <http://www.oesca.org/vnews/display.v/ART/47bb7a71896f5>.

Continuing this trend, Ohio created the educational regional service system in 2006. The purpose of the regional system is to improve school effectiveness and student achievement, while at the same time improving regional coordination, reducing unnecessary duplication of programs, and providing more streamlined delivery of educational services. Ohio now has 16 educational regions. Each educational region is overseen by a Regional Advisory Council. Communication and cooperation between the various regions is facilitated by the State Regional Alliance Board, which includes members from each of the Regional Advisory Councils and representatives from various stakeholder groups, such as the Department of Education and the Ohio Parent Teacher Association.<sup>940</sup>

### **Adult Education**

The decline in low-skill, high-wage manufacturing jobs in Ohio promotes a greater need for the education of Ohioans beyond their secondary school. Ohio offers a wide range of higher education options to address the myriad opportunities and challenges presented by a 21<sup>st</sup> century economy.

### **Higher Education System**

Ohio is home to one of the largest systems of public higher education in the nation, which includes 13 university main campuses, 24 university regional campuses, 1 free standing medical college, and 23 community colleges.<sup>941</sup> With Ohio's Transfer to Degree Guarantee, students in an Ohio public community college can transfer their general education credits to an Ohio public institution of higher education.<sup>942</sup>

Ohio's public higher education system is now overseen by the Department of Higher Education. The Ohio Board of Regents was the predecessor to the Department and was created in 1963. For most of its existence, the Board of Regents was responsible for setting policy and appointing a chancellor, who served as an administrative official. In 2007, the General Assembly made the chancellor position a cabinet-level office by transferring the appointment of the chancellor from the Board of Regents to the governor, giving the chancellor direct control over agency policy and having the chancellor report directly to the governor. Consistent with this structural change, in 2015 the Board of Regents was officially renamed the Department of

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<sup>940</sup> See Ohio Educational Service Centers Association, The Ohio Educational Regional Service System, and related documents at <http://www.oesca.org/vnews/display.v/SEC/Resources%7CERSS>.

<sup>941</sup> See Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Higher Education)* 2–3 (March 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/bor.pdf>.

<sup>942</sup> Ohio Board of Regents, Transfer College Credit, <https://transfercredit.ohio.gov/ap/20?>

Higher Education, and the chancellor was renamed as the director. The Board of Regents continues to exist as an advisory body to the director.<sup>943</sup>

Workforce development is a priority for Ohio's public colleges and universities. As the Board of Regents recently opined:

Ohio leaders have prioritized a clear and unambiguous goal to ensure the state has a robust, globally competitive workforce capable of meeting the current and future needs of Ohio employers. Reaching this objective will require the University System of Ohio ("USO") to successfully equip students with the relevant knowledge and skills that permit career advancement and meet the state's workforce needs. Closing the gap between the skills and knowledge USO graduates possess and the skillsets required by Ohio employers must be an issue of ongoing attention and innovation.<sup>944</sup>

The budget for the Department of Higher Education was approximately \$2.4 billion in fiscal year 2015. Of that amount, approximately 88% directly supports Ohio's public colleges and universities. Over \$1.4 billion is provided annually to Ohio's public universities for instructional and general operational support, and over \$400 million is provided to Ohio's community colleges. As with K-12 education, the funding of higher education continues to be a priority in Ohio. In the recently passed biennial budget, approximately \$2.56 billion is appropriated for higher education in fiscal year 2016, and \$2.64 billion is appropriated for fiscal year 2017.<sup>945</sup>

Student access to higher education is another priority in Ohio. Every year, the State funds around \$130 million in scholarships and grants and provides \$30 million in student debt reduction.<sup>946</sup> Approximately 536,853 individuals were enrolled at a public college or university in Ohio in 2013.

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<sup>943</sup> *Id.* at 1–2.

<sup>944</sup> See Ohio Board of Regents, *Seventh Report on the Condition of Higher Education in Ohio, Pre-K to Jobs: Higher Education's Role in Developing Students for Careers 3* (2014), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2014-Conditions-Report\\_FINAL.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2014-Conditions-Report_FINAL.pdf).

<sup>945</sup> See Legislative Service Commission, Budget in Detail, H.B. 64 of the 131st General Assembly, As Enacted (with FY 2015 Actual Expenditures) 68 (July 7, 2015), available at <http://www.lsc.ohio.gov/fiscal/bid131/budgetindetail-hb64-en-with-fy2015actuals.pdf>.

<sup>946</sup> See Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Higher Education)* 28 (March 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/bor.pdf>.

## Ohio Public Higher Education Network

Type of Institution	Number of Institutions	Headcount in Fall 2013
University main campuses	14	288,767
University regional campuses	24	60,494
Free standing medical college	1	836
Community colleges	14	138,962
Technical colleges	9	49,030

Ohio is also home to an extensive private system of higher education. More than 100 private colleges and universities call Ohio home. These colleges and universities serve nearly 200,000 students annually.<sup>947</sup>

Amongst its various public and private colleges and universities, Ohio houses nine law schools,<sup>948</sup> five medical schools, two dental schools,<sup>949</sup> and dozens of other graduate programs. Many of these institutions rank among the best in the Nation:

- Three of Ohio’s undergraduate institutions rank among the top 100 in the United States: Case Western Reserve University, The Ohio State University, and Miami University.<sup>950</sup>
- Five of Ohio’s liberal arts colleges also rank among the top 100 nationally.<sup>951</sup>
- The Ohio State University Moritz College of Law is ranked among the top 35 law schools in the country.<sup>952</sup>

<sup>947</sup> Ohio Board of Regents, *Total Headcount Enrollment by Institution and by Campus: Fall Term 2004 to 2013*, at 1 (Dec. 2014), [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/data/statistical-profiles/enrollment/headcount\\_institution\\_campus\\_04-13.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/data/statistical-profiles/enrollment/headcount_institution_campus_04-13.pdf).

<sup>948</sup> Supreme Court of Ohio, Ohio Law Schools, <http://www.supremecourt.ohio.gov/RelatedOrgs/schools>.

<sup>949</sup> American Student Dental Association, U.S. Dental Schools, <http://www.asdanet.org/us-dental-schools.aspx>.

<sup>950</sup> U.S. News and World Report, National University Rankings, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities>.

<sup>951</sup> U.S. News and World Report, National Liberal Arts Colleges Ranking, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-liberal-arts-colleges>.

<sup>952</sup> U.S. News and World Report, Best Law Schools, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings/page+2>.

- The Ohio State University Medical School ranks within the 50 best primary care medical programs in the nation.<sup>953</sup>

All told, almost 700,000 students were enrolled at an institution of higher education in fall 2013. In 2012, Ohio-based institutions awarded 35,871 associate degrees, 66,736 bachelor's degrees, and 30,140 graduate degrees.<sup>954</sup>

### **Other Adult Education Programs**

Ohio funds a number of training and education programs for adults in addition to the public higher education system. For example, there are currently 56 Adult Basic and Literacy Education (“ABLE”) programs in Ohio. These ABLE programs provide free services and are intended to assist adults in acquiring the basic skills necessary to be successful in either employment or post-secondary education. Between state and federal funds, Ohio spends over \$21 million annually on ABLE programs.<sup>955</sup> In fiscal year 2011, Ohio’s ABLE programs ranked in the top ten nationally for employment upon completion, placement in post-secondary education or training, and GED completion.

The Ohio Technical Centers (“OTC”s) also help workforce development by providing market-driven, post-secondary workforce education and training services, including:

- Career guidance and counseling;
- Comprehensive assessment services;
- Financial aid assistance;
- Job readiness and job placement assistance;
- Short-term training targeted at high-skill, skill wage, high-demand jobs;
- Training that leads to industry-recognized credentials; and
- Specialized services for employers.

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<sup>953</sup> U.S. News and World Report, Best Medical Schools: Primary Care, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-medical-schools/primary-care-rankings/page+2>.

<sup>954</sup> *Id.* at 2–3, 18.

<sup>955</sup> *Id.* at 26.

In fiscal year 2013, OTCs served 14,217 adults at 57 adult workforce education centers throughout the state. OTCs receive around \$16 million annually in funding from the State.<sup>956</sup>

Adult workforce education originated from Ohio Revised Code 3313.52, which authorizes the boards of education of certain school districts to organize evening school for individuals over the age of 18. OTCs and ABLE programs are sometimes housed in the same location but not always.<sup>957</sup>

### **ODJFS, Office of Workforce Development**

The Ohio Department of Job and Family Services (“ODJFS”) develops and oversees a wide variety of programs that benefit families and individuals. Most ODJFS programs are funded by the federal government through reimbursements and grants. ODJFS typically supervises the administration of these programs, channels funds to local agencies, and provides technical support to ensure compliance with federal and state regulations. The Office of Workforce Development is the entity tasked with administering and overseeing ODJFS’s workforce development programs. In fiscal year 2015, approximately \$152 million was spent on workforce development.<sup>958</sup>

#### **Workforce Innovation and Opportunity Act (“WIOA”) Programs**

Approximately 76% of the Office of Workforce Development’s budget is devoted to programs funded through the federal Workforce Innovation and Opportunity Act. Passed in 2014, the WIOA supersedes the Workforce Investment Act of 1998 and amends the Adult Education and Family Literacy Act, the Wagner-Peyser Act, and the Rehabilitation Act of 1973.<sup>959</sup> The overall goals of the WIOA are to do the following:

- Increase opportunities for individuals, particularly those with barriers to employment;
- Support alignment of workforce investment, education, and economic development systems;
- Provide workers with the skills and credentials to secure and advance employment;

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<sup>956</sup> *Id.* at 38–39.

<sup>957</sup> OTC locations by county are available at <https://www.ohiohighered.org/otc/locations>; ABLE locations by county are available at <https://www.ohiohighered.org/able/locations>.

<sup>958</sup> See generally Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Job and Family Services)* 81–85 (March 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/jfs.pdf>.

<sup>959</sup> *Id.* at 82.

- Promote improvement in the structure and delivery of services;
- Increase the prosperity of workers and employers; and
- Increase the employment retention and earnings of participants and increase the attainment of recognized post-secondary credentials.<sup>960</sup>

The three program areas and funding streams for the WIOA are youth, adults, and dislocated workers. Under the WIOA, funds are allocated to states based on the latest available data from the Census Bureau; states then suballocate funds to local investment areas according to federally prescribed allocation procedures. There are 20 workforce investment areas in Ohio.<sup>961</sup>

Under federal law, workforce investment areas must deliver services through so-called “one-stops,” which serve as the primary public resource for job and career counseling, training, job searching, employment, and other ancillary services. These one-stops, known as OhioMeansJobs Centers, are divided into two categories—Level 1 and Level 2. All Level 2 Centers, also referred to as full-service centers, are required to provide a full array of core-training services and have a fully functional resource room, training rooms, computer labs, updated technology, job search/upgrade resource materials, meeting/interview rooms, and other employment-related amenities. Level 1 Centers, also referred to as satellite centers, may offer fewer services and resources, but must always be affiliated with a nearby Level 2 Center. Currently, 89 total OhioMeansJobs Centers are throughout Ohio—30 Level 2 Centers and 59 Level 1 Centers—with at least one training center in each of Ohio’s 88 counties.<sup>962</sup>

The following graphic summarizes how the 89 OhioMeansJobs Centers fit within Ohio’s 20 workforce investment areas:

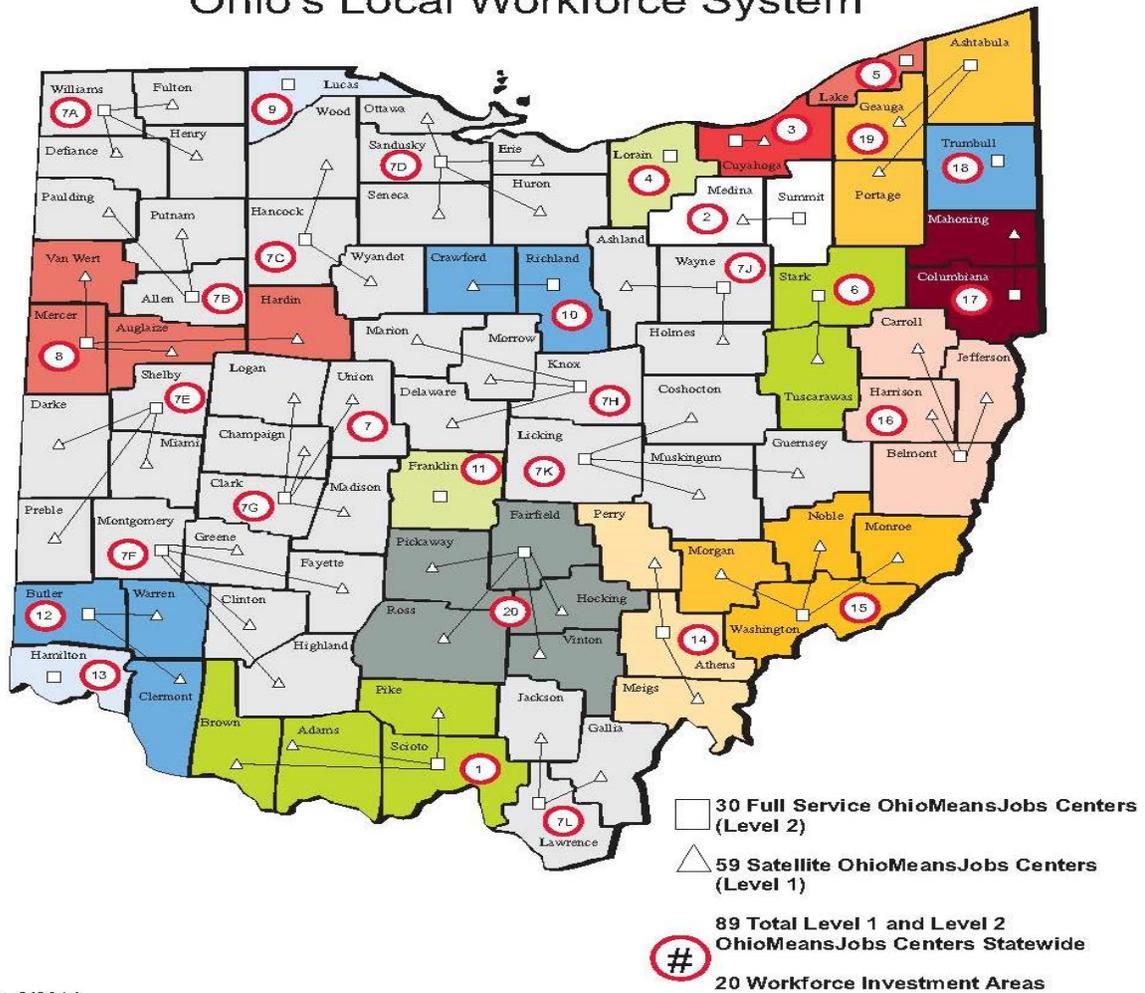
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<sup>960</sup> Ohio Department of Job and Family Services, Workforce Innovation and Opportunity Act (WIOA), <http://jfs.ohio.gov/owd/wioa/index.stm>.

<sup>961</sup> Ohio Department of Job and Family Services, OhioMeansJobs Centers, <http://jfs.ohio.gov/owd/wia/wiamap.stm>.

<sup>962</sup> Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Job and Family Services)* 82–83 (March 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/jfs.pdf>.

# Ohio's Local Workforce System



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Approximately \$83.2 million was allocated to WIOA programs in Ohio in fiscal year 2015, with about 81% allocated to Ohio's 20 workforce investment areas. In program year 2013, the various OhioMeansJobs Centers provided services to 12,813 adults, 7,242 dislocated workers, and 7,999 youth, and around 272,570 individuals received self-services at their local OhioMeansJobs Centers.<sup>963</sup> For each of the three main funding and program areas—adults, dislocated workers, and youth—Ohio negotiates with the federal government goals relating to standardized performance measures. In program year 2013, Ohio received a rating of “Exceeds” in six areas and “Meets” in the remaining three areas.<sup>964</sup>

<sup>963</sup> *Id.* at 83–84.

<sup>964</sup> See Ohio Department of Job and Family Services, *Ohio Workforce Investment Act Program Year 2013 Annual Report*, available at <http://jfs.ohio.gov/owd/wia/Docs/PY2013-Ohio-WIA-Annual-Report.stm>.

The remaining 19% of WIOA allocations in fiscal year 2015, or about \$15.4 million, were devoted to state-wide initiatives.<sup>965</sup> Examples include:

- National Emergency Grants—provide temporary extra funding to help communities recover from unemployment as a result of plants closing, mass layoffs, and natural disasters.
- Ohio Learn to Earn—provides workplace training opportunities for eligible unemployment compensation claimants and those who have recently exhausted their unemployment benefits.
- Offender Network for Employment to STOP Recidivism Project (“O.N.E.-STOPS”)—provides currently incarcerated offenders with job search skills necessary to immediately find employment upon release.
- On-the-Job Training—trains a paid participant who engages in productive work that provides knowledge or skills essential to the full and adequate performance of that job; reimburses the employer for the costs associated with training.
- Ohio Works Incentive Program—provides incentives to local workforce areas that successfully place Ohio Works First recipients into employment and help them retain their jobs.<sup>966</sup>

Another statewide initiative recently undertaken by the Office of Workforce Development was the launch of the expanded OhioMeansJobs.com website in 2013. One goal in creating the website was to provide online many of the same services previously offered only at the OhioMeansJobs centers. Consistent with this goal, the website provides in-depth career exploration services for students, job-search and job-training information for adults, and a Business Support Center for employers. In program year 2013, 56.3 million job searches were conducted on OhioMeansJobs.com, more than 2.4 million unique visitors used the website, and 8,367 employers received resumes through the Business Support Center.<sup>967</sup>

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<sup>965</sup> Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Job and Family Services)* 85 (March 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/jfs.pdf>.

<sup>966</sup> See Ohio Department of Job and Family Services, Statewide Initiatives, <http://jfs.ohio.gov/owd/Initiatives/Index.stm>.

<sup>967</sup> Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Job and Family Services)* 87–88 (March 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/jfs.pdf>.

## **Other Programs**

In addition to WIOA programs, the Office of Workforce Development administers programs in the following areas: veterans programs, labor exchange services programs, and miscellaneous workforce programs.<sup>968</sup>

Specialized resources are available to veterans at all OhioMeansJobs Centers and online at OhioMeansJobs.com. The separately funded Disabled Veterans Outreach Program Specialist (“DVOPS”) provides more intensive one-on-one employment and training services, with a primary focus of meeting the needs of veterans and eligible spouses who are unable to obtain employment through the OhioMeansJobs Centers.

As an integrated part of the one-stop OhioMeansJob system, Ohio’s Labor Exchange Services Program provides statewide services that include job-search assistance, referral-and-placement assistance to job seekers, re-employment services to unemployment-insurance claimants, and recruitment services to employers with employment opportunities. These services, however, are separately funded through the federal Wagner-Peyser Act.

The Office of Workforce Development administers even more workforce programs. One worth mentioning is the Work Opportunity Tax Credits Program, which is a federal tax-incentive program for businesses hiring individuals who face significant barriers to employment. Employers must apply for, and receive, certification from ODJFS to claim these tax credits. In fiscal year 2013, the Office of Workforce Development processed 171,084 applications, resulting in reduced federal income tax liability of about \$185 million.

## **Governor’s Office of Workforce Transformation**

Executive Order 2012-02K created the Governor’s Office of Workforce Transformation (“OWT”) to coordinate and align workforce policies, programs, and resources across state government to improve effectiveness, efficiency, and accountability. Additionally, it was tasked with creating a workforce data collection system and performance measures. The same executive order also created the Governor’s Executive Workforce Board to advise the Governor and the OWT on the development, implementation, and continuous improvement of Ohio’s entire workforce system. Both the OWT and the Governor’s Executive Workforce Board were re-authorized through Executive Order 2015-08K.

Currently, Ohio’s workforce development efforts are spread out across 91 programs in 13 agencies. OWT is tasked with making reforms to create more efficient, responsive, and effective services for employers and workers. With better alignment, Ohio hopes to reduce

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<sup>968</sup> See generally *id.* at 91–94.

redundancy, fragmentation, and lack of coordination to improve the state and local programs that fuel the workforce system.

### **Traditional Workforce Incentive and Training Programs**

Ohio funds a wide variety of programs that touch on workforce development in some way. Many of these programs are highlighted elsewhere in this Manual. The following are examples of programs that tackle workforce development head-on.

#### **Incumbent Workforce Training Voucher Program**

Begun in 2013, Ohio's Incumbent Workforce Training Voucher Program is designed to provide direct financial assistance to train Ohio workers and improve the economic competitiveness of Ohio's employers. The Program is administered by the Ohio Development Services Agency. Funded with \$50 million through one-time revenue from casino license fees, around \$7.5 million is appropriated to the Program in each fiscal year 2016 and fiscal year 2017.<sup>969</sup>

Under the Program, employers can apply for vouchers of up to \$4,000 per existing employee and may receive up to \$250,000 total per fiscal year. To be eligible, employers must be in one of the 13 targeted industries: Advanced Manufacturing, Aerospace and Aviation, Automotive, BioHealth, Corporate Headquarters, Energy, Financial Services, Food Processing, Information Technology and Services, Polymers and Chemicals, Back Office, Logistics, or Research and Development. The employer's NAICS code will determine eligibility as to the targeted industry. The subsidized training must relate the employee's current position or future advancement within the company. However, the Program does cover a wide variety of training modes and methods, and the training provider may be public or private, or an in-house trainer.<sup>970</sup>

#### **OhioMeansJobs Workforce Development Revolving Loan Program**

The OhioMeansJobs Workforce Development Revolving Loan Program was created in 2013 to assist with job growth and advancement through training and retraining. Under the Program, up to \$100,000 may be awarded to educational institutions for approved workforce training programs, with the funds to be used to provide loans of up to \$10,000 for program

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<sup>969</sup> See Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Development Services Agency)* 37 (March 2015), at <http://www.lsc.ohio.gov/fiscal/redbooks131/dev.pdf>.

<sup>970</sup> Additional information is available online at Ohio Development Services Agency, Business/Business Grants, Loans and Tax Credits, Ohio Incumbent Workforce Training Voucher Program, [http://development.ohio.gov/bs/bs\\_wtvp.htm](http://development.ohio.gov/bs/bs_wtvp.htm).

participants. The loans are to be repaid to the State within seven years and are interest free until six months after the participant completes the program.

The General Assembly provided \$50 million of total funding to the Program for the combined fiscal year 2014 – fiscal year 2015 period. The total amount dedicated to the Program for fiscal year 2016 and fiscal year 2017 is \$15.5 million. Institutions eligible to participate in the Program include:

- Public colleges and universities;
- Private, non-profit colleges and universities;
- Private, for-profit educational institutions; and
- Joint vocational school districts and various types of career-technical centers.

The Director of the Ohio Department of Higher Education is responsible for overseeing the Program. In awarding funds, the Director is required to give preference to workforce training programs in which the educational institution partners with a local employer that is willing to provide either funding for the program itself or willing to repay all or part of a program participant's loan.<sup>971</sup>

### **Workforce Development through JobsOhio**

JobsOhio continually seeks input from private and public-sector leaders, including CEOs, university presidents, and other key stakeholders. As a result, in 2014 JobsOhio announced its plan to launch a customized workforce training initiative. The workforce development team at JobsOhio will collaborate with the Governor's Office of Workforce Transformation as well as community colleges, technical schools, and other institutions. This customized initiative will be tied directly to the projects that JobsOhio executes with companies.<sup>972</sup>

Just one of the many types of assistance currently offered by JobsOhio is the Workforce Grant Program. This Program seeks to promote economic development, business expansion, and job creation by providing funding for the improvement of worker skills and abilities in Ohio. The Program primarily focuses on new job creation but may consider projects that improve operational efficiencies and facilitate the retention of jobs. Each grant is tied to a project that typically lasts three years. New guidelines for the Program were approved in September

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<sup>971</sup> See Ohio Legislative Service Commission, *LSC Redbook: Analysis of the Executive Budget Proposal (Department of Higher Education)* 35–36 (March 2015), available at <http://www.lsc.ohio.gov/fiscal/redbooks131/bor.pdf>.

<sup>972</sup> See JobsOhio, *2014 Annual Report & 2015 Strategic Plan* 2–5, available at [http://jobs-ohio.com/images/JO\\_AnnualReport\\_20142015.pdf](http://jobs-ohio.com/images/JO_AnnualReport_20142015.pdf).

2015.<sup>973</sup> In 2015, JobsOhio awarded over \$6.0 million in workforce grants to at least 47 different companies.<sup>974</sup>

### **Industry-Based Training and Apprenticeships**

Chapter 12 of this Manual deals with a financing, construction, and a delivery tool known as public-private partnerships (also known as PPP or P3s). But this subsection focuses on another type of public-private partnership for workforce development—industry-based training and apprenticeships—and its role in workforce development.

### **International Inspiration and Nationwide Trends**

A growing nationwide trend in the workforce development field is the proliferation of industry-based training and apprenticeships.

One of the main inspirations for this trend is Germany and the German dual-education system. Even in the face of increased global competition, Germany is an oft-cited example of an economy that has been able to sustain manufacturing as a relevant source of employment, growth, and exports. At least part of Germany's success has been ascribed to its dual-education system. Beginning roughly around the age of 16, German students choose one of three paths—around 15% pursue full-time vocational education and training, 30% pursue a traditional college prep path, and the remaining 45% enter the dual system. Under the dual system, training occurs mainly through two- to three-year apprenticeships at a firm, where students train three or four days a week; students then spend their remaining time at a part-time vocational school learning more theoretical training. In 2011, around 1.46 million young Germans participated in apprenticeships, and by the age of 20 approximately 60% of all Germans receive a certification in one of 300-plus recognized areas, through either the dual system or a full-time vocational school.<sup>975</sup>

In the United States, momentum is building in support of apprenticeship programs. In December 2014, the federal Department of Labor announced the \$100 million American Apprenticeship Grants program, which is expected to fund approximately 25 grants to

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<sup>973</sup> See [http://jobs-ohio.com/site/assets/files/1124/jobsOhio\\_workforce\\_grant\\_guidelines\\_final\\_09\\_17\\_2015.pdf](http://jobs-ohio.com/site/assets/files/1124/jobsOhio_workforce_grant_guidelines_final_09_17_2015.pdf).

<sup>974</sup> General information regarding the Workforce Grant Program and other types of economic development assistance is available online at <http://jobs-ohio.com/funding>. A monthly break-down of funded projects, including company commitments and the type and amount of assistance being provided by JobsOhio, is available online at <http://jobs-ohio.com/about/monthly-metrics>.

<sup>975</sup> See Parilla, Trujillo & Berube, *Skills and Innovation Strategies to Strengthen Manufacturing: Lessons from German* (Feb. 26, 2015), available at The Brookings Institution, <http://www.brookings.edu/research/reports/2015/02/26-germany-skills-innovation-manufacturing-parilla-trujillo-berube>.

innovative public-private partnerships.<sup>976</sup> Also in 2014, Senators Cory Booker (D-NJ) and Tim Scott (R-SC) introduced the Leveraging and Energizing America’s Apprenticeship Programs (“LEAP”) Act, which would provide federal tax credits for hiring new apprentices that are registered with either the Department of Labor or a state apprenticeship entity. Apprenticeship programs are up and running in a number of states, including Michigan, South Carolina, and Kentucky.<sup>977</sup>

### **Specific Industry-Based Training Efforts**

Ohio has made significant strides in both apprenticeship programs and industry-based training generally. More than 1,100 apprenticeship programs are registered through ODJFS. Each program includes a minimum of 2,000 hours of structured, on-the-job training and 144 hours per year of related technical instruction. Within ODJFS, the Ohio State Apprenticeship Council oversees apprenticeships. The Council consists of three employer representatives, three employee representatives, and three public representatives.

At the individual program level, Ohio’s colleges and career centers are constantly striving for new and innovative ways to foster workforce development. Just a few of the many examples include:

- Located in Fremont, Ohio, the Kern Center for Community and Industrial Development at Terra State Community College specializes in customized training for the region’s industrial trades and manufacturing companies. Since 2013, the Kern Center has development curricula and provided customized training for over forty companies and 1,200 individuals. The Kern Center offers training in the areas of assessment, professional development, information technology, safety and health, and quality and manufacturing, among others.

While the focus on customized training is a more recent development, Terra State Community College has been providing traditional apprenticeship training for decades. In that time, Terra State has partnered with over 70 companies in skilled-trade areas such as electrician, machinist, millwright, mechanics, mold-making multi-craft, tool and die making, welders, machine set-up, and robotic set-up.

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<sup>976</sup> See United States Department of Labor, American Apprenticeship Grants, <http://www.dol.gov/apprenticeship/grants.htm>.

<sup>977</sup> See Parilla, Trujillo & Berube, *Skills and Innovation Strategies to Strengthen Manufacturing: Lessons from German* (Feb. 26, 2015), available at The Brookings Institution, <http://www.brookings.edu/research/reports/2015/02/26-germany-skills-innovation-manufacturing-parilla-trujillo-berube>.

- Based in Toledo and Findlay, Owens Community College partnered with Penn National Gaming Company to train employees for the opening of the Hollywood Casino in Toledo. This collaboration allowed Hollywood Casino to meet its training deadlines, which in turn allowed an on-time opening in May 2012.
- In October 2012, Cuyahoga Community College (“Tri-C”) launched its new Advanced Technology Training Center. A major component of the Center is a state-of-the-art welding lab stocked with equipment provided by Cleveland-based Lincoln Electric. Tri-C currently offers a Fast-Track Welding Boot Camp that provides 280 hours of instruction and hands-on training in over 10 weeks and prepares individuals for earning three separate nationally recognized certifications.
- Lorain County Community College (“LCCC”), located in Northeast Ohio, provides another notable example of how Ohio is focusing on training employees to meet the demand of the growing advanced manufacturing sector. Recently, a \$15 million grant was made to LCCC by of the Ohio Technical Skills Innovation Network (“Ohio TechNet”). Eleven universities received money to create or expand job-driven training for the advanced manufacturing sector. LCCC manages an additional \$4.1 million in support of statewide data collection and third-party evaluation as part of an overall program to closely align workforce programs with economic development priorities.
- In the Cincinnati area, industry partners are working together to grow the skills of the current and future advanced manufacturing workforce. In 2009, the Advanced Manufacturing Career Pathway Partnership team was convened to meet the needs of employers and employees in the industry. This regional partnership (Ohio, Indiana, and Kentucky) includes businesses, workforce investment boards, chambers of commerce, secondary and post-secondary educational institutions, and philanthropic funders.<sup>978</sup> Since 2008, more than 9,000 individuals have been served through the Career Pathway Partnership, with more than 88% completing training.<sup>979</sup>
- The Robotics & Advanced Manufacturing Technology Education Collaborative (“RAMTEC”) was formed initially through a partnership between the Tri-Rivers Career Center, Marion Technical College and The Ohio State University regional branch at Marion. One of the primary goals of RAMTEC is to address the skills gap by preparing high school and adult students with advanced manufacturing and

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<sup>978</sup> *Id.*

<sup>979</sup> *Id.*

engineering skills. Companies whose workers have received training at the Tri-Rivers RAMTEC facility include Nucor Steel Marion, National Lime and Stone Co., Silver Line Building Products Corp., Whirlpool, Marion Industries, Cardington Yutaka Technologies, Bridgestone, US Yachiyo, and American Showa.

In 2014, and as part of the Governor’s Straight A Fund initiative, the Ohio Department of Education awarded \$15 million to build eight additional RAMTEC facilities in career centers throughout the State, including Tolles Career & Technical Center; C-TEC (Career and Technical Education Centers of Licking County); Penta Career Center; Pioneer Career & Technology Center; Miami Valley Career Technology Center; Portage Lakes Career Center; Cuyahoga Valley Career Center; and Great Oaks Institute of Technology. All eight of these RAMTEC facilities are now up and running.

### **Internship Programs**

Ohio also recently instituted a state-wide cooperative education (co-op) and internship program. The Ohio Means Internships & Co-ops (“OMIC”) Program was launched in September 2012 with the goal of imbedding internships and co-ops within the college and university experience. To date, the Ohio Department of Higher Education has awarded approximately \$22 million to 26 “lead grantees” and 20 additional “partner institutions.” The OMIC Program places a premium on sustainability and relevance to regional economic and workforce needs.<sup>980</sup> In conjunction with this project, Ohio has a new website, <http://www.ohiomeansinternships.com>, which allows students to search for internships and co-ops statewide and employers to post opportunities and review resumes already online. The first year of the program saw over 800 businesses hire 2,018 students as OMIC interns or co-ops.<sup>981</sup>

The goal of the Ohio Third Frontier Internship Program is to develop a pool of talented workers for Ohio's businesses, create enriching student work experiences, and assist students in obtaining permanent full-time employment in Ohio after graduation. The program links Ohio students with rewarding internship opportunities that provide great hands-on experience within Ohio’s private sector business community. It provides a participating business with a

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<sup>980</sup> See Ohio Board of Regents, *Seventh Report on the Condition of Higher Education in Ohio, Pre-K to Jobs: Higher Education’s Role in Developing Students for Careers* 36–37, 75–76 (2014), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2014-Conditions-Report\\_FINAL.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2014-Conditions-Report_FINAL.pdf).

<sup>981</sup> See Ohio Department of High Education, *2014 Annual Report on Ohio Means Internships & Co-ops (OMIC): Award Strategy, Performance, & Financial Measures* 5 (Dec. 31, 2014), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/omi/2014-OMIC-Annual-Report\\_FINAL.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/omi/2014-OMIC-Annual-Report_FINAL.pdf).

reimbursement of up to 50% of the intern’s wage or no more than \$3,000 for a 12-month period.

### **STEM Workforce Development**

Developing a tech workforce is an especially critical component of workforce development. Science, technology, engineering, and math (“STEM”) workers serve the tech industry and constitute about 5% of the American workforce but account for more than 50% of the nation’s sustained economic growth.<sup>982</sup> Ohio is promoting the development of the STEM workforce.

The Ohio STEM Learning Network is the nation’s first-ever statewide network for STEM education funded by Ohio as well as the Bill & Melinda Gates Foundation.<sup>983</sup> The Ohio STEM Learning Network developed seven hubs and seven training centers; assisted in the design, development, and success of more than 20 Ohio schools; and built a network among 16 states.<sup>984</sup>

Dayton and its local partners offer an example of a regional STEM workforce model. Built upon the 10,000 employees of the Wright Patterson Air Force Base and the Air Force Research Lab, Dayton, Ohio has the largest concentration of STEM workers—not just in Ohio but also as one of the top 10 in the United States.<sup>985</sup> To capitalize on this base of STEM workers, the Regional STEM Collaborative (“RSC”) was created to develop a K-12 STEM workforce strategy.<sup>986</sup> The RSC’s sole focus is to increase the number of students entering into STEM Career Pathways and ultimately becoming a part of our region’s strong STEM Workforce. The RSC approach centers on

- identifying projected STEM workforce needs in Ohio’s key industry growth areas;
- seeking out and supporting STEM initiatives and creating synergistic partnering opportunities around the region;
- promoting national, state, and regional programs to develop and retain a strong STEM workforce;
- working to enhance STEM teaching methodology and resources inside our classrooms; and

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<sup>982</sup> U.S. Department of Labor, *The STEM Workforce Challenge*, 2007.

<sup>983</sup> See Ohio STEM Learning Network, Akron Hub, <http://www.osln.org/hubs/akron>.

<sup>984</sup> *Id.*

<sup>985</sup> See The Dayton Regional STEM Center, FAQ, <http://daytonregionalstemcenter.org/faq>.

<sup>986</sup> *Id.*

- strengthening the collaborative network.<sup>987</sup>

RSC also focuses on supporting the STEM network of teachers, promoting the STEM professions with students, and benchmarking the effort on national STEM initiatives.<sup>988</sup>

In the biennial budget passed for fiscal years 2016 and 2017, Ohio approved \$25 million to support the establishment of the Ohio Federal Research Network. The Ohio Federal Research Network will foster collaboration between the state's research universities (led by The Ohio State University), Wright-Patterson Air Force Base, NASA Glenn Research Center, and the private sector. The goal of the initiative is to bring in \$300 million in new federal research contracts to Ohio-based companies over the next five years.<sup>989</sup>

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<sup>987</sup> *Id.*

<sup>988</sup> *Id.*

<sup>989</sup> <http://www.bizjournals.com/dayton/news/2015/07/02/major-ohio-research-network-gets-state-funding.html>.

**Chapter Nine:**  
**Energy, the Environment & Economic Development**

**Key Points:**

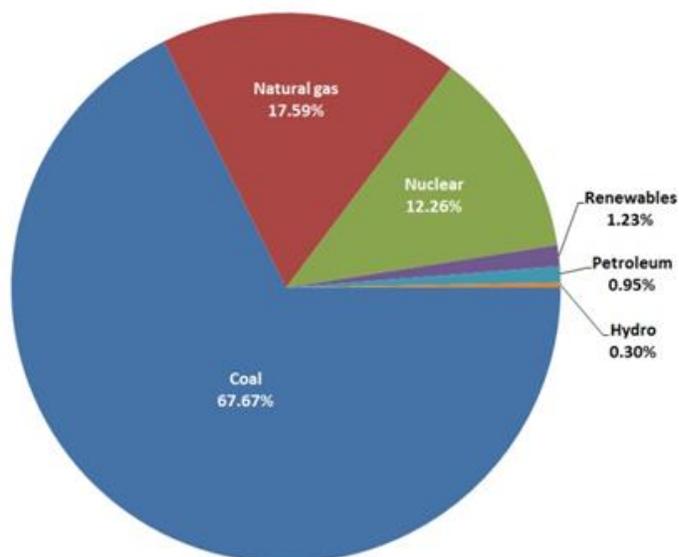
- There are a number of incentives available to Ohio businesses that increase their energy efficiency and opportunities for businesses to benefit from environmental revitalization projects.
- Ohio affects the energy industry through the regulation of power production, service, and incentives for energy investments and energy efficiency measures.
- Ohio deregulated the provision of electricity and natural gas service and relies on the marketplace for the negotiation of energy costs provided to residential and business consumers.
- A range of regulations, subsidies, loans, and grants are used to provide economic incentives for energy investments and energy-efficiency measures, all with the goal of diversifying the State's energy sources, promoting low-cost, reliable power service, and enhancing the economic development of the State.
- Ohio's environmental regulatory scheme provides opportunities for businesses to benefit from environmental revitalization projects that positively affect both businesses and communities.

Ohio's economy, especially its large manufacturing and agriculture sectors, depends on access to reliable, diverse, and low-cost energy.<sup>990</sup> Ohio is a national leader in energy production and is home to several blossoming supply chains that support state-based energy industries.<sup>991</sup> These include coal, oil and gas, nuclear, and renewable energy. With the 7th largest state GDP and 7th largest population, Ohio ranks 11th in electricity production, 10th in coal production, 13th in crude oil production, 10th in marketed natural gas production, and

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<sup>990</sup> United States Energy Information Administration, *Ohio: State Profile and Energy Estimates*, <http://www.eia.gov/state/?sid=OH>.

<sup>991</sup> *Id.*



16th overall in energy production.<sup>992</sup> Additionally, Ohio had the 7th largest crude oil refining capacity in 2014.<sup>993</sup>

Ohio regulates energy production and energy prices and promotes efficiency while also incentivizing energy facilities to impact economic development. Recent court decisions have determined that energy-production regulation is primarily an issue of statewide concern and cannot be regulated or banned at the local level. Ohio operates in a deregulated electric

and natural gas marketplace in an effort to keep energy prices down. Finally, Ohio has a range of incentives and subsidies to promote energy investments for production and efficiency.

### **Regulation of Energy Production**

Ohio regulates major energy production through the Ohio Power Siting Board, Ohio Environmental Protection Agency (“Ohio EPA”), and the Ohio Department of Natural Resources (“ODNR”).

The Ohio Power Siting Board regulates the construction of any “major utility facility” or “economically significant wind farm” within Ohio.<sup>994</sup> Energy-production facilities that generate 50 megawatts or more, electric transmission lines of 125 kilovolts or more, natural gas transmission lines, or five megawatt wind farms must obtain a Certificate of Environmental Compatibility and Public Need from the Ohio Power Siting Board.<sup>995</sup> The chairman of the Ohio Siting Board is the chairman of the Public Utilities Commission of Ohio (“PUCO”), and the Board consists of seven voting and four non-voting legislators.<sup>996</sup>

The Ohio Power Siting Board follows a legal process similar to many other PUCO processes, which includes a pre-application meeting, public information meeting, filing the complete application, providing legal notice of the application and making it available to the

<sup>992</sup> United States Energy Information Administration, *Ohio Profile Overview*, <http://www.eia.gov/state/?sid=OH>.

<sup>993</sup> *Id.*

<sup>994</sup> The Public Utilities Commission of Ohio, *Siting New Energy Infrastructure in Ohio: A Guidance Document 2* (March 2010), available at [http://www.puco.ohio.gov/emplibrary/files/OPSB/Presentations\\_Manuals/OhioSitingManual.pdf](http://www.puco.ohio.gov/emplibrary/files/OPSB/Presentations_Manuals/OhioSitingManual.pdf).

<sup>995</sup> *Id.*

<sup>996</sup> *Id.*

public, giving interested parties the opportunity to intervene in the case, and producing a staff report.<sup>997</sup> Ohio law dictates that the Ohio Power Siting Board's decision to grant permission for a new power production facility be based upon the following criteria:

- need for new electric or natural gas transmission facilities;
- probable environmental impact, including compliance with air and water pollution control and solid waste disposal laws;
- impact on existing agricultural land;
- use of new technology to lessen the environmental impact and adoption of the maximum feasible water conservation practices; and
- whether the electric transmission line proposed is consistent with regional electric power grid plans and interconnected systems and whether the facility will serve the interests of electric system economy and reliability.<sup>998</sup>

Since 2012, the Ohio Power Siting Board has approved 44 energy production facilities.<sup>999</sup>

Besides the Ohio Power Siting Board regulation of energy-production facilities, Ohio EPA and ODNR regulate natural gas drilling and production.<sup>1000</sup> Shale oil and natural gas deposits are between 7,000 and 12,000 feet below ground in Ohio.<sup>1001</sup> Natural gas is extracted from the shale through a two-step horizontal drilling and hydraulic fracturing process in which the well is drilled horizontally once the shale is fractured using a mixture of sand, water, and chemicals.<sup>1002</sup> Trucks transport the used water and brine that travels to the surface and inject them into deep wells offsite.<sup>1003</sup>

It is the use of chemicals, disposal of water and brine, and managing truck and other traffic that leads to state regulation of Ohio shale oil and natural gas. The ODNR Division of Oil and Gas Resources Management regulates well siting, design, operation, and construction as well as the disposal of brine and drilling fluids from oil and gas drilling and production.<sup>1004</sup> Ohio law forbids locating a surface well within 150 feet of a dwelling and regulates the location of

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<sup>997</sup> *Id.* at 3–4.

<sup>998</sup> *Id.* at 5.

<sup>999</sup> *Id.*

<sup>1000</sup> See Ohio Environmental Protection Agency/Ohio Department of Natural Resource, *Drilling for Natural Gas in the Marcellus and Utica Shales: Environmental Regulatory Basics* (Jan. 2014), available at <http://www.epa.ohio.gov/portals/0/general%20pdfs/generalshale711.pdf>.

<sup>1001</sup> *Id.* at 1.

<sup>1002</sup> *Id.* at 1–2.

<sup>1003</sup> *Id.* at 2.

<sup>1004</sup> *Id.*

waste water wells.<sup>1005</sup> No oil or gas well can fail to restore the land surface within the area disturbed in siting, drilling, completing, and producing the well as required in Revised Code Section 1509.072.<sup>1006</sup> Ohio EPA’s water-quality certification and air emissions are required for each drilling site, and the Ohio EPA also regulates solid waste sent off-site for disposal.<sup>1007</sup>

Whether Ohio local governments can provide their own regulation of shale drilling facilities is a major issue. In *State ex rel. Morrison v. Beck Energy Corp.* the Ohio Supreme Court decided the Home Rule Amendment to the Ohio Constitution does not grant local governments the power to regulate oil and gas activities and operations within their jurisdiction.<sup>1008</sup> The Court held that Revised Code Chapter 1509 gives state government “sole and exclusive authority” to regulate the permitting, location, and spacing of oil and gas wells.<sup>1009</sup> The Ohio Supreme Court applied its traditional home rule constitutional test: a municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of police power, rather than local self-government; (2) the statute is a general law; and (3) the ordinance is in conflict with the statute.<sup>1010</sup> First, the Court found that the ordinances banning drilling for oil or gas without a local permit did not regulate the form and structure of local government; thus, the debate of the case would center on the local government’s police power.<sup>1011</sup> Second, the Court determined the state regulation of the oil and gas drilling was a general law because it is part of a statewide and comprehensive legislative enactment; applies to all parts of the state alike and operates uniformly; sets forth police, sanitary, or similar regulations; and prescribes a rule of conduct upon citizens.<sup>1012</sup> The Court did not agree with the city’s argument that the law only applied to Eastern Ohio because that is where the oil and natural gas drilling occurs.<sup>1013</sup> The local ordinances were invalidated because they conflicted with the state regulatory structure.<sup>1014</sup>

### **Regulation of Energy Service: Price and Efficiency**

State regulation of energy service affects the price and reliability of electric and natural gas service for Ohio consumers.

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<sup>1005</sup> R.C. 1509.021.

<sup>1006</sup> R.C. 1509.072.

<sup>1007</sup> *Id.*

<sup>1008</sup> *State ex rel. Morrison v. Beck Energy Corp.*, 2015-Ohio-485 (Feb. 17, 2015).

<sup>1009</sup> *Id.* at ¶ 1.

<sup>1010</sup> *Id.* at ¶ 15.

<sup>1011</sup> *Id.* at ¶ 18.

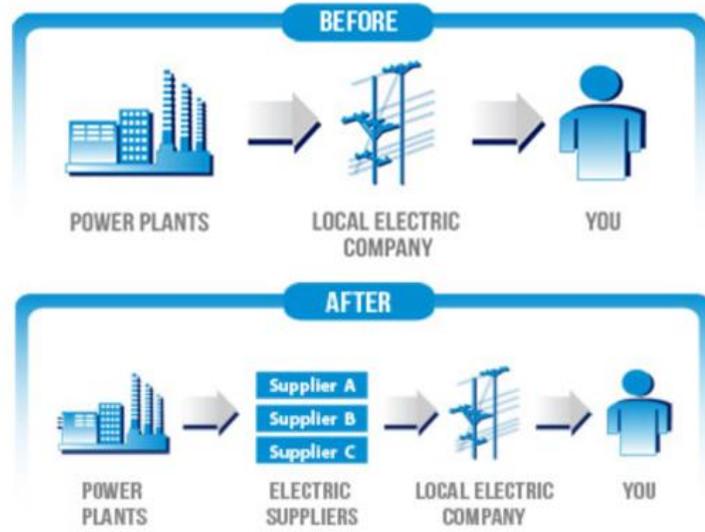
<sup>1012</sup> *Id.* at ¶¶ 19–23.

<sup>1013</sup> *Id.*

<sup>1014</sup> *Id.* at ¶¶ 25–31.

## Deregulation of Ohio's Electricity Market

In recent years, the United States electric industry has undergone a sea change in the way it delivers electricity to households and businesses. Deregulation gives consumers the power to choose their electricity provider in much the same way they may choose their phone carrier. The goal of deregulation has been to lower prices while expanding services and giving the public a say in who supplies their power.<sup>1015</sup> Ohio adopted energy deregulation in 2001.<sup>1016</sup>



Utilities in deregulated markets must divest all ownership in generation and transmission and are responsible only for distribution, operations, maintenance from the interconnection at the grid to the meter; billing the ratepayer; and acting as the Provider of Last Resort (“POLR”)—a back-up electric service provider in each area open to competition.<sup>1017</sup> Ohio’s deregulation policy is codified in Revised Code 4928.02, which states that it is state policy to:

- (1) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (2) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (3) Ensure diversity of electricity supplies and suppliers;

<sup>1015</sup> United States Department of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets* (May 2002), available at [http://www.pnl.gov/main/publications/external/technical\\_reports/PNNL-13906.pdf](http://www.pnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf).

<sup>1016</sup> Institute for 21st Century Energy, Ohio Energy Profile, [http://www.energyxxi.org/sites/default/files/state\\_pdfs/Ohio.pdf](http://www.energyxxi.org/sites/default/files/state_pdfs/Ohio.pdf).

<sup>1017</sup> See Ohio Adm. Code 4901:1-6-27(A) (“Except as otherwise provided in this rule, an incumbent local exchange carrier (“ILEC”) shall provide basic local exchange service (“BLES”) to all persons or entities in its service area requesting that service, and that service shall be provided on a reasonable and nondiscriminatory basis.”).

- (4) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;
- (5) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities;
- (6) Recognize the continuing emergence of competitive electricity markets through developing and implementing flexible regulatory treatment;
- (7) Ensure effective competition in providing retail electric service;
- (8) Ensure retail electric service consumer protection against unreasonable sales practices, market deficiencies, and market power;
- (9) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;
- (10) Encourage implementing distributed generation across customer classes;
- (11) Protect at-risk populations, including when considering the implementation of any new advanced energy or renewable energy resource;
- (12) Encourage the use and education of small business owners regarding energy efficiency programs and alternative energy resources; and
- (13) Facilitate the state's effectiveness in the global economy.

In Ohio's deregulated utility market, traditional utilities face retail competition from Competitive Retail Electric Suppliers ("CRES Providers"), and Ohio has over 700 CRES Providers, spurring a competitive power marketplace.<sup>1018</sup> In a deregulated electricity market, like Ohio, while the utility still owns the entire infrastructure and is responsible for distributing electricity to homes and businesses, competing electricity providers may buy the electricity and sell it to consumers directly.<sup>1019</sup>

Energy brokers and aggregators play a role in negotiating lower power rates.<sup>1020</sup> Energy brokers must be licensed by the State. They act as intermediaries between energy producers

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<sup>1018</sup> The Public Utilities Commission of Ohio, Regulated Company List, <http://www.puco.ohio.gov/puco/index.cfm/docketing/regulated-company-list/?IndId=31#sthash.QABaiEVb.dpbs>.

<sup>1019</sup> *Id.*

<sup>1020</sup> *Id.*

and energy consumers.<sup>1021</sup> Brokers assume the contractual and legal responsibility for the sale and arrangement for the supply of retail electric generation service to a retail customer without taking title to the power supplied.<sup>1022</sup> Ohio law also authorizes aggregators to negotiate contracts with customers to combine electric loads to purchase retail electric generation service. This service does not include governmental aggregators.<sup>1023</sup> The 303 licensed energy brokers and aggregators in Ohio lead the effort to reduce energy charges through negotiation with electric generation companies.<sup>1024</sup>

### **Natural Gas Deregulation**

Because natural gas exists in the Marcellus and Utica regions, a number of economic opportunities have been created by hydraulic fracturing and its support industries. Ohio is at the heart of the national growth in oil and natural gas production tied to hydraulic fracturing of previously energy-dormant sites. The U.S. Department of Energy determined that, since January 2012, natural gas production in the Marcellus and Utica regions has accounted for 85% of the increase in natural gas production in the U.S.<sup>1025</sup> The Producer Price Index for natural gas, measured annually, fell 56.8% between 2007 and 2012, tied to the growth in hydraulic fracturing in Ohio and elsewhere across the United States.<sup>1026</sup>



The natural gas industry is a complex network of companies that produce, transport, and distribute natural gas. Like the electric market, natural gas in Ohio also operates in a mostly deregulated market. The market offers unbundled and comparable natural gas services and goods that provide wholesale and retail customers with supplier, price, terms, conditions, and quality options.<sup>1027</sup> Delivery remains a utility service that will continue at the

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<sup>1021</sup> *Id.*

<sup>1022</sup> *Id.*

<sup>1023</sup> *Id.*

<sup>1024</sup> *Id.*

<sup>1025</sup> Krohn & Nullé, [Marcellus, Utica Provide 85% of U.S. Shale Gas Production Growth Since Start of 2012](http://www.eia.gov/todayinenergy/detail.cfm?id=22252) (July 28, 2015), available at United States Energy Information Administration, <http://www.eia.gov/todayinenergy/detail.cfm?id=22252>.

<sup>1026</sup> PPI Energy and Chemicals Team, *The Effects of Shale Gas Production on Natural Gas Prices* (May 2013), available at United States Department of Labor, Bureau of Labor Statistics, <http://www.bls.gov/opub/btn/volume-2/the-effects-of-shale-gas-production-on-natural-gas-prices.htm>.

<sup>1027</sup> Goals of natural gas deregulation include promoting “the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and

regulated rate set by the PUCO. Competitive Retail Natural Gas (“CRNG”) Providers, like CRES Providers for electricity, negotiate lower natural gas rates, and Ohio has nearly 600 CRNG Providers.<sup>1028</sup>

### **Municipally Owned Public Utilities & Cooperatives**

Every resident in a deregulated market doesn’t necessarily have the power to choose among retail energy suppliers. Deregulation in Ohio is required of investor-owned utilities only.<sup>1029</sup> Those who live in the service area of an electric cooperative or a municipal utility may not be able to purchase electricity supply from an alternative supplier. Public utilities can be privately owned or publicly owned. Publicly owned utilities include cooperative and municipal utilities. Any municipality can acquire, construct, or operate any public utility product or service if it is supplied to the people who live in the municipality.<sup>1030</sup> Municipal electric utilities are municipal corporations, such as cities and villages that maintain their own electric distribution system. The Ohio Constitution specifically grants municipal corporations the right to operate utilities in Section 4 of Article XVIII.<sup>1031</sup>

A cooperative is a nonprofit electric utility that is owned and operated by the same consumers it serves.<sup>1032</sup> It ensures that residents receive power for low prices by purchasing power wholesale from a generation facility.<sup>1033</sup> Co-op rates are set only as high as necessary to fund expenses.<sup>1034</sup> If the co-op has excess margins, it returns the money to its members through patronage or capital credits.<sup>1035</sup> Though each member has equal ownership of the

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quality options they elect to meet their respective needs”; “diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers”; and “an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods.” See R.C. 4929.02.

<sup>1028</sup> The Public Utilities Commission of Ohio, Regulated Company List,

<http://www.puco.ohio.gov/puco/index.cfm/docketing/regulated-company-list/?IndId=31#sthash.QABaiEVb.dpbs>.

<sup>1029</sup> “Electric services company” includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent. R.C. 4928.01(9).

<sup>1030</sup> Ohio Constitution, Article XVIII, Section 4 (“Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.”).

<sup>1031</sup> *Id.*

<sup>1032</sup> R.C. 4928.01(A)(5).

<sup>1033</sup> R.C. 4928.05(A)(2).

<sup>1034</sup> *Id.*

<sup>1035</sup> *Id.*

utility, policies for a co-op are determined by a consumer-elected board.<sup>1036</sup> Co-ops are mainly located in rural areas. They were initially formed in the 1930s to help distribute power to residents in remote locations.<sup>1037</sup>

### **Reasonable Arrangements**

Access to low-cost, reliable power is critical to Ohio businesses. Manufacturers, for the most part, rely on energy brokers to negotiate generation power rates. Many businesses seek to gain even lower electric rates through multiple PUCO programs. The PUCO can approve of reasonable arrangements that provide an electric cost reduction under Revised Code 4905.31. These special contracts may be entered into between public utilities and their customers, subject to approval by the PUCO.<sup>1038</sup> These contracts include arrangements that differ from standard rate schedules and are specifically tailored to a customer's service. The PUCO supervises the schedule or reasonable arrangement, which it can change, alter, or modify.<sup>1039</sup> Parties may propose several types of arrangements, including any financial device that may be practicable or advantageous to the parties interested.<sup>1040</sup> These financial devices are often negotiated rate schedules. Notably, Revised Code 4905.31 does not expressly require utility consent, but the statute does require utility compliance.<sup>1041</sup>

The PUCO may award a reasonable arrangement if the following criteria are met:

- Company is not retail in nature and can illustrate financial viability;
- At least 25 jobs are created within three years paying 150% of the federal minimum wage;
- Other local and state tax incentives must be associated with the project;
- Additional tax and economic benefits of the project must be illustrated; and
- Company must agree to maintain operations at the project site for the term of the incentives.<sup>1042</sup>

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<sup>1036</sup> *Id.*

<sup>1037</sup> Ohio Rural Electric Cooperatives, Inc., Ohio's Electric Cooperatives, <http://www.ohioruralelectric.coop/local-electric-co-ops>.

<sup>1038</sup> R.C. 4905.31.

<sup>1039</sup> R.C. 4905.31(E).

<sup>1040</sup> *Id.*

<sup>1041</sup> *Id.*

<sup>1042</sup> Ohio Adm. Code, 4901:1-38-03.

Electric utilities affected by the reasonable arrangement discount are able to seek approval from the PUCO to gain a “rider” that permits them to pass on the costs of this reduced power to the statewide basis of other electric company customers.<sup>1043</sup>

Ohio law also permits the PUCO to approve of energy-efficiency arrangements between an electric utility and a customer or group of customers that have new or expanded energy-efficiency production facilities.<sup>1044</sup> Critical factors for PUCO review related to the energy-efficiency arrangements include creation of at least 10 new jobs over three years paying over 150% of the federal minimum wage; demonstrated financial viability of the company requesting the arrangement; award of local, state, or federal tax incentives for the project; agreement by the company to maintain operations at the project site for the term of the incentives; outline of annual electric billings without incentives for the term of the incentives; and annual estimated delta revenues for the term of the incentives.<sup>1045</sup> PUCO energy-efficiency arrangements, just like the reasonable arrangements, follow the formal PUCO administrative law process that require public disclosure of the agreement, provide public hearings, permit parties to oppose or intervene, and require staff reports, all before the PUCO decision on the merits of the case. Thus, PUCO energy-efficiency arrangements are another incentive rarely used.

Finally, Ohio law permits the PUCO to approve of unique arrangements.<sup>1046</sup> An electric utility may file an application under Ohio Revised Code 4905.31 for approval of a unique arrangement with one or more of its customers, consumers, or employees.<sup>1047</sup> Unique arrangements do not involve new job creation but instead focus on saving an energy-intensive facility from closure due to high energy costs.

### **Utility Programs for Reduction in Power Usage**

Many Ohio electric and natural gas providers offer financial incentives to customers who reduce their consumption or peak demand usage. For example, American Electric Power (“AEP”), serving central Ohio, has offered programs resulting in manufacturers and warehouses receiving incentives totaling \$25,015,332.<sup>1048</sup> One program offered by AEP is the Prescriptive Program, which offers businesses set financial incentives for the implementation of energy-efficient improvements and technologies that reduce energy consumption.<sup>1049</sup> First Energy, which covers northern Ohio, passes costs associated with mandated energy efficiency programs

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<sup>1043</sup> Ohio Adm. Code 4901:1-38-08.

<sup>1044</sup> Ohio Adm. Code 4901:1-38-04.

<sup>1045</sup> *Id.*

<sup>1046</sup> Ohio Adm. Code 4901:1-38-05.

<sup>1047</sup> *Id.*

<sup>1048</sup> <https://www.aepohio.com/save/business/programs/ManufacturingWarehousing.aspx>.

<sup>1049</sup> <https://www.aepohio.com/save/business/programs/PrescriptiveProgram.aspx>.

on to its customers through a charge called DSE2 Charge.<sup>1050</sup> Mercantile customers (non-residential customers that use more than 700,000 kWh per year or are part of a national account) can request exemption from the DSE2 charge by filing an application with the PUCO.<sup>1051</sup> For the application to be approved, the mercantile customer must demonstrate that it has completed sufficient energy-efficiency projects at its facility.<sup>1052</sup>

As an example, Replex Plastics, located in Mount Vernon, is an Ohio-based manufacturer of custom plastic lenses, mirrors, and domes. Replex Plastics, with the help of AEP incentives, implemented efficiency lighting, occupancy sensors, and a new air compressor. The projected annual energy savings from this \$88,085 project are 318,409 kWh. The company found many benefits to the project, beyond the obvious financial benefits of energy cost savings. For example, Replex Plastics credited improvements in lighting quality for better productivity, less scrap, and higher product quality.<sup>1053</sup>

Natural gas providers also offer incentives and riders to commercial customers. For example, Duke Energy, servicing southern Ohio, implemented its Smart Saver Incentive Program, which allows for businesses to receive cash for installing high-efficiency lighting, HVAC, pumps, and other qualifying equipment.<sup>1054</sup> Recent state legislation also will give natural gas utilities a tool to use for critical natural gas infrastructure development. Ohio House Bill 319, passed by the 130<sup>th</sup> Ohio General Assembly, permits a natural gas company to apply to the PUCO for approval of one or more economic development projects (“EDP”) to include an infrastructure development rider.<sup>1055</sup> The PUCO may approve two types of EDPs: (1) a general EDP or (2) a certified SiteOhio EDP intended for commercial, industrial, or manufacturing use.<sup>1056</sup> The natural gas company can be awarded an economic development rider by the PUCO to have the costs of the infrastructure development covered by other customers.<sup>1057</sup> All previously approved EDPs of the same type are not projected to exceed \$2 multiplied by the

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<sup>1050</sup> Brakey, *New Charges Linked to Efficiency Standards Will Show Up on Electric Bills July 1*, Crain’s Cleveland Business (June 20, 2014), available at <http://www.crainscleveland.com/print/article/20140620/ENERGY/140629978/new-charges-linked-to-efficiency-standards-will-show-up-on-electric>.

<sup>1051</sup> *Id.*

<sup>1052</sup> *Id.*

<sup>1053</sup> “An Ohio Mirror Manufacturer Committed to Sustainability Reduces Energy Use,”

[www.aepohio.com/global/utilities/lib/docs/save/business/programs/SuccessStories/ReplaxPlastics.pdf](http://www.aepohio.com/global/utilities/lib/docs/save/business/programs/SuccessStories/ReplaxPlastics.pdf).

<sup>1054</sup> <http://www.duke-energy.com/ohio-large-business/energy-efficiency/smart-saver-incentive-program.asp>.

<sup>1055</sup> R.C. 4929.161.

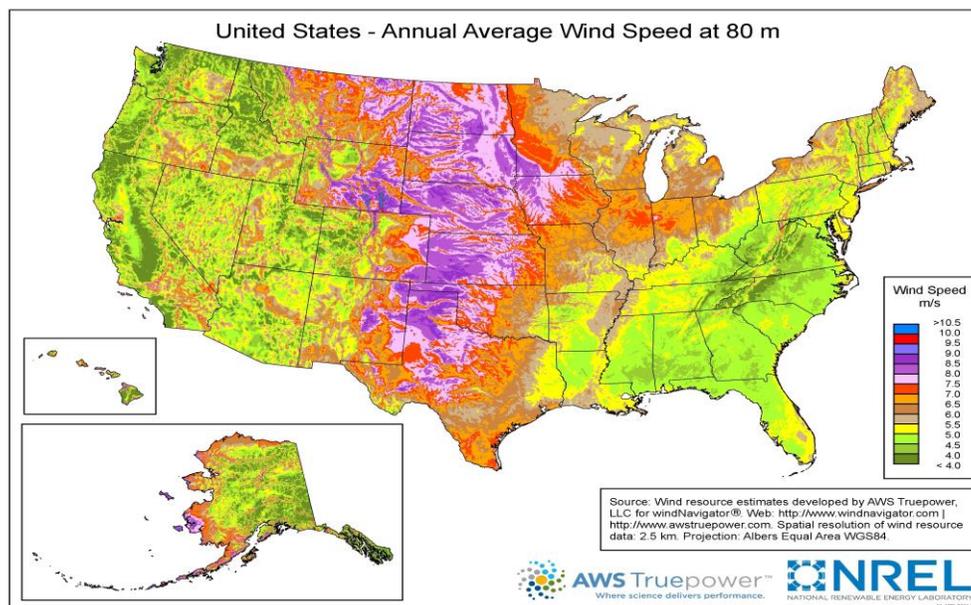
<sup>1056</sup> *Id.*

<sup>1057</sup> R.C. 4929.162

aggregate number of the company's Ohio customers and \$1 multiplied by the aggregate number of the company's Ohio customers for SiteOhio EDPs.<sup>1058</sup>

### **Renewable Energy Industry**

Ohio is also home to various forms of renewable energy such as wind and solar energy. According to the National Renewable Energy Laboratory, northwest Ohio is rich in opportunity for the development of wind energy.



Ohio's wind energy capacity grew exponentially in 2011, increasing from less than 9 megawatts to more than 110 megawatts by the end of the year.<sup>1059</sup> Further projects, both planned and under construction, brought the state's wind capacity up to over 1,400 megawatts by the end of 2012.<sup>1060</sup> Ohio has the potential for further wind energy development, especially in the northwestern part of the state from Sandusky toward Toledo and along the shores of Lake Erie, the state has a potential capacity of more than 54,000 megawatts.<sup>1061</sup>

While Ohio's first wind facilities—like the 7.2-megawatt AMP–Ohio/Green Mountain Energy Wind Farm in Bowling Green, completed in 2004, and the 0.23 megawatt turbine at

<sup>1058</sup> *Id.*

<sup>1059</sup> The Public Utilities Commission of Ohio, How to Generate Wind Power in Ohio, <http://www.puco.ohio.gov/puco/index.cfm/be-informed/consumer-topics/how-to-generate-wind-power-in-ohio/#sthash.DDXLcU8.dpbs>.

<sup>1060</sup> *Id.*

<sup>1061</sup> *Id.*

Cleveland’s Great Lakes Science Center—were relatively small in scale, recent projects and turbines are much larger. A 99-megawatts farm in Paulding County began generating electricity in October 2011.<sup>1062</sup> In Cleveland, Lincoln Electric installed the largest urban wind tower in North America in 2011.<sup>1063</sup>

Solar power in Ohio has been increasing as the cost of photovoltaics has decreased. Ohio has adopted a net metering rule that allows any customer generating up to 25 kW to use net metering, where surplus kilowatt hours are rolled over each month and paid by the utility company once a year at the generation rate upon request (see below).<sup>1064</sup> Costs have decreased to the point that the average consumer may save approximately \$17,527 over a 20-year period by installing solar panels.<sup>1065</sup>

Ohio is home to a 12-megawatts solar farm in Upper Sandusky, the largest solar farm in the state and second largest east of the Mississippi River.<sup>1066</sup> It covers 80 acres and contains 159,000 solar panels built by First Solar. The First Solar panels used were made locally, in Perrysburg, Ohio.<sup>1067</sup> The 12-megawatts facility can power 9,000 homes on a sunny day.<sup>1068</sup> First Solar is a photovoltaic (“PV”) manufacturer of rigid thin film modules (solar panels) and a provider of utility-scale PV power plants and supporting services.<sup>1069</sup> It is an Arizona-based company, but its first factory was built in Perrysburg, Ohio. First Solar completed an expansion of its Perrysburg facility in 2010. A future 49.9-megawatts facility is planned near The Wilds, in southeastern Ohio.

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<sup>1062</sup> *Id.*

<sup>1063</sup> *Id.*

<sup>1064</sup> R.C. 1551.20 (defining “solar or wind energy system” as “any method used directly to provide space heating or cooling, hot water, industrial process heat, or mechanical or electric power by the collection, conversion, or storage of solar or wind energy including, but not limited to, active or passive solar systems. It does not include any equipment that is part of a conventional system for such purposes, that is, a system that does not use solar or wind energy; nor does it include a roof or any windows or walls that would be contained in a similar structure not designed or modified to use solar energy for space heating or cooling, except for those modifications to the design or construction of such roof, windows, or walls that are necessary to their improved use to capture solar energy for space heating or cooling”).

<sup>1065</sup> R.C. 5727.75 (defining “solar energy project” as “an energy project composed of an energy facility using solar panels to generate electricity”).

<sup>1066</sup> Michaels, *Upper Sandusky Home to OH’s Largest Solar Farm*, Toledo Blade (Aug. 19, 2010), available at <http://www.toledonewsnow.com/story/13014951/upper-sandusky-home-to-ohs-largest-solar-farm>.

<sup>1067</sup> *Id.*

<sup>1068</sup> *Id.*

<sup>1069</sup> *Id.*

## **Energy Incentives**

Multiple state agencies provide funding and incentives for energy-related projects. Incentives include the promotion of energy production and energy efficiency, as both means affect energy costs for employers.

### **ODSA Qualified Energy Project Tax Exemption**

As discussed in [Chapter 4](#), ODSA currently provides owners or lessees of renewable, clean coal, advanced nuclear, and cogeneration energy projects with an exemption from the public utility tangible personal property tax through its Qualified Energy Project Tax Exemption. To qualify, the owner or lessee subject to a sale leaseback transaction must apply to ODSA for the exemption.<sup>1070</sup>

Large projects (above 5 megawatts) require approval from each board of county commissioners where the project is located.<sup>1071</sup> In addition, these large projects require agreements to train and equip local emergency responders, as well as repair roadway infrastructure following the construction of the project.<sup>1072</sup> Small projects (less than 250 kilowatts) are exempt as a matter of law under Revised Code 5709.53.<sup>1073</sup> If the project meets the requirements of the exemption, then the Director of ODSA will certify the project as a “Qualified Energy Project.” Qualified Energy Projects remain exempt from taxation so long as the project is completed within the statutory deadlines, meets the “Ohio Jobs Requirement,” and continues to meet several ongoing obligations, including providing the ODSA with project information on an annual basis.<sup>1074</sup> Projects taking advantage of the program and larger than two megawatts must make a workforce training commitment for careers in wind or solar energy and report on their status of partnering either with a university or apprenticeship program for workforce development.<sup>1075</sup>

### **ODSA Energy Loan Fund**

The Energy Loan Fund provides low-cost financing to small businesses, manufacturers, nonprofits, and public entities for energy improvements that reduce energy usage and associated costs, reduce fossil fuel emissions, or create or retain jobs. Funding is provided

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<sup>1070</sup> R.C. 5727.75(B)(1)(a)–(c) (“Tangible personal property of a qualified energy project using renewable energy resources is exempt from taxation for tax years 2011 through 2016 if all of the [requisite] conditions are satisfied.”).

<sup>1071</sup> Ohio Development Services Agency, Business/Business Grants, Loans, and Tax Credits, Qualified Energy Project Tax Exemption, [http://development.ohio.gov/bs/bs\\_qepte.htm](http://development.ohio.gov/bs/bs_qepte.htm).

<sup>1072</sup> *Id.*

<sup>1073</sup> *Id.*

<sup>1074</sup> *Id.*

<sup>1075</sup> *Id.*

through the Advanced Energy Fund and the federal State Energy Program and The American Recovery and Reinvestment Act of 2009 (“ARRA”).<sup>1076</sup> Eligible activities include energy retrofits, energy distribution technologies, and renewable energy technologies.<sup>1077</sup> Projects must achieve 15% reduction in energy usage, demonstrate economic and environmental impacts, and be included within a long-term energy strategy of the community served.<sup>1078</sup> The Energy Loan Fund is available to businesses that have up to 500 employees and own or operate facilities located in Ohio, manufacturers enrolled in the Energy Efficiency Program for Manufacturers, public entities, and nonprofits. It provides long-term financing for energy efficiency and renewable energy projects.<sup>1079</sup>

### **ODSA Energy Efficiency Program for Manufacturers**

The Energy Efficiency Program for Manufacturers is a multi-phase energy-efficiency program that helps Ohio manufacturers reduce their costs through facilitation services and financial assistance that diagnose, plan, and implement cost-effective energy improvements at their facilities.<sup>1080</sup> Funding comes through the U.S. Department of Energy's State Energy Program and Ohio's Advanced Energy Fund. The program is designed in four phases:

- **Phase I** is the identification of energy cost savings through a facilitated process where company management examines how they think about energy within their business systems.
- **Phase II** is the development of an energy plan that combines changes in business process methodologies with identifying cost-effective measures through the completion of a technical energy audit of the company's facilities.
- **Phase III** is the installation of the energy cost savings measures, and many companies are eligible for financing through Office of Energy to implement these measures.

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<sup>1076</sup> State funding is available through the Advanced Energy Fund (“AEF”), which is authorized by Revised Code 4928.61 through 4928.63 of the Revised Code. Federal funding is available through the U.S. Department of Energy’s State Energy Program (“SEP”), which is authorized under 10 C.F.R. 420.

<sup>1077</sup> Ohio Development Services Agency, Business/Advanced Energy and Efficiency Programs, Energy Loan Fund, [http://development.ohio.gov/bs/bs\\_energyloanfund.htm](http://development.ohio.gov/bs/bs_energyloanfund.htm).

<sup>1078</sup> *Id.*

<sup>1079</sup> Ohio Development Services Agency, Energy Loan Fund, Frequently Asked Questions, <http://development.ohio.gov/files/bs/FAQ1%20FNL.pdf>.

<sup>1080</sup> Ohio Development Services Agency, Business/Advanced Energy and Efficiency Programs, Energy Efficiency Program for Manufacturers, [http://www.development.ohio.gov/bs/bs\\_energyefficprograms.htm](http://www.development.ohio.gov/bs/bs_energyefficprograms.htm).

- Phase IV is measurement and verification of the energy cost-savings measures.<sup>1081</sup>

In today's global economy, Ohio companies are competing with manufacturers from around the world. The Energy Efficiency Program for Manufacturers aims to help Ohio companies reduce costs through sustainable energy savings identified in the diagnostic process. The program has assisted a number of businesses throughout Ohio.

One example is Kovatch Castings, Inc. in Uniontown, Ohio. This investment castings foundry primarily focuses on manufacturing precision cast components that contain complex geometries. After 36 years in business, Kovatch Castings was ready to continue energy efficiency improvements in order to expand its business. Through the Energy Efficiency Program for Manufacturers, with funding by AARA and the State Energy Program, Kovatch Castings was able to install a new energy efficient gas oven to replace older, inefficient ovens currently in operation. This change reduced natural gas usage by 12,040 MMBTUs annually and reduced gas consumption by 40%, in addition to \$93,062 in anticipated cost savings per year.<sup>1082</sup>

### **ODSA State Energy Program**

ODSA has received federal funding through the annual State Energy Program, which is a formula-based funding program provided by the United States Department of Energy. Through this program, states are allocated grant funding to address energy priorities, such as adopting emerging-renewable energy and energy-efficiency technologies.<sup>1083</sup> ODSA issues competitive solicitations that direct grant funding to education, outreach, technical assistance, and other services.<sup>1084</sup> The goal of the program is to increase jobs in Ohio, reduce energy use, and reduce greenhouse gas emissions through the increased adoption of renewable and energy efficient technologies.<sup>1085</sup>

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<sup>1081</sup> *Id.*

<sup>1082</sup> See *id.* for more information on Kovatch Castings, Inc.'s, as well as other companies', participation in the Energy Efficiency Program for Manufacturers.

<sup>1083</sup> Ohio Development Services Agency, Business/Business Grants, Loans and Tax Credits, State Energy Program (SEP), [http://development.ohio.gov/bs/bs\\_sepogram.htm](http://development.ohio.gov/bs/bs_sepogram.htm).

<sup>1084</sup> *Id.*

<sup>1085</sup> *Id.*

The General Motors plant in Defiance, Ohio has been a successful recipient of State Energy Program funding. The plant uses a cupola furnace that is fueled by foundry coke.<sup>1086</sup> The cupola creates cast iron that becomes automotive engine cylinder blocks and heads.<sup>1087</sup> The coke is 91% fixed carbon and its combustion releases high amounts of carbon dioxide into the atmosphere.<sup>1088</sup> To reduce energy costs and carbon dioxide emissions, the cupola was upgraded with a desiccant-based dehumidification system, removing 600 tons of water vapor from the cupola blast air used to combust coke.<sup>1089</sup> The lowered operating costs and emissions resulting from this project make Defiance Plant 1 more competitive in the global gray-iron-casting marketplace, help sustain its operations, and retain its employees.<sup>1090</sup> The project resulted in \$436,215 in cost savings per year and reduced CO<sup>2</sup> emissions by more than 4.5 million pounds per year, or the equivalent of taking 401 cars off the road.<sup>1091</sup>

In 2014, ODSA created an energy efficiency-program entitled the Ohio Energy Loan Loss Reserve Program (“Program”) to allow qualified Ohio port authorities designated by ODSA to access AARA energy-efficiency funds provided to the ODSA. The Program now permits these Eligible Port Authorities to establish loan loss reserves to support financing for energy efficiency and renewable energy or energy-related improvements that comply with certain requirements (“Energy Projects”). ODSA has entered into Loan Loss Reserve Agreements with Eligible Port Authorities that permit those Eligible Port Authorities to provide credit enhancement for Energy Projects.

### **Ohio Air Quality Development Authority Opportunities**

The Ohio Air Quality Development Authority (“OAQDA”) is a non-regulatory agency created by the Ohio General Assembly in 1970.<sup>1092</sup> Using the tool of conduit financing, OAQDA qualifies projects for tax exemptions if the projects contribute to better air quality.<sup>1093</sup> OAQDA helps businesses qualify machinery and equipment improvement projects for tax

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<sup>1086</sup> Ohio Department of Development, *Success Stories: General Motors Company*, available at [http://development.ohio.gov/files/bs/general\\_motors\\_cs.pdf](http://development.ohio.gov/files/bs/general_motors_cs.pdf).

<sup>1087</sup> *Id.*

<sup>1088</sup> *Id.*

<sup>1089</sup> *Id.*

<sup>1090</sup> *Id.*

<sup>1091</sup> *Id.*

<sup>1092</sup> The Ohio Air Quality Development Authority, About OAQDA, [http://www.ohioairquality.org/oaqda/about\\_oaqda.asp](http://www.ohioairquality.org/oaqda/about_oaqda.asp).

<sup>1093</sup> The Ohio Air Quality Development Authority, Business Assistance/Small Business, Clean Air Resource Center (“CARC”), [http://www.ohioairquality.org/clean\\_air/carc.asp](http://www.ohioairquality.org/clean_air/carc.asp).

exemptions.<sup>1094</sup> If the project or improvement cleans the air (directly or by being more energy efficient), usually the project can be financed through OAQDA to achieve tax benefits. Projects financed through OAQDA are exempt from real property taxation, tangible property tax, sales and use taxes on equipment, and calculation of the Commercial Activity Tax (“CAT”) for the life of the loan.<sup>1095</sup>

### **Small Business and OAQDA**

Qualifying small businesses can seek tax benefits through OAQDA programs.<sup>1096</sup> OAQDA’s Clean Air Resource Center (“CARC”) makes clean air compliance more affordable. CARC can provide access to free, confidential assessments to identify pollution problems and to recommend solutions.<sup>1097</sup> OAQDA can also assist by offering technical assistance and information about alternative processes and technology to reduce air pollution.<sup>1098</sup> CARC also provides financing to purchase pollution control or prevention equipment.<sup>1099</sup> These include businesses such as dry cleaners that need machines with cleaner emissions to collision repair shops that must install paint booths. In addition to loans, small businesses can take advantage of grants through CARC to cover up-front costs of financing pollution control investments.<sup>1100</sup>

### **Large Business and OAQDA**

Large businesses considering energy-efficiency improvements, process changes, or the purchase of traditional pollution-control equipment to reduce or eliminate air emissions may be eligible for assistance through OAQDA as well.<sup>1101</sup> An “air quality facility” can be financed through OAQDA. Generally, an air quality facility is any modification or replacement of property, process, device, structure, or equipment that removes, reduces, prevents, contains,

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<sup>1094</sup> *Id.*

<sup>1095</sup> *Id.*

<sup>1096</sup> Under OAQDA guidelines, a small business is a small stationary source covered by the Clean Air Act, which employs 100 or fewer individuals, emits less than 75 tons per year of all regulated air pollutants, and emits 50 tons or less per year of any regulated pollutant. Small businesses may be eligible if they use the following processes: baking, burning, casting, coating, degreasing, dry cleaning, molding, painting, plating, and printing. See The Ohio Air Quality Development Authority, Business Assistance/Small Business, What Is a Small Business?, [http://www.ohioairquality.org/clean\\_air/what\\_is\\_small\\_business.asp](http://www.ohioairquality.org/clean_air/what_is_small_business.asp).

<sup>1097</sup> The Ohio Air Quality Development Authority, Business Assistance/Small Business, Clean Air Resource Center (CARC), [http://www.ohioairquality.org/clean\\_air/carc.asp](http://www.ohioairquality.org/clean_air/carc.asp).

<sup>1098</sup> *Id.*

<sup>1099</sup> *Id.*

<sup>1100</sup> For more information on the CARC program and how small businesses can take advantage of these incentives, see The Ohio Air Quality Development Authority, Business Assistance/Small Business, [http://www.ohioairquality.org/clean\\_air/small\\_business.asp](http://www.ohioairquality.org/clean_air/small_business.asp).

<sup>1101</sup> In general, OAQDA defines a large business as one that employs more than 100 people.

alters, conveys, stores, disperses, or disposes of air contaminants.<sup>1102</sup> Affected businesses may be those businesses that emit volatile organic compounds (“VOCs”), nitrogen oxides (“NOx”), or sulfur dioxides (“SO<sub>2</sub>”); use asphalt, rubber, metal finishers, plastics, or synthetic materials in the manufacturing or construction trades; or perform work involving the coating or painting of metal surfaces.<sup>1103</sup> Steel, chemical, and utility companies and automobile manufacturers, are all affected by the requirement to control air emissions and would be eligible for OAQDA incentives.<sup>1104</sup> OAQDA offers a variety of tax incentives for projects improving air quality and can even provide 100% exemption for a number of taxes.<sup>1105</sup>

### **Energy Special Improvement Districts (“ESID”)**

Legislation enacted in Ohio in July 2009 (House Bill 1) expanded existing special improvement district law by authorizing local municipalities and townships to create “special energy improvement districts” that offer property owners financing to install photovoltaic (PV) or solar-thermal systems on real property.<sup>1106</sup> In June 2010, legislation (Senate Bill 232) provided additional authorization to municipalities to authorize financing of geothermal, customer-generated systems (including wind, biomass, and gasification systems 250 kW and below or 250 kW and above as long as they serve all or part of the owner’s on-site load) and energy-efficiency improvements that are permanently fixed to the property within a special improvement district (“SID”).<sup>1107</sup> In general, as detailed in Chapter 2, a SID is created either by petition of the owners of real property within a proposed district or by an existing qualified nonprofit corporation.<sup>1108</sup> Creation is initiated in one of two ways: (1) owners of at least 60% of the front footage (excluding church or government property) petition the appropriate legislative authority, or (2) owners of at least 75% of the land area within the proposed SID petition the appropriate legislative authority. Normally, a SID is created as a general special

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<sup>1102</sup> R.C. 3706.01(G) (defining “air quality facility” as, among other things, “[a]ny method, modification or replacement of property, process, device, structure, or equipment that removes, reduces, prevents, contains, alters, conveys, stores, disperses, or disposes of air contaminants or substances containing air contaminants, or that renders less noxious or reduces the concentration of air contaminants in the ambient air, including, without limitation, facilities and expenditures that qualify as air pollution control facilities under section 103 (C)(4)(F) of the Internal Revenue Code of 1954, as amended, and regulations adopted thereunder”).

<sup>1103</sup> The Ohio Air Quality Development Authority, Business Assistance/Large Business, Affected Businesses and Processes, [http://www.ohioairquality.org/clean\\_air/affected\\_businesses.asp](http://www.ohioairquality.org/clean_air/affected_businesses.asp).

<sup>1104</sup> *Id.*

<sup>1105</sup> These include tangible personal property tax, real property tax, corporate franchise tax, sales and use tax, and interest income on bonds and notes issued by OAQDA. For more information, see The Ohio Air Quality Development Authority, Business Assistance/Large Business, Financial Benefits, [http://www.ohioairquality.org/clean\\_air/large\\_bus\\_financial\\_benefits.asp](http://www.ohioairquality.org/clean_air/large_bus_financial_benefits.asp).

<sup>1106</sup> United States Department of Energy, Local Option—Special Energy Improvement Districts: Ohio, <http://energy.gov/savings/local-option-special-energy-improvement-districts>.

<sup>1107</sup> *Id.*

<sup>1108</sup> R.C. 1710.02.

improvement district. A general SID provides for the development of a plan for projects and services benefitting the district, and property owners are specially assessed for the plan's projects and services, including projects and services dealing with education, safety, and transportation improvement.<sup>1109</sup> Property owners pay special assessments that cover costs of projects within the district and provide a source of revenue that secures bonds issued by governments or their authorized agencies to pay costs of developing the project.<sup>1110</sup> In a general SID, parcels of real property in the district must consist of a contiguous area of real property.<sup>1111</sup> Unlike a regular SID, an Energy SID does not have to include contiguous properties and can provide spot financing anywhere within a broad territory.<sup>1112</sup> Property owners anywhere in the district can implement energy-efficiency improvements using technologies such as solar water heat, solar thermal electric, solar thermal process heat, photovoltaic, wind, biomass, geothermal heat pumps, anaerobic digestion, and geothermal direct-use energy.<sup>1113</sup> ESID's require petitions signed by all property owners within the SID area. If a qualified nonprofit corporation does not already exist for the SID, one must be created. The corporation's articles of incorporation must be approved by resolution of each participating political subdivision. The owners of real property within the SID boundaries become members of the nonprofit corporation.

Any municipality choosing to establish an ESID can issue general obligation bonds or revenue bonds (secured solely by special assessment payments) or apply for state or federal money to fund such programs.<sup>1114</sup> Property owners who opt in to such a program and install solar, geothermal, wind, biomass, gasification, or energy efficiency improvements permanently affixed to their real properties using municipal financing must agree to a special assessment on the property tax bill for up to 30 years to pay for the financing secured through this mechanism.<sup>1115</sup> Municipalities and townships interested in creating such districts and providing financing for property owners must approve a special energy improvement district via

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<sup>1109</sup> United States Department of Energy, Local Option—Special Energy Improvement Districts: Ohio, <http://energy.gov/savings/local-option-special-energy-improvement-districts>.

<sup>1110</sup> *Id.*

<sup>1111</sup> R.C. 1710.02(A) (“All territory in a special improvement district shall be contiguous . . .”).

<sup>1112</sup> *Id.* (“The area of each district shall be contiguous; except that the area of a special improvement district may be noncontiguous if all parcels of real property included within such area contain at least one special energy improvement thereon.”).

<sup>1113</sup> R.C. 1710.01(I) (defining “special energy improvement project” as “any property, device, structure, or equipment necessary for the acquisition, installation, equipping, and improvement of any real or personal property used for the purpose of creating a solar photovoltaic project, a solar thermal energy project, a geothermal energy project, a customer-generated energy project, or an energy efficiency improvement, whether such real or personal property is publicly or privately owned”).

<sup>1114</sup> United States Department of Energy, Local Option—Special Energy Improvement Districts: Ohio, <http://energy.gov/savings/local-option-special-energy-improvement-districts>.

<sup>1115</sup> *Id.*

ordinance or resolution after receiving the resident petition.<sup>1116</sup> A SID board of directors must be created to implement the program. Each local municipality or township must determine specific eligibility criteria, the maximum financing amount and interest rates, and other terms.

### **Property Assessed Clean Energy (“PACE”)**

The “PACE” project process is one way Ohio communities are using energy-efficiency funding authorized by ESID legislation. PACE presents a way to finance energy-efficiency, renewable-energy, and water-conservation upgrades to buildings.<sup>1117</sup> PACE can pay for new heating and cooling systems, lighting improvements, solar panels, water pumps, insulation, and more for almost any property – homes, commercial, industrial, non-profit, and agricultural. PACE provides an opportunity for businesses and homeowners to save money by making their buildings more efficient, thus creating more property value as well.<sup>1118</sup> PACE pays for projects up front at 100% of the cost.<sup>1119</sup> Property owners can opt in to add 100% of the financed cost of the improvements to a special property-tax assessment on their property for up to 30 years. PACE financing legislation has been enacted by 28 states, including Ohio.<sup>1120</sup> Additionally, PACE financing stays with a building upon sale and is easy to share with tenants. State and local governments sponsor PACE financing to create jobs, promote economic development, and conserve natural resources.<sup>1121</sup>

Ohio began developing PACE programs in 2010. Not all local governments in Ohio offer PACE financing. Ohio currently has three PACE programs with funded projects happening throughout the state.

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<sup>1116</sup> *Id.*

<sup>1117</sup> ODSA has partnered with Ohio port authorities as they originate loans for projects that make business and nonprofit facilities more energy efficient. This is done through the Loan Loss Reserve program, which offers credit enhancement to eligible Ohio port authorities as they originate loans. Eight port authorities are already participating in the program. More information can be found at Ohio Development Services Agency, Community/Loan Loss Reserve Program, [http://development.ohio.gov/cs/cs\\_llr.htm](http://development.ohio.gov/cs/cs_llr.htm).

<sup>1118</sup> The Ohio State University, Energize Ohio, Property Assessed Clean Energy (PACE) Financing/Special Energy Improvement Districts (SID), <http://energizeohio.osu.edu/incentives/property-assessed-clean-energy-pace-financingspecial-energy-improvement-districts-sid>.

<sup>1119</sup> *Id.*

<sup>1120</sup> *Id.*

<sup>1121</sup> Am.Sub.S.B. 232 (2010) includes a provision for aggregating renewable energy credits created by projects within a district. The bill also allows any electricity savings or demand reduction resulting from projects within a district to count towards the electric distribution utility’s compliance under the Energy Efficiency Resource Standard (22% reduction in electricity use by 2026 and peak demand reduction requirements under R.C. 4928.66. This would not include any industrial customers who choose to commit its savings to the utility in exchange for an exemption from the utility’s energy efficiency cost recovery mechanism, as provided by law. The district would have to report to the utility regarding energy projects implemented in the special energy improvement district on a quarterly basis.

BetterBuildings Northwest Ohio is a program that seeks to enable the transformation of energy use and conservation among local businesses in the Toledo area. The program has the goal of achieving at least 20% energy savings per project, with many projects that are whole building retrofits averaging from 30% to 50%. BetterBuildings also has the objective of removing market barriers for businesses to complete energy efficiency projects, the largest of which is the lack of available funding or capital budgets. Its financing programs offer 100% financing of all project costs, with no upfront out-of-pocket expense to the business. Since its inception BetterBuildings has completed 80 buildings with a project value of energy conservation measures (“ECMS”) of over \$30,000,000. The program has become one of the largest and most highly recognized PACE districts in the country.<sup>1122</sup>

The Greater Cincinnati Energy Alliance is a nonprofit organization dedicated to creating energy-related economic development programs to support energy-efficiency and renewable-energy projects. The Energy Alliance, in partnership with the Port of Greater Cincinnati Development Authority, is working with communities throughout Southwest Ohio to implement PACE programs. Commercial property owners across the region have indicated an interest in PACE, and a pipeline of projects is in development.<sup>1123</sup>

### **Coal Research and Development Program**

The Ohio Coal Development Office (housed within ODSA) invests in the development and implementation of technologies that can use Ohio's vast reserves of coal in an economical, environmentally sound manner. The Coal Research Consortium provides grants to research institutions studying mechanisms critical to emissions formation, methods of control, and for uses of coal as a feedstock for other processes.<sup>1124</sup> This includes fundamental research, development, and inquiry that enable the conversion or use of Ohio coal as a fuel or chemical feedstock in an environmentally acceptable manner. Additionally, the Coal Demonstration and Pilot Program issues grants to utility power producers, clean coal technology developers, research and development firms, and universities directed for discovery of new technologies or the demonstration or application of existing technologies that enables the conversion or use of Ohio coal as a fuel or chemical feedstock in an environmentally acceptable manner.<sup>1125</sup>

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<sup>1122</sup> “Improving Buildings Across Northwest Ohio by Financing Energy Efficiency Technology,” [www.toledoportauthority.org/Programs/BetterBuildingsNWO.aspx](http://www.toledoportauthority.org/Programs/BetterBuildingsNWO.aspx).

<sup>1123</sup> Additional information can be found by visiting the Greater Cincinnati Energy Alliance at [www.gcpace.org](http://www.gcpace.org).

<sup>1124</sup> [http://development.ohio.gov/bs/bs\\_ohiocoaldev.htm](http://development.ohio.gov/bs/bs_ohiocoaldev.htm)

<sup>1125</sup> *Id.*

## **Environmental Incentives for Redevelopment and Compliance**

### **Brownfield Development Program**

Much like area PACE programs, funding is also available for revitalization. In many cities, commercial real estate that could be used for development is contaminated or possibly contaminated with hazardous waste. Such sites are known as brownfields. The Revised Code defines brownfields as “abandoned, idled, or under-used industrial, commercial, or institutional property where expansion or redevelopment is complicated by known or potential releases of hazardous substances or petroleum.”<sup>1126</sup> Revitalizing a brownfield can seem daunting and costly. Fortunately, several resources provide funding and expertise throughout the revitalization process.

There are several stages to revitalizing a brownfield. First, the site must be identified, and a plan to address remediation must be developed.<sup>1127</sup> To create a sound remediation plan, it is important to know the intended use of the property.<sup>1128</sup> For example, the clean-up process for an industrial site would be less stringent than that for a residential community.

Next, an environmental site assessment must be performed to determine if the proposed construction site is contaminated.<sup>1129</sup> The Ohio EPA offers several programs for public entities to conduct these assessments at no charge and provide technical assistance on the cleanup process (see below). Environmental Assessments can be very costly, and the costs are generally borne by the prospective purchaser. Assessments are usually conducted in two phases. Phase I assessments range from \$5,000- \$8,000, while Phase II assessments can cost more than \$100,000.<sup>1130</sup>

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<sup>1126</sup> R.C. 122.65(D).

<sup>1127</sup> Ohio Environmental Protection Agency, Ohio Brownfield Redevelopment Toolbox 9, available at <http://epa.ohio.gov/portals/30/SABR/docs/Ohiopercent20Brownfieldpercent20Toolbox.pdf>.

<sup>1128</sup> *Id.* at 10.

<sup>1129</sup> *Id.* at 13.

<sup>1130</sup> *Id.* at 14.

<u>Phase I</u>	<u>Phase II</u>
<ul style="list-style-type: none"> <li>• Operational history of the site;</li> <li>• Site visit;</li> <li>• Interviews;</li> <li>• Assessment under the EPA’s VAP rules.</li> <li>• If inconclusive or identifies contamination, additional assessment must be done.</li> </ul>	<ul style="list-style-type: none"> <li>• Collection and analysis of soil, sediment, ground water, and other samples;</li> <li>• Assessment of contamination levels and risk to human health.<sup>1131</sup></li> </ul>

Large amounts of grant and loan funding are available to subsidize and front the costs associated with these assessments.<sup>1132</sup>

If the site is contaminated, it must be cleaned according to the standards appropriate for the intended use of the property and the type and extent of contamination.<sup>1133</sup> Frequently, cleanup includes “removal or treatment of contaminated soil, capping and/or covering the contaminated area, and cleaning up ground water.”<sup>1134</sup>

Once cleanup is complete and the EPA has certified the cleanup, they will issue a covenant not to sue.<sup>1135</sup> Once this is issued, the EPA assures that they will not sue the current, or any future, property owners for environmental contamination. At this point, the property owner may develop the site.

A variety of resources are available to those contemplating abating a brownfield. Several are detailed below.

- **EPA Targeted Brownfield Assessment**

If a local government believes that a potential construction site could be contaminated, the Ohio EPA offers free targeted brownfield assessments for qualifying public entities. The Site Investigation Field Unit will conduct a property

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<sup>1131</sup> *Id.* at 15–16.

<sup>1132</sup> *Id.* at 13–14.

<sup>1133</sup> *Id.* at 17.

<sup>1134</sup> *Id.* at 18.

<sup>1135</sup> *Id.* at 13.

assessment, which frequently includes a historical review of the sites uses, a site inspection, and soil and groundwater testing.<sup>1136</sup>

- **EPA VAP Technical Assistance**

In addition to the Targeted Brownfield Assessment, the EPA also offers grant-funded technical assistance for voluntary action programs.<sup>1137</sup> EPA employees will provide guidance on brownfield assessment, as well as the cleanup process, should the assessment reveal contamination.<sup>1138</sup>

- **Ohio Brownfield Fund**

ODSA operates the Ohio Brownfield Fund. The fund provides grants and loans that “can be used to help plan, assess, and remediate brownfields throughout the state.”<sup>1139</sup> During the initial evaluation stage, ODSA will provide technical assistance and limited funds to assist developers and property owners plan their site cleanup. As the remediation process progresses, the fund will provide up to \$500,000 in loans to conduct Phase II environmental assessments and up to \$5 million in loans for cleanup. ODSA also assists JobsOhio in carrying out the Revitalization Program.

- **JobsOhio Revitalization Program Loan and Grant Fund**

The JobsOhio Revitalization Program Loan and Grant Fund is designed to support the acceleration of redeveloping sites in Ohio. Primary focus will be placed on projects where the cost of the redevelopment and remediation is more than the value of the land and a site cannot be competitively developed in the current marketplace. Priority will be placed on projects that support near term job creation opportunities for Ohioans.<sup>1140</sup> Typical revitalization projects retain or create at least 20 jobs at the prevailing local wage.<sup>1141</sup> Loans are available up to \$5 million. These loans are often coupled with grants, usually amounting to \$1 million.<sup>1142</sup> One company to benefit from this program is Adena Health System, which will renovate

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<sup>1136</sup> *Id.*; Ohio Environmental Protection Agency, Field Technical Assistance from Ohio EPA, <http://www.epa.ohio.gov/derr/ACRE/sifu/fieldtechasst.aspx>.

<sup>1137</sup> *Supra* not 87, at 11.

<sup>1138</sup> *Id.*

<sup>1139</sup> Ohio Development Services Agency, Ohio Brownfield Fund, [http://development.ohio.gov/cs/cs\\_brownfield.htm](http://development.ohio.gov/cs/cs_brownfield.htm).

<sup>1140</sup> JobsOhio, JobsOhio Revitalization Program Loan and Grant Fund, available at [http://www.jobs-ohio.com/site/assets/files/1126/revite\\_loangrant\\_revised\\_final\\_061614.pdf](http://www.jobs-ohio.com/site/assets/files/1126/revite_loangrant_revised_final_061614.pdf).

<sup>1141</sup> *Id.*

<sup>1142</sup> *Id.*

and move into the historic Carlisle building in Chillicothe, Ohio. The building had been sitting vacant for a number of years.

Additional funding is available from the JobsOhio Revitalization Program during the Phase II Environmental Assessment. If redevelopment of the potentially contaminated site is likely to create or retain jobs, grant funding up to \$200,000 may be available for environmental testing, lab fees, and professional fees.<sup>1143</sup>

- **Abandoned Service Station Fund Program**

Approved by the legislature in July 2015, the Abandoned Service Station Fund Program presents an opportunity for current and former service station sites to obtain financial assistance for the assessment (\$100,000 grants) and cleanup (\$500,000 grants) of old gas station sites throughout the State.<sup>1144</sup> The Program is funded with \$20 million and available to eligible applicants. Applicants must meet three qualifications: (1) they must be a political subdivision; (2) the site must be designated a “Class C” release site; and (3) the site must be public property at the time of cleanup or assessment.<sup>1145</sup> Under the bill, grants may be awarded to a property owner, defined as a county, municipal corporation, township, or port authority or an organization that owns publicly owned lands.<sup>1146</sup> Publicly owned lands include land that is owned by an organization that has entered into a relevant agreement with such a political subdivision.<sup>1147</sup> There are currently 655 known Class C release sites in Ohio.<sup>1148</sup> The Bureau of Underground Storage Tank Regulation (“BUSTR”) is responsible for issuing Class C designations in Ohio.<sup>1149</sup> Cleanup or remediation is any action at a Class C release site to contain, remove, or dispose of petroleum or other hazardous substances or remove underground storage tanks used to store petroleum or other hazardous substances.<sup>1150</sup> Under the program, the Director of Development Services may do either or both of the following: (1) award a grant of not more than \$100,000 to a property owner for a property assessment

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<sup>1143</sup> JobsOhio, JobsOhio Revitalization Program Phase II Assessment Fund, available at [http://www.jobs-ohio.com/site/assets/files/1126/revite\\_phase2\\_revised\\_final\\_061614.pdf](http://www.jobs-ohio.com/site/assets/files/1126/revite_phase2_revised_final_061614.pdf).

<sup>1144</sup> Legislative Service Commission, Am. Sub. H.B. 64 available at <http://www.lsc.ohio.gov/budget/agencyanalyses131/passedsenate/dev.pdf>.

<sup>1145</sup> Ohio EPA, *ODSA Brownfield Program – State of Ohio*, available at <http://epa.ohio.gov/portals/30/sabr/docs/training/workshop/perrysburg/ODSA%20Brownfield%20Program.pptx>.

<sup>1146</sup> Legislative Service Commission, Am. Sub. H.B. 64 available at <http://www.lsc.ohio.gov/budget/agencyanalyses131/passedsenate/dev.pdf>.

<sup>1147</sup> *Id.*

<sup>1148</sup> *Id.*

<sup>1149</sup> *Id.*

<sup>1150</sup> *Id.*

on a Class C release site and (2) award a grant of not more than \$500,000 to a property owner for cleanup or remediation of a Class C release site.<sup>1151</sup> A property owner must use the grant to create a site that provides opportunities for economic impact through redevelopment.<sup>1152</sup>

Each of the foregoing incentives helps bring business and residents back to communities. When used effectively, these incentives and programs can revitalize underutilized areas and structures, leading to greater economic prosperity.

### **Environmental Permitting Assistance Programs**

Many businesses, such as manufacturers, will likely need a permit if their operation discharges pollutants to the air, land, water, or sewers. Under state and federal law, the business owner is responsible for the necessary permits. Ohio businesses have the Ohio EPA as a useful resource. The Ohio EPA works with businesses throughout the permit application process, which starts with a pre-application meeting. For small businesses with less than 100 employees, the Ohio EPA's Office of Compliance Assistance and Pollution Prevention ("OCAPP") can provide free and confidential assistance and can be reached at 1-800-329-7518.

For example, Masco Builder Cabinet Group, a cabinet manufacturer in Jackson, Ohio (Jackson County) generated large quantities of hazardous and solid waste in the form of used solvents, coatings, saw dust, and industrial wastes. Masco saved over \$1.5 million in 2007 and reduced annual emissions by more than 31 million pounds after implementing several process changes suggested by the Ohio EPA.<sup>1153</sup>

Air pollution permits are required for air contaminant sources – generally, anything that emits an air pollutant. The Administrative Code details various air permit exemptions. For example, under OAC 3745:15-05, "de minimis" sources do not require a permit. De minimis sources are those that emit less than ten pounds per day of any air contaminant and less than one ton per year of any hazardous air pollutant or combination of hazardous air pollutants.<sup>1154</sup> Certain sources are considered permanent exemptions,<sup>1155</sup> and a permit-by-rule ("PBR") is a specific provision that applies to certain low-emitting air pollution sources, such as printers.<sup>1156</sup>

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<sup>1151</sup> *Id.*

<sup>1152</sup> *Id.*

<sup>1153</sup> <http://epa.ohio.gov/ocapp/ComplianceAssistanceandPollutionPrevention.aspx#117825903-case-studiesexamples-of-cost-savings>.

<sup>1154</sup> Ohio Adm. Code 3745-15-05(B).

<sup>1155</sup> Ohio Adm. Code 3745:31-03(A)(1).

<sup>1156</sup> Ohio Adm. Code 3745:31-03(A)(4).

Working with the Ohio EPA or OCAPP not only ensures that companies are in compliance with state law but also identifies cost-saving opportunities and measures that help companies stay competitive.

When considering environmental regulations, remember that state-level environmental agencies, like the Ohio EPA, administer the federal regulations that the United States EPA puts in place.<sup>1157</sup> Many environmental statutes “are designed to operate predominantly on the state level and allow or require states to establish and implement their own plans to accomplish a federally mandated objective.”<sup>1158</sup> Consider the Clean Water Act. Under the Clean Water Act, states must sign off on a proposed project that will affect water quality in that state before the federal government issues the required permits and may reject the project if it does not meet the water quality standards determined by the state.<sup>1159</sup>

Because federal law is the “supreme law of the land,” if a state law conflicts with federal law, it is the federal law that applies.<sup>1160</sup> Preemption usually applies in three situations: (1) express preemption (which derives from explicit language contained in a statute), (2) field preemption (when congress ‘completely occupies’ a field and displaces state or local law in the area) or (3) conflict preemption (which arises when it is impossible to comply with both federal and state or local law).<sup>1161</sup> When a state law conflicts with a federal law for any of these three reasons, the federal law will apply.

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<sup>1157</sup> <http://www2.epa.gov/laws-regulations/regulations>.

<sup>1158</sup> <http://www.vslawyers.com/Federal-Preemption-of-State-Environmental-Law.shtml>.

<sup>1159</sup> *Id.*

<sup>1160</sup> Article VI of the United States Constitution

<sup>1161</sup> “It’s Not Easy Being Green”: Local Initiatives, Preemption Problems, And The Market Participant Exception, 78 U. Cin. L. Rev. 835.

**Chapter Ten:**  
**Ohio's Technology Commercialization and Startup Companies**

**Key Points:**

- Technology entrepreneurship typically has a positive impact on economic development.
- Ohio's technology commercialization efforts strive to retain and attract research and development jobs to Ohio and build a new generation of tech startup companies by transforming ideas born on a university campus into global tech companies.
- The Third Frontier Program provides millions of dollars annually to foster early-stage capital access, directly fund early-stage tech startups in targeted industries, and develop a statewide network of support organizations to foster tech company growth at the regional level.
- Ohio is home to a series of business incubators that spawn growing technology companies through affordable office, lab, or manufacturing space, counseling from seasoned business advisors, access to capital, and other common services companies need to grow.

Regions with a concentration of high-tech, entrepreneurial firms are often global economic leaders. From 1990 to 2001, entrepreneurial regions had 125% higher employment growth, 58% higher wage growth, 109% higher productivity, 54% more research and development, 67% more patents, 63% higher percentage of hi-tech establishments, and 42% higher portion of college-educated population than the least entrepreneurial regions.<sup>1162</sup>

One of the ways that Ohio builds an entrepreneurial culture comes from commercializing university research in an effort to take an idea from the research lab and turn it into a successful company. This can be achieved by providing capital access, building an entrepreneurial support system, and developing a tech-oriented workforce. Ohio's tech commercialization efforts are primarily tied to the state's Third Frontier Program and university tech commercialization. Ohio's \$1.6 billion Third Frontier Program has produced economic

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<sup>1162</sup> OECD-Eurostat Entrepreneurship Indicators Programme, *Measuring Entrepreneurship: A Collection of Indicators* (2009 Ed.), <http://www.insme.org/files/3862>.

returns.<sup>1163</sup> Through 2008, Third Frontier expenditures of \$681 million have generated \$6.6 billion of economic activity, 41,300 total jobs, and \$2.4 billion in employee wages and benefits.<sup>1164</sup> Ohio gained nearly a \$10 return on every dollar of the State’s investment from 2003–2008.<sup>1165</sup>

### **University Commercialization**

Commercialization develops an idea into a product or service for commercial sale. Commercialization involves either a single company developing its own idea or several entities collaborating to bring an idea to market. A common collaboration, and one relevant to state government, is that between a state university and a startup company. State universities are “leading catalysts,” driving Ohio’s statewide efforts to promote its innovation economy<sup>1166</sup> with numerous valuable ideas identified through sophisticated high-tech research.<sup>1167</sup> State universities, however, inherently lack the means to develop and manufacture products and thus convert important research into commercial products. Universities will therefore partner with industry to bring ideas to market. In this context, the industry partner is often an early stage or startup company.

State university-startup partnerships directly impact economic growth and the economy. Startups create a significant percentage of new jobs throughout the United States and drive the growth of innovative technology fields, thereby creating wealth.<sup>1168</sup> Improving and increasing collaboration between startups and state universities is a key component to Ohio “compete[ing] successfully in the global innovation economy.”<sup>1169</sup>

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<sup>1163</sup> SRI International, *Making an Impact: Assessing the Benefits of Ohio’s Investment in Technology-Based Economic Development Programs* (Sept. 2009), [http://www.sri.com/sites/default/files/brochures/ohioimpactstudyppt\\_sri\\_final.pdf](http://www.sri.com/sites/default/files/brochures/ohioimpactstudyppt_sri_final.pdf).

<sup>1164</sup> *Id.*

<sup>1165</sup> *Id.*

<sup>1166</sup> See Ohio Board of Regents, *Sixth Report on the Condition of Higher Education in Ohio: Status of Implementation of Strategic Recommendations for Advancing Ohio’s Innovation Economy* 5 (2013), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report\\_FINAL-WEB.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report_FINAL-WEB.pdf).

<sup>1167</sup> See *id.* at 13.

<sup>1168</sup> See, e.g., The White House, Startup America, <http://www.whitehouse.gov/economy/business/startup-america> (“Startups are engines of job creation” that “create the majority of new jobs, in every part of the country and in every industry”).

<sup>1169</sup> See Ohio Board of Regents, *Fifth Report on the Condition of Higher Education in Ohio: Advancing Ohio’s Innovation Economy* 5 (2012), available at [https://www.ohiohighered.org/files/uploads/Commercialization/2012%20Condition%20Report\\_FINAL\\_WEB.pdf](https://www.ohiohighered.org/files/uploads/Commercialization/2012%20Condition%20Report_FINAL_WEB.pdf).

Improving state university-startup collaboration requires addressing some of the critical challenges facing startups.<sup>1170</sup> The foremost challenge is procuring sufficient capital.<sup>1171</sup> Funding is often difficult to obtain after the initial research funding and knowledge creation but before private investors begin providing significant capital. This period of development is known as the “Valley of Death”<sup>1172</sup> and is when a number of startups fail. Startup companies are also challenged by a lack of access to cutting-edge equipment, entrepreneurship expertise, and connections to potential partners.<sup>1173</sup> Another challenge occurs when state universities fail to harmonize license and sponsored research agreements (“SRAs”) statewide. This harmony minimizes unnecessary delays in executing agreements.<sup>1174</sup>

Ohio offers a number of resources to alleviate challenges faced by startups and increase their chances of success. Ohio also offers significant funding opportunities for high tech startups. Ohio has a robust incubator and accelerator system to provide access to equipment, entrepreneurial expertise, and potentially important business connections. Ohio has also taken steps to harmonize license agreements and SRAs and to provide industry partners resources to lessen the cost of negotiating those agreements.

The Revised Code defines, in part, the rights of the university or college and faculty/staff engaged in research. The Revised Code reserves:

all rights to and interests in discoveries, inventions, or patents  
which result from research or investigation conducted in any

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<sup>1170</sup> See Natsheh, Gbadegeshin, Rimpilainen, Imamovic-Tokalic & Zambrano, *Identifying the Challenges in Commercializing High Technology: A Case Study of Quantum Key Distribution Technology*, 5 *Technology Innovation Mgt. Rev.* 26–36 (2015), available at <http://timreview.ca/article/864> (identifying numerous challenges facing startup companies).

<sup>1171</sup> Ohio Board of Regents, *Sixth Report on the Condition of Higher Education in Ohio: Status of Implementation of Strategic Recommendations for Advancing Ohio’s Innovation Economy* 47 (2013), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report\\_FINAL-WEB.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report_FINAL-WEB.pdf) (“Timely access to capital at all stages of the commercialization continuum is vital to ensuring the continuous innovation needed to sustain long-term economic growth and global competitiveness.”)

<sup>1172</sup> See, e.g., Ohio Board of Regents, *Fifth Report on the Condition of Higher Education in Ohio: Advancing Ohio’s Innovation Economy* 14 (2012), available at [https://www.ohiohighered.org/files/uploads/Commercialization/2012%20Condition%20Report\\_FINAL\\_WEB.pdf](https://www.ohiohighered.org/files/uploads/Commercialization/2012%20Condition%20Report_FINAL_WEB.pdf);

Ohio Board of Regents, *Sixth Report on the Condition of Higher Education in Ohio: Status of Implementation of Strategic Recommendations for Advancing Ohio’s Innovation Economy* 47 (2013), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report\\_FINAL-WEB.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report_FINAL-WEB.pdf); Barr, Baker, Markham & Kingon, *Bridging the Valley of Death: Lessons Learned from 14 Years of Commercialization of Technology Education*, 8 *Academy of Mgt. Learning & Edn.* (2009).

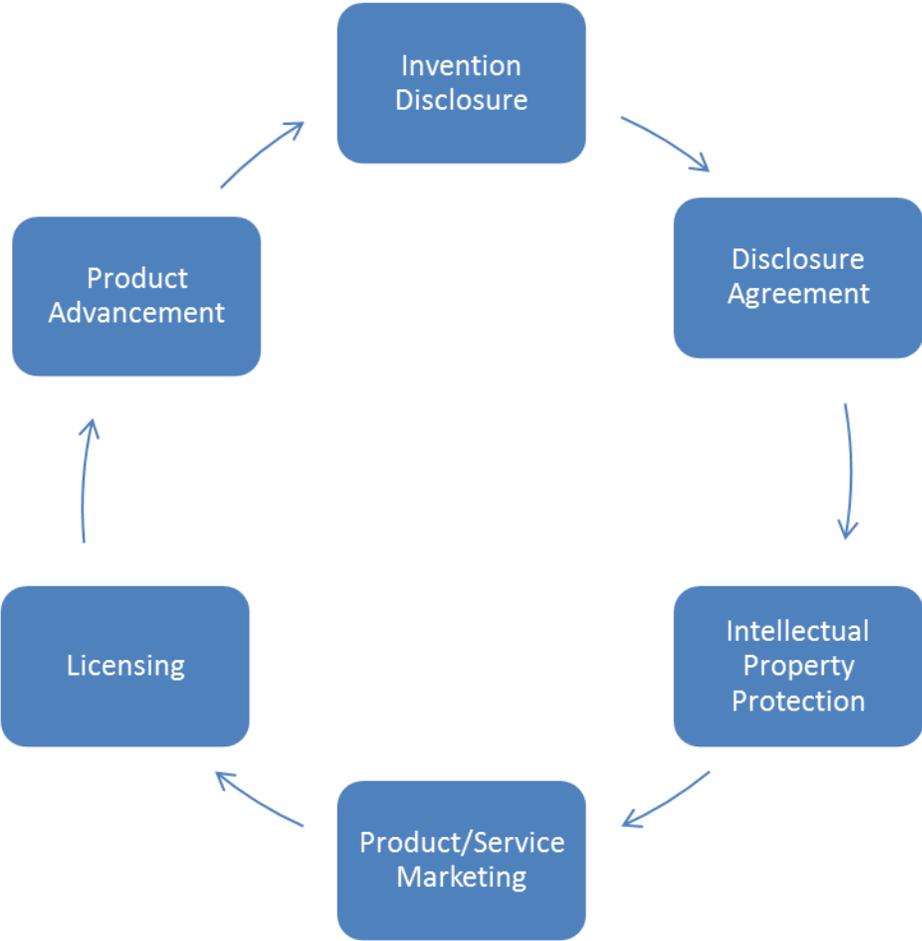
<sup>1173</sup> See Ohio Board of Regents, *Sixth Report on the Condition of Higher Education in Ohio: Status of Implementation of Strategic Recommendations for Advancing Ohio’s Innovation Economy* 42 (2013), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report\\_FINAL-WEB.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report_FINAL-WEB.pdf).

<sup>1174</sup> See *id.* at 37.

experiment station, bureau, laboratory, research facility, or other facility of any state college or university, or by employees of any state college or university acting within the scope of their employment or with funding, equipment, or infrastructure provided by or through any state college or university, shall be the sole property of that college or university.<sup>1175</sup>

Furthermore, state colleges and universities are permitted to adopt a technology-commercialization policy. These institutions have the rights to all income or proceeds gained from the retention, assignment, license, transfer, sale or disposal of the discovery, invention, or patent gained from research commercialized by university/college faculty.<sup>1176</sup>

**University Commercialization Process**



<sup>1175</sup> R.C. 3345.14 (B).

<sup>1176</sup> R.C. 3345.14 (C).

The university-commercialization process varies at each university in Ohio based upon that institution's tech-transfer policy. Generally, Ohio universities commercialize research through a multi-step process that begins with the faculty/staff disclosing the invention to the university. Inventions may include various types of discoveries and technological innovations such as processes, methods, machines, articles of manufacture, devices, chemicals, and compositions of matter.<sup>1177</sup> Following disclosure, the university and faculty/staff may agree on the disclosure; gain intellectual property protection for the invention, discovery, or innovation; and begin the process of developing, marketing, or licensing this invention, discovery, or innovation (see additional discussion below).<sup>1178</sup>

Ohio's universities have commercialized a number of technologies and transformed them into successful companies. Kent Displays, Inc., the maker of Boogie Board writing tablets, offers one such example. Founded in 1993 through a partnership between Kent State University and Manning Ventures, it develops and manufactures Reflex™ liquid crystal displays for unique, sustainable applications.<sup>1179</sup> In October 2008, Kent Displays installed a new roll-to-roll production line in Kent, Ohio to mass produce Reflex LCDs from rolls of plastic. Kent Displays is a university-tech commercialization success story, selling millions of its tablets.<sup>1180</sup>

### **Ohio Third Frontier: Addressing Funding Challenges for Startups**

Ohio provides high-tech startups numerous funding opportunities through the Ohio Third Frontier ("OTF"), a technology-based economic development initiative run by ODSA.<sup>1181</sup> Ohio law specifically dictates that OTF is to coordinate and administer science and technology programs to promote the welfare of the people of Ohio and to maximize the economic growth of Ohio through expansion of high-technology research-and-development capabilities and product-and-process innovation and commercialization.<sup>1182</sup> To accomplish these objectives, OTF finances Ohio technology-based companies, universities, nonprofit research institutions, and other groups through a number of different funding programs.<sup>1183</sup>

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<sup>1177</sup> The Ohio State University, Technology Commercialization Office, <https://tco.osu.edu/tools-resources/invention-disclosure>.

<sup>1178</sup> *Id.*

<sup>1179</sup> See Kent Displays, About Us, <http://www.kentdisplays.com/company/aboutus.php>.

<sup>1180</sup> *Id.*

<sup>1181</sup> Ohio Development Services Agency, Ohio Third Frontier, Innovation Creating Opportunity, [http://development.ohio.gov/bs\\_thirdfrontier/default.htm](http://development.ohio.gov/bs_thirdfrontier/default.htm).

<sup>1182</sup> R.C. 184.01.

<sup>1183</sup> *Id.*

## **Entrepreneurial Signature Program**

The Entrepreneurial Signature Program (“ESP”) provides a network of services and assistance providers to technology-based entrepreneurs and small tech-based companies.<sup>1184</sup> The program provides valuable resources that help startups survive the initial stages of development such as entrepreneurial assistance, access to customers and investors, and access to entrepreneurs-in-residence.<sup>1185</sup>

ESP grants are awarded through specific Ohio business incubators: CincyTech, Accelerant Dayton/Dayton Development Coalition, JumpStart (Cleveland), Ohio University, Rocket Ventures (Toledo), and Rev1 Ventures (Columbus).<sup>1186</sup> The ESP incubators then fund specific Ohio-based “client” startups that need assistance in the “imagining, incubating, or demonstrating” phases of commercialization.<sup>1187</sup> The ESP program works with and through specific incubators to provide startups with capital for surviving the Valley of Death.

## **Technology Validation and Start-Up Fund**

The Technology Validation and Start-up Fund (“TVSF”) is designed to provide support to universities and startups that commercialize state-university technology.<sup>1188</sup> The TVSF provides funding at two different points in the commercialization process. First, the TVSF offers up to \$50,000 for “technology validation.” These funds typically are awarded to state universities so they can generate proof needed to establish that the concept has viable commercial potential.<sup>1189</sup> Second, the TVSF awards up to \$150,000 to startup companies to either move the concept to commercialization or move the development to the stage where additional, private investment funds can be made.<sup>1190</sup> This funding is aimed directly at assisting startups as they traverse the Valley of Death.

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<sup>1184</sup> Ohio Development Services Agency, Ohio Third Frontier, Entrepreneurial Signature Program (ESP), [http://development.ohio.gov/bs\\_thirdfrontier/esp.htm](http://development.ohio.gov/bs_thirdfrontier/esp.htm).

<sup>1185</sup> Ohio Development Services Agency, *Entrepreneurial Signature Program Bidders Conference 7* (July 18, 2014), <https://development.ohio.gov/files/otf/CY2015-16%20ESP%20Bidders%20Conference.pdf>.

<sup>1186</sup> *Id.* at 6.

<sup>1187</sup> Ohio Development Services Agency, *Ohio Third Frontier Entrepreneurial Signature Program: Calendar Years 2015 and 2016 Request for Proposals (RFP)* 5–6, available at <http://development.ohio.gov/files/otf/Entrepreneurial%20Signature%20Program%20RFP.pdf>.

<sup>1188</sup> See Ohio Development Services Agency, *Technology Validation and Start-Up Fund Fact Sheet*, available at [http://development.ohio.gov/files/otf/TVSF\\_Factsheet\\_2015.pdf](http://development.ohio.gov/files/otf/TVSF_Factsheet_2015.pdf).

<sup>1189</sup> See *id.*

<sup>1190</sup> See *id.*

### **Pre-Seed/Seed Plus Fund Capitalization Program**

The Pre-Seed/Seed Plus Fund Capitalization Program (“PFCP”) assists startups by increasing the availability of “risk capital” at all stages of product development.<sup>1191</sup> The PFCP achieves its goal by providing funding through a non-recourse loan to investment groups such as “Angel” investors.<sup>1192</sup> The investment groups commit to meet or exceed a 1:1 cash cost share and invest the capital within three years in Ohio technology-based companies in the “imagining, incubating, or demonstrating” phases of commercialization.<sup>1193</sup> The PFCP works with and through investment groups to provide startups with capital for getting through the Valley of Death.

### **Commercial Acceleration Loan Fund (“CALF”)**

The Commercial Acceleration Loan Fund is a program providing early-stage funding to companies that have already received professional investment.<sup>1194</sup> The CALF program targets companies that are nearing commercialization – companies that have an operating history of at least two years and professional investment.<sup>1195</sup> Thus, the CALF program does not provide simple funding or grants but rather substantial loans ranging in size from \$500,000 to \$2.5 million.<sup>1196</sup>

OTF offers startups a variety of different funding opportunities that can assist their efforts to commercialize a product. Some of these opportunities are aimed at long-term jobs creation (TVSF) while others are focused on near-term jobs creation (CALF). OTF funding must be approved by the Ohio Third Frontier Commission, following the review of the proposal by both business and financial consultants for ODSA. Whether the funding is through an ESP or investment, or directly provided to the startup, funding options are available and should be considered by any technology-based startup.

### **Office of Economic Adjustment: Unique Federal Funding Opportunities**

The Office of Economic Adjustment (“OEA”) is a unique federal program administered by the Department of Defense and designed, in part, to assist state and local communities by engaging the private sector in order to plan and undertake community economic development

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<sup>1191</sup> See Ohio Development Services Agency, *Pre-Seed Fund Capitalization Program 2014: Proposal Evaluation Report 3* (June 2014), available at <http://development.ohio.gov/files/otf/InvGroup%20-%20PFCP%20CY14%20Evaluation%20Report%202014-06.pdf>.

<sup>1192</sup> See *id.*

<sup>1193</sup> See *id.* at 3–4.

<sup>1194</sup> Ohio Development Services Agency, *Commercial Acceleration Loan Fund 1*, available at <http://development.ohio.gov/files/otf/2013%20CALF%20Notice%20of%20Funds.pdf>.

<sup>1195</sup> *Id.* at 2.

<sup>1196</sup> *Id.*

and diversification. The OEA also provides grants to organize and plan economic recovery in response to, e.g., military base closures and realignment of military installations. Because of Ohio's many ties to the military, including Wright Patterson Air Force Base, this program should not be overlooked.

### **Startup Incubator System: Addressing Expertise and Resource Challenges**

Startup incubators are nonprofit organizations dedicated to assisting startup companies in commercializing a product. Incubators typically offer numerous services, including discounted office space, access to entrepreneurial experts such as an “entrepreneur-in-residence,” and access to business connections. Some incubators offer access to costly equipment. These resources can play an important role in promoting the growth of startup companies and are the reason why incubators are a critical part of the commercialization infrastructure.<sup>1197</sup>

#### **Technology Incubators**

Ohio has numerous incubators<sup>1198</sup> to support startups. OTF ESPs, in addition to offering funding opportunities to startups as discussed above, also serve as incubators providing tech-based startups with entrepreneurial support.<sup>1199</sup> ESPs are accessible to high-tech startups in six different regions of Ohio.<sup>1200</sup> Ohio has also funded numerous Edison Technology Center (“ETC”) incubators to promote commercialization. Those incubators include BioEnterprise, the Hamilton County Business Center, Lorain County Community College GLIDE, MAGNET Innovation Center, Ohio University Innovation Center, Youngstown Business Incubator, and several others. Finally, Ohio has a number of other incubators that are not Ohio ESPs or ETCs, but are still members of the National Business Incubation Association, including, for example, the Dublin Entrepreneurial Center.<sup>1201</sup> These incubators serve local and regional startups and provide valuable resources beyond those provided by the State.

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<sup>1197</sup> See Ohio Board of Regents, *Sixth Report on the Condition of Higher Education in Ohio: Status of Implementation of Strategic Recommendations for Advancing Ohio's Innovation Economy* 42 (2013), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report\\_FINAL-WEB.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report_FINAL-WEB.pdf).

<sup>1198</sup> See The International Business Innovation Association, Find a Business Incubator Near You, [http://www2.nbia.org/links\\_to\\_member\\_incubators](http://www2.nbia.org/links_to_member_incubators) (search “Ohio”).

<sup>1199</sup> See Ohio Development Services Agency, Ohio Third Frontier, Entrepreneurial Signature Program (ESP), [http://development.ohio.gov/bs\\_thirdfrontier/esp.htm](http://development.ohio.gov/bs_thirdfrontier/esp.htm).

<sup>1200</sup> See *id.*

<sup>1201</sup> See The International Business Innovation Association, Find a Business Incubator Near You, [http://www2.nbia.org/links\\_to\\_member\\_incubators](http://www2.nbia.org/links_to_member_incubators) (search “Ohio”).

Ohio also has ETCs that are dedicated to providing resources and guidance to startups and other companies in specific technology fields.<sup>1202</sup> These ETCs typically do not offer space to startups but rather offer access to costly equipment in a specialized technology area and resources to link startups with other companies in the technology area, including, for example, potential supply chain partners. ETCs include BioOhio (biotechnology),<sup>1203</sup> PolymerOhio (polymers),<sup>1204</sup> Edison Welding Institute (materials joining),<sup>1205</sup> and TechSolve (process improvement).<sup>1206</sup>

Ohio benefits from a number of successful technology incubators all across the state. Southeast Ohio's Innovation Center provides business incubation resources to fuel the Athens, Ohio economy.<sup>1207</sup> Created in 1983, the Ohio University Innovation Center was the first university-based business incubator in Ohio and the 12th nationwide.<sup>1208</sup> The current 36,000-square-foot facility, which opened in 2003, hosts 19 prospering member companies and provides resources to member companies that include flexible office space, labs, and meeting space; access to business coaches and other professionals; shared access to conferencing and office technology.<sup>1209</sup> Ohio University's Innovation Center is also a job producer. Nearly 140 jobs and over \$6 million in labor income are tied to the Innovation Center.<sup>1210</sup>

In sum, Ohio has an incubator system and infrastructure that offers startups resources by region and technology field. Startups should consider taking advantage of these resources to increase their likelihood of successfully bringing a product to market.

### **Building Research Parks**

Research parks are land-use developments where land and buildings house public and private research-oriented organizations and technology. Universities and private-sector organizations operate research parks, and they are often known as 21st Century versions of the 20th Century industrial park. But research parks provide additional services beyond traditional

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<sup>1202</sup> See Ohio Board of Regents, *Sixth Report on the Condition of Higher Education in Ohio: Status of Implementation of Strategic Recommendations for Advancing Ohio's Innovation Economy* 42–43 (2013), available at [https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report\\_FINAL-WEB.pdf](https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/board/condition-report/2013-Condition-Report_FINAL-WEB.pdf).

<sup>1203</sup> See BioOhio, About, <http://www.bioohio.com/about>.

<sup>1204</sup> See PolymerOhio, Who We Are, <http://polymerohio.org/polymerohio>.

<sup>1205</sup> See EWI, [www.ewi.org](http://www.ewi.org).

<sup>1206</sup> See TechSolve, About Us, <https://www.techsolve.org/corporate/about-us>.

<sup>1207</sup> See Ohio University, About the Ohio University Innovation Center, <https://www.ohio.edu/research/innovation/history.cfm>.

<sup>1208</sup> *Id.*

<sup>1209</sup> *Id.*

<sup>1210</sup> Jolley, The 2014 Economic Analysis of Ohio University Innovation Center 1 (March 3, 2015), available at <https://www.ohio.edu/research/innovation/upload/2014-Economic-Impact-of-Innovation-Center.pdf>.

industrial park developments. Research parks can add real estate and business support services tied to university-tech-transfer operations. By linking high-tech companies with support services and university faculty, staff, and students, research parks foster commercialization and often recruit larger tech companies. Ohio’s Battelle Memorial Institute identified the key elements of successful university research parks.

**Battelle’s University Research Park Benchmarks for Success<sup>1211</sup>**

<b>Research Park Aspect</b>	<b>National Benchmark</b>
Capital Access	Company venture capital access
Employment	750 employees
Financing	Under \$1,000,000 budget park revenue, local, state & federal sources
Governance	Managed by university or university affiliated non-profit
Infrastructure	Roads, water, sewer and fiber optics available
Land Use Planning	Master Plan developed for average 114 acre site
Major Voice	Local leadership promoting park
Mission	Tech commercialization and attracting major technology tenants
Research University	Link to a research university
Services	Access to state funding programs, business planning and marketing advice and technology/market assessment
Tax Incentives	Tax incentives to recruit companies
Tech Transfer	Connect to university faculty tech commercialization program
Workforce	STEM workforce pipeline to park tenants

The Ohio State University BioHio Research Park in rural Wooster, Ohio offers one model for research park development. The BioHio Research Park is geared toward agbioscience

<sup>1211</sup> Battelle Technology Partnership Practice, *Characteristics and Trends in North American Research Parks: 21st Century Directions* (Oct. 2007), available at <http://www.aurp.net/assets/documents/FinalBattelle.pdf>.

technology commercialization and supports tenant companies, clients, and the community.<sup>1212</sup> They provide office and lab space and a connection to the Ohio State University’s College of Agriculture.<sup>1213</sup> BioHio Research Park’s 95-acre site was developed with state and federal funding support for critical infrastructure. Ohio provided more than \$3 million to fund the road and utilities. This funding was matched by city of Wooster funding that was needed to develop the required site infrastructure.<sup>1214</sup> A U.S. Department of Commerce, Economic Development Administration grant connected with a local match provided nearly \$2 million to prepare a master plan for the BioHio Research Park.<sup>1215</sup>

### **The Ohio Attorney General: Addressing Transactional Challenges**

Ohio provides numerous resources to assist partnerships between industry and state universities, making the process more transparent and leading to cost savings. The Attorney General’s Office (“AGO”) provides a Commercialization webpage describing the various types of agreements common to an industry partnership with a state university and provides template forms of these agreements. The template agreements serve both to harmonize agreements statewide among universities and to minimize legal costs by providing industry partners with a good sense of what an agreement with a state university should look like. The AGO has also identified several “essential” terms an industry partner will encounter in these agreements and explains why state universities include those terms. These essential terms, and the legal basis behind them, can expedite the negotiation process by avoiding wasted resources negotiating terms to which state universities are very unlikely to acquiesce.

#### **Agreements**

An Industry-University relationship involves one or more of the following types of agreements: non-disclosure (“NDA”), sponsored research (“SRA”), intellectual property license (“IP License”), and experimental testing (“ETA”).

The first formal step of the commercialization process typically involves a mutual NDA. The NDA facilitates the university-industry relationship by allowing the state university and industry partner to share confidential information without fear of disclosure. The AGO, Ohio Department of Higher Education (“ODHE”), and various Ohio technology transfer officers have

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<sup>1212</sup> See BioHio Research Park, About Us, <http://biohioresearchpark.org/about-us>.

<sup>1213</sup> *Id.*

<sup>1214</sup> See Ohio Development Services Agency, Business/Job Ready Sites, BioHio Research Park, [http://development.ohio.gov/redev/JRS\\_biohio.htm](http://development.ohio.gov/redev/JRS_biohio.htm).

<sup>1215</sup> See Espinoza, *BioHio Research Park Receives Grant for Master Plan, Selects Consultants for Development*, The Ohio State Univ. New Releases (Oct. 28, 2013), <http://cfaes.osu.edu/news/articles/biohio-research-park-receives-grant-for-master-plan-selects-consultants-for>.

developed a template mutual NDA that is approved by the AGO. A copy of the template is available online at the AGO's Commercialization Webpage.<sup>1216</sup>

Once an NDA is in place, the parties can proceed with the substantive agreement that best fits the anticipated relationship. An SRA is typically used when an industry partner wishes to partner with a state university for research purposes in an area of commercial interest to the industry partner. An IP License is used when the industry partner desires to commercialize university discoveries. An ETA is typically used when an industry partner wishes to have a university conduct tests on materials or products developed by the industry partner.

The AGO, ODHE, and various Ohio technology transfer officers developed a template SRA and a template ETA. The AGO also developed a model IP License and a document explaining the "anatomy" of an IP License with a state university by identifying key provisions typically found in an IP License, explaining the purpose of those provisions and providing template language for each identified provision. Copies of the template SRA and ETA and the IP License documents are available online at the AGO's Commercialization Webpage.<sup>1217</sup>

The template agreements can serve as a useful starting point for negotiations between an industry partner and university. Typically, the parties will modify the template agreements to address the specific circumstances of the relationship. Some universities will opt to use their own template agreements as a baseline. Those template agreements should not differ materially from the above agreements. In this scenario, the industry partner can compare the university's baseline template to the relevant template agreements provided by the AGO.

### **Essential Terms**

Agreements with state universities will include certain "essential" terms that are either non-negotiable or strongly preferred terms for legal or university policy reasons. Understanding what terms are "essential" can expedite the negotiation process by minimizing negotiation over these terms and allowing the parties to focus on critical business terms. The Attorney General has identified more than a dozen essential terms on its Commercialization Webpage, with explanations as to why those terms are essential.<sup>1218</sup> The essential terms include biennium, certification of funds, indemnification, arbitration, choice of law, confidentiality, sovereign immunity, legal representation and settlement authority, independent contractor status, and limitations on damages for State universities. Below are several other terms that typically arise only in the context of commercialization agreements.

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<sup>1216</sup> Ohio Attorney General, Technology Transfer and Commercialization, <http://www.ohioattorneygeneral.gov/Business/Services-for-Business/Commercialization>.

<sup>1217</sup> *Id.*

<sup>1218</sup> *Id.*

## (1) Use of University Facilities: Initial Ownership and Tax Implications

Ohio law specifies that state universities in Ohio own all rights to and interests in any inventions resulting from work performed (1) at a facility of the university; (2) by a state university employee acting within the scope of their employment; or (3) with funding, equipment, or infrastructure provided by or through the university.<sup>1219</sup> A state university can waive its ownership rights under this statutory provision, but the statutory provision is the default. An industry partner that is, for example, either using state university facilities to perform its own testing or leasing space from a state university needs to understand Ohio law governing IP ownership. State universities will typically agree to reasonable terms.

State universities routinely finance new facilities with tax-exempt bonds (“Supported Facilities”). To maintain the tax-exempt status of those bonds, a university must avoid “private business use” of the Supported Facilities.<sup>1220</sup> But sponsored research agreements can result in private business use unless the agreement falls within the “safe harbor” provided by the IRS.<sup>1221</sup> For corporate-sponsored research, the IRS safe harbor allows the university to license the technology at a competitive price determined at the time either the license or resulting technology is available for use.<sup>1222</sup> For an industry or federally sponsored research agreement, the IRS safe harbor entitles the sponsors to no more than a non-exclusive, royalty-free license to use the product of any research.<sup>1223</sup> Accordingly, state universities will limit the scope of the license grant to conform to IRS regulations when Supported Facilities are used to perform sponsored research.

## (2) Bayh-Dole

State university inventions are frequently made using funds from the federal government. These funds may be grants from, for example, the National Institute of Health or the Department of Defense. Those “federally-funded inventions” are governed by the Bayh-Dole Act.<sup>1224</sup> The requirements of Bayh-Dole Act may impact university-industry agreements in several ways.

State universities are permitted to own federally funded inventions.<sup>1225</sup> But they may not assign their ownership in these inventions to third parties without the approval of the

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<sup>1219</sup> See R.C. 3345.14(B).

<sup>1220</sup> Private Business Use determinations are a complicated tax and business analysis, and bond lawyers should be consulted when making determinations regarding private business use.

<sup>1221</sup> See IRS Revenue Procedure 2007-47, available at [http://www.irs.gov/irb/2007-29\\_IRB/ar12.html](http://www.irs.gov/irb/2007-29_IRB/ar12.html).

<sup>1222</sup> See *id.* at 6.02.

<sup>1223</sup> See *id.* at 6.03(4).

<sup>1224</sup> See 35 U.S.C. 200–212.

<sup>1225</sup> See 35 U.S.C. 202(a).

funding agency.<sup>1226</sup> Thus, a state university is typically unable to assign federally funded inventions as part of a university-industry agreement.

The Bayh-Dole Act requires state universities and their licensees of federally funded inventions to take “effective steps to achieve practical application of the subject invention” or risk losing certain rights to those inventions.<sup>1227</sup> State universities will therefore require licensees of federally funded inventions to achieve milestones to ensure progress toward commercialization. Milestones are negotiable and dependent on the circumstances of the agreement and technology.

Finally, the Bayh-Dole Act provides that if the state university takes title in any invention, “the Federal agency shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any subject invention throughout the world . . . .”<sup>1228</sup> A patent license from a state university may include a provision informing licensee that the federal government may have certain rights in the licensed patent under the Bayh-Dole Act.

### (3) Export Control: Compliance and Publication Rights

Federal law includes a number of laws and regulations governing the export of products, including the Export Administration Regulations (“EAR”),<sup>1229</sup> which implement the Export Administration Act, and the International Traffic in Arms Regulations (“ITAR”),<sup>1230</sup> which implement provisions of the Arms Export Control Act<sup>1231</sup> (collectively “Export Control Laws”).

Export Control Laws impose significant penalties for violations, including civil penalties up to \$500,000 per incident and criminal fines and imprisonment for willful violations. A state university will therefore include a provision in the agreement that requires the Licensee to comply with all applicable Export Control Laws.

Export Control Laws also affect whether state universities will grant certain “prepublication” rights to an industry partner, such as abstaining from publication or allowing the sponsor to withhold results from publication. University research is often subject to Export Control Laws because the research is done, in part, by a foreign student. The EAR, for example, prohibits export activities that include the “release of technology or source code subject to the

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<sup>1226</sup> See 35 U.S.C. 202(c)(7)(A).

<sup>1227</sup> See 35 U.S.C. 203(a)(1).

<sup>1228</sup> See 35 U.S.C. 202(c)(4).

<sup>1229</sup> See 15 C.F.R. 730.

<sup>1230</sup> See 22 C.F.R. 120.

<sup>1231</sup> See 22 C.F.R. 120.1(a).

EAR to a foreign national.”<sup>1232</sup> A state university potentially engages in export subject to the EAR if that university provides technology or source code to a foreign graduate student.<sup>1233</sup>

The EAR, however, provides a safe harbor to state universities. Information resulting from “fundamental research” is not subject to the EAR (“Fundamental Research Exclusion”).<sup>1234</sup> In defining “fundamental research,” the EAR focuses on publication and prepublication rights. First, fundamental research is defined as “basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community.”<sup>1235</sup> Industry prepublication review affects whether the information is “ordinarily published and shared broadly within the scientific community” and is therefore fundamental research.<sup>1236</sup> Generally, prepublication review rights will cause the research to fall outside of the Fundamental Research Exclusion. Limited exceptions exist when the prepublication review is to ensure that publication will not (1) divulge proprietary information that the sponsor has furnished to the researchers; or (2) compromise patent rights.<sup>1237</sup> Any other prepublication review rights will likely cause the research to fall outside of the “fundamental research” definition and potentially subject that research to the EAR.<sup>1238</sup>

Accordingly, to qualify for the Fundamental Research Exclusion, state universities will rarely grant sponsors prepublication review rights beyond those permitted by the EAR. Private universities are likely to opt for the same approach because the Fundamental Research Exclusion is not limited to state universities but rather applies to “any accredited institution of higher education located in the United States.”<sup>1239</sup> The typical publication provision is found in the template SRA<sup>1240</sup>. It requires notice to the industry partner or “Sponsor” of an intent to publish, a 30-day period for the Sponsor to review for patent concerns (known as a “notice period”), and then an additional 60-day delay in submission to allow for the Sponsor to adequately address those patent concerns (known as a “delay period”). The template SRA provides the Sponsor 90 days to draft and file a patent application that preserves the novelty of

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<sup>1232</sup> 15 C.F.R. 734.2(b)(2)(ii).

<sup>1233</sup> *See id.*

<sup>1234</sup> *See* 15 C.F.R. 734.3(b)(3)(ii).

<sup>1235</sup> 15 C.F.R. 734.8(a). The ITAR define fundamental research using the same language. *See* 22 C.F.R. 120.11(a)(8).

<sup>1236</sup> *See* 15 C.F.R. 734.8(b)(2)–(6).

<sup>1237</sup> *See id.*

<sup>1238</sup> The ITAR provides that University research is not fundamental research if “the University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity.” 22 C.F.R. 120.11(a)(8)(i). Unlike the EAR, the ITAR does not explicitly allow prepublication review to assess disclosure of sponsor proprietary information or preserve patent rights. Thus, an agreement within the scope of the ITAR may have narrower prepublication rights than an agreement only within the scope of the EAR.

<sup>1239</sup> 15 C.F.R. 734.8(b)(1).

<sup>1240</sup> *See* Ohio Attorney General, Technology Transfer and Commercialization, Sponsored Research and License Agreements, [http://www.ohioattorneygeneral.gov/Business/Commercialization#Sponsored\\_Research](http://www.ohioattorneygeneral.gov/Business/Commercialization#Sponsored_Research).

any invention disclosed in the publication or to negotiate with the authors' alternative language that does not disclose the Sponsor's IP.

Startups should consult the Attorney General's Commercialization Webpage when negotiating agreements with state universities. The resources provided should help to minimize costs by providing baseline agreements and terms that allow the startup and state university to focus negotiations on key business terms.

**Chapter Eleven:**  
**Ohio's Competitiveness in the Global Market**

**Key Points:**

- Regions and states that export goods and services and attract global investment gain jobs that pay higher-than-average salaries.
- Ohio maintains programs to help companies succeed in the global marketplace as well as to recruit global investment in the State.
- Ohio promotes exports among its companies through the International Trade Assistance Centers (“ITAC”) that have a statewide network of regionally operated organizations working with companies to promote export success, as well as targeted state funding for companies to participate in global market events.
- Ohio promotes global investment with resources that have been provided to prepare sites for large-scale, global manufacturing investments and tax abatements provided through select Foreign Trade Zones.
- Businesses must clearly understand the process for developing a global workforce through the immigration and worker visa program.

Seventy percent of the world’s customers are outside of the United States. Access to these markets is important for the Ohio economy.<sup>1241</sup> Americans working for firms that export earn, on average, more than 15% more than workers that do not export, and exports support more than a third of America’s manufacturing jobs.<sup>1242</sup>

**Exports**

Ohio’s geographic location in the United States offers direct access to markets in the Midwest, South, East Coast, and Canada. Transportation options are abundant, including access to eight major highways, more than 5,000 miles of railroad track, five international airports, and nine commercial shipping ports on Lake Erie and other terminals on the Ohio River, making

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<sup>1241</sup> See International Trade Administration, *Exporting Is Good for Your Bottom Line*, <http://trade.gov/cs/factsheet.asp>.

<sup>1242</sup> U.S. Department of Commerce, 2010 National Export Strategy.

Ohio a prime spot for businesses to compete in the global marketplace.<sup>1243</sup> According to a 2010 report by the Brookings Institution, exporting is essential to promoting economic growth in Ohio.<sup>1244</sup> Typically, businesses that export goods or services not only see an increase in production and sales but also tend to have larger workforces, offer better benefits and pay, and help spark innovation and productivity for nearby businesses.<sup>1245</sup>

According to the Ohio Exports Report for 2014, issued by the ODSA, Ohio was the 9th largest state for exporting, and goods were sent to 216 countries and territories.<sup>1246</sup> Merchandise exports were valued at \$52.1 billion, up 2.6% from 2013.<sup>1247</sup> Top merchandise exports included transportation equipment, machinery, chemicals, primary metal manufactures, and fabricated metal products.<sup>1248</sup> The United States has free trade agreements with 20 countries,<sup>1249</sup> and is part of approximately 40 bilateral treaties.<sup>1250</sup> Approximately 58% (\$30.5 billion) of all exports from Ohio in 2014 were exported to free trade agreement partners.<sup>1251</sup> In 2014, Ohio's largest export markets were to Canada, Mexico, China, United Kingdom, and Germany.<sup>1252</sup>

Exporting and importing are subject to federal laws and regulations, including licenses, taxes, duty fees, trade barriers, economic and trade sanctions, and the laws of countries where goods will be imported to or exported from. Import and export laws and regulations vary depending on the type of goods to be imported or exported. Businesses must contact federal, state, and local government agencies with authority over the good to be imported or exported for specific information on the regulatory, permit, and licensing requirements. Licensed customs brokers can help companies prepare the documentation required to import goods, and

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<sup>1243</sup> JobsOhio, *Ohio Overview: Learn Why Ohio Is the Top Location for Your Business*, available at [http://jobs-ohio.com/images/Ohio-Overview\\_Final.pdf](http://jobs-ohio.com/images/Ohio-Overview_Final.pdf).

<sup>1244</sup> The Brookings Institution, *Restoring Prosperity: Transforming Ohio's Communities for the Next Economy 4* (Feb. 22, 2010), available at <http://www.brookings.edu/research/reports/2010/02/22-ohio-prosperity>.

<sup>1245</sup> *Id.*

<sup>1246</sup> Ohio Development Services Agency, *Ohio Exports Report: 2014* (March 2015), available at <http://development.ohio.gov/files/research/B2004.pdf>.

<sup>1247</sup> *Id.*

<sup>1248</sup> International Trade Administration, *Ohio Exports, Jobs, and Foreign Investment 2*, available at <http://www.trade.gov/mas/ian/statereports/states/oh.pdf>.

<sup>1249</sup> Office of the United States Trade Representative, Free Trade Agreements, <http://ustr.gov/trade-agreements/free-trade-agreements>.

<sup>1250</sup> U.S. Department of State, United States Bilateral Investment Treaties, <http://www.state.gov/e/eb/afd/bit/117402.htm>.

<sup>1251</sup> International Trade Administration, *Ohio Exports, Jobs, and Foreign Investment 2*, available at <http://www.trade.gov/mas/ian/statereports/states/oh.pdf>.

<sup>1252</sup> *Id.*

freight forwarders can help companies prepare for exporting goods.<sup>1253</sup> Many state programs are also available to assist Ohio businesses navigating compliance with the federal laws and regulations.

The following resources provide additional information, assistance, and counseling services on exporting:

- Ohio Development Services Agency, Export Assistance ([http://development.ohio.gov/bs/bs\\_globalohio.htm](http://development.ohio.gov/bs/bs_globalohio.htm))
- Ohio Development Services Agency, Small Business Development Centers ([www.ohiosbdc.ohio.gov](http://www.ohiosbdc.ohio.gov))
- U.S. Small Business Administration (<http://www.sba.gov>)
- U.S. Commercial Service, U.S. Export Assistance Center (<http://www.trade.gov/cs>)
- A Basic Guide to Exporting, U.S. Department of Commerce ([http://export.gov/basicguide/eg\\_main\\_017243.asp](http://export.gov/basicguide/eg_main_017243.asp))
- U.S. Department of Commerce, International Trade Administration (<http://www.ita.doc.gov>)
- U.S. Department of Treasury, Office of Foreign Assets Control, Financial Sanctions (<http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>)

### **ODSA Support for Export Growth**

Small Business Development Centers across Ohio provide free export counseling and education to Ohio businesses.<sup>1254</sup> International trade specialists provide counseling in areas such as export compliance, international business plans, export readiness, and financing.<sup>1255</sup> International trade specialists are located at select Small Business Development Centers in Toledo, Cleveland, Akron, Youngstown, Dayton, Columbus, and Piketon.<sup>1256</sup> The Small Business

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<sup>1253</sup> Beesley, *Selling Imported Goods Within the U.S.: Get Started with This Small Business Checklist* (March 3, 2014), available at <http://www.sba.gov/blogs/selling-imported-goods-within-us-get-started-small-business-checklist>.

<sup>1254</sup> See Ohio Development Services Agency, [http://development.ohio.gov/bs/bs\\_globalohio\\_ece.htm](http://development.ohio.gov/bs/bs_globalohio_ece.htm).

<sup>1255</sup> *Id.*

<sup>1256</sup> See Ohio Small Business Development Centers, Export Assistance, <http://development.ohio.gov/files/bs/exportmap10062015.pdf>.

Development Center program is partly funded by ODSA and the U.S. Small Business Administration.<sup>1257</sup>

ODSA provides assistance and resources to help Ohio businesses expand into international markets. Financial assistance includes the Ohio International Market Access Grant for Exporters (“IMAGE”), funded by Ohio and the U.S. Small Business Administration, which offers financial assistance to small businesses to promote products and services in international markets.

When the Muth Lumber Company wanted to expand its domestic lumber business abroad, they applied for and received an IMAGE grant to help cover the costs to attend international trade shows.<sup>1258</sup> The company’s international marketing efforts led to an increase in sales and an opportunity to hire more employees. Wiseco Performance Products received export counseling to develop an export compliance system, and as a result, the company’s profits increased 20% from international sales.<sup>1259</sup> Matrix Seafood also received assistance from international trade specialists to help with international marketing and importing compliance, which led to job creation and increased profits.<sup>1260</sup>

Other financial assistance opportunities include the Ohio Appalachia Export Grant (“AEG”), which is funded by the Ohio Development Services Agency, and the Appalachian Regional Commission, which support small businesses in Appalachia seeking to promote their business outside of the U.S. In addition, ODSA sponsors the Ohio Export Internship Program with The Ohio State University and Youngstown State University, which connects businesses newly engaged in exporting with business students.<sup>1261</sup>

### **Foreign Direct Investment**

In addition to exporting goods and services to international markets, foreign-owned businesses also choose Ohio as a location to conduct operations in the United States. In Ohio,

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<sup>1257</sup> *Id.*

<sup>1258</sup> Ohio Development Services Agency, *International Trade Assistance Center (ITAC) Success Story: Muth Lumber*, available at [http://development.ohio.gov/files/bs/success\\_muth2014.pdf](http://development.ohio.gov/files/bs/success_muth2014.pdf).

<sup>1259</sup> Ohio Development Services Agency, *International Trade Assistance Center (ITAC) Success Story: Wiseco Performance Products*, available at [http://development.ohio.gov/files/bs/success\\_wiesco2014.pdf](http://development.ohio.gov/files/bs/success_wiesco2014.pdf).

<sup>1260</sup> Ohio Development Services Agency, *International Trade Assistance Center (ITAC) Success Story: Matrix Seafood*, available at [http://development.ohio.gov/files/bs/success\\_matrixsea2014.pdf](http://development.ohio.gov/files/bs/success_matrixsea2014.pdf).

<sup>1261</sup> Ohio Development Services Agency, Business/Entrepreneurship and Business Assistance Centers, Ohio Export Internship Program, [http://development.ohio.gov/bs/bs\\_oxip.htm](http://development.ohio.gov/bs/bs_oxip.htm).

the majority of foreign direct investment comes from Japan, the United Kingdom, Germany, and Canada. In 2012, 224,000 Ohioans were employed by foreign-controlled companies.<sup>1262</sup>

For example, one of the largest foreign-controlled businesses in Ohio is the Japanese car manufacturer Honda, which employs more than 9,000 people.<sup>1263</sup> Honda operates 11 facilities across Ohio, with its main plant in Marysville, Ohio.<sup>1264</sup> Honda has exported more than \$22 billion worth of automobiles and parts from the U.S. to international markets.<sup>1265</sup> Honda's presence in Ohio is important not only to the thousands of Ohioans it employs but also to the economic growth of other Ohio businesses. Honda has purchased billions of dollars in parts from Ohio-based suppliers.<sup>1266</sup> Borgers USA Corporation, an automotive supplier with headquarters in Germany, opened a new facility in Norwalk, Ohio in October 2015.<sup>1267</sup> The new factory is expected to create approximately 230 jobs by 2020.<sup>1268</sup> This is the company's second facility in the United States.<sup>1269</sup>

### **JobsOhio Support for Foreign Direct Investment**

As discussed in Chapter 2, JobsOhio is a private, non-profit economic development organization aimed at bringing new businesses to Ohio.<sup>1270</sup> JobsOhio works with both domestic and international companies to assist businesses to relocate and expand in Ohio. As part of its efforts to promote foreign direct investment in Ohio, JobsOhio has overseas representatives located in Germany, Japan, China, and Canada.

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<sup>1262</sup> International Trade Administration, *Ohio Exports, Jobs, and Foreign Investment 1*, available at <http://www.trade.gov/mas/ian/statereports/states/oh.pdf>.

<sup>1263</sup> Union County Chamber of Commerce, Union County: An Automotive Powerhouse, <http://www.unioncounty.org/economic-development/automotive>; Ohio Department of Development, *International Corporate Investment in Ohio Operations* (July 2012), available at <http://jobs-ohio.com/images/ohio-international-corporate-investment.pdf>.

<sup>1264</sup> Honda of America Manufacturing, Inc., 2014 Fact Book, *A Driving Force in Ohio*, available at <http://ohio.honda.com/2014-fact-brochure>.

<sup>1265</sup> Honda of America Manufacturing, Inc., Our Story, <http://ohio.honda.com/our-story>.

<sup>1266</sup> Honda of America Manufacturing, Inc., 2014 Fact Book, *A Driving Force in Ohio*, available at <http://ohio.honda.com/2014-fact-brochure>.

<sup>1267</sup> Seitz, *Borgers Begins Production*, Norwalk Reflector (October 15, 2015), available at <http://www.norwalkreflector.com/Local/2015/10/14/Borgers-begins-production.html?ci=stream&lp=1>.

<sup>1268</sup> Seitz, *Borgers Is Incredible Victory for Norwalk*, Norwalk Reflector (July 5, 2015), available at <http://www.norwalkreflector.com/article/news/7610591>; Select USA, *Foreign Direct Investment into Ohio*, available at <http://selectusa.commerce.gov/state-fact-sheets/2015-03-16%20FDI%20State%20Fact%20Sheet%20-%20Ohio.pdf>.

<sup>1269</sup> *Id.*

<sup>1270</sup> JobsOhio, <http://jobs-ohio.com/about/>.

JobsOhio provides an interactive site selection tool to help companies find the best location in Ohio based on their business needs.<sup>1271</sup> The site selection tool provides demographic, economic, geographic, and other data of available properties and the surrounding area.<sup>1272</sup>

JobsOhio worked with Fuyao Group, a Chinese based company, to open a facility in Ohio. Fuyao Group has invested approximately \$300 million into Fuyao Glass America Inc.'s auto glass production plant in Moraine, Ohio.<sup>1273</sup> The company is expected to employ approximately 1,550 people by 2020.<sup>1274</sup>

### **JobsOhio Network**

The JobsOhio Network is the State's primary sales force when it comes to promoting global investment. Working closely with JobsOhio, regional economic development groups have staff devoted full time to promoting global development in their region. This team of economic development professionals travels regularly to global markets to promote Foreign Direct Investment in Ohio. This team also coordinates regional trade missions to bring area companies to global markets to promote business opportunities.

Columbus 2020, partnered with the Brookings Institution and JP Morgan Chase, to develop a comprehensive export strategy for Central Ohio companies.<sup>1275</sup> Columbus 2020 and other economic development leaders in the state recognize that companies that export pay higher wages and are often more profitable.

### **Foreign Trade Zones**

Companies looking to reduce the cost of doing business and remain competitive in the global marketplace may benefit from operating in one of the Foreign Trade Zones ("FTZ") located in Ohio. FTZs are areas within the United States that are in or adjacent to U.S. ports of entry.<sup>1276</sup> FTZs are federally regulated by the U.S. Foreign-Trade Zones Board and under the

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<sup>1271</sup> JobsOhio, Site Selection Tool, <http://jobs-ohio.com/site-selection/>.

<sup>1272</sup> *Id.*

<sup>1273</sup> Gnau, *Moraine Plant to be World's Top Auto Glass Producer*, Dayton Daily News (July 23, 2015), available at [http://www.mydaytondailynews.com/news/news/moraine-plant-to-be-worlds-top-auto-glass-producer/nm5dq/?icmp=daytondaily\\_internallink\\_textlink\\_apr2013\\_daytondailystubtomydaytondaily\\_launch#1dfb65ab.4007873.735803](http://www.mydaytondailynews.com/news/news/moraine-plant-to-be-worlds-top-auto-glass-producer/nm5dq/?icmp=daytondaily_internallink_textlink_apr2013_daytondailystubtomydaytondaily_launch#1dfb65ab.4007873.735803).

<sup>1274</sup> *Id.*

<sup>1275</sup> See The Columbus Region, Columbus Global Connect, <http://columbusregion.com/Sectors-Industries/International-Business/columbusglobalconnect.aspx>.

<sup>1276</sup> 19 U.S.C. 81b; 15 C.F.R. 400.11.

supervision of U.S. Customs and Border Protection (“CBP”).<sup>1277</sup> FTZs are established, operated, and maintained by FTZ grantees.<sup>1278</sup> Under Ohio law, port authorities have the power to establish, operate, and maintain FTZs; corporations can also be created for this purpose.<sup>1279</sup>

Companies designated with FTZ status are allowed delayed or reduced duty payments on foreign merchandise, thereby helping U.S. companies remain competitive in the global marketplace. Foreign goods may be imported into a FTZ without going through the formal CBP entry procedures.<sup>1280</sup> Customs duties are not required until the goods leave the FTZ for domestic sale.<sup>1281</sup> Domestic goods that enter the FTZ for export are subject to excise tax rebates and drawback when the goods enter the FTZ.<sup>1282</sup> Goods may enter the FTZ for operations, including storage, exhibition, assembly, manufacturing, and processing; however, retail trade is not permitted within a FTZ.<sup>1283</sup>

FTZs offer many benefits for companies that import parts and then re-export the final product.<sup>1284</sup> In addition, FTZ status attracts companies seeking to bring production back to the U.S. from abroad.<sup>1285</sup> Businesses looking to operate within an FTZ will find numerous opportunities to do so in Ohio. Ohio’s proximity to Lake Erie and the Ohio River, as well as its extensive rail line, highways, and airports (offering direct access to markets throughout the U.S. and Canada) make Ohio a prime location for FTZs. Out of approximately 177 FTZs in the United States and Puerto Rico, nine FTZs are located throughout Ohio.<sup>1286</sup> FTZs are located in all regions of the State including port authorities in Toledo, Cleveland, and Lawrence County, as well as Cincinnati, Dayton, Clinton County, Franklin County, Findlay, and Akron/Canton.<sup>1287</sup>

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<sup>1277</sup> See 19 U.S.C. 81a–81u (Foreign-Trade Zones Act of 1934); 15 C.F.R. 400 (FTZ Regulations); 19 C.F.R. 146 (CBP Regulations).

<sup>1278</sup> 19 U.S.C. 81a.

<sup>1279</sup> R.C. 4582.31(A)(9) and 1743.11.

<sup>1280</sup> U.S. Customs and Border Protection, About Foreign-Trade Zones and Contact Info, <http://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about>.

<sup>1281</sup> *Id.*

<sup>1282</sup> *Id.*

<sup>1283</sup> *Id.*

<sup>1284</sup> National Association of Foreign-Trade Zones, *Foreign-Trade Zones Boost U.S. Exports and Re-Shoring* (Oct. 14, 2014), available at <http://www.naftz.org/3046-foreign-trade-zones-boost-u-s-exports-and-re-shoring>.

<sup>1285</sup> *Id.*

<sup>1286</sup> *Id.*

<sup>1287</sup> U.S. Foreign-Trade Zones Board, U.S. Foreign-Trade Zones, available at <http://enforcement.trade.gov/ftzpage/letters/ftzlist-map.html>.

Companies with FTZ status typically include businesses in the pharmaceutical, automotive, electronics, distribution, oil refinery, and textile industries.<sup>1288</sup>

For example, the Whirlpool Corporation opened a 2.4-million square-foot manufacturing facility in FTZ 8 in Clyde, Ohio.<sup>1289</sup> Other notable companies conducting business in Ohio with FTZ designation include Jeep, Daimler Chrysler, Ford, GM, Honda, BP-Husky Refining, LLC, Marathon Petroleum Company LP, Lincoln Electric, Abercrombie & Fitch, and Mr. Coffee.<sup>1290</sup>

But other industries and smaller companies may benefit from FTZ designation, depending on the volume and value of the goods being imported or exported.<sup>1291</sup> Companies seeking FTZ designation should contact the FTZ grantee in their zone to learn about the application process and the costs associated with FTZ status. A complete list of FTZs in Ohio, including subzones and contact information for grantees, is located on the U.S. Foreign-Trade Zones Board webpage.<sup>1292</sup>

The following resources provide additional information on FTZs:

- U.S. Department of Commerce, International Trade Administration website ([www.trade.gov/ftz](http://www.trade.gov/ftz))
- U.S. Customs and Border Protection (<http://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about>)
- The National Association of Foreign-Trade Zones (<http://www.naftz.org>)
- Foreign Trade Zone Calculator, Foreign-Trade Zone #138 (<http://ftz138.com/benefits/savings>)

<sup>1288</sup> Cleveland-Cuyahoga County Port Authority, Maritime & Logistics, Foreign Trade Zone, available at <http://www.portofcleveland.com/maritime-logistics/foreign-trade-zone>.

<sup>1289</sup> Federal Register, Notice: Foreign-Trade Zone 8-Toledo, Ohio; Authorization of Production Activity; Whirlpool Corporation, Subzone 8I, (Washing Machines), Clyde and Green Springs, Ohio (Feb. 24, 2014), <http://www.federalregister.gov/articles/2014/02/24/2014-03901/foreign-trade-zone-8-toledo-ohio-authorization-of-production-activity-whirlpool-corporation-subzone>; National Association of Foreign-Trade Zones, *Whirlpool Returns Production to U.S., Using Foreign-Trade Zones* (Dec. 20, 2013), available at <http://www.naftz.org/2181-whirlpool-returns-production-to-u-s-using-foreign-trade-zones>.

<sup>1290</sup> U.S. Foreign-Trade Zones Board, U.S. Foreign-Trade Zones, available at <http://enforcement.trade.gov/ftzpage/letters/ftzlist-map.html>.

<sup>1291</sup> Cleveland-Cuyahoga County Port Authority, Maritime & Logistics, Foreign Trade Zone, available at <http://www.portofcleveland.com/maritime-logistics/foreign-trade-zone>.

<sup>1292</sup> U.S. Foreign-Trade Zones Board, U.S. Foreign-Trade Zones, available at <http://enforcement.trade.gov/ftzpage/letters/ftzlist-map.html>.

## **Ohio's Global Workforce**

Foreign investors seeking to invest in U.S. businesses have several immigration options to work in the U.S. on a temporary or permanent basis. Immigration law is governed by federal laws and regulations and is not state specific. Federal immigration law is highly complex; employers and investors should consult a qualified immigration attorney to determine the best options for investing, as well as for hiring foreign national employees in the U.S.

Generally, visitors may enter the U.S. in B-1 status to engage in limited business activities, such as attending business meetings, conferences, negotiating contracts, consulting with business associates, litigating, or engaging in commercial transactions.<sup>1293</sup> Individuals who are members of a board of directors of a U.S. corporation may enter the U.S. on a B-1 visitor visa to perform board-member functions and attend board meetings.<sup>1294</sup> Foreign nationals must obtain a nonimmigrant or immigrant visa before engaging in actual work in the U.S.

Most U.S. work visas are employer sponsored, and U.S. employers must obtain prior approval from United States Citizenship and Immigration Services (“USCIS”) qualifying the foreign national for the particular nonimmigrant visa category. But a few work visas may be self-petitioned. Once the petition is approved by USCIS, the applicant must then apply for a visa at a U.S. consulate abroad before entering the U.S. Below is a brief overview of the most common types of work visas

### **L-1 Intra-company Transferee Visa**

The L-1 visa for intra-company transferees allows U.S. companies to bring in certain key personnel who have been working abroad for a parent, subsidiary, branch, or affiliate of the U.S. company and are coming to the U.S. to continue working in an executive, managerial, or specialized knowledge capacity.<sup>1295</sup> The employee must have worked for the company abroad for at least one continuous year within the three years preceding the L-1 application.<sup>1296</sup>

Typically, the U.S. company must first obtain USCIS approval before the worker can apply for a visa at a U.S. consulate abroad and enter the U.S. to begin working. Certain large companies may receive a onetime blanket L-1 approval from USCIS, which speeds up the immigration process and allows workers to apply for an L-1 visa directly at a U.S. consulate

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<sup>1293</sup> U.S. Department of State Foreign Affairs Manual, 9 FAM 41.31 N8.

<sup>1294</sup> U.S. Department of State Foreign Affairs Manual, 9 FAM 41.31 N9.2.

<sup>1295</sup> INA 101(a)(15)(L); 8 C.F.R. 214.2(l).

<sup>1296</sup> *Id.*

abroad.<sup>1297</sup> L-1 managers and executives are eligible for a maximum period of seven years in L-1A status, and specialized knowledge capacity workers are eligible for a maximum period of five years in L-1B status. Spouses and children may accompany the principal L-1 holder on dependent visas. U.S. companies can also sponsor multinational executives and managers for permanent residency (i.e. “green card”) through an accelerated path.<sup>1298</sup>

### **H-1B Specialty Occupation Visa**

The H-1B specialty occupation visa is the most common nonimmigrant visa type. This category is for professionals who will be working in positions that require a bachelor’s degree or higher in a specific field of study.<sup>1299</sup> Typical specialty occupation professions include accounting, engineering, medicine, information technology, and teaching. U.S. companies can sponsor a foreign national for an H-1B visa by obtaining a certified Labor Condition Application (“LCA”) from the Department of Labor and filing a petition with USCIS.

The H-1B category is subject to a numerical cap of 65,000 visas per fiscal year.<sup>1300</sup> An additional 20,000 visas are available for foreign nationals who have earned U.S. Master’s degrees or higher.<sup>1301</sup> H-1B beneficiaries are exempt from the numerical limitations if they will work for an institution of higher education or a related or affiliated nonprofit entity or will be employed by a nonprofit research organization or governmental research organization.<sup>1302</sup> Workers may hold H-1B status for a maximum of six years. Spouses and children may accompany the principal H-1B holder on a dependent visa. Children may attend school on H-4 status. Certain spouses on H-4 may be eligible for work authorization.<sup>1303</sup>

### **Treaty visas: TN, E-3, H-1B1**

U.S. companies may fast track employer sponsorship for employees from a few limited countries. The North American Free Trade Agreement (“NAFTA”) permits citizens of Mexico and Canada that are engaged in professional activities to apply for TN status.<sup>1304</sup> The E-3 category sets aside 10,500 visas per fiscal year for citizens of Australia.<sup>1305</sup> Finally, the H-1B1 visa

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<sup>1297</sup> Companies that have been doing business in the U.S. for at least one year, have three or more domestic and foreign branches, subsidiaries or affiliates and either a combined U.S. annual sales of \$25 million, a U.S. workforce of 1,000 or received at least 10 L petition approvals in the last 12 months are eligible to apply for a L-1 blanket petition. 8 C.F.R. 214.2(l)(4).

<sup>1298</sup> INA 204.5(j).

<sup>1299</sup> INA 101(a)(15)(H)(i)(b); 8 C.F.R. 214.2(h).

<sup>1300</sup> INA 214(g)(1)(A)(vii).

<sup>1301</sup> INA 214(g)(5)(C).

<sup>1302</sup> INA 214(g)(5).

<sup>1303</sup> 8 C.F.R. 214.2(h)(9)(iv); 8 C.F.R. 274a.13(d).

<sup>1304</sup> 8 C.F.R. 214.6.

<sup>1305</sup> INA 101(a)(15)(E)(iii).

provided for by the U.S.-Chile Free Trade Agreement and the U.S.-Singapore Free Trade Agreement sets aside a limited number of H-1B visas for citizens of Chile and Singapore.<sup>1306</sup>

These visa categories have eligibility requirements similar to the H-1B category, and spouses and children may accompany the principal applicant. But there are a few differences from the H-1B category. The TN, E-3, and H-1B1 categories may be renewed indefinitely and employers do not need to obtain prior approval from USCIS. Instead, the foreign national can apply for the visa directly at a U.S. consulate.

### **Treaty Trader and Treaty Investor Visas (E-1 and E-2)**

The E-1 treaty trader visa is available for those coming to the U.S. to engage in substantial international trade between the U.S. and the treaty country.<sup>1307</sup> The E-2 treaty investor visa is available to investors to develop and direct a business in the U.S.<sup>1308</sup> Employers can also sponsor essential employees from the treaty country for an E visa. Spouses and children may accompany the principal E-1 or E-2 holder on a dependent visa. E-1 and E-2 visas may be issued in up to two-year increments indefinitely. However, there is no parallel option for obtaining lawful permanent residency.

E-1 and E-2 status is available for citizens of certain countries that have a treaty agreement with the U.S., such as a treaty of friendship, treaty of commerce and navigation, Bilateral Investment Treaty, or Free Trade Agreement. The U.S. Department of State maintains a complete list of the most current eligible treaty countries.<sup>1309</sup> Each treaty may contain specific provisions on eligibility. In addition, each U.S. consulate may have different visa application requirements. Therefore, it is important to research both the qualifying treaty and consulate where the applicant will apply to determine if the foreign national will qualify for either E-1 or E-2.

### **Immigrant Investor Visa (EB-5)**

The EB-5 immigrant investor program was created by Congress in 1990 to increase job growth through foreign investment in the U.S. economy.<sup>1310</sup> Under the program, a foreign national may receive a two-year conditional permanent residency status by investing \$1 million in a new commercial enterprise that will create at least 10 full-time jobs for qualifying U.S.

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<sup>1306</sup> Up to 1,400 visas are set aside for citizens of Chile and 5,400 are set aside for citizens of Singapore. INA 214(g)(8).

<sup>1307</sup> INA 101(a)(15)(E); 8 C.F.R. 214.2(e).

<sup>1308</sup> *Id.*

<sup>1309</sup> U.S. Department of State, Treaty Countries, <http://travel.state.gov/content/visas/english/fees/treaty.html>.

<sup>1310</sup> INA 203(b)(5) and 216A; 8 C.F.R. 204.6 and 216.6.

workers.<sup>1311</sup> The investor must be engaged in the daily management or policy formation of the enterprise. The investment must be at risk; therefore intent to invest is not sufficient. The minimum investment is reduced to \$500,000 if the investment is in a Targeted Employment Area (“TEA”). A TEA is a rural area or an area of high unemployment with an unemployment rate of at least 150% of the national average. The Ohio Development Services Agency is authorized to designate areas “High Unemployment Areas.” Applicants seeking to qualify for the \$500,000 investment in a TEA may apply for a High Unemployment Area designation directly through ODSA.

Investors also have the option of investing in the regional center model, which allows for pooled investments in large projects.<sup>1312</sup> The regional center model is popular because it has more flexible requirements for job creation and the need to have direct, day-to-day involvement over the investment enterprise. Regional centers are approved by USCIS, and a list of the currently approved regional centers, by state, is available on the USCIS website.<sup>1313</sup>

The foreign national investor must file a petition with USCIS demonstrating that the investment meets all of the requirements of the EB-5 program. After two years of conditional, permanent resident status, the EB-5 investor may apply to have the conditions removed and become a lawful permanent resident. The investor is eligible to apply for U.S. citizenship five years after the conditional permanent residence status was granted.

One example of a successful EB-5 project is the Goodyear-Hoover project. More than \$322 million was spent on infrastructure projects in Akron, Ohio and surrounding areas.<sup>1314</sup> Of the total investment, \$104 million came from foreign investors. The projects included development of a new Goodyear World Headquarters and renovations to the former Goodyear Headquarters and the former Hoover Vacuum Company Headquarters. These projects created more than 2,000 direct jobs for Ohioans and more than 200 foreign nationals successfully applied for green cards based on their investment in this project.<sup>1315</sup>

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<sup>1311</sup> U.S. Citizenship and Immigration Services, Policy Memorandum, *EB-5 Adjudications Policy* (May 30, 2013), available at <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>.

<sup>1312</sup> 8 C.F.R. 204.6(e).

<sup>1313</sup> U.S. Citizenship and Immigration Services, Immigrant Investor Regional Centers, <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers#table>.

<sup>1314</sup> CMB, Group X—Goodyear and Hoover, <http://www.cmb5visa.com/projects/group-10-goodyear-and-hoover>; U.S. Citizenship and Immigration Services, *Request to Amend Regional Center Designation: CMB Summit LLC* (July 30, 2013), available at [http://www.cmb5visa.com/cms/wp-content/uploads/2014/06/Amendment\\_CMB-Summit-LLC\\_7-30-13.pdf](http://www.cmb5visa.com/cms/wp-content/uploads/2014/06/Amendment_CMB-Summit-LLC_7-30-13.pdf).

<sup>1315</sup> CMB, Group X—Goodyear and Hoover, <http://www.cmb5visa.com/projects/group-10-goodyear-and-hoover>.

Another example of a successful EB-5 project in Ohio is the Flats East Bank project in Cleveland.<sup>1316</sup> Ninety foreign nationals invested \$45 million (approximately 30% of the total investment) into the construction of new buildings, restaurants, and retail space, creating an estimated 1,800 jobs for Ohioans. The foreign investors received lawful permanent residence (“green cards”) as part of their investment.<sup>1317</sup>

### **Other Entrepreneurial Visas**

The USCIS Entrepreneur Visa Guide provides more information on visa options for foreign investors.<sup>1318</sup> A foreign national who is the sole owner or has an ownership interest in a U.S. company may also be eligible for employment authorization in connection with H-1B status.<sup>1319</sup> International students on F-1 status are also eligible for work authorization with approved Optional Practical Training.<sup>1320</sup> Employment authorization is limited to a maximum of 29 months, and during this time, F-1 students may work in any job that is related to their field of study, including self-employment.<sup>1321</sup>

To qualify for H-1B status, foreign investors must demonstrate that a bona fide employer-employee relationship exists between the company and the investor.<sup>1322</sup> The USCIS has indicated that an employer-employee relationship may exist if there is evidence that the company controls the foreign investor’s employment, such as through a board of directors, shareholders, investors, or other factors.<sup>1323</sup> But the H-1B option may be preferable if the

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<sup>1316</sup> Cleveland International Fund, Flats East Bank Phase 1, <http://clevelandinternationalfund.com/FEB1/FlatsEastBankPhase1.php>; Jarobe-Mcfee, Flats East Bank Developers Wrap Up Phase Two Financing, with Apartment Building Underway, The Plain Dealer (April 21, 2014), available at <http://clevelandinternationalfund.com/portal-articles/Flats%20II/PD%20FEB2%20financing%20in%20place%202014.04.21.pdf>.

<sup>1317</sup> *Id.*

<sup>1318</sup> U.S. Citizenship and Immigration Services, Entrepreneur Visa Guide, <http://www.uscis.gov/eir/visa-guide/entrepreneur-visa-guide>.

<sup>1319</sup> U.S. Citizenship and Immigration Services, Memorandum, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements* (Jan. 8, 2010), available at <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

<sup>1320</sup> U.S. Customs and Immigration Enforcement, Policy Guidance, Policy Guidance 1004-03—Update to Optional Practical Training (April 23, 2010), available at [http://www.ice.gov/doclib/sevis/pdf/opt\\_policy\\_guidance\\_042010.pdf](http://www.ice.gov/doclib/sevis/pdf/opt_policy_guidance_042010.pdf).

<sup>1321</sup> *Id.*

<sup>1322</sup> U.S. Citizenship and Immigration Services, Memorandum, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements* (Jan. 8, 2010) <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

<sup>1323</sup> U.S. Citizenship and Immigration Services, *Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions* (Jan. 13, 2010),

investment is under the \$1 million dollar threshold required to qualify for EB-5 or the foreign national is not a citizen of a treaty country for eligibility under the E-1 or E-2 categories.

### **Diversity Visa Lottery**

Another option for foreign nationals to receive green cards to live and work permanently in the U.S. is through the Diversity Immigrant Visa Program. Each year the U.S. Department of State randomly selects up to 55,000 applicants for immigrant visas from citizens of countries with low rates of admission to the U.S.<sup>1324</sup> More information on the eligibility requirements and selection process is available on the U.S. Department of State website.<sup>1325</sup>

To find out more about the eligibility requirements and application process for all categories, please consult the following resources:

- USCIS website (<http://www.uscis.gov>)
- U.S. Department of State, Bureau of Consular Affairs website (<http://travel.state.gov/content/visas/english.html>)
- U.S. Department of Labor, Office of Foreign Labor Certification (<http://www.foreignlaborcert.doleta.gov>)

### **G.R.E.A.T. Initiative**

While immigration law is federally regulated, Ohio has made recent efforts to attract international students. Ohio launched the Global Reach to Engage Academic Talent (“G.R.E.A.T.”) initiative in 2014 to enhance the State’s globalization efforts.<sup>1326</sup> This is the first state law in the U.S. that focuses on attracting and retaining international students. The Ohio G.R.E.A.T. initiative aims to increase Ohio’s global economic competitiveness by promoting Ohio globally as a postsecondary destination, encouraging international postsecondary students to remain in Ohio after graduation, and enhancing global economic competitiveness for native Ohio students.<sup>1327</sup>

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<http://www.uscis.gov/news/public-releases-topic/business-immigration/questions-answers-uscis-issues-guidance-memorandum-establishing-employee-employer-relationship-h-1b-petitions>.

<sup>1324</sup> INA 203(c).

<sup>1325</sup> U.S. Department of State, *Instructions for the 2016 Diversity Immigrant Visa Program (DV-2016)*, available at [http://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2016-Instructions-Translations/DV\\_2016\\_Instructions\\_English.pdf](http://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2016-Instructions-Translations/DV_2016_Instructions_English.pdf).

<sup>1326</sup> Ohio G.R.E.A.T., About Ohio G.R.E.A.T., <http://www.Ohio-GREAT.us/#/about-ohio>; see also Sub.H.B. 484 (2014).

<sup>1327</sup> Ohio G.R.E.A.T., *Chancellor John Carey’s Recommendations for Ohio’s Postsecondary Globalization Initiative*, available at <http://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/global/GREATreport.pdf>.

**Chapter Twelve:**  
**Public-Private Partnerships**

**Key Points:**

- Public Private Partnerships (PPP or P3s) are challenging to define, but they tend involve the public and private sectors working together to bring a project to fruition.
- P3 agreements are complex documents that serve to protect the public while encouraging private investment.
- Ohio’s Constitution can limit certain types of P3 transactions.
- Future P3 projects in Ohio will likely center on financing aviation, water and sewer projects, higher-education, and schools.

Ohio, like the rest of the states, faces a challenge in funding their infrastructure needs. Public-private partnerships (also known as PPP or P3s) are something people hear about more often as states and local governments try to determine how best to address budget issues and bridge resource gaps while still providing essential services to the public.<sup>1328</sup> The P3 approach creates an opportunity to meet infrastructure challenges that are important to economic development. For instance, the average age of the 84,000 dams in the country is 52 years old, and the number of high-hazard dams is 14,000, which will cost \$21 billion to repair.<sup>1329</sup> An estimated 240,000 water main breaks occur every year, illustrating the struggles of America’s aging water infrastructure that could cost more than \$1 trillion to repair.<sup>1330</sup> Annual funding for Superfund site cleanups is estimated at \$500 million short of demand, with 1,280 sites remaining on the National Priorities List and over 400,000 brownfields in need of cleanup and redevelopment.<sup>1331</sup> An estimated 100,000 miles of levees are in all 50 states and rehabilitation costs amount to \$100 billion.<sup>1332</sup> This infrastructure challenge exists in part because the federal, state, and local governments lack the resources to fund all the infrastructure needs.

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<sup>1328</sup> Deye, *U.S. Infrastructure Public-Private Partnerships: Ready for Takeoff?*, Kennedy School Rev. (April 26, 2015).

<sup>1329</sup> See American Society of Civil Engineers, *2013 Report Card for America’s Infrastructure*, available at <http://infrastructurereportcard.org>.

<sup>1330</sup> *Id.*

<sup>1331</sup> *Id.*

<sup>1332</sup> *Id.*

## **P3 Defined**

The definition of P3 depends in large part on its source. The U.S. Department of Transportation defines P3s as “contractual agreements formed between a public agency and a private sector entity that allow for greater private sector participation in the delivery and financing of transportation projects.”<sup>1333</sup> Meanwhile, the National Council for Public-Private Partnerships defines a P3 as “a contractual arrangement whereby the resources, risks and rewards of both the public agency and private company are combined to provide greater efficiency, better access to capital, and improved compliance with a range of government regulations regarding the environment and workplace.”<sup>1334</sup>

Ultimately, a P3 is a mutually beneficial relationship formed between the public and private sectors. The private sector partner typically makes a substantial equity investment, and in return the public sector gains access to new or improved services. When properly vetted and structured, P3s should allocate risk to the party best suited to handle it. The public sector is often able to shift risks related to lack of demand and revenue, design and construction, operations and maintenance, finance, and extraordinary circumstances to the private sector, while retaining some measure of control over the project.<sup>1335</sup> P3s can reduce development risks, provide more cost effective and timely infrastructure delivery, offer the potential for better ongoing maintenance, and leverage limited public sector resources, all while maintaining an appropriate level of public control over the project.<sup>1336</sup>

The key elements of a public-private partnership include:

- (1) risk transfer/allocation;
- (2) typically some form of private sector financing or equity;
- (3) long-term arrangements;
- (4) possible profit sharing with the public sector;<sup>1337</sup> and
- (5) a single point of responsibility.

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<sup>1333</sup> McNichol, *The United States: The World's Largest Emerging P3 Market* 5 (April 2013).

<sup>1334</sup> Cooper, *P3 Conference in Texas to Focus on Water Infrastructure Projects* (April 21, 2013).

<sup>1335</sup> Practical Law Company, *Public Private Partnerships: Issues and Considerations* (2013).

<sup>1336</sup> The National Council for Public-Private Partnerships, *Testing Tradition: Assessing the Added Value of Public-Private Partnerships* 1 (2012), available at <http://www.ncppp.org/wp-content/uploads/2013/03/WhitePaper2012-FinalWeb.pdf>.

<sup>1337</sup> Of course, the public needs to be careful not to run afoul of Article VIII, Sections 4 and 6 of the Ohio Constitution by taking ownership in a private for-profit entity. However, it can receive payments from the private sector for certain benchmarks or other payment arrangements.

Ideally, a P3 should not just transfer risk from the public to private sectors but rather allocate risk to the party best suited to manage and mitigate.<sup>1338</sup> A well-structured public-private partnership will contain the optimal transfer of public sector risk to the private sector. In some cases, the public sector may be the party best able to manage certain risks, like obtaining permits and other regulatory issues. This risk-shifting involves recognizing that transferring all risk is neither necessary nor appropriate because some risks can be controlled only by the public sector or are so unlikely that the cost of transferring them does not provide value to the public because the private sector will need to be compensated for taking on that risk.<sup>1339</sup> The more risks that are transferred from the public sector to the private, the more the public sector will likely pay for the project. Some risks can be more easily borne by the private sector (for example, design and construction), so the private sector is likely to take those risks as part of a project. But transfer of environmental or other unknown risks often comes at a cost to the public sector.

### **History and Future of P3s**

Public-private partnerships are being discussed with more frequency primarily because of the increase in major infrastructure projects in the United States,<sup>1340</sup> as well as increased federal support<sup>1341</sup> for them. But public-private partnerships are not really new – in fact, Ohio’s first P3 began in 1855, when the Erie Canals Project was launched with Arnold Medbery & Co. as the contractor.<sup>1342</sup> One of the first P3s in the United States was the Lancaster Turnpike, a toll road built by the private sector with public sector oversight and rights of way, which opened in 1793.<sup>1343</sup> Other early examples include the initial Erie Canal (completed in 1825) and the first Transcontinental Railroad (finished in 1869).<sup>1344</sup> Despite their early use, P3s fell out of favor and were not used much in the United States as state and federal budgets expanded. Infrastructure P3s have been used all over the world (primarily Europe, Canada, and Australia)<sup>1345</sup> and have moved back into the US in the past decade.<sup>1346</sup> In fact, in a September

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<sup>1338</sup> Abramson, *Build America Infrastructure Investment Summit, September 9, 2014—Key Points*, Association for the Improvement of American Infrastructure, [http://aiai-infra.info/treasury\\_and\\_transportation\\_host\\_infrastructure\\_investment\\_summit.html](http://aiai-infra.info/treasury_and_transportation_host_infrastructure_investment_summit.html).

<sup>1339</sup> Texas P3 Association, *Model P3FI Guidelines for Local Government Entities* 9 (Jan. 2012).

<sup>1340</sup> Fried & Falk, *An Expanding US P3 Market*, Chadbourne & Parke LLP (Feb. 2015), available at [http://www.chadbourne.com/An-Expanding-US-P3-Market-02-18-2015\\_projectfinance](http://www.chadbourne.com/An-Expanding-US-P3-Market-02-18-2015_projectfinance); Deye, *U.S. Infrastructure Public-Private Partnerships: Ready for Takeoff?*, Kennedy School Rev. (April 26, 2015).

<sup>1341</sup> Fried & Falk, *An Expanding US P3 Market* (describing the encouragement by the federal government’s efforts with new and expanded infrastructure financing programs).

<sup>1342</sup> *State v. Medbery*, 7 Ohio St. 522, 523 (1875).

<sup>1343</sup> Corrigan, *Ten Principles for Successful Public/Private Partnerships*, ULI-the Urban Land Institute (2005).

<sup>1344</sup> *Id.*

<sup>1345</sup> Roux, *Can It Be True That the U.S. P3 Transportation Projects Are Gaining Momentum?*, Inside Counsel Magazine (Jan. 29, 2015), available at <http://www.insidecounsel.com/2015/01/29/can-it-be-true-that-the-us-p3-transportation-proje>.

2014 report, Moody's Investors Service stated, "the United States has the potential to become the largest P3 market in the world, given the sheer size of its infrastructure."<sup>1347</sup> In this past decade, "P3 structures have matured, and P3 opportunities have diversified and increased."<sup>1348</sup>

The Build America Investment Initiative, launched in July 2014 by President Obama, called on federal agencies to find new ways to increase investment in ports, roads, bridges, broadband networks, drinking water, sewer systems, and other projects by facilitating partnerships between private sector investors and federal, state, and local governments.<sup>1349</sup> The President believes that improving the country's infrastructure is necessary to create jobs, provide certainty to states and communities, help American businesses, and grow the economy.<sup>1350</sup> Federal support is also shown through the Transportation Infrastructure Finance and Innovation Act (TIFIA) program, which "plays an essential role in the US P3 market by providing 'credit assistance for qualified projects of regional and national significance.'"<sup>1351</sup> Federal government support for these types of programs seems to be widespread. For example, the Rural Infrastructure Opportunity Fund is a P3 undertaken by CoBank, Capitol Peak Asset Management, and the US Department of Agriculture.<sup>1352</sup> The fund's target investments include "rural community facilities (including health care and educational facilities), rural water and waste-water systems, rural energy projects, rural broadband expansion efforts, local and regional food systems, and other infrastructure."<sup>1353</sup>

### **P3 Agreement Considerations**

Public-private partnership agreements vary greatly based upon the type of project contemplated by the agreement. To assist with the development of P3 projects for infrastructure in the United States, the Federal Highway Administration has placed a number of agreements online, and it has developed information on structuring agreements and model

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<sup>1346</sup> Deye, *U.S. Infrastructure Public-Private Partnerships*; Fried & Falk, *An Expanding US P3 Market*.

<sup>1347</sup> *Public-Private Partnerships: Global P3 Landscape: A Region-by-Region Round-Up*, Moody's Investors Serv. (Sept. 8, 2014).

<sup>1348</sup> Fried & Falk, *An Expanding US P3 Market*.

<sup>1349</sup> The White House, *Fact Sheet: Building a 21st Century Infrastructure: Increasing Public and Private Collaboration with the Build America Investment Initiative* (July 17, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/07/17/fact-sheet-building-21st-century-infrastructure-increasing-public-and-pr>.

<sup>1350</sup> *Id.*

<sup>1351</sup> Deye, *U.S. Infrastructure Public-Private Partnerships*.

<sup>1352</sup> Gabriel & Devlin, *Market Update: A Review of the U.S. Public Private Partnership (P3) Sector in 2014*, Practical Law Fin. (Jan. 7, 2015).

<sup>1353</sup> *Id.*

provisions.<sup>1354</sup> The agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, or manage a facility or system.<sup>1355</sup>

Some of the earliest P3s in the United States were toll facilities where the concessionaire took on all of the risk related to the toll revenue to be collected (for example, the Indiana Toll Road). Following the failure of some of those projects, like the bankruptcies of the operators of the Indiana Toll Road, South Carolina’s Southern Connector, and San Diego’s South Bay Expressway,<sup>1356</sup> many toll facilities now include a minimum compensation/payment from the public sector as part of the P3 agreement.<sup>1357</sup> At the opposite end of the spectrum, it is seen as “fiscally imprudent to sacrifice stable, long-term revenue for a one-time payment used to fund short-term needs.”<sup>1358</sup> An example of a one-time payment that didn’t work for the public sector was the city of Chicago’s parking agreement. Chicago leased its 36,000 parking meters to a consortium for 75 years for \$1.2 billion.<sup>1359</sup> The City used the payment to help its then-existing budget crisis. While residents saw parking rates rise, the City lost its \$20 million annual revenue stream produced by the parking meters, and critics claimed that the term was too long, undervaluing the asset Chicago leased by up to a billion dollars.<sup>1360</sup>

### **Ohio’s Legal Limits for P3s**

The State cannot create a debt that is not otherwise authorized by the Ohio Constitution. The Ohio Constitution limits public-private partnerships through Article VIII and the state debt limits. Article VIII and the limit on state debt of \$750,000<sup>1361</sup> found in Section 1 strictly limit the State’s ability to take on debt because Ohio requires a balanced budget each biennium. Article VIII, Section 3 of the Ohio Constitution directs that no debt may be created by or on behalf of the State except as specified in Sections 1 and 2 of Article VIII.<sup>1362</sup> Additionally, the Ohio Constitution prohibits the General Assembly from making any appropriation for a

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<sup>1354</sup> U.S. Department of Transportation Federal Highway Administration, Innovative Program Delivery, Agreements, [www.fhwa.dot.gov/ipd/P3/agreements](http://www.fhwa.dot.gov/ipd/P3/agreements).

<sup>1355</sup> Private Solutions to Public Problems, Partnerships to Build a Better Government, Ky. Chamber 5 (July 2013).

<sup>1356</sup> Schmidt & Chung, *The Indiana Toll Road and the Dark Side of Privately Financed Highways*, Streetblog USA (Nov. 18, 2014).

<sup>1357</sup> U.S. Department of Transportation Federal Highway Administration, Innovative Program Delivery, *Payment Mechanisms in Public-Private Partnerships (P3s)* (2012), available at [http://www.fhwa.dot.gov/ipd/pdfs/fact\\_sheets/p3\\_paymentmechanisms.pdf](http://www.fhwa.dot.gov/ipd/pdfs/fact_sheets/p3_paymentmechanisms.pdf).

<sup>1358</sup> Holeywell, *Public-Private Partnerships Are Popular, But Are They Practical?* (Nov. 29, 2013), available at [www.governing.com](http://www.governing.com).

<sup>1359</sup> Gabriel & Devlin, *Market Update*.

<sup>1360</sup> Joravsky & Dumke, *FAIL, Part One: Chicago’s Parking Meter Lease Deal* (April 9, 2009); Joravsky & Dumke, *FAIL, Part Two: One BILLION Dollars!* (May 21, 2009).

<sup>1361</sup> Ohio Constitution, Article VIII, Section 1. Unfortunately, this debt limit has never been adjusted for inflation, and was created at a time when Ohio had a \$20,000,000 state debt.

<sup>1362</sup> Article VIII, Section 2, provides that the state can incur debt to “repel invasion, suppress insurrection, or to defend the state in war . . . .” Obviously, this is not a frequently used provision.

period longer than two years.<sup>1363</sup> Article VIII, Section 17(A) of the Ohio Constitution also limits state debt for future obligations that are paid from the General Revenue Fund—those obligations cannot exceed 5% of the total estimated general revenue fund amounts for that year.

The state debt limit of \$750,000 relates to the debt incurred by the Ohio Canal Commission as it issued stock to finance the building of the Erie Canal and the Miami Canal.<sup>1364</sup> As essentially Ohio’s first public-private partnership, it was not a success. Because of the state’s poor fiscal condition and inefficient tax collection, there was never enough money to make a single interest or principal payment between 1825 through 1945.<sup>1365</sup> Under this backdrop, the debt limit was established. In 1855, the Board of Public Works contracted with a private party to repair and maintain the Erie Canal for a period of five years, in exchange for an annual payment (which was to be paid on a monthly basis).<sup>1366</sup> Approximately two years into the contract, the state failed to appropriate payment to the contractor (who claimed to be ready and willing to perform), and a lawsuit ensued. The Ohio Supreme Court ruled that no valid obligation was created by the contract, and the contractor was not paid.<sup>1367</sup> Because of the limits on the ability of the State to incur debt, public-private partnerships are often structured with “appropriation risk,” meaning that if the legislature were ever to not appropriate a payment to a private party, the State would not be able to pay it. Obligations of the State for which revenue has been provided and appropriations made for the payment thereof in the current biennium are not debts within the meaning of Article VIII, Section 3 of the Ohio Constitution.<sup>1368</sup>

### **ODOT’s Role in Infrastructure P3s**

Ohio has specifically authorized public-private partnerships for transportation and infrastructure through statute.<sup>1369</sup> The Ohio statute gives broad authority to ODOT to undertake a public-private initiative with a private entity to develop, finance, maintain, or operate transportation facilities.<sup>1370</sup> Ohio’s statute defines a public-private initiative as any arrangement between a public and private entity that is set forth in a public-private agreement that provides for the following:

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<sup>1363</sup> Ohio Constitution, Article II, Section 22.

<sup>1364</sup> Testimony of Seth Metcalf to the Ohio Constitutional Modernization Commission—Committee on Finance, Taxation, and Economic Development (May 8, 2014).

<sup>1365</sup> *Id.*

<sup>1366</sup> *State v. Medbery*, 7 Ohio St. 522, 523 (1857).

<sup>1367</sup> *Id.*

<sup>1368</sup> *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450 (1960), paragraph 2 of the syllabus.

<sup>1369</sup> R.C. 5501.71(A) and 5501.83, giving broad authority to undertake P3 procurement to develop, finance, maintain or operate transportation facilities.

<sup>1370</sup> R.C. 5501.71(a) and 5501.072(A).

- (1) Acceptance of a private contribution, including a money payment, for a project or service for a transportation facility;
- (2) Sharing of resources and the means of providing a project or service for a transport facility;
- (3) Cooperation in researching, developing, and implementing projects or services for a transportation facility.<sup>1371</sup>

The statute defines a “transportation facility” very broadly, including a “tunnel, ferry, port facility on navigable waters that are used for commerce, intermodal facility, or similar facility open to the public and used for the transportation of persons or goods, and any building, structure, parking area, or other appurtenances or property needed to operate a transportation facility.”<sup>1372</sup> Section 5501 of the Revised Code, however, more generally defines a “transportation facility” to include all publicly owned modes or means of transportation.<sup>1373</sup> By having a statute this broad, as it relates to infrastructure improvements, Ohio is very permissive regarding what projects can be undertaken using a P3 mechanism.

In anticipation of increased P3 projects, ODOT created the Division of Innovative Delivery.<sup>1374</sup> The Division of Innovative Delivery is tasked with “develop[ing] new and innovative approaches to managing, maintaining, operating, and building the State’s infrastructure assets to reduce costs, enhance efficiency, and generate revenue.”<sup>1375</sup> In addition to handling the Portsmouth Bypass Project (discussed below), they have developed other P3 projects, like State Farm’s sponsorship of trucks on the freeways.<sup>1376</sup> Through this private infusion of cash from State Farm, ODOT can provide a service to Ohio’s citizens and those passing through on our interstates and busy highways. ODOT will receive \$850,000 in the first year and \$875,000 in subsequent years of a ten-year agreement in exchange for allowing State Farm to advertise on its Safety Patrol vehicles.<sup>1377</sup> These Safety Patrol vehicles assist stranded motorists in Ohio’s six

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<sup>1371</sup> R.C. 5501.70(I)(1)–(3).

<sup>1372</sup> R.C. 5501.70(J).

<sup>1373</sup> R.C. 5501.01. Examples would include highways, rights of way, roads and bridges, parking facilities, aviation, port and rail facilities, public transportation facilities, rest areas, and roadside parks.

<sup>1374</sup> ODOT Policy No. 34-001(P), effective Nov. 15, 2012 (describing the public-private initiatives policy within ODOT).

<sup>1375</sup> *Id.*

<sup>1376</sup> Ohio Department of Transportation, State Farm Safety Patrol, [www.dot.state.oh.us/Services/State-Farm-Safety-Patrol](http://www.dot.state.oh.us/Services/State-Farm-Safety-Patrol).

<sup>1377</sup> Grant, *ODOT Will Raise up to \$8.65 Million by Letting State Farm Put Its Name on Freeway Service Vans*, Cleveland.com (June 9, 2014), available at [http://www.cleveland.com/metro/index.ssf/2014/06/odot\\_allows\\_state\\_farm\\_to\\_wrap.html](http://www.cleveland.com/metro/index.ssf/2014/06/odot_allows_state_farm_to_wrap.html).

largest cities by changing flat tires and jump-starting cars. The payments from State Farm help offset shortfalls in ODOT's highway maintenance budgets.<sup>1378</sup>

Ohio's first infrastructure P3 was the Portsmouth Bypass. The Portsmouth Bypass, also known as the Southern Ohio Veterans Memorial Highway is a \$634 million, 16-mile, four-lane, limited-access highway around the city of Portsmouth in Scioto County in south central Ohio. The project is being delivered as an availability payment design-build-finance-operate-maintain ("DBFOM") concession. The term of the concession will extend for 35 years.<sup>1379</sup> By procuring the project on a DBFOM basis, ODOT has estimated that it has consolidated the implementation period for the project from 13 to 5 years.<sup>1380</sup>

During the Portsmouth Bypass Project, ODOT received questions about appropriations risk in connection with the termination provisions and later clarified its agreement to describe how a termination (and the related payments) would work under the State's debt and appropriations limitations.<sup>1381</sup> The circular nature of the two-year biennium and appropriation created a problem for bidders. ODOT's contractual obligations were limited to the two-year biennium, and if ODOT did not make an appropriation to fund the availability payments, the only recourse the concessionaire would have would be a termination payment.<sup>1382</sup> This termination payment would also be subject to appropriation, and an obligation to seek an appropriation in the contract could not extend beyond the biennium.<sup>1383</sup> Following the clarification issued by ODOT and a round of bidder meetings to discuss appropriations issues, ODOT restructured the transaction to include a lease.<sup>1384</sup> That structure provided an innovative way to address Ohio's two-year contract limitations and its debt and appropriations challenges, while complying with Ohio law. To create a legally enforceable claim, ODOT granted a right of way by lease that could legally extend beyond the biennium and provide a legally valid method for making a termination payment. This provides the developer a constitutionally valid claim (a

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<sup>1378</sup> Grant, *ODOT Will Raise up to \$8.65 Million by Letting State Farm Put Its Name on Freeway Service Vans* (June 9, 2014), available at [http://www.cleveland.com/metro/index.ssf/2014/06/odot\\_allows\\_state\\_farm\\_to\\_wrap.html](http://www.cleveland.com/metro/index.ssf/2014/06/odot_allows_state_farm_to_wrap.html).

<sup>1379</sup> Project Profile, Innovative Program Delivery, Federal Highway Administration, [www.fhwa.dot.gov/ipd/project\\_profiles/oh\\_veterans\\_highway](http://www.fhwa.dot.gov/ipd/project_profiles/oh_veterans_highway).

<sup>1380</sup> *Id.*

<sup>1381</sup> See PPA Consolidated Comments/Requests for Clarifications Responses regarding the PPA issued by ODOT on July 3, 2014, available at [http://www.dot.state.oh.us/Divisions/InnovativeDelivery/20140516RFCResponses/20140703\\_PPA\\_RFC\\_Response\\_s.pdf](http://www.dot.state.oh.us/Divisions/InnovativeDelivery/20140516RFCResponses/20140703_PPA_RFC_Response_s.pdf); PPA Requests for Clarification Responses issued by ODOT on July 25, 2014, available at [http://www.dot.state.oh.us/Divisions/InnovativeDelivery/20140516RFCResponses/PBP\\_PPA\\_RFC.pdf](http://www.dot.state.oh.us/Divisions/InnovativeDelivery/20140516RFCResponses/PBP_PPA_RFC.pdf).

<sup>1382</sup> KPMG, *The Portsmouth Bypass: Bringing Innovative Delivery to Ohio* 20 (2014).

<sup>1383</sup> *Id.*

<sup>1384</sup> See Final RFP, Addendum #2, Public Private Partnership Agreement draft dated July 25, 2014, available at [www.dot.state.oh.us/Divisions/InnovativeDelivery/PortsmouthRFP/20140725\\_Portsmouth\\_PPA\\_Clean.pdf](http://www.dot.state.oh.us/Divisions/InnovativeDelivery/PortsmouthRFP/20140725_Portsmouth_PPA_Clean.pdf).

takings claim) if the termination payment is not made and ODOT takes possession of the road.<sup>1385</sup>

### **Expanded Opportunities for P3s**

Public-private partnerships occur in other contexts as well, often called social infrastructure projects. While many of the previously discussed infrastructure projects often provide for the project sponsor to provide a fee or stipend for the development and submission of proposals (sometimes even by statute), this type of fee is often not available in other P3 opportunities. The lack of a fee or stipend can limit the number of responsive bidders due to project costs involved in a bid submission.<sup>1386</sup> These so-called “social infrastructure” projects have built courthouses, civic buildings, university housing and facilities, and water and wastewater projects.<sup>1387</sup> P3s have been used to complete mixed-use developments, urban renewal (through land and property assembly), convention centers, airports, and affordable and military housing.<sup>1388</sup> Many of the changes to banking regulations brought about by the Dodd-Frank Act have created opportunities for P3 projects in the development of industrial and commercial parks and speculative building construction. Many universities and colleges within the state already use public-private partnerships, like Campus Partners,<sup>1389</sup> to improve the area around campus. The chart below provides some examples of the diversity in projects (beyond pure infrastructure) and spread throughout the country:<sup>1390</sup>

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<sup>1385</sup> KPMG, *The Portsmouth Bypass: Bringing Innovative Delivery to Ohio 20* (2014).

<sup>1386</sup> ODOT Policy No. 34-001(P), effective Nov. 15, 2012 (detailing how ODOT has the discretion to provide fees or stipends).

<sup>1387</sup> *Market Update: A Review of the U.S. Public Private Partnership (P3) Sector in 2014*, Practical Law Fin. (Jan. 7, 2015).

<sup>1388</sup> Corrigan, *Ten Principles for Successful Public/Private Partnerships*, ULI-the Urban Land Institute (2005).

<sup>1389</sup> Campus Partners for Community Urban Redevelopment was founded in 1995 by The Ohio State University, in cooperation with the City of Columbus, to spearhead the revitalization of the University District.

<sup>1390</sup> Fried & Falk, *An Expanding US P3 Market*, Chadbourne & Parke LLP (Feb. 2015), available at [http://www.chadbourne.com/An-Expanding-US-P3-Market-02-18-2015\\_projectfinance](http://www.chadbourne.com/An-Expanding-US-P3-Market-02-18-2015_projectfinance).

Types of Projects:	Example:
Transit	Eagle Light Rail – Colorado Purple Line Light Rail – Maryland
Social	Long Beach Courthouse – California Indianapolis Court House – Indiana Houston Justice Complex – Texas UC Merced Campus Project – California University of Kansas Project – Kansas
Water	Rialto, California Bayonne, New Jersey
Airport	Luis Munoz Marin Airport – Puerto Rico Central Terminal Building – LaGuardia Airport Denver Great Airport Hall – Colorado

Under Ohio House Bill 145, schools could benefit from infusions of private sector funds if the STEM Public-Private Partnership Pilot Program is created. The goal of the program is to “encourage public-private partnerships between high schools, colleges, and the community to provide high school students the opportunity to receive education and training in a targeted industry [...] while simultaneously earning high school and college credit for the course.”<sup>1391</sup> Whether or not the STEM program gets off the ground, other P3 programs are already being used in higher education to help train workers for today’s industry needs. For more details, please see [Chapter 8](#).

Because the aviation industry is essential for moving people, it is a big part of economic development and another ready opportunity for public-private partnerships. In 1996, the

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<sup>1391</sup> House Bill No. 145 (as introduced–April 7, 2015). Referred to Finance Committee on April 14, 2015.

Federal Aviation Administration established the P3 Pilot Program,<sup>1392</sup> but to date only the Puerto Rico Ports Authority has used the public-private partnership program successfully—at the San Juan Airport in Puerto Rico.<sup>1393</sup> The San Juan Airport included an ongoing revenue share, which aligned the incentives of the parties.<sup>1394</sup>

The International Terminal at New York's JFK airport was also developed using a P3 model because the New York and New Jersey Port Authority that controlled the airport had limited debt capacity to finance necessary improvements.<sup>1395</sup> At JFK, the private partners designed, financed, built, and now operate and manage the facility. In exchange, they receive income from terminal operations and retail activity.<sup>1396</sup> At the time of its redevelopment in 2001, the project was the largest public-private infrastructure project in the nation, at a cost of \$1.4 billion.<sup>1397</sup> The LaGuardia Airport renovation, announced in July 2015, however, is also being procured by the New York and New Jersey Port Authority using a P3 model with a price tag of nearly \$4 billion.<sup>1398</sup> Another example of an airline public-private partnership is Love Field, which was built by Southwest Airlines and then returned to the city of Dallas.<sup>1399</sup> Southwest had an incentive to build the project to improve its business, but Dallas ultimately became the owner of the airport.

Not many P3 projects have involved airports, as these often have high credit ratings, so they can operate efficiently. An example of a project where an airport may want to do a P3 would be when massive improvements are required by an unfunded regulation without a looming deadline to implement the changes.<sup>1400</sup>

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<sup>1392</sup> The Airport Privatization Pilot Program was established to explore privatization as a means of generating access to various sources of private capital for airport development and improvement, allowing private companies to own, manage, lease, and develop public airports. See Federal Aviation Administration, Airport Privatization Pilot Program, [www.faa.gov/airports/airport\\_compliance/privatization](http://www.faa.gov/airports/airport_compliance/privatization).

<sup>1393</sup> House Public-Private Partnership Roundtable Discussion (May 20, 2014). As of October 2014, however, there is an active application for the Hendry County Airglades Airport in Florida, where the county is seeking a private developer to convert the airport into an international hub for perishable cargo. See Federal Aviation Administration, Airport Privatization Pilot Program, [www.faa.gov/airports/airport\\_compliance/privatization](http://www.faa.gov/airports/airport_compliance/privatization); Christensen, *U.S. Sugar and Hendry County Seek to Turn Sleepy Airport into Cargo Hub to Rival MIA* (Oct. 8, 2014).

<sup>1394</sup> House Public-Private Partnership Roundtable Discussion (May 20, 2014).

<sup>1395</sup> *Id.*; The National Council for Public-Private Partnerships, *Testing Tradition: Assessing the Added Value of Public-Private Partnerships* 21 (2012), available at <http://www.ncppp.org/wp-content/uploads/2013/03/WhitePaper2012-FinalWeb.pdf>.

<sup>1396</sup> The National Council for Public-Private Partnerships, *Testing Tradition* at 21.

<sup>1397</sup> Corrigan, *Ten Principles for Successful Public/Private Partnerships*, ULI-the Urban Land Institute 22 (2005).

<sup>1398</sup> Rivoli, *LaGuardia Airport to See \$4B Overhaul to Resolve Crowding and Flight Delays by 2021*, New York Daily News (July 27, 2015).

<sup>1399</sup> House Public-Private Partnership Roundtable Discussion (May 20, 2014).

<sup>1400</sup> *Id.*

Outside of the United States, airports often have a much higher percentage of their revenue coming from non-airline sources.<sup>1401</sup> Generally, private companies can obtain efficiencies through improving technology, from implementing modern business practices and infrastructure improvements, and not typically from raising fees.<sup>1402</sup> Because of the difference in airport revenues abroad, more P3s have occurred in the airline industry outside of the US than within the US.

A handful of major water-related P3s have also started to emerge in the market. Congress recently created a pilot P3 program and new the Water Infrastructure Finance and Innovation Act (“WIFIA”) loan program to support water P3s.<sup>1403</sup> In June 2014, President Obama signed the Water Resources Reform and Development Act of 2014 (“WRRDA”).<sup>1404</sup> The WRRDA requires the Army Corps of Engineers to “develop a P3 pilot program allowing non-federal partners to carry out water resource development projects, including coastal harbor improvement, channel improvement, inland navigation, flood damage reduction, aquatic ecosystem restoration, and hurricane and storm damage reduction.”<sup>1405</sup> The WIFIA will hopefully address water and waste-water sector needs. This program may be of great interest to Ohioans, due to the increased need for water and sewer structures as a result of booming shale industry in the eastern part of the state. Local governments may be able to partner with industry to build the needed facilities, using some of the federally available programs and funds.

Local governments have used P3s for years as a way to undertake economic development, relying on their home rule power to sign agreements with private companies. Local economic development P3’s frequently involve JEDD’s, discussed more in Chapter 2. Oftentimes, local governments have a private project that receives public support or incentives and refer to the project as a “public-private partnership,” without the risk-shifting considerations discussed above. Other times, government entities will create a collaboration with private partners and use the term “public-private partnership.” For example, in Cleveland, the public, nonprofit, and business communities collaborated to establish a comprehensive

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<sup>1401</sup> *Id.*

<sup>1402</sup> The National Council for Public-Private Partnerships, *House P3 Panel Explores Airport Privatization* (May 21, 2014), <http://www.ncppp.org/house-p3-panel-explores-airport-privatization>.

<sup>1403</sup> Fried & Falk, *An Expanding US P3 Market*, Chadbourne & Parke LLP (Feb. 2015), available at [http://www.chadbourne.com/An-Expanding-US-P3-Market-02-18-2015\\_projectfinance](http://www.chadbourne.com/An-Expanding-US-P3-Market-02-18-2015_projectfinance).

<sup>1404</sup> Public Law 113-121, 128 Stat. 1193 (2014). This law contains the WIFIA authorization, making low interest rate federal loans to partially fund vital water and wastewater infrastructure.

<sup>1405</sup> The National Council for Public-Private Partnerships, *House Includes P3 Pilot Initiative in Water Resources Infrastructure Bill* (May 21, 2014), <http://www.ncppp.org/house-includes-p3-pilot-initiative-in-water-resources-infrastructure-bill>.

redevelopment framework for the waterfront district.<sup>1406</sup> Likewise, the Ohio Department of Health established a statewide “public-private partnership” with children’s provider organization, state agencies, and children’s advocates to improve children’s healthcare and outcomes in Ohio.<sup>1407</sup> Although these relationships may not shift risks to the private sector, they still can benefit Ohioians.

What does all of this mean for economic development in Ohio? Ultimately, the state (and other governmental units) and the private sector have several ways to partner to benefit the citizens of Ohio. The first thing that parties need to do is creatively brainstorm ways that a project can be completed. You do not want to decide to do a P3 and then find a project; you need to have a good project in mind, and then find alternative ways to do it. Sometimes a P3 will make sense, and sometimes it will not. However, the public sector is more willing than ever before to collaborate.

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<sup>1406</sup> Corrigan, *Ten Principles for Successful Public/Private Partnerships*, ULI-the Urban Land Institute 17 (2005). Partners included the Port Authority, the Ohio Department of Transportation, the Greater Cleveland Partnership, and Cleveland Neighborhood Development Corporation, and their relationship was set forth in a Memorandum of Understanding.

<sup>1407</sup> Ohio Department of Health, *BEACON Projects Overview*, available at <https://www.odh.ohio.gov/~media/ODH/ASSETS/Files/beacon/02-08-11beaconprojects.pdf>.

**Chapter Thirteen:**  
**Public Records Impact on Economic Development**

**Key Points:**

- Public Records and Open Meetings laws address both public records and meetings of government officials, including state and local government economic development officials.
- The Public Records Act gives the public access to government records; however, this access is balanced against an interest in maintaining the confidentiality of sensitive and proprietary records belonging to private businesses. For this reason, the Public Records Act allows certain types of business records to be withheld from the public.
- The Open Meetings Act ensures the public’s access to government meetings. Generally, public bodies are required to conduct meetings that are open to the public. Public bodies can discuss only a limited number of topics in private sessions that are not open to the public.

Thomas Jefferson famously wrote, “Information is the currency of democracy.” The public’s access to the work of government is essential to our democratic system of government. Access to government meetings and records provides citizens with the information they need to participate in the democratic process. Ohio’s Sunshine Laws, consisting of the Public Records Act and Open Meetings Act, provide public access to the workings of government. These laws also enable public access to public records documenting the government’s spending of public money to support economic development, while ensuring that sensitive information belonging to private businesses is not jeopardized.

The public’s ability to access information maintained by the government is a modern development. Historically, the public’s right to access governmental records was severely restricted, and citizens were permitted to inspect government documents only with special consent from the government.<sup>1408</sup> Over time, Ohio courts recognized the public’s right to obtain and review the government’s records as a fundamental cornerstone of democracy. In 1960, the Ohio Supreme Court acknowledged “that public records are the people’s records, and that the officials in whose custody they happen to be are merely trustees for the people . . . .”<sup>1409</sup> In 1963, the Ohio General Assembly codified the public’s right of access to government

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<sup>1408</sup> *State ex rel. Nat. Broad. Co. v. City of Cleveland*, 38 Ohio St.3d 79, 81 (1988).

<sup>1409</sup> *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371 (1960)

records.<sup>1410</sup> Like the Public Records Act, the Open Meetings Act evolved from the principle that citizens have the right to observe the workings of their representative government.<sup>1411</sup> These laws affect economic development because the state and local government officials implementing economic development programs must comply with the public records and open meetings law. This compliance affects the negotiation of incentives and various other parts of the economic development process from the perspective of a private company wishing to keep its business plans and information private. Situations in which a private company submits to a public office its confidential and proprietary business information may raise novel legal issues that should be discussed with legal counsel.

For those looking for additional information, the Attorney General’s Office annually publishes a comprehensive manual on the Public Records Act and Open Meetings Act.<sup>1412</sup>

### **The Public Records Act**

The General Assembly enacted the Public Records Act in 1963 under its general power to pass legislation. The Public Records Act applies to “**public records**,” which are “records kept by any public office.”<sup>1413</sup> The term “**public office**” is defined to include “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by Ohio law for the exercise of any function of government.”<sup>1414</sup> Cities, counties, port authorities and Community Improvement Corporations are all public offices, but many of the other Special Purpose Entities discussed in Chapter 2 are not “public offices” by statute. As a result, each entity must undergo an analysis to determine if compliance with the Public Records Act might be required (as discussed further below). Notably, however, the Public Records Act specifically provides that JobsOhio, the nonprofit corporation that promotes job creation and economic development in Ohio, is not a public office under the Public Records Act.<sup>1415</sup> Not only is JobsOhio not a “public office,” but by statute, its records are not public records.<sup>1416</sup> Records created by JobsOhio are not public records, regardless of who may have custody of the records.<sup>1417</sup> Records received by JobsOhio from any entity that isn’t subject to

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<sup>1410</sup> See 1963 Ohio Laws 130, 155 (“All public records shall be open at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.”).

<sup>1411</sup> *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 544 (1996).

<sup>1412</sup> This manual is available online at Ohio Attorney General, Publications Files, <http://www.ohioattorneygeneral.gov/Files/Publications-Files>.

<sup>1413</sup> R.C. 149.43(A)(1).

<sup>1414</sup> R.C. 149.011(A).

<sup>1415</sup> *Id.*

<sup>1416</sup> *Id.*; R.C. 187.04(C); *State ex rel. Ullmann v. JobsOhio*, 138 Ohio St.3d 83, 2013-Ohio-5188, 3 N.E.3d 1183 (Mem),

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<sup>1417</sup> R.C. 187.04(C)(1).

the Public Records Act are also not public records, regardless of who may have custody of those records.<sup>1418</sup> Likewise, if JobsOhio receives records from a public office that are not public records when in the hands of the public office (for example, confidential financial information exempted under Revised Code 122.36), they do not become public records regardless of who has custody of the records.<sup>1419</sup>

Additionally, JobsOhio is required by statute to make certain records available to the public under the same conditions as public records.<sup>1420</sup> These records include:

- JobsOhio’s federal income tax returns (Form 990);
- Report of actual or in-kind expenditures for the travel, meals, or lodging of the governor or of any public official or employee designated by the governor pursuant to Revised Code 187.03;
- The annual total compensation paid to each officer and employee of JobsOhio;
- Each JobsOhio financial audit report;
- Each JobsOhio supplemental compliance and control review report;
- Records of any fully executed incentive proposals, to be filed annually;
- Records pertaining to the monitoring of commitments made by incentive recipients, to be filed annually; and
- A copy of the minutes of all public meetings of the JobsOhio Board of Directors.

Other non-public entities do not typically make these types of documents available to the public.

Records of a public office are subject to disclosure under the Public Records Act if they meet the three-part definition of “**record**”: (1) on a fixed media; (2) created or received by or coming under the jurisdiction of the state or political subdivisions; and (3) document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.<sup>1421</sup> Records that do not exist do not meet this definition, and a public office is not required to create records to satisfy a request.<sup>1422</sup>

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<sup>1418</sup> R.C. 187.04(C)(2).

<sup>1419</sup> R.C. 187.04(C)(3).

<sup>1420</sup> R.C. 187.04.

<sup>1421</sup> *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, ¶ 19; R.C. 149.011(G).

<sup>1422</sup> *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 16.

In some circumstances, the Public Records Act may apply to records that are maintained by a private entity if there is clear and convincing evidence that a private entity is the “functional equivalent” of a public office. Courts will apply a four-part test to determine if the Public Records Act applies to a private entity, including (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement of regulation; and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.<sup>1423</sup>

Separately, the records generated when private entities contract with public offices to perform government work may also be subject to the Public Records Act. For example, in *State ex rel. Cincinnati Enquirer v. Krings*, the Ohio Supreme Court considered whether the records of private contractors working on the construction of Paul Brown Stadium, a publicly funded football stadium, were public records subject to disclosure under the Public Records Act.<sup>1424</sup> In that case, the Hamilton County Board of Commissioners, which was authorized to redevelop the Cincinnati riverfront area and construct the stadium, entered into contracts with a number of contractors for development services.<sup>1425</sup> Under these contracts, the contractors agreed to construct the stadium, monitor the costs of the project, and provide the Board access to cost-accounting and other project information upon request.<sup>1426</sup> The Court explained that these contractors, despite being a private entity, were subject to the Public Records Act if they met the following requirements: “(1) it must prepare the records in order to carry out a public office’s responsibilities, (2) the public office must be able to monitor the private entity’s performance, and (3) the public office must have access to the records for this purpose.”<sup>1427</sup> In applying these factors, the Court held that the private contractors were subject to the Public Records Act because the Hamilton County Board of Commissioners had access to the contractors’ records and because the contractors were fulfilling the Board’s governmental responsibility of redeveloping Cincinnati’s riverfront area. In reaching this conclusion, the Supreme Court noted that “governmental entities cannot conceal information concerning public duties by delegating these duties to a private entity.”<sup>1428</sup>

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<sup>1423</sup> *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, paragraph two of syllabus.

<sup>1424</sup> 93 Ohio St.3d 654 (2001).

<sup>1425</sup> *Id.* at 655.

<sup>1426</sup> *Id.* at 656.

<sup>1427</sup> *Id.* at 657.

<sup>1428</sup> *Id.* at 659.

## **Exceptions to the Public Records Act**

There are many laws that allow public offices to not release certain types of records. Numerous Ohio and federal laws create “exceptions” that protect documents from public disclosure under the Public Records Act. One relevant exception in the economic development realm, discussed in more detail below, is the provision that excludes from the definition of public record all “[r]ecords the release of which is prohibited by state or federal law.”<sup>1429</sup>

When a public office withholds an entire record or redacts any part of a record, the public office has to notify the requester of the reason for withholding or redacting the record.<sup>1430</sup> The Supreme Court of Ohio has emphasized that exceptions to disclosure must be strictly construed against the public office, and the public office bears the burden to establish the applicability of an exception.<sup>1431</sup>

### **Contracts Do Not Create Exceptions**

Under the Public Records Act, a public office may not withhold records based on confidentiality provisions that are included in settlement agreements or contracts.<sup>1432</sup> That is, a public office cannot contract around the Public Records Act by including a confidentiality provision in a settlement agreement or contract that precludes the release of records that would otherwise be subject to disclosure. Such contractual provisions are **void and unenforceable**.<sup>1433</sup>

### **Intellectual Property Records of Universities**

A public office’s intellectual property records are excluded from the definition of a “public record” and are not subject to public disclosure under the Public Records Act.<sup>1434</sup> An “intellectual property record” is:

- (1) a record “other than a financial or administrative record”;
- (2) “produced or collected by or for faculty or staff of a state institution of higher learning”;
- (3) produced in “the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue”; and

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<sup>1429</sup> R.C. 149.43(A)(1)(v).

<sup>1430</sup> R.C. 149.43(B)(1).

<sup>1431</sup> *Id.*

<sup>1432</sup> *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 137 (1997).

<sup>1433</sup> *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 527 (1997).

<sup>1434</sup> R.C. 149.43(A)(1)(m).

(4) not “publicly released, published, or patented.”<sup>1435</sup>

This exemption applies whether or not the study or research was sponsored by the institution holding the records or in conjunction with a governmental body or private entity.<sup>1436</sup> The Supreme Court of Ohio considered whether this exemption applied to spinal-cord research program records maintained by a state university college of medicine in the case *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*.<sup>1437</sup> The Supreme Court found that the requested records were intellectual property records because the University restricted access to these records even though some records had been shown or loaned to small groups of scientists. But the University did not make the records available to members of the public, and scientists with limited access to the records were required to sign nondisclosure agreements. In light of these extensive restrictions, the records satisfied the fourth prong of the definition of an intellectual property record because they had not been “publicly released, published, or patented.”<sup>1438</sup>

There are scores of other exceptions to the Public Records Act. Below are some examples of documents excepted from to the Public Records Act under “prohibited by state or federal law” catch-all in Revised Code 149.43(A)(1)(v).

### **Trade Secret**

Records held by a public office that meet the definition of a trade secret are excepted from disclosure under the Public Records Act. Ohio law defines trade secret as information, including “scientific or technical information, . . . any business information or plans, financial information, or listing of names, addresses, or telephone numbers that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”<sup>1439</sup>

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<sup>1435</sup> R.C. 149.43(A)(2)(5).

<sup>1436</sup> *Id.*

<sup>1437</sup> 108 Ohio St.3d 288 (2006).

<sup>1438</sup> *Id.* at ¶ 33.

<sup>1439</sup> R.C. 1333.61(D).

The Supreme Court of Ohio has also adopted the following factors in analyzing a trade secret claim:

(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.<sup>1440</sup>

In applying this test, the Supreme Court held that a page-long preliminary business plan listing the names of the top patient-volume physicians in a medical center and their characteristics constituted a trade secret of The Ohio State University.<sup>1441</sup> The release of this plan, the Court explained, would permit the University's competitors to recruit these premier physicians to the University's detriment.<sup>1442</sup>

### **Copyrighted Records**

Copyright law is a federal law that allows public offices to withhold covered records from disclosure under the Public Records Act.<sup>1443</sup> Federal copyright law protects "original works of authorship" that are fixed in a "tangible medium," including literary works; musical works; dramatic works, pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.<sup>1444</sup> A copyright gives the owner of an original work of authorship the exclusive rights to copy that work.<sup>1445</sup> A court may award monetary damages and other relief for infringing on a copyright against those who improperly use or reproduce copyrighted material.<sup>1446</sup>

The Ohio Supreme Court has enforced copyright protection in a disclosure situation. In *State ex rel. Gambill v. Opperman*, the Ohio Supreme Court considered whether a county

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<sup>1440</sup> *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399–400 (2000).

<sup>1441</sup> *Id.* at 398.

<sup>1442</sup> *Id.*

<sup>1443</sup> *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 22.

<sup>1444</sup> 17 U.S.C. 102(a)(1)–(8).

<sup>1445</sup> Specifically, the copyright owner has exclusive rights to reproduce the work, to prepare derivative works based upon the copyrighted work, to distribute copies of the work to the public, to perform the work publicly, to display the work publicly, and to perform the work publicly by means of digital audio transmission. 17 U.S.C. 106(1)–(6).

<sup>1446</sup> 17 U.S.C. 502–505.

engineer's electronic database, which included the raw data used to create tax maps and access aerial photographs, was exempt from disclosure due to copyright law.<sup>1447</sup> The Court concluded that because the records in the database were inextricably intertwined with copyright-protected software, the copyright exception applied to allow the public office to withhold the requested records.

### **Materials Submitted to ODSA Director or the Controlling Board**

ODSA's Business Services Division administers the state economic development financing programs.<sup>1448</sup> In so doing, the director of ODSA receives and processes applications for certain forms of industrial, community, and economic development assistance, often through JobsOhio as part of ODSA's relationship with JobsOhio.<sup>1449</sup> Any materials or data that consist of trade secrets or commercial or financial information regarding projects that is submitted to, made available to, or received by the director of ODSA or the Controlling Board, may be withheld from public disclosure.<sup>1450</sup>

### **Tax Credit Authority**

To foster job creation, the Tax Credit Authority is empowered to issue tax credits to taxpayers or potential taxpayers who propose projects that would create jobs in the state.<sup>1451</sup> To receive a tax credit, applicants are required to submit an application demonstrating that the proposed projects will create new jobs and strengthen the economy, which may include financial information about the proposed projects.<sup>1452</sup> These financial statements and other information submitted to ODSA or the Tax Credit Authority by an applicant or recipient of a tax credit may be withheld from disclosure under the Public Records Act.<sup>1453</sup> However, this information may be used by the chair of the Tax Credit Authority to issue public reports or in connection with any court proceedings about the issuance of tax credits.<sup>1454</sup>

### **Port Authority Records**

Port authorities are subject to the Public Records Act.<sup>1455</sup> But port authorities may withhold from public disclosure the financial and proprietary information, including trade

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<sup>1447</sup> 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 25.

<sup>1448</sup> R.C. 122.64(A).

<sup>1449</sup> R.C. 122.30–.33.

<sup>1450</sup> R.C. 122.36. This exception applies to records that are submitted to ODSA and the Controlling Board, not to a city's community development department. *See State ex rel. Jacobs v. Prudoff*, 30 Ohio App.3d 89 (9th Dist. 1986).

<sup>1451</sup> R.C. 122.17(B)-(C)(1).

<sup>1452</sup> R.C. 122.17(C)(1)(b).

<sup>1453</sup> R.C. 122.17(G).

<sup>1454</sup> R.C. 122.17(G).

<sup>1455</sup> *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, ¶¶ 10–13.

secrets that a business submits to a port authority in the relocation or improvement of that business.<sup>1456</sup> In addition, any other information that the business submits to a port authority in its relocation or improvement of the business is not subject to disclosure under the Public Records Act because it is not a public record. However, once the business commits in writing to proceed with the relocation or improvement at issue, that “other information” becomes a public record subject to disclosure.<sup>1457</sup>

### **Records of Community Improvement Corporations**

Information disclosed by an entity to a community improvement corporation may be kept confidential in certain circumstances. Specifically, any financial and proprietary information, including trade secrets, submitted to a community improvement corporation in a business’s relocation or improvement is confidential information not subject to public disclosure under Revised Code 1724.11(A)(1). In addition, until the entity commits in writing to proceed with the relocation or improvement any other information that the entity submits to a community improvement corporation in connection with that activity is not subject to disclosure under the Public Records Act.<sup>1458</sup> But the financial and proprietary information is not required to be released once the entity has committed in writing to the project.

### **Requesting Public Records**

A request for public records does not have to be in writing, and the requester does not have to give a reason for making the request.<sup>1459</sup> A requester may remain anonymous, and the public office cannot require the requester to identify himself or herself; however, if knowing this information would allow the public office to locate, identify, or deliver the requested records, the public office may request it but must first inform the requester that providing this information is not mandatory.<sup>1460</sup>

A public records request must describe records with enough specificity for a public office to identify the records.<sup>1461</sup> If a request is ambiguous or overly broad, a public office may deny the request. When that occurs, the public office must explain to the requester how the office organizes its records and afford the requester the opportunity to revise the request.<sup>1462</sup>

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<sup>1456</sup> R.C. 4582.58(B) and 4582.091.

<sup>1457</sup> *Id.*; see also *State ex rel. R.R. Ventures, Inc. v. Columbiana Cty. Port Auth.*, 7th Dist. Columbiana No. 2002-CO-26, 2004-Ohio-391, ¶ 26.

<sup>1458</sup> R.C. 1724.11(A)(2).

<sup>1459</sup> R.C. 149.43(B)(4).

<sup>1460</sup> R.C. 149.43(B)(4)–(5).

<sup>1461</sup> *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17.

<sup>1462</sup> R.C. 149.43(B)(2).

The Public Records Act generally requires every public office, when requested, to make copies of records available within a reasonable period of time.<sup>1463</sup> The Act also requires every public office upon request to promptly prepare public records and make them available for inspection during regular business hours.<sup>1464</sup> While the law does not specify the precise length of time for responding to public records requests, courts consider a number of factors, including the time it takes to identify,<sup>1465</sup> locate and retrieve,<sup>1466</sup> review,<sup>1467</sup> and redact<sup>1468</sup> records in making the fact-intensive determination of whether a public office has complied with its obligations. For example, in *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Edn.*, the Supreme Court of Ohio held that a school district’s six-day delay in responding to a newspaper’s request for the résumés of the finalists for the position of school district treasurer was not reasonable.<sup>1469</sup>

If a requester is requesting a copy of a public record, the public office must permit the requester to choose the format, including (1) in paper format; (2) in the same format in which the public office keeps the public record; or (3) in any other format that the public office determines it can provide the record.<sup>1470</sup> A public office may also charge the actual cost of providing public records to a requester. This “does not include labor costs for employee time to respond to the request and make the copies.”<sup>1471</sup> In addition, the requester may choose how to receive the copies of public records, and the public office may charge the requester the cost of delivery.<sup>1472</sup>

### **Enforcement, Liability, and Alternatives to Litigation**

A person who believes that a public office did not comply with its obligations under the Public Records Act may file a mandamus action, which is a court action, to compel the public office to comply with the law.<sup>1473</sup> This lawsuit can be filed in one of three courts: in the common pleas court in the county where the alleged violation occurred, in the court of appeals in the appellate district where the alleged violation occurred, or in the Supreme Court of Ohio.<sup>1474</sup> If the court determines that the public office violated the Public Records Act, the court

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<sup>1463</sup> R.C. 149.43(B)(1).

<sup>1464</sup> *Id.*

<sup>1465</sup> R.C. 149.43(B)(2), (5).

<sup>1466</sup> R.C. 149.43(B)(5).

<sup>1467</sup> *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, ¶ 17.

<sup>1468</sup> R.C. 149.43(A)(11).

<sup>1469</sup> 97 Ohio St.3d 58 (2002).

<sup>1470</sup> R.C. 149.43(B)(6).

<sup>1471</sup> *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 304, 2013-Ohio-761, ¶ 27.

<sup>1472</sup> R.C. 149.43(B)(7).

<sup>1473</sup> R.C. 149.43(C)(1).

<sup>1474</sup> *Id.*

may order the public office to comply with the law and to pay court costs, attorney's fees, and in certain cases, statutory damages.<sup>1475</sup>

As an alternative to litigation, the Ohio Attorney General's Public Records Mediation Program is available to (1) individuals who requested public records from a local public office or (2) to local public offices that have received a public records request. This free program helps public records requesters and local governments resolve disputes through mediated discussion, education, and cooperation. The Program is not available, however, if the requester has already filed a lawsuit.<sup>1476</sup>

### **Records Management Obligations and Liability**

To facilitate transparency and ensure the public's access to public records, the Public Records Act requires a public office to organize and maintain its public records so that they can be made available for inspection or copying upon request.<sup>1477</sup> Public offices are also prohibited from removing, destroying, mutilating, or otherwise damaging or disposing of its records unless it is allowed to do so by law or the public office's records retention schedule.<sup>1478</sup>

A person who is aggrieved by a public office's unauthorized "removal, destruction, mutilation, transfer, or other damage to or disposition of a record" may file lawsuits for either or both of the following remedies: (1) injunctive relief that orders the public office to comply with records management law; and (2) to recover forfeiture of \$1,000 for each violation of the law not to exceed \$10,000.<sup>1479</sup>

### **Open Meetings Act**

Like the Public Records Act, the Open Meetings Act allows citizens to observe the workings of government. The Open Meetings Act requires public bodies to deliberate and take action on public business in meetings that are open to the public.

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<sup>1475</sup> *Id.* A court is required to award the requester statutory damages of \$100 for each business day during which the public office or person responsible for the requested records failed to comply with its obligations, up to a maximum of \$1,000 if the requester meets two requirements: (1) the requester submits a written request by hand delivery or certified mail to inspect or receive copies of any public record; (2) this request "fairly describes the public record or class of public records to the public office or person responsible for the requested public records."

<sup>1476</sup> For additional information about this program, see Ohio Attorney General, Public Records Mediation Program, [www.OhioAttorneyGeneral.gov/PublicRecordsMediation](http://www.OhioAttorneyGeneral.gov/PublicRecordsMediation).

<sup>1477</sup> R.C. 149.43(B)(2).

<sup>1478</sup> R.C. 149.351(A). Absent a retention schedule or applicable statute, a public office is not permitted to dispose of public records.

<sup>1479</sup> R.C. 149.351(B).

The Open Meetings Act, with some exceptions, applies to state and local “public bodies”<sup>1480</sup> when they conduct “meetings.” The term “meeting” is defined as “any prearranged discussion of the public business of the public body by a majority of its members.”<sup>1481</sup> The definition of “public body” includes the committees and subcommittees of “[a]ny board, commission, committee, council, or similar decision-making body of a state agency . . . [or] county, township, municipal corporation, school district, or other political subdivision or local public institution” and sanitation courts.<sup>1482</sup> The Open Meetings Act does not apply to the board of directors or any committee of the nonprofit corporation JobsOhio and the board of directors of any subsidiary or committee of JobsOhio.<sup>1483</sup> Likewise, the Open Meetings Act does not apply to other special purpose entities that are not “public bodies” either. Whether a particular special purpose entity is subject to the Open Meetings Act is a fact-specific inquiry that requires a consideration of the factors discussed in this section.

Notably, a public entity need not be created by state statute or local ordinance to be considered a public body under the Open Meetings Act. In *Wheeling Corp. v. Columbus & Ohio River R.R.*, the court considered whether a temporary selection committee, established by the Ohio Rail Development Commission (“ORDC”) to evaluate requests for proposals submitted to ORDC, was a public body subject to the Open Meetings Act.<sup>1484</sup> The court found that the committee being established by an agency, ORDC, and not under a state statute or ordinance was immaterial to determining whether the committee was a public body.<sup>1485</sup> The court held that this selection committee was a public body in part because it “made decisions and then advised ORDC,” a public body.<sup>1486</sup>

Likewise, a court has held that an urban design review board, composed of a group of architectural consultants for the city of Cincinnati, was a public body subject to the Open Meetings Act because the board made decisions when formulating its advice to the city manager and to the Cincinnati City Council regarding development and planning projects.<sup>1487</sup>

Courts have also found that the Open Meetings Act applies to private bodies that are created by state law and are authorized to receive and spend public funds to support public programs. In the case *State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Assn. of Greater Toledo*, a court held that the Economic Opportunity Planning Association of Greater

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<sup>1480</sup> R.C. 121.22(B)(1).

<sup>1481</sup> R.C. 121.22(B)(2).

<sup>1482</sup> R.C. 121.22(B)(1)(a)–(c).

<sup>1483</sup> R.C. 121.22(D)(11). R.C. 121.22(D) identifies the public bodies that are not subject to the Open Meetings Act.

<sup>1484</sup> 147 Ohio App.3d 460, 472 (10th Dist. 2001).

<sup>1485</sup> *Id.* at ¶ 62.

<sup>1486</sup> *Id.* at ¶¶ 62–63.

<sup>1487</sup> *Cincinnati Enquirer v. Cincinnati*, 145 Ohio App.3d 335 (1st Dist. 2001).

Toledo was a public body because it was designated by a statute as a community action agency charged with spending governmental funds for public purposes.<sup>1488</sup>

### **Duties of a Public Body Under the Open Meetings Act**

The Open Meetings Act imposes three primary requirements on public bodies: (1) conduct meetings that are open to the public; (2) provide notice of meetings to the public; and (3) take and keep meeting minutes.

The first requirement of the Open Meetings Act is that public bodies, including all committees and subcommittees, must take official action and conduct all deliberations of public business in open meetings.<sup>1489</sup> While public bodies can discuss a limited number of topics in private meetings, called executive sessions, most business must be discussed in meetings that are open to the public.<sup>1490</sup> The Open Meetings Act provides that a resolution, rule, or formal action of any kind is invalid unless adopted by the public body in an open meeting.<sup>1491</sup> The Supreme Court has specifically found a violation of the Open Meetings Act when members of a public body met in back-to-back closed meetings, each attended by less than a majority of public body but which, taken together, were attended by a majority of that body.<sup>1492</sup>

Courts have invalidated the formal actions of public bodies that were not taken in open meetings.<sup>1493</sup> For example, *Mansfield City Council v. Richland Cty. Council AFL-CIO* stemmed from a city council's deliberations regarding approval of a proposed tax abatement in a session that was not open to the public.<sup>1494</sup> A group seeking revocation of the tax abatement sued the city council and argued that its decision to not take action regarding the tax abatement was invalid because the council members deliberated and decided in a private session.<sup>1495</sup> In reviewing this case, an appellate court agreed with the group and held that the city council had violated the Open Meetings Act by deliberating and taking official action in a closed session.<sup>1496</sup> The Court invalidated the city council's decision and awarded the group attorney's fees of \$7,500.<sup>1497</sup>

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<sup>1488</sup> 61 Ohio Misc.2d 631 (Lucas C.P. 1990) (holding that the EOPA is a public body subject to the Open Meetings Act).

<sup>1489</sup> R.C. 121.22(A).

<sup>1490</sup> *Id.*

<sup>1491</sup> R.C. 121.22(H).

<sup>1492</sup> *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 544 (1996).

<sup>1493</sup> 5th Dist. Richland No. 03-CA-55, 2003 WL 23652878 (Dec. 24, 2003).

<sup>1494</sup> *Id.* at ¶ 5.

<sup>1495</sup> *Id.* at ¶¶ 37–40.

<sup>1496</sup> *Id.* at ¶ 40.

<sup>1497</sup> *Id.* at ¶¶ 54–57.

The Open Meetings Act also requires that public bodies allow citizens to attend its meetings by giving notice of their meetings.<sup>1498</sup> The type of notice required varies with the type of meeting the body is conducting. The Open Meetings Act classifies meetings as “regular” or “special” meetings. Regular meetings are those held at prescheduled intervals, such as monthly or quarterly. Special meetings, including emergency meetings, are all meetings other than regular meetings.

The Open Meetings Act requires that public bodies establish by rule a reasonable method by which to notify the public of the time and place of all its regular meetings and the time, place, and purpose of all its special meetings. When informing the public of the purpose of a special meeting, the public body must specifically list the topics to be discussed and is limited to discussing those particular topics. When giving notice of special meetings, a public body is required to give at least 24-hour advance notice to the news media that requested notice. If a public body convenes an emergency meeting, immediate notice of the time, place, and purpose of the meeting is required to all media outlets that requested such notice. Public bodies must also provide reasonable advance notice of all regular and special meetings at which a specific type of public business is to be discussed when a person requests and pays a reasonable fee for such notification.<sup>1499</sup>

Finally, the Open Meetings Act requires that public bodies prepare and maintain full and accurate minutes of their open meetings and make these minutes available the public. While minutes do not have to be a verbatim transcript of the proceedings, they must include enough facts to allow the public to appreciate the rationale behind the public body’s decisions.<sup>1500</sup>

To address alleged or threatened violations of the Open Meetings Act, any person may file a lawsuit for an injunction in the appropriate court of common pleas within two years of the alleged or threatened violation.<sup>1501</sup> If a violation is proven, the court must issue an order requiring the public body to comply with the Open Meetings Act and to pay courts costs and reasonable attorney fees.<sup>1502</sup>

### **Certain Public Bodies Permitted to Consider Development Programs in Closed Meetings**

The Open Meetings Act permits the Controlling Board, the Tax Credit Authority, and the Minority Development Financing Advisory Board, by unanimous vote, to meet in a closed

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<sup>1498</sup> R.C. 121.22(F).

<sup>1499</sup> *Id.*

<sup>1500</sup> R.C. 121.22(C).

<sup>1501</sup> R.C. 121.22(I)(1).

<sup>1502</sup> R.C. 121.22(I)(2).

session to consider granting assistance under certain development programs, if doing so will protect the interest of the applicant or the possible investment of public funds.<sup>1503</sup> Such meetings may be closed only while considering specific types of confidential information received from the applicant, namely marketing plans, specific business strategy, production techniques and trade secrets, financial projections, and personal financial statements of the applicant or members of the applicant's immediate family.<sup>1504</sup>

Moreover, Revised Code 1724.11(B) authorizes the board of a community improvement corporation to consider certain information in an executive session upon the unanimous vote of all members present.<sup>1505</sup> Specifically, the board of a community improvement corporation may consider the following information in executive session:<sup>1506</sup>

- any financial and proprietary information, including trade secrets, submitted by or for an entity to the community improvement corporation in connection to the relocation, location, expansion, improvement, or preservation of the business of that entity; and
- the pursuit of any one or more of the purposes under division (B) of Revised Code 1724.01 for which a county land reutilization corporation is organized, held, or kept by the community improvement corporation, or by any political subdivision for which the community improvement corporation is acting as agent.<sup>1507</sup>

Under Revised Code 4582.091(B), port authorities may also close their meetings to the public when they are considering nonpublic information, but they may consider only that nonpublic information during the closed session.

### **Executive Session**

In limited circumstances (such as those described above), the Open Meetings Act permits members of a public body to meet in executive session, which is a private meeting among members of the public body and those they invite.<sup>1508</sup> Public bodies are required to comply with specific procedures for adjourning into executive sessions.<sup>1509</sup> First, there must be a proper motion to begin an executive session that identifies one of the nine topics that a public

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<sup>1503</sup> R.C. 121.22(E).

<sup>1504</sup> R.C. 121.22(E)(1)–(5).

<sup>1505</sup> R.C. 1724.11(B)(1).

<sup>1506</sup> R.C. 1724.11(A).

<sup>1507</sup> R.C. 1724.11(A)(2).

<sup>1508</sup> R.C. 121.22(G).

<sup>1509</sup> *Id.*

body can discuss in executive session.<sup>1510</sup> Second, the motion must be approved by a majority of a quorum of the public body by a roll call vote.<sup>1511</sup> The public body is then limited to discussing only the specific topic identified in the motion to adjourn into executive session. For example, a court held that Ohio Rail Development Commission’s selection committee, which was established to evaluate and score proposals submitted in response to a request for proposals to operate a state-owned rail line, violated the Open Meetings Act by conducting an executive session to deliberate the selection process and operating agreement and failing to make the proper motion to adjourn into executive session.<sup>1512</sup>

The Revised Code identifies nine subjects that a public body may consider in executive session:<sup>1513</sup> These include:

- (1) Personnel matters, including the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or officials; or the investigation of charges or complaints against a public employee, official, licensee, or regulated individuals, unless the person requests a public hearing.<sup>1514</sup>
- (2) Purchase or sale of real or personal property by competitive bid if disclosure of the information would result in a competitive advantage to the person whose personal, private interest is adverse to the general public interest.<sup>1515</sup>
- (3) Pending or imminent court action with the public body’s attorney.<sup>1516</sup>
- (4) Preparation for, conduct of, or review of a collective bargaining strategy.<sup>1517</sup>
- (5) Matters that a public body is required to keep confidential by state or federal law.<sup>1518</sup> A court has held that a board of commissioners may adjourn into executive session to discuss information that they are “*legally bound* to keep from the public.”<sup>1519</sup>

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<sup>1510</sup> *Id.*

<sup>1511</sup> *Id.*

<sup>1512</sup> *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 472 (10<sup>th</sup> Dist.).

<sup>1513</sup> R.C. 121.22(G).

<sup>1514</sup> R.C. 121.22(G)(1).

<sup>1515</sup> R.C. 121.22(G)(2).

<sup>1516</sup> R.C. 121.22(G)(3).

<sup>1517</sup> R.C. 121.22(G)(4).

<sup>1518</sup> R.C. 121.22(G)(5).

<sup>1519</sup> *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 12th Dist. Clermont Nos. CA2011-05-045, CA2011-06-047, 2012-Ohio-2569.

- (6) Security matters if disclosure could reasonably be expected to jeopardize the security of the public body or public office.<sup>1520</sup>
- (7) County, joint township, or municipal hospitals' trade secrets.<sup>1521</sup>
- (8) Discussion of veterans service commission applications for financial assistance by members of Veterans Service Commissions.<sup>1522</sup>

Finally, a public body may meet in executive session to consider the confidential business information of an applicant for economic development assistance.<sup>1523</sup> This is the most recent addition to the topics that a public body may discuss in executive session. A public body may enter into an executive session to consider certain confidential information directly related to economic development initiatives. The statute defines the type of information a public body may consider in an executive session to discuss economic development. A public body must meet the following three requirements to discuss this topic in executive session:

- (1) The public body must hold the executive session to consider either (A) an application for economic development assistance and information related to the applicant's marketing plans, specific business strategy, production techniques, trade secrets, or personal financial statements; or (B) confidential information related to negotiations with other political subdivisions regarding requests for economic development;
- (2) In addition to satisfying either alternative above, the confidential information must be either (A) related directly to a request for economic development assistance under specified statutory schemes; or (B) related directly to public infrastructure improvements or the extension of utility services directly related to an economic development project; and
- (3) The executive session must be necessary to protect the applicant's interests, the potential investment, or the expenditure of public funds to be made in the economic development project. The public body's present members must unanimously agree to the executive session's necessity.<sup>1524</sup>

Documents or other public records discussed by public bodies during executive session are subject to public disclosure, upon request, unless the record is legally exempted from

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<sup>1520</sup> R.C. 121.22(G)(6).

<sup>1521</sup> R.C. 121.22(G)(7).

<sup>1522</sup> R.C. 121.22(J).

<sup>1523</sup> R.C. 121.22(G)(8).

<sup>1524</sup> *Id.*

disclosure in whole or part.<sup>1525</sup> For example, if a public body discusses collective bargaining issues in executive session, a settlement agreement negotiated during that executive session is subject to public disclosure unless an exception applies.<sup>1526</sup>

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<sup>1525</sup> *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 138–139 (1997).

<sup>1526</sup> *Id.*



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