

# *CLOSING THE “DIGITAL DIVIDE” IN OHIO*

A Legal “White Paper” Exploring How Ohio Public Entities Can

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## Introduction

### Why Was This White Paper Written?

Over the next decade the federal government will make tens of billions of dollars available for the development of high-speed internet infrastructure (broadband infrastructure) throughout the United States. That being the case, it may not be clear why there is a need for a “White Paper” specific to Ohio dealing with other “traditional” economic development tools used to provide public capital for economic development and infrastructure projects. However, as impressive as the federal government’s investment will be, there are many reasons why a “state-specific” analysis of the topic is necessary.

#### *States Will Administer Most of the New Federal Funding*

First and foremost, state and local government agencies and institutions will play a substantial role in determining how federal funds for broadband will be used. Even though the federal government is supplying the funding, these institutions will be primarily responsible for administering and distributing the money. Congress has set general guidelines for the use of money distributed for broadband as part of the American Rescue Plan Act<sup>1</sup> (ARPA) and the Infrastructure Investment and Jobs Act<sup>2</sup> (IIJA), and assigned responsibility for implementing its mandates to the Treasury Department,<sup>3</sup> the Federal Communications Commission (FCC), and the National Telecommunications and Information Administration (NTIA).<sup>4</sup> However, the development of the actual *plan* to build out broadband infrastructure, to increase the adoption of broadband, and to make broadband affordable has purposefully been left to the individual states, much like the other federally-funded infrastructure programs.<sup>5</sup>

#### *Federal Funding Programs Require a State or a Local Government Match*

This White Paper is also relevant because the federally funded broadband infrastructure programs require or strongly encourage matching state or local funds to be provided along with the federal grant. For example, the IIJA’s Broadband Equity, Access, and Deployment (BEAD) Program requires that states match at least

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<sup>1</sup> Public Law 117-2, March 11, 2021, <https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>

<sup>2</sup> Public Law 117-58, November 15, 2021, <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>

<sup>3</sup> The Treasury Department is responsible for developing regulations governing the expenditure of funds provided to states and local government as part of the Coronavirus State and Local Fiscal Recovery Funds (SLFRF). See Final Rule at 87 Federal Register No. 18 (January 27, 2022) (<https://www.govinfo.gov/content/pkg/FR-2022-01-27/pdf/2022-00292.pdf>)

<sup>4</sup> Although primary responsibility for distributing funds provided under the IIJA has been assigned to the NTIA, the FCC’s has a limited – but very important – role under the IIJA to fulfill Congress’ mandates under the [Broadband Deployment Accuracy and Technological Availability Act](#) (DATA Act) to create a workable set of maps showing the number of potential locations where broadband service is needed and whether those locations are served, unserved or underserved. This data will be used to allocate grant funding to the states. As discussed [later](#), federal funding under the BEAD program is contingent on allowing private and public entities to apply for funding.

<sup>5</sup> For example, the Federal Highway Trust Fund grant program. See PETER G. PETERSON FOUND., The Highway Trust Fund Explained (Aug. 14, 2020), <https://www.pgpf.org/budget-basics/budget-explainer-highway-trust-fund>.

25% of the overall cost of program funding. ARPA grants, such as State and Local Fiscal Recovery Funds (SLFRF), can count toward that match requirement. However, in many states and localities that money has already been used for other needs, and more local funding resources must be identified.

### *Federal Government Bias for Public Private Partnerships*

In recent years, reliance solely on the private sector (for-profit internet service providers and telecoms) or on local public entities (municipal broadband) acting alone to “close the digital divide” has given way to a recognition that private (for profit) and other nongovernment entities (NGOs) must work with public entities (such as state and local governments) to address the problem. In most cases, neither the private sector (*Private Entities*) nor the public sector (*Public Entities*) acting alone has the combination of access to capital, expertise, and public policy objectives necessary to deliver affordable, reliable broadband service to all individuals and businesses in unserved and underserved areas of the country. Public-private partnerships (P3s) are favored because they create the opportunity to combine the strengths of each and forge long-term relationships that minimize risk by capitalizing on the available resources and expertise of each.

### *Each State’s Approach to Economic Development Is Unique*

Issues faced when closing the digital divide are really not appreciably different than those encountered with other economic development projects: the potential private source revenues are inadequate for private for-profit entities to profitably construct, maintain and operate the broadband infrastructure. This may be true either because potential customers are spaced too far apart in rural settings, or because not enough customers can afford service in an urban setting; in either case, some level of public investment along with private capital must be supplied to close the financing gap.

When compared to other states, Ohio has a long tradition of granting political subdivisions, particularly cities and villages (municipal corporations) broad home rule powers, and while legislation has been proposed to limit municipal corporations from owning, operating, and offering broadband service to its residents and businesses, at least so far those efforts have been unsuccessful. While the Ohio legislature excluded local government from participating in its last grant program, Congress did require that local government entities (and NGOs) be eligible to participate in the IJA’s BEAD grant program. Therefore it is unlikely Ohio will be able to impose an outright ban on local government participation in future state-administered grant programs. Nonetheless, Ohio’s bias against Public Entity broadband needs to be understood by advisors who are assessing the best approach to bridging the digital **divide** in underserved areas of the state.

In any event, for all involved in bringing broadband to their community, an understanding of these economic development tools and how and when they can be deployed effectively, is a critical ingredient for success. What works in Ohio may not work in other states, and some solutions used in other states cannot be used in Ohio because of state and local law restrictions.

### **Who Should Use this White Paper?**

This White Paper is intended for use by project engineers and consultants, internet service providers (ISPs), community planners, legal and financial advisors, and local government administrators and officials. It assumes some level of understanding of broadband infrastructure and the internet service industry and a

significant interest in the peculiar aspects of Ohio law that will affect the development of a workable public-private partnership solution to the digital divide in their community.

## How to Use this White Paper and Understanding Its Limitations

This White Paper addresses issues relating to the legal power and authority of political subdivisions, agencies, and public corporations (Public Entities) to enter into and take part in a P3 arrangement with for-profit and nonprofit entities (Private Entities), as well as restrictions that may affect a Public Entity's ability to finance a project undertaken by the public-private partnership.

Because of its scope, this White Paper cannot comprehensively discuss every aspect of Ohio state and local law that might be relevant. For example, the White Paper does not discuss general government procedures, public notice, and restrictions on the governing body of a Public Entity. However, the White Paper does identify procedures unique to financing a broadband network or a Public Entity's participation in a P3 created for that purpose.

In addition, legal matters common to any public infrastructure project financed with federal or state funds generally are not addressed in this paper. For example, an environmental site assessment (ESA) is typically part of the due diligence associated with any commercial project.<sup>6</sup> The purpose of this assessment is to decide whether the location or type of structures impacted by the project create compliance issues under various federal environmental and historical preservations statutes. This review may be mandatory when using federal funds for a project.<sup>7</sup> While such an assessment may present time-consuming challenges for participants in a broadband P3, the concerns are not unique to a broadband project. Therefore, it is not specifically covered in this White Paper.

This White Paper makes liberal use of footnotes and hyperlinked resources where possible. It is generally organized to include the following topics:

- An Explanation of P3s
- Common "Traditional" Economic Development Tools to Close a Financing Gap
- Project Ownership and Its Importance in Structuring a P3
- The Role of the BroadbandOhio Office
- Ohio State and Local Government Organization
- Debt Financing for Broadband
- Regulation of Broadband as a Public Utility through the Ohio Public Service Commission
- Broadband-Specific Real Estate, Zoning and Land Use
- Recent Proposed State Legislation

A major theme of this White Paper is that to truly close the digital divide Public Entities and Private Entities will need to "partner" to draw on the strengths of each and access funding opportunities traditionally used in P3s for economic development as well as traditional government financing tools. To help Public Entities and their advisors solicit Private Entities willing to engage in this process, a memorandum entitled "Soliciting Broadband P3 Partners -- Drafting an Effective Public Entity Request for Information/Qualifications (RFI/RFQ) or Request for Proposal (RFP)" is included as an Appendix.

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<sup>6</sup> An environmental site assessment (ESA) is used to determine whether the location or type of structures involved create compliance issues under various federal environmental and historical preservation statutes

<sup>7</sup> For example, this review may be mandatory when seeking a federal grant such as under the [USDA Reconnect Grant Program](#).

This White Paper was last updated in November 2022. As new administrative and legislative developments occur often, the information supplied must be updated using one or more of the resources described throughout the document.

The views expressed are those of the author writing in their individual capacity only – not those of the University of Missouri System or the UMKC School of Law. The information provided is not intended to constitute legal advice, and all information, content, and materials referenced are for general informational purposes only.

No reader should act or refrain from acting solely on the basis of information in this White Paper without first seeking legal advice from counsel in the relevant jurisdiction.

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# What Is a Public-Private Partnership (P3) & Why Is it Needed to Bridge the Digital Divide?

## P3's Defined

In this White Paper, the term public-private partnership (“P3”) means an agreement or series of agreements between one or more state or local government entities (Public Entities) and one or more for-profit businesses or nonprofits (Private Entities) for the purpose of joining to share risks and potential rewards related to the design, construction, maintenance and operation, and/or ownership of a capital asset – a broadband network in this case.

This definition potentially includes an almost limitless range of possible relationships. For example, a P3 includes a municipal broadband utility operated by a city, where the only involvement of a Private Entity is a design-build contract for the network. It also includes a broadband network that is owned and operated by a Private Entity (a for-profit ISP), where a Public Entity has entered into a long-term indefeasible right-to-use (IRU) agreement<sup>8</sup> covering a portion of the network that is needed for governmental services.

While the risks and potential rewards are allocated quite differently, each is a P3. In the first case, the city through its municipal utility will pay for the network and will be responsible for maintaining and operating it. The private contractor is responsible for determining network design requirements that meet the city's needs and assumes the risk of constructing and delivering that network to the city on a turn-key basis in accordance with the mutually agreed specifications.

In the second alternative, the roles are largely reversed, with the Private Entity assuming many of the risks associated with the design, construction, maintenance, and operation of the network. However, even here the city's obligations pursuant to the IDU agreement make it liable for a percentage of the capital cost incurred to build the network and a fixed percentage of the cost of maintaining and operating the network.

A P3 is almost never documented as a “partnership.” There are likely many reasons for this; not the least of which is that Ohio and many other states prohibit direct investment in a business entity (a for-profit corporation, limited liability company, or partnership).<sup>9</sup> Instead, P3s usually are documented through a series of interrelated legal agreements that will include the overall arrangement. This often will cover the design, financing, construction, maintenance, operation, and ownership of the project, but P3s can have a more limited scope or duration. However structured, ideally the parties will approach these issues thoughtfully, with the goal of emphasizing and enforcing areas of agreement and compromising on areas where interests diverge.<sup>10</sup>

Of course, that ideal, even if sought in good faith by all parties, can be difficult to achieve. It's important to keep in mind that calling something a P3 does not guarantee a successful project; in fact, depending on the

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<sup>8</sup> An IDU Agreement [can be defined as](#) a right to use a portion of an asset, in this case an internet network, typically in exchange for an upfront portion of the cost of constructing the network and annual installments representing a percentage of the cost of maintaining and operating the asset. While not exclusive to the telecommunications industry, these agreements are common for fixed fiberoptic internet networks.

<sup>9</sup> OHIO CONST. art. VII, §§ [4](#), [6](#).

<sup>10</sup> Typically neither the Public nor the Private Entity will want their arrangement to be classified as a “partnership” either for state law or for federal income tax purposes. Typically this can be easily accomplished because the public entity



locality's past experience, calling an arrangement a P3 when describing it to the public or government decisionmakers may be a bad idea. The term "cooperative agreement" might be a more descriptive and less "politically charged" term.

## Why Are P3s Used for Broadband?

Even though they are not documented as such, all P3s *are* "partnerships" in the sense that they should contemplate a sharing of risks and rewards to achieve a common purpose. Private and Public Entities may define those risks differently – and almost certainly they will have a different view of the potential "rewards" of the venture.

For the private for-profit partner, the desired reward may be achieving a certain level of economic return on the equity it has invested, while the public partner may be focused instead on growing the community's population, expanding business opportunities, or reducing poverty rates. While these goals may at first appear wildly dissimilar, often they are not, because the same level of utilization of the broadband network may help achieve the Public Entity's societal goals while at the same time providing the Private Entity with a reasonable economic return. The key to this of course lies in the ability of each to find common ground and to respect the needs and desires of the other.

Another characteristic of P3s is that they usually are created out of economic necessity. If either "partner" felt able to "go at it alone," it would. In the case of most broadband P3s the challenges that lead to the use of the P3 are three-fold.

First, of course, there must be a perceived "public need" for broadband. In large part, the COVID pandemic created this sense of "public need." Probably more than any other event, it contributed to the shift in the public's mindset from "broadband is nice to have" to "broadband is a necessity – just as water, sewer, and electric power." Once that "public need" is recognized, Public Entities are willing to take part in a P3. Until that happens, only the private sector will be involved.

Second, both the Public Entity and the Private Entity must possess resources that the other is missing. For example, Private Entities often have technical expertise and specialized resources superior to those possessed by a Public Entity, that can be deployed to facilitate efficient construction and operation of a broadband network. Similarly, Public Entities might provide the project a stable long-term revenue source for the completed network through an IRU agreement, or they could assist in obtaining access to public right-of-way and necessary easements over private property.

Finally, as discussed in the introduction, there always is a "financing gap" for the broadband infrastructure project – a difference between the cost of the broadband network the community wants and needs, and the amount of subscriber revenues that can be expected to support the cost of building, maintaining and operating it. In these cases, there simply is no way for the private sector to economically supply services to these locations. Some level of Public Entity financial support is needed.

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"benefits" from the arrangement in ways other than an economic profit (for example, better health, education and overall economic opportunity for the community at large). If more direct economic benefit for the Public Entity is contemplated – particularly if both parties intend to earn an economic "profit" from the arrangement – specific advice related to the potential tax or other legal consequences of the arrangement should be obtained.

# Traditional Public Economic Development Tools

## Introduction

Most broadband P3 projects share a problem that plagues nearly all economic development projects – a lack of money. Yet without these projects – factories, warehouses, retail stores, major businesses, public arenas and convention centers – economic growth in the community and region decline along with local tax revenues, and eventually, the overall quality of life in the community is adversely impacted. This is why Ohio law recognizes that economic development and job creation are “public purposes” justifying direct and indirect investment to promote economic development in a community.

Broadband infrastructure projects (whether owned and operated by a private company or as a municipal utility) are no different. The cost of construction and operation are too high to justify a private investment by a Private Entity ISP and likely will not support a revenue-based municipal utility model. Like other economic development projects, broadband P3s must consider one or more common economic development financing “tools” discussed in this section to close the financing gap.

What follows is not an exhaustive discussion of these tools, but instead is an overview to help in understanding the role they have played in P3 projects over the past 30-40 years. Later sections will emphasize how these tools can be useful in “bridging the financial divide” to create an economically viable broadband P3 project.

## Tax-Exempt Financing

### *How Does Tax-Exempt Financing Help Close a Financing Gap?*

Any time a Public Entity is involved in a broadband P3 project, one should immediately consider ways the financing component of the plan could involve debt, the interest on which is exempt from federal and/or state income tax (“tax-exempt”) when received by the debtholder. All broadband P3 projects will rely on a limited stream of subscriber revenues to fund operating costs, maintenance, and the repayment of the capital (equity and debt) that was invested to finance the network. For Public Entities, the “investment” is typically sourced primarily from interest-bearing debt (“bonds”<sup>11</sup>), and debt is also an important component of any Private Entity’s investment as well.

As many are aware from personal experience of home loans, the higher the interest rate on borrowed funds, the less principal can be borrowed and repaid from a given amount of revenue. At the same time, for

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<sup>11</sup> Throughout this White Paper, Public Entity debt will be referred to as a “bond” or “bonds” and tax-exempt debt will be referred to as a “tax-exempt bond.” However, the label is not intended to apply exclusively to debt that is documented as a “bond.” Any type borrowing for federal income tax purposes – a promissory note, interest-bearing installment sale, capital financing lease, or certificate of participation in a financing lease, will be treated as “debt” for income tax purposes and potentially can be structured as “tax-exempt” debt (a tax-exempt bond). However, there may be very different state law consequences associated with different types of arrangements even if they are all classified as debt instruments for federal income tax purposes. For example, while a Public Entity may not be authorized by statute to issue a bond or a note and borrow funds finance a project, it may have the statutory authority to sign a capital lease (a financing lease) and to make “rent payments” that are treated for federal income tax purposes as interest and principal payments on a borrowing.

investors who buy bonds, their true rate of return is the amount – after payment of tax on interest earned – that they retain.<sup>12</sup> For those reasons, all other things being equal, interest rates on tax-exempt bonds are typically lower than on taxable bonds.<sup>13</sup> While the amount of that difference has varied considerably over time depending on the borrower’s credit rating, the overall level of interest rates in the marketplace, and the actual and expected future federal and state tax rates, tax-exempt bonds have been an important tool for economic development projects for many years.

### *Categories of Tax-Exempt Bonds*

There are different types of “tax-exempt bonds,” and each has traditionally had a different level of interest savings, or “discount,” when compared to fully taxable debt. The least valuable, in terms of closing a project’s “financing gap” are bonds the interest on which is fully taxable for federal income tax purposes but exempt from Ohio income tax. For an investor, the value of a state income tax exemption is quite limited, because individual state income tax rates are relatively low when compared to federal income tax rates.<sup>14</sup> So, the fact that a bond is exempt from Ohio income tax does not significantly increase the investment’s after-tax return, when compared to a fully taxable bond. In Ohio, interest on all debt that is exempt from federal income tax is also exempt from Ohio income tax.<sup>15</sup>

### *Qualified Broadband Project Private Activity Bonds*

The second type of tax-exempt bond is exempt both from Ohio income tax and from “normal” federal income taxes. However, this debt is subject to a special type of federal income tax called the alternative

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<sup>12</sup> Federal tax rates range from 10% - 37% percent for individuals and 21% for corporations. This means that for investors paying tax at the highest rate, for every dollar of taxable interest earned – after taxes they will “net” 63 cents (for individuals) or 79 cents (for a corporate bondholder).

<sup>13</sup> Continuing with the example in the prior footnote, an individual taxed at the maximum federal income tax rate of 37% would receive the same after-tax return (after paying the federal income tax liability) from a federally tax-exempt bond paying 3% as they would from a taxable investment paying 4.76%. Yet from the perspective of the Public Entity, its interest expense is 59% higher on taxable bond when compared to a tax-exempt bond.

<sup>14</sup> Currently 3.99% for individuals. Ohio does not have a corporate income tax. See Taxes In Ohio: Ohio Tax Rates, Collections, and Burdens, TAX FOUND., [Index](#) (last visited November 8, 2022).

<sup>15</sup> See OHIO REV. CODE ANN. § [5747.01\(A\)](#). “Adjusted gross income” or “Ohio adjusted gross income” means federal adjusted gross income, as defined and used in the Internal Revenue Code, adjusted as provided in this section: (1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities.” [emphasis added].

minimum tax or AMT. While not all investors are subject to the AMT, enough are to cause these bonds (sometimes called “AMT bonds”) to pay interest at a slightly higher rate than non-AMT bonds.

The IJA added a new specific category of tax-exempt AMT bonds to the Internal Revenue Code (IRC)<sup>16</sup> for qualified broadband projects.<sup>17</sup> If the broadband infrastructure project meets all requirements for tax-exempt financing,<sup>18</sup> broadband project tax-exempt bonds can be used by a Public Entity to finance a broadband project that will be wholly owned and operated by a for-profit Private Entity and secured and paid solely by that Private Entity. This opens up the possibility for a Public Entity to supply a significant contribution toward supplying access to broadband without any direct financial investment in the project.

#### *Governmental Bonds and Qualified 501(c)(3) Bonds<sup>19</sup>*

The last, categories of tax-exempt financing that can be useful in funding a broadband P3 are referred to as governmental bonds or qualified 501(c)(3) bonds. These bonds are tax-exempt both for federal and state income tax purposes, and the interest paid is not subject to alternative minimum tax. Therefore, these bonds can offer the greatest potential to reduce borrowing costs and help close a financing gap for a project.

However, these tax-exempt bonds typically require the greatest level of involvement or financial commitment to repay the debt, either by a Public Entity directly or by an NGO that is closely aligned to the Public Entity. For example, a city municipal electric utility might issue tax-exempt revenue bonds to finance a broadband network in the city, but unlike the Qualified Broadband Project Private Activity Bonds described above, the city could not require a private ISP to be responsible for repaying the bonds and still qualify the bonds as Governmental Bonds. A qualified 501(c)(3) bond has similar restrictions, except that in addition to a Public Entity, an NGO that has been recognized by the IRS to be exempt from tax under IRC §501(c)(3) is treated as a Public Entity.

To summarize, tax-exempt bonds can offer a significant source of funding and financial advantage for a broadband P3, but at the same time, they can involve complexities in structure and potentially greater financial risk for the Public Entity. For this reason, while it is important for decisionmakers and their advisors

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<sup>16</sup> 26 U.S.C. § [142](#), as amended. Throughout the balance of this White Paper, sections of the Internal Revenue Code will be referred to as “IRC”.

<sup>17</sup> See [I.R.C. §§ 142\(a\)\(16\), \(n\)\(1\)](#). A “qualified broadband project” must “provide broadband service solely to 1 or more census block groups in which more than 50 percent of residential households do not have access to fixed, terrestrial broadband service which delivers at least 25 megabits per second downstream and at least 3 megabits service upstream” and the project must “result in internet access to residential locations, commercial locations, or a combination of residential and commercial locations at speeds not less than 100 megabits per second for downloads and 20 megabits for second for uploads,” but only if at least 90% of the locations provided service by the bond-funded project previously lacked that service at the 25/3 megabits per second threshold.

<sup>18</sup> There are many other limitations that apply to these bonds. Among them is a requirement that the state, through the Ohio Department of Development, designate the project to receive a portion of the state’s overall private activity bond allocation limit. See [I.R.C. § 146](#) and [OHIO ADMIN. CODE Ch 122-4](#).

<sup>19</sup> [I.R.C. § 145](#). While a detailed discussion of all of the federal income tax requirements for issuing tax-exempt bonds is beyond the scope of this White Paper, qualified 501(c)(3) bonds are so named because non-governmental organizations that are exempt from tax under § 501(c)(3) can own, lease or otherwise use the financed project and pay debt service on the bonds. Governmental Bonds ([I.R.C. § 141](#)) are tax-exempt only if Public Entities are the only owners and use of the financed project is limited to Public Entities (and the general public) or, alternatively, if substantially all of the debt service on the tax-exempt bonds is secured and paid from taxes.

to be aware of the possibility of using tax-exempt bonds, it is extremely important to obtain legal and financial advice before committing to that course to fund a broadband P3.

## Tax Assessments and Tax Assessment Financing

Tax assessments and tax assessment financing have been incentive tools used to fund public infrastructure for many years. When used in connection with an economic development project, it is usually undertaken by a Public Entity to provide a type of “off balance sheet” financing for infrastructure costs related to the private commercial or residential project that otherwise would have been paid by the Private Entity from equity or conventional financing. While the Private Entity ultimately is responsible for paying these costs either directly or through an annual tax assessment, tax assessment financing often can be accomplished with tax-exempt bonds, and sometimes those bonds will have a lower interest rate (compared to the debt of the Private Entity) simply because the Public Entity’s name is on the bond.

The mechanics of tax assessment financing are fairly straightforward. In connection with the desired new development (e.g., a new housing project or a commercial development), substantial improvements to public infrastructure also are required. This could include roads, water, sewer, and electric service – and perhaps broadband service as well. Unless these improvements are made, the new private development cannot proceed. Thus, from a practical standpoint, the infrastructure is an essential indirect cost of the overall development, even though the improvements ultimately will not belong to or be the responsibility of the commercial developer or homebuilder.

To fund these improvements, a Public Entity imposes a special real estate property tax assessment equal to the aggregate cost of the improvements. This assessment covers all property that is benefited by the new development (the benefited district). The aggregate total tax assessment (equal to the value of the improvements) is then allocated among the parcels of land in the benefited district using a formula such as the cost per square foot of land in the benefited district.

While the total tax assessment for each parcel of land could be assessed (collected) at the time the improvements in the district are completed, more commonly the Public Entity agrees to allow each property owner to spread the obligation over a number of years, and to pay the total tax due over those years as part of the annual property tax bill. To obtain the funds necessary to construct the improvements, the Public Entity issues debt obligations that are payable solely from the special assessment property taxes. In many cases, this debt can be structured as tax-exempt governmental bonds.

The payment of a special assessment tax typically is not a personal liability of the property owner, but payment of the tax assessment can be enforced through a tax lien that is “senior” to all mortgages/deeds of trust held by secured creditors. For this reason, and because interest on the obligations usually is tax-exempt,

special assessment debt normally has an interest rate that is significantly below the rate at which a private entity could borrow.

As described later, Ohio law specifically authorizes several Public Entities to impose special assessments to finance a wide variety of public improvements backed by special assessments.<sup>20</sup>

## Property Tax Abatement (Exemption) and Tax Increment Financing

In many states, property tax exemption is one of the oldest economic incentives used to help bridge a financing gap for a P3 project. Originally limited to situations where the property was located in a blighted or economically depressed area, with the advent of industrial revenue bond financing, in some states it has been expanded to include most new commercial enterprises no matter where they are located, as part of an economic development project. However, Ohio has not followed this trend, and as discussed [in a later section](#) offers property tax exemption in only a limited number of settings that generally would not directly apply to a broadband P3.

Ohio does provide a closely related economic development tool – tax increment financing or “TIF.” TIF involves “freezing” the assessed value of land and related improvements in a specific area of a city or county (a TIF district) at their pre-development values. Real property taxes continue to be collected based on this value and continue to be distributed to the various taxing authorities (school districts, the county, special taxing districts, etc.).

Substantial improvements are then made to the property within the TIF district. The resulting increase in the property’s value creates an “increment” equal to the amount of additional real property taxes that would otherwise have been collected and distributed to the taxing districts because of the appreciation in value. The increment is collected in the same manner as real estate property taxes but instead of being distributed to the local taxing districts, it is reallocated to fund a portion of the cost of project improvements in the designated TIF district directly or to fund debt service on TIF bonds that are issued for that purpose.

For example, assume that prior to development a parcel of property has an assessed value of \$100,000 and produces annual real estate taxes of \$6,000. After TIF is in place, a new building is constructed on the site, and the assessed value of the property increases to \$10,000,000. If no TIF were in place, the property taxes would rise to \$600,000 (6% of \$10,000,000). Because of the TIF, only \$6,000 is distributed to the various local taxing districts and the remaining \$594,000 “increment” is diverted to pay costs identified in a written project plan approved by the public entity (the TIF Plan).

As discussed, [later](#) in this White Paper, it is most likely broadband infrastructure projects cost would be undertaken as one part of an overall economic development project within a TIF district, rather than as a single use of funds within the TIF district.

## Special Districts

Special improvement or taxing districts are geographic areas of a city or a county where various public improvements or services are provided to individuals and businesses through a public agency or authority rather than a municipal corporation (city or village), township, or county. These districts differ from traditional political subdivisions because they have limited missions and powers (e.g., transportation, parking, community improvement, storm water, flood control, utilities, etc.). They may exist only for the

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<sup>20</sup> See, for example, the discussion involving [Special Taxing Districts](#), and [New Community Authorities](#).

limited time period necessary to construct and complete the financing of a particular capital project or may continue on an indefinite basis to handle ongoing maintenance and operation as well. In Ohio, these districts are managed by a board of directors and patterned off of Ohio's nonprofit corporation statute. Ohio statutes permit the formation of several types of districts – several of which may be able to participate in a broadband P3.

## State and Local Tax Credits

State tax credits, particularly transferable or refundable tax credits, can be an important tool a Public Entity can use to help raise Private Entity equity capital to support a project. The financing structure used to include transferable State Tax Credits is complex, but typically involves a direct equity investment in a project that qualifies for the issuance of a state tax credit. That credit can in turn be sold or specially allocated (at a discount) to investors that otherwise can use them to offset a state tax liability. The proceeds of the sale or allocation in turn can be dedicated to fund costs of an eligible project. For example, if an investor was to receive tax credits sufficient to offset \$100 of its income tax liability, they might be willing to invest \$75 in the project.

One shortcoming of tax credit programs is that their value assumes that the investor will actually have a tax liability. This uncertainty can significantly reduce the perceived value of the tax credit.<sup>21</sup> States have sought to mitigate this problem in one of two ways. First, and most directly, the credit may be made “refundable” – meaning that if an investor taxpayer lacks a tax liability sufficient to use the credit, it may instead apply for a tax refund equal to the value of the credit. Under this option, the credit is treated as a prepayment of the current year's tax liability, for which a refund may be claimed. A second option is to allow a taxpayer that has received the credit the option of transferring it to another person who does.

Two possible tax credits that may be useful in the development of broadband infrastructure in Ohio are [discussed later](#) in this White Paper.

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<sup>21</sup> One option adopted by the federal government is to make tax credits in the current year eligible to be carried back to offset a prior year's tax liability or carried forward to future years where there is a tax liability. However, some start-up ventures, may incur tax losses for several years of the business's start-up period due to other available write-offs.

# The Private Partner's Federal Tax Requirements and "State Law" Ownership of Broadband Assets

## Federal Income Tax Ownership vs. State Law "Title"

Who will own the broadband network that has been financed and operated using a P3? And what exactly do we mean by that? As [previously discussed](#), a P3 almost never is structured as a business corporation, limited liability company, or partnership between a Public Entity and a Private Entity, in part because the Public Entity is not interested in making an economic profit, and in part because it's [expressly prohibited](#) by law. This means that from a legal perspective the network will not be "owned" by the P3. However, that doesn't mean that "ownership" of the financed network is not a significant concern, both for state law and federal income tax purposes. Later sections of this White Paper will emphasize that certain methods for a Public Entity to help fund a P3 absolutely require that the financed property be "owned" by a Public Entity. On the other hand, others allow the Public Entity to provide financial support for the broadband network only if the property is *not* owned by a Private Entity.

In each case, however, when one speaks of "ownership" of property for purposes of state law, the term is taken to mean "legal title" – without regard to who has control or enjoyment of the property. Legal title in turn is evidenced by a legal deed or certificate of title or some other similar document.

For federal income tax purposes Private Entities participating in the P3 view legal title as only one factor, and often not the most important factor, in determining who is treated as the owner of property for federal income tax purposes, and often for purposes of financial accounting as well. This question is important for purposes of claiming depreciation and other tax benefits, and it also may be relevant for purposes of using [tax-exempt financing](#) and certain federal income tax credits.<sup>22</sup>

The Internal Revenue Service has long recognized that the tax benefits provided to a property owner depend on more than legal title, and instead focuses on whether the title holder also has retained significant benefits and burdens of ownership attributable to the asset, such as the ability to realize an economic profit from the sale or operation of the asset and the risk of loss in event of a casualty or financial failure of a business that uses the asset.<sup>23</sup> This distinction opens up the possibility that a Public Entity in a P3 could be treated as the "owner" of property for purposes of using one or more state law economic benefit tools discussed in the last section, even though the Private Entity was treated as the owner of the same assets for federal income tax purposes.

The point here is the requirements for broadband network ownership for state law purposes often can be accommodated under legal structures in which a Private Entity keeps the economic rights of ownership of the asset for federal income tax purposes. On the other hand, because ownership of an asset for federal

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<sup>22</sup> For example, the federal [New Markets Tax Credit program](#) (I.R.C. § 45D) provides investors in certain enterprises a federal tax credit equal to 39% of their equity investment. However, to qualify for the program, the business enterprise must not be owned by a state or local government for federal income tax purposes.

<sup>23</sup> For example, in Revenue Ruling Rev. Rul. 68-590, 1968-2 C.B. 66, the IRS determined that a company should be considered the "owner" of property for federal income tax purposes, when the company leased it from a political subdivision. The terms of the lease required the company to pay substantially all of its cost as "rent" over the term of the lease and entitled the company to purchase the property and acquire title at the end of the lease term for a nominal additional payment. The Ruling concluded that taken together, the arrangement gave the company the rights and responsibilities characterized as property owner that was financing the acquisition price of the asset over time.



income tax purposes does not necessarily depend on which entity has “legal title,” it may be possible to provide a Public Entity with rights equivalent to ownership of an asset through a capital lease or a long-term contract (such as an Indefeasible Right of Use Agreement). This flexibility also means that in most cases “legal title” issues can be resolved with the help of legal and financial consultants, by creatively structuring the rights and obligations associated with the property, as long as these requirements are explored early in the process of negotiating the P3.

## Depreciation, Investment Tax Credit & Other Federal Tax Benefits – Accommodating a Public Entity or NGO.

Other potential areas of concern can arise when structuring and negotiating P3s between Public Entities and Private Entities or their “controlled” NGO. Here are three somewhat common issues that arise:

First, Private Entities sometimes fail to recognize that having a Public Entity rent a portion of the privately-owned asset<sup>24</sup> or using tax-exempt bonds to finance the asset<sup>25</sup> requires the use of tax depreciation schedules that are significantly less favorable than those available if the property were financed with taxable debt or if the tenant was a Private Entity subject to federal income tax. Second, P3s are sometimes structured so that an NGO controlled by a Public Entity is actually a partner in a limited liability partnership or a member in a limited liability company. In these cases, allocating items of income, gain, loss, and deduction for tax purposes can be problematic because the NGO typically does not care about taxable income or loss. Third, since 2018, all grants provided to a Private Entity must be reported as taxable income unless otherwise subject to a special exception in the Internal Revenue Code.<sup>26</sup> For this reason, when structuring the P3, the parties may find it advantageous to divert grants for broadband infrastructure construction to the Public Entity partner. The Private Entity partner still may be able to realize an economic benefit (and taxable income) from the arrangement over time through some other ongoing revenue stream (such as an operating agreement). While an extensive discussion of any of these issues is beyond the scope of this White Paper, it is important that they be identified by tax and legal advisors early in the process of negotiating the P3, so that the proposed state law economic incentives used do not create unanticipated federal income tax consequences for the Private Entity.

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<sup>24</sup> [I.R.C. § 168\(g\)\(1\), \(5\).](#)

<sup>25</sup> [I.R.C. § 168\(g\)\(1\), \(h\)\(1\).](#)

<sup>26</sup> In late 2019, Congress enacted an exception to preserve their tax-exempt status of rural electric cooperatives operating as exempt organizations pursuant to I.R.C. § 501(c)(12). That exempt status was threatened because of the large amount of grants for broadband infrastructure many cooperatives had received. See I.R.C. § 501(c)(12)(K)(ii). This special rule generally does not apply for other Private Entities. In September 2022 Senators Jerry Moran and Mark Warner proposed legislation that would create a more general exception for any ISP that received federal grants for broadband pursuant to IIJA or ARPA. See Sens. Moran, Warner Introduce Legislation to Prevent Taxation of Broadband Grants September 30, 2022 (last accessed November 11, 2022). Hopefully, this or similar legislation will be adopted by Congress, as it seems foolish and wasteful to provide grants to private ISPs for broadband development on the one hand and then to require a sizable percentage of that grant to be paid back in income tax.

# Federal Preemption Limits on State and Local Regulation of Broadband

## The Telecommunications Act of 1996 and Broadband

Section 253(a) of the Telecommunications Act (47 U.S.C.S. § 253(a)) (the Telecommunications Act) significantly restricts and preempts states and local governments from regulating telecommunication services including but not limited to internet access.

That section provides:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

However, there are some exceptions to this prohibition. States can impose competitively neutral requirements necessary to preserve and advance universal service in all communities. Regulations that protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers also are permitted – as long as those policies don't conflict with those developed by the FCC. In addition, states and local governments are entitled to manage the public rights-of-way or to provide competitively neutral charges for the use of that right-of-way. Again, those rules and regulations cannot have the effect of prohibiting any entity from providing internet service.<sup>27</sup> Finally, under certain circumstances, §254(f) of the Telecommunications Act permits a state to require that a proposed wireline telecommunications provider in an area then served by a rural telephone company offering universal wireline access also offer universal access to customers in that area.

## The Public Utilities Commission of Ohio (PUCO) and Telecommunications Services.

The Public Utilities Commission of Ohio (PUCO) generally regulates investor-owned utilities in Ohio. Public utilities are defined by statute only to include a limited class of telecommunications communications.<sup>28</sup> However, the term “public utilities” does not include any service offered by a municipality and does not include broadband service (as defined by the FCC) or information services as defined by the

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<sup>27</sup> [47 U.S.C.S. § 253\(b\), \(c\)](#). The power of the FCC to regulate significant limits on a local government's zoning and permitting process was recently unsuccessfully tested by a group of municipalities in *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). Ohio's exercise of this power is described [later](#) in this White Paper in the section dealing with real estate and land use issues.

<sup>28</sup> See OHIO REV. CODE ANN. [§ 4905.03\(A\)](#) (definition of public utility company includes “business of transmitting telephonic messages to, from, through, or in this state.”)

Telecommunication Services Act of 1996 when provided by a telephone company,<sup>29</sup> and generally since 2010, PUCO's voice over internet protocol (VoIP) service and wireless services has been limited as well.<sup>30</sup>

The Telecommunications Act of 1996 does not bar states from prohibiting Public Entities from providing telecommunication services, including broadband.<sup>31</sup> While several states do impose some restrictions on Public Entities providing internet to businesses and individuals, at present Ohio is not one of them,<sup>32</sup> and the fact that municipal corporations generally have [home rule powers](#) means that no significant legal barriers exist to Public Partners providing internet service as a municipal utility.

## The PUCO and Electric Utility Providers

Electric utilities could be critical partners in bridging the digital divide in Ohio but face some unique state law regulatory challenges described here and as discussed in more detail [later](#), in the section dealing with easement issues for their existing electric transmission lines. However, even taking these restrictions into account, the fact remains that many utilities have installed fiber optic cable on poles or underground throughout their transmission network to regulate power distribution and monitor power consumption. From the standpoint of engineering and construction costs, a significant number of these providers have found that this same fiber optic cable could be deployed to provide internet service in the homes and businesses of its customers or provide middle-mile access to ISPs serving those end users.

### *Rural Electric Cooperatives*

PUCO does not regulate Rural Electric Cooperatives,<sup>33</sup> and since it also does not generally regulate broadband services, no indirect state law regulatory barriers are apparent that would bar a rural electric cooperative from offering that service directly or through a subsidiary. For this reason rural electric cooperatives likely will be an important Private Entity provider of broadband and an important potential partner in a broadband

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<sup>29</sup> OHIO REV. CODE ANN. [§ 4905.02\(A\)\(3\), \(5\)](#).

<sup>30</sup> See generally OHIO REV. CODE ANN. [§ 4927.03](#).

<sup>31</sup> [Nixon v. Mo. Mun. League, 541 U.S. 125 \(2004\)](#).

<sup>32</sup> Tyler Cooper, Municipal Broadband Is Restricted In 18 States Across The U.S. In 2021, BROADBANDNOW (Dec. 1, 2021), <https://broadbandnow.com/report/municipal-broadband-roadblocks/>. However, see the discussion on proposed state law [later](#) in this White Paper

<sup>33</sup> OHIO REV. CODE ANN. [§ 4905.02\(A\)\(2\)](#). “[Public utilities do not include....other than a telephone company, [a company] that is owned and operated exclusively by and solely for the utility's customers, including any consumer or group of consumers purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas exclusively by and solely for the consumer's or consumers' own intended use as the end user or end users and not for profit.”

P3.<sup>34</sup> As [discussed later](#) in this White Paper, in 2021 the Ohio legislature took a major step to enable cooperatives to more easily use existing easements for utility service to offer broadband service as well.

### *Regulated Investor-owned Electric Utilities*

PUCO regulates the rates for-profit investor-owned electric utilities can charge for electric service. Over the past several years many of these utilities have begun using fiber optic cable to monitor and control their electric distribution system, and to monitor usage by end-user customers. While at least some of these companies have considered entering the market for delivering service to end-user residents and businesses, the rate-setting mechanisms in place by PUCO may make it difficult for these companies to be significant players in bridging the digital divide. The issue is a difficult one: how should any profits or losses received or incurred by a for-profit utility in providing broadband service be handled in light of the fact that some or all of the assets used were paid for by electric utility ratepayers who may or may not be using the broadband service.

An example is AEP Ohio's 2019 proposal seeking rate approval to charge for implementation of its Smart Grid Proposal that would use fiber optic cable infrastructure.<sup>35</sup> In its initial proposal, AEP stated that "if the rules changed to allow AEP Ohio to offer these services to customers and traditional ISPs did not take the opportunity to expand to these rural customers, AEP Ohio will evaluate the business case associated with offering these services." However, even that appears to have been a "bridge too far" – and the settlement order ultimately approved by PUCO apparently specifically struck any reference or inference that AEP Ohio might one day offer retail broadband service.<sup>36</sup>

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<sup>34</sup> See Gail Keck, Co-ops that once brought electricity to rural Ohio work to offer high speed internet, FARM & DAIRY (Nov. 11, 2021), <https://www.farmanddairy.com/news/rural-internet-co-op-expansion-picks-up-speed/692763.html> (a November 2021 article summarizing efforts by cooperatives to offer broadband service).

<sup>35</sup> See Paul Ring, AEP Ohio Seeks To Install Fiber (Broadband) As Part Of Smart Grid Deployment, ENERGY CHOICE MATTERS (July 2019), <http://www.energychoicematters.com/stories/20190729aab.html>.

<sup>36</sup> See OHIO PUB. UTILS. COMM'N, PUCO APPROVES AEP OHIO'S GRIDSMART PHASE 3, <https://puco.ohio.gov/news/aep-gridsmart-3> (2021); Joint Stipulation and Recommendation In the Matter of the Application of Ohio Power Company to Initiate its gridSMART Phase 3 Project, Case No. 19-1475-EL-RDR, Oct. 27, 2021, <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A21J27B60907B00430>.

## Ohio's Department of Development & BroadbandOhio Office

A primary purpose of this White Paper is to describe state and local economic development tools that can be used to facilitate the expansion of broadband access, and unique legal issues that can arise in connection with a broadband infrastructure project. However, a general description of Ohio's efforts to promote broadband development is offered to provide the historical context, along with a summary of the state's current plans to participate in federal broadband grant programs.

While there have been ongoing efforts to use public-private partnerships to expand broadband infrastructure at least dating back to the programs under the American Recovery and Reinvestment Act (ARRA) in 2010,<sup>37</sup> the current initiative and funding efforts arose out of ideas contained in The Ohio Broadband Strategy,<sup>38</sup> a comprehensive report prepared by InnovateOhio. InnovateOhio is a group created within the Ohio Governor's office. InnovateOhio is headed by its appointed director, Ohio's Lt. Governor, Jon Husted, and has an advisory board that includes private sector leaders in innovation and technology.<sup>39</sup>

The Broadband Strategy set out several objectives that have since been enacted as funded programs. The philosophy underlying the strategy emphasized private, as opposed to public, ownership of internet infrastructure and it proposed that incentives be directed to projects that used internet-based applications for healthcare, education, and economic development.<sup>40</sup> The Broadband Strategy recommended creation of a state broadband office, creation of a broadband grant program, and implementation of specific steps to make it easier to deploy broadband infrastructure over public right of way and private property.

### BroadbandOhio

In March 2020, Governor DeWine created the BroadbandOhio office to begin implementation of Ohio's Broadband Strategy.<sup>41</sup> This office is "housed in the Ohio Department of Development and aims to "bring high-speed internet access to every Ohioan and build a best-in-class broadband network in Ohio."<sup>42</sup> A key focus of the BroadbandOhio was Ohio's grant program for "unserved and underserved"<sup>43</sup> areas within the

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<sup>37</sup> Ohio Middle Mile Consortium Partner Awarded \$30 Million for Broadband Stimulus Grant, OARNET (July 2, 2010), [https://www.oar.net/press/ohio\\_middle\\_mile\\_consortium\\_partner\\_awarded\\_30\\_million\\_broadband\\_stimulus\\_grant](https://www.oar.net/press/ohio_middle_mile_consortium_partner_awarded_30_million_broadband_stimulus_grant) Since 2008, Ohio has partnered with [ConnectedNationOhio](#), a limited liability company affiliated with [Connected Nation, Inc.](#), a nonprofit corporation on broadband development projects.

<sup>38</sup> INNOVATEOHIO, [THE OHIO BROADBAND STRATEGY](#) (Dec. 2019) [hereinafter STRATEGY].

<sup>39</sup> See OHIO REV. CODE ANN. § [107.71](#). About InnovateOhio, INNOVATEOHIO, <https://innovateohio.gov/about> (Last accessed Aug. 23, 2022)

<sup>40</sup> STRATEGY, *supra* note 36, at 7.

<sup>41</sup> GOVERNOR DEWINE CREATES BROADBANDOHIO TO SUPPORT EXPANSION OF HIGH-SPEED INTERNET, MIKE DEWINE: GOV. OHIO, <https://governor.ohio.gov/media/news-and-media/creation-of-broadbandohio> (Mar. 5, 2020). The Department of Development was previously known as the Development Services Agency.

<sup>42</sup> BROADBANDOHIO, <https://broadband.ohio.gov> (last visited Sept. 12, 2022).

<sup>43</sup> See [OHIO REV. CODE ANN. § 122.40](#). The statute defines an areas with service of less than 10/1 Mbps service as unserved and areas with less than 25/3 Mbps service as underserved. Both definitions excluding areas where construction of service is in progress and expected to be completed within 2 years.

state.<sup>44</sup> Additionally, this 2021 legislation created yet another entity – the Broadband Expansion Program Authority<sup>45</sup>

BroadbandOhio now is an important state office that is involved in broadband infrastructure development funding programs. Specifically, the office is administering the distribution of CARES Act funding appropriated for broadband infrastructure grants<sup>46</sup>, directing the creation of detailed maps needed to assess where better broadband access is needed<sup>47</sup>, and is responsible for the development of the statewide broadband plans contemplated by the federal BEAD and Broadband Equity Act programs.

### Ohio’s Residential Broadband Expansion Grant Program

The Residential Broadband Expansion grant program operates by awarding grants to internet service providers for the purpose of building out infrastructure and networks in the aforementioned “unserved and underserved” communities in Ohio. Ohio statutes define an unserved or underserved areas is as those lacking access to internet speeds of at least 25 Mbps download and 3 Mbps upload.<sup>48</sup>

For successful applicants, the grant will cover what is known as the “broadband funding gap.” The “broadband funding gap” is “the difference between the total amount of money a broadband provider calculates is necessary to construct the last mile of a specific broadband network and the total amount of

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<sup>44</sup> OHIO REV. CODE ANN. §§ [122.40-4077](#). H.B. 2, 134th Gen. Assemb. 2021 (available at [https://search-prod.lis.state.oh.us/solarapi/v1/general\\_assembly\\_134/bills/hb2/EN/05/hb2\\_05\\_EN?format=pdf](https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb2/EN/05/hb2_05_EN?format=pdf)) House Bill 2 also implemented many of the suggested proposals that were part of the Strategy, including substantial changes designed to easement and assess to utility poles, [discussed later](#) in the White Paper.

<sup>45</sup> OHIO REV. CODE ANN. [§ 122.403](#). This Authority’s members consist of the director of development or the director’s designee, the director of the office of InnovateOhio or the director’s designee, and three other members as follows: one member appointed by the president of the senate, one member appointed by the speaker of the house of representatives, and one member appointed by the governor.

<sup>46</sup> See e.g., CARES Act Funding, OHIO DEP’T EDUC. <https://education.ohio.gov/Topics/Reset-and-Restart/CARES-Act-Funding#BroadbandOhio> (Aug. 16, 2021).

<sup>47</sup> BROADBANDOHIO, OHIO’S BROADBAND AVAILABILITY GAPS, <https://broadband.ohio.gov/view-maps> (last visited Sept. 12, 2022)

<sup>48</sup> OHIO REV. CODE ANN, [§ 122.40\(L\)](#).

money that the provider has determined is the maximum amount of money that is cost effective for the provider to invest in last mile construction for that network.”<sup>49</sup>

“Governmental or quasi-governmental entities were specifically excluded from participation in the grant program, and as [discussed later](#), in the past legislation has been proposed in the General Assembly that would have the effect of banning most municipal broadband networks currently operating in Ohio.”<sup>50</sup>

As of March 2022, more than \$232 million had been awarded as a part of this program. These grants provided funding for 33 broadband expansion projects in 31 counties across the state. Additionally, several internet service providers committed to independently fund 71 additional broadband expansion projects. This additional funding would provide service for around 52,000 households across 31 additional counties.<sup>51</sup>

## JobsOhio – Middle-Mile Infrastructure Grants

JobsOhio is an Ohio nonprofit corporation formed by the Governor in 2011 at the direction of the General Assembly. Organized under Ohio’s general nonprofit corporation statute,<sup>52</sup> JobsOhio’s board of directors is appointed by the Governor and acts to provide support and expertise to the Department of Development and assists the state in distributing funds and other activities that encourage strategic economic initiatives and partnerships to promote economic development within the state. As a nonprofit, JobsOhio is able to participate directly more effectively in privately owned projects that are designed to boost economic development. Broadband is one area of strategic interest and funding for JobsOhio. For example, in July 2022<sup>53</sup> it announced a middle mile access partnership with [Agile Networks](#) to provide \$40 million investment in Digital Access Ohio, LLC along with an additional \$10 million in funding provided by Agile. The funds reportedly will be used to provide additional middle mile wireless access points to support the “last-mile” ISP expansion in unserved or underserved Ohio locations.

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<sup>49</sup> OHIO REV. CODE ANN. [§ 122.40\(B\)](#); see also BROADBANDOHIO, OHIO RESIDENTIAL BROADBAND EXPANSION GRANT PROGRAM, <https://broadband.ohio.gov/grant-opportunities/grant-opportunities-1/grant-opportunities-1> (last visited Sept. 12, 2022).

<sup>50</sup> OHIO REV. CODE ANN. [§ 122.40\(C\)\(2\)](#).

<sup>51</sup> BROADBANDOHIO, PRESS RELEASE (Mar. 18, 2022), [https://content.govdelivery.com/attachments/OHIOGOVERNOR/2022/03/18/file\\_attachments/2107000/Broadband%20Release%20Attachment.pdf](https://content.govdelivery.com/attachments/OHIOGOVERNOR/2022/03/18/file_attachments/2107000/Broadband%20Release%20Attachment.pdf).

<sup>52</sup> See generally OHIO REV. CODE. ANN. [Ch. 187](#).

<sup>53</sup> See JobsOhio Investment Seeks to Help Close Digital Divide in Ohio, JOBSOHIO (July 29, 2022), <https://www.jobsohio.com/news-press/jobsohio-investment-seeks-to-help-close-digital-divide-in-ohio/>.

# Peculiarities of an Ohio “Public Partner” – The Organization of Ohio Government & General Rules Governing Ohio Public Entities’ Ability to Participate in a Broadband P3

Unlike private businesses and nonprofit institutions (Private Entities), the authority and power of state and local government to act (e.g., to contract, issue debt, spend money, and operate enterprises) is more limited. While it sometimes is possible to work around, or structure a P3 agreement in a manner that adapts to, these constraints, these differences must be understood and carefully navigated. Ignoring them can scuttle even the most well-constructed P3. At a minimum, this will be embarrassing and damage the reputation of the advisor that promoted the plan, and at the worst, it could potentially expose public officials to legal and political jeopardy.

This section starts with a general overview of how the Ohio government (and its many potential Public Entity “partners” are organized. It then describes general rules governing the ability of Ohio Public Entities to participate in P3s – specifically those dedicated to bringing better broadband service to the community. Later sections will focus on the role local government and specially created districts can play in providing financial resources to a broadband P3.

## Overview of Ohio Government

### *The Ohio Constitution*

Ohio government is organized and governed by its constitution. The current Ohio Constitution was adopted in 1851<sup>54</sup> and has been amended many times by Ohio voters. It organizes state government around legislative, executive, and judicial branches<sup>55</sup> and establishes a general framework for the organization and operation of counties and townships,<sup>56</sup> and municipal corporations (cities and villages).<sup>57</sup>

### *The General Assembly*

The Ohio General Assembly consists of a House of Representatives (99 members) and Senate (33 members) elected to 2- and 4-year terms, respectively.<sup>58</sup> The General Assembly exercises legislative power in Ohio. It

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<sup>54</sup> OHIO LEGIS., OHIO CONSTITUTION: THE 1851 CONSTITUTION WITH AMENDMENTS TO 2017, <https://www.legislature.ohio.gov/laws/ohio-constitution>.

<sup>55</sup> OHIO CONST. art. [II](#), [III](#), [IV](#).

<sup>56</sup> OHIO CONST. art. [X](#).

<sup>57</sup> OHIO CONST. art. [XVIII](#).

<sup>58</sup> See OHIO CONST. [art. II, § 2](#); [id. art. XI, § 3\(A\)](#); [id. art. XI, § 4\(D\)](#).



has broad powers to enact legislation, subject only to restrictions imposed by the Federal and Ohio Constitutions.<sup>59</sup>

### *Relevant Executive Branch and Departments*

The Executive Department consists of the Governor, six other elected officials,<sup>60</sup> and the Governor’s Cabinet. The Governor appoints members of the Cabinet, and they head 26 executive departments and agencies.<sup>61</sup> Consistent with the federal government’s system, bills enacted by the Ohio General Assembly must be approved by the Governor to become law, except in cases where the Governor’s veto is overridden by a 3/5’ths vote of both houses of the General Assembly.<sup>62</sup>

The most relevant Department for purposes of this White Paper is the Department of Development (DOD) and within DOD, “BroadbandOhio” which was created by the governor in 2020. The role of the BroadbandOhio was [described earlier](#) in a separate section of this White Paper.

### Local Government Public Entities

The Ohio Constitution establishes counties, townships, and municipal corporations respectively as the core institutions of local government in Ohio. There are 88 counties<sup>63</sup> and over 1300 Townships<sup>64</sup> in Ohio. There are approximately 940 municipalities in Ohio (cities and villages) that are classified according to their population.<sup>65</sup> The General Assembly also has created or authorized the creation of many separate political subdivisions, bodies corporate and politic, and districts<sup>66</sup> several of which may be useful in financing a broadband P3.

### Limitations on Public Entity’s Power to Participate in P3s –Dillon’s Rule & Municipal Corporation Home Rule

#### *Dillon’s Rule and Broadband P3s*

The state statutes governing most Private Entities (for-profit corporations, limited liability companies, and partnerships) and nonprofit corporations (NGOs) enable them to operate, enter into contracts, and conduct

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<sup>59</sup> OHIO CONST. [art. II, § 1](#).

<sup>60</sup> OHIO CONST. [art. III, § 1](#) (The elected members include the Governor and Lieutenant Governor, Secretary of State, Treasurer, and Attorney General).

<sup>61</sup> CABINET, MIKE DEWINE: GOV. OHIO, <https://governor.ohio.gov/administration/cabinet> (last visited Sept. 12, 2022)

<sup>62</sup> A GUIDEBOOK FOR OHIO LEGISLATORS, OHIO LEGIS. SERV. COMM’N, ch. 5 (available at <https://www.lsc.ohio.gov/documents/reference/current/guidebook/17/Chapter%205.pdf>).

<sup>63</sup> List of Counties in Ohio, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_counties\\_in\\_Ohio](https://en.wikipedia.org/wiki/List_of_counties_in_Ohio) (last visited Sept. 12, 2022).

<sup>64</sup> About Townships, OHIO TWP. ASS’N, <https://www.ohiotownships.org/ohio-townships-101> (last visited Sept. 12, 2022).

<sup>65</sup> U.S. CENSUS BUREAU, 2010 CENSUS DATA: OHIO, <https://www.census.gov/geographies/reference-files/2010/geo/state-local-geo-guides-2010/ohio.html> (Oct. 8, 2021).

<sup>66</sup> Examples include school districts, water and sewer districts, hospital districts, ambulance districts, recreation districts, solid waste districts, library districts, special improvement districts, and new development districts.

business to the same extent as a natural person.<sup>67</sup> So long as the proper officers, directors, managers, or members approve an action taken a court will recognize and enforce the contract or action.

Historically, things have been much different for some Public Entities. In many states, the powers of most Public Entities are strictly limited by statute, and it is very important for anyone working on a broadband P3 to understand this difference and appreciate how it may limit and restrict the role a Public Entity can play in a P3.

In Ohio, except for Cities and Villages, discussed below, the powers of most Public Entities are limited by a doctrine called “Dillon’s Rule.” Dillon’s Rule states that Public Entities have only those powers: granted in express words; (2) necessarily implied or necessarily incident to the powers expressly granted; and (3) absolutely essential to the declared objects and purposes of the corporation – not simply convenient but indispensable. Furthermore, any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.<sup>68</sup>

Therefore, when working with Public Entities that are subject to Dillon’s Rule (which includes almost all counties and townships and other Public Entities other than cities and villages),<sup>69</sup> it will be very important to analyze the Ohio Constitution and statutes governing the Public Entity to see what it is authorized to do. For example, if a P3 contemplates that a Public Entity will borrow money to finance a portion of the cost of broadband infrastructure, the statute under which the Public Entity was created must expressly permit it to incur the debt *and* contain express or implied authority to use the money raised to finance the broadband infrastructure. If this authority does not exist, there is a real risk that a court might refuse to enforce the agreement.

### *Counties and Dillon’s Rule*

The Ohio Constitution establishes and addresses the powers of counties, townships, and municipal corporations, respectively. Except for two counties where voters have adopted a charter and approved home rule status,<sup>70</sup> counties only have the powers given to them by the General Assembly. Counties are governed by a three-member board of county commissioners along with eight elected officials. Counties generally have authority to govern only in unincorporated areas of a county. They may directly operate certain public facilities such as hospitals, jails, and roads, but do not have the authority to own or operate other utilities

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<sup>67</sup> See [OHIO REV. CODE ANN. § 1701.03\(A\)\(1\)](#).

<sup>68</sup> Diane Lang, Dillon’ Rule ... And the Birth of Home Rule, MUN. REP. (Dec. 1991), [https://nmml.org/wp-content/uploads/Dillon’s-Rule-The-Birth-of-Home rule .pdf](https://nmml.org/wp-content/uploads/Dillon’s-Rule-The-Birth-of-Home-rule.pdf).

<sup>69</sup> See, e.g., Ohio County Government Overview, NAT’L ASS’N CNTYS., [https://www.naco.org/sites/default/files/event\\_attachments/DRAFT\\_Ohio\\_012022.pdf](https://www.naco.org/sites/default/files/event_attachments/DRAFT_Ohio_012022.pdf) (last accessed Aug. 24, 2022).

<sup>70</sup> OHIO REV. CODE ANN. [Ch. 302](#). Only Cuyahoga and Summit County have elected home rule status.

except for water and solid waste.<sup>71</sup> They do have authority to contract with municipalities for the provision of electric and natural gas service.<sup>72</sup>

### *Townships and Dillon's Rule*

Townships are the oldest unit of government in Ohio, predating Ohio's admission as a state. Governed by elected trustees, Townships are primarily responsible for township roads, maintenance, waste disposal, police protection, fire and EMS systems.<sup>73</sup> Like counties, townships have the authority to elect a more limited form of home rule government.

### *Other Public Entities*

Other Public Entities are subject to Dillon's Rule and may participate in broadband P3s and finance broadband infrastructure only to the extent granted express or implied authority to do so. Several possibilities are discussed later in this White Paper.

## Home Rule in Ohio

### *Municipal Corporations*

The Ohio Constitution classifies municipal corporations as either cities or villages based on population. A municipality with a population of 5,000 people or more is considered a city, and those with populations less than 5,000 people are villages.<sup>74</sup>

Dillon's Rule *does not* apply to Ohio Municipal Corporations (cities and villages). Art. XVIII, § 3 of the Ohio Constitution confers upon municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."<sup>75</sup> While the words "as are not in conflict with general laws" may make this constitutional provision sound more like Dillon's Rule, those words only modify the "local police, sanitary and other similar regulations" clause – rather than the "powers of local self-government" generally.<sup>76</sup> Therefore, a municipality has all the true home rule powers with regard to local self-government within its jurisdiction.<sup>77</sup> Art XVIII, § 7 of the Ohio constitution furthers these home rule powers by granting municipalities the ability to adopt a charter for their government and further confirms that municipalities may exercise all powers of local self-government.<sup>78</sup> However, a municipality's adoption of a charter is not

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<sup>71</sup> See OHIO REV. CODE ANN. Chs. [307](#), [343](#).

<sup>72</sup> Ohio County Government Overview, NAT'L ASS'N CNTYS., [https://www.naco.org/sites/default/files/event\\_attachments/DRAFT\\_Ohio\\_012022.pdf](https://www.naco.org/sites/default/files/event_attachments/DRAFT_Ohio_012022.pdf) (last accessed Aug. 24, 2022).

<sup>73</sup> About Townships, OHIO TWP. ASS'N, <https://www.ohiotownships.org/ohio-townships-101> (last visited Sept. 12, 2022).

<sup>74</sup> OHIO CONST. [art. XVIII, § 1](#).

<sup>75</sup> OHIO CONST. Art. [XVIII](#). §7

<sup>76</sup> OHJUR CONSTLAW § 180.

<sup>77</sup> Id.

<sup>78</sup> OHIO CONST. [art. XVIII, § 7](#).

mandatory. A municipality that decides not to adopt a charter still is authorized to enact ordinances that concern matters of *substantive* local self-government, and these ordinances will preempt conflicting general state law – however, non-chartered municipalities must abide by state law in *procedural* matters of local self-government.<sup>79</sup>

### *Counties & Townships*

Counties are authorized to adopt home rule status and to avoid the limitations of Dillon’s Rule in a manner similar to municipal corporations.<sup>80</sup> However, at this point, only two counties have elected to do so.<sup>81</sup>

Townships are authorized to elect “limited” home rule status.<sup>82</sup> Once the election is approved by voters these townships have broader powers related to certain limited matters such as water, sewer, and police service, but generally are not understood to have powers as broad as those afforded to home rule municipal corporations or home rule counties. At this point only 33 townships (out of 1308) have elected limited home rule status.<sup>83</sup> However, if a broadband P3 happens to be in one of these home rule counties or townships, it would be wise to consult with legal counsel to determine if any of the home rule powers contained in the charter would provide additional options for a county or township’s participation in a broadband P3.

## Other Limitations on Public Entities Imposed by the Ohio Constitution

### *Joint-Ownership, Investment, and Lending of Credit to Private Entities*

The Ohio Constitution generally prohibits the state of Ohio<sup>84</sup> and its counties, townships, and municipal corporations<sup>85</sup> from owning, extending credit, or financially aiding Private Entities. These sections (Article

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<sup>79</sup> OHJUR CONSTLAW at § 185 (“For example, while a city’s determination that its officers’ compensation should be increased is a matter of local concern that is governed by the law of the municipality, the time for the payment of that increase is a procedural matter governed by a general statute that prohibits in-term pay increases for a city official.”); see Generally, John E. Gotherman, Municipal Home Rule and Charters, OHIO CITIES & VILLS. (Nov./Dec. 2002), reproduced at [https://www.columbus.gov/uploadedFiles/Columbus/Elected\\_Officials/City\\_Council/Charter\\_Review\\_Commission/Oho%20Municipal%20Home%20Rule%20Charters,%20John%20E.%20Gotherman.pdf](https://www.columbus.gov/uploadedFiles/Columbus/Elected_Officials/City_Council/Charter_Review_Commission/Oho%20Municipal%20Home%20Rule%20Charters,%20John%20E.%20Gotherman.pdf).

<sup>80</sup> OHIO REV. CODE ANN. [Ch. 302](#).

<sup>81</sup> Only Cuyahoga and Summit County have elected home rule status.

<sup>82</sup> OHIO REV. CODE ANN. Ch. [504](#).

<sup>83</sup> See also Alyssa Bethel, Limited Home Rule Townships, 135 MEMBERS BRIEF 1 (December 8, 2021) (available at <https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/134%20Limited%20Home%20Rule%20Townships.pdf>).

<sup>84</sup> [OHIO CONST. art. VIII, § 4](#). “The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.”

<sup>85</sup> [OHIO CONST. art. VIII, § 6](#) “No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, 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...”

VIII, sections 4 and 6) initially led the Ohio Supreme Court to impose significant limitations on the state, county, and municipal corporations to promote economic development in their communities.<sup>86</sup>

However, as a direct result of that case, Ohio voters adopted an amendment to the Ohio Constitution that significantly limits the scope and impact of the general prohibition against extending credit or financially aiding Private Entities. That amendment to Article VIII, Section 13 of the Ohio Constitution<sup>87</sup> provides the constitutional underpinning for almost all of the financing of capital improvements (public and private) for industry, commerce, distribution and research.<sup>88</sup>

Laws consistent with this amendment and private entity participation in public financings, are also authorized, subject only the qualification that tax revenues may not be used or pledged to the repayment of the debt.<sup>89</sup> The impact of this amendment is further enhanced by the fact that Ohio courts generally have a long-standing doctrine of deferring to the governing legislative body in identifying when a particular project is undertaken for a public purpose.<sup>90</sup> However, individualized legal advice may be required to confirm that these prohibitions do not in any way limit the Public Entity's participation in a broadband P3, particularly if the legal structure or the project itself lies outside the express authority granted by statute or the Public Entity's charter.

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<sup>86</sup> See *State ex rel. Saxbe v. Brand*, 197 N.E. 2<sup>nd</sup> 328 (Ohio 1964) (invalidating the state's issuance of bonds to promote economic development)

<sup>87</sup> [OHIO CONST. art. VIII, § 13.](#)

<sup>88</sup> *Id.* "To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, ..., 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>89</sup> Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, 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, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section....

<sup>90</sup> *Bazell v. City of Cincinnati*, 233 N.E.2d 864, 868–69 (Ohio 1968) ("The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable." (citing *Gordon v. Rhodes*, 100 N.E.2d 225, 231 (Ohio 1951)); See also *State ex rel Gordon v. Rhodes*, 100 N.E.2d 225, 231 (quoting 37 *American Jurisprudence* 734, Section 120) ("What is a public use is not capable of absolute definition. A public use changes with changing conditions of society, new appliances in the sciences, and other changes brought about by an increase in population and by new modes of transportation and communication. The courts as a rule have attempted no judicial definition of a public as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances.")).

### *The Public Use Doctrine & Eminent Domain*

Even though economic development of a community may be a valid justification for the expenditure of funds and financing of a project, it may not justify other actions of Public Entities to facilitate a broadband P3. For example, the Ohio Constitution prohibits the taking of private property by eminent domain except for a “public use” for monetary compensation determined by a jury.<sup>91</sup> Unlike the provisions of the Ohio Constitution and case law permitting the expenditure of funds and assistance in financing projects for industry, commerce, distribution, and research, discussed above, the Ohio Supreme Court has refused to sustain the taking of private property by eminent domain based on these public purposes alone.<sup>92</sup>

However, Ohio Municipal Corporations are authorized to condemn property within the corporate limits to provide a public service or utility,<sup>93</sup> and as [described in a later section](#), the Ohio General Assembly has taken actions designed to streamline the process of using existing easements for broadband P3s undertaken by cooperatives.

### *Limitations on the Issuance of Debt.*

As a result of Dillon’s rule, most counties, townships, and other Public Entities subject to Dillon’s Rule may issue debt only if authorized by the Ohio Constitution and state statutes. Article XIII, § 6 and Article XVIII, § 13 of the Ohio Constitution<sup>94</sup> also states that the authority of municipal corporations may also be limited by state law.

The General Assembly has exercised this authority and adopted rules applicable to other Public Entities as well, through adoption of the Uniform Public Securities Law.<sup>95</sup> The provisions of Uniform Securities Law apply generally to many types of Public Entities, and an extensive discussion of these provisions is beyond the scope of this White Paper. However, in some instances, Uniform Securities Law can act to limit the amount and the terms of Public Entity debt that can be issued, even by home rule Public Entities.<sup>96</sup>

Not all debt issued by Public Entities is subject to the Uniform Public Securities Law. Certain debt – particularly certain revenue bond debt – is governed by other provisions of the Ohio Code described in the next section. For these reasons the advice of legal counsel will be required to determine the feasibility of a

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<sup>91</sup> OHIO CONST. [art. I, § 19](#).

<sup>92</sup> “Although economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit.” *Norwood v. Horney*, 853 N.E.2d 1115,1141 (2006).

<sup>93</sup> OHIO CONST. [art. XVIII, § 4](#).

<sup>94</sup> OHIO CONST. [art. XIII, § 6](#) “The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.” *Id.* [art. XVIII, § 13](#) “Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.”

<sup>95</sup> OHIO REV. CODE ANN. [Ch. 133](#).

<sup>96</sup> For a recent summary of the law see *The Guide to Municipal Debt*, OHIO MUN. ADVISORY COUNCIL (2019), <http://www.ohiomac.com/Rates/GuideToMunicipalDebt.pdf> [hereinafter *Municipal Debt Guide*].

proposed financing for broadband infrastructure, and to assist in providing greater flexibility to the Public Entity as it works to structure the terms of a debt financing for a broadband project.

# Authority for Public Entities to Own, Operate, & Finance Broadband Infrastructure or to Participate in Broadband Public Private Partnerships

## Introduction

This section of the White Paper describes possible approaches to enable Public Entities to own, operate, and finance retail broadband networks or to participate in a broadband P3 having that objective. Even if the Public Entity's governing body has no interest in owning and operating a broadband network, one advantage of a P3 structure is that it can play an important role in providing funds needed to make the project financially feasible. This important role also can permit the Public Entity to influence the ownership, maintenance, and operation of a broadband network, so that it provides service that is available and affordable for everyone in the community.

In other words, properly structured, a broadband P3 should not be a one-way street, with the Public Entity supplying financial resources and reducing risks for the Private Entity and receiving nothing in return. As described earlier, realizing the ultimate goal of the broadband P3 –making broadband access available to everyone in the community— enables Public Entities to further their public purposes and objectives as well, Public Entity officials will want to focus on ways the broadband P3 can result in better and more cost-effective delivery of general government services and public utilities, as well as providing for industrial and economic development in the community.

However, to achieve these public purposes – to build the network infrastructure at a cost that enables service to be priced at a reasonable level – often requires a public financial commitment along with federal grants and private ISP investment, and this section describes some options available to Public Entities to provide those funds.

## Discretionary Power of the Governing Body of Public Entities

One point that needs to be stressed at the outset of this section is that merely because a Public Entity may have the *power* to issue debt or to provide other forms of financial assistance to a broadband infrastructure project, that does not mean it can be compelled to do so. Furthermore, in some cases, local government can achieve that result only with the approval of a state agency or a state-sponsored Public Entity. For example, the issuance of [private activity bonds](#) requires approval of a state agency as well as authorization of the governing body of an Ohio, county township or municipal corporation. In every case, public officials likely will be very concerned about the financial viability of the P3 and its ability to repay bondholders. Finally, worthy projects may be rejected by the governing body of the Public Entity solely for political or philosophical reasons.

For all of these reasons, when structuring a P3 it is extremely important to make certain that support exists in the governing body for each Public Entity partner that is expected to make a financial contribution and each government agency that must approve the means of funding that contribution. Fortunately, as the



discussion below indicates, often there are multiple options available, so if one approach does not work, another may be available.

## Constitutional Provisions

There are two provisions of the Ohio Constitution that contemplate Public Entities and Private Entities entering into contractual agreements to develop, construct, and operate various types of broadband P3 projects. First, the language in Article VIII, § 13 ([discussed in the prior section](#)) clearly contemplates agreements between Public and Private Entities as part of an overall plan to finance a broadband P3 to accomplish and/or facilitate industry, commerce, distribution, and research. Second, Article XVIII, § 4 authorizes Municipal Corporations (cities and villages) *to contract with others* to provide any product or service supplied to the municipality or its inhabitants as a public utility. The term “public utility” is not specifically defined in the statutes. However, the language used seems to contemplate any product or service the municipal corporation provides to the general public.<sup>97</sup>

## General Home Rule Powers

All municipal corporations and the two Ohio Counties that have elected home rule status (“home rule counties”), presumably have the power to own and operate a broadband network to serve their residents and businesses, unless prohibited by their charter. Apparently about 30 currently do so, even though that approach – at least historically – has not been favored by some in the General Assembly.<sup>98</sup>

## Municipal Utility and Enterprise Revenue Bonds

Municipal Corporations have the authority to issue revenue or mortgage revenue bonds for utility purposes under [Article XVIII, Section 12](#) of the Constitution. Generally, these bonds may be secured only by the property and net revenues of the utility. They are not subject to the [Uniform Public Securities Law](#). As previously discussed, while no court has directly addressed the issue the provision of internet service to all residents and businesses within its boundaries, based on case law it seems likely that broadband is a “utility” eligible for financing.<sup>99</sup> Additionally, while not expressly included in the Ohio Constitution, one commentator has observed that municipal corporations also may issue revenue bonds under the grant of general home

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<sup>97</sup> See OHIO CONST. art. XVIII, §§ [4](#), [5](#), and [6](#). Ohio Statutes generally define the provision of telephone and telecommunication services to the public as a “public utility” although as previously discussed internet and other “public utilities” are not subject to regulation by PUCO. See, e.g., *River Bend Farm Dev. Co. v. Cellular One*, 1996 Ohio App. Lexis 889 (1996) (Wireless telecommunication facilities are part of a public utility and outside the scope of township zoning regulations); see generally [City of Englewood v. Miami Valley Lighting, LLC](#), 911 N.E.2d 913 (Ohio App. 2009) (holding that for purposes of condemnation, a city could not condemn certain privately owned personal property (streetlights) because the facts did not demonstrate that the lights were operated by the company as a “public utility” or that the property provided the public an essential service. “Although courts have not required that a public utility be “essential to survival,” courts have construed essential services to be akin to those services provided by traditional public utilities, such as electricity, gas, solid waste disposal, and telecommunication services.” [citations omitted; emphasis supplied])

<sup>98</sup> See Jon Brodtkin, Ohio GOP attempt to ban municipal broadband after protest from residents, ARSTECHNICA (June 29, 2021), <https://arstechnica.com/tech-policy/2021/06/ohio-gop-ends-attempt-to-ban-municipal-broadband-after-protest-from-residents/>; Sean Gonsalves, Municipal Broadband advocates Win Major Victory in Ohio, CMTY. NETWORKS (June 29, 2021), <https://muninetworks.org/content/municipal-broadband-advocates-win-major-victory-ohio>

<sup>99</sup> See supra note 96 and accompanying text.

rule powers in [Article XVIII, Section 3](#)<sup>100</sup> of the Ohio Constitution. Apparently, this debt need not comply with the "Uniform Public Securities Law" or with the dollar limitations on direct and indirect debt.<sup>101</sup>

The right to finance a municipal internet *utility* also may suggest a means of using municipal utility revenue bonds to provide funds to finance a broadband P3 that will be used for a substantial period by one or more Private Entities.

[Article XVIII, §10](#) of the Ohio Constitution states:

A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

One could envision a municipal corporation and one or more Private Entities (for-profit ISPs) joining to jointly finance the acquisition and construction of broadband infrastructure that the municipal corporation intends to operate to assist in the delivery of utility services (for example electric service) in the community. Since that network would almost certainly have capacity in excess of that needed by the municipality, the excess could be sold or leased to the Private Entity and used to deliver internet service to residents and businesses in the community. Using this approach, the Ohio Constitution appears to allow bonds to be issued for the

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<sup>100</sup> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." [emphasis added].

<sup>101</sup> See [Municipal Debt Guide](#), supra note 94, at 24. This provision also may permit the municipalities to issue revenue bonds secured by a pledge of municipal income taxes. Id. at 25. See Generally MUNICIPAL INCOME TAX, TAX.OHIO.GOV 121, 121-126 (available at [https://tax.ohio.gov/static/communications/publications/brief\\_summaries/2009\\_brief\\_summary/municipal\\_income\\_tax.pdf](https://tax.ohio.gov/static/communications/publications/brief_summaries/2009_brief_summary/municipal_income_tax.pdf)) (last accessed Aug. 31, 2022).

entire cost of the network system, so long as the cost of the ISP's portion is backed only by the ISP's payments.<sup>102</sup>

## Industrial Revenue Bonds

### *Conduit Financing*

Chapter 165 of the Ohio Code<sup>103</sup> contains the state's industrial revenue bond statute.<sup>104</sup> Industrial revenue bond financing almost always is structured as a conduit financing and is most often used to facilitate tax-exempt financing.<sup>105</sup> In a conduit financing, bonds can be issued by the state, a county, a township, or a municipal corporation. The proceeds of the bonds are then loaned or otherwise made available to the project owner/operator.<sup>106</sup> The debt is then repaid by the project owner/operator as a loan or a financing lease. In this way, the Ohio Public Entity in effect acts as a "conduit" between the ultimate investor (the bondholder or lender) and the project owner/operator (borrower or lessee).

### *"Projects" Eligible for Industrial Revenue Bond Financing*

The proceeds from the sale of industrial revenue bonds can be used to finance manufacturing, distribution, commercial, or research facilities,<sup>107</sup> so the facilities (land, building, and equipment) of a commercial Private Entity ISP should be eligible for financing, and in fact, the Ohio Attorney General reached this conclusion in a recent opinion,<sup>108</sup> finding that a privately-owned fiber optic cable provider was engaged in a commercial

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<sup>102</sup> This arrangement might be best documented as a transfer of the network capacity through a long-term IDU (Indefeasible Right of Use) Agreement. The overall feasibility of such a structure in a particular case, both from financing and legal perspective, would need to be verified with local experts, but the approach does illustrate ways a Public Entity's ability to access the municipal debt market may serve to speed a Private Entity's investment in the community.

<sup>103</sup> OHIO REV. CODE ANN. [§ 165.01](#) ("Project' means real or personal property, or both, including undivided and other interests therein, acquired by gift or purchase, constructed, reconstructed, enlarged, improved, furnished, or equipped, or any combination thereof, by an issuer, or by others in whole or in part from the proceeds of a loan made by an issuer, for industry, commerce, distribution, or research and located within the boundaries of the issuer.") A project is also designed to include all property and facilities described in [art. VIII, § 13](#) – discussed in an [earlier section](#) of this White Paper.

<sup>104</sup> A similar though not identical provision is contained in [OHIO REV. CODE ANN. Ch. 761](#). However, it is only available for municipal corporations (cities and villages), and it requires close coordination with and use of the municipal corporation's Community Improvement Corporation as an agent to accomplish the financing of the project. See OHIO REV. CODE ANN. [§ 761.02](#) and [Ch. 1724](#).

<sup>105</sup> IIA § 80401 amended [I.R.C. § 142\(a\)](#) to create a new category of federally tax-exempt bonds for broadband infrastructure. See the [earlier discussion](#) of the benefit of tax-exempt financing.

<sup>106</sup> Technically the municipality could retain title to the property and lease it to the project owner. In other states this is used to achieve tax property exemption for the project during the period it is "owned" by the Public Entity.

<sup>107</sup> OHIO REV. CODE ANN. [§ 165.01](#).

<sup>108</sup> [2004 Ohio Op. Atty. Gen. No. 5 \(February 5, 2004\)](#).

activity and qualified for financing under Chapter 165. In reaching this conclusion, the Opinion relied on the expansive definition adopted by the Ohio Supreme Court in *State ex rel. Bd. of County Comm'rs v. Zupanic*.<sup>109</sup>

#### *Using Industrial Revenue Bonds to Finance a Privately Owned broadband P3 Network*

Most debt issued under Chapter 165 has traditionally been structured as a conduit financing, as described above. Certainly, the potential availability of tax-exempt financing for privately-owned and operated broadband networks potentially makes a municipal corporation, township, or county's participation in this type of broadband P3 as the issuer of the debt a significant economic contribution.<sup>110</sup>

But that likely is not the only potential option available to Ohio Public Entities. A second issue, discussed in the previously described Ohio Attorney General Opinion,<sup>111</sup> addresses a more interesting question: is the previously described conduit financing structure, in which the Private Entity pays 100% of the bond debt service, *mandated*? While the Opinion acknowledged that the initial answer might appear to be "yes," it concludes this was not required by the terms of the statute at all. Rather, the sole limitation on a Public Entity (or any other party's) payment of bond debt service was that taxes are not to be used to repay the bonds. This conclusion raises the possibility of many types of broadband P3 structures that involve shared use, and shared repayment of the construction costs of a broadband network that would be owned and operated by a Private Entity partner.

Taken together, Industrial Revenue Bond financing would seem to be a very promising tool for financing a broadband P3. However, the procedure for issuance of industrial revenue bonds is highly technical, and although simplified somewhat in 2021,<sup>112</sup> legal advice is critical throughout the process, particularly if tax-exempt bond financing is contemplated.<sup>113</sup>

#### *Joint Economic Development Districts*

Ohio law permits municipal corporations and townships to join to create and fund Joint Economic Development Districts<sup>114</sup> by contract for the purpose of carrying out an economic development plan or providing utility services within the district. Once formed, the District can impose a district-wide income tax

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<sup>109</sup> *State, ex Rel. v. Zupanic*, [581 N.E.2d 1086 \(1991\)](#) (the Court "adopt[ed] definitions of "commerce" as the exchange of goods, productions, or property of any kind and "industry" as the commercial production and sale of goods and services, and [found] that the exchange of money for possessory interests in rental units constitutes commerce and the commercial service of providing and maintaining rental housing constitutes a service industry within the meaning of Ohio Const. art. VIII, § 13")

<sup>110</sup> See [the prior discussion](#) of the economic benefit of tax-exempt financing

<sup>111</sup> See [2004 Ohio Op. Gen. No. 5 \(February 5, 2004\)](#) (the private owner of the fiber network only committed to pay the first year's debt service on the bonds, shortfalls would be paid by the issuer and other Public Entities from sources other than taxes).

<sup>112</sup> [H.B. 444, 133rd Gen. Ass. 2019 Ohio HB 444 \(Jan. 9, 2021\)](#) <https://legiscan.com/OH/text/HB444/2019>.

<sup>113</sup> For example, notice must be given to the Director of Development of the intended issue of bonds issued under Ohio Rev. Code Ch. 165 and, if tax exempt, the bonds will need an allocation of the state's bond volume cap. See [Ohio Admin. Code Ch 122-4](#).

<sup>114</sup> OHIO REV. CODE ANN. §§ [715.70-72](#).

on businesses to fund services in the incorporated and unincorporated areas of the district.<sup>115</sup> Generally, each contracting party (municipal corporation and township) must be contiguous to at least one other contracting party. While a Joint Economic Development District, might fit into an overall plan to broadband to an unserved or underserved area, its usefulness may be limited since this tool is designed for commercial development. In that regard, the residential areas are generally excluded from the district except in the case of a mixed-use development.<sup>116</sup>

## Special District Nonprofits

While counties, townships, and municipalities may have the authority to own and directly operate a broadband network as a public utility or to encourage economic development and job creation, that may not be the optimal approach in every community. Some communities may prefer instead to have the network enterprise held in a separate entity, but still desire to retain indirect control over the operation to help ensure that the network truly does serve the public interest rather than private profit. To achieve these goals counties and municipalities can consider using an aligned special district nonprofit corporation (NGO).

Ohio Statutes (the “NGO Act”)<sup>117</sup> generally provides for the creation of a nonprofit corporation for any purpose other than pecuniary gain or profit. As one would expect, none of the net earnings of such a corporation can be distributed to the corporation’s members, directors, officers, or other private persons, although payments of reasonable expenses and reasonable compensation for services are not considered a distribution of net profits of the entity.<sup>118</sup> Once formed, generally an NGO is empowered to engage in any activity permitted by a natural person.<sup>119</sup>

### *Federal Tax Exemption for an NGO that Lessens the Burdens of Government*

For federal income tax purposes, such an NGO might achieve favorable status as a federally tax-exempt charity. In this regard, it is important to understand that the standard for achieving tax-exempt status under federal income tax rules (IRC § 501(c)(3)) is not the same as the broad authority granted to form an NGO under the NGO Act.

For example, merely operating as a *not-for-profit* ISP, (without more) while literally meeting the requirements of the NGO Act would be considered to be engaging in a trade or business, and is *not*, by itself, a basis for federal income tax-exempt status under IRC §501(c)(3).<sup>120</sup> However, a nonprofit corporation can

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<sup>115</sup> OHIO REV. CODE ANN. [§ 715.72](#).

<sup>116</sup> See OHIO REV. CODE ANN. [§715.72\(E\)](#). A “mixed-use development” is defined as “a real estate project that tends to mitigate traffic and sprawl by integrating some combination of retail, office, residential, hotel, recreation, and other functions in a pedestrian-oriented environment that maximizes the use of available space by allowing members of the community to live, work, and play in one architecturally expressive area with multiple amenities.” § 715.72(A)(9). The statute contains no specific authority for issuing debt in the name of a Joint Economic Development District

<sup>117</sup> OHIO REV. CODE ANN. [CH. 1702](#).

<sup>118</sup> OHIO REV. CODE ANN. [§1702.01\(C\)](#)

<sup>119</sup> OHIO REV. CODE ANN. [§1702.02](#)

<sup>120</sup> In Ohio, NGOs formed to qualify under IRC §501(c)(3) are called Public Benefit Corporations: “Public benefit corporation” means a corporation that is recognized as exempt from federal income taxation under section 501(c)(3) of the “Internal Revenue Code of 1986,” 100 Stat. 2085, 26 U.S.C. 1, as amended, or is organized for a public or charitable purpose and that upon dissolution must distribute its assets to a public benefit corporation, the United States, a state or any political subdivision of a state, or a person that is recognized as exempt from federal income

obtain tax-exempt status under §501(c)(3), qualify for [federal tax-exempt bond financing](#), and qualify for the receipt of tax-deductible charitable contributions if it is organized and operated exclusively for *charitable purposes*.

As defined by the Internal Revenue Code, “charitable purposes” includes “lessening the burdens of government.” This is a term used to describe arrangements where an NGO is organized and operates in a manner closely aligned with a county or municipality so that it can work to help the local government achieve an identified public objective. An IRS training memorandum states that depending on the level of local government involvement, a nonprofit ISP might qualify for tax-exempt status under 501(c)(3).<sup>121</sup>

### *Special Improvement Districts*

A Special Improvement District (SID)<sup>122</sup> is a special type of Ohio nonprofit corporation that is treated as a public agency and public authority for certain purposes.<sup>123</sup> SIDs may be established as a contiguous area within the boundaries of a municipal corporation, township, or any combination of municipal corporations and townships located within a single county, or counties that adjoin one another. A SID has broad powers including those provided to Ohio nonprofit corporations in the NGO Act. It also has the power to require the municipal corporation, township, or county that contains it, to impose special tax assessments for the

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taxation under section 501(c)(3) of the "Internal Revenue Code of 1986," as amended. "Public benefit corporation" does not include a nonprofit corporation that is organized by one or more municipal corporations to further a public purpose that is not a charitable purpose." See OHIO REV. CODE ANN. [§1702.01\(P\)](#)

<sup>121</sup> See Donna Moore & Robert Harper, Internet Service Providers Exemption Issues Under IRC 501(c)(3) and 501(c)(12), (1999) (available at <https://www.irs.gov/pub/irs-tege/eotopic99.pdf>).

<sup>122</sup> See generally [OHIO REV. CODE ANN. Ch. 1710](#); Bricker & Eckler, DevelopOhio Economic Incentives Toolkit, BRICKLER & ECKLER (Aug. 2, 2022), <https://connect.bricker.com/1/462/uploads/develop-ohio-toolkit.pdf>.

<sup>123</sup> See Ohio Rev. Code Ann. [§ 1710.02\(D\)](#). Except as otherwise provided in this section, the nonprofit corporation that governs a district shall be organized in the manner described in Chapter 1702. of the Revised Code. The district created under this chapter shall be considered a public agency under section [102.01](#) and a public authority under section [4115.03](#) of the Revised Code.

purpose of developing and implementing plans for public improvements and public services that benefit residents and businesses in the district.<sup>124</sup>

The process of creating a SID is initiated by a petition signed by the required percentage of real property owners within the district<sup>125</sup> and requires the approval of the governing body of the participating county, township, or municipality.<sup>126</sup>

Once formed, a SID is governed by its Board of Trustees, and since the Board is authorized to contract with any person for purposes of carrying out their approved plan for the public improvement or service (such as delivering broadband to residents and businesses within the district's boundaries).<sup>127</sup> The Board of Trustees of an existing SID may develop and adopt additional written plans for the SID, which must be approved by the governing body of the participating municipal corporations, counties or townships.<sup>128</sup> Thus, it would seem possible for both existing or newly-created SIDs to participate as a Public Entity partner in a broadband P3. As was true with other possible funding options, the process of creating a district and obtaining approval of a written plan is complex and missteps can delay the process. For that reason, legal advice should be

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<sup>124</sup> OHIO REV. CODE ANN. [§ 1710.01\(D\)](#). "Public improvement" means the planning, design, construction, reconstruction, enlargement, or alteration of any facility or improvement, including the acquisition of land, for which a special assessment may be levied under Chapter 727...." OHIO REV. CODE ANN. [§ 727.01](#) defines a public improvement to include a "public improvement or public services plans of a district formed under Chapter 1710...." The result of these two provisions appears to be to allow any public improvement or service in an approved SID plan to be financed with a special assessment.

<sup>125</sup> "Once the petition is signed by those members who own at least sixty per cent of the front footage of property that is to be assessed and that abuts upon a street, alley, public road, place, boulevard, parkway, park entrance, easement, or other public improvement, or those members who own at least seventy-five per cent of the area to be assessed for the improvement or service, the petition may be submitted to each legislative authority for approval."

<sup>126</sup> Once the board of directors of the special improvement district adopts a plan, it shall submit the plan to the legislative authority of each participating political subdivision and the municipal executive of each municipal corporation in which the district is located, if any. The legislative authorities and municipal executives shall review the plan and, within sixty days after receiving it, may submit their comments and recommendations about it to the district. After reviewing these comments and recommendations, the board of directors may amend the plan. It may then submit the plan, amended or otherwise, in the form of a petition to members of the district whose property may be assessed for the plan

<sup>127</sup> OHIO REV. CODE ANN. [§ 1710.02\(G\)](#). "Each nonprofit corporation governing a district under this chapter may do the following: (1) Exercise all powers of nonprofit corporations granted under Chapter 1702. of the Revised Code that do not conflict with this chapter; (2) Develop, adopt, revise, implement, and repeal plans for public improvements and public services for all or any part of the district; (3) Contract with any person, political subdivision as defined in section [2744.01](#) of the Revised Code, or state agency as defined in section [1.60](#) of the Revised Code to develop and implement plans for public improvements or public services within the district...."

<sup>128</sup> OHIO REV. CODE ANN. [§ 1710.06](#).

sought prior to initiating the process of creating or using a Special Improvement District for a broadband infrastructure project.

### *New Community Authorities*

A New Community Authority<sup>129</sup> is another tool that may be useful for a county or municipal corporation that is seeking to encourage Private Entities to move forward with broadband projects, provided it is part of a new development in the community. There generally is no limitation on the size of a New Community Authority, but generally a private developer must own or have the ability to obtain control of all of the land in the proposed area. A New Community Authority is authorized to construct and develop nearly any type of public improvement in conjunction with the private development, including telecommunications facilities.<sup>130</sup> New Community Authorities are initially controlled by a board of trustees that is appointed by the county or municipal corporation and the developer.<sup>131</sup> Among the advantages of a New Community Authority is the ability to impose special assessments that are based upon factors other than the benefit conferred on individual tracks of property in the area.<sup>132</sup>

### *Other Districts & Nonprofits*

While the SID and NCA are likely to be the most flexible means for Ohio counties, townships, and municipal corporations to use when structuring a Public Entity's participation and investment in a broadband network project or a broadband P3, Ohio statutes authorize several other types of nonprofit-controlled entities to facilitate investment in special areas of economic need.<sup>133</sup> Perhaps the most common example of nonprofit corporations sponsored by Public Entities are Community Improvement Corporations (CIC).<sup>134</sup> While these

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<sup>129</sup> OHIO REV. CODE ANN. [Ch. 349.](#)

<sup>130</sup> OHIO REV. CODE ANN. [§ 349.01\(I\).](#)

<sup>131</sup> See generally OHIO REV. CODE ANN. [Ch 349](#); Kristopher Wahlers, *New Community Authorities as a Tool for Economic Development*, ICE MILLER (Sept. 29, 2017), <https://www.icemiller.com/ice-on-fire-insights/publications/new-community-authorities-as-a-tool-for-economic-d/>; *New Community Authorities*, SQUIRE SANDERS: OHIO PUB. L. UPDATE (Spring 2009), [https://www.squirepattonboggs.com/~media/files/insights/publications/2009/04/ohio-public-law-update/files/ohio\\_public\\_law\\_update\\_spring\\_2009\\_by\\_squire\\_san\\_/fileattachment/ohio\\_public\\_law\\_update\\_spring\\_2009\\_by\\_squire\\_san\\_.pdf](https://www.squirepattonboggs.com/~media/files/insights/publications/2009/04/ohio-public-law-update/files/ohio_public_law_update_spring_2009_by_squire_san_/fileattachment/ohio_public_law_update_spring_2009_by_squire_san_.pdf).

<sup>132</sup> OHIO REV. CODE ANN. [§ 349.01\(L\)](#) "Community development charge" means:(1) A dollar amount which shall be determined on the basis of the assessed valuation of real property or interests in real property in a new community district, the income of the residents of such property subject to such charge under section [349.07](#) of the Revised Code, if such property is devoted to residential uses or to the profits, gross receipts, or other revenues of any business including, but not limited to, rentals received from leases of real property located in the district, a uniform or other fee on each parcel of such real property in a new community district, or any combination of the foregoing bases.

<sup>133</sup> See, e.g., OHIO REV. CODE ANN. [TITLE 17.](#)

<sup>134</sup> OHIO REV. CODE ANN. Ch. [1724](#)



nonprofits may not be in a position to directly assist in a broadband P3, they are intended to serve an important planning function for community redevelopment and land acquisition for revitalization projects.

## Property Tax Exemption and Tax Increment Financing

### *Property Tax Exemption*

Ohio has relatively few provisions that offer property tax exemption. Unlike many jurisdictions, real and personal property financed with industrial revenue bonds are not exempt from property tax, even if the conduit financing is structured as a “lease” where the Public Entity retains title to the property.<sup>135</sup> There are four programs that permit local Public Entities to offer property tax exemption; however, these programs are generally limited to noncommercial real property and thus are likely to be of limited if any use to encourage a Private Entity to locate broadband infrastructure in a community.<sup>136</sup>

### *Tax Increment Financing*

Closely connected to these tax abatement programs is tax increment financing (TIF).<sup>137</sup> The mechanics of TIF financing was [described in an earlier section](#) of this White Paper.

While not likely to be undertaken as a stand-alone project, broadband infrastructure might be included as part of an overall strategy to remediate blight or encourage economic development within a designated TIF project area.

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<sup>135</sup> See OHIO REV. CODE ANN. [§ 165.09](#).

<sup>136</sup> See generally Bricker & Eckler, DevelopOhio Economic Incentives Toolkit, BRICKLER & ECKLER 40-58 (Aug. 2, 2022), <https://connect.bricker.com/1/462/uploads/develop-ohio-toolkit.pdf>. Four programs are the Enterprise Zone Program (OHIO REV. CODE ANN. §§ [5709.61-.69](#)), the Ohio Community Reinvestment Area Program [5709.631](#), and the Undeveloped Property Tax Abatement Program (OHIO REV. CODE ANN. § [5709.52](#)) and The Airport Development District [§§308.20-.25](#).

<sup>137</sup> Tax Increment Financing (TIF) is available to municipal corporations (OHIO REV. CODE ANN. §§ [5709.40-.43](#)), townships (OHIO REV. CODE ANN. §§ [5709.73-.75](#)) and counties (OHIO REV. CODE ANN. §§ [5709.78-.81](#))

## State & Local Tax Credit Programs

Ohio authorizes state and local income tax credits, two of which may be useful for Public Entities seeking to provide an economic incentive to a Private Entity and encourage buildout of a broadband network in the community. As [previously described](#), tax credits can be used to provide equity capital to a private development project either by making the credits transferrable or refundable.

### *Municipal Job Creation Tax Credit Program*

Municipal corporations (cities and villages) are authorized to impose income tax on wages and business income.<sup>138</sup> Section 718.15 authorizes the municipal corporation to provide a tax credit to a business, measured as a percentage of the new income tax revenue the municipal corporation receives from new employees of the company. The credit can be maintained for up to 15 years. Before granting the credit, the municipal corporation must enter into a written agreement specifying the terms and conditions under which the credit will be provided. While the statute requires that the credit be based on a percentage of wages paid, it imposes no limitations on other terms and requirements the municipality might wish to impose (such as network build out and performance).

The municipality has the option of making this credit refundable or nonrefundable. As [previously discussed](#), refundable credits provide the Private Partner assurance that it will receive the value of the credit, even if it has not municipal income tax liability.

### *Opportunity Zone State Tax Credit Program*

Ohio also provides several state income tax credit programs. One that may be particularly useful in some communities is the Opportunity Zone State Tax Credit Program.<sup>139</sup> This program is only available to communities located in an Ohio federally designated opportunity zone.<sup>140</sup> However, the tax credit is available even if the taxpayer investor does not qualify for the federal opportunity zone tax benefit.<sup>141</sup>

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<sup>138</sup> OHIO REV. CODE ANN. [Ch. 718](#). For a list of most Ohio cities income tax rates see <https://www.ritaohio.com/TaxRatesTable>.

<sup>139</sup> OHIO REV CODE ANN. § . See generally Expansion of Ohio Opportunity Zones Tax Credit Program Creates Opportunities, VORYS (Summer 2022), <https://www.vorys.com/publications-3125.html#:~:text=Second%2C%20S.B.,through%20June%2030%2C%202023> for a discussion of the tax credit and recent amendments to the existing statute.

<sup>140</sup> See OHIO OPPORTUNITY ZONES, <https://opportunityzones.ohio.gov/home> (last visited Sept. 12, 2022) for a map of rural and urban locations in Ohio that have been designated as opportunity zones.

<sup>141</sup> For federal income tax purposes and investment of capital gain in an opportunity zone fund is deferred and gain attributable to the newly investment is tax exempt if held for a qualified period. See OPPORTUNITY ZONES, IRS, <https://www.irs.gov/credits-deductions/businesses/opportunity-zones> (last accessed September 5, 2022) for a comprehensive discussion of the federal opportunity zone requirements.

Investments qualifying for the Opportunity Zone Tax Credit are eligible for a credit equal to 10% of the capital investment in the project.<sup>142</sup>

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<sup>142</sup> See OHIO OPPORTUNITY ZONES TAX CREDIT PROGRAM: FAQ – 2020 APPLICATION ROUND, OHIO DEV. SERVS. AGENCY, [https://www.novoco.com/sites/default/files/atoms/files/ohio\\_opportunity\\_zones\\_faqs.pdf](https://www.novoco.com/sites/default/files/atoms/files/ohio_opportunity_zones_faqs.pdf) (discussing the initial version of the statute).

## Ohio Specific Broadband Right-of-Way and Easement Issues

Ohio has ISP-favorable rules intended to encourage and streamline the process of locating wireless and wireline infrastructure in a public right of way, as well as new favorable legislation that can assist rule electric cooperatives that will wish to co-locate broadband infrastructure over easements dedicated, they hold only for electrical service. However, the easement legislation does not extend to the other investor-owned utilities that hold similar easements.

### Legislation Permitting Use of Public Right of Way

Ohio has enacted legislation governing applications and the permitting process for use of the public right of way to locate wireless internet infrastructure.<sup>143</sup> It is intended to streamline the process of locating or co-locating wireless towers and equipment on existing public or utility-owned property. The Statute applies only to the public right of way owned by a municipal corporation, and it does not include fiber-optic or coaxial cable except to the extent immediately adjacent to and directly associated with a particular wireless antenna.<sup>144</sup> The statute does not supersede the FCC's authority to regulate the placement of wireless communication devices.<sup>145</sup> The statute generally prohibits municipalities from granting exclusive access to any provider, sets minimum time periods for granting or denying requests for access, establishes uniform criteria for evaluating requests for access and establishes maximum charges both for the initial application and annual fees.

### Legislation Permitting Pole Attachments

[Ohio Revised Code Chapter 4926](#) provides rules designed to permit broadband providers to access existing poles of a not-for-profit rural electric cooperative<sup>146</sup> to deliver broadband service "under just and reasonable rates, terms, and conditions."<sup>147</sup> In large part, this statute expands existing Federal rules that apply to utilities that are implemented by the FCC pursuant to the Communications Act of 1996,<sup>148</sup> but it also

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<sup>143</sup> [OHIO REV. CODE ANN. Ch. 4939](#).

<sup>144</sup> [OHIO REV. CODE ANN. § 4939.01](#). The definition includes "any public street, public road, public highway, public freeway, public lane, public path, public alley, public court, public sidewalk, public boulevard, public parkway, public drive, public easement, and any other land dedicated or otherwise designated for a compatible public use, which, on or after July 2, 2002, is owned or controlled by a municipal corporation. "Public way" excludes a private easement."

<sup>145</sup> [OHIO REV. CODE ANN. § 4939.039](#).

<sup>146</sup> As defined in [OHIO REV. CODE ANN. § 4928.01](#).

<sup>147</sup> [OHIO REV. CODE ANN. § 4926.03](#)

<sup>148</sup> [47 U.S.C. 224](#). The FCC does not have jurisdiction over municipal utilities or cooperatives. Thus, the purpose of [OHIO REV. CODE Ch. 4926](#) is to expand similar rules to electric cooperatives.

specifically permits a cooperative to deny a request for reasons of insufficient capacity or safety, reliability or engineering standards.<sup>149</sup>

## Use of Existing Easements for Broadband Infrastructure

In many situations, a rural electric cooperative is the most logical candidate to bring high-speed fiber-based internet to their service area. In some situations, these cooperatives already have fiber deployed on their poles throughout the service area and use it to manage their electric distribution and transmission facilities, and of course, existing poles potentially can make aerial deployment possible. However, a problem faced by rural electric utilities in other states is the extent to which existing easements that may permit the use of fiber optic cable to allow them or others to use fiber optic cable to deliver internet (a telecommunications service) in addition to electrical services.

This problem can be illustrated by the case of *Barfield v. Sho-Me Power Electric Cooperative*, [10 F. Supp. 3d 997](#) (W.D Mo. 2014), *aff'd* [853 F.3d 795](#) (8<sup>th</sup> Cir. 2017). The Missouri controversy arose when a rural electric cooperative, Sho-Me Power Electric Cooperative attached fiber optic cable to its existing electric utility poles. Barfield, representing the landowners that had previously granted easements to Sho-Me Power for electrical power transmission lines sued for trespass, claiming that the use of the easement to provide internet communications to customers was neither contemplated nor approved under the terms of the original easements. The Court sided with the landowners, holding that under Missouri law, secondary use of the easement was not contemplated by the easement language, and was problematic even if it resulted in no more restrictions on the property. In other words, a landowner was entitled to be compensated for Sho-Me Power's use as it was not contemplated or implied from the language of the easements, regardless of whether it resulted in any greater inconvenience or restriction to the landowner.

A much different result is likely if the same case arose in Ohio after passage of the new legislation last year.<sup>150</sup> The new statute sets limits on the calculation of damages and timing for bringing a lawsuit.<sup>151</sup> Under the statutory standard damages are limited to the diminished value of the property as a result of its use to provide broadband service.<sup>152</sup> In addition, current or future revenues or profits derived from the use of the easement to offer broadband may not be included in the calculation of the damage award.<sup>153</sup> If broadband service is or is capable of being used to assist in the delivery of electrical service, no claim for damages may

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<sup>149</sup> [OHIO REV. CODE ANN. § 4926.15.](#)

<sup>150</sup> [OHIO REV. CODE ANN. Ch. 118.](#)

<sup>151</sup> [OHIO REV. CODE ANN. § 188.11](#) (a lawsuit must be filed within one year of the damages claimed).

<sup>152</sup> [OHIO REV. CODE ANN. § 188.05.](#) “[T]he court may award damages to the owner equal to not more than the difference between the following: (1) The fair market value of the owner's interest in the property of the estate immediately before the provision of broadband service; (2) The fair market value of the owner's interest in the property of the estate immediately after the provision of broadband service. (B) Any damages awarded ... shall be a fixed amount that shall not continue, accumulate, or accrue [and] .... shall be established by the testimony of a qualified real estate appraiser.” In addition, current or future revenues or profits derived from the use of the easement to offer broadband may not be included in the calculation of the damage award. [OHIO REV. CODE ANN. § 188.14.](#) Finally, if broadband service is or is capable of

<sup>153</sup> [OHIO REV. CODE ANN. § 188.14.](#)

be brought.<sup>154</sup> Further, Ohio courts are specifically barred from enjoining the provision of broadband service.<sup>155</sup> The provisions in the new law apply both to a cooperative's direct use of the easement to provide service, or to any use made by a subsidiary, sublessee, or apportioned use by another entity.<sup>156</sup>

Taken together then, the new statute practically eliminates the possibility of a landowner's claim against a cooperative (or others claiming based on the cooperative's easement) unless they are able to show a real diminished value related to the use of the land. While there may be exceptions, it is difficult to imagine many situations where that will be possible. An unanswered question is whether this statute will have any impact on claims brought by holders of easements other than rural electric cooperatives such as investor-owned utilities.

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<sup>154</sup> [OHIO REV. CODE ANN. § 188.23.](#)

<sup>155</sup> [OHIO REV. CODE ANN. § 188.08.](#)

<sup>156</sup> [OHIO REV. CODE ANN. § 188.02.](#)

## Proposed Legislation

The 2021 session of the Ohio General Assembly was particularly active, and in large part enacted the recommendations made by the InnovateOhio task force in Ohio's Broadband Strategy, previously described in an [earlier section](#). However, one area alluded to in Strategy may be a source of additional potential legislation and/or conflict with federal and local government strategies in the future.

While it is clear that the state's executive branch and the Ohio General Assembly view public-private partnerships as being able to bridge the digital divide,<sup>157</sup> it is equally apparent that policy recommended by the Ohio Broadband Strategy limited state financial support to Private Entities only.<sup>158</sup> Reflecting this approach, the state's 2021 broadband grant program excluded Public Entities from participating.

For example, the appropriations bill that funded the broadband grant program contained an [amendment](#) that would have denied political subdivisions the power to own a broadband network in any area that broadband service at download and upload speeds of 10 and 1 Mbps respectively. While the amendment ultimately was not included in the final legislation that passed, the fact it was included in the first place confirms the bias against Public Entity ownership of broadband networks in Ohio. What is less clear is how this bias can be squared with the provisions of the IJA that require both governmental and rural cooperatives to be eligible to participate in any state grant program funded under the BEAD Program.

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<sup>157</sup> See [STRATEGY](#), *supra* note 37, at 3 ("The Ohio Broadband Strategy, with input from business and community leaders, explores ways to provide service to all communities by leveraging our state assets and resources, encouraging public private partnerships, and coordinating broadband expansion with economic development initiatives."); at p.4 ("This plan represents both a necessary step so Ohio can compete for federal resources as well as a collective effort across public and private sectors to reach areas currently lacking connectivity.").

<sup>158</sup> See [STRATEGY](#), *supra* note 37, at 6 ("Because each region of Ohio presents unique challenges, state government will pursue a number of complementary strategies to leverage resources and encourage private sector participation in expanding high-speed internet to those who have already waited far too long.").