

As Reported by the House State and Local Government Committee

133rd General Assembly

Regular Session

2019-2020

Sub. H. B. No. 218

Representative Patton

Cosponsors: Representatives Wiggam, Hambley

A BILL

To enact sections 168.01, 168.02, 168.03, 168.04, 1
168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 2
168.11, 168.12, 168.13, 168.14, and 168.15 of 3
the Revised Code to authorize certain public 4
entities to enter into public-private 5
initiatives with a private party through a 6
public-private agreement regarding public 7
facilities. 8

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 168.01, 168.02, 168.03, 168.04, 9
168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 168.11, 168.12, 10
168.13, 168.14, and 168.15 of the Revised Code be enacted to 11
read as follows: 12

Sec. 168.01. "Affected jurisdiction" means any unit of 13
government within the state in which all or part of a facility 14
is located or any other public entity directly affected by the 15
facility. 16

"Contracting authority" means the director or chief 17
executive officer in the case of a state agency, the board of 18

trustees in the case of a state institution of higher education, 19
the board of county commissioners in the case of a county, the 20
board of township trustees in the case of a township, the 21
legislative authority in the case of a municipal corporation, 22
the board of library trustees in the case of a library or 23
library district, the board of directors in the case of a port 24
authority, the board of education in the case of a school 25
district, the governing authority in the case of a community 26
school, the governing body in the case of a STEM school, and the 27
board of trustees in the case of a college-preparatory boarding 28
school. 29

"Facility" means any existing or new public building, 30
public improvement, or public infrastructure, or part of such 31
building, improvement, or public infrastructure, that is used or 32
will be used by a public body or the public at large, or is used 33
in support of a public purpose or for the delivery of services 34
to the public. 35

"Force majeure" means an uncontrollable force or natural 36
disaster not within the power of the operator or the public 37
body. 38

"Maintenance" includes routine maintenance, major 39
maintenance, and any other categories of maintenance that may be 40
designated by the public body. 41

"Material default" means any failure of an operator to 42
perform any duties under a public-private agreement that 43
jeopardizes delivery of adequate service to the public and 44
remains unsatisfied after a reasonable period of time and after 45
the operator has received written notice from the public body of 46
the failure. 47

"Operate" means any action to maintain, repair, improve, equip, or modify a facility. 48
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"Operator" means a private entity that has entered into a public-private agreement under sections 168.01 to 168.15 of the Revised Code. 50
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"Political subdivision" means a county, township, municipal corporation, library or library district created under Chapter 3375. of the Revised Code, or port authority created under Chapter 4582. of the Revised Code. 53
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"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity. 57
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"Public body" means a state agency, state institution of higher education, political subdivision, or public school. 61
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"Public-private agreement" means the agreement between a private entity and the public body that relates to the design, build, financing, operation, or maintenance of a facility subject to sections 168.01 to 168.15 of the Revised Code. 63
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"Public-private initiative" means an arrangement between the public body and a private entity, the terms of which are stated in a public-private agreement, that provides for both of the following: 67
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(A) Sharing of resources and the means of providing a project or service for a facility; 71
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(B) Cooperation in researching, developing, and implementing projects or services for a facility. 73
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"Public school" means a school district created under 75

Chapter 3311., community school created under Chapter 3314., 76
STEM school created under Chapter 3326., or college-preparatory 77
boarding school created under Chapter 3328. of the Revised Code. 78

"State agency" has the meaning defined in section 1.60 of 79
the Revised Code but does not include the department of 80
transportation. 81

"State institution of higher education" has the meaning 82
defined in section 3345.011 of the Revised Code. 83

"Utility" means a privately, publicly, or cooperatively 84
owned line, facility, or system for producing, transmitting, or 85
distributing communications, cable television, power, 86
electricity, light, heat, gas, oil, crude products, water, 87
steam, waste, storm water not connected with highway drainage, 88
alternative or renewable energy sources such as wind or solar, 89
or any other similar commodity, including a fire or police 90
signal system or street lighting system that directly or 91
indirectly serves the public. 92

Sec. 168.02. A facility subject to a public-private 93
agreement under sections 168.01 to 168.15 of the Revised Code 94
shall be owned by the public body unless the public body, in its 95
discretion, elects to provide for ownership of the facility by 96
the private entity through a lease agreement that is part of the 97
public-private agreement. Notwithstanding any provision of the 98
Revised Code, the lease agreement shall provide for the lease of 99
all or a portion of the facility to, or ownership by, the 100
private entity for a term of up to forty years. In consideration 101
therefor, the agreement shall provide for complete reversion of 102
the facility, in good or better condition, to the public body at 103
the expiration of the lease. 104

<u>Sec. 168.03. (A) A public body may solicit, receive,</u>	105
<u>consider, evaluate, and accept a proposal for a public-private</u>	106
<u>initiative.</u>	107
<u>(B) In soliciting and selecting a private entity with</u>	108
<u>which to enter into a public-private initiative, the public body</u>	109
<u>shall use one or both of the following:</u>	110
<u>(1) Sealed bidding;</u>	111
<u>(2) Selection of proposals, with or without negotiations,</u>	112
<u>based on qualifications, best value, or both.</u>	113
<u>(C) (1) The public body shall consider the following</u>	114
<u>factors in evaluating and selecting a bid or proposal to enter</u>	115
<u>into a public-private initiative:</u>	116
<u>(a) The ability of the facility to serve a public purpose;</u>	117
<u>(b) The proposed aggregate cost of and financial plan for</u>	118
<u>the facility, including costs for labor, fringe benefits,</u>	119
<u>equipment and materials, and costs of administering, monitoring,</u>	120
<u>and inspecting the facility;</u>	121
<u>(c) The general reputation, qualifications, industry</u>	122
<u>experience, and financial capacity of the private entity;</u>	123
<u>(d) The proposed design, operation, and feasibility of the</u>	124
<u>facility;</u>	125
<u>(e) Comments from local citizens and affected</u>	126
<u>jurisdictions;</u>	127
<u>(f) Benefits to the public and the affected facility;</u>	128
<u>(g) The safety record of the private entity;</u>	129
<u>(h) The inclusion of a teaming agreement in the bid or</u>	130
<u>proposal that identifies the primary designer of record or</u>	131

design firm representing not less than thirty per cent of the 132
estimated design fee, the primary construction contractor 133
representing not less than thirty per cent of the estimated 134
construction dollar value amount, and the primary financier 135
representing not less than fifty per cent of the total project 136
cost; 137

(i) Any other criteria that the public body considers 138
appropriate. 139

(2) The public body may consider the following factors in 140
evaluating and selecting a bid or proposal to enter into a 141
public-private initiative: 142

(a) The bidder's estimates of capital expenditures and 143
operating expenses for the proposed facility; 144

(b) The schedule for completion of the proposed facility; 145

(c) Whether user fees, lease payments, or other charges 146
will be collected for use of the proposed facility over the term 147
of the public-private agreement; 148

(d) The proposed length of time before ownership of the 149
facility reverts to the public body. 150

(D) The public body shall select a private entity for a 151
public-private initiative on a competitive basis. 152

(E) Any materials or data submitted to, made available to, 153
or received by the contracting authority, to the extent that the 154
materials or data consist of trade secrets, as defined in 155
section 1333.61 of the Revised Code, are confidential and are 156
not public records for the purposes of section 149.43 of the 157
Revised Code. Financial information received by the contracting 158
authority that is related to a proposal is confidential and not 159

a public record for purposes of section 149.43 of the Revised 160
Code until such time as a proposal is selected. Before 161
submission of a solicited proposal, a private entity may request 162
a review by the public body of information that the private 163
entity has identified as confidential, to determine whether such 164
information would be subject to disclosure under section 149.43 165
of the Revised Code. 166

(F) (1) The public body may reimburse a private entity for 167
a portion of the actual costs the entity incurred in submitting 168
a proposal for a public-private initiative that was solicited by 169
the public body under this section. When considering the 170
reimbursement of such costs, the contracting authority shall 171
describe, in the request for proposals for a specific public- 172
private initiative, the specific terms and conditions for 173
reimbursing a private entity. The contracting authority may 174
include in the terms and conditions a requirement that the 175
private entity execute an agreement to transfer to the public 176
body the rights to the use of the work product contained in the 177
proposal in exchange for receiving the reimbursement. 178

(2) The contracting authority shall make all decisions 179
related to the reimbursement of a specific private entity and 180
related to the maximum amount of the reimbursement. However, the 181
public body shall not reimburse a private entity if that entity 182
enters into the public-private agreement that is the subject of 183
the solicited proposal, except as set forth in the request for 184
proposals or in the public-private agreement. The reimbursement 185
of costs under division (F) of this section is exempt from any 186
competitive bidding required by law. 187

(3) If the public body, pursuant to division (F) (1) of 188
this section, includes a reimbursement provision in a request 189

for proposals and the public body subsequently terminates the 190
solicitation before the solicitation expiration date, the public 191
body shall prorate the amount of the reimbursement that is to be 192
paid to each private entity participating in the solicitation on 193
the date the public body terminates the solicitation. The public 194
body shall calculate the proration percentage by determining the 195
number of days from the date the solicitation first was offered 196
until the date the public body terminated the solicitation and 197
dividing that number by the number of days of the original 198
solicitation period. 199

(4) Except as otherwise provided in writing by the public 200
body, if, pursuant to division (F)(1) of this section, the 201
public body includes a reimbursement provision in a request for 202
proposals and subsequently enters into negotiations based on the 203
selection of a desired proposal and the public body elects to 204
terminate those negotiations for the convenience of the public 205
body and through no fault of the proposer, the proposer is 206
entitled to the full reimbursement amount. 207

Sec. 168.04. (A) The public body may receive, consider, 208
evaluate, and accept or reject an unsolicited proposal for a 209
public-private initiative if the proposal meets all of the 210
following: 211

(1) Is independently originated and developed by the 212
proposer; 213

(2) Benefits the public; 214

(3) Is prepared without public body supervision; 215

(4) Includes sufficient detail and information for the 216
public body to evaluate the proposal in an objective and timely 217
manner, including the conceptual design or plan for the proposed 218

facility, project costs, and a schedule for starting and 219
completing the facility; 220

(5) Is made by a private entity that is not prohibited 221
from making an unsolicited proposal under section 3517.13 of the 222
Revised Code. 223

(B) Within ninety days after receiving an unsolicited 224
proposal, the public body may undertake a preliminary evaluation 225
of the unsolicited proposal to determine if the proposal 226
complies with the requirements of division (A) of this section. 227

(C) Any materials or data submitted to, made available to, 228
or received by the contracting authority under this section, to 229
the extent that the materials or data consist of trade secrets, 230
as defined in section 1333.61 of the Revised Code, are 231
confidential and are not public records for the purposes of 232
section 149.43 of the Revised Code. Financial information 233
received by the contracting authority that is related to a 234
proposal is confidential and not a public record for purposes of 235
section 149.43 of the Revised Code until the public body accepts 236
or rejects the proposal. Before submission of an unsolicited 237
proposal or a competing proposal, a private entity may request a 238
review by the public body of information that the private entity 239
has identified as confidential to determine whether such 240
information would be subject to disclosure under section 149.43 241
of the Revised Code. 242

(D) If the unsolicited proposal does not comply with 243
division (A) of this section, the public body shall return the 244
proposal without further action. 245

(E) If the unsolicited proposal complies with division (A) 246
of this section, the public body may continue to evaluate the 247

<u>proposal in accordance with this section.</u>	248
<u>(F) (1) If the unsolicited proposal complies with division</u>	249
<u>(A) of this section, the public body shall advertise the</u>	250
<u>unsolicited proposal for the purpose of receiving competitive</u>	251
<u>proposals for the proposed facility.</u>	252
<u>(2) The advertisement shall outline the general nature and</u>	253
<u>scope of the unsolicited proposal, including the location of the</u>	254
<u>facility and the work to be performed on or in connection with</u>	255
<u>the facility and shall specify an address to which a competing</u>	256
<u>proposal may be submitted.</u>	257
<u>(3) The advertisement shall specify a reasonable time</u>	258
<u>period by which competitors must submit a competing proposal to</u>	259
<u>the public body.</u>	260
<u>(G) The public body shall charge a reasonable fee to cover</u>	261
<u>its costs to process, review, and evaluate an unsolicited</u>	262
<u>proposal and any competing proposals.</u>	263
<u>(H) Upon receipt of any competing proposals, the public</u>	264
<u>body shall evaluate the unsolicited proposal and any competing</u>	265
<u>proposals using the factors set forth under division (C) of</u>	266
<u>section 168.03 of the Revised Code.</u>	267
<u>(I) After evaluating the unsolicited proposal and any</u>	268
<u>competing proposals, the public body may do any of the</u>	269
<u>following:</u>	270
<u>(1) Accept the unsolicited proposal and reject any</u>	271
<u>competing proposals;</u>	272
<u>(2) Reject the unsolicited proposal and accept a</u>	273
<u>comparable competing proposal if the public body determines that</u>	274
<u>the comparable competing proposal is the most advantageous to</u>	275

<u>the jurisdictions served by the public body;</u>	276
<u>(3) Reject the unsolicited proposal and any competing proposals.</u>	277 278
<u>Sec. 168.05. (A) After selecting a solicited or unsolicited proposal for a public-private initiative, the public body shall enter into a public-private agreement for a facility with the selected private entity. An affected jurisdiction may be a party to a public-private agreement entered into by the public body and a selected private entity.</u>	279 280 281 282 283 284
<u>(B) (1) A public-private agreement under this section shall provide for all of the following:</u>	285 286
<u>(a) Planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a facility. A public-private agreement that provides for the construction or reconstruction of a facility also shall provide for maintenance after the construction or reconstruction;</u>	287 288 289 290 291 292
<u>(b) Term of the public-private agreement;</u>	293
<u>(c) Type of property interest, if any, the private entity will have in the facility;</u>	294 295
<u>(d) A specific plan to ensure proper maintenance of the facility throughout the term of the agreement and a return of the facility to the public body, if applicable, in good condition and repair;</u>	296 297 298 299
<u>(e) Compliance with applicable federal, state, and local laws, including laws applicable to public improvements to the extent those laws do not conflict with the provisions of Chapter 168. of the Revised Code;</u>	300 301 302 303

<u>(f) Grounds for termination of the public-private</u>	304
<u>agreement by the public body or operator;</u>	305
<u>(g) Disposition of the facility upon completion of the</u>	306
<u>agreement;</u>	307
<u>(h) Inspection by the public body of construction of or</u>	308
<u>improvements to the facility;</u>	309
<u>(i) Filing by the operator, on a periodic basis, of</u>	310
<u>appropriate financial statements in a form acceptable to the</u>	311
<u>public body;</u>	312
<u>(j) Filing by the operator, on a periodic basis, of</u>	313
<u>reports as determined by the public body in a form acceptable to</u>	314
<u>the public body;</u>	315
<u>(k) Procedures for amendment of the agreement;</u>	316
<u>(l) If the agreement contains a construction services</u>	317
<u>component, a contract performance bond executed by a surety</u>	318
<u>authorized by the department of insurance to write surety bonds</u>	319
<u>in an amount equal to the construction services component</u>	320
<u>contract price, conditioned upon the private entity or</u>	321
<u>contractor performing the construction services portion of the</u>	322
<u>work in accordance with the agreed upon terms, within the time</u>	323
<u>prescribed;</u>	324
<u>(m) If the agreement contains a construction services</u>	325
<u>component, a payment bond executed by a surety authorized by the</u>	326
<u>department of insurance to write surety bonds in an amount equal</u>	327
<u>to the construction services component contract price,</u>	328
<u>conditioned upon the payment for all labor, work performed, and</u>	329
<u>materials furnished in connection with the construction services</u>	330
<u>portion of the work.</u>	331

(2) As used in divisions (B) (1) (l) and (m) of this 332
section, "construction services" means design-build, 333
construction, reconstruction, replacement, improvement, or 334
repair services. 335

(C) A public-private agreement under this section may 336
provide for any of the following: 337

(1) Review and approval by the public body of the 338
operator's plans for the development and operation of the 339
facility; 340

(2) Maintenance by the operator of a policy of liability 341
insurance or self-insurance; 342

(3) Financing obligations of the operator and the public 343
body; 344

(4) Apportionment of expenses between the operator and the 345
public body; 346

(5) Rights and duties of the operator, the public body, 347
and other state and local governmental entities with respect to 348
use of the facility; 349

(6) Rights and remedies available in the event of default 350
or delay; 351

(7) Terms and conditions of indemnification of the 352
operator by the public body; 353

(8) Assignment, subcontracting, or other delegation of 354
responsibilities of the operator or the public body under the 355
agreement to third parties, including other private entities and 356
other public bodies; 357

(9) Sale or lease to the operator of private property 358

related to the facility. 359

(D) The contracting authority may include in any public-private agreement under sections 168.01 to 168.15 of the Revised Code a provision authorizing a binding dispute resolution method for any controversy subsequently arising out of the contract. The binding dispute resolution method may proceed only upon agreement of all parties to the controversy. 360
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As used in this division, "binding dispute resolution" means a binding determination after review by a technical expert of all relevant items, which may include documents, and by interviewing appropriate personnel and visiting the project site involved in the controversy. "Binding dispute resolution" does not involve representation by legal counsel or advocacy by any person on behalf of any party to the controversy. 366
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(E) No public-private agreement entered into under this section shall be construed to transfer to a private entity the contracting authority's authority to appropriate property under Chapter 163. of the Revised Code or otherwise provided under the Revised Code. 373
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(F) Money collected by the public body pursuant to an agreement entered into under this section shall be deposited into a fund created for this purpose or as otherwise determined by the public body or as specified in the agreement. 378
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(G) Any provision of law requiring competitive bidding does not apply to public-private agreements under sections 168.01 to 168.15 of the Revised Code. 382
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(H) Any agreement entered into under this section is subject to sections 4115.03 to 4115.21 of the Revised Code. 385
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Sec. 168.06. In the event of termination of the public- 387

private agreement, the authority and duties of the operator 388
cease, except for any duties and obligations that extend beyond 389
the termination as provided in the public-private agreement, and 390
the facility reverts to the public body and shall be dedicated 391
to the public body for public use. 392

Sec. 168.07. (A) Upon the occurrence and during the 393
continuation of material default by an operator, not related to 394
an event of force majeure, the public body may do the following: 395

(1) Elect to take over the facility, including the 396
succession of all right, title, and interest in the facility, 397
subject to any liens on revenues previously granted by the 398
private entity; 399

(2) Terminate the public-private agreement and exercise 400
any other available rights and remedies. 401

(B) In the event that the public body elects to take over 402
a facility, the public body shall collect and pay any revenues 403
that are subject to lien to satisfy any obligation and may do 404
the following: 405

(1) Develop and operate the facility and comply with any 406
service contracts; 407

(2) Solicit proposals for the maintenance and operation of 408
the facility under section 168.03 of the Revised Code. 409

Sec. 168.08. A public body having authority to issue 410
obligations may issue, in accordance with that authority, 411
obligations for the purpose of providing funds to carry out 412
sections 168.01 to 168.15 of the Revised Code with respect to 413
the development or financing of a facility. 414

Sec. 168.09. (A) For the purposes of carrying out sections 415

168.01 to 168.15 of the Revised Code, the public body may do all 416
of the following: 417

(1) Accept, subject to applicable terms and conditions, 418
available funds from the United States or any of its agencies, 419
whether the funds are made available by grant, loan, or other 420
financial assistance; 421

(2) Enter into agreements or other arrangements with the 422
United States or any of its agencies as may be necessary; 423

(3) For the purpose of completing a facility under an 424
agreement, accept from any source any grant, donation, gift, or 425
other form of conveyance of land, money, other real or personal 426
property, or other item of value made to the public body. 427

(B) Any facility may be financed in whole or in part by 428
contribution of any funds or property made by any private entity 429
or affected jurisdiction that is party to a public-private 430
agreement under sections 168.01 to 168.15 of the Revised Code. 431

(C) The public body may use federal, state, local, and 432
private funds to finance a facility under sections 168.01 to 433
168.15 of the Revised Code and shall comply with any 434
requirements and restrictions governing the use of the funds, 435
including maintaining the funds separately when necessary. 436

Sec. 168.10. A facility and any tangible personal property 437
used exclusively with a facility that is owned by the public 438
body and leased, licensed, financed, or otherwise conveyed to an 439
operator, or that is acquired, constructed, or otherwise 440
provided by an operator on behalf of the public body, is exempt 441
from all ad valorem property taxes and special assessments 442
levied against property by the state or any political 443
subdivision of the state. Building and construction materials 444

that will be incorporated into a facility pursuant to a public- 445
private agreement are exempt from the taxes imposed under 446
Chapters 5739. and 5741. of the Revised Code. 447

As used in this section, "political subdivision" means a 448
county, township, municipal corporation, or any other body 449
corporate and politic that is responsible for government 450
activities in a geographic area smaller than that of the state. 451

Sec. 168.11. The public body may acquire property, rights- 452
of-way, or other rights in property for public use in connection 453
with projects that are part of a public-private initiative in 454
accordance with Chapter 163. of the Revised Code. If the public 455
body proposes to acquire property, rights-of-way, or other 456
rights in property for such public use at the request of a 457
private entity, the acquisition shall be by the public body, in 458
accordance with Chapter 163. of the Revised Code, and only if 459
the contracting authority first makes a finding that the 460
acquisition is for a public use and serves the public purposes 461
of sections 168.01 to 168.15 of the Revised Code; the 462
contracting authority also shall require the private party to 463
pay the costs of the acquisition. 464

Sec. 168.12. All law enforcement officers of the state and 465
of an affected local jurisdiction shall have the same powers and 466
jurisdiction within the limits of the facility as they have in 467
their respective areas of jurisdiction and access to the 468
facility at any time for the purpose of exercising such powers 469
and jurisdiction. 470

Sec. 168.13. An operator under sections 168.01 to 168.15 471
of the Revised Code and any utility whose facility is to be 472
crossed or relocated shall cooperate fully in planning and 473
arranging the manner of the crossing or relocation of the 474

utility facility. 475

Sec. 168.14. Nothing in sections 168.01 to 168.15 of the 476
Revised Code shall be construed or deemed to affect any waiver 477
of the sovereign immunity of the public body or any officer or 478
employee of the public body with respect to the participation in 479
or approval of all or any part of the facility or its operation. 480

A municipal corporation may adopt ordinances regarding 481
public-private initiatives that vary from sections 168.01 to 482
168.15 of the Revised Code. 483

If, during the term of the public-private agreement, an 484
improvement is made to the facility and that improvement is not 485
part of the public-private agreement, the improvement shall be 486
made in accordance with laws applicable to public improvements. 487

Sec. 168.15. A state agency may adopt rules under Chapter 488
119. of the Revised Code, a county or township may adopt 489
resolutions, a municipal corporation may adopt ordinances, a 490
state institution of higher education may adopt rules, and a 491
public school, library or library district, or port authority 492
may adopt resolutions to carry out sections 168.01 to 168.15 of 493
the Revised Code. 494