#### As Introduced

# 133rd General Assembly Regular Session 2019-2020

H. B. No. 218

## **Representative Patton**

## A BILL

То	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

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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,

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equip, or modify a facility.	49
"Operator" means a private entity that has entered into a	50
public-private agreement under sections 168.01 to 168.15 of the	51
Revised Code.	52
"Political subdivision" means a county, township,	53
municipal corporation, library or library district created under	54
Chapter 3375. of the Revised Code, or port authority created	55
under Chapter 4582. of the Revised Code.	56
"Private entity" means any natural person, corporation,	57
general partnership, limited liability company, limited	58
<pre>partnership, joint venture, business trust, public benefit</pre>	59
corporation, nonprofit entity, or other business entity.	60
"Public body" means a state agency, state institution of	61
higher education, political subdivision, or public school.	62
"Public-private agreement" means the agreement between a	63
private entity and the public body that relates to the design,	64
build, financing, operation, or maintenance of a facility	65
subject to sections 168.01 to 168.15 of the Revised Code.	66
"Public-private initiative" means an arrangement between	67
the public body and a private entity, the terms of which are	68
stated in a public-private agreement, that provides for both of	69
the following:	70
(A) Sharing of resources and the means of providing a	71
project or service for a facility;	72
(B) Cooperation in researching, developing, and	73
implementing projects or services for a facility.	74
"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 party 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 party 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
Sec. 168.03. (A) A public body may solicit, receive,	105

consider, evaluate, and accept a proposal for a public-private	106
<u>initiative</u> .	107
(B) In soliciting and selecting a private entity with	108
which to enter into a public-private initiative, the public body	109
shall use one or both of the following:	110
(1) Sealed bidding;	111
(2) Selection of proposals, with or without negotiations,	112
based on qualifications, best value, or both.	113
(C) (1) The public body shall consider the following	114
factors in evaluating and selecting a bid or proposal to enter	115
<pre>into a public-private initiative:</pre>	116
(a) The ability of the facility to serve a public purpose;	117
(b) The proposed cost of and financial plan for the	118
<pre>facility;</pre>	119
(c) The general reputation, qualifications, industry	120
experience, and financial capacity of the private entity;	121
(d) The proposed design, operation, and feasibility of the	122
<pre>facility;</pre>	123
(e) Comments from local citizens and affected	124
jurisdictions;	125
(f) Benefits to the public and the affected facility;	126
(g) The safety record of the private entity;	127
(h) The inclusion of a teaming agreement in the bid or	128
proposal that identifies the primary designer of record or	129
design firm representing not less than thirty per cent of the	130
estimated design fee, the primary construction contractor	131
representing not less than thirty per cent of the estimated	132

construction dollar value amount, and the primary financier	133
representing not less than fifty per cent of the total project	134
<pre>cost;</pre>	135
(i) Any other criteria that the public body considers	136
appropriate.	137
(2) The public body may consider the following factors in	138
evaluating and selecting a bid or proposal to enter into a	139
<pre>public-private initiative:</pre>	140
(a) The bidder's estimates of capital expenditures and	141
operating expenses for the proposed facility;	142
(b) The schedule for completion of the proposed facility;	143
(c) Whether user fees, lease payments, or other charges	144
will be collected for use of the proposed facility over the term	145
of the public-private agreement;	146
(d) The proposed length of time before ownership of the	147
facility reverts to the public body.	148
(D) The public body shall select a private entity for a	149
<pre>public-private initiative on a competitive basis.</pre>	150
(E) Any materials or data submitted to, made available to,	151
or received by the contracting authority, to the extent that the	152
materials or data consist of trade secrets, as defined in	153
section 1333.61 of the Revised Code, are confidential and are	154
not public records for the purposes of section 149.43 of the	155
Revised Code. Financial information received by the contracting	156
authority that is related to a proposal is confidential and not	157
a public record for purposes of section 149.43 of the Revised	158
Code until such time as a proposal is selected. Before	159
submission of a solicited proposal, a private entity may request	160

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a review by the public body of information that the private	161
entity has identified as confidential, to determine whether such	162
information would be subject to disclosure under section 149.43	163
of the Revised Code.	164
(F) (1) The public body may reimburse a private entity for	165
a portion of the actual costs the entity incurred in submitting	166
a proposal for a public-private initiative that was solicited by	167
the public body under this section. When considering the	168
reimbursement of such costs, the contracting authority shall	169
describe in the request for proposals for a specific public-	170
private initiative the specific terms and conditions for	171
reimbursing a private entity. The contracting authority may	172
include in the terms and conditions a requirement that the	173
private entity execute an agreement to transfer to the public	174
body the rights to the use of the work product contained in the	175
proposal in exchange for receiving the reimbursement.	176
(2) The contracting authority shall make all decisions	177
related to the reimbursement of a specific private entity and	178
related to the maximum amount of the reimbursement. However, the	179
public body shall not reimburse a private entity if that entity	180
enters into the public-private agreement that is the subject of	181
the solicited proposal, except as set forth in the request for	182
proposals or in the public-private agreement. The reimbursement	183
of costs under division (G) of this section is exempt from any	184
competitive bidding required by law.	185
(3) If the public body, pursuant to division (G)(1) of	186
this section, includes a reimbursement provision in a request	187
for proposals and the public body subsequently terminates the	188
solicitation before the solicitation expiration date, the public	189
body shall prorate the amount of the reimbursement that is to be	190

paid to each private entity participating in the solicitation on	191
the date the public body terminates the solicitation. The public	192
body shall calculate the proration percentage by determining the	193
number of days from the date the solicitation first was offered	194
until the date the public body terminated the solicitation and	195
dividing that number by the number of days of the original	196
solicitation period.	197
(4) Except as otherwise provided in writing by the public	198
body, if, pursuant to division (G)(1) of this section, the	199
public body includes a reimbursement provision in a request for	200
proposals and subsequently enters into negotiations based on the	201
selection of a desired proposal and the public body elects to	202
terminate those negotiations for the convenience of the public	203
body and through no fault of the proposer, the proposer is	204
entitled to the full reimbursement amount.	205
Sec. 168.04. (A) The public body may receive, consider,	206
evaluate, and accept or reject an unsolicited proposal for a	207
public-private initiative if the proposal meets all of the	208
<pre>following:</pre>	209
(1) Is independently originated and developed by the	210
proposer;	211
(2) Benefits the public;	212
(3) Is prepared without public body supervision;	213
(4) Includes sufficient detail and information for the	214
public body to evaluate the proposal in an objective and timely	215
manner, including the conceptual design or plan for the proposed	216
facility, project costs, and a schedule for starting and	217
completing the facility;	218

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from making an unsolicited proposal under section 3517.13 of the	220
Revised Code.	221
(B) Within ninety days after receiving an unsolicited	222
proposal, the public body shall undertake a preliminary	223
evaluation of the unsolicited proposal to determine if the	224
proposal complies with the requirements of division (A) of this	225
section.	226
(C) Any materials or data submitted to, made available to,	227
or received by the contracting authority under this section, to	228
the extent that the materials or data consist of trade secrets,	229
as defined in section 1333.61 of the Revised Code, are	230
confidential and are not public records for the purposes of	231
section 149.43 of the Revised Code. Financial information	232
received by the contracting authority that is related to a	233
proposal is confidential and not a public record for purposes of	234
section 149.43 of the Revised Code until the public body accepts	235
or rejects the proposal. Before submission of an unsolicited	236
proposal or a competing proposal, a private entity may request a	237
review by the public body of information that the private entity	238
has identified as confidential to determine whether such	239
information would be subject to disclosure under section 149.43	240
of the Revised Code.	241
(D) If the unsolicited proposal does not comply with	242
division (A) of this section, the public body shall return the	243
proposal without further action.	244
(E) If the unsolicited proposal complies with division (A)	245
of this section, the public body may continue to evaluate the	246
proposal in accordance with this section.	247
(F) (1) If the unsolicited proposal complies with division	248

(A) of this section, the public body shall advertise the	249
unsolicited proposal for the purpose of receiving competitive	250
proposals for the proposed facility.	251
(2) The advertigement shall outline the general nature and	252
(2) The advertisement shall outline the general nature and	
scope of the unsolicited proposal, including the location of the	253
facility and the work to be performed on or in connection with	254
the facility and shall specify an address to which a competing	255
proposal may be submitted.	256
(3) The advertisement shall specify a reasonable time	257
period by which competitors must submit a competing proposal to	258
the public body.	259
(G) The public body shall charge a reasonable fee to cover_	260
its costs to process, review, and evaluate an unsolicited	261
proposal and any competing proposals.	262
(H) Upon receipt of any competing proposals, the public	263
body shall do all of the following:	264
(1) Determine if any competing proposal is comparable in	265
nature and scope to the original unsolicited proposal;	266
(2) Evaluate the original unsolicited proposal and any	267
comparable competing proposal;	268
(3) Conduct any good faith discussions and, if necessary,	269
any negotiations concerning each qualified proposal.	270
	0.71
(I) The public body shall evaluate an unsolicited proposal	271
and any comparable competing proposal using the following	272
<u>factors:</u>	273
(1) Novel methods, approaches, or concepts demonstrated by	274
the proposal;	275

(2) Scientific, technical, or socioeconomic merits of the	276
<pre>proposal;</pre>	277
(3) Potential contribution of the proposal to the public	278
<pre>body's mission;</pre>	279
(4) Capabilities, related experience, facilities, or	280
techniques of the private entity or unique combinations of these	281
qualities that are integral factors for achieving the proposal	282
<pre>objectives;</pre>	283
(5) Qualifications, capabilities, and experience of the	284
proposed principal investigator, team leader, or key personnel,	285
who are critical to achieving the proposal objectives;	286
(6) How the proposal benefits the public;	287
(7) Any other factors appropriate to a particular	288
proposal.	289
(J) After evaluating the unsolicited proposal and any	290
competing proposals, the public body may do any of the	291
<pre>following:</pre>	292
(1) Accept the unsolicited proposal and reject any	293
<pre>competing proposals;</pre>	294
(2) Reject the unsolicited proposal and accept a	295
comparable competing proposal if the public body determines that	296
the comparable competing proposal is the most advantageous to	297
the jurisdictions served by the public body;	298
(3) Reject the unsolicited proposal and any competing	299
proposals.	300
Sec. 168.05. (A) After selecting a solicited or	301
unsolicited proposal for a public-private initiative, the public	302

body shall enter into a public-private agreement for a facility	303
with the selected private entity. An affected jurisdiction may	304
be a party to a public-private agreement entered into by the	305
<pre>public body and a selected private entity.</pre>	306
(B)(1) A public-private agreement under this section shall	307
<pre>provide for all of the following:</pre>	308
(a) Planning, acquisition, financing, development, design,	309
construction, reconstruction, replacement, improvement,	310
maintenance, management, repair, leasing, or operation of a	311
<pre>facility;</pre>	312
(b) Term of the public-private agreement;	313
(c) Type of property interest, if any, the private entity	314
will have in the facility;	315
(d) A specific plan to ensure proper maintenance of the	316
facility throughout the term of the agreement and a return of	317
the facility to the public body, if applicable, in good	318
<pre>condition and repair;</pre>	319
(e) Compliance with applicable federal, state, and local	320
laws;	321
(f) Grounds for termination of the public-private	322
agreement by the public body or operator;	323
(g) Disposition of the facility upon completion of the	324
<pre>agreement;</pre>	325
(h) Procedures for amendment of the agreement;	326
(i) If the agreement contains a construction services	327
component, a contract performance bond executed by a surety	328
authorized by the department of insurance to write surety bonds	329

in an amount specified by the contracting authority, conditioned	330
upon the private entity or contractor performing the	331
construction services portion of the work in accordance with the	332
agreed upon terms, within the time prescribed;	333
(j) If the agreement contains a construction services	334
component, a payment bond executed by a surety authorized by the	335
department of insurance to write surety bonds in an amount	336
specified by the contracting authority, conditioned upon the	337
payment for all labor, work performed, and materials furnished	338
in connection with the construction services portion of the	339
work.	340
(2) As used in divisions (B)(1)(i) and (j) of this	341
section, "construction services" means design-build,	342
construction, reconstruction, replacement, improvement, or	343
repair services.	344
(C) A public-private agreement under this section may	345
provide for any of the following:	346
(1) Review and approval by the public body of the	347
operator's plans for the development and operation of the	348
facility;	349
(2) Inspection by the public body of construction of or	350
<pre>improvements to the facility;</pre>	351
(3) Maintenance by the operator of a policy of liability	352
<pre>insurance or self-insurance;</pre>	353
(4) Filing by the operator, on a periodic basis, of	354
appropriate financial statements in a form acceptable to the	355
<pre>public body;</pre>	356
(5) Filing by the operator, on a periodic basis, of	357

reports as determined by the public body in a form acceptable to	358
the public body;	359
(6) Financing obligations of the operator and the public	360
body;	361
(7) Apportionment of expenses between the operator and the	362
<pre>public body;</pre>	363
(8) Rights and duties of the operator, the public body,	364
and other state and local governmental entities with respect to	365
use of the facility;	366
(9) Rights and remedies available in the event of default	367
or delay;	368
(10) Terms and conditions of indemnification of the	369
operator by the public body;	370
(11) Assignment, subcontracting, or other delegation of	371
responsibilities of the operator or the public body under the	372
agreement to third parties, including other private entities and	373
<pre>other public bodies;</pre>	374
(12) Sale or lease to the operator of private property	375
related to the facility.	376
(D)(1) The contracting authority may include in any	377
public-private agreement under sections 168.01 to 168.15 of the	378
Revised Code a provision authorizing a binding dispute	379
resolution method for any controversy subsequently arising out	380
of the contract. The binding dispute resolution method may	381
proceed only upon agreement of all parties to the controversy.	382
If all parties do not agree to proceed to a binding dispute	383
resolution, a party having a claim against the public body shall	384
exhaust its administrative remedies specified in the public-	385

private agreement before filing any action against the public	386
body in the court of claims.	387
No appeal from the determination of a technical expert	388
lies to any court, except that the court of common pleas of	389
Franklin county may issue an order vacating such a determination	390
upon the application of any party to the binding dispute	391
resolution if any of the following applies:	392
(a) The determination was procured by corruption, fraud,	393
or undue means.	394
(b) There was evidence of partiality or corruption on the	395
part of the technical expert.	396
(c) The technical expert was guilty of misconduct in	397
refusing to postpone the hearing, upon sufficient cause shown,	398
or in refusing to hear evidence pertinent and material to the	399
controversy, or of any other misbehavior by which the rights of	400
any party have been prejudiced.	401
(2) As used in this division, "binding dispute resolution"	402
means a binding determination after review by a technical expert	403
of all relevant items, which may include documents, and by	404
interviewing appropriate personnel and visiting the project site	405
involved in the controversy. "Binding dispute resolution" does	406
not involve representation by legal counsel or advocacy by any	407
person on behalf of any party to the controversy.	408
(E) No public-private agreement entered into under this	409
section shall be construed to transfer to a private entity the	410
contracting authority's authority to appropriate property under	411
Chapter 163. of the Revised Code or otherwise provided under the	412
Revised Code.	413
(F) Money collected by the public body pursuant to an_	414

agreement entered into under this section shall be deposited	415
into a fund created for this purpose or as otherwise determined	416
by the public body or as specified in the agreement.	417
(G) Any provision of law requiring competitive bidding	418
does not apply to public-private agreements under sections	419
168.01 to 168.15 of the Revised Code.	420
Sec. 168.06. In the event of termination of the public-	421
private agreement, the authority and duties of the operator	422
cease, except for any duties and obligations that extend beyond	423
the termination as provided in the public-private agreement, and	424
the facility reverts to the public body and shall be dedicated	425
to the public body for public use.	426
Sec. 168.07. (A) Upon the occurrence and during the	427
continuation of material default by an operator, not related to	428
an event of force majeure, the public body may do the following:	429
(1) Elect to take over the facility, including the	430
succession of all right, title, and interest in the facility,	431
subject to any liens on revenues previously granted by the	432
<pre>private entity;</pre>	433
(2) Terminate the public-private agreement and exercise	434
any other available rights and remedies.	435
(B) In the event that the public body elects to take over	436
a facility, the public body shall collect and pay any revenues	437
that are subject to lien to satisfy any obligation and may do	438
<pre>the following:</pre>	439
(1) Develop and operate the facility and comply with any	440
service contracts;	441
(2) Solicit proposals for the maintenance and operation of	442

the facility under section 168.03 of the Revised Code.	443
Sec. 168.08. A public body having authority to issue	444
obligations may issue, in accordance with that authority,	445
obligations for the purpose of providing funds to carry out	446
sections 168.01 to 168.15 of the Revised Code with respect to	447
the development or financing of a facility.	448
Sec. 168.09. (A) For the purposes of carrying out sections	449
168.01 to 168.15 of the Revised Code, the public body may do all	450
of the following:	451
(1) Accept, subject to applicable terms and conditions,	452
available funds from the United States or any of its agencies,	453
whether the funds are made available by grant, loan, or other	454
<pre>financial assistance;</pre>	455
(2) Enter into agreements or other arrangements with the	456
United States or any of its agencies as may be necessary;	457
(3) For the purpose of completing a facility under an	458
agreement, accept from any source any grant, donation, gift, or	459
other form of conveyance of land, money, other real or personal	460
property, or other item of value made to the public body.	461
(B) Any facility may be financed in whole or in part by	462
contribution of any funds or property made by any private entity	463
or affected jurisdiction that is party to a public-private	464
agreement under sections 168.01 to 168.15 of the Revised Code.	465
(C) The public body may use federal, state, local, and	466
private funds to finance a facility under sections 168.01 to	467
168.15 of the Revised Code and shall comply with any	468
requirements and restrictions governing the use of the funds,	469
including maintaining the funds separately when necessary	470

Sec. 168.10. A facility and any tangible personal property	471
used exclusively with a facility that is owned by the public	472
body and leased, licensed, financed, or otherwise conveyed to an	473
operator, or that is acquired, constructed, or otherwise	474
provided by an operator on behalf of the public body, is exempt	475
from all ad valorem property taxes and special assessments	476
levied against property by the state or any political	477
subdivision of the state. Building and construction materials	478
that will be incorporated into a facility pursuant to a public-	479
private agreement are exempt from the taxes imposed under	480
Chapters 5739. and 5741. of the Revised Code.	481
As used in this section, "political subdivision" means a	482
county, township, municipal corporation, or any other body	483
corporate and politic that is responsible for government	484
activities in a geographic area smaller than that of the state.	485
Sec. 168.11. The public body may acquire property, rights-	486
of-way, or other rights in property for public use in connection	487
with projects that are part of a public-private initiative in	488
accordance with Chapter 163. of the Revised Code. If the public	489
body proposes to acquire property, rights-of-way, or other	490
rights in property for such public use at the request of a	491
private entity, the acquisition shall be by the public body, in	492
accordance with Chapter 163. of the Revised Code, and only if	493
the contracting authority first makes a finding that the	494
acquisition is for a public use and serves the public purposes	495
of sections 168.01 to 168.15 of the Revised Code; the	496
contracting authority also shall require the private party to	497
pay the costs of the acquisition.	498
Sec. 168.12. All law enforcement officers of the state and	499
of an affected local jurisdiction shall have the same powers and	500

jurisdiction within the limits of the facility as they have in	501
their respective areas of jurisdiction and access to the	502
facility at any time for the purpose of exercising such powers	503
and jurisdiction.	504
Sec. 168.13. An operator under sections 168.01 to 168.15	505
of the Revised Code and any utility whose facility is to be	506
crossed or relocated shall cooperate fully in planning and	507
arranging the manner of the crossing or relocation of the	508
utility facility.	509
Sec. 168.14. Nothing in sections 168.01 to 168.15 of the	510
Revised Code shall be construed or deemed to affect any waiver	511
of the sovereign immunity of the public body or any officer or	512
employee of the public body with respect to the participation in	513
or approval of all or any part of the facility or its operation.	514
Sec. 168.15. A state agency may adopt rules under Chapter	515
119. of the Revised Code, a county or township may adopt	516
resolutions, a municipal corporation may adopt ordinances, a	517
state institution of higher education may adopt rules, and a	518
public school may adopt resolutions to carry out sections 168.01	519
to 168.15 of the Revised Code.	520