

**As Introduced**

**134th General Assembly  
Regular Session  
2021-2022**

**H. B. No. 91**

**Representative Patton**



**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, 48

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  
partnership, joint venture, business trust, public benefit 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 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

**Sec. 168.03.** (A) A public body may solicit, receive, 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
<u>design firm representing not less than thirty per cent of the</u>	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



<u>completing the facility;</u>	220
<u>(5) Is made by a private entity that is not prohibited</u>	221
<u>from making an unsolicited proposal under section 3517.13 of the</u>	222
<u>Revised Code.</u>	223
<u>(B) Within ninety days after receiving an unsolicited</u>	224
<u>proposal, the public body may undertake a preliminary evaluation</u>	225
<u>of the unsolicited proposal to determine if the proposal</u>	226
<u>complies with the requirements of division (A) of this section.</u>	227
<u>(C) Any materials or data submitted to, made available to,</u>	228
<u>or received by the contracting authority under this section, to</u>	229
<u>the extent that the materials or data consist of trade secrets,</u>	230
<u>as defined in section 1333.61 of the Revised Code, are</u>	231
<u>confidential and are not public records for the purposes of</u>	232
<u>section 149.43 of the Revised Code. Financial information</u>	233
<u>received by the contracting authority that is related to a</u>	234
<u>proposal is confidential and not a public record for purposes of</u>	235
<u>section 149.43 of the Revised Code until the public body accepts</u>	236
<u>or rejects the proposal. Before submission of an unsolicited</u>	237
<u>proposal or a competing proposal, a private entity may request a</u>	238
<u>review by the public body of information that the private entity</u>	239
<u>has identified as confidential to determine whether such</u>	240
<u>information would be subject to disclosure under section 149.43</u>	241
<u>of the Revised Code.</u>	242
<u>(D) If the unsolicited proposal does not comply with</u>	243
<u>division (A) of this section, the public body shall return the</u>	244
<u>proposal without further action.</u>	245
<u>(E) If the unsolicited proposal complies with division (A)</u>	246
<u>of this section, the public body may continue to evaluate the</u>	247
<u>proposal in accordance with this section.</u>	248

(F) (1) If the unsolicited proposal complies with division 249  
(A) of this section, the public body shall advertise the 250  
unsolicited proposal for the purpose of receiving competitive 251  
proposals for the proposed facility. 252

(2) The advertisement shall outline the general nature and 253  
scope of the unsolicited proposal, including the location of the 254  
facility and the work to be performed on or in connection with 255  
the facility and shall specify an address to which a competing 256  
proposal may be submitted. 257

(3) The advertisement shall specify a reasonable time 258  
period by which competitors must submit a competing proposal to 259  
the public body. 260

(G) The public body shall charge a reasonable fee to cover 261  
its costs to process, review, and evaluate an unsolicited 262  
proposal and any competing proposals. 263

(H) Upon receipt of any competing proposals, the public 264  
body shall evaluate the unsolicited proposal and any competing 265  
proposals using the factors set forth under division (C) of 266  
section 168.03 of the Revised Code. 267

(I) After evaluating the unsolicited proposal and any 268  
competing proposals, the public body may do any of the 269  
following: 270

(1) Accept the unsolicited proposal and reject any 271  
competing proposals; 272

(2) Reject the unsolicited proposal and accept a 273  
comparable competing proposal if the public body determines that 274  
the comparable competing proposal is the most advantageous to 275  
the jurisdictions served by the public body; 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
<u>(2) As used in divisions (B) (1) (1) and (m) of this</u>	332

<u>section, "construction services" means design-build,</u>	333
<u>construction, reconstruction, replacement, improvement, or</u>	334
<u>repair services.</u>	335
<u>(C) A public-private agreement under this section may</u>	336
<u>provide for any of the following:</u>	337
<u>(1) Review and approval by the public body of the</u>	338
<u>operator's plans for the development and operation of the</u>	339
<u>facility;</u>	340
<u>(2) Maintenance by the operator of a policy of liability</u>	341
<u>insurance or self-insurance;</u>	342
<u>(3) Financing obligations of the operator and the public</u>	343
<u>body;</u>	344
<u>(4) Apportionment of expenses between the operator and the</u>	345
<u>public body;</u>	346
<u>(5) Rights and duties of the operator, the public body,</u>	347
<u>and other state and local governmental entities with respect to</u>	348
<u>use of the facility;</u>	349
<u>(6) Rights and remedies available in the event of default</u>	350
<u>or delay;</u>	351
<u>(7) Terms and conditions of indemnification of the</u>	352
<u>operator by the public body;</u>	353
<u>(8) Assignment, subcontracting, or other delegation of</u>	354
<u>responsibilities of the operator or the public body under the</u>	355
<u>agreement to third parties, including other private entities and</u>	356
<u>other public bodies;</u>	357
<u>(9) Sale or lease to the operator of private property</u>	358
<u>related to the facility.</u>	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-private agreement, the authority and duties of the operator 387  
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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