



Ohio Municipal Attorneys Association

Serving Local Government Attorneys since 1953

Phone: 614-221-4349

175 S. Third Street, Suite 510

Fax: 614-221-4390

E-mail: ghunter@omloho.org

NEWSLETTER

July 19, 2019

4-2019

Barbara Langhenry, President,
Director of Law, Cleveland

Gregory Hicks, 1st Vice President
Law Director, Warren

Zach Klein, 2nd Vice President,
City Attorney, Columbus

James E. Hood, Past President,
City Attorney, Reynoldsburg

Garry E. Hunter, General Counsel, OMAA

CONTENT

**Ohio Port Authorities May Assist Ohio Municipalities in the
Creation of Public-Private Partnerships** 2

**TMDL Legislation Provides Limited Window of Opportunity for
Ohio's Sewer Utilities to Challenge Existing Permit Limits** 4

LEGAL ADVISOR'S UPDATE (June 18, 2019) Attachment 1

Ohio Port Authorities May Assist Ohio Municipalities in the Creation of Public-Private Partnerships

**By David A. Rogers
Frost Brown Todd LLC**

P3s Generally

The use of public-private partnerships (P3s) and similar “Project Finance” strategies has continued to grow as part of governmental and economic development finance throughout the United States. P3 transactions have a long history in the rest of the World (especially Europe and Canada); and new variations have been developed in the U.S., where tax-exempt financing has been introduced as a possible funding source.

One example of this expansion is a relatively new Kentucky P3 statute, and another is pending legislation in Ohio, H.B. 218, officially endorsed by the OML on June 17, 2019. While H.B. 218 may or may not become law, existing Ohio law contains mechanisms that allow many P3 structures to be implemented, even without express “P3” legislation.

The key advantages of P3 legislation are the express grant of permission to local governments to engage in an abbreviated procurement processes, and act quickly without arduous procedures, to contract with private parties to “design, build, finance, operate and/or maintain” public or related infrastructure. The acronym DBFOM is sometimes used, if all P3 components are assigned in whole or in part to a private party; yet in practice each P3 deal is different. Frequently, the contracts involve less than a full DBFOM arrangement— for example the project will be designed, built and financed by the private party, but after delivery it will be operated and maintained by the public party. In the alternative, some projects are built, operated and maintained by the private party, with an option to buy the assets. The key in each proposed P3 is to examine whether using traditional procurement, financing and construction methods will produce the fastest build and lowest cost; and then also to determine whether traditional operational methods and maintenance programs offer the lowest cost and best result over the entire “life-cycle” of the infrastructure asset.

Ohio Proposed Legislation

With respect to the proposed Ohio statute, it is detailed and flexible enough to provide a reasonable framework for future P3s in Ohio. Elements of the new Ohio statute may be cumbersome procedurally (e.g. a requirement to publish notice of unsolicited bids); but many in the P3 industry are hopeful that in actual operation the procedures will be workable and help municipalities to extract value from private sector participation and financing.

Another encouraging development in addition to this proposed statute is the increasing awareness by municipal finance bankers and attorneys of the fact that there are many different types of P3s that may help state and local governments accomplish their development, monetization and operating goals; and not just for typical infrastructure, but also for housing and economic development projects. The classic P3 seeks to utilize DBFOM systems to create value for governments and life-cycle efficiencies. But, as previously stated, many projects often can achieve

improved results with a less comprehensive approach, i.e. some lesser or different combination of DBFOM.

Current Ohio P3 Examples

There is currently the opportunity in Ohio, even without “P3” legislation applicable to municipalities, to structure and finance many project finance transactions under existing laws. First, P3 legislation (ORC Sections 5501.70 to 5501.83) has already been adopted for use by the Ohio Department of Transportation; and for example the Portsmouth By-Pass roadway was designated by ODOT’s Office of Innovative Delivery as a P3, while ODOT is negotiating with Kentucky over options to rebuild the Brent Spence Bridge utilized by Interstates 71 and 75, connecting Cincinnati and Northern Kentucky. Second, The Ohio State University utilized its authority under the Revised Code to enter into a negotiated long-term lease to monetize and finance a 50-year lease and concession agreement with Queensland Investment Corporation’s CampusParc affiliate, for all its on-street and structured parking. That lease yielded a payment of \$483 million in 2012 and saving all future construction and operating expenses. Third, the Ohio port authority statute (ORC Chapter 4582) grants extensive P3-like powers to port authorities and expressly permits those authorities to share those powers with local governmental units in Ohio. In other words, by creating a contractual joint venture with the applicable port authority, a municipality can effectively treat its project as a “port authority facility” under the law and select from several types of finance, operations, acquisition and lease structures available to such port authorities; again, essentially providing P3 authorization.

Ohio Port Authority P3s

As a more specific example, any municipality can enter into a Cooperative Agreement with a local port authority and under ORC Section 4582.431(B) expressly share each other’s powers, as necessary – for example from the port authority to the city or village. After entering into such an agreement, the municipality can use all of the powers of the port authority under ORC Chapter 4582, except powers of eminent domain or taxation. [The city or village, of course, has its own powers in that regard.] Once your municipal attorney and Bond Counsel determine that the infrastructure project you are considering is a qualified “port authority facility” – and the definition is very broad – then the city or village, using those shared powers, can design, bid, procure, build, finance, operate and maintain that facility like it was a port authority engaged in economic development activities. For example, competitive bidding is not required, and neither is prevailing wages, if the project furthers the purposes of Article VIII, Section 13, Ohio Constitution. In addition, the private sector is expressly encouraged to construct and operate “port authority facilities” under ORC Section 4582.35, further enhancing the legal authority being granted to the municipality through the Cooperative Agreement.

501(c)(3) or Governmental Partners

In addition, excitement is building for the option to structure a P3 with a 501(c)(3) organization or another governmental entity as lessee/concessionaire. Those transactions can utilize tax-exempt bonds (with usually lower rates) to finance construction and/or monetization of projects. Utilizing a port authority Cooperative Agreement these so called “American Model” proposals can be compared through a negotiated or bid process to P3 structures using private equity and taxable debt; to determine the best outcome for each governmental project. Note that in today’s low interest rate environment tax-exempt rates may not differ too much from taxable rates, and may not offset the

benefits of a structure where the private lessee/concessionaire injects equity into the project.

Revenues are Key

Finally, and most important, it is important to remember that there is a difference between financing mechanisms and funding sources. Whether or not a traditional financing method is used to provide financing for an infrastructure project, or a P3 financing method, the parties must still find funding to pay for the construction, debt service and operations of the project. If there are no user fees to pay these costs then the city or village will still need to work with its revenue and funding resources and those of any private party to close the funding gap.

David A. Rogers, Frost Brown Todd LLC, may be reached at drogers@fbtlaw.com or 614-559-7252.

EN03165.Public-03165 4845-7149-1228v2

TMDL Legislation Provides Limited Window of Opportunity for Ohio's Sewer Utilities to Challenge Existing Permit Limits

Stephen P. Samuels, Member
Environmental Practice Group, Frost Brown Todd LLC

On March 24, 2015, the Ohio Supreme Court issued its decision in *Fairfield County v. Nally*, ruling that Ohio EPA cannot base NPDES permit limits on standards set forth in Total Maximum Daily Load (TMDL) reports unless the standards are first formally promulgated as a rule. Because none of the dozens of TMDLs issued by Ohio EPA had gone through the rulemaking procedures prescribed by Revised Code Chapter 119, the decision arguably invalidated all previously-issued TMDLs, and potentially all NPDES permit limits and pretreatment limits that were based on the TMDLs.

Confronted with this quagmire, Ohio EPA's issuance of new or modified TMDLs ground to a halt for the next three years. Faced with pressure from U.S. EPA and environmental organizations to end the delay, Ohio EPA decided to seek a legislative fix that would exempt TMDLs from the rulemaking process. Because Frost Brown Todd represented Fairfield County in the litigation, the firm was asked to assist Ohio EPA in developing the legislation. The joint work product found expression in the enactment of H.B. 49 by the 132nd General Assembly, which was codified in Revised Code Sections 6111.561-6111.564. The legislation reinstated all pre-existing TMDLs, and established a robust stakeholder involvement protocol for future TMDLs.

The new law also created a limited window of opportunity (RC § 6111.564) for NPDES permit holders and indirect dischargers to POTWs with TMDL-based limits to challenge those limits in the first renewal or modification of their existing permit. Although § 6111.564 does not state that an

appeal of such limits can only be brought after the *first* renewal or modification of an existing permit, Ohio EPA would have a strong timeliness argument that a subsequent challenge should be dismissed based on the legal doctrines of waiver and estoppel.

Because of the limited window provided under the new law, it is essential that Ohio's sewer utilities and permitted industrial users carefully review their next draft NPDES permit renewal or modification to determine if existing TMDL-based limits are included, particularly phosphorus limits. Nearly all phosphorus limits are based on TMDLs, most are extremely restrictive (frequently costing many millions of dollars to meet), and many are based on TMDLs with limited or questionable scientific or environmental merit.

If a renewal or modified permit contains a TMDL-based limit—even if the limit has not yet come into effect—a potential appeal of the permit should be carefully evaluated. Otherwise, there may not be a second opportunity to do so.

Stephen P. Samuels, Frost Brown Todd LLC, may be reached at ssamuels@fbtlaw.com or (614) 559-7259.

EN00728.Public-00728 4823-3347-1132v1

LEGAL ADVISOR'S UPDATE

(This update is enclosed as Attachment 1)



ZACH KLEIN
COLUMBUS CITY ATTORNEY

Police Legal Advisor
120 Marconi Blvd., Columbus, Ohio 43215
614-645-4530 Fax 645-4551 www.ColumbusCityAttorney.org

Legal Advisor's Update

by Jeffrey S. Furbee (jfurbee@columbuspolice.org) and Deana Leffler
(dleffler@columbuspolice.org) June 18th, 2019

A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item.