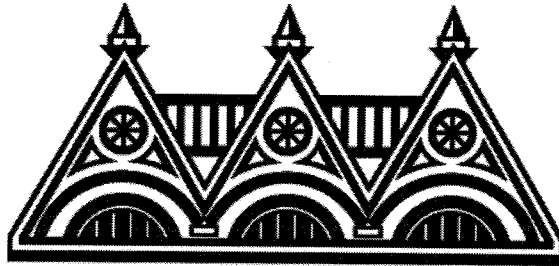


**COMMUNITY COLLABORATION:
Boosters, Local Governments and Nonprofits**

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INTRODUCTION

New and enhanced community recreational facilities have become a casualty in today's highly politicized era of scarce resources. It is rare to see such facilities overtly represented in bond issue or permanent improvement levy campaigns. These materials examine collaborative alternatives to financing such facilities or enhancements thereto.

BOOSTERS

There are many legal issues inherent in gifts of facilities to school districts, whether the gift is from a booster group affiliated with the school district or a community chest.

I. Common Fact Pattern

The common fact pattern for gifts is as follows:

- board of education declines to fund facilities;
- school-affiliated group ("boosters") proposes to fund and construct gift;
- boosters do not have the resources to complete gift at inception;
- boosters intend to raise money through fundraising activities and in-kind donations of labor and materials, hiring skilled trades only when necessary; and
- gift becomes sole property of school district once completed.

II. Legal Issues

A. Nature of Boosters

Knowing the booster membership and leadership is helpful in ensuring a successful gift.

It is important to know the legal status of the boosters, whether they are an unincorporated association or a corporation. In addition, it is important to know whether they are nonprofit for purposes of R.C. Chapter 1745 and the Internal Revenue Code¹.

B. Permission to Enter School Property

R.C. 3313.20 vests the board of education with the management and control of school district property. Before construction of the gift begins, the board should pass a simple resolution permitting the boosters to enter school district property for the purpose of constructing the gift. This resolution can also state that the school district has no underlying responsibility for any equipment brought to and left at the site by the boosters and that the boosters will provide full security for such equipment and the site.

C. Competitive Bidding.

¹ In order for donations to the boosters to be tax deductible as charitable contributions, the group must obtain a private letter ruling from the Internal Revenue Service (Form 1023).

If the boosters undertake the construction of the gift totally independent of the board of education, the boosters do not have to comply with the public bidding requirements imposed by R.C. 3313.46. If there is any involvement by the school district, *i.e.*, an underlying contract or direction on the progress of the gift imposed by the school district, competitive bidding would be required for all materials and labor covered by the competitive bidding statute, *i.e.*, school buildings, not furniture and equipment.

D. Gift Law

R.C. 3313.36 authorizes the board of education to accept gifts. Typically, this is done by resolution of the board with an attached deed of gift and acceptance of gift. This cannot be done, however, until construction of the gift is completed; otherwise, there would be an underlying contract between the school district and the boosters requiring competitive bidding. The gift does not have to be fully completed for the board to accept it; partial gifts and school district contributions toward the gift are permitted.

In accepting the gift, the board should also consider facility disparities among male and female teams. A federal court² held as follows:

It was the school board's responsibility to ensure equal athletic opportunities, under Title IX, for both the girls' softball team and the boys' baseball team, and where the board had acquiesced to a funding system which involved separate booster clubs for each team, the board could be held responsible for the consequences of that approach, even though the board itself provided equal funding to male and female teams.

E. Insurance

The boosters should have their own liability insurance, separate from the school district, and anybody the boosters or the district hires should have the appropriate insurance. The school district should discuss this further with its own liability insurance agent. In addition, the board of education should ensure that it has insurance to cover any risks associated with the project, independent of the boosters insurance.

F. Risk Management

The boosters should have guidelines regarding who is permitted at the construction site and have a qualified person overseeing construction. School equipment used for construction of the gift should be under school control. Materials should be stored appropriately. The gift should not be used until completed. Once completed, use of the gift should be in accordance with school policy.

G. Security

Even though the boosters will be responsible for the gift during construction, they and the school district should have an understanding of responsibility for securing the construction site.

² Daniels v. School Board of Brevard County, Florida, 985 F.Supp. 1458 (United States District Court, M.D. Florida), decided November 25, 1997.

H. Communication

The school district cannot totally protect itself from claims from injured persons, ensure timely completion of the gift, or ensure that the gift meets the specifications of the school district and applicable building codes. If there is an agreement with respect to any of these items, such an agreement would form an underlying contract between the boosters and the school district, which would cause competitive bidding laws to apply.

While the school district cannot have an underlying agreement with the boosters if the gift is to be constructed totally by the boosters and given to the school district as a gift upon completion, the school district and the boosters could meet and discuss the scope of the gift, the needs of the school district, and other issues that would assist the boosters in defining the gift and determining the scope of the gift. Communication between the parties is not prohibited. In some instances, boards of education adopt resolutions of intent to accept the gift. Such a resolution can declare the school district's ability and willingness to accept gifts and specifically reference the proposed gift by the boosters; the recitals could reference the boosters' intent to provide a gift that will conform with all applicable laws and regulations, describe the general nature of the gift, and outline the purpose of the gift. Again, the key appears to be the lack of control by the school district over the gift and its progress.

I. Booster Defaults

If the boosters are unable to complete the gift, and if there is no underlying contract between the boosters and the school district, the school district has no legal obligation to complete the gift or statutory authority to make the boosters a loan to complete the gift.

If the school district chooses to complete the gift, it will want to ensure the following:

- full disclosure of all booster contracts and obligations;
- appropriate transition from the boosters to the school district regarding access to the site, security for the site, materials storage, etc.;
- the gift has no liens or security interests; and
- gift financing is not in default.³

J. Default Prevention

Some school districts have passed policies to prevent boosters from defaulting on gifts.

[Sample Permanent Improvement Gift Policy]

Before the board of education will permit entry on school property in connection with a gift of any permanent improvement, or will accept a gift of any permanent improvement or any labor or materials in connection with a permanent improvement, the individual or non-governmental organization proposing the gift must satisfy the following criteria, as applicable:

1. Fiscal Responsibility:

³ If the school district assumes responsibility for the gift, school officials should carefully examine booster financing arrangements and, if possible, attempt to renegotiate unfavorable terms.

- a. Funds sufficient to complete the gift must be immediately available prior to beginning acquisition or construction or the donated item(s) must be owned in full.
 - b. Any fund raisers must:
 - (1) relate to a gift approved by the board of education as to scope; and
 - (2) if school children are involved, have prior written approval of the designated school administrator.
 - c. Gift expenditures over \$ _____ must be approved by the designated school administrator and by the Board of Education.
 - d. No new gifts may be given or started by the same individual or non-governmental organization until all prior gifts are finished and final bills paid.
 - e. The individual or non-governmental organization proposing the gift must make appropriate arrangements for:
 - (1) liability insurance for those working on the gift; and
 - (2) securing the gift site.
2. Design and Build Responsibility:
- a. The following scope of the gift must be approved by the board of education:
 - (1) Design Plans;
 - (2) Preliminary Schedule; and
 - (3) Site Impact.
 - b. Changes in the scope of the gift must have prior approval of the Board of Education.
 - c. All phases of the gift must have proper permits and inspections.
 - d. The designated school administrator and Board of Education shall be given regular reports on the status of the gift.

LOCAL GOVERNMENTS

The Ohio Revised Code permits cooperative funding of facilities and programs of a recreational nature, but the parties to the collaboration must be political subdivisions⁴. R.C. 755.16 provides that the participating political subdivisions may jointly acquire, equip, operate and maintain parks, recreational facilities and community centers; may appropriate money therefor; and may contribute such lands, money, personal property or services to the joint venture as may be agreed upon.

This section discusses: (1) the legal framework under which a collaborative recreation project (the "Project") can be built, operated and managed; and (2) the manner in which the Project's operating costs could be covered. Also included herein is a general discussion of support group contributions and federal tax considerations.

I. Legal Framework

For reasons discussed herein, the best way to accomplish any cooperative Project construction financing and operation is to establish a joint venture, particularly one of the joint control methods permitted by Sections 755.14 and 755.16.

The three joint control methods described in these sections are: (1) a joint recreation district; (2) a joint venture between the participating political subdivisions with control vested in a joint recreation board; and (3) a joint venture which would enumerate the responsibilities of the participating political subdivisions without forming either a joint district or a joint board. The distinguishing characteristics and relative advantages of each will be discussed hereafter. It should be noted that the statutes cited above all contemplate cooperation among governmental units only; the participation of any not-for-profit corporation, e.g., a YWCA or arts council, would have to be through a lease or management contract. This concept is discussed below in connection with federal tax considerations.

A. Joint Recreation District

A recreation district could finance, construct and operate the Project. This would remove the participating political subdivisions from direct responsibility for those facilities, focusing voters' attention on the Project as a community project serving all residents of the area.

A second advantage to this option is that bonds issued by a recreation district are not included in calculating the direct debt limitations of the participating political subdivisions. If the political subdivisions, acting alone, issue debt for recreation facilities, the debt is generally included in the debt calculations for the respective entity and reduces that entity's capacity to issue debt for other purposes.

⁴ R.C. 755.16 permits a joint venture among any municipal corporation, township, township park district, county, or school district with any one or more of the same or with an educational service center ("ESC") in any combination, and a joint recreation district. R.C. 755.16 also provides that any school district or ESC constructing or improving its facilities may provide for the inclusion of parks, recreational facilities and community centers to be jointly acquired, constructed, operated and maintained.

R.C. 3313.59 permits school districts to cooperate with other public officials having the custody and management of public buildings and grounds to provide for educational, social, civic and recreational activities. Such cooperation may consist of the contribution of funds, equipment or personnel.

The major disadvantage to the Project being built by a recreation district is that the financing of the same would probably require a voted bond issue of the recreation district itself and a levy for operating expenses. This may cause some ballot confusion and competition. It could be that the participating political subdivisions have funds to contribute toward construction of the Project pursuant to a joint venture agreement. Except for counties pledging sales and use tax revenue to support a recreation district's debt under R.C. 755.171, there is no clear authority for statutory political subdivisions to contribute funds to a third party such as a recreation district to build and operate the Project. As creatures of statute, counties, school districts and townships may only expend funds as specifically provided by statute or as may be implied from statute.⁵

B. Joint Recreation Board

Very similar to the recreation district is the establishment of a joint venture with control being vested in a joint recreation board. The joint recreation board has some distinct differences from the recreation district board. A joint recreation board is vested with all of the powers and responsibilities of the participating political subdivisions pursuant to sections 755.12 to 755.18 of the Revised Code. R.C. 755.14 (B)(1).

The advantages for so structuring the creation and control of the Project are nearly identical to the advantages listed for the recreation district above.

An advantage which the joint recreation board has over a recreation district is that the joint recreation board need not have its own bond issue, if the participating political subdivisions can provide sufficient capital without such an issue. R.C. 755.16(A) specifically permits the participating political subdivisions to contribute funds to a joint recreation board organized pursuant to a joint venture.

The major disadvantage to a joint recreation board is that, like a recreation district, once the joint recreation board is established, it is essentially a self-governing body. Some unpredictability over the future of the Project accompanies this proposition. However, this unpredictability may be lessened through the provisions of the joint venture agreement as discussed below.

To create a joint venture establishing the Project, the participating political subdivisions must come to an agreement over the terms of the joint venture, including each entity's rights and responsibilities as to the Project. R.C. 755.16(A). Such terms should be set forth in a written joint venture agreement. Within that agreement, the participating political subdivisions should create the joint recreation board, if one is desired. The written agreement will express the powers and responsibilities of the joint recreation board, as well as those of the establishing entities. The legislation of the political subdivisions effectuating the agreement shall establish the members of the joint recreation board (who serve without pay), as well as the method of selecting these members and filling vacancies. R.C. 755.14 (B)(1).

C. Joint Venture Alone

The final joint control option for constructing the Project is a simple joint venture, as described in R.C. 755.16(A). The only distinguishing characteristic between this simple joint

⁵ R.C. 133.151 authorizes counties and townships to issue self-supporting securities to pay the cost of their own and other counties' or townships' permanent improvements. Such self-supporting securities are not permitted to be general obligations of the issuer.

venture and one which creates a joint recreation board is that the powers and responsibilities of the participating political subdivisions are set forth in the joint venture agreement, with all of the control being divided between the participants as the agreement provides. No joint recreation board is required because the establishment of such a board is permissive by its language (i.e., "may. . . establish a joint recreation board"). R.C. 755.14(B)(1)

The advantages to this type of agreement without a controlling board are: (1) there does not need to be a separate entity established to operate the Project; and (2) if the participating political subdivisions are able to adequately fund it from monies already on hand, the joint venture need not be funded by a separate bond issue or levy. The participating political subdivisions may contribute such lands, money, personal property or services to the joint venture as may be agreed upon for both Project permanent improvements and operating expenses.

The disadvantage to the simple joint venture is that necessary changes must be dealt with either through a new agreement and corresponding legislation or by one political subdivision alone, if the agreement calls for the acquiescence of power by one political subdivision to the other(s).

Such a joint venture is established through nearly the same procedures as were discussed above for a joint venture that also creates a joint recreation board. The differences are that the agreement will not have to create such a board, and the agreement will have to more specifically define the roles of participating political subdivisions, as well as the respective political subdivisions' rights in any property contributed to the joint venture.

In drafting joint venture agreements, certain common concerns are typically addressed:

- contributions--what is the scope of the joint venture? What contributions will be made by the respective parties? Funds, property or services? Any conditions on the contributions, e.g., annual appropriation, after-acquired property, etc.?
- construction--which party will be the construction agent? Prevailing wage requirements apply? What happens with a budget shortfall or excess?
- term--what should the term of the joint venture be? Extensions permitted? Assignments?
- employees--will they remain employees of the respective parties? How will the joint venture affect them for purposes of retirement contributions or sovereign immunity?
- contracts--with third parties--will the parties be contracting with any third parties to provide regular or periodic services, e.g., boosters, youth athletic leagues, etc.?
- insurance--are endorsements needed to existing casualty and liability policies or additional insurance desired?
- daily operation and scheduling of the joint venture--will the parties want to handle this directly or delegate it to staff, e.g., school district athletic director, parks and recreation director, etc.?
- leases or subleases--necessary? What about tenant improvements or signage? Biomedical waste?
- evaluation--will the parties want to evaluate the joint venture periodically?

- termination--will the parties want to be able to withdraw from the joint venture at will or only under certain conditions, i.e., following a specified notice period?

D. Booster or Community Contributions

Any booster or community contributions should not cause a problem to any of the above options for jointly controlled facilities. These types of groups are not included in the language of the statutory provisions encompassing such a project (See R.C. 755.12 to 755.18). A community group could become an active member in the control of the facilities via a joint venture agreement, i.e., providing or appointing a member of an operations committee, and can make contributions in support of the Project. The group would have to make its gift to one of the participating political subdivisions with the condition that the funds will be used to finance or operate the Project.

II. Operating Costs

Presumably a large portion of the cost of operating and maintaining the Project will come from user fees which may differ on the basis of residency. If user fees are not sufficient to pay all costs, the participating political subdivisions may agree to contribute money out of their treasuries to cover the deficiency. R.C. 755.18. This section also states that a joint recreation district may contribute working capital from its general fund for operation of recreational facilities. Presumably a joint recreation board created in conjunction with a joint venture may do the same. R.C. 755.14(B)(1). Either of these entities may levy voted property taxes to acquire, maintain and operate a community center and other recreational facilities. As to both the joint venture with and the joint venture without a joint recreation board, the joint venture agreement will define the method of covering the operating expenses of the Project.

III. Federal Income Tax Considerations

If any of the participating political subdivisions issue tax-exempt debt to assist in financing the Project, maintaining the tax-exempt status of such debt is critical. The tax-exempt status will be jeopardized if the bonds become "private activity bonds" prior to maturity.

A "private activity bond" is a bond that satisfies either the "private business use test" or the "private loan financing test." The private business use test is satisfied if: (a) more than ten percent (10%) of the bond proceeds are used in the trade or business of any person other than a governmental unit, and (b) the payment of the principal and interest on bonds representing more than ten percent (10%) of the total issue is secured by or derived from property to be used in the trade or business of nongovernmental persons. If the private business use of a facility is not related to the government use of such facility or if the related private business use of the facility is disproportionate to the government use, then 5% is substituted for 10% in each of the places it appears in the prior sentence.

The private loan financing test is satisfied if the bond proceeds used to make loans to any non-governmental person exceed the lesser of five percent (5%) of the proceeds of the issue or five million dollars (\$5,000,000).

Simply put, the use of the Project, as well as the way it is financed, will have federal tax consequences. Certainly, a governmental unit such as a school district, township or recreation district or a recreation board may accept charitable contributions or collect taxes, to the extent

permitted by Ohio law, for Project construction and/or operation without adverse federal income tax consequences for bonds used to finance the same.

User charges levied by a governmental unit for the Project are permitted to the extent they are paid by natural persons as members of the general public, either per visit or via a membership for a specified period of time. This is defined as the "general public use" exception. User charges for the Project levied by a governmental unit on nonprofit organizations such as a YWCA do not pose a problem if neither the "private business use test" nor the "private loan financing test" are satisfied.

Leases and management contracts for the Project also pose problems. Leases of the Project to a non-governmental person will constitute private business use of the Project, unless the lease is extremely short (such as less than 30 days). Any management contract that designates a non-governmental unit to manage the Project could be a problem if not structured appropriately. The management contract would not constitute private business use if the contract provided only reasonable compensation that is not based on a share of net profits.

Federal tax considerations in this area are extremely complex. Bond counsel should be consulted early and often regarding these complex tax issues in order to best avoid the negative consequences of private activity bond treatment.

NONPROFITS

Collaboration with nonprofits for recreational facilities may take a variety of forms.

A. Leases

R.C. 3313.17 gives the board of education broad power to lease property, so long as it is not presently needed for school use. Some school districts have used this power to enter into leases of recreational facilities with nonprofits such as private colleges and parochial schools and used the proceeds of the lease to finance enhancements. Others have leased space within a school building for a wellness/physical therapy office or for a municipal recreation center.

Key provisions of such leases typically include:

- school district right to terminate if the board determines the facilities are needed for school use;
- term, rent and renewal;
- coordination with school district activities;
- clear definition of what facilities are being leased, e.g., for a stadium, the locker rooms, training room, scoreboard, public address system, press box, ticket booths and parking areas;
- hours of contest, including pre- and post- contest use;
- staffing for contests, including custodians and security (if using school district personnel, consider using school district salary schedule);
- responsibility for and staffing of concessions;

- game services and supplies, e.g., field phones, chains and down markers, water supply, etc.;
- permitted identification, e.g., "Home Field of the Nonprofits";
- liability and casualty insurance;
- indemnification, including damage to persons or property by visitors; and
- revenue from use of facilities.

B. Management Contracts

R.C. 3313.17 and 3313.47 permit school districts to enter into management contracts. An example would be a YWCA that runs a community swimming program during nonschool hours at a school natatorium. Such management contracts need to be structured appropriately if the facility being used was financed with tax-exempt securities, as noted above.

C. Revenue Bonds

The Internal Revenue Code of 1986, as amended, Article VIII, Section 13 of the Ohio Constitution and R.C. Chapter 165 authorize the state, counties and municipal corporations to issue tax-exempt revenue bonds to finance industrial, commercial, research and distribution facilities and to loan the proceeds of such revenue bonds to private parties, including nonprofits, to pay the costs of such projects. In order to issue revenue bonds, the issuing authority must meet certain statutory criteria, including job creation.

Revenue bonds have been used to construct health and fitness centers for nonprofits such as Y's which have included swimming pools, running tracks, gymnasiums, handball courts, etc. Such facilities could be leased to a variety of entities, e.g., school district, hospital, child care provider, or an institution of higher learning.