

OPINION NO. 2004-005**Syllabus:**

1. A board of county commissioners is authorized by R.C. Chapter 165 to issue debt securities to raise funds for contribution to a private corporation for a project as defined in R.C. 165.01(H) without requiring that the private corporation make payments to the board to fully cover the debt service on the securities.
2. In issuing debt securities pursuant to R.C. Chapter 165, a board of county commissioners may pledge non-tax revenues of the county

as security for the payment of the principal and interest on the debt securities, provided that the particular non-tax revenues so pledged are not restricted to other uses.

To: Robin N. Piper, Butler County Prosecuting Attorney, Hamilton, Ohio
By: Jim Petro, Attorney General, February 5, 2004

We have received your request for an opinion relating to the issuance of industrial development bonds pursuant to R.C. Chapter 165. You have asked the following questions:

1. May the Board of County Commissioners issue debt securities under R.C. Chapter 165 to raise funds for contribution to a private corporation to construct telecommunications facilities where there is no requirement that the private corporation make payments to the Board to fully cover the debt service on such securities?
2. If the Board of County Commissioners may incur such debt, may the Board pledge non-tax revenues of the County as security for the repayment of the principal and interest on such securities?

Proposed agreement

Your questions have arisen in connection with a proposed agreement concerning the expansion of a fiber optic network. As you have described the situation, the Butler County Board of Commissioners has provided several economic development grants to NORMAP Telecommunications, LLC, to induce NORMAP to construct an open and competitive fiber optic telecommunications system in Butler County. The system comprises a fiber optic loop linking several cities and townships, including the City of Middletown. Pursuant to the agreements, twenty-four of the ninety-six optical fibers in the fiber optic cable were dedicated to the county.

Currently there is a proposal to expand the fiber optic network within the City of Middletown to interconnect with the Middletown City School District, the Butler County Job and Family Services location in Middletown, and other educational facilities. Under the proposal, twelve of the fibers in the extension would be dedicated to the Middletown School District, twelve would be dedicated to the Middletown Chamber of Commerce, and forty-eight would be conveyed or dedicated to the county. In addition, the extension would allow competitive local exchange telephone carriers to provide local exchange service within the City of Middletown.

The proposal provides for the county to give NORMAP a loan/grant in the amount of \$1,500,000.00 to construct the extension. The county would obtain the money through debt financing, and NORMAP would agree to pay the first year's debt service on the county's debt. After the first year, NORMAP would be required to pay to the county any moneys it received from the Middletown School District for the school district's use of the extension.¹

¹The agreement does not mandate that NORMAP impose charges upon the Middletown School District for use of the extension. Apparently there is a possibility that the Middletown School District will obtain federal funds for using the fiber optic network, and the intention

The agreement contains no other requirement that NORMAP pay any other portion of the debt to be incurred by the county to raise funds for this project.

The agreement is conditioned, among other things, upon the county's obtaining commitments for acceptable debt financing of its obligations under the agreement. Hence, the proposal will not be carried out unless financing can be secured. *See, e.g., Shelters, Inc. v. Kadivar*, No. 1073, 1983 Ohio App. LEXIS 13925 (Clermont County May 25, 1983).

You have questioned whether the county has authority to incur the proposed debt. Although you have provided us with a copy of the proposed agreement, this opinion does not address the validity of particular terms of that agreement. *See* 1983 Op. Att'y Gen. No. 83-087, at 2-342 (the Attorney General is "without authority to render an opinion interpreting a particular agreement or contract. The determination of particular parties' rights is a matter which falls within the jurisdiction of the judiciary"). Rather, this opinion discusses only the specific questions you have raised.

Authority of county to incur debt pursuant to R.C. Chapter 165

It is firmly established that a board of county commissioners has only the authority it is granted by statute, either expressly or by necessary implication. *See State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); 2001 Op. Att'y Gen. No. 2001-022, at 2-125. Further, the authority of a board of county commissioners to act in financial transactions "must be clear and distinctly granted," and any doubt regarding such authority must be resolved against its exercise. *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916); 1986 Op. Att'y Gen. No. 86-053, at 2-282. Therefore, a board of county commissioners may incur debt or provide county funds to a private corporation only if it has clear statutory authority to do so.

An analysis of a county's authority to incur debt and provide funds pursuant to R.C. Chapter 165 must begin with a review of relevant constitutional provisions. Section 6 of Article VIII of the Ohio Constitution prohibits the enactment of laws that authorize a county (or a city, town, or township) to become a stockholder in a private company or association, or "to raise money for, or to loan its credit to, or in aid of," a private company or association. A comparable provision appearing in Section 4 of Article VIII applies a similar prohibition to the state. Sections 4 and 6 have been construed and applied to prohibit government

is that, if such funds are received, the Middletown School District will pay them to NORMAP. The relevant contractual provision states:

8.04. Debt Service. NORMAP shall pay to the County, fifteen (15) days prior to its actual due date, the first twelve months of debt service on the amended County Contribution, per Section 8.02 (the "Extension Debt Service"). For each twelve month period (year) thereafter, NORMAP has received funds (directly or indirectly) from the Middletown, Ohio public schools for said schools [sic] (direct or indirect) use of the Extension ("Extension Funds"), then NORMAP shall remit such funds to the County (up to the Extension Debt Service), presuming the funds received by NORMAP from the Middletown public schools are equal to or greater than [sic] the Extension Debt Service. NORMAP hereby grants to the County a security interest in each year's Extension Funds (up to that year's Extension Debt Service) to secure the payment of the Extension Funds in the event of NORMAP's non-payment of the Extension Funds, bankruptcy, or appointment of a receiver to supervise its business or assets.

involvement in private business ventures. *See, e.g., C.I.V.I.C. Group v. City of Warren*, 88 Ohio St. 3d 37, 40, 723 N.E.2d 106 (2000) (the purpose of Ohio Const. art. VIII, § 6 “is to prohibit private interests from tapping into public funds at the taxpayers’ expense”); *Walker v. City of Cincinnati*, 21 Ohio St. 14, 54 (1871) (Ohio Const. art. VIII, § 6 “forbids the union of public and private capital or credit in any enterprise whatever”). In particular, Sections 4 and 6 prohibit the issuance of government bonds for the purpose of aiding a business venture of a private company. *See State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St. 3d 111, 114, 579 N.E.2d 705 (1991) (construing Ohio Const. art. VIII, § 4).

An exception to Sections 4 and 6 has been created by Section 13 of Article VIII,² which allows “the state and governmental subdivisions to give financial assistance to private

²The full text of Ohio Const. art. VIII, § 13, is as follows:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section.

Except for facilities for pollution control or solid waste disposal, as determined by law, no guarantees or loans and no lending of aid or credit shall be made under the laws enacted pursuant to this section of the Constitution for facilities to be constructed for the purpose of providing electric or gas utility service to the public.

The powers herein granted shall be in addition to and not in derogation of existing powers of the state or its political subdivisions, taxing districts, or public authorities, or their agencies or instrumentalities or corporations not for profit designated by any of them as such agencies or instrumentalities.

industry or to other governmental units in order to create new employment within this state." *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St. 2d 34, 36-37, 218 N.E.2d 446 (1966); *see also, e.g., State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St. 3d at 114. Specifically, Section 13 states that, "[t]o create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste," it is determined to be "in the public interest and a proper public purpose" for the state or its political subdivisions "to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment" of property, structures, equipment and facilities within Ohio for industry, commerce, distribution, and research. Section 13 authorizes the General Assembly to pass laws to authorize the borrowing of money and issuance of bonds by political subdivisions and "the making of guarantees and loans and the lending of aid and credit." Section 13 has been found to permit the issuance of grants to private entities, as well as the making of loans. *See* 1998 Op. Att'y Gen. No. 98-034; *see also* 2000 Op. Att'y Gen. No. 2000-013.

Section 13 goes on to state that activities taken and debt incurred under its provisions are not subject to the requirements, limitations, or prohibitions of any other section of Article VIII of the Ohio Constitution, or of Article XII, Sections 6 and 11, which concern restrictions on debt. Thus, any activity that comes under Section 13 is not subject to the prohibitions of Sections 4 and 6. *See State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*; 2000 Op. Att'y Gen. No. 2000-013, at 2-76 ("an arrangement may be authorized under Ohio Const. art. VIII, § 13 even if it involves the lending of credit of the state or a joint enterprise between the state and a private, for-profit entity"); 1998 Op. Att'y Gen. No. 98-034. An important proviso included in Section 13 is that "moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted" under Section 13. *See State ex rel. Ryan v. City Council of Gahanna*, 9 Ohio St. 3d 126, 459 N.E.2d 208 (1984); *State ex rel. Burton v. Greater Portsmouth Growth Corp.*

Your questions refer to R.C. Chapter 165, which was enacted to implement Ohio Const. art VIII, § 13. *See* R.C. 165.02 ("Section 13 of Article VIII, Ohio Constitution, is in part implemented by this chapter in furtherance of the public purposes of the state to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the state"). R.C. Chapter 165 authorizes the issuance of industrial development bonds. It includes as an "issuer" a county which has, pursuant to R.C. 1724.10, designated a community improvement corporation (CIC) as its agency for industrial, commercial, distribution, and research development and for which a plan has been prepared by the CIC and confirmed by the county's issuing authority (consisting of the board of county commissioners or other body succeeding to the board's legislative powers). R.C. 165.01(D) and (E); *see* 2003 Op. Att'y Gen. No. 2003-037. Pursuant to R.C. 165.03, if the issuer is a county, the issuing authority cannot deliver bonds issued under R.C. Chapter 165 until it has received from its agency CIC a certification that a project to be financed by the issuance of the bonds is in accordance with the plan. R.C. 165.03(C).³ In addition, before the bonds are delivered

Any corporation organized under the laws of Ohio is hereby authorized to lend or contribute moneys to the state or its political subdivisions or agencies or instrumentalities thereof on such terms as may be agreed upon in furtherance of laws enacted pursuant to this section.

³A representative of your office has informed us that a CIC has been established in Butler County. The CIC will serve as the county's agency and will be responsible for preparing a

the county must provide written notice to the Director of the Department of Development advising the Director of the proposed delivery, the amount of the bonds, the proposed lessee, and the project or projects to be financed. R.C. 165.03(D). An issuer, including a county, has authority in accordance with Section 13 to issue bonds, to provide funds for acquiring, constructing, reconstructing, enlarging, improving, furnishing or equipping projects, to make loans, and to provide security for the bonds. R.C. 165.02.⁴

For purposes of R.C. Chapter 165, a “project” consists of real or personal property acquired by an issuer “or by others in whole or in part from the proceeds of a loan made by an issuer, for industry, commerce, distribution, or research and located within the boundaries of the issuer.” R.C. 165.01(H).⁵ Anything that meets the definition of “project” for

plan and determining that a project to be financed by the issuance of bonds under R.C. Chapter 165 is in accordance with the plan. *See* R.C. 165.03(C); R.C. 1724.10.

⁴R.C. 165.02 states, in part:

Section 13 of Article VIII, Ohio Constitution, is in part implemented by this chapter in furtherance of the public purposes of the state to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the state. An issuer acting through its issuing authority may in accordance with Section 13 of Article VIII, Ohio Constitution:

...

(C) Issue its bonds to provide funds, by loans or otherwise, for acquiring, constructing, reconstructing, enlarging, improving, furnishing, or equipping one or more projects or parts thereof;

(D) Make loans for the acquisition, construction, reconstruction, enlargement, improvement, furnishing, or equipping of projects or parts thereof upon such terms as the issuing authority may determine or authorize, including secured or unsecured loans, and, in connection therewith, enter into loan agreements and other agreements, accept notes or other forms of obligation to evidence such indebtedness and security interests to secure such indebtedness, and take such action as may be considered by it appropriate to protect such security and safeguard against losses, including, without limitation thereto, foreclosure and the bidding upon and purchase of property upon foreclosure or other sale;

...

(H) Pledge, assign, hypothecate, or otherwise encumber as security for the bonds, the rentals, revenues, and other income, charges, and moneys realized from the use, lease, sale, or other disposition of one or more projects or parts thereof as may be designated in the bond proceedings and enter into trust agreements or indentures of mortgage for the benefit of bondholders

....

⁵R.C. 165.01(H) states:

(H) “Project” means real or personal property, or both, including undivided and other interests therein, acquired by gift or purchase, constructed, reconstructed, enlarged, improved, furnished, or equipped, or any combination thereof, by an issuer, or by others in whole or in part from the proceeds of a loan made by an issuer, for industry, commerce, distribution,

purposes of R.C. Chapter 165 "is hereby determined to qualify as facilities described in Section 13 of Article VIII, Ohio Constitution." *Id.* If the issuing authority includes in the bond proceedings determinations that the proposed project meets the statutory definition of a project and is consistent with the constitutional purposes, "such determinations shall be conclusive as to the validity and enforceability of the bonds issued under such bond proceedings and of such bond proceedings and security interests given and leases, subleases, sales agreements, loan agreements, and other agreements made in connection therewith, all in accordance with their terms." R.C. 165.03(A).

Question under R.C. Chapter 165 whether private corporation must agree to make payments to the county to fully cover the debt service on debt securities

Your first question is whether the board of county commissioners may issue debt securities under R.C. Chapter 165 to raise funds for contribution to a private corporation to construct telecommunications facilities where there is no requirement that the private corporation make payments to the board to fully cover the debt service on the securities. It is clear, initially, that for the construction of a telecommunications system to be a permitted purpose for the issuance of bonds under R.C. Chapter 165, it must be found to be a project under R.C. 165.01(H) and, thus, to qualify as facilities described in Ohio Const. art. VIII, § 13. To meet these criteria, the system must promote industry, commerce, distribution, or research and must be located within the boundaries of the issuer. Ohio Const. art. VIII, § 13; R.C. 165.01(H). The Ohio Supreme Court has found it appropriate to consider whether activities that will occur once construction is complete will meet these criteria. *See C.I.V.I.C. Group v. City of Warren*, 88 Ohio St. 3d at 42; *State ex rel. Bd. of County Comm'rs v. Zupanic*, 62 Ohio St. 3d 297, 301 n.8, 581 N.E.2d 1086 (1991).

The courts have construed "commerce" in a manner that appears to be broad enough to include a telecommunications system. *See State ex rel. Bd. of County Comm'rs v. Zupanic*, 62 Ohio St. 3d at 301 (adopting definitions of "commerce" as the exchange of goods, productions, or property of any kind and "industry" as the commercial production and sale of goods and services, and finding that the exchange of money for possessory interests in rental units constitutes commerce and the commercial service of providing and maintaining rental housing constitutes a service industry within the meaning of Ohio Const. art. VIII, § 13); *City of Norton v. Limbach*, 65 Ohio App. 3d 709, 585 N.E.2d 444 (Summit County 1989) (Ohio Const. art. VIII, § 13 and R.C. Chapter 165 authorize the issuance of industrial revenue bonds to be used to acquire funds by means of arbitrage investment to purchase an option to buy a limestone mine and to pay for feasibility studies regarding the potential for the production of hydroelectric energy at the mine); *County of Stark v. Ferguson*, 2 Ohio App. 3d 72, 76, 440 N.E.2d 816 (Stark County 1981) (the construction, operation, and maintenance of a medical-dental-pharmacy-laboratory building constitutes commerce within the meaning of Ohio Const. art. VIII, § 13); 2000 Op. Att'y Gen. No. 2000-013,

or research and located within the boundaries of the issuer. A project as defined in this division is hereby determined to qualify as facilities described in Section 13 of Article VIII, Ohio Constitution.

This definition requires that a project undertaken by someone other than an issuer be funded "in whole or in part from the proceeds of a loan made by an issuer." Thus, it appears that each project must, in some part, involve a loan made by an issuer. Accordingly, a project may not be funded entirely by a grant from the issuer, but must impose upon the recipient an obligation to repay some amount as a loan. *See* 2000 Op. Att'y Gen. No. 2000-013, at 2-76 (discussing grants and loans).

at 2-78 (“[a]s used in Ohio Const. art. VIII, § 13, the term ‘commerce’ has been construed broadly to include all types of business and financial interactions”); 1983 Op. Att’y Gen. No. 83-087; *cf. C.I.V.I.C. Group v. City of Warren*, 88 Ohio St. 3d at 42 (the construction of a subdivision street and related improvements, once complete, benefits no one except the residential property owners and does not fit the definition of industry and commerce).

It appears that a telecommunications system could assist in commerce and in the distribution of information, and thus could serve the purpose of creating or preserving jobs and employment opportunities and improving the economic welfare of the people of Ohio, as required by Ohio Const. art. VIII, § 13 and R.C. 165.01(H). The board of county commissioners has discretion to determine in the first instance whether the particular system at issue fits the criteria set forth in Ohio Const. art. VIII, § 13 and R.C. Chapter 165. *See* R.C. 165.03(A); *City of Norton v. Limbach*, 65 Ohio App. 3d at 713-14.⁶

With regard to the question whether it is necessary to have an agreement that the private corporation must make payments to the board of county commissioners to fully cover the debt service on debt securities issued pursuant to R.C. Chapter 165, there are several relevant statutory provisions. Although the statutes may appear, at first glance, to require the private corporation that benefits from county funds to pay in full the debt service incurred to acquire those funds, a more thorough examination of the statutes indicates that, although a full-payment arrangement is permitted, it is not mandated by statute.

Initially, R.C. 165.02, which provides general authority for the issuance of industrial development bonds, states that the issuer may “[i]ssue its bonds to provide funds, by loans or otherwise,” for acquiring or constructing projects. R.C. 165.02(C). Inclusion of the word “otherwise” indicates that funds may be provided not only as loans but by other means, including grants that need not be repaid. *See* 2000 Op. Att’y Gen. No. 2000-013, at 2-77 (“[a] program under Ohio Const. art. VIII, § 13 may be structured to provide either grants or loans”); 1998 Op. Att’y Gen. No. 98-034, at 2-198 (“[u]se of the general word ‘provide’ suggests that financial assistance may be supplied in any reasonable manner, including through grants to nonprofit corporations”); *see also* 1982 Op. Att’y Gen. No. 82-096, at 2-268 (definition of “project” allows a project to be funded partially by industrial development bonds and partially from private sources).

Similarly, the general statutory authority for the issuer to make loans states that the loans may be upon such terms as the issuing authority determines, including secured or unsecured loans, and that the issuer may “take such action as may be considered by it appropriate to protect such security and safeguard against losses.” R.C. 165.02(D). Pursuant to this provision, the issuer might determine that a loan need not be secured by the borrower, or that the terms of a loan might not require payment to cover debt service in full. *See also* R.C. 165.05 (bonds may be secured by a trust agreement or indenture of mortgage

⁶The proposed agreement contains references to Ohio Const. art. VIII, § 13 and R.C. 307.07, but not to R.C. Chapter 165. R.C. 307.07 authorizes a board of county commissioners to create an office of economic development or participate in a joint office of economic development, which may make loans or grants or provide other forms of financial assistance for the purpose of economic development. Creation and operation of the office may be funded from the general fund or from proceeds of a tax levy under R.C. 5705.19(EE). *See* R.C. 307.07(A); R.C. 307.64. These moneys are not non-tax moneys and are not available for activities under Ohio Const. art. VIII, § 13. *See* R.C. 5705.05. *See generally* 1994 Op. Att’y Gen. No. 94-071.

between the issuer and a corporate trustee, which may provide, *inter alia*, for maintenance of the agreement or indenture until the issuer has fully paid the principal and interest on the bonds or provision for payment has been made).

R.C. 165.03 states expressly that “[t]he principal of and interest on the bonds and all other payments required to be made by the bond proceedings shall be payable solely from the revenues and secured by security interests as provided in such bond proceedings.” R.C. 165.03(A). On its face, this language may appear to require that revenues derived from the project and security provided by the recipient of the bond proceeds will be sufficient to pay the debt service in full. An examination of the definitions reveals that this is not necessarily the case.

The term “revenues” is defined to include rentals, revenues, payments, incomes, charges, and moneys derived from the use, lease, rental or sale of pledged facilities or derived pursuant to a loan made for a project. R.C. 165.01(I).⁷ However, it also includes “proceeds from any insurance, condemnation or guaranty, pertaining to pledged facilities or the financing thereof.” *Id.* Guarantees pertaining to the financing of facilities may be provided by the issuer, as well as by the recipient of the bond proceeds. *See* R.C. 165.02. The constitution and statutes prohibit the issuer from pledging or guaranteeing tax proceeds in payment of debt securities, but they do not prohibit the pledge or guarantee of moneys derived from other sources. *See* Ohio Const. art. VIII, § 13; R.C. 165.03(A); R.C. 165.12. Accordingly, it is possible for the revenues used to pay the costs of debt service to include proceeds from guarantees provided by the issuer. *See generally* 2003 Op. Att’y Gen. No. 2003-037 (syllabus, paragraph 1) (indicating that, in an arrangement with a CIC, a county may agree to take on part of the cost of a project and stating: “[e]xcept as provided by agreement in accordance with Ohio Const. art. VIII, § 13 and R.C. 1724.10, any debts incurred by the CIC in a business venture are those of the CIC and not those of the county”).

Further, the bond proceedings are simply the agreements and documents providing for the issuance of bonds. R.C. 165.01(C); R.C. 165.04.⁸ Thus, for purposes of R.C. 165.03,

⁷R.C. 165.01(I) states:

(I) “Revenues” means the rentals, revenues, payments, repayments, income, charges, and moneys derived or to be derived from the use, lease, sublease, rental, sale, including installment sale or conditional sale, or other disposition of pledged facilities, or derived or to be derived pursuant to a loan made for a project, bond proceeds to the extent provided in the bond proceedings for the payment of principal of, or premium, if any, or interest on the bonds, proceeds from any insurance, condemnation or guaranty pertaining to pledged facilities or the financing thereof, and income and profit from the investment of the proceeds of bonds or of any revenues.

⁸R.C. 165.01(C) states:

(C) “Bond proceedings” means the resolution or ordinance or the trust agreement or indenture of mortgage, or combination thereof, authorizing or providing for the terms and conditions applicable to bonds issued under authority of this chapter.

R.C. 165.04 states that the bond proceedings may contain provisions that are part of the contract with the bondholders on various matters, including pledging rentals, revenues, and other income, charges, and moneys designated for the payment of principal and interest on the bonds, and other payments required by the bond proceedings.

“security interests as provided in such bond proceedings” include whatever security interests the issuer requires or agrees to provide, and are not limited to security interests in property of the recipient of the bond proceeds. *See* R.C. 165.03(A) (stating that determinations contained in the bond proceedings are conclusive as to the validity and enforceability of “security interests given” and other agreements made in connection with the bond proceedings). The term “security interest” is defined broadly to include “a mortgage, lien, or other encumbrance on, or pledge or assignment of, or other security interest with respect to all or any part of pledged facilities, revenues, reserve funds, or other funds established under the bond proceedings,” and also to include any “interest granted, assigned, or released to secure payments of the principal of, premium, if any, or interest on any bonds or to secure any other payments to be made by an issuer under the bond proceedings.”⁹ Accordingly, the bond proceedings may provide for security to be provided by the issuer.

In accordance with Section 13, R.C. 165.03(A) provides that “[t]he bond proceedings shall not obligate or pledge moneys raised by taxation.” The bond proceedings may, however, obligate or pledge moneys of the issuer that are derived from sources other than taxation. *See generally State ex rel. Ryan v. City Council of Gahanna.*

R.C. 165.12 also prescribes the funds from which the bonds are payable, stating:

Bonds issued under authority of Chapter 165. of the Revised Code do not, and shall state that they do not, represent or constitute a debt or pledge of the faith and credit of the issuer, and such bonds are payable solely from the rentals, revenues, and other income, charges, and moneys as are pledged for their payment in accordance with the bond proceedings. No moneys of any issuer raised by taxation shall be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to sections 165.01 to 165.14 of the Revised Code.

Again, the statutory language adopts the constitutional prohibition against obligating or pledging moneys raised by taxation to pay the costs of debt securities, but it does not restrict the use of any other moneys of the issuer.

Careful examination of the statutory provisions contained in R.C. Chapter 165 thus discloses that they would permit an arrangement under which a board of county commis-

⁹R.C. 165.01(J) states:

(J) “Security interest” means a mortgage, lien, or other encumbrance on, or pledge or assignment of, or other security interest with respect to all or any part of pledged facilities, revenues, reserve funds, or other funds established under the bond proceedings, or on, of, or with respect to, a lease, sublease, sale, conditional sale or installment sale agreement, loan agreement, or any other agreement pertaining to the lease, sublease, sale, or other disposition of a project or pertaining to a loan made for a project, or any guaranty or insurance agreement made with respect thereto, or any interest of the issuer therein, or any other interest granted, assigned, or released to secure payments of the principal of, premium, if any, or interest on any bonds or to secure any other payments to be made by an issuer under the bond proceedings. Any security interest under this chapter may be prior or subordinate to or on a parity with any other mortgage, lien, encumbrance, pledge, assignment, or other security interest.

sioners issues debt securities under R.C. Chapter 165, grants a private corporation use of proceeds from the debt securities, and does not require the private corporation to make payments to the board to fully cover the debt service on the securities. We conclude, therefore, that a board of county commissioners is authorized by R.C. Chapter 165 to issue debt securities to raise funds for contribution to a private corporation for a project as defined in R.C. 165.01(H) without requiring that the private corporation make payments to the board to fully cover the debt service on the securities.

Whether the board of county commissioners chooses to enter into an arrangement pursuant to R.C. Chapter 165 under which a private corporation receiving the benefits of debt securities is not required to pay the cost of debt service in full is within the discretion of the board. As discussed above, R.C. Chapter 165 permits an issuer to include in the bond proceedings provisions that require a private company receiving the benefit of debt securities to bear the costs of debt service, and to take various steps to place the risk of any loss on the recipient. A prudent issuer might be well advised to consider the inclusion of such provisions. As a matter of law, however, an issuer is permitted to pledge or obligate its non-tax revenue to pay debt service or to provide grants, rather than loans, for portions of projects. See generally *City of Norton v. Limbach*, 65 Ohio App. 3d at 716 (it is properly left to the legislative body to decide “whether the proposed bond issue or the underlying Project is wise, or even fiscally sound”); *County of Stark v. Ferguson*, 2 Ohio App. 3d at 77 (“[t]he determination of whether the authorization of such bonds should be made in the public interest is essentially a political question, properly decided by the legislative and executive branches of government”). See generally *State ex rel. Ryan v. City Council of Gahanna*, 9 Ohio St. 3d at 131 (Locher, J., concurring) (the issuance of revenue bonds may not be feasible when there is no income stream certainty); *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 132, 107 N.E.2d 206 (1952) (“[t]he inadequacy, if any, of the security for these bonds should be just as apparent to the buyer of the bonds as they are to respondents”); *Master Consol. Corp. v. BancOhio Nat’l Bank*, 61 Ohio St. 3d 570, 575 N.E.2d 817 (1991).

Question under R.C. Chapter 165 whether board of county commissioners may pledge non-tax revenue of the county as security for the payment of the principal and interest on debt securities

Your second question asks whether the board of county commissioners may pledge non-tax revenues of the county as security for the repayment of principal and interest on debt securities issued under R.C. Chapter 165. It is our understanding that this question relates to “[t]he principal of and interest on the bonds and all other payments required to be made by the bond proceedings,” as set forth in R.C. 165.03(A), and we use the statutory term “payment” in discussing these amounts. See also R.C. 165.04(A).

As discussed above, Section 13, R.C. 165.03(A), and R.C. 165.12 prohibit the pledging of tax revenues of the county as security for the payment of principal and interest on debt securities issued under R.C. Chapter 165, but do not prohibit the use of non-tax revenues for that purpose. These provisions imply that non-tax revenues may be used to fund projects under R.C. Chapter 165 and, thus, that non-tax revenues may be pledged as security for the payment of principal and interest on debt securities issued by the county.

Authority for a county to pledge non-tax revenues of the county as security for the payment of the principal and interest on debt securities is evident also in the provisions of R.C. 165.02(C) that permit an issuer to issue bonds to provide funds, by loans or otherwise, and in the provisions of R.C. 165.02(D) that authorize an issuer to make loans “upon such terms as the issuing authority may determine or authorize,” enter into “loan agreements

and other agreements,” and make determinations regarding the security for loans. *See also* R.C. 165.02(E) (permitting an issuer to enter into contracts and execute all instruments necessary or appropriate to carry out the purposes of R.C. Chapter 165); R.C. 165.02(L) (authorizing an issuer to do “all other acts necessary or appropriate” to carry out the purposes of R.C. Chapter 165 and Ohio Const. art. VIII, § 13); R.C. 165.03 (issuer’s determinations in bond proceedings are conclusive as to the validity and enforceability of security interests given).

The grant of authority is supported by R.C. 165.06, which recognizes the rights of bondholders to apply to have a receiver appointed to administer the moneys pledged to the payment of principal and interest on the bonds, “excluding any power to pledge additional rentals, revenues, or other income, charges, or moneys of the issuer, including those derived from taxation,” but by implication including non-tax revenue of the issuer pledged to the payment of the bonds. As discussed above, the statutory definitions of “bond proceedings,” “project,” “revenues,” and “security interest” provide further support for this understanding of the statutory scheme. *See* R.C. 165.01(C), (H), (I), and (J); *see also* R.C. 165.02(H) (security, trust agreements, and indentures of mortgage); R.C. 165.04 (provisions of bond proceedings); R.C. 165.05 (securing bonds by trust agreement or indenture of mortgage).

In addition, this construction of Section 13 and R.C. Chapter 165 is consistent with various instances in which issuers of bonds authorized pursuant to Section 13 have been permitted to use non-tax revenues to pay the costs of debt service. *See State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (finding that fees collected from owners and operators of underground storage tanks were not tax moneys and, therefore, could be used to pay interest on revenue bonds issued pursuant to Ohio Const. art. VIII, § 13 and R.C. 3737.94); *State ex rel. Duerk v. Donahay*, 67 Ohio St. 2d 216, 423 N.E.2d 429 (1981) (finding that moneys representing gross profits derived from the state’s liquor sales were not tax moneys and, therefore, could be used to secure a loan made pursuant to Ohio Const. art. VIII, § 13 and R.C. Chapter 166); 1994 Op. Att’y Gen. No. 94-071 (finding that moneys derived from loan payments received by the Ohio Water Development Authority were not tax moneys and, therefore, could be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to R.C. Chapter 6121 or 6123 and Ohio Const. art. VIII, § 13).

Clearly, non-tax revenues may be used to secure the payment of bonds issued pursuant to R.C. Chapter 165 only if the revenues are permitted by law to be used for that purpose. Revenues that are restricted by law to other uses may be applied only to those other uses. Accordingly, if the use of particular non-tax revenues is restricted to purposes that do not permit their use as security for the payment of the principal and interest on particular debt securities issued pursuant to R.C. Chapter 165, then the particular revenues in question will not be available for such use. *See, e.g., State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St. 3d at 116-17 (storage tank assessments that are not tax moneys are never placed in the general fund and “are to be used only for narrow and specific purposes, all directly related to UST [underground storage tank] problems”); *State ex rel. Gordon v. Rhodes* (municipal revenues from parking meters are not tax revenues if amounts in excess of those required to pay the cost of furnishing on-street parking are used for purposes of providing other necessary parking facilities). *See generally* 1994 Op. Att’y Gen. No. 94-071, at 2-357 to 2-360 (discussion of factors to consider in determining whether particular moneys are moneys raised by taxation for purposes of Ohio Const. art. VIII, § 13).

We conclude, accordingly, that in issuing debt securities pursuant to R.C. Chapter 165, a board of county commissioners may pledge non-tax revenues of the county as security

for the payment of the principal and interest on the debt securities, provided that the particular non-tax revenues so pledged are not restricted to other uses.

Conclusion

Therefore, it is my opinion and you are advised, as follows:

1. A board of county commissioners is authorized by R.C. Chapter 165 to issue debt securities to raise funds for contribution to a private corporation for a project as defined in R.C. 165.01(H) without requiring that the private corporation make payments to the board to fully cover the debt service on the securities.
2. In issuing debt securities pursuant to R.C. Chapter 165, a board of county commissioners may pledge non-tax revenues of the county as security for the payment of the principal and interest on the debt securities, provided that the particular non-tax revenues so pledged are not restricted to other uses.