

OPINION NO. 2000-035**Syllabus:**

The public hearings conducted by a township board of zoning appeals to consider the matters described in R.C. 519.14(A)-(C) in accordance with R.C. 519.15 are not "meetings" of the board for purposes of R.C. 121.22, but, rather, are quasi-judicial proceedings. While, pursuant to R.C. 519.15, such hearings are public hearings, R.C. 121.22 does not require a township board of zoning appeals to conduct its deliberations on such matters in meetings that are open to the public. (1985 Op. Att'y Gen. No. 85-044 (syllabus, paragraph two), overruled.)

To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio
By: Betty D. Montgomery, Attorney General, September 14, 2000

You have submitted an opinion request in which you ask whether R.C. 121.22 requires a township board of zoning appeals to conduct, in an open meeting, its deliberations upon an appeal from a decision of an administrative officer, a request for variance, or an application for a conditional use permit.¹ According to your letter, two recent judicial decisions interpreting the requirements of R.C. 121.22 have prompted you to request that we reconsider 1985 Op. Att'y Gen. No. 85-044, which concluded that a township board of zoning appeals is a public body subject to the open meeting requirements of R.C. 121.22 and may not, in an executive session, conduct its deliberations concerning a zoning appeal heard pursuant to R.C. 519.14(A) or (B).

In order to answer your question, let us begin with a brief discussion of R.C. 121.22. The fundamental requirement of R.C. 121.22 is set forth in division (C), which states in pertinent part: "All meetings of any public body are declared to be public meetings open to the public at all times.... The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection."² An exception to the requirement that public bodies transact the public business in open meetings is established by R.C. 121.22(G), which authorizes a public body to hold an executive

¹Pursuant to R.C. 519.14, a township board of zoning appeals may, among other things:

(A) Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of [R.C. 519.02-.25], or of any resolution adopted pursuant thereto;

(B) Authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done;

(C) Grant conditional zoning certificates for the use of land, buildings, or other structures if such certificates for specific uses are provided for in the zoning resolution.

²As used in R.C. 121.22, the word "meeting" means "any prearranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2).

session,³ from which the public may be excluded, in order to consider any of the matters listed in R.C. 121.22(G).⁴ Moreover, pursuant to R.C. 121.22(H):

A resolution, rule, or *formal action of any kind* is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.⁵ (Emphasis and footnote added.)

Turning now to the application of R.C. 121.22 to the proceedings of a township board of zoning appeals, we begin with the conclusion in the first syllabus paragraph of 1985 Op. Att'y Gen. No. 85-044 that a township board of zoning appeals created under R.C. 519.13 is a "public body" for purposes of R.C. 121.22. As used in R.C. 121.22, the term "public body" includes, among others, "*any* legislative authority or *board*, commission, committee, council, agency, authority, or similar decision-making body *of any* county, *township*, municipal corporation, school district, or other political subdivision or local public institution." R.C. 121.22(B)(1)(a) (emphasis added).

Pursuant to R.C. 519.13, in any township that has adopted zoning regulations, the board of township trustees must appoint a township board of zoning appeals, the members of which are reimbursed or compensated, as approved and provided by the board of trustees of the township. It is also the board of township trustees that appropriates funds for the hiring of necessary personnel for the township board of zoning appeals. R.C. 519.13. The manner in which its members are appointed and compensated, as well as its source of funding, indicate that a township board of zoning appeals is a board of a township, and thus a "public body," as defined in R.C. 121.22(B)(1)(a).

Let us now consider the conclusion set forth in the second paragraph of the syllabus of 1985 Op. Att'y Gen. No. 85-044, that a township board of zoning appeals "may not conduct, in an executive session, deliberations concerning a zoning appeal heard pursuant to R.C. 519.14(A) or (B)." In reaching this conclusion, 1985 Op. Att'y Gen. No. 85-044, at 2-159, focused upon the amendment to R.C. 121.22 in 1975 Ohio Laws, Part I, 152 (Am. Sub. S.B. 74, eff. Nov. 28, 1975), in which the General Assembly added the requirement that

³See generally *Thomas v. Bd. of Trustees*, 5 Ohio App. 2d 265, 268, 215 N.E.2d 434, 436 (Trumbull County 1966) ("[a]n executive session of a governmental body is normally one which is limited to the members of the governmental body and such other persons as are specifically invited by such body to attend the meeting").

⁴R.C. 121.22(G) enumerates the matters that a public body may consider in executive session, including, among other things, certain personnel matters, matters of imminent or pending litigation when discussed with the public body's attorney, and matters required to be kept confidential by state or federal law.

⁵See generally R.C. 121.22(F) (requiring every public body to establish, by rule, a reasonable method by which the public is able to determine when the public body is meeting); R.C. 121.22(G) (authority to conduct executive session to discuss any of the matters enumerated therein); R.C. 121.22(J) (requiring county veterans service commissions to consider certain matters in executive session).

public officials not only take official action in open meetings, but also that they “conduct all deliberations upon official business *only in open meetings unless the subject matter is specifically excepted by law*,” R.C. 121.22(A) (emphasis added). As explained in *Matheny v. Frontier Local Bd. of Educ.*, 62 Ohio St. 2d 362, 365, 405 N.E.2d 1041, 1044 (1980):

The 1975 amendment to R. C. 121.22 was intended to expand public access to the operation of state and local governmental entities. The major thrust of this amendment was to require that not only formal actions of public bodies, but also the deliberations preceding those actions, take place in sessions open to the public. (Footnote omitted.)

The 1985 opinion also noted that, pursuant to then R.C. 121.22(H), *see* 1985-1986 Ohio Laws, Part I, 1760, 1863 (Sub. H.B. 201, eff., in part, July 1, 1985), “[a] resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose *specifically authorized in division (G)* of this section and conducted at an executive session held in compliance with this section” (emphasis added). Accordingly, 1985 Op. Att’y Gen. No. 85-044 concluded at 2-159 that:

The deliberations of a township board of zoning appeals conducted prior to the board’s taking formal action under R.C. 519.14 with respect to a zoning appeal are not specifically included in R.C. 121.22(G) as matters which may be considered in executive session, and may not, therefore, be discussed in an executive session. Rather, pursuant to R.C. 121.22(C) and (H), such deliberations must be conducted in meetings which are open to the public.⁶ (Footnote added.)

You question whether this conclusion must be reconsidered in light of the Ohio Supreme Court’s decision in *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St. 3d 58, 689 N.E.2d 32 (1998) (per curiam). Let us, therefore, review the factual circumstances of that case, and the court’s specific conclusions of law.

The *TBC* case arose out of an appeal to the Board of Tax Appeals concerning the valuation of a parcel of property by a county board of revision.⁷ After an attorney-examiner for the Board of Tax Appeals conducted a hearing on the matter, one of the parties requested

⁶*See generally Coy v. Clarksfield Twp. Bd. of Zoning Appeals*, No. H-96-041, 1997 Ohio App. Lexis 1714 (Ct. App. Huron County April 25, 1997) (adopting the reasoning and conclusions of 1985 Op. Att’y Gen. No. 85-044).

⁷The powers and duties of the Board of Tax Appeals are set forth, in part, in R.C. 5703.02, which authorizes the Board, among other things, to:

(A) Exercise the authority provided by law to hear and determine all appeals of questions of law and fact arising under the tax laws of this state in appeals from decisions, orders, determinations, or actions of any tax administrative agency established by the law of this state, including but not limited to appeals from:

(1) Actions of county budget commissions;

(2) Decisions of county boards of revision;

(3) Actions of any assessing officer or other public official under the tax laws of this state;

the release of the proposed opinion the attorney-examiner had prepared for the Board. The Board explained that it was its practice to receive for its approval a proposed opinion drafted by the attorney-examiner assigned to hear and recommend a resolution of a case, and refused to release a copy of the proposed opinion. The requesting party claimed, among other things, that, pursuant to R.C. 121.22, the Board of Tax Appeals was required to release a copy of the proposed opinion. The *TBC* court concluded, in part, that “the Sunshine Law does not apply to adjudication proceedings at the BTA.” 81 Ohio St. 3d at 61, 689 N.E.2d at 34.

In reaching this conclusion, the *TBC* court relied, in part, upon its earlier decision in *Matheny v. Frontier Local Bd. of Education*, 62 Ohio St. 2d 362, 405 N.E.2d 1041 (1980), in which the court held that a “meeting” under R.C. 121.22 was different from a “hearing.” The *TBC* court further explained:

“[T]he term ‘hearing’ [used in an earlier version of R.C. 121.22] was used to refer to situations where a formal hearing was statutorily mandated. Therefore, even though a public body must open all its meetings to the public, there is a category of gatherings called ‘hearings,’ which do not have to be public.”

81 Ohio St. 3d at 61, 689 N.E.2d at 35 (quoting *Westerville v. Hahn*, 52 Ohio App. 3d 8, 12, 556 N.E.2d 200, 205 (Franklin County 1988)).

The *TBC* court then described the characteristics of an administrative hearing or quasi-judicial proceeding to which the open meeting requirements of R.C. 121.22 do not apply. Among the characteristics of such proceedings are the requirements of notice, hearing, and an opportunity to introduce evidence at the proceeding, the ability to appeal to a court the decision arising out of the proceeding, and that the purpose served by the proceeding is to resolve or decide a “justiciable dispute” between parties, a matter that necessarily involves the exercise of discretion. 81 Ohio St. 3d at 61-62, 689 N.E.2d at 35.

In finding that proceedings of the Board of Tax Appeals are “quasi-judicial” proceedings that do not constitute “meetings” for purposes of R.C. 121.22, the *TBC* court stated:

In *Zangerle v. Evatt* (1942), 139 Ohio St. 563, 571, 23 O.O. 52, 55, 41 N.E.2d 369, 373, we held that the BTA is a quasi-judicial body when discharging its adjudication duties. In this task, the BTA conducts hearings in the nature of legal proceedings, providing notice and an opportunity to introduce testimony through witnesses. A litigant may appeal to the courts

(4) Final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by him;

(5) Adoption and promulgation of rules of the tax commissioner.

See also R.C. 5717.01 (stating in part, “[t]he county board of revision shall thereupon certify to the board of tax appeals a transcript of the record of the proceedings of the county board of revision pertaining to the original complaint, and all evidence offered in connection therewith. Such appeal may be heard by the board of tax appeals at its offices in Columbus or in the county where the property is listed for taxation, or the board of tax appeals may cause its examiners to conduct such hearing and to report to it their findings for affirmation or rejection”).

only those administrative agency decisions resulting from quasi-judicial proceedings.

....

The BTA's adjudication is a quasi-judicial proceeding that settles a "justiciable dispute requiring evaluation and resolution." Although the BTA opens its hearings to the public under Ohio Adm. Code 5717-1-15(D), it, like all judicial bodies, requires privacy to deliberate, *i.e.*, to evaluate and resolve, the disputes. This privacy frees the BTA from the open pressure of the litigants as it contemplates the case. Privacy provides an opportunity for candid discussion between board members and staff on the legal issues and the facts so the BTA can reach a sound decision.

81 Ohio St. 3d at 62, 689 N.E.2d at 35 (various citations omitted). The *TBC* court then concluded that, "[f]or these reasons, the Sunshine Law does not apply to adjudications of disputes in quasi-judicial proceedings, such as at the BTA." *Id.*, 689 N.E.2d at 35-36.

Let us now consider whether the proceedings conducted by a township board of zoning appeals under R.C. 519.14(A)-(C) constitute "adjudications of disputes in quasi-judicial proceedings," as described in *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*. If so, such proceedings do not constitute "meetings" for purposes of R.C. 121.22, and the deliberations concerning those adjudications need not be conducted in open meetings.

Pursuant to R.C. 519.14(A)-(C), a township board of zoning appeals may hear and decide appeals concerning actions of administrative officers in the enforcement of township zoning matters under R.C. 519.02-.25, R.C. 519.14(A), grant conditional zoning certificates,⁸ R.C. 519.14(C), and, upon appeal, authorize a variance from the township zoning resolution,⁹ R.C. 519.14(B).

⁸See generally *Nunamaker v. Board of Zoning Appeals*, 2 Ohio St. 3d 115, 118, 443 N.E.2d 172, 175 (1982) (describing the effect of a conditional zoning certificate, as follows: "A special permit, which is evidenced by a conditional zoning certificate, authorizes a use which is permitted by zoning regulations, subject to the issuance of such a permit or conditional certificate. Thus, the special permit results in the establishment or maintenance of a use in the location and under the circumstances mandated by the zoning ordinance or resolution, and such permit may be granted upon whatever terms are imposed by the zoning ordinance or resolution" (quoting *Boston v. Montville Twp. Bd. of Zoning Appeals*, 32 Ohio Misc. 118, 120-21, 289 N.E.2d 184, 186 (C.P. Medina County 1972))).

⁹In describing the various powers and duties of a township board of zoning appeals, the court in *In re Rocky Point Plaza Corp.*, 86 Ohio App. 3d 486, 491, 621 N.E.2d 566, 569 (Franklin County 1993), explained:

There seems to be a blurring of applications for rezoning, applications for variances, and applications for conditional use permits, each of which requires a separate and distinct procedure and approach. Applications for rezoning are legislative in nature and are subject to a public hearing before a planning commission in most communities, with a recommendation of approval or disapproval based upon governmental, political and policy considerations. On the other hand, both applications for variances and applications for permits, such as conditional use permits, require adjudication hearings, not legislative hearings.

The procedure for appeals to the township board of zoning appeals is prescribed, in part, by R.C. 519.15,¹⁰ which requires a township board of zoning appeals, when conducting proceedings under R.C. 519.14(A)-(C), to give the parties notice of the public hearing of the appeal and to allow any person to appear at such hearing in person or through an attorney.¹¹ The purpose of such hearings is to hear evidence from which the board may determine the rights of the parties before it. *See, e.g., Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St. 3d 260, 263, 510 N.E.2d 373, 376 (1987) (“[i]n making its determination of whether enforcement of the [zoning] resolution will result in unnecessary hardship, a board of zoning appeals must permit the applicant to present evidence in support of such claim”); *Heiney v. Sylvania Twp. Bd. of Zoning Appeals*, 126 Ohio App. 3d 391, 396, 710 N.E.2d 725, 727 (Lucas County 1998) (“[a] hearing upon an application for a conditional use permit is an adjudicatory hearing.... At adjudicatory hearings, the rights of specific persons are determined based upon the direct evidence presented, not public opinion” (various citations omitted)).

The proceedings of a township board of zoning appeals under R.C. 519.14(A)-(C) possess an additional characteristic of a quasi-judicial proceeding in that any such decision may be appealed to a court of common pleas pursuant to R.C. 2506.01.¹² *See, e.g., Kasper v.*

In other words, there is no public hearing upon an application for a variance or an application for a conditional use permit but, instead, *an adjudication hearing, which is open to the public.* (Emphasis added.)

¹⁰R.C. 519.15 states in pertinent part:

Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.

The board of zoning appeals shall fix a reasonable time for the *public hearing of the appeal*, give at least *ten days' notice* in writing to the parties in interest, give *notice* of such public hearing *by one publication* in one or more newspapers of general circulation in the county at least ten days before the date of such hearing, and decide the appeal within a reasonable time after it is submitted. *Upon the hearing, any person may appear in person or by attorney.* (Emphasis added.)

Separate provision is made for appeals from decisions by a township board of zoning appeals to revoke a variance or conditional zoning certificate under R.C. 519.14(D). Because you have not asked about the procedure governed by R.C. 519.14(D), this opinion will not address that issue.

¹¹The requirement in R.C. 519.15 that such appeals be conducted as public hearings is not the same as R.C. 121.22's requirement that a public body conduct its official business and deliberations thereon in meetings that are open to the public.

¹²R.C. 2506.01 states:

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any

Coury, 51 Ohio St. 3d 185, 555 N.E.2d 310 (1990); *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E.2d 1350 (1988); *Roper v. Bd. of Zoning Appeals*, 173 Ohio St. 168, 180 N.E.2d 591 (1962). In addition, decisions by a township board of zoning appeals under R.C. 519.14(A)-(C) involve the exercise of discretion. See, e.g., *Consolidated Management, Inc. v. City of Cleveland*, 6 Ohio St. 3d 238, 452 N.E.2d 1287 (1983); *Mentor Lagoons, Inc. v. Zoning Bd. of Appeals*, 168 Ohio St. 113, 151 N.E.2d 533 (1958) (syllabus, paragraph one) (“[o]rdinarily, the matter, as to whether a variance should or should not be authorized in a specific case by a township board of zoning appeals which is acting pursuant to Section 519.14, Revised Code, and similar provisions of a township zoning resolution, is a matter within the sound discretion of such board”).

Upon review of the foregoing characteristics of a township board of zoning appeals’ proceedings under R.C. 519.14(A)-(C), we conclude that such proceedings constitute “adjudications of disputes in quasi-judicial proceedings,” as described in *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*. Because the Ohio Supreme Court has declared that such quasi-judicial proceedings are not “meetings” for purposes of R.C. 121.22, and that R.C. 121.22 does not require that the deliberations of the matters adjudicated in such proceedings be open to the public, *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, we must overrule syllabus, paragraph two of 1985 Op. Att’y Gen. No. 85-044.¹³ We must also bear in mind that, although a hearing conducted by a township board of zoning appeals under R.C. 519.14(A)-(C) is not a “meeting” subject to the open meeting requirements of R.C. 121.22, the hearing itself, apart from the deliberations concerning that hearing, is, pursuant to R.C. 519.15, a “public hearing.”

political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in [R.C. Chapter 2505], except as modified by this chapter.

The appeal provided in this chapter is in addition to any other remedy of appeal provided by law.

A “final order, adjudication, or decision” means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

¹³As noted in your opinion request, subsequent to the decision in *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St. 3d 58, 689 N.E.2d 32 (1998) (per curiam), the Wayne County Court of Appeals decided *Castle Manufactured Homes, Inc. v. Tegmeier*, No. 98CA0065, 1999 Ohio App. Lexis 4519 (Ct. App. Wayne County, Sept. 29, 1999), in which it addressed whether a township board of zoning appeals had violated R.C. 121.22 by meeting in executive session to consider the granting of the requested zoning variance. Relying upon the *TBC* case, the Wayne County Court of Appeals concluded that the board of zoning appeals was acting in a quasi-judicial capacity when considering the zoning variance, and that R.C. 121.22 did not apply to the deliberations of the board in considering the variance request. *But see Coy v. Clarksfield Twp. Bd. of Zoning Appeals*, No. H-96-041, 1997 Ohio App. Lexis 1714 (Ct. App. Huron County April 25, 1997) (adopting the reasoning and conclusions of 1985 Op. Att’y Gen. No. 85-044).

It is, therefore, my opinion, and you are hereby advised that, the public hearings conducted by a township board of zoning appeals to consider the matters described in R.C. 519.14(A)-(C) in accordance with R.C. 519.15 are not "meetings" of the board for purposes of R.C. 121.22, but, rather, are quasi-judicial proceedings. While, pursuant to R.C. 519.15, such hearings are public hearings, R.C. 121.22 does not require a township board of zoning appeals to conduct its deliberations on such matters in meetings that are open to the public. (1985 Op. Att'y Gen. No. 85-044 (syllabus, paragraph two), overruled.)