OPINION NO. 79-061

Syllabus:

1. The governing board of a community improvement corporation, organized in the manner provided in R.C. 1702.04 and as provided in R.C. 1724.01 to R.C. 1724.09, inclusive, does not constitute a public body for the purposes of R.C. 121.22.

2. The governing board of a community improvement corporation that has been designated an agency of a county, a municipal corporation, or any combination thereof, pursuant to R.C. 1724.10, constitutes a public body for the purposes of R.C. 121.22.

To: Ronald L. Collins, Tuscarawas County Pros. Atty., New Philadelphia, Ohio
By: William J. Brown, Attorney General, September 27, 1979

I have before me your request for an opinion which inquires as to whether a community improvement corporation is bound by the provisions of R.C. 121.22, popularly known as the "sunshine law."

R.C. 121.22, which generally provides that all public bodies are to conduct official business in meetings open to the public, provides, in part, as follows:

> (B) As used in this section:
> (1) 'Public body' means any board, commission, committee, or similar decision-making body of a state agency, institution or authority, and any legislative authority or board, commission, committee, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution.
> . . .
>
> (C) All meetings of any public body are declared to be public meetings open to the public at all times.

Despite the sweeping scope of the foregoing definition, its application has, since its enactment, posed rather difficult problems. See 1976 Op. Att'y Gen. No. 76-062. Rather than defining a public body, the statute does nothing more than generically enumerate various entities. Unlike open-meeting statutes in other jurisdictions, the provision includes no standard that would allow one to determine definitively whether a particular entity qualifies as a public body. See e.g., Ariz. Rev. Stat. Ann. §38-431 (1) (". . . all agencies, boards and commissions . . . which are supported in whole or in part by tax revenues or which expend tax revenues."); Colo. Rev. Stat. Ann. §24-6-402(1) (". . . policy-making or rule-making body of any state agency or authority or of the legislature . . ."); Idaho Code §67-2341(3)(a) (". . . any state board commission, department, authority, educational institution or other state agency, which is created by or pursuant to statute.") Thus, application of the open-meeting statute to an entity that is not among those expressly enumerated in R.C. 121.22(B) requires considerable analysis.

It should be noted at the outset that a community improvement corporation possesses certain characteristics that are suggestive of a public status. The sole purpose of the corporation, which is the advancement, encouragement and promotion of the industrial, economic, commercial and civic development of a community or area is undeniably public. R.C. 1724.01. In addition, R.C. 307.78 authorizes a board of county commissioners to contribute funds to a community improvement corporation and R.C. 1724.05 requires a community improvement corporation to submit a yearly financial report to the state director of economic and community development.

Many of the corporation's features, however, suggest a private status. A community improvement corporation is, in essence, a private non-profit corporation which is bound by the general terms of R.C. Chapter 1702 (non-profit corporations). A privately organized entity that performs a public purpose occupies a status no different from that of countless other non-profit corporations, the private nature of which is indisputable.

Nor is a community improvement corporation possessed of powers derived from statute. Although R.C. 1724.02 provides that a community improvement corporation "shall" possess certain powers enumerated therein, the ultimate source of its power is not R.C. 1724.02, but its articles of incorporation and code of regulations.

Thus, a brief review of R.C. Chapter 1724 and related provisions indicates that a basic community improvement corporation is a hybrid entity that possesses

certain features of both a public and private nature. Quite apart from its equivocal nature, however, there is simply no basis to conclude that any one or all of the foregoing characteristics are dispositive, in determining whether an entity qualifies as a public body under the terms of Ohio's open-meeting statute. Therefore, based upon an examination of the organization and operation of a community improvement corporation, I am unable to conclude as a matter of law that the corporation is a public body under R.C. 121.22.

It is, of course, well settled that the meaning of a term that appears in a statute may be ascertained by reference to the meaning of words associated with it. e.g., Myers v. Seaburger, 45 Ohio St. 232 (1887). Application of the foregoing rule to the statutory definition set forth in R.C. 121.22(B) would indicate that the statute applies to "decision-making" bodies only. Inasmuch as a community improvement corporation acts generally in an advisory capacity, see State ex rel. Burton v. Greater Portsmouth Growth Corp. 7 Ohio St. 2d 34 (1966), it would appear that a community improvement corporation cannot qualify as a public body under the terms of the open-meeting statute. This position, however, gives consequence to a distinction that is unrecognized by R.C. 121.22. It may well be true that community improvement corporations act in an advisory capacity and that they possess no real power to affect the legal rights and relations of others. There is, however, no language in the statute that would indicate that "decision-making" is to be viewed in such a formal and restrictive sense. A simple recommendation, however tentative and far removed from the legal rights of others, is the result of decision-making. Since any collective body is, in this sense, involved in the process of decision making, the phrase is of no assistance in delineating the scope of the term "public body" under R.C. 121.22.

As I have had occasion to remark in the past, the most reliable statement regarding the intended scope of R.C. 121.22 is to be found in its introductory provision, which provides as follows:

> (A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

Applying the foregoing provision in 1976 Op. Att'y Gen. No. 76-062, I concluded that the board of trustees of a Comprehensive Mental Health Center did not constitute a public body for purposes of R.C. 121.22. In so concluding, I noted that the General Assembly apparently intended the statute to apply to all bodies that are comprised of public officials. Conversely, a body comprised of individuals who do not qualify as public officials would not fall within the purview of the statute.

The pertinent inquiry at this juncture, therefore, is whether the individuals on the governing board of a community improvement corporation qualify as public officers.

As I stated in Opinion No. 76-062, the meaning of the term "public officer" is often contextual and courts have given it different meanings under different circumstances. The chief and decisive characteristic of a public office, however, is the quality of the duties attaching to the office. Thus, it has been held that a public office is one invested by law with some portion of the sovereign power of the state. State ex rel. Milburn v. Pethtel, 153 Ohio St. 1 (1950). In the case of Herbert v. Ferguson, 142 Ohio St. 496, 501 (1944), the court discussed the nature of a public office in the following terms:

> . . .[A] position is a public office when it is created by law, with duties cast upon the incumbent which involve some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and are not occasional or intermittent.

Thus, a public office is one created by law and the duties of which are defined by law. In addition, these statutorily defined duties must involve some exercise of the sovereign power.

On the basis of the foregoing it is clear that members of the governing board of a community improvement corporation are not public officers. Such a position is created and the powers thereof are defined by the articles of incorporation and the corporate code of regulations. Moreover, the management of a non-profit corporation that acts in an advisory capacity cannot be said to exercise any portion of the sovereign power of the state. This holds true irrespective of how closely aligned the purposes and interests of the corporation are to those of the government.

In answer to your question, it is my opinion and you are advised, that the governing board of a community improvement corporation, organized in the manner provided in R.C. 1702.04, and as provided in R.C. 1724.01 to R.C. 1724.09, inclusive, does not constitute a public body for the purposes of R.C. 121.22.

It must be noted, however, that under certain circumstances the status of a community improvement corporation may transcend that of a simple non-profit corporation. It is, therefore, necessary to consider the applicability of the open-meeting statute under such circumstance.

Pursuant to agreement, a community improvement corporation may be designated an agency of a political subdivision. R.C. 1724.10, which authorizes such a designation, provides, in part, as follows:

> A community improvement corporation may be designated by a county, one or more municipal corporations, two or more adjoining counties, or any combination of the foregoing, as the agency of each such political subdivision for the industrial, commercial, distribution, and research development in such political subdivision when the legislative authority of such political subdivision has determined that the policy of the political subdivision is to promote the health, safety, morals, and general welfare of its inhabitants through the designation of a community improvement corporation as such agency. Such designation shall be made by the legislative authority of the political subdivision by resolution or ordinance.

A community improvement corporation so designated is quite literally an agency of a county or a municipal corporation. As such, it falls squarely and unequivocally within the statutory definition of a "public body" set forth in R.C. 121.22(B). I must conclude, therefore, that once a community improvement corporation has received agency designation pursuant to R.C. 1724.10, it is bound by the terms of the open-meeting statute.

In reaching this conclusion, I am aware of the provision set forth in R.C. 1724.10, which states that "membership in the governing board of a community improvement corporation does not constitute the holding of a public office or employment within the meaning of sections 731.02 and 731.12 of the Revised Code or any other section of the Revised Code." If, as stated previously, the holding of a public office defines the outer limits of the open-meeting statute's application, one might argue, on the basis of this provision, that the governing board of a community improvement corporation is not a public body.

However, because the provision is rather obviously intended to eliminate problems regarding conflicts of interest and incompatability of office, the argument is in this context not persuasive. In this particular instance reliance upon the provision regarding public offices would be inappropriate. It must be remembered that R.C. 121.22(A) provides that the statute is to be liberally construed ". . . to require public officials to take official action . . . in open meetings." Were there an apparent ambiguity concerning the applicability of R.C. 121.22 to the body in question, the provision could, as it has in the past, be invoked

to clarify the issue. As with all other rules of statutory construction, however, the rule of liberal construction should be applied only in the face of some ambiguity. e.g., Kroff v. Amrhein, 94 Ohio St. 282 (1916); State ex rel. Shaker Heights Public Library v. Main, 83 Ohio App. 415 (1948). In this instance, the scope of R.C. 121.22 is quite clear. Application of the rule of liberal construction would only create an ambiguity, rather than eliminating one.

I must conclude, therefore, that the governing board of a community improvement corporation that has been designated an agency of a county, a municipal corporation, or any combination thereof, pursuant to R.C. 1724.10, constitutes a public body for the purposes of R.C. 121.22.

I am aware that the conclusions stated herein may be the source of some practical difficulties. I understand that most community improvement corporations have, in fact, received agency designation pursuant to R.C. 1724.10. The mere fact that it has been so designated does not, however, mean that a community improvement corporation must comply with R.C. 121.22 at all times. What is required of a designated community improvement corporation under the open-meeting statute will be a function of the business before it. When the corporation is acting as an agency of a political subdivision, it is bound by the requirements of R.C. 121.22. At all other times it may, as the board sees fit, either comply with the provisions or ignore them. This distinction with respect to the corporation's function should be drawn after consideration of the agreement between the political subdivision and the corporation. This agreement, which is required by R.C. 1724.10, provides that the designated corporation shall provide the political subdivision with one or more of the services enumerated in the statute. In performing any of the functions set forth in the agreement, or in conducting any of the deliberations preceding the performance of such a function, the corporation is bound by R.C. 121.22. In all other instances, it is not.

In conclusion, it is my opinion, and you are advised, that:

1. The governing board of a community improvement corporation, organized in the manner provided in R.C. 1702.04 and as provided in R.C. 1724.01 to R.C. 1724.09, inclusive, does not constitute a public body for the purposes of R.C. 121.22.

2. The governing board of a community improvement corporation that has been designated an agency of a county, a municipal corporation, or any combination thereof, pursuant to R.C. 1724.10, constitutes a public body for the purposes of R.C. 121.22.