

**OPINION NO. 85-010****Syllabus:**

1. Where a three member board of township trustees considers an application for a zoning change pursuant to R.C. 519.12 and one of the members withdraws from consideration of the matter due to a conflict of interest, the unanimity requirement of R.C. 519.12 is satisfied if the two remaining trustees concur in their vote either to deny or to modify the recommendation of the township zoning commission.
2. Pursuant to R.C. 519.12, a board of township trustees shall adopt, deny, or modify the recommendation of the township zoning commission with regard to a proposed amendment or supplement to a township zoning resolution within twenty days after a public hearing on the proposed amendment or supplement. If the board fails to take action within the twenty day statutory period, it may be compelled to act by a writ of mandamus; however, failure of the board of township trustees to act within twenty days does not constitute approval of the zoning commission's recommendation.

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**To: John A. Pfefferle, Erie County Prosecuting Attorney, Sandusky, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, April 9, 1985**

I have before me your request for my opinion concerning the procedure to be followed by a board of township trustees when the board considers an application for a zoning change pursuant to R.C. 519.12. In your request letter, you have set forth the following facts:

1. An application for a change of zoning was properly filed and duly considered by the Township Zoning Commission, which recommended the application be denied;
2. The recommendation of the Zoning Commission, text and map pertaining thereto, and the recommendation of the County Planning Commission were timely filed with the Board of Trustees;
3. The Board of Trustees duly scheduled the matter for a public hearing as provided by statute;
4. At the public hearing before the Board of Trustees on the application for a zoning change, one of the trustees disclosed what he felt was a conflict of interest and withdrew from further consideration of the matter.

I have restated your questions with regard to this situation as follows:

1. Where a three member board of township trustees considers an application for a zoning change pursuant to R.C. 519.12 and one of the members withdraws from consideration of the matter, does a concurring vote of the two remaining trustees either to deny or to modify the recommendation of the township zoning commission satisfy the unanimity requirement of R.C. 519.12?
2. Where a three member board of township trustees considers an application for a zoning change pursuant to R.C. 519.12 and one of the members withdraws from consideration of the matter, if a concurring vote of the two remaining trustees either to deny or to modify the recommendation of the township zoning commission does not satisfy the unanimity requirement of R.C. 519.12, what procedure should be followed to appoint an additional trustee for the purpose of considering the application?
3. What is the effect of the failure of the board of township trustees to adopt or deny the recommendation of the zoning commission or to adopt some modification thereof within twenty days after a public hearing pursuant to the procedure set forth in R.C. 519.12?

Before addressing your specific questions, it is necessary for me to examine briefly the nature of a township's zoning power, and the procedures by which zoning resolutions are enacted. Townships do not have any constitutionally granted or inherent police power, the power upon which zoning legislation is based. Indeed, "[w]hatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute." Yorkavitz v. Township Trustees, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957). In R.C. Chapter 519 the General Assembly has delegated to townships the power to regulate by resolution building and land use in the unincorporated territory of such townships.

R.C. 519.04 provides that the board of township trustees of any township proceeding under R.C. Chapter 519 shall establish a township zoning commission. R.C. Chapter 519 sets forth the procedure for the recommendation of a zoning plan to the county or regional planning commission, if there is such a commission, for

approval, disapproval or suggestions, R.C. 519.07, and for various public hearings on such matters, see, e.g., R.C. 519.06; R.C. 519.08. After receiving the recommended zoning plan from the township zoning commission and holding the public hearing provided for by R.C. 519.08, "the board of township trustees shall consider such recommendations and vote upon the adoption of the zoning resolution." R.C. 519.10. R.C. 519.11 provides that a board of township trustees, upon its adoption of a zoning resolution, "shall cause the question of whether or not the proposed plan of zoning shall be put into effect to be submitted to the electors residing in the unincorporated area of the township included in the proposed plan of zoning for their approval or rejection." Upon certification by the board of elections, the resolution takes immediate effect, if the plan is so approved. R.C. 519.11.

Once a zoning resolution has been enacted, a board of township trustees has the authority to amend or supplement the zoning resolution by following the procedures set forth in R.C. 519.12. See generally 1981 Op. Att'y Gen. No. 81-065. The statutory procedure for amending or supplementing such resolution is prescribed by R.C. 519.12 and may be initiated "by the filing of an application therefor by one or more of the owners or lessees of property within the area proposed to be changed or affected by the proposed amendment or supplement with the township zoning commission." Upon the filing of such application, the township zoning commission must set a date for a public hearing upon proper notice. Within five days after the filing of such application, the township zoning commission "shall transmit a copy thereof together with text and map pertaining thereto to the county or regional planning commission." R.C. 519.12 At the public hearing, the township zoning commission must consider the recommendation of the county or regional planning commission to approve, deny or modify the proposed amendment or supplement. Then, the township zoning commission must, within thirty days after the public hearing, recommend the approval, denial or modification of the proposed amendment or supplement and submit to the board of township trustees such recommendation together with such application, the text and map pertaining thereto and the recommendation of the county or regional planning commission thereon. Pursuant to R.C. 519.12, the board of township trustees must, upon receipt of such recommendation, set a time for a public hearing on the proposed amendment or supplement upon proper notice.

Your questions pertain to the stage in the statutory procedure in which the board of township trustees passes upon the zoning commission's recommendation. Regarding this stage of the procedure R.C. 519.12 provides as follows:

Within twenty days after such public hearing the board [of township trustees] shall either adopt or deny the recommendations of the [township] zoning commission or adopt some modification thereof. In the event the board denies or modifies the recommendation of the township zoning commission the unanimous vote of the board shall be required. (Emphasis added.)

Thus, R.C. 519.12 states that the board of township trustees shall adopt, deny or modify the recommendation of the township zoning commission within twenty days after the board holds a public hearing on the proposed amendment or supplement to the township zoning resolution. R.C. 519.12 further provides that the unanimous vote of the board of township trustees is required to deny or modify the recommendation of the township zoning commission.

Your first question concerns the unanimity requirement of R.C. 519.12. Specifically you ask whether a concurring vote of two of three township trustees either to deny or to modify the recommendation of the township zoning commission satisfies the unanimity requirement of R.C. 519.12 where the third trustee withdraws from consideration of the matter due to a conflict of interest. As noted above, R.C. 519.12 provides that, "[i]n the event the board denies or modifies the recommendation of the township zoning commission the unanimous vote of the board shall be required." It is a well-settled principle of statutory construction that in the absence of a statutory definition of words used in a statute, such words are to be read according to their plain, common meaning. See R.C. 1.42; Baker v. Powhatan Mining Co., 146 Ohio St. 600, 67 N.E.2d 714 (1946). Black's Law Dictionary 1366 (5th ed. 1979) defines "unanimous" as follows: "To say that a

proposition was adopted by a 'unanimous' vote does not always mean that every one present voted for the proposition, but it may, and generally does, mean, when a *viva voce* vote is taken, that no one voted in the negative." Webster's New World Dictionary 1543 (2d college ed. 1978) defines "unanimous" as: "agreeing completely; united in opinion." Neither definition requires that every member of a body vote for a given proposition in order for the vote to be unanimous. Rather, the definition merely requires that those who vote on the proposition vote in agreement and that no one dissents. In the instant situation, a member of a three member board of township trustees who, due to a conflict of interest, withdraws from consideration of an application for a zoning change neither votes with the remaining members nor votes against them to deny or modify the recommendation of the township zoning commission. Thus, if the remaining members concur in their vote to deny or modify the recommendation of the township zoning commission, such vote satisfies the requirement of R.C. 519.12 that the board's vote be unanimous. Cf. Seyler v. Balsly, 5 Ohio Misc. 210, 210 N.E.2d 747 (C.P. Hamilton County 1965) (wherein the court held that the requirement of R.C. 303.12 that action of the three member board of county commissioners to deny a recommendation of the county rural zoning commission be by "unanimous vote of the board" is satisfied when both of the members who constituted a quorum for the meeting voted for such denial and the attendance of the third commissioner was recorded in the minutes as "absent on leave and not voting").

I note that another well-settled maxim of statutory construction is that where the General Assembly uses certain language in one instance and wholly different language in another, different meanings are to be attached to such language. See Inglis v. Pontius, 102 Ohio St. 140, 131 N.E. 509 (1921). The nature of the unanimity language of R.C. 519.12 becomes apparent when such language is compared to the unanimity language of other statutes. For example, R.C. 305.23 provides as follows:

No proposition involving an expenditure of one thousand dollars or more shall be agreed to by the board of county commissioners, unless twenty days have elapsed since the introduction of the proposition, unless by the unanimous consent of all the members of the board present, which consent shall be taken by yeas and nays and entered on the record. (Emphasis added.)

R.C. 305.23 provides for expenditures of one thousand dollars or more by a board of county commissioners, without the statutorily prescribed twenty day waiting period, upon a unanimous vote of all of the commissioners who are present when the vote is taken. See 1976 Op. Att'y Gen. No. 76-022 (advising that R.C. 305.23 allows for the passage of a proposition by the affirmative vote of all members of a board of county commissioners who are present, and only a quorum of the board need consider the proposition, and suggesting that abstention destroys unanimity within the meaning of R.C. 305.23). By contrast, R.C. 519.12 provides that "the unanimous vote of the board [of township trustees] shall be required" to deny or modify the recommendation of the township zoning commission. The plain language of R.C. 519.12 merely requires a unanimous vote of the board as an entity rather than a unanimous vote of all the members of the board or all of the members of the board who are present.

There is also a significant difference between the unanimity language of R.C. 519.12 and that of R.C. 519.09 concerning changes in text or maps certified by the township zoning commission. R.C. 519.09 provides in pertinent part as follows: "If such changes are disapproved by the zoning commission, the provision so disapproved must receive the favorable vote of the entire membership of the board of township trustees in order to be adopted." (Emphasis added.) While R.C. 519.12 merely requires, as noted above, a unanimous vote of the board as an entity, R.C. 519.09 requires the favorable vote of the entire membership of the board of township trustees in order to adopt changes in text or maps which were disapproved by the township zoning commission. The difference in language between R.C. 519.12 and R.C. 519.09, two provisions of the same chapter of the Revised Code, clearly indicates that the General Assembly intended different meanings to be attached to the different language. See generally Gumm v. City of Lexington, 247 Ky. 139, 56 S.W.2d 703 (1933) (wherein the court recognizes a distinction between

statutory language requiring a unanimous vote "of all of the members of the body", or "of all those elected or appointed" and statutory language requiring a unanimous vote of the body). In answer to your first question, it is my opinion that where a three member board of township trustees considers an application for a zoning change pursuant to R.C. 519.12 and one of the members withdraws from consideration of the matter, a concurring vote of the two remaining trustees either to deny or to modify the recommendation of the township zoning commission satisfies the unanimity requirement of R.C. 519.12.

Since I have answered your first question affirmatively, it is unnecessary to address your second question. Therefore, I turn now to your third question in which you ask about the effect of the failure of the board of township trustees to adopt, deny, or modify the recommendation of the zoning commission within twenty days after a public hearing pursuant to the procedure set forth in the above quoted portion of R.C. 519.12. As noted above, R.C. 519.12 provides that the board of township trustees shall adopt, deny or modify the recommendation of the township zoning commission with regard to a proposed amendment or supplement to the township zoning resolution within twenty days after the board holds a public hearing on the proposed change. R.C. 519.12 does not, however, address the failure of the board to adopt, deny, or modify the recommendation of the zoning commission within the twenty day period. It is instructive, however, to look to cases which interpret analogous statutory provisions. In Deserisy v. DeCourcy, 16 Ohio App. 2d 147, 242 N.E.2d 670 (Hamilton County 1968), the court construed R.C. 303.12, which pertains to amendments or supplements to county zoning resolutions. The specific language in R.C. 303.12 which the court construed in Deserisy is similar to the language in R.C. 519.12 which I examined in answering your first question. R.C. 303.12 provides in pertinent part as follows:

Within twenty days after such public hearing the board [of county commissioners] shall either adopt or deny the recommendation of the zoning commission or adopt some modification thereof. In the event the board denies or modifies the recommendation of the county rural zoning commission the unanimous vote of the board shall be required.

In Deserisy the court rejected the argument that R.C. 303.12 must be construed to mean that the failure of the board of county commissioners either to adopt or to deny the recommendation of the zoning commission within twenty days after the public hearing constitutes approval of such recommendation, stating:

The Legislature of this state has provided, inter alia, in Section 711.09, Revised Code, that unless the planning commission, platting commissioner or legislative authority of a village approves or disapproves a plat within thirty days of its submission, it is deemed approved. In Section 709.04, the Legislature has said that:

". . . If the legislative authority fails to pass an ordinance or resolution accepting the application for annexation within a period of one hundred twenty days after the transcript is laid before it by the auditor or clerk, the application for annexation shall be deemed rejected by the legislative authority, unless it has been prevented from acting by a temporary restraining order, a temporary injunction, or some other order of a court." (Emphasis added.)

The omission of a provision in Section 303.12, Revised Code, that failure by the Board of County Commissioners to act shall constitute approval or disapproval can only be interpreted to mean that the Legislature intended to establish only a time within which the board must act or be compelled to act by a writ of mandamus. It is beyond argument that mandamus will lie, not to control official discretion, but to compel the exercise thereof.

. . . .  
We hold that the failure of the Board of County Commissioners to act within twenty days of its hearing on plaintiffs' application for change of zone did not constitute approval of the favorable recommendations of the Rural Zoning Commission but merely rendered such board amenable to mandamus.

16 Ohio App. 2d at 149-50, 242 N.E.2d at 671-72.

Since the twenty day language of R.C. 303.12 is identical to that of R.C. 519.12, the reasoning of the Deserisy court in construing R.C. 303.12 is applicable to the construction of R.C. 519.12. Under the Deserisy court's analysis, the omission of a provision in R.C. 519.12 with regard to the effect of the failure of a board of township trustees to adopt, deny or modify the recommendation of the township zoning commission within the twenty day period must be construed to mean that the twenty day period established in R.C. 519.12 is merely a time within which the board must act. If the board fails to take action within the twenty day statutory period, it may be compelled to act by a writ of mandamus; however, failure of the board of trustees to act within twenty days does not constitute approval of the zoning commission's recommendation. Compare R.C. 519.12 with R.C. 519.07 (approval of planning commission with respect to proposed zoning resolution "shall be conclusively presumed unless, within twenty days after receiving the proposed zoning resolution, it notifies the zoning commission to the contrary").

I note that, in your request letter you ask whether, notwithstanding my opinion, the board of township trustees should submit the issues raised under R.C. 519.12 to the county court of common pleas in the form of an action for declaratory judgment. I find that an answer to this question resides within the discretion of the board of township trustees and its legal advisor, the county prosecutor.

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

1. Where a three member board of township trustees considers an application for a zoning change pursuant to R.C. 519.12 and one of the members withdraws from consideration of the matter due to a conflict of interest, the unanimity requirement of R.C. 519.12 is satisfied if the two remaining trustees concur in their vote either to deny or to modify the recommendation of the township zoning commission.
2. Pursuant to R.C. 519.12, a board of township trustees shall adopt, deny, or modify the recommendation of the township zoning commission with regard to a proposed amendment or supplement to a township zoning resolution within twenty days after a public hearing on the proposed amendment or supplement. If the board fails to take action within the twenty day statutory period, it may be compelled to act by a writ of mandamus; however, failure of the board of township trustees to act within twenty days does not constitute approval of the zoning commission's recommendation.