BZA: Powers and Duties-Variance Authority and Those Other Pesky Applications

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A. *Jurisdiction – Local Zoning Board of Appeals/Adjustment ("BZA") or Planning Commission.*

1. *Role of Building Inspector or Code Enforcement Officer.*

a. Judge, Jury, Police Officer, Resource Person.

b. Ohio Rev. Code § 303.16. (County Zoning Inspector).

c. Ohio Rev. Code § 519.16. (Township Zoning Inspector).

2. *3 Types of Applications to The BZA: Variances, Appeals of Chief Zoning Official's Code Interpretations, and Special Permits (E.g., Adjustments to Nonconforming Uses, Conditional Uses).*

a. Appeals of code interpretations by code enforcement officers and variance requests to local planning and zoning boards are available to obtain relief from denials of permits to construct or expand nonconforming structures or to build upon nonconforming lots, to establish uses not permitted in the particular zoning district, including an appeal to establish the right to a prior nonconforming use. "Pleading" in the alternative to BZA may be helpful.

b. Differences between Variances and Prior Nonconforming Uses.

i. A variance is a permanent and officially-approved deviation from the governmental unit's zoning regulations. A variance runs with the land from successor-in-interest to successor-in-interest. It is not a personal license. *E.g., State, ex rel. Casale v. McLean* (1991), 58 Ohio St.3d 163, and *Fox v. Johnson* (1971), 28 Ohio App.2d 175. Zoning variances may, however, expire upon either the terms of the zoning ordinance or resolution or by their own terms. *Scarnecchia v. Austintown Twp.* (Mahoning Cty.), 2005 Ohio App. LEXIS 4098.

ii. A prior nonconforming use is a use of property lawfully existing prior to enactment of a zoning regulation and maintained after the effective date of the regulation, even though the use does not comply with the zoning restrictions in the district in which it is located. Prior nonconforming uses may run with the land, but they may be discontinued or deemed abandoned. *See, e.g.*, Ohio Rev. Code §713.15 and 519.19.

iii. *Res judicata* effect of denial of variance upon request for prior nonconforming use status. *Grava v. Parkman Township* (1995), 73 Ohio St.3d 379. (A valid final judgment rendered on the merits by a BZA denying a variance request bars all subsequent actions based upon any claim -- i.e., claim of nonconforming use -- arising out of the transaction or occurrence that was the subject matter of the previous action.) Exception is made to this rule for changed circumstances between each proceeding, but the courts do not define what constitutes sufficient "changed circumstances". *See, e.g., Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260.

In *Davis v. Coventry Twp. Bd. of Zoning Appeals* (2/14/01), 2001 Ohio App. LEXIS 513, the court held that *res judicata* did not apply where a property owner who had previously been denied several variances to build a house, revised his plans and requested only one variance.

In *Captain Buffalo Foods Inc. vs. City of Cleveland* (10/8/09), 2009 Ohio App. LEXIS 4524, the court found that a loft addition not requiring a height variance that was proposed after two variances for a second and third floor addition were rejected was a substantial departure from the previous application and that *res judicata* did not apply.

In *The Pataskala Banking Company v. Etna Township,* 2009 Ohio 3108 (Licking Cty.), the

Court noted that *res judicata* is considered de novo on appeal as a question of law and the court must decide whether the parties have had an ample opportunity to argue the matters.

B. *"Use" Variances vs. "Area/Size" Variances: "Hardship" vs. "Practical Difficulties" Standard.*

1. "Use" Variances.

A use variance is granted only upon the finding of an "unnecessary hardship" which generally means that the property owner cannot make any economically viable use of the property under the current zoning restrictions. A "use" variance is an application for a deviation from the permitted uses in the subject zoning district. "Use" means exactly what it says, a use of the property as opposed to zoning restrictions on setbacks, building, height, etc.

The standards for determining a use variance are generally:

a. the variance requested stems from a condition which is unique to the property at issue and not ordinarily found in the same zone or district;

b. the hardship condition is not created by actions of the applicant; (One court has held that if the applicant purchases the property with knowledge of the use restriction, he is not entitled to a use variance. *Moulagiannis v. Cleveland BOZA* (Cuyahoga Cty.), 2005 App. LEXIS 2100;

c. the granting of the variance will not adversely affect the rights of adjacent owners;

d. the granting of the variance will not adversely affect the public health, safety or general welfare;

e. the variance will be consistent with the general spirit and intent of the zoning code;

f. the variance sought is the minimum which will afford relief to the applicant; and

g. there is no other economically viable use which is permitted in the zoning district. (Query whether *Goldberg Cos. v. Richmond Heights*, (1998), 81 Ohio St.3d 207, renders this standard invalid? The answer should be "no". *Goldberg* involved the test to determine the constitutionality of a zoning regulation via a declaratory judgment action). *See, Brown v. Painesville Twp. BZA* (Lake Cty.), 2005 Ohio App. LEXIS 5062.

There is not any one case in Ohio which sets forth these standards for a "use" variance. *See, Adelman Real Estate Co. v. Gabanic* (Nov. 15, 1991), Geauga App. No. 90-G-1607, unreported, for a good discussion of this problem. This list of standards is taken from legal tests set forth in several use variance cases in Ohio, as well as from Anderson, *Am. Law of Zoning* 3d (1986). *See, e.g., On Point Professional Body Art v. Cleveland* (Cuyahoga Cty.), 2006 Ohio App. LEXIS 5725; *Consolidated Management, Inc. v. Cleveland* (1983), 6 Ohio St.3d 238; *Fox v. Johnson* (1971), 28 Ohio App.2d 175; *In re Appeal of Clements* (1965), 2 Ohio App.2d 201; *FRC of Kamms Corner, Inc. v. Cleveland* (1984), 14 Ohio App.3d 372; *Currie-Hall Investment Co. v. Hudson Twp.* (Sept. 27, 1995), Summit App. No. 17016, unreported; *Phillips v. City of Westlake*, 2009 Ohio 2489 (Cuyahoga Cty.).

2. "Area/Size" Variances.

a. Variances for area, size and setback requirements are judged by a less stringent legal standard than for use variances -- i.e., "practical difficulty" in meeting code requirements is all that is required to be shown by a property owner, not an "unnecessary hardship". *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30; *Perez v. Cleveland Bd. of Zoning Appeals* (1/13/00), 2000 Ohio App. LEXIS 80 ("unreasonable hardship" standard cannot be applied for an "area" variance). An owner's "preference" to proceed in a non-code conforming manner is not a "practical difficulty." *Cameron v. Pataskala* (Licking Cty.), 2005 Ohio App. LEXIS 3329.

b. The *factors* to be considered and weighed to determine whether a property owner has encountered practical difficulties are (but are not limited to) the following:

i. whether the property in question will yield a

reasonable return or whether there can be any beneficial use of the property without the variance;

ii. whether the variance is substantial;

iii. whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer substantial detriment as a result of the variance;

iv. whether the variance would adversely affect the delivery of governmental services (*e.g.*, water, sewer, garbage);

v. whether the property owner purchased the property with knowledge of the zoning restrictions;

vi. whether the property owner's predicament feasibly can be obviated through some method other than a variance; and

vii. whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance.

Duncan v. Middlefield (1986), 23 Ohio St.3d 83.

The *Duncan* opinion does not limit the analysis to only these seven factors. For example, municipalities have added such factors as: whether the property has unique physical characteristics - - e.g., exceptional narrowness of the lot or irregular terrain; or whether the practical difficulty exists solely through the actions of the property owner. An appellate court in Ohio has, however, used the seven *Duncan* factors to uphold a zoning board's decision in spite of other standards in the municipal code that were different. *Budget Car Sales v. Village of Groveport BZA* (2002), Franklin Cty. App., No. 01AP-932, *unreported*. Also, these are only "factors" for establishing the right to an area or size variance and an applicant need not meet each and every factor. Conversely, the board hearing the case need not make factual findings as to each "factor" to support a decision to grant or deny a variance. *Carrolls*

Corp. v. BZA, City of Willoughby (Lake Cty.), 2006 Ohio App. LEXIS 3379.

The last *Duncan* factor -- whether "substantial justice" would be done by granting a variance -- has been used by a court to justify granting a variance to a property owner where the city officials had erroneously told the owner that variances would not be needed for his development plan prior to his purchase of the property, only to discover later that a substantial variance was needed. The zoning board had denied the variance. The court's ruling circumvented the general rule that the doctrine of "estoppel" does not operate against the government. *Winfield v. Painesville* (Lake Cty.), 2005, Ohio App. LEXIS 3447.

The *Duncan* factors may likely be applicable to township zoning board rulings on variances in spite of the "unnecessary hardship" standard for variances, in general, as set forth in Ohio Rev. Code § 519.14. *See, Butz v. Twp. of Danbury*, (Ottawa Cty.) 2010 Ohio 179; *Baker v. Mad River Twp. Bd. of Zoning App* (Champaign Cty.) 2009 Ohio 3121; *DiSanto Enterprises, Inc. v. Olmsted Twp.* (Cuyahoga), 2008 Ohio App. LEXIS 5818; *Stace Development, Inc. v. Wellington Twp. Bd. Of Zoning App.* (Lorain Cty.), 2005 Ohio App. LEXIS 4331; *Welling vs. Perry Twp. Bd. of Zoning App.* (Stark Cty.), 2004 Ohio App. LEXIS 1550; *Hebeler v. Colerain Twp. Bd. of Zoning Appeals* (Hamilton 1997), 116 Ohio App.3d 182; *Zangara v. Chester Twp. Trustees* (Geauga Cty. 1991), 77 Ohio App. 3d. 56, motion to certify over'd. (1992), 62 Ohio St.3d 1508; *In re: Liverpool Twp. Zoning Bd. of Appeals* (Nov. 19, 1997), Medina App. C.A. No. 2657-M, *unreported*; *Peterson v. Washington Ct. Athletic Club* (Medina Cty. 1986), 28 Ohio App.3d 90; *Carroll v. Bath Twp. Bd. of Zoning Appeals* (Nov. 1, 1995), Greene App. No. 94 CA 115, *unreported*. *Rydbom v. Palmyra Twp. Bd. of Zoning App.* (June 26, 1998), Portage App. No. 97-P-0086, *unreported*; *Stickleman v. Bd. of Zoning App., Harrison Twp*. (Darke Cty.), 2002 Ohio App. LEXIS 2900.

But see, Dsuban v. Union Twp. Bd. of Zoning Appeals (12/18/00), 2000 Ohio App. LEXIS 5904, where the Butler

County Appellate Court held that the zoning board's denial of a variance to place barbed wire atop a fence was reversed and remanded because the township's zoning resolution requiring the showing of "practical difficulties" for the granting of a variance violates the authority given to townships in the Revised Code to grant variances only upon an "unnecessary hardship". *See also, Briggs v. Dinsmore Twp. BZA* (Shelby Cty.), 2005 Ohio App. LEXIS 2886, and *In the matter of the Appeal of: American Outdoor Advertising, LLC from the Decision of Jerome Township* (2003), Union Cty. App., No. 14-02-27, *unreported*. (These courts held the "unnecessary" hardship standard must be applied to requests for either area or use variances because of the requirement in the language of Ohio Rev. Code § 519.14.) *See also North Fork Properties v. Bath Township* (Summit Cty.), 2004 Ohio App. LEXIS 104 (citing to *Dsuban* in a case holding that a township zoning resolution prohibiting use variances is invalid because it is more stringent than 519.14). This split of authority in Ohio will likely be settled ultimately by the Ohio Supreme Court.

3. Reasonable conditions may be placed by the board upon the grant of a variance. *See Mechanics v. Sloe* (Geauga Cty.), 2008 Ohio App. LEXIS 1029.

4. *Advice to both zoning officials and property owners*: Develop a thorough and accurate record of proceedings before the local zoning board through: appropriate legal representation, attendance of a court reporter or stenographer, testimony under oath, sworn affidavits, cross-examine witnesses, proffer of evidence into the record if admission of evidence into the record is denied by board, use of board's subpoena power. (See consequences in Ohio Rev. Code § 2506.03 and 2506.04).

C. *Rehearings by the BZA and Judicial Review of Decision of the BZA*

Administrative - related appeals to court through Ohio Rev. Code § 2506.01, *et seq.*

1. 30 days to appeal final decision of local boards in Ohio Rev. Code §§ 2505.03 and 2505.04; Ohio App. Rule 4(A). Otherwise, administrative *res judicata* may apply. *Grava, supra*; *see Set*

Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals (1987), 31 Ohio St.3d 260. (Exception for changed circumstances).

2. Notice of appeal and praecipe must be filed with the local administrative board within 30 days of the final decision. Ohio Rev. Code §§2505.04 and 2506.02; *All Erection and Crane Rental v. Twp. of Newbury* (Geauga Cty.), 2009 Ohio 6705; *Guysinger v. Chillicothe Bd. of Zoning Appeals* (Ross Cty. 1990), 66 Ohio App.3d 353; *Hanson v. Shaker Heights* (Cuy. Cty. 2003), 152 Ohio App.3d 1 (the appellant's service of a copy of a notice of appeal which was filed with the court upon a local board is sufficient to perfect the appeal); *Voss v. Franklin Cty. BZA* (Franklin), 2008 Ohio App. LEXIS 5772 and *Jura v. Hudson* (Summit Cty.) 2004 Ohio App. LEXIS 6269 (service of the notice of appeal with a summons by the court upon the administrative body is not sufficient to perfect the appeal); *Hagan v. Marlboro Twp. Bd. of Zoning Appeals* (Jan. 29, 1996), Stark App. No. 95 CA 0086, *unreported* (Notice of appeal need not be filed with Court within 30 days).

3. A local zoning board" has no jurisdiction to rehear or modify its decision after the 30-day appeal time has expired, unless there exist changed circumstances of a material and relevant nature. *E.g., State, ex rel. Borsuk v. Cleveland* (1972), 28 Ohio St.2d 224 and *Set Products, Inc., supra*; *Baker v. Mad River Twp. Bd. of Zoning App.* (Champaign Cty.) 2009 Ohio 3121.

4. The former supersedeas bond requirement of Ohio Rev. Code § 2505.06 in appeals upon questions of law and fact has been eliminated by amendment to that Section.

5. If a stay of construction pursuant to a variance is not obtained from the court, and construction commences, the appeal of any grant of a variance may be rendered moot. *Gajewski v. BZA* (Cuyahoga Cty.), 2008 Ohio App. LEXIS 4446; *Smola v. Legeza* (Ashtabula Cty.), 2005 Ohio App. LEXIS 6353; *Baker v. Mad River Twp. Bd. of Zoning App.* (Champaign Cty.), 2009 Ohio 3121.

6. Appellant's right to present additional evidence to the court beyond evidence in the administrative board's record is governed by the strict application of standards in Ohio Rev. Code §2506.03 -- i.e., one of the following applies:

a. the transcript does not contain a report of all evidence admitted or proffered by the appellant;

b. The appellant was not permitted to appear and be heard in person, or by his attorney, in opposition to the final order, adjudication, or decision appealed from, and to do any of the following:

   i. present his position, arguments, and contentions;

   ii. offer and examine witnesses and present evidence in support;

   iii. cross-examine witnesses purporting to refute his position, arguments, and contentions;

   iv. offer evidence to refute evidence and testimony offered in opposition to his position, arguments, and contentions;

   v. proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.

c. the testimony adduced was not given under oath;

d. the appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body;

e. the officer or body failed to file with the transcript, conclusions of fact supporting the final order, adjudication, or decision appealed from. (A failure of the board to make conclusions of fact or findings to support its decision may lead the court to reverse the decision remand the case to the board for findings. *Kubbs v. BZA of City of Pataskala* (10/19/07), Licking Cty., 2007 Ohio App. LEXIS 5120.) A board's or commission's detailed minutes expressing individual board members' opinions regarding the case may suffice as "conclusions of fact" under R.C. 2506.03. *See Ziss v. City of Independence* (Cuyahoga), 2008 Ohio App.

LEXIS 5700.

An appellate court held that the local government has the right to move to present additional evidence under Ohio Rev. Code § 2506.03. *E.g., Route 20 Bowling Alley, Inc. v. City of Mentor* (Dec. 26, 1995), Lake App. No. 94-L-141, *unreported*.

7. Neighboring property owners have standing as parties in Ohio Rev. Code § 2506 appeals if they appeared at the administrative hearing and testified in opposition to an application. *Roper v. Bd. of Zoning Apps. of Richfield Twp.* (1962), 173 Ohio St. 168. *In Alihassan v. Alliance Bd. of Zoning Appeals* (12/18/00), 2000 Ohio App. LEXIS 6024, the Stark County Court of Appeals held that a neighboring owner may have standing to appeal under Ohio Rev. Code § 2506 where it did not appear before the local administrative board due to inadequate notice of the nature of the variance being requested. Injunctive relief is also available through Ohio Rev. Code § 713.13, but this remedy may be precluded if the person bringing the action under § 713.13 failed to appeal an administrative ruling pursuant to R.C. § 2506.01, *et seq. Murray Energy Corp. v. City of Pepper Pike* (Cuyahoga), 2008 Ohio App. LEXIS 2364. *See, Lofino's, Inc. v. City of Beavercreek* (Greene Cty.), 2009 Ohio 4404 (no standing despite extensive argument to City due to lack of showing of specific loss to property); *Guttentag v. Etna Twp. BZA* (Licking), 2008 Ohio App. LEXIS 2232 (no standing by NIMBY because he did not contest the zoning permit or own land contiguous to the subject property).

8. However, it has been consistently held by courts of appeals in Ohio that neither a nonprofit corporation nor an unincorporated association may pursuant a R.C. 2506 appeal because it is not "within that class of persons whose rights have been directly affected by the administrative decision." *See, Noe Bixby Road Neighbors v. Columbus City Council*, 150 Ohio App.3d 305 (November 26, 2002), 10th Appellate District; *Women of the Old West End, Inc., et al. v. City of Toledo*, (6th Appellate District, Lucas County), 1998 Ohio App. LEXIS 2394; *Brady Area Residents Association, et al. v. Franklin Township Zoning Board of Appeals, et al.* (11th Appellate District, Portage County), 1992 Ohio App.LEXIS 6216; *Northern Woods Civil Association, et al. v. City of Columbus Graphics Commission, et al.*, 31 Ohio App.3d 46 (1986, 10th Appellate District, Franklin County). This

statement assumes the nonprofit corporation is not an owner or lessee of property that may abut or be in the immediate vicinity of the subject property. This legal principle is based on R.C. Chapter 2506 expressly limiting the availability of an appeal thereunder to those whose rights, duties, privileges, benefits or legal relationships have been determined by the decision. *See, In re: Appeal of Bass Lake Community, Inc.* (1983), 5 Ohio St.3d 141, 144. The classic example of such groups not having standing to appeal are homeowners associations contesting a particular landowner's land use approval (and the group does not own contiguous property) and public interest groups contesting approvals by local administrative boards, even when a contiguous property owner may be a member of the group. *Robin's Trace Homowners' Assn. v. City of Green* (Summit Cty.), 2010 Ohio LEXIS App. 974 (association must show that its members have suffered actual injury).

9. A charter municipality may have standing to contest the decision of its own BZA only where its charter provides for such an appeal. *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24. Townships cannot appeal.

10. Common pleas court standard of review: if there exists a *"preponderance of substantial, reliable, and probative evidence on the whole record"* before the administrative board to support the local board's decision, it will be upheld. Ohio Rev. Code §2506.04; *Dudukovich v. Housing Authority* (1979), 58 Ohio St.2d 202. Board's decision accorded a presumption of validity. *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298.

    "Direct evidence" is required and not subjective and speculative comments or unsubstantiated public opinion. *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals* (1993), 66 Ohio St.3d 452; *Adelman Real Estate Co. v. Gabanic* (Geauga 1996), 109 Ohio App.3d 689. Oral arguments at hearings are not evidence upon which to base a board decision. *Kohrman v. Cincinnati Zoning Board* (Hamilton Cty. 2005), 165 Ohio App.3d 401.

11. If the local board's decision precludes any development of the property, constitutional claims may be raised by the property owner in a Ohio Rev. Code § 2506 appeal which must be tried de

novo by the court. *Bencin v. Bd. of Bldg. & Zoning App.* (Cuyahoga Cty.), 2009 Ohio 5570; *All Erection and Crane Rental v. Twp. of Newbury* (Geauga Cty.), 2009 Ohio 6705; *SMC, Inc. v. Laudi* (Cuyahoga 1975), 44 Ohio App.2d 325; *Brown v. Painesville Twp. BZA* (Lake Cty.), 2005 Ohio App. LEXIS 5062. See, *Haisley v. Mercu County Bd. of Zoning App.* (Mercer Cty.), 2007 Ohio App. LEXIS 5304 (Case remanded by appellate court to trial court to develop a record with burden on property owner to prove unconstitutionality of ordinance's application.)

12. A trial court or appellate court has the authority to remand a variance case back to the local board when there are procedural irregularities or a transcript of proceedings is not made by the local board. *See Schellhardt v. Mercer County BZA* (Mercer Cty.), 2008 Ohio App. LEXIS 1825.

D. *Alternatives to Variance Requests -- Zoning Changes/Amendments or Declaratory Judgment Actions.*

1. Zoning Changes/Amendments (Legislative Remedy).

Virtually all municipal zoning codes and/or charters provide a process for property owners to apply for an amendment of zoning regulations or to amend the zoning district applicable to their particular property. This process usually requires a referral of the proposed zoning change from the municipal legislative authority to the municipal planning commission for study, a public hearing and a recommendation back to the legislative authority. The process generally takes several months. *See also* Ohio Rev. Code § 303.12 (County Rural Zoning Amendments) and Ohio Rev. Code § 519.12 (Township Zoning Amendments).

All local zoning changes and amendments are subject to possible referendum election by petition of a certain number of the electors.

For a review of when the volume of requested variances may constitute a rezoning of property, *see Brady Area Residents Association v. Franklin Twp. Zoning Bd. of App.* (2003), Portage Cty. App., 2000-P-0059, unreported.

2. Declaratory Judgment.

The remedy for the failure of a proposed legislative zoning change

is a declaratory judgment action in court to declare the current zoning unconstitutional. Any procedural challenges to the enactment of zoning ordinances must be brought within two years. Ohio Rev. Code § 713.121 (Municipalities); Ohio Rev. Code § 303.122 (Counties); Ohio Rev. Code § 519.122 (Townships).

If the defendant-government authority raises it as an affirmative defense, plaintiff-property owner may need to exhaust administrative remedies -- e.g., a variance request -- prior to bringing a declaratory judgment action, except where: 1) the administrative remedy is not equally as serviceable as a declaratory judgment action or is unusually expensive or onerous, 2) seeking the remedy would constitute a vain act; or 3) if the administrative body does not have the authority to grant the relief requested. *Jones v. Chagrin Falls* (1997), 77 Ohio St. 3d 456; *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12; *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263; *Gates Mills Investment Co. v. Pepper Pike* (1975), 44 Ohio St.2d 73; *Standard Oil Co. v. Warrensville Heights* (1976), 48 Ohio App. 2d; *Accent Group, Inc. v. North Randall* (Cuyahoga Cty.), 2005 Ohio App. LEXIS 4857; *but see, Pengal v. Mentor-on-the-Lake* (Lake Cty.), 2005 Ohio App. LEXIS 4611.

E. *Ohio Sunshine Laws Applicability to the Quasi-Judicial Deliberations of the BZA*

1. Sunshine Laws Are Not Always Applicable to the Quasi-Judicial Deliberations of the BZA.

At least some of the Sunshine Laws under Ohio Rev. Code § 121.22 and § 149.43 may not applicable to quasi-judicial deliberations of the BZA. The full extent of these issues has not been completely decided by the courts but it is clear that the rules may have changed in the last 10 years.

The Ohio Open Meetings Law at Ohio Rev. Code § 121.22 requires all public meetings to be held in the open and that all deliberations occur in public unless per a statutory exception in executive session. However, a series of cases and an Ohio Attorney General Opinion have now confirmed that a BZA hearing on a variance is not governed by § 121.22. While a hearing is required and the hearing must be open to the public, this is per the statute governing the variance process (i.e., Ohio Rev. Code § 519.15),

not because of the Ohio Sunshine Laws. *Groff-Knight v. BZA*, (Delaware Co.) 2004 Ohio App. LEXIS 2856, *11 (discussing analogous conditional use permits under Ohio Rev. Code § 519.14(C)); *TBC Westlake, Inc. v. Hamilton County Board of Revision* (1998), 81 Ohio St. 3d 58); 2000 Ohio Op. Att'y Gen. No. 35.

The BZA as a quasi-judicial body requires privacy to evaluate and resolve disputes, i.e., the BZA can deliberate in private. *See TBC Westlake, Inc.*, 81 Ohio St. 3d at 62. The Ohio Supreme Court held in a Tax Board of Revision case that a quasi judicial body has the right, like a judicial body, to deliberate in private to allow it to contemplate the case free from litigant pressures, provides for open and candid discussions among the members of the board and its staff, and to allow the board to reach a sound decision. *Id.* The Court in *Groff-Knight* applied this ruling to a BZA in a conditional use case. Since a variance hearing is also a quasi-judicial matter, the court reasoned this ruling extends to variance hearings as well.

A separate issue from the ability to deliberate in private is what information from the private deliberations must be made public as a "public record" under Ohio Rev. Code § 149.43(A)(1). A privilege known as the "judicial mental process" allows for certain materials and thoughts to be excluded from the definition of a "public record," including a judge's trial notes. *TBC Westlake, Inc.*, 81 Ohio St. 3d at 62-64 (citing *State ex rel Thomas v. Ohio State Univ.* (1994), 71 Ohio St. 3d 245, 249; *State ex rel Steffen v. Kraft* (1993), 67 Ohio St. 3d 439, 440; *United States v. Morgan* (1941), 313 U.S. 409, 421).

The judicial mental process privilege is a state common law privilege that has been applied to BZA officers. *See e.g., Libis v. Akron BZA* (Summit Co. 1972), 33 Ohio App. 2d 94, 97 (stating "[a]n administrative officer, sitting in a quasi-judicial capacity and required to reach a conclusion based on evidence presented to him, cannot be called by either party to the proceedings and examined as to the mental process in arriving at such conclusion"). A report written by an attorney-examiner given to a quasi-judicial body (the Board of Tax Appeals, or "BTA") to assist in its decision making process was held to not be a public record under the judicial mental process privilege. *TBC Westlake, Inc.*, 81 Ohio St. 3d at 62-64. This raises the question of whether the staff report ordinarily

prepared by staff for the BZA is a public record. While many times these reports are shared with the applicant and interested parties, this is a question yet to be considered by the courts.

The public records law will still apply to at least part of the variance process. The information about the public notice at the very least will be public. Where the line stops and starts however, like with regard to the staff report, remains to be seen. However, it is assumed that if the local government staff takes an adversarial position in its staff report to the Board, the report should be a public record accessible to the adversarial party and to others.

The holding by the Ohio Supreme Court in *TBC* that a report prepared by an attorney-examiner to be used by the BTA in reaching its decision is not a public record leads to the question of whether a quasi- judicial body such as the BZA can deliberate with outside legal counsel in private. The attorney-examiner in *TBC* was a hearing officer that reported his findings to the BTA and it was his attorney-examiner's report that was disallowed as a public record for inspection by the opposing party. However, in *Groff-Knight* the court noted that the BZA had deliberated in private and returned to have a member make a detailed motion that the court noted had obviously been prepared with the help of legal counsel.

There is no real question that BZA variance hearings are quasi-judicial in nature. BZA decisions can be appealed under Ohio Rev. Code § 2506.01, which only provides for appeals from quasi-judicial proceedings. *State ex rel. Travelcenters of Am., Inc. v. Westfield Twp. Zoning Comm.* (1999), 87 Ohio St. 3d 161, 165. The BZA acts administratively and as a quasi-judicial body in reviewing use permit applications. *Groff-Knight v. BZA*, (Delaware Co.) 2004 Ohio App. LEXIS 2856, *11. The characteristics used to determine if the acts, i.e., proceedings, of an administrative agency are quasi-judicial include the requirements of notice, a hearing, the opportunity to introduce evidence, the right to appeal to a court, and the proceeding needs to determine a "justiciable dispute" between multiple parties requiring the exercise of discretion. *TBC Westlake, Inc.*, 81 Ohio St. 3d at 62; 2000 Ohio Op. Att'y Gen. No. 35 (applying the *TBC* decision to BZA decisions under Ohio Rev. Code § 519.14). The BZA meets all of the characteristics of a quasi-judicial body holding quasi-judicial proceedings.

F. *Typical Zoning Code/Resolution Pitfalls And Weaknesses*

1. Substantive Problems

a. Sign regulations (First Amendment implications)

i. Not content neutral, but rather based on the message of the sign, requiring a heightened scrutiny by the courts of the sign regulation.

ii. Preferences given to commercial signs over political/opinion-related signs;

iii. Durational limits on posting of political/opinion-related signs, either before or after an election or a particular event.

iv. Inadequate levels of political/opinion-related signage on private properties that do not permit an owner or resident to adequately express support of several candidates or causes.

v. Requiring a permit and/or fee for non-commercial, political/opinion-related signs. Can be seen as a "prior restraint" on First Amendment protected speech.

vi. Preferences given to local government signage of a non-safety or traffic-related purpose over private party signage.

vii. Sign regulations as to size, height, number, setbacks, and other locational requirements that are not based upon factual studies related to visibility, speed limits on community streets, aesthetics concerns for neighborhoods and districts, etc.

b. Variance Standards/Factors

Many codes/resolutions fail to make the distinction between "use" variances and variances for area and size regulations. The Ohio Supreme Court has clearly delineated between these types of variances and the standards that need to be applied when a zoning board adjudicates such variances. Use variances need to be adjudicated by zoning boards upon strict standards clearly delineated in the zoning code that constitute an "unnecessary hardship". With respect to area/size-type variances, municipalities (cities and villages) can clearly set forth in their codes the

seven factors set forth in the Ohio Supreme Court holding in *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, and any other factors the municipality deems appropriate. Townships in Ohio need to be very careful in the adoption of standards or factors for variances since they are governed by Ohio Revised Code Chapter 519. The only standards set forth in Chapter 519 (§519.14) is the "unnecessary hardship" for authority to grant any type of variance. However, several courts of appeals in Ohio, particularly in Northeastern Ohio, have authorized the use of the *Duncan* factors for area-type variances for township zoning boards of zoning appeals to use.

c. Zoning Codes/Resolutions that are in Conflict with the Comprehensive/Master Plan.

If a community has a comprehensive/master plan, its zoning regulations should comport with that plan or at least not be in conflict with it. As demonstrated later, a community in Ohio need not have a comprehensive/master plan in order to adopt zoning regulations. However, if it has such a plan, it should only deviate from that plan for clearly articulated and accepted land use planning reasons.

d. Not Treating Religious Land Uses the Same as Other Types of Places of Assembly such as Schools, Theatres, Party Centers, etc.

The federal "Religious Land Use and Institutionalized Persons Act" ("RLUIPA"), 42 USC Section 2000(c)(c) *et seq.*, codifies the protections embodied in the Free Exercise Clause of the First Amendment of the U.S. Constitution. Many codes/resolutions do not permit places of religious assembly to be located in zoning districts where other places of assembly are permitted to be located or under the same terms and conditions as those other places of assembly. This will lead to a violation of the RLUIPA.

2. Procedural Problems

a. Failure of a Code/Resolution to Specify What Constitutes a Final Decision of a Local Board or Commission in an Administrative Hearing Matter.

This failure can be a problem because a local government will want to have a very specific point in time to begin an aggrieved party's time limit to appeal to court from such a decision. Specifying the effective

date of a final decision also clearly delineates the time frame within which a local zoning board or commission may reconsider, rehear or modify its decision prior to any court appeal time running or an appeal being filed to court.

b. Failure of the Board of Commission to Support its Decision with Conclusions of Fact.

A failure of the Board to make conclusions of fact supporting its final decision can lead to a trial before the court upon appeal and may lead to the court reversing the final decision and remanding it back to the Board or Commission for such conclusions of fact.

c. Failure to Define Who has Standing to Oppose the Granting of a Variance or Other Land Use Application for Purposes of Internal Appeals to a Higher Board or Entity Within the Local Government or for Standing to Appeal or to be a Party in a Court Appeal.

Generally under Ohio law, contiguous property owners or tenants have such standing. An argument could be made that other neighboring property owners/tenants who may not be contiguous to the subject property have standing.

d. Failure to Set Forth in your Code/Resolution a Process for Remedying Possible Takings Claims.

The case law surrounding taking claims under the Federal Constitution, clearly state that a property owner alleging a takings by the regulatory action of a local government must pursue any available remedies under local or state law prior to bringing such a federal takings claim. It is helpful to have in your code/resolution procedure for hearing alleged taking claims in order to handle such claims at a municipal/township level prior to a property owner going to court. This can be done through use variance provisions and through specific procedures and remedies for complaints of a taking by regulatory action.

e. Time Limitations on Conditional Uses.

Many municipal codes and township resolutions have time limits on conditional uses and require a user to periodically have a conditional use permit renewed. There should be no reason for such a provision in a code/resolution since the local government is always able to enforce the

conditions related to conditional uses. Furthermore, why would any investor in property or a business wish to do business in your community if they are beholding to a local board on a periodic basis to have the right to continue their business renewed.

Board of Zoning Appeals
Area/Size Variance Worksheet

Application for property located at: ____

Applicant: ____

After reviewing the application, the hearing of evidence under oath, reviewing all documentary submissions of interested parties, and by taking into consideration the personal knowledge of the property in question, the Board of Zoning Appeals finds and concludes:

1. The property in question [will/will not] yield a reasonable return and there [can/cannot] be a beneficial use of the property without the variance because
____
____
____.

2. The variance is [substantial/insubstantial] because ____
____
____
____
____.

3. The essential character of the neighborhood [would/would not] be substantially altered or adjoining properties [would/would not] suffer a substantial detriment as a result of the variance because
____
____
____.

4. The variance [would/would not] adversely affect the delivery of governmental services, (*e.g.* water, sewer, garbage).

5. The applicant purchased the property [with/without] knowledge of the zoning restriction.

6. The applicant's predicament feasibly [can/cannot] be resolved through some method other than a variance.

7. The spirit and intent behind the zoning requirement [would/would not] be observed and substantial justice [done/not done] by granting the variance because
____
____
____.

For all of the above reasons, I move that the variance be [granted/denied] (granted with the following conditions):
____
____.