

OPEN MEETINGS ADVISORY OPINION NO. 2008-09

Issued On August 7, 2008 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The West Virginia Manufactured Housing Construction and Safety Standards Board (hereinafter "the Board") asks for guidance concerning several questions regarding the meaning and application of the Open Meetings Act: (1) May the staff of the Division of Labor provide a packet of written information regarding matters to be addressed at a meeting to the Board Members in advance of a meeting? (2) Must this same information be provided to the public in advance of the meeting? (3) If the Board accepts an invitation to meet informally with the Board of Directors of the West Virginia Housing Institute, to what extent may Board Members discuss matters that will require official action by the Board at some future time? (4) What are the guidelines for conducting a work session? (5) Are work sessions subject to the requirements of the Act? (6) Are minutes required for a work session? (7) Is there a requirement to record work sessions?

FACTS RELIED UPON BY THE COMMITTEE

The Board consists of six members and the Commissioner of the Division of Labor who serves as the Board's Chair. The Board was established by W. Va. Code § 21-9-1 to serve as the state administrative agency responsible for the administration and enforcement of federal standards related to manufactured housing.

The Board's responsibilities include acting on applications for licensure of manufactured housing manufacturers, dealers and contractors, responding to consumer complaints, taking disciplinary action against licensees and individuals acting in violation of statutory mandates, inspecting the installation of manufactured homes and administering the State Manufactured Housing Recovery Fund. The day-to-day operations of the Board, including inspections and investigations, are carried out by a staff employed by the Division of Labor.

The Board meets four to six times annually, and may hold additional telephonic meetings as necessary. Prior to each meeting, the Division of Labor staff compiles a packet of information regarding each matter appearing on the meeting agenda for Board action. This packet is provided in advance of the meeting to each Board Member, providing an opportunity to review all of the material. The packet generally includes, but is not limited to, such items as the meeting agenda, minutes from a prior meeting, applications for licensure, consumer complaints, inspection and investigation reports, photographs, notices of violations, cease and desist orders, licensee and non-licensee responses and the prior disciplinary history of a licensee, if any. The packet may also include recommended decisions submitted by a Hearing Examiner after hearings conducted pursuant to the Administrative Procedures Act.

Some of the information contained in these packets includes confidential or proprietary data. For example, licensure applications will include specific biographical information, the identity of the applicant's bank, bank account numbers, the amount of the applicant's line of credit or other proof of financial viability, the applicant's state and federal tax identification numbers, the name of the applicant's liability insurance carrier and a copy of the applicant's declaration page. Further, recommended decisions and other proposed

actions arising out of disciplinary matters are proposed actions, and may or may not be adopted by the Board.

The Board has been invited to meet with the Board of Directors of the West Virginia Housing Institute (hereinafter "the Institute"), a trade association which represents the state's manufactured housing industry including many, but not all, of the Board's licensees.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2, *Definitions*, provides in pertinent part:

(4) "Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;

* * *

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

W. Va. Code § 6-9A-3 provides in pertinent part:

Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

W. Va. Code § 6-9A-5, *Minutes*, provides as follows:

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

- (1) The date, time and place of the meeting;
- (2) The name of each member of the governing body present and absent;

- (3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and
- (4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

W. Va. Code § 6-9A-9, *Broadcasting or recording meetings*, provides:

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of the equipment may not be declared to constitute undue interference: *Provided*, That if the public agency, in good faith, determines that the size of the meeting room is such that all members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it.

Finally, W. Va. Code § 6-9A-3 provides that, except for certain specific exceptions, "all meetings of any governing body shall be open to the public."

ADVISORY OPINION

The seven questions raised by the Board are answered as follows:

(1) May the staff of the Division of Labor provide a packet of written information regarding matters to be addressed at a meeting to the Board Members in advance of a meeting?

There is no provision in the Open Meetings Act which restricts a staff which provides administrative and technical support to a governing body from providing the members with written material intended to facilitate the process of conducting an open public meeting. Documentation, including but not limited to, proposed action items, supporting documents, and staff recommendations and guidance, may be included in packets of written material provided to each Board Member in advance of a meeting. The material may be mailed, hand-delivered, picked up from the agency's office by a Board Member or his or her authorized representative, or transmitted via electronic mail.

(2) Must this same information be provided to the public in advance of the meeting?

In accordance with the Open Meetings Act, a meeting agenda should be made available to the public and the media a reasonable time in advance of any regular or special meeting, or work session. Further, in accordance with W. Va. Code § 6-9A-5, copies of draft minutes for any previous regular or special meeting or work session should also be made available to the public and the media upon request. This Committee has previously determined that a governing body of a public agency may comply with the minimum requirements of the Act by making its meeting agenda available at least three business days in advance of a regular meeting and two business days in advance of a special meeting. For purposes of calculating this notice period, business days do not include Saturdays, Sundays, legal holidays or the day of the meeting.

There is no provision in the Open Meetings Act which controls whether other documents included in a pre-meeting packet provided to members of a governing body of a public agency must be released to the public. Generally, this issue is controlled by the State's Freedom of Information law, the agency's enabling legislation and applicable privacy laws. Neither this Committee nor the full Ethics Commission has authority to provide definitive guidance on the meaning and application of these other laws. The agency may wish to seek guidance on this issue from another authority, such as the State's Attorney General.

(3) If the Board accepts an invitation to meet informally with the Board of Directors of the West Virginia Housing Institute, to what extent may Board Members discuss matters that will require official action by the Board at some future time?

The definition of "meeting" in the Act explicitly permits "general discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action." Therefore, the Act does not prohibit a gathering in response to an invitation from the West Virginia Housing Institute where a quorum of the Board is present, so long as the Board Members do not engage in discussion which involves deliberating toward a decision on a matter requiring official Board action.

The Institute may make a presentation to the Board concerning matters of interest. Board Members may ask questions of the presenters but should refrain from discussion among themselves on any matters requiring official action. Nonetheless, Board Members may freely discuss logistical matters, such as what items need to be included on the meeting agenda for a future meeting, what data or documentation needs to be provided in advance of the meeting, and what persons or organizations should be invited to make presentations or otherwise provide input at a future meeting.

(4) What are the guidelines for conducting a work session?

Ordinarily, a "work session" involves a meeting where a quorum of a governing body is present and matters requiring official action by the governing body may be discussed and considered, but no votes are taken or decisions made.

(5) Are work sessions subject to the requirements of the Act?

Work sessions where a quorum of a governing body is present, and matters requiring official action by the governing body are discussed, are meetings subject to the requirements of the Open Meetings Act. Therefore, notice should be provided of the date,

time, place and agenda of a work session in the same manner as any regular or special meeting of the Board, including publication of notice in the State Register at least five calendar days in advance of the work session. Moreover, any such work session constitutes an open meeting where the public and the media should be able to hear and observe the discussions which take place, subject to the same executive session exceptions that apply in a formal meeting. Should the Board elect to meet with the Institute during such a work session, the Board Members may freely engage in discussion regarding any matters included on the work session agenda.

(6) Are minutes required for a work session?

The Act requires that minutes be prepared for each meeting. Because a work session ordinarily involves a meeting, minutes are required. If the work session is followed by a formal meeting, the minutes of the work session may be incorporated into the minutes of the subsequent meeting as a single document.

(7) Is there a requirement to record work sessions?

There is no requirement in the Open Meetings Act that a governing body record any portion of an open meeting. However, this Committee previously recognized in Open Meetings Advisory Opinions 2001-07 and 2005-08 that the Act allows the media and any member of the public to use a tape recorder, video camera, or other similar device to record the open portion of a public meeting, subject to reasonable limitations on placement set forth in section 9 of the Act. Because a work session ordinarily involves a meeting of a governing body of a public agency, these same rules apply to work sessions. The Board may record the work session if it wishes, but there is no requirement in the Open Meetings Act to do so.

This advisory opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1, *et seq.*, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6-9A-11, a governing body or member thereof that acts in good faith reliance on this advisory opinion has an absolute defense to any civil suit or criminal prosecution for any action taken based upon this opinion, so long as the underlying facts and circumstances surrounding the action are the same or substantially the same as those being addressed in this opinion, unless and until it is amended or revoked.


James E. Shepherd II, Chairman