

OPEN MEETINGS ADVISORY OPINION NO. 2011-06

Issued On October 6, 2011 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

An attorney on behalf of the Hardy County Rural Development Authority asks whether the Open Meetings Act prohibits a quorum of county commissioners from serving on the Development Authority board.

FACTS RELIED UPON BY THE COMMITTEE

The West Virginia Code authorizes county commissions to create development authorities. W. Va. Code § 7-12-1. These authorities are public agencies. The management of the authorities is vested in a board consisting of at least twelve persons, but not more than twenty-one. Although the code specifically states that board members shall receive no compensation, they are entitled to expense reimbursement.

The statute requires county commissions to appoint the development authority board members. The statute further requires the county commission to appoint a member “to represent the county commission on the board”. W. Va. Code § 7-12-3.

The Hardy County Rural Development Authority has two County Commissioners on its board. One was appointed before his election to the County Commission as a representative of the business community. After becoming an elected County Commissioner, he remained on the Authority Board. Another County Commissioner also serves on the Authority as the County Commission’s designated representative. There are three County Commissioners in Hardy County; hence, a quorum of County Commissioners serves on the Rural Development Authority.

The Requester states that, to the best of his knowledge, the Hardy County Commissioners on the Development Authority board do not discuss county commission business during Development Authority meetings nor are cross-over issues voted upon. Moreover, the Requester states that the County Commissioners who serve on the Development Authority Board realize they may not use the Authority meetings as a forum to deliberate and decide issues which may come before the County Commission. Nonetheless, there are discussions of mutual interest to the Development Authority and the County Commission. “The purposes for which the authority is created are to promote, develop and advance the business prosperity and economic welfare of the municipality or county for which it is created....” W. Va. Code § 7-12-2. Further, the Authority has a direct interest in County Commission’s adoption of a comprehensive plan. See W. Va. Code § 8A-3-1(a) (“The general purpose of a comprehensive plan is

to guide a governing body to accomplish a coordinated and compatible development of land and improvements within its territorial jurisdiction, in accordance with present and future needs and resources.”)

The County Commission regularly makes general appropriations to the Development Authority and otherwise supports the Authority’s mission.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(3) defines “governing body” in pertinent part as “the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members. . . .”

W. Va. Code § 6-9A-2(4) defines “meeting” as:

[T]he 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:

* * *

(D) General discussions among members of a governing body on issues of interest to the public when held in 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.

W. Va. Code § 6-9A-2(5) defines “official action” as “action which is taken by virtue of power granted by law, ordinance, policy, rule or by virtue of the office held.”

W. Va. Code § 6-9A-2(7) defines “quorum” as “the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.”

ADVISORY OPINION

The Open Meetings Committee has never had the opportunity to address the specific question presented, although it considered a related question in Open Meetings Advisory Opinion 2001-08. There, a County Commission asked whether a quorum of Commissioners could meet with municipal officials to encourage their participation in a project that the County Commission had already voted to support. The Committee ruled

that a “gathering of Commissioners for the purpose of presenting their position to officials of a municipality in their county, or advocating their position before a state or regional agency, regarding a matter which they have already considered and acted upon, would not be a meeting of the County Commission subject to the Act.” The Committee cautioned, by implication, that the municipality with which the Commissioners were meeting had a duty to notice the meeting at which the public officials were making their presentation.¹

Here, a quorum of County Commissioners serves on the board of another public body that meets regularly. The purpose of a development authority is set forth in statute:

The purposes for which the authority is created are to promote, develop and advance the business prosperity and economic welfare of the municipality or county for which it is created, its citizens and its industrial complex; to encourage and assist through loans, investments or other business transactions in the locating of new business and industry within the municipality or county and to rehabilitate and assist existing businesses and industries therein; to stimulate and promote the expansion of all kinds of business and industrial activity which will tend to advance business and industrial development and maintain the economic stability of the municipality or county, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of the county; to cooperate and act in conjunction with other organizations, federal, state or local, in the promotion and advancement of industrial, commercial, agricultural, and recreational developments within the municipality or county; and to furnish money and credit, land and industrial sites, technical assistance and such other aid as may be deemed requisite to approved and deserving applicants for the promotion, development and conduct of all kinds of business activity within the municipality or county.

W. Va. Code § 7-12-2.

Clearly the County Commission has a vested interest in the success of the Authority. Indeed, the Authority’s interests **are** the County’s interests. For this reason, the Legislature deemed that not only are county commissions required to appoint the development authority board members, the statute further requires the county commission to appoint a member “to represent the county commission on the board”.
W. Va. Code § 7-12-3.

¹ While the opinion did not discuss this particular issue in detail, presumably the Committee was cautioning the County Commissioners that if they were meeting with a quorum of the City Council or a quorum of one of its committees, then the City would have a duty to notice its meetings.

The County Commission demonstrates its support through funding, as well as through promoting the Authority's projects. When requested, it lends its support to the Authority's grant and loan applications. The County Commission also considers the Authority's position when adopting the mandatory comprehensive plan for the county.

It is hard to envision a scenario where issues concerning the County Commission are not discussed at Authority meetings. Further, given the Authority's reliance on the County Commission's support, it is inevitable that the Authority will seek input from the members of the County Commission who sit on its Board regarding future or proposed action of the County Commission.

As noted above, the term "meeting" does not include:

(D) General discussions among members of a governing body on issues of interest to the public when held in 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.

W. Va. Code § 6-9A-2(4)(D).

In Open Meetings advisory Opinion 2008-09, a State Board was invited to an informal meeting with another State Board and asked: "[T]o what extent may Board Members discuss matters that will require official action by the Board at some future time?" This Committee ruled that a quorum of Board Members could meet with the other Board so long as they did not "engage in discussion which involves deliberating toward a decision on a matter requiring official Board action." Board Members were also permitted to ask questions of the other Board, but were expressly directed to "refrain from discussion among themselves on any matters requiring official action".²

The Authority's meetings are subject to the Open Meetings Act. As a result, it would be disingenuous to characterize the verbal participation of the two County Commissioners at an Authority meeting as an exception to the Open Meeting Act's definition of meeting. The input of the two County Commissioners at an Authority meeting does not constitute "general discussion". Further, it cannot be said that an Authority meeting held in compliance with the Open Meetings Act is a "planned or unplanned social, educational, training, informal, ceremonial or similar setting". Additionally, public business **is** discussed with the clear intention for the discussion to lead to official action at some time. Thus, the two County Commissioners' discussion of public business at an Authority meeting is **not** exempt from the Act's definition of meeting.

² In Open Meetings Advisory Opinion 2011-03, this Committee clarified that members of governing bodies should refrain from discussing matters that require official action at that particular meeting, or at some other meeting in the future.

In Open Meetings Advisory Opinion 2011-02, this Committee held that a quorum of a County Commission could not attend a staff meeting, stating: “The Open Meetings Act requires that official action be taken at a properly noticed public meeting. This same rule of law applies to deliberations amongst a quorum of a governing body.”

Since the Authority is subject to the Open Meetings Act, there is room for argument that there is transparency in this process. Citizens have the opportunity to attend Authority meetings and observe the actions of the public body, including the actions and comments of the County Commissioners serving on it. That argument presumes, however, that the public even knows that a quorum of its commissioners serves on the authority board. It places the burden on the public to know that a quorum of county commissioners is meeting when that meeting has not been noticed as a County Commission meeting; as a result, the public has not been properly notified that the **County Commission** is meeting and deliberating.

This Committee believes that the spirit of the Open Meetings Act requires even greater transparency. Indeed, the Act notes that “...public agencies ... exist for the singular purpose of representing citizens ... in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions...” W. Va. Code § 6-9A-1. One way to promote citizen participation is by attending public meetings. “Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials.” *Id.*

According to the Requester, “[T]here is discussion with regard to issues of mutual interest to the Rural Development Authority and the County Commission but no determination or vote of the Hardy County Commission is ever mentioned at Rural Development Authority meetings.” Any such discussion on an issue that results in future action by the County Commission, however, constitutes deliberation; and, given the presence of a quorum of the County Commission as members of the Authority, that discussion also constitutes deliberation of the County Commission. See Advisory Opinion 2011-03. (Open Meetings Act requires a meeting agenda to include all items that require official action that the governing body will discuss at that meeting, even if the governing body does not take official action at that particular meeting.)

Although the plain language in the Open Meetings Act does not expressly prohibit a quorum of a County Commission from serving on another public body, it is implicit, based on the spirit and intent of the Act, even when the meetings of each body are subject to the Open Meetings Act. Otherwise, members of a governing body may circumvent the Act’s requirements in an effort to conceal their official actions. It may then become a meeting within a meeting. While this committee imputes no ill motive to the Requester, given the lack of clear precedence--indeed, he is to be commended for seeking clarification through a formal advisory opinion—this Committee’s duty is to

interpret the Act as it applies to all governing bodies, not just the one seeking this advisory opinion.

For the foregoing reasons, the Committee finds that the Open Meetings Act prohibits a quorum of a governing body from serving on another public board, commission or authority **unless** both governing bodies post notices of the governing body's meetings as meetings of both governing bodies. Only then will the public be placed on notice that a quorum of one governing body is meeting to conduct business at the meeting of the other governing body.

Other laws may also apply. For example, there is the common law doctrine governing self-appointment. This doctrine was summarized in a July 15, 1938 Attorney General Opinion as follows:

It is contrary to public policy to permit an official board having the power to appoint to an office to exercise that power by appointing one or more of their own body. When a statute confers the appointing power, and does not expressly authorize self-appointment, the appointment of some other than self is always contemplated.

38 W. Va. Op. Atty. Gen. 15 (1938), citing Parris v. Town of Adel, 86 S.E. 1095 (Ga. 1915). See also Arbogast v. Shields, 14 S.E.2d 4 (W. Va. 1941) ("No person with power to appoint to another office or position is permitted to appoint himself.")

This Committee has no authority to interpret this doctrine or to render an opinion as to its applicability, if any, to the situation presented. Nonetheless, it may be that the Legislature was attempting to prevent a violation of this doctrine through the limitations imposed by the Open Meetings Act discussed hereinabove.

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.

S/S 10-6-2011

Jack Buckalew, Acting Chairperson