

Open Meetings Advisory Opinion No. 2024-02

Issued on April 4, 2024, by

The West Virginia Ethics Commission
Committee on Open Governmental Meetings

Opinion Sought

The **Jefferson County Planning Commission** asks whether its Committees are subject to the Open Meetings Act.

Facts Relied Upon by the Committee

The Jefferson County Planning Commission (“Planning Commission” or “Requester”) oversees the administration of the county zoning ordinance, the county subdivision ordinance, other matters related to land use in Jefferson County, and its own fiscal affairs pursuant to W. Va. Code § 8A-2-11. The Commission consists of nine members, each appointed to serve a three-year term of office. W. Va. Code § 8A-2-4. State law provides, in relevant part, that the duties of county planning commissions include making “recommendations to the appropriate governing body concerning planning.” W. Va. Code § 8A-2-11(8).

The Planning Commission has adopted by-laws that include a provision that enables the Commission to form committees. The provision states:

The Planning Commission may establish one or more committees to which, pursuant to W. Va. Code § 8A-2-11(15), it may delegate limited powers. Committees shall consist of no less than three (3) members nor more than five (5) members of the Planning Commission. Appointments to committees shall be made by a majority vote of the Planning Commission.

The Planning Commission has established three committees: the Budget Committee, the Solar Text Amendment Committee, and the Ordinance Rewrite Committee (collectively “the Committees” or the “Planning Commission Committees”). Each Committee consists exclusively of three Planning Commission members.¹ None of the Committees are meeting at this time.

The Planning Commission is required to approve and submit an annual budget to the Jefferson County Commission. W. Va. Code § 8A-2-11. The budget is prepared by the director of the department of engineering, planning, and zoning (“director”), who is not a member of the Commission, but is a Jefferson County employee. The Requester states

¹ According to the Requester, a quorum of Planning Commission members has never served on any of the Committees. Currently, there is a vacancy on the Solar Text Amendment Committee.

that the Planning Commission formed the Budget Committee to review the budget prepared by the director before the director presented the budget to the Planning Commission. Similarly, the Commission formed the Solar Text Amendment Committee in February 2020 to work with consultants and Planning Commission staff to draft ordinance amendments to its solar text ordinance. Staff presented the draft ordinance amendments to the Planning Commission at a public meeting.

The Planning Commission rewrote the county's subdivision ordinance and its zoning ordinance in 2008. During the process, staff identified conflicts between the two ordinances that needed to be resolved through several amendments to the subdivision ordinance in 2010. The Planning Commission hired a consultant to rewrite the ordinance, and in 2019, the Commission formed the Ordinance Rewrite Committee to "review and work with [the] consultant to revise [the] subdivision and land development ordinance." According to the Requester, the Ordinance Rewrite Committee facilitated meetings between staff and the consultants, helped identify conflicts in the ordinances, and met privately with the consultant. The proposed changes to the ordinance have not been presented to the Planning Commission, and the project is currently suspended pending the completion of the Jefferson County Comprehensive Plan.

The Requester describes each Committee as "an advisory body with no legislative authority." The Requester states that the Committees do not formulate policy, make recommendations directly to the Planning Commission, or have decision-making authority. Rather, the Committees were created to facilitate interactions between Planning Commission staff and consultants, make recommendations to Planning Commission staff and the consultants, and present progress reports to the Planning Commission. The Requester states that Planning Commission staff and consultants have created documents and drafted ordinance provisions, which the staff presented to the Planning Commission at a public meeting.

The Requester has asked whether the Committees are subject to the Open Governmental Meetings Act, at W. Va. Code §§ 6-9A-1 through 12 ("Open Meetings Act"), and whether the Committees should prepare agendas for, invite the public to, and take minutes of its meetings.

Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-2(4) states:

"Governing body" means 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; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

W. Va. Code § 6-9A-2(5) states, in relevant part:

(5) "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:

. . . .

(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-2(7) states:

"Public agency" means any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. The term "public agency" does not include courts created by article eight of the West Virginia Constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

W. Va. Code § 6-9A-3(a) states:

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public.

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The Open Meetings Act requires a governing body of a public agency to hold public meetings, subject to exceptions. "Public agency" means any administrative or legislative unit of . . . county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. W. Va. Code § 6-9A-2(7). The Planning Commission is a public agency because it is a commission authorized by law

to exercise some portion of executive or legislative power relating to county planning. See W. Va. Code § 8A-2-11 (establishing the powers and duties of county planning commissions).²

Next, this Committee must determine whether the Committees are governing bodies of the Planning Commission. “Governing body” means 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” This Committee has previously addressed whether committees are governing bodies of public agencies and therefore subject to the Open Meetings Act. In Open Meetings Advisory Opinion 2002-13, this Committee held that a standing committee, consisting of two or more members of a public agency, whose purpose is to make recommendations to the public agency as a whole, is a governing body of a public agency, and must conduct its meetings in compliance with the Open Meetings Act. See *also* Open Meetings Advisory Opinion 2005-05. In Open Meetings Advisory Opinion 2014-02, this Committee held that committees that are merely tasked with “collation of data or preliminary research, however, are not subject to the Act as long as they are not tasked with making recommendations about that data to the Council or otherwise exercise executive or legislative power.”

Whether a committee is a “governing body” for purposes of the Open Meetings Act depends upon the authority delegated to the committee by the public agency that created it. Here, the Planning Commission’s by-laws allow the public agency, the Planning Commission, to create committees and delegate limited powers to the committees. The Committees consist exclusively of three Planning Commission members. The Requester states that the main purpose of the Committees is to facilitate interactions between Planning Commission staff and consultants, make recommendations to the Planning Commission staff and consultants, and present progress reports to the Planning Commission. Although the Requester has stated that the Committees make recommendations to staff and consultants, the Requester has not stated specifically what type of recommendations the Committees have been delegated the authority to make.

Therefore, this Committee finds that facilitating interactions between Planning Commission staff and consultants and presenting progress reports to the Planning Commission do not constitute making decisions or recommendations to a public agency on policy or administration. Thus, when the Committees’ authority is limited to these activities, the Committees are not governing bodies under the Open Meetings Act.

The Requester also states, however, that the Committees make recommendations to Planning Commission staff and the consultants who in turn make recommendations to the Planning Commission. **This Committee finds that if the Planning Commission delegated authority to the Committees to make recommendations to Planning**

² The duties of county planning commissions include making “recommendations to the appropriate governing body concerning planning.” W. Va. Code § 8A-2-11(8).

Commission staff or consultants on policy or administration, such as the contents of an ordinance or budget, and the staff or consultants make recommendations to the Planning Commission on these same matters, then the Committees are governing bodies under the Open Meetings Act. While the Committees are making recommendations to the staff and consultants and not directly to the Planning Commission, this Committee finds that making a recommendation to staff or consultants that are or may be passed along in part or whole to the governing body constitutes making a recommendation to the Planning Commission, a public agency. In making this determination, this Committee has also considered that the Planning Commission Committees consist of three Planning Commission members.

Next, this Committee will address which gatherings of a governing body trigger the notice, agenda, minutes, and other public meeting requirements under the Open Meetings Act. W. Va. Code § 6-9A-3. A “meeting” under the Act is “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.” W. Va. Code § 6-9A-2(5) (defining meeting and acts excluded from the definition). Not every gathering of a governing body is a public meeting. *Id.*

In Open Meetings Advisory Opinion 2018-01, this Committee concluded that county commissioners may meet with other county officials and their staff members regarding concerns the staff members had about performing their work so long as the meetings would simply serve as an educational tool for the commissioners to learn about the functions of other county elected officials and their staffs.³ Conversely, in Open Meetings Advisory Opinion 2019-03, this Committee held that a quorum of civil service commissioners may not meet outside of a public meeting to discuss staff job duties, staff performance, appropriate office conduct, or approving expenditures because such activities go beyond simply serving as an educational tool for commissioners.

This Committee holds that when the Committees merely facilitate interactions between Planning Commission staff and consultants or present progress reports to the Planning Commission, such gatherings may be held in private because they are not public meetings under the Open Meetings Act.

If the Committees make recommendations to Planning Commission staff or consultants on policy or administration, such as the contents of an ordinance or budget, and the staff or consultants make recommendations to the Planning Commission on these same matters, then a quorum of those Committee members may not meet with Planning Commission staff or consultants outside of a properly noticed public meeting.

Each Committee must determine prior to each meeting, based upon the purpose of the meeting, whether it must notice and hold a public meeting or whether the gathering is

³ Nonetheless, to avoid any possibility of contravening the Act, this Committee still recommended that only one member of the county commission attend the meetings and report back to the full commission during a properly noticed meeting where this item has been placed on the agenda.

one that does not require a public meeting under the Open Meetings Act. For a gathering not subject to Open Meetings Act public meeting requirements, the committee participants must ensure that they do not stray into discussing matters that must be considered at properly noticed public meetings.

This Advisory Opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1 through 6-9A-12, and does not purport to interpret other laws or rules.

/s/ Lynn Davis
Lynn Davis, Chairperson
Open Governmental Meetings Committee
West Virginia Ethics Commission