

OPEN MEETINGS ADVISORY OPINION NO. 2008-15

Issued On December 4, 2008 By The WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The City of Oak Hill seeks approval for procedural rules governing emergency meetings, the conduct of public comment periods and disposition of audio or video recordings of meetings. **(Procedure is not attached but on file)**

FACTS RELIED UPON BY THE COMMITTEE

The City of Oak Hill is in the process of adopting procedural rules providing for emergency meetings, addressing how public comment periods are conducted, and regulating the retention of recordings made to assist in the preparation of meeting minutes. The City Council has previously adopted one or more ordinances addressing how and when notice of regular and special meetings is given and those rules are not presently before this Committee for review.

The Council is proposing certain rules regarding emergency meetings. Part of the proposed rule addresses notice to the voting members of Council which is an internal matter of municipal governance not controlled by the Open Meetings Act. Under the rule, notices of emergency meetings stating the date, time, place and purpose of the meeting, to include the facts and circumstances of the emergency, shall be posted on the bulletin board in the entrance to City Hall.

The proposed rule also authorizes the City Clerk to record Council meetings, employing digital audio and video devices or other available technologies. Under the rule, these recordings, in whatever form, may be erased and reused or destroyed at any time after the minutes of a particular meeting have been approved by the Council.

The Council proposes to provide for public comment during each regular Council meeting. Speakers will be required to register in advance providing their name, address and subject to be addressed, but no one will be required to register more than 15 minutes prior to the meeting. Speakers may be limited to three minutes each.

The location of the meeting may be changed by the Mayor to another venue within the municipal boundaries, in the event Council Chambers will not accommodate, or are anticipated not to accommodate, all those wishing to attend or speak. In such an event, a notice will be posted on the exterior door of Council Chambers and the start of the meeting will be delayed up to 30 minutes to accommodate the change of venue.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-3 provides:

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. Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: Provided, that persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

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.

ADVISORY OPINION

The Open Meetings Act generally requires governing bodies of public agencies to promulgate rules relating to making available reasonable notice of the date, time, place and agenda of all public meetings. The City of Oak Hill has previously established guidance on these matters in ordinances which are not included in this request for an advisory opinion, or in any earlier advisory opinion.

In addition to rules relating to notice and agendas, governing bodies may elect to adopt other rules governing meeting procedures. Consistent with its legislative mandate to determine whether any proposed course of action would violate any provision in the Act, this Committee will review such additional provisions. However, the Committee's opinion, and any immunity which flows from that opinion, will be limited to whether any provision in these proposed rules is inconsistent with the Act.

The opinion will not address discretionary application of a rule to a specific situation, unless the requester provides a proposed set of facts describing that situation. In the event of an emergency requiring immediate official action, the City of Oak Hill plans to give notice of an emergency meeting by posting a meeting notice on the bulletin board in the entrance to City Hall. The posted notice will include the date, time, place and purpose of the meeting, and the facts and circumstances of the emergency.

The Open Meetings Act permits governing bodies of public agencies to hold emergency meetings in the event of an emergency requiring immediate official action. Whether or not a particular set of facts and circumstances constitutes an "emergency" requiring immediate official action is a matter which must be determined on a case-by-case, fact-specific basis. For that reason, this Committee has required governing bodies to include a statement of the facts and circumstances comprising the emergency in their emergency meeting notice, or on the agenda when an item requiring immediate official action is added after the time frame for giving reasonable notice of routine items.

In addition, in Open Meetings Advisory Opinion 2007-05, regarding the City of Dunbar, this Committee noted that the explanation of the nature of the emergency requiring official action should be repeated in the meeting minutes for that particular meeting. This helps to ensure that the public is aware of the justification for meeting without giving the usual notice which the media and the public are accustomed to receiving. Accordingly, the City of Oak Hill should amend its proposed rule to provide that the explanation of the nature of the emergency requiring immediate official action be repeated in the meeting minutes for that particular meeting.

In addition to authorizing the City Clerk to record each Council meeting using available audio and video technology, the proposed rule permits the Clerk to erase and reuse or destroy any recording, in whatever form, at any time after the minutes for a particular meeting are approved by the Council. In Open Meetings Advisory Opinion 2008-12, concerning the West Virginia Board of Accountancy, this Committee concluded that there is no requirement in the Open Meetings Act for a recording of a meeting that has been made at the direction of the governing body to be retained after the minutes for that meeting have been approved in a subsequent meeting. Therefore, the discretion provided to the City Clerk in the proposed rule is not inconsistent with any provision in the Open Meetings Act.

The Council has elected to provide a public comment period during each regular meeting. Individuals wanting to speak must register in advance stating their name, address and the subject they wish to comment upon. However, speakers are not required to register more than 15 minutes before the meeting begins. The rule provides a three-minute time limit for each speaker, unless the Mayor agrees to grant additional time.

This Committee has previously recognized that there is no provision in the Open Meetings Act which requires governing bodies of public agencies to provide an opportunity for public comment. Governing bodies which elect to set aside time for public comment during their meetings are prohibited by the Act from conditioning participation on signing up to speak more than 15 minutes before the meeting is scheduled to begin. Otherwise, governing bodies may make reasonable rules governing those who elect to participate in the public comment period.

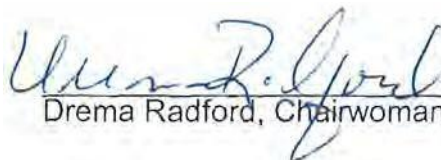
In Open Meetings Advisory Opinion 2006-05, concerning the Berkeley County Planning Commission, this Committee found that a three-minute time limit for speakers participating in a public comment period was not unreasonable. Oak Hill's three-minute time limit is likewise acceptable. Similarly, it is not unreasonable to condition participation upon signing up to address a particular topic and providing the speaker's name and address. Oak Hill's proposed rule also permits the Mayor to change the venue for a meeting in the event that Council Chambers will not accommodate the number of people wishing to attend or speak at the meeting, or if it is anticipated that such an event will occur. When such a situation develops, the rule requires that notice be posted on the exterior door of Council Chambers indicating the new meeting location, which must lie within the municipal boundaries, and the start of the meeting may be delayed up to 30 minutes to accommodate this relocation effort.

This Committee finds that there is no provision in the Open Meetings Act which mandates that a governing body of a public agency change the location of a meeting whenever it either finds or reasonably expects that its regular meeting place will not be able to accommodate all those wishing to attend. However, consistent with the purposes behind the enactment of the Open Meetings Act, this Committee strongly encourages any governing body which encounters such a situation to make every reasonable *effort* to accommodate the attendees, if this can be accomplished without undue hardship to the governing body or interfering with its ability to conduct an efficient public meeting. The rule proposed by Oak Hill is consistent with this approach and provides reasonable notice of a change of venue to accommodate public attendance.

Accordingly, consistent with its limited authority to review additional provisions as previously discussed, this Committee finds that none of the other provisions contained in the proposed rule are unreasonable nor are any other provisions inconsistent with the Open Meetings Act.

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/ Drema Radford



Drema Radford, Chairwoman