

## **OPEN MEETINGS ADVISORY OPINION NO. 2012-05**

**Issued On January 10, 2013 By The  
WEST VIRGINIA ETHICS COMMISSION  
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS**

### **OPINION SOUGHT**

The **Outdoor Heritage Conservation Fund** asks whether it is required to go into executive session to discuss grant applications for conservation easements.

### **FACTS RELIED UPON BY THE COMMITTEE**

The Outdoor Heritage Conservation Fund (hereinafter "Conservation Fund") is a State agency which is governed by a Board of Trustees. Its primary mission relates to the conservation of land. W.Va. Code § 5B-2G-6.

In furtherance of its mission, the Conservation Fund is expressly authorized to acquire interests in real property, or to disburse grants for that purpose. If a grant is awarded to a land trust or similar entity to purchase a conservation easement, the property interest purchased with the money is a permanent conveyance. W.Va. Code § 5B-2G-9. If any such interests acquired are not utilized strictly for conservation purposes, then the real property interest vests in the Conservation Fund. W.Va. Code § 5B-2G-9.

The grant applications request specific information about the property being considered for an easement. For example, it may contain information about whether the property owner's bank is willing to subordinate its first deed of trust on the property owner's mortgage. Additionally, the application may contain information about the landowner's willingness to lower the purchase price.

### **CODE PROVISIONS RELIED UPON BY THE COMMITTEE**

W. Va. Code § 6-9A-4(b)(9) provides, in relevant part that a governing body may hold an executive session:

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision:  
Provided, That information relied on during the course of deliberations on matters

involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, however, That information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session;

### **ADVISORY OPINION**

The Requester has asked whether it is required to go into executive session. The Committee welcomes this opportunity to clarify this common misconception. The Open Meetings Act does not ever require a governing body to go into executive session for any purpose. Instead, the Act authorizes a governing body to hold an executive session for specifically articulated reasons. W. Va. Code § 6-9A-4(b).

As a result, in this opinion the Committee will consider whether the Requester may go into executive session for the articulated purpose.

The Open Meetings Act provides that a governing body may hold an executive session to consider matters affecting the purchase or sale of property. This Committee previously ruled in O.M.A.O. 2003-07 that a Farmland Protection Board may meet in executive session to review and discuss applications from landowners who were seeking to have their property included in the farmland protection program. The opinion notes that while the discussions may occur in executive session, final votes must be taken during open session.

This Committee finds that the same rule of law applies in the present case. The Open Meetings Act specifically provides for an executive session "to consider matters involving or affecting the purchase, sale or lease of property". (emphasis supplied). The Conservation Fund must decide which applicants should be awarded grant money to purchase an easement. As part of this discussion, it may discuss matters which may impact the purchase price of the easement or the property value of the applicant. If such discussions were to be held in open session, it could adversely affect the Conservation Fund's ability to frankly discuss the pros and cons of each property, and the value it places on an easement therein.

In conclusion, the Committee finds that in accordance with the Open Meetings Act and O.M.A.O. 2003-07, the Conservation Fund may discuss grant applications for easements in executive session under the "purchase or sale of property" exception.

All votes must be taken during the open session of a meeting.<sup>1</sup>

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/ Kemp Morton, Acting Chair

---

<sup>1</sup> In regard to whether the applications are, at the time of submission or at any point thereafter, subject to FOIA, W.Va. Code §§ 29B-1-1, *et seq.*, is a matter outside of the jurisdiction of this Committee.