

Land Use and Sustainable Development Law Clinic WEST VIRGINIA OPEN GOVERNMENTAL MEETINGS ACT (OGMA) AND COVID-19, AS OF MARCH 2020 (SUBJECT TO CHANGE)

Fact Sheet

Spring 2020

Local governments in West Virginia are likely concerned about how the spread of COVID-19 will impact the operation of state and local government, with one of the main concerns being compliance with the West Virginia Open Governmental Meetings Act (OGMA).¹ In light of the need for social distancing to lessen the rate at which the virus spreads, gathering communities for open meetings may not be a prudent decision. At this point, however, no special exemptions or exceptions to OGMA exist for situations such as the one currently unfolding. Several state governors have issued emergency orders impacting open governmental meetings but, as of the date of this fact sheet, West Virginia has not done so.²

Governing bodies should therefore continue to adhere to normal protocol, while strongly considering the option of postponing all non-essential meetings subject to OGMA. Beyond OGMA, municipalities should also check their charter, which may have provisions applicable to meetings. Charter provisions must be followed. As to OGMA, the following are some important points to consider.

Emergency Meetings

Governing bodies should exercise caution when calling an emergency meeting. Emergency meetings require both an emergency and the need for official action in response to the emergency. The West Virginia Ethics Commission has posted information on emergency meetings related to COVID-19.³ This fact sheet elaborates on that information.

What constitutes an emergency?

Emergency meetings should only be called by the governing body for the purpose of addressing an unexpected event that poses an imminent threat to the public or threat of property or material financial loss. The reason for having an emergency meeting must be tied to an identifiable issue that requires immediate attention. A meeting to address routine matters does not become an emergency meeting because of COVID-19.

For example, if the governing body wants to meet to discuss whether the community should purchase a new vehicle and the purchase can be delayed, the COVID-19 pandemic does not make the meeting an emergency meeting. However, if, for example, workers at a water treatment facility test positive for COVID-19, the governing body could call an emergency meeting to address how the facility will operate while the workers are quarantined.

W. Va. Code § 6-9A-1

"[I]t is...in the best interests of the people of this state for the proceedings of public agencies [to] be conducted openly, with only a few clearly defined exceptions."

"Open government allows the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government."

1 W. Va. Code Ann. § 6-9A-1, et seq. (West 2019).

2 See, e.g., Massachusetts Municipal Association, "Gov. signs order suspending parts of open meeting law to enable local decision-making during COVID-19 emergency," (Mar. 13, 2020). (Massachusetts' meetings do not have to be in public places, but "adequate, alternative means" must be provided to allow "adequate access" by the public. Must be real-time unless real-time would cause "economic hardship." In that case, transcript, recording, etc. must be provided "as soon as practicable."); Washington State Office of the Attorney General's Office, Open Public Meetings Act General Guidance Regarding Coronavirus (Mar. 6, 2020) (Washington State did not change the rules, but provided some guidance reminding local governments that they cannot discuss business via emails, text messages, etc., because they cannot convene in person and would like to move business forward.); JDSUPRA, "Coronavirus, the Open Meetings Law, and Emergency Powers: A Brief Guide for Municipal Officials," (Mar. 17, 2020) (New York permits all members of the body to participate remotely, but the public must have the ability to "view or listen to" the meeting and the

What requirements exist for emergency meetings?

Before an emergency meeting, an agenda must still be provided as soon as practicable. Notice of the emergency meeting must set forth the reason for, and purpose of, the emergency meeting. During the meeting, minutes must still be recorded.

Public Participation

In order to comply with OGMA, the public must be able to participate in all local government meetings, with the exception of executive sessions. While a member or members of the governing body can participate remotely in a properly called meeting, the local government must ensure the public can hear all parties. Preferably, the meeting mode would allow two-way communication between the public and the governing body.

Can the entire governing body meet by tele- or videoconference?

Maybe. OGMA requires that the public be able to clearly hear the discussion and participate in a meeting. For example, if the governing body is utilizing teleconferencing connections, the public must be able to clearly hear the members of the body and the members of the governing body must be able to hear each other and the public. This arrangement might manifest by keeping city hall open for community members to congregate at a safe distance from each other with teleconferencing available so that the public, including the media, can participate in the meeting while council members congregate in a separate room.

A meeting, even if properly noticed, conducted on a closed line with only staff and the governing body on the call would likely be an improper meeting. In addition, at this time, many members of the public do not feel comfortable congregating in public places. If the present situation prevents, as a practical matter, the public from participating in the meeting, the meeting should be postponed unless the meeting addresses an emergency.

A staff opinion of the West Virginia Ethics Commission is consistent with these points.⁴ The staff opinion, though not binding, states that the meeting need not be in person but may be held with all members of the body on the telephone or audio or visual stream if the members of the public may attend. The public must, at a minimum, be able to hear the audio or visual meeting. The opinion gives an example of streaming the meeting on Facebook. The governing body must consider, however, whether members of the public have access to a reliable phone line or internet access, and whether members of the public have access to Facebook.

Public Meeting v. Public Hearing


The aforementioned staff opinion does not consider public hearings. The West Virginia Code provides for public “meetings” and public “hearings.” Although West Virginia law does not define either term, the public generally lacks the right to speak at a public meeting, unless the governing body provides an opportunity on the agenda. Meanwhile, public hearings are conducted for the primary purpose of hearing from the public.

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meeting must be recorded and transcribed.); The Texas Tribune, “As coronavirus stops people from gathering, Gov. Greg Abbott suspends part of open-meetings law,” (Mar. 17, 2020) (Texas permits all members of the body to participate remotely, but the public must have the right to “participate in” the meeting. One suggestion was to conduct the meeting via a conference call that includes access to the public, which would be provided with the dial-in number, or utilizing an online platform where the public can “participate.”).

³ West Virginia Ethics Commission, Coronavirus and the Open Meetings Act, News and Announcements, *available at* <https://ethics.wv.gov/Pages/default.aspx> (last accessed Mar. 23, 2020).

⁴ *Id.*



Given this distinction, a governing body likely complies with OGMA by providing, telephonically or through video streaming or other methods, the opportunity for the public to only hear a public meeting. However, for a public hearing, the governing body likely has to provide some method for the public to speak, telephonically or otherwise, so that the members of the governing body and other members of the public can hear. Alternatively, the ability to have comments submitted by members of the public in some way and having the comments read so members of the governing body and the public can hear likely satisfies OGMA.

Can local governments record a meeting and post the recording on the local government website after the meeting is completed so citizens can watch without having to attend?

Although this option supports social distancing to slow the spread of COVID-19, the intent of OGMA is to provide citizens an opportunity to participate in local government meetings. Considering the distinction between public meetings and public hearings, it is likely that simply recording a public meeting and publicly posting the recording shortly after the conclusion of the public meeting would be sufficient for OGMA. Notably, nothing prevents a community from recording public meetings in addition to making meetings open to the public in an effort to keep the public informed while social distancing is underway. However, recording and posting public hearings would not satisfy OGMA.

Providing Notice and Agenda and Meeting Minutes

For regular meetings, local governments must still provide notice and agenda three business days in advance at the “normal” location. Special meetings require two business days in advance of the meeting for notice and agenda. Similarly, meeting minutes must be provided normally, that is no later than one day after the next regularly scheduled meeting.

In deciding whether to hold a meeting subject to OGMA, questions to keep in mind...

1. Does the governing body need to meet at this particular time, or can the meeting be postponed?
2. Is the governing body following normal protocol for meetings that must be held?

Other Concerns

As meetings are inevitably postponed, other legal requirements may be implicated. For example, the planning commission and board of zoning appeals must meet at least quarterly. Postponing meetings may cause this provision to be violated. However, the safety of citizens must be the primary concern. Given the purpose of OGMA—to ensure public participation in public meetings—if COVID-19 makes safe public participation impossible, non-emergency meetings should be postponed. Courts are unlikely to penalize a local government for maintaining public health, safety, and welfare. All decisions should document the reason behind the decision and be based on the best available information at the time. The Centers for Disease Control and Prevention provides one source of reliable, science-based information.

This document is not legal advice or a legal opinion. A local government should consult with its attorney or the West Virginia Ethics Commission, Committee on Open Governmental Meetings. For more information, the WVU College of Law, Land Use and Sustainable Development Law Clinic has developed a fact sheet that further outlines requirements of West Virginia Open Meeting Laws.