

# Chapter 1

## County Commissioners Generally

### Historical Background and Composition of the County Commission

County government in Virginia has its roots in the old English system which provided for county courts as the principal local governing body.

The first West Virginia Constitution in 1863 did away with the county courts and provided for a township system. Town meetings were the governing device and boards of township supervisors handled the general management of county business. Several officers, however, including the sheriff, surveyor of lands, recorder, assessor and prosecuting attorney, were elected on a county wide basis.

The 1872 Constitution restored the old county court system with some modifications. The court consisted of a president elected at large and justices of the peace. Then came the state's Judiciary Amendment of 1880 which generally provided for three-member, elective bodies-- and which stripped the commissioners of all judicial functions except limited ones in such fields as settlement of accounts.

Section 10, article 9 of the Constitution provides for a three-member commission, one to be elected each two years for a term of six years. No two of the commissioners shall be elected from the same magisterial district. If two or more persons residing in the same district shall receive the greater number of votes cast at any election, then only one of such persons receiving the highest number shall be declared elected, and the person living in another district, who shall receive the next highest number of votes, shall be declared elected.

The 1880 Judiciary Amendment contained the following proviso: "such tribunals as have been heretofore established by the legislature under and by virtue of the Constitution of 1872 for police and fiscal purposes shall, until otherwise provided by law, remain and continue as presently constituted." This proviso has never been changed and remains in effect. This accounts for those counties in which the commission has or has had something other than a three-member commission. Presently only one county commission remains under this proviso, Jefferson County has five county commissioners.

### **Qualifications/Residency Requirements for Candidates for County Commissioners**

WV Code Chapter 7, Article one, section 1b requires that a candidate for the office of county commissioner shall be a resident from the magisterial district for which he or she is seeking election: (1) By the **last day to file a certificate of announcement** or (2) At the time of his or her appointment by the county executive committee or the chairperson of the county executive committee.

Chapter 7, article 1, section 15, outlines the procedures for challenging a candidate for the office of county commission based on residency. Any person desiring to contest the qualifications of another person whose nomination in the primary election, nomination by petition, or nomination by appointment to fill a vacancy on the ballot, has been certified and filed as a candidate for the office of county commission at a general election, must file a verified petition with the circuit court of the county in which the candidate is seeking office, specifically setting forth the grounds of the challenge, within thirty days after the date of the primary election.

### **County Commission Reformation provision - 1974**

Section 13, article 9 of the Constitution, ratified by the voters at the 1974 general election, provides for the reformation of county commissions with the assent of a majority of the voters of such county voting at an election, by creating another tribunal for the transaction of the business required to be performed by the commission. Whenever the county commission receives a petition signed by ten percent of the registered voters of the county requesting the reformation, alternation, or modification of the commission, it shall be the mandatory duty of such county commission to request the legislature, at its next regular session thereafter, to enact an act reforming, altering or modifying such county commission and establishing in lieu thereof another tribunal for the transaction of the business required to be performed by such county commission, such act to take effect upon approval of a majority of the voters of the county. This Constitutional provision applies strictly to the form of the commission leaving the powers and duties identical with those of all other county commissions. (Procedures are outlined in WV Code 7-1-1a) In 2010, Berkeley County voters used this provision to elect a five-member county council.

### **Taking the Oath of Office**

Chapter 6, article 1, section 5, addresses when the oath of office must be taken. It requires that any person elected or appointed to the office must take the oath before the date of the beginning of the term of office, and before entering into or discharging any of the duties of the office.

### **Consolidated Local Government Act - 2006**

In 2006 the Legislature passed the Consolidated Local Government Act, Chapter 7A of the WV Code. This act authorizes municipal, county, and metro consolidations. Chapter 7A sets forth the powers of the consolidated governments, limits taxing authority in metro consolidations, addresses the jurisdiction and limitations of consolidated local governments, and sets up the process for implementing local government consolidations with voter approval at 55% required. A consolidation can begin by a 25% petition of the qualified voters of each affected local government or a resolution by the governing body of each affected local government. (WV Code 7A)

## **County Commission Constitutional Powers**

County commissions, as such, do not possess inherent rights of self-government but are a creation of the state and only with authority to perform local functions spelled out in the Constitution or by legislative enactment.

The Constitution confers upon the county commissions certain powers, but in each case limits such power to the manner prescribed by law. The phrase "in the manner prescribed by law" simply means as provided by acts of the legislature. The courts have repeatedly held that the county commissions are possessed only of such powers as are expressly conferred by the Constitution, and the legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given, and in the mode prescribed.

The Constitutional powers of county commissions are contained in section 11, article 9 of the West Virginia Constitution. Those powers and duties specifically granted to county commissions therein are:

- (1) The custody through their clerks of all deeds and other papers presented for record in their counties, and the same shall be preserved, or otherwise disposed of as may be prescribed by law.
- (2) Under such regulations as may be prescribed by law they shall have the administration of the internal police and fiscal affairs of their counties, with authority to lay the county levies. For example, under §7-1-3ff County Commissions are granted the authority to adopt ordinances dealing with dilapidated buildings that are public safety hazards.
- (3) Until otherwise prescribed by law, they shall, in all cases of contest, be the judge of the election, qualification and return of their own members, and of all county and district officers, subject to such regulations, by appeal or otherwise as may be prescribed by law.

This section gives broad powers to the legislature to authorize the county commissions to exercise such other powers and perform such other duties, not of a judicial nature, as the legislature might elect to do. It also authorizes other powers concerning liquor sales, roads, bridges, etc. which have been made obsolete by other Constitutional changes.

Subparagraph (1), giving the county commission the custody of certain legal documents, requires that such functions be performed by the county clerk, and while it requires the documents to be maintained within the county, it leaves to the legislature the determination of all the details as to the maintenance and/or destruction of these documents.

Sub-paragraph (2) gives to the county commission broad powers in the administration of internal police and fiscal affairs and would prevent the legislature from transferring such powers elsewhere. It does, however leave to the legislature the determination of what such powers are and the mode of exercising them. The power to lay the levies (property tax) is given to the county commission, while the legislature can determine methods and details but cannot transfer this power elsewhere.

Sub-paragraph (3) which seems to give county commission the right to determine the qualification of county elected officials and to decide election contests is almost a nullity for the reason that the legislature may at any time prescribe some other method. Even if the power is left with the county commissions the legislature must determine the methods and appeals.

Elsewhere in the Constitution there are provisions relating to county government and to certain functions and duties of county commissions. These will be discussed in connection with those functions and duties.

### **County Commission Statutory Duties & Authorities**

As was stated earlier, the constitution gives broad powers to the legislature to authorize the county commissions to exercise such other powers and perform such other duties, not of a judicial nature, as the legislature might elect to do. Many county commission duties and authorities are set out in Chapter 7 and elsewhere in the West Virginia Code. Following is a partial list of duties and powers:

- Lay and disburse county levies (7-1-3)
- Preparation and adoption of a budget for all county offices except judicial (7-7-7)
- Supervise the general management of the fiscal affairs and business of the county (7-1-5)
- Approve purchase orders and payment vouchers for all elected county offices except judicial (7-1-5)
- Sit as Board of Equalization and Review to hear appeals on property assessments (11-3-24)
- Jurisdiction in all matters of probate (7-1-3)
- In cases of contest, judge the election, qualification and returns of their own members and all county and district officers, subject to appeal (7-1-3)
- Custody of all deeds & papers presented for record through county clerk (7-1-3)
- Supervision & Maintenance of County Courthouses (7-1-5)
- Agriculture Extension (19-8-1)
- Authority to treat streams to prevent floods (7-1-3u)
- Cable Franchising Agent (Chapter 24D)
- Authority to hire litter control officers (7-1-3ff)
- Responsibility for naming & renaming roads, ways, streets, avenues, drives and the like, to assure uniform nonduplicative conversion of all rural routes to city-type addressing (7-1-3)
- Construction of waterworks, sewers and sewage disposal plants within their jurisdiction (7-1-3a)
- Authority to lease, rent or permit the use of county property (7-1-3k)

- **Appoint members of certain county boards, authorities and public service districts**
- **Adopt ordinances and orders in areas of jurisdiction as prescribed by law:**
  - **Authority to adopt, by order, State Building Code (7-1-3n)**
  - **Authority to require, by order, permits for mobile homes or house trailers (7-1-3p)**
  - **Authorizing voter-approved county services fees for infrastructure projects (7-20-11 & 7-20-12)**
  - **Dog Leash Ordinance authority (19-20-6)**
  - **Floodplain ordinance authority (7-1-3v)**
  - **Authority to govern business of massage (7-1-3z)**
  - **Ordinance for regulating dilapidated building & structures (7-1-3ff)**
  - **Ordinance restricting the location of businesses offering exotic entertainment (7-1-3jj)**
  - **Ordinance authority to provide for the elimination of hazards to public health and safety (7-1-3kk)**
  - **Ordinance authority to restrict certain activities in relation to obscene matter (7-1-4)**
  - **Ordinance authority for counties with a county-wide comprehensive plan to further regulate or prohibit ATV operation on any road in the county (17F-1)**
  - **Ordinance authority for county planning & zoning (Chapter 8A)**

## Sessions – Meetings

The American Heritage Dictionary defines the word "session" as: "1. a meeting of a legislative or judicial body for transacting business. 2. A series of such meetings." For the purposes of our discussion the words session and meeting will be used interchangeably.

### **I. Meetings Generally**

County commissions are required by section 9, article 9 of the Constitution to hold four regular sessions each year at such times as may be fixed by the commission and entered of record. This same section provides that two members shall constitute a quorum. Chapter 7, article 1, section 5a allows commissioners to excuse themselves from a vote if they have a direct pecuniary or personal interest in the matter.

Chapter 7, article 1, section 2, of the Code of West Virginia requires the holding of four regular sessions in the manner provided by the Constitution and further provides that such regular sessions be held at the courthouse. **It is important to note here that the official transaction of all business of the commission must be at the courthouse or courthouse annex.** A January 14, 1997, attorney general's opinion states in part as follows:

*"unless otherwise designated by the county commission or the Governor, (when destroyed or not in condition to be occupied) a county commission must hold its sessions within the county courthouse or any building used as a courthouse facility and so designated as such by an appropriate order of the county commission."*

Section 2 also provides for the holding of special sessions to be called by the president of the court, with the concurrence of at least one other member. A notice of the time and purpose of the special meeting must be posted at the front door of the courthouse by the county clerk at least two days before such special session is to be held.

The courts have consistently held that the commissions are not limited to four regular sessions. The attorney general in an opinion issued September 24, 1952 held in part as follows:

*"Based on the above it is our conclusion that there is nothing in the Constitution or statutes which prevents a county court (commission) from legally being in session every day in the year, if necessary, except Sundays and holidays."*

County commissions today meet as seldom as once a month and as frequently as several times a month. Since both the Constitution and the Code require the time of the regular sessions to be entered of record, the commission should, at its first regular session each year, fix the time of such regular sessions and make this a part of the record of the proceedings of the commission.

There are a number of meetings for special purposes, such as levy estimate and order sessions, canvass of the results of elections, boards of equalization and review, etc., for which the time is fixed by statute. It is not necessary for the commission to fix these times or to enter them of record. These sessions will be discussed in discussing their particular subject matter.

Section 10, article 9 of the Constitution and chapter 7, article 1, section 1 of the Code each provide for the election of a president of the commission annually. The Code requires that this be done at the commission's first meeting of the year or as soon thereafter as is practical. Section 44 of the Constitution requires that in the election of a president of the commission it shall be by voice vote and reads as follows:

*"In all elections to office which may hereafter take place in the legislature, or in any county, or municipal body, the vote shall be viva voce, and entered on its journals."*

## **II. Open Governmental Proceedings Act**

Meetings of County Commissions are subject to the Open Governmental Proceedings Act contained in WV Code, Chapter 6, article 9A, section 1 (§6-9A-1 et seq.) (1999), because county commissioners are considered to be both a public agency and a governing body under the Act. The act defines a "governing body" as two or more members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration. The Act defines "meeting" as the convening of such a governing body. More importantly for county commissioners, the bill specifically sets forth what does NOT constitute a meeting as follows:

- (a) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;
- (b) Any on-site inspection of any project or program;
- (c) Any political party caucus;
- (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 and not intended to lead to an official action; or
- (e) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate meetings.

"Official action" is defined as action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

Chapter 6, article 9A, section 2 allows that meetings may be held by telephone conference or other electronic means.

### **III. Executive Sessions**

With respect to executive sessions the Act provides that prior to convening an executive session during a regular, special or emergency meeting, during the open portion of the meeting, the presiding officer must identify the specific authorization for the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session. Minutes of executive sessions are **NOT required** to be taken and if taken, there is **NO requirement** they be made public. Chapter 6, article 9A, section 4, sets out the specific exceptions to the Act for which an executive session may be held.

### **IV. Minutes**

Chapter 6, article 9A, section 5 requires all governing bodies to provide for written minutes of all of its meetings, except for Executive Session as explained above. Such minutes shall be available to the public within a reasonable time and shall include at least the following:

- (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, the vote of each member, by name.

Minutes of executive sessions are **NOT REQUIRED** to be taken and if taken there is **no requirement** they be made public.

### **V. Enforcement of the Act**

The Act provides for enforcement of the provisions of the Act in the circuit court of the county where the public agency regularly meets and imposes criminal penalties on any person who is a member of a public or governmental body required to conduct open meetings in compliance with Act and who knowingly and willfully violates the provisions of this law. Additional provisions provide for the governing body or member, thereof to request an advisory opinion from the executive director of the West Virginia Ethics Commission or its committee on open governmental meetings as to whether a proposed action violates the provisions of the act and imposes a duty on the Attorney General to compile statutory and case law pertaining to this act and to prepare summaries and interpretations for the purpose of informing public officials subject to the article and its requirements.

The Act also imposes a duty on the Secretary of State and Clerks of the County Commissions, City Clerks or Records of Municipalities to provide a copy of material compiled by the Attorney General to all elected public officials within their jurisdictions.

# Commissioners' Salaries Constitutional and Statutory

Section 6, article 9 of the Constitution authorizes the legislature to provide for the compensation of county officers, including county commissioners.<sup>1</sup> Chapter 7, article 7, section 3 of the Code classifies the counties into ten classes for the purpose of determining the compensation of elected county officials, including county commissioners. The ten classes are based on a county's assessed valuation of property. All classes with minimum and maximum valuations are as follows:<sup>2</sup>

<u>CLASS</u>	MINIMUM ASSESSED VALUATION OF PROPERTY <u>ALL CLASSES</u>	MAXIMUM ASSESSED VALUATION OF PROPERTY <u>ALL CLASSES</u>
Class I	\$2,000,000,000	NO LIMIT
Class II	\$1,500,000,000	\$1,999,999,999
Class III	\$1,000,000,000	\$1,499,999,999
Class IV	\$700,000,000	\$999,999,999
Class V	\$ 600,000,000	\$ 699,999,999
Class VI	\$ 500,000,000	\$ 599,999,999
Class VII	\$ 400,000,000	\$ 499,999,999
Class VIII	\$ 300,000,000	\$ 399,999,999
Class IX	\$ 200,000,000	\$ 299,999,999
Class X	\$ ---0---	\$ 199,999,999

Each two years after March 29th, 1998 the county commission must review the assessed valuations of the county as certified by the assessor, the state auditor and the county clerk and determine if the county is within the limits of a class above or below the class which the county is then in. If the commission so determines it shall record the new classification with the state auditor and record its action on the commission's record.

Section 38, article 6 of the Constitution provides in part as follows:

*"...Nor shall the salary of any public officer be increased or diminished during his term of office,"*

Therefore, a member of the county commission, as well as other elected county officials, may not take an increase in salary by reason of a change in classification during his or her term of office. However, the West Virginia Supreme Court of Appeals held in Springer v. Board of education of Ohio County, 117 W.Va. 413, as follows:

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<sup>1</sup>For current salary rates see appendix. -A

<sup>2</sup>See appendix-B for county classification.

*"Where the duties newly imposed on a public official by the legislature are not mere incidents of the office which he holds, but embrace a new field, and are beyond the scope and range of the office as it theretofore had existed and functioned, a concurrent legislative increase of salary of such official is not violative of West Virginia Constitution, article 6, section 38, which inhibits the increasing of a public official's salary within his term of office."*

The attorney general held in an opinion rendered March 17, 1975 as follows:

*"Thus, we conclude that one elected to fill an unexpired term, who had been previously appointed to fill the vacancy in such office, begins a new term upon his election and is eligible for any salary increase resulting either from legislation enacted prior to his election or from a county reclassification effected prior to his election."*

The legislature, at its 1991 session, amended the Code by transferring the salary provisions for county commissioners from chapter 7, article 7, section 5a to chapter 7, article 7, section 4. This legislation provided new duties and increased the salaries. It did, however, require the commission to provide additional revenues over and above the previous year in an amount equal to or in excess of the amounts necessary to pay for the increase. The amended section 4 sets forth the procedures to be followed. In the event a county does not meet the requirements for implementation of an increase in salary in the year an increase is approved, it may become eligible and may provide for the increases in subsequent years.

In 1996, the legislature again amended the WV Code to increase county commission salaries as of January 1, 1997, and added a provision that within each county, every county commissioner whose term of office began prior to or on or after January 1, 1997, shall receive the same annual compensation by virtue of legislative findings of extra duties. This amendment also set forth such extra duties in Chapter 7, article 7, section 1 of the W V Code, eliminating any inequalities of salaries of commissioners serving the same county. The requirement for the commission to provide additional revenues over and above the previous year in an amount equal to or in excess of the amounts necessary to pay for the increase was repeated in this amendment also. Again, when a county does not meet this requirement in the year an increase is approved, it may become eligible and may provide for the increases in subsequent years.

In 2002, the legislature amended 7-7-4 to give county commissioners and other elected officials a 10% salary increase effective July 1, 2002. The also added another stipulation that requires each county commissioner or other elected official to file with the county commission his or her written agreement to accept the increase. The requirement for additional revenues remains.

**Again in 2006, 7-7-4 was amended to give county commissioners and other elected officials a 20% salary increase. The restrictions and stipulations remain the same. (For current salary rates see appendix A)**

## **Offices and Courthouse Hours**

Chapter 7, article 3, section 2 states that the county commission of every county must provide, at the county seat, suitable offices for the judge of the circuit court and judges of limited jurisdiction, the county commission, clerks of the circuit and county courts, assessor, sheriff, prosecuting attorney, surveyor and all other offices as are or may be required by law.

The county commission, by proper order, may designate an annex or other building to be a part of the courthouse. The courthouse shall be open to the public Monday through Friday during the hours prescribed by the county commission by an order duly recorded in the order book of the commission. The county commission in such order may, in its discretion, provide that the courthouse, including any annex or other facility housing the courts and offices hereinbefore set forth be open on Saturdays and prescribe the hours during which it shall be open. It may not require the offices to be open on Sundays or National or State holidays.

The West Virginia Supreme Court of Appeals held in a 1986 decision that the county commission does not have the authority to designate legal holidays for the purpose of closing the courthouse, and that the only legal holidays are those that the legislature has designated or authorized.

Chapter 2, article 2, section 1 designates certain legal holidays and in addition thereto provides that all days which may be appointed or recommended by the governor of this state or the President of the United States, as days of thanksgiving or for the general cessation of business shall be legal holidays.

Any day or part of a day designated by the governor as time off, without charge against annual leave, for state employees statewide, may also be time off for county employees if the county commission elects to designate the day or part of as time off, without charge against annual leave for county employees. Any entire or part statewide day off designated by the governor may, for all courts, be treated as if it were a legal holiday.

In Chapter 2, article 2, section 2, the determination of "a weather or other emergency day" when weather or other emergency conditions in that county prevent the general transaction of court business, is designated by order of the chief justice of the supreme court of appeals or by order of the chief judge of the circuit court of the county in which the proceedings is directed to take place or in which the act is to be done.

## **Vacancy in Office of County Commissioner**

Chapter 3, article 10, section 7, provides that any vacancy in the office of county commissioner shall be filled by the county commission unless the number of vacancies in the commission deprives the body of a quorum. In this case the governor shall fill any vacancy necessary to create a quorum thereof.

If a quorum of county commissioners cannot agree upon a person to fill the vacancy within thirty days of the date the vacancy occurs, the county executive committee of the vacating county commissioner's political party shall select and name a person to fill the vacancy from the membership of the vacating county commissioner's political party.

Persons appointed by and of these procedures shall continue in office until the next general election is certified unless the vacancy is for a term that ends on December thirty-first following the next general election. The vacancy shall be filled by an election for the unexpired term if the unexpired term is greater than one year.