

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 23 Public Meetings

**SPONSOR(S):** Government Operations Subcommittee; Rodrigues and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 50

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N, As CS	Stramski	Williamson
2) Rulemaking Oversight & Repeal Subcommittee	9 Y, 2 N	Rubottom	Rubottom
3) State Affairs Committee			

### SUMMARY ANALYSIS

The State Constitution and the Florida Statutes set forth the state's public policy regarding access to government meetings; however, both are silent concerning whether citizens have a right to be heard at a public meeting. To date, Florida courts have heard two cases concerning whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings. Current case law provides that while Florida law requires meetings to be open to the public, it does not give the public the right to speak.

The bill requires members of the public to be given a reasonable opportunity to be heard on a proposition before a board or commission. However, the opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if certain requirements are met. The bill also provides that the opportunity to be heard is not required at certain meetings of a board or commission.

The bill authorizes a board or commission to adopt limited rules or policies: prescribing procedures relating to the time an individual has to address the board or commission; providing guidelines for allowing representatives to speak on behalf of groups or factions at meetings where large numbers of individuals wish to be heard; prescribing procedures by which an individual may inform a board or commission of a desire to be heard; and designating a period of time for public comment. If the board or commission adopts rules or policies in compliance with the act and follows such rules or policies when providing an opportunity for the public to be heard, the board or commission is deemed to be acting in accordance with the act.

The bill provides that a circuit court has jurisdiction to issue an injunction for the purpose of enforcing this act upon the filing of an application for such injunction by any citizen of Florida. Whenever an action is filed against a board or commission to enforce the provisions of the act, the court must assess reasonable attorney fees against the appropriate state agency or authority if the court determines that the defendant acted in violation of the act. The bill authorizes the court to assess reasonable attorney's fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. The bill provides that if a board or commission appeals a court order that found the board or commission to violate this bill, and such order is affirmed, the court shall award reasonable attorney fees for the appeal.

The bill provides that any action taken by a board or commission that is found to be in violation of the act is not void as a result of such violation.

The bill could have a negative fiscal impact on state and local governments.

This bill may be a county or municipal mandate. See Section III.A.1. of the analysis.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### State Constitution: Open Meetings

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

Article I, s. 24(c) of the State Constitution authorizes the Legislature to provide exemptions from the open meeting requirements upon a two-thirds vote of both legislative chambers, in a bill that specifies the public necessity giving rise to the exemption.

##### Government in the Sunshine Law

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., also known as the "Government in the Sunshine Law" or "Sunshine Law," further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times.<sup>1</sup> The board or commission must provide reasonable notice of all public meetings.<sup>2</sup> Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public's access to the facility.<sup>3</sup> Minutes of a public meeting must be promptly recorded and be open to public inspection.<sup>4</sup>

##### Right to Speak at Meetings

The State Constitution and the Florida Statutes do not require citizens to be heard at public meetings of collegial governmental bodies. To date, Florida appellate courts have heard two cases directly addressing whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings.<sup>5</sup>

In *Keesler v. Community Maritime Park Associates, Inc.*<sup>6</sup>, the plaintiffs sued the Community Maritime Park Associates, Inc., (CMPA) alleging that the CMPA violated the Sunshine Law by not providing the plaintiffs with the opportunity to speak at a meeting concerning the development of certain waterfront property. The plaintiffs argued that the phrase "open to the public" granted citizens the right to speak at public meetings. The First District Court of Appeal held:

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<sup>1</sup> Section 286.011(1), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 286.011(6), F.S.

<sup>4</sup> Section 286.011(2), F.S.

<sup>5</sup> Florida courts have heard numerous cases regarding Sunshine Law violations; however, only two appear to be on point regarding the public's right to speak at a public meeting. Other cases have merely opined that the public has an inalienable right to be present and to be heard. The courts have opined that "boards should not be allowed, through devious methods, to 'deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.'" *See, for example, Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 699 (Fla. 1969) ("specified boards and commissions ... should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made"); *Krause v. Reno*, 366 So.2d 1244, 1250 (Fla. 3rd DCA 1979) ("citizen input factor" is an important aspect of public meetings); *Homestead-Miami Speedway, LLC v. City of Miami*, 828 So.2d 411 (Fla. 3rd DCA 2002) (city did not violate Sunshine Law when there was public participation and debate in some but not all meetings regarding a proposed contract).

<sup>6</sup> 32 So.3d 659 (Fla. 1st DCA 2010).

[A]lthough the Sunshine Law requires that meetings be open to the public, the law does not give the public the right to speak at the meetings. Appellants have failed to point to any case construing the phrase “open to the public” to grant the public the right to speak, and in light of the clear and unambiguous language in *Marston*<sup>7</sup> (albeit dicta), we are not inclined to broadly construe the phrase as granting such a right here.<sup>8</sup>

The second case, *Kennedy v. St. Johns Water Management District*<sup>9</sup>, was argued before the Fifth District Court of Appeal on October 13, 2011. At a meeting of the St. Johns Water Management District (District), the overflow crowd was put in other rooms and provided a video feed of the meeting. Additionally, the District limited participation in the meeting by members of a group called “The St. Johns Riverkeeper.” Only the St. Johns Riverkeeper representative and attorney were allowed to address the District board. Mr. Kennedy, who wanted to participate in the discussion, sued arguing that the Sunshine Law requires that citizens be given the opportunity to be heard. Mr. Kennedy also alleged that the District violated the Sunshine Law by failing to have a large enough facility to allow all who were interested in attending the meeting to be present in the meeting room. On October 25, 2011, the Fifth District Court of Appeal affirmed the trial court’s ruling that the District did not violate the Sunshine Law as alleged.

Traditional parliamentary law is inherently applicable to some extent in all collegial public bodies (“public bodies”), whether elected, representative or appointive. It provides a guide to understanding the rights and responsibilities of participants in meetings of public bodies. The fundamental requirements of decision-making by a validly constituted public body include the following:<sup>10</sup>

- ✓ Authority to decide
- ✓ A meeting of the public body
- ✓ Proper notice
- ✓ A quorum present
- ✓ A question clearly presented
- ✓ An opportunity to debate
- ✓ Decision by majority vote
- ✓ No fraud or deception in the determination
- ✓ No violation of binding law

These principles reveal that the purpose of meeting, debating and voting is for *the public body*, to make up *its* collective mind. Whether a body is composed of elected representatives or appointed specialists, in a republican form of government,<sup>11</sup> it acts on behalf of and in the name of the people or some subset of the public. The genius of this form is that it allows more deliberative decision-making than direct democracy or mob rule, while protecting the public from the arbitrary unaccountability of a dictator.

In the American tradition, freedom of speech as well as the right to *petition* government for a redress of grievances have been separated in time and place from the conduct of meetings of public bodies. The principles behind parliamentary law provide that membership in a public body entails the right to debate on substantive questions, and to speak on points of privilege, subject to the right of the majority of the membership to limit such speech. Only members of a legislative body and their invited guests have a right to presence on the floor of a legislative chamber or to address the legislative body. Even Governors and Presidents must be invited to address a legislature in session. Accordingly, with limited exceptions, other public bodies have typically not been required to allow public *participation* in their

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<sup>7</sup> In *Wood v. Marston*, the Florida Supreme Court held that the University of Florida improperly closed meetings of a committee charged with soliciting and screening applicants for the deanship of the college of law. However, the *Marston* court noted “nothing in this decision gives the public the right to be more than spectators. The public has no authority to participate in or to interfere with the decision-making process.” *Wood v. Marston*, 442 So.2d 934, 941 (Fla. 1983).

<sup>8</sup> *Keesler* at 660-661.

<sup>9</sup> *Kennedy v. St. Johns River Water Management District*, No. 2009-0441-CA (Fla. 7th Cir. Ct. 2010), *per curiam affirmed* 84 So.3d 331 (Fla. 5th DCA 2011).

<sup>10</sup> See, e.g., “Ten Principles That Govern Procedure in Group Decision Making”, Mason’s Manual of Legislative Procedure, pp. 2-3 (NCSL 2010) (hereinafter, “Mason’s”).

<sup>11</sup> A republican form of government is guaranteed to every U. S. state. Art. IV, s. 4, U. S. Const.

meetings,<sup>12</sup> despite open meeting laws and other innovations designed to assure public *scrutiny* of public decision-making,

Because of this separation of public speech from decision-making meetings, lobbying involves communication and persuasion *prior to* public decision-making. Unlike the relationship between attorneys and courts, lobbyists have never held an unconditional right to address a public meeting called to make public decision. Public bodies do have the right to hear the opinions of others possessing valuable information to aid the body in its deliberations.<sup>13</sup> However, the body has the clear right to decide whether or not the presentation of such opinions in its meeting may be helpful. Thus, legislative committees invite visitors to speak, but are not compelled to do so. And they are particularly reluctant to do so when the demand to speak exceeds the time authorized for the meeting. In short, the members of a public body have a limited right to address a meeting, but visitors do not.

Visitors who participate in public meetings are not bound by the ethical rules and laws that govern the participation of elected or appointed members of public bodies. Under traditional practice, however, non-members invited to speak may be asked by a public body to disclose their interests and any conflicts relating to the proposal before the body. Non-member participants may also be placed under oath to confirm their truthfulness under penalty of perjury.

In sum, representative and appointed public bodies are organized to act on behalf of the public, and typically are either elected or appointed to represent the public interest or to contribute some particular expertise to the public body. Such bodies meet to make decisions on behalf of the public by melding the divergent views of their members into a single view of the body. In such meetings, the unrestrained active participation of unelected or unappointed participants has never been deemed necessary, and has often been counterproductive to the orderly determination of the meeting's decision-making objective.

### **Effect of the Bill**

The bill creates a new section of law governing the opportunity for the public to be heard at public meetings of a board or commission. The bill defines the term “board” or “commission” to mean a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision.

The bill requires members of the public to be given a reasonable opportunity to be heard on a proposition before a board or commission. However, the opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if the opportunity:

- Occurs at a meeting that is during the decisionmaking process; and
- Is within reasonable proximity in time before the meeting at which the board or commission takes the official action.

It is unclear what is meant by the terms “proposition” and “reasonable proximity” because the terms are not defined.

The opportunity to be heard is not required for purposes of meetings that are exempt from open meeting requirements. In addition, the opportunity to be heard is not required when a board or commission is considering:

- An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, when compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;
- An official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations; or

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<sup>12</sup> Limited exceptions include bodies assigned quasi-judicial responsibilities to decide specific substantial interests of particular parties, who are entitled to appear and defend their interests. Even then, a right to address the body is tied to a substantial interest affected.

<sup>13</sup> Section 43, para. 6, p. 37-38, Mason's.

- A meeting in which the board or commission is acting in a quasi-judicial capacity, except as otherwise provided by law.

It is unclear what is considered an “unreasonable delay” when deciding if the public’s opportunity to be heard should be curtailed.

If the board or commission adopts rules or policies to govern the opportunity to be heard, then those rules or policies must be limited to those that:

- Provide guidelines regarding the amount of time an individual has to address the board or commission;
- Prescribe procedures that allow a representative of a group or faction on a proposition to address the board or commission at meetings in which a large number of individuals wish to be heard, rather than all members of the group or faction;
- Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard; to indicate his or her support, opposition, or neutrality on a proposition; and to indicate his or her designation of a representative to speak for him or her or his or her group on a proposition if he or she so chooses; or
- Designate a specified period of time for public comment.

The bill authorizes the adoption of rules or policies to allow representatives of factions or groups to address the board, but does not specifically address the manner of selecting such representatives. Neither does the bill define factions or groups.

If the board or commission adopts rules or policies in compliance with the act and follows such rules or policies when providing an opportunity to be heard, the board or commission is deemed to be acting in compliance with the act.

The bill provides that a circuit court has jurisdiction to issue an injunction for the purpose of enforcing this section upon the filing of an application for such injunction by any citizen of Florida. Whenever an action is filed against a board or commission to enforce the provisions of this act, the court must assess reasonable attorney fees against the appropriate state agency or authority if the court determines that the defendant to such action acted in violation of the act. The bill also authorizes the court to assess reasonable attorney fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. These provisions do not apply to a state attorney or his or her duly authorized assistants or any officer charged with enforcing the provisions of the act. If a board or commission appeals a court order that found the board or commission to violate this bill, and such order is affirmed, the court shall award reasonable attorney fees for the appeal.

The bill would allow lobbyists and others having special interests, whether disclosed or undisclosed, to exercise all the rights granted to members of the public. Such interested participants would even be able to recruit speakers and filibuster the time allotted for public input. The bill does not appear to allow any conditions such as an oath or affirmation or the disclosure of interests or conflicts.

The bill also would allow any person or organization, including those who are not constituents of the board or commission, to speak on any subject remotely related to the proposition being deliberated whenever the opportunity for public comment is made available. Even paid commercials may be protected by the bill.

The bill provides that any action taken by a board or commission that is found to be in violation of the act is not void as a result of such violation.

The bill provides that the act fulfills an important state interest.

## B. SECTION DIRECTORY:

Section 1 creates s. 286.0114, F.S., providing that the public be provided with a reasonable opportunity to be heard at public meetings.

Section 2 provides a legislative finding of an important state interest.

Section 3 provides an effective date of October 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

Governmental entities could incur additional meeting related expenses because longer and more frequent meetings could be required when considering items of great public interest. As a result, it is likely staff would have to be compensated, security would have to be provided, and other expenses related to the meeting and meeting facility would be incurred. The amount of those potential expenses is indeterminate and would vary depending on the magnitude of each issue and the specific associated meeting requirements.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision of Art. VII, s. 18 of the State Constitution may apply because this bill could cause counties and municipalities to incur additional expenses associated with longer meetings or an increased number of meetings due to the new requirement that the public be provided with the opportunity to speak at such meetings; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. If an exemption does not apply, an exception may still apply if the bill articulates a finding of serving an important state interest and if the bill applies to all persons similarly situated. The bill articulates a finding of serving an important state interest and it applies to boards and commissions of all state agencies and authorities and all agencies and authorities of counties, municipal corporations, and political subdivisions. Therefore, an exception appears to apply.

2. Other:

None.

## B. RULE-MAKING AUTHORITY:

The bill limits a presumed authority of every board or commission to adopt rules or policies governing the opportunity to be heard. The limited rules or policies may require, at meetings in which a large number of individuals wish to be heard, that representatives of groups or factions on an item, rather than all of the members of the groups or factions, address the board or commission. It requires representatives of factions or groups to address the board, but does not directly address the manner of selecting such representatives. It also does not appear to provide sufficient guidance to the definition of "factions" or "groups" in order to allow a clear distinction between an individual and a group having a similar position on a question. (May all speakers in favor of a question be considered part of a single faction or group?)

As drafted, the opportunity to be heard is subject to rules or policies adopted by the state or local board or commission. Allowing each state board or commission to create its own rules allows it to tailor its rules to its needs, but may not provide as much ease of use by the public as would uniform rules created by an entity such as the Administration Commission.

The bill allows time to be limited by rule but does not appear to provide guidance sufficient for a board or commission to determine whether a time limit allows "reasonable" time.

The bill does not provide sufficient guidance to determine whether a public participant, once recognized to speak, may be limited to the proposition before the board or commission.

Not every board and commission may possess sufficient rulemaking authority to adopt rules as contemplated by the bill. Nothing in the bill can be easily construed to grant such authority. If a public body lacked such authority, the only constraint on public participation would be a judge's interpretation of the phrase "reasonable opportunity".

## C. DRAFTING ISSUES OR OTHER COMMENTS:

### Drafting Issues: Placement in Law

The bill creates s. 286.0114, F.S., to provide provisions governing the opportunity for the public to be heard at a public meeting of a board or commission. It has been suggested that the provisions be created in s. 286.0110, F.S., in order to ensure that the provisions are placed in law behind the Sunshine Law. As currently drafted, the opportunity to speak provisions would be placed in law behind exemptions to the Sunshine Law. However, the placement of statutory provisions does not ordinarily affect their meaning. The Florida Statutes are organized by a numbering system established by the Office of Legislative Services.<sup>14</sup> So much leeway is authorized in the organization process that the placement and numbering of statutes should not be used in interpretation, except as may be required by express references thereto.<sup>15</sup>

The Government Operations Subcommittee amended the bill to provide needed consistency in the use of the terms "board" and "commission". As a consequence, the bill has the same scope as Florida's open meetings law.<sup>16</sup> Accordingly, the bill does not appear to apply to all public bodies,<sup>17</sup> particularly to those bodies created by the Constitution having their own inherent procedural jurisdiction.

### Other Comments: Remedies

The bill provides that a person may seek injunctive relief to enforce the right to a reasonable opportunity to be heard. However, the bill also provides that any act taken by a board or commission in violation of the bill is not void. A challenge brought by a person who alleges that he or she was not provided a reasonable opportunity to be heard before a board or commission about a proposition may

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<sup>14</sup> See, Section 11.242(2), F.S.

<sup>15</sup> See, Section 11.242(5)(c)-(g), F.S. See also, Art. III, s. 6, Fla. Const. (laws may not be amended by reference to title only but only by changing the text of the substantive provisions).

<sup>16</sup> Section 286.011, F.S.

<sup>17</sup> The self-executing open meetings provision of the Florida Constitution applies to "any collegial public body of the executive branch...or...of a county, municipality, school district, or special district, at which official acts are to be taken..." Art. I, s. 24, Fla. Const. The term "any collegial body" appears broader than the definition of "board or commission" in the bill.

be rendered moot if the board or commission has taken a final action on the proposition. Moot matters are generally not considered by courts. Injunctive relief, for example, might not be available in such a scenario as there would be no action of the board or commission that could be enjoined.<sup>18</sup> Declaratory relief may likewise be unavailable.<sup>19</sup> On the other hand, there is a generally recognized exception to the rule of mootness where a matter is capable of repetition and evading review. Where a harm is capable of recurring, courts may consider a case even though the specifics of that particular case may render it moot.<sup>20</sup>

### Non-English Speakers

The bill does not make provision for non-English speakers, translation of non-English comments or the allocation of time between speakers for whom a reasonable opportunity may require translation and those who do not require translation.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 6, 2013, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably with committee substitute. The committee substitute:

- Defines the term “board” or “commission”. This change creates consistency in the use of the term throughout the bill.
- Clarifies that the opportunity to be heard must be afforded before action is taken on a proposition. The original bill inconsistently referenced the terms “proposition” or “item”.
- Clarifies that the rule requirements under the bill only pertain to the opportunity to be heard, and that the requirements do not limit the ability of a board or commission to maintain order and decorum.
- Authorizes the court to assess attorney fees to a challenger if the challenger prevails on appeal from a trial court order finding a violation of the opportunity to be heard.
- Provides a legislative finding of an important state interest.
- Provides that if a board or commission adopts rules or policies and follows those rules or policies, then the board or commission is deemed to be acting in compliance with the act. The original bill stated if a board or commission adopted rules or policies and followed those rules or policies it would merely be presumed to be acting in compliance with the act.
- Delays the effective date from July 1, 2013, to October 1, 2013.
- Removes the provision providing that an opportunity to be heard must be provided at a meeting with the same notice requirements as the meeting at which an official action on a proposition is taken.
- Clarifies that the opportunity to be heard does not apply to an official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations.

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<sup>18</sup> See, for example, *Chafetz v. Greene*, 203 So.2d 18 (Fla. 3rd DCA 1967) (dismissing a suit seeking to enjoin an election as moot since the election had been held); *Halloran v. Pensacola Ass’n of Life Underwriters, Inc.*, 395 So.2d 554 (Fla. 1st DCA 1981) (dismissing as moot a suit seeking to enjoin a temporary suspension where the suspension had expired).

<sup>19</sup> See *Boatman v. Florida Dep’t of Corrections*, 924 So.2d 906 (Fla. 1st DCA 2008) (finding that portion of complaint dealing with conditions for which an inmate sought declaratory and injunctive relief were rendered moot by the inmate’s transfer).

<sup>20</sup> See *Gangloff v. Taylor*, 758 So.2d 1159 (Fla. 4th DCA 2000) (holding that action challenging a homeowner’s association’s assessments was not rendered moot by a change in the method of levying assessments as there was no guarantee that future boards would not attempt to reinstate the old method of levying assessments); *Z.R. v. State*, 596 So.2d 723 (Fla. 5th DCA 1992) (stating that a challenge to detention without an adjudicatory hearing in violation of statute could proceed even after the detention had terminated, as illegal detentions might otherwise be capable of repetition yet evading judicial review).