The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL:	SB 50
INTRODUCER:	Senator Negron
SUBJECT:	Public Meetings
DATE:	February 5, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	McVaney	GO	**Pre-meeting**
2.			AP	
3.			RC	
4.				
5.				
6.				

I. Summary:

SB 50 requires members of the public to be given a reasonable opportunity to be heard at a public meeting on a proposition before a state or local government board or commission. Such opportunity 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 excludes specified meetings and acts from the "right to speak" requirement.

The bill authorizes a board or commission to adopt certain reasonable rules or policies to ensure the orderly conduct of a public meeting. If a board or commission adopts such rules or policies and thereafter complies with them, it is presumed to be acting in compliance with the act.

The bill authorizes circuit courts to issue injunctions for the purpose of enforcing the act upon the filing of an application for such injunction by any citizen of Florida. If an action is filed against a board or commission to enforce the provisions of the act and the court determines that the board or commission violated the act, the bill requires the court to assess reasonable attorney fees against the appropriate state agency or authority. The bill also authorizes the court to assess reasonable attorney fees against the individual filing the action if the court finds that the action was filed in bad faith or was frivolous. The bill excludes specified public officers from its attorney fee provisions.

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.

This bill creates section 286.0114 of the Florida Statutes.

II. Present Situation:

Florida Constitution: Public Meetings

The Florida Constitution requires 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, to be open and noticed to the public.[1]

Government in the Sunshine Law

Access to government meetings is also governed by the Florida Statutes. Section 286.011, F.S., also known as the "Government in the Sunshine Law" or "Sunshine Law," requires 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, to be open to the public at all times. The board or commission must provide reasonable notice of all public meetings. Public meetings may not be held in certain locations that discriminate 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.[2] Minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and be open to public inspection.[3]

Right to Speak at Public Meetings

The Florida Constitution and the Florida Statutes 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.

In *Keesler v. Community Maritime Park Associates, Inc.*,[4] the plaintiffs alleged that the Community Maritime Park Associates, Inc. (CMPA)[5] violated the Sunshine Law by not providing them the opportunity to speak at a public meeting concerning the development of certain waterfront property. The plaintiffs argued that the Sunshine Law phrase "open to the public" grants citizens the right to speak at public meetings. The First District Court of Appeal held that no such right exists:

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[1] Article I, s. 24(b) of the Florida Constitution.
[2] Section 286.011(6), F.S.
[3] Section 286.011(2), F.S.
[4] 32 So.3d 659 (Fla. 1st DCA 2010).
[5] The CMPA is a not-for-profit corporation charged by the City of Pensacola with overseeing the development of a parcel of public waterfront property. The CMPA did not dispute that it was subject to the requirements of the Sunshine Law. *Id*. at 660. A private entity is generally subject to public records and open meetings laws when 1) there has been a delegation of the public agency's governmental functions; or 2) the private entity plays an integral part in the decision-making process of the public agency or has a significant level of involvement with the public agency's performance of its duties. *See* Ops. Att'y Gen. Fla. 92-53 (1992) (direct support organization created for purpose of assisting public museum subject to s. 286.011, F.S.); 83-95 (1983) (where county accepted services of nongovernmental committee to recodify and amend county's zoning laws, committee subject to Sunshine Law).

> Relying on the language in *Marston*[6], the trial court determined that, although 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* (albeit dicta), we are not inclined to broadly construe the phrase as granting such a right here.[7]

In the second case, *Kennedy v. St. Johns Water Management District*, the plaintiffs alleged, in part, that the St. Johns Water Management District (the district) violated the Sunshine Law by preventing certain people from speaking at a public meeting concerning the proposed approval of a water use permit.[8] The trial court held that, "Because, as clearly articulated in *Keesler*, the Sunshine Law does not require the public be allowed to speak, plaintiffs' claim … fails as a matter of law."[9] The Fifth District Court of Appeal affirmed the trial court's ruling.[10]

III. Effect of Proposed Changes:

The bill creates s. 286.0114, F.S., providing that members of the public must be given a reasonable opportunity to be heard on a proposition before a board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision. The opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action on the proposition if such opportunity:

- Occurs at a meeting that meets the same notice requirements as the meeting at which the board or commission takes official action on the item;
- Occurs at a meeting that is during the decision-making process; and
- Is within reasonable proximity before the meeting at which the board or commission takes the official action.

The opportunity to be heard is not required for meetings that are exempt from open meetings requirements or for meetings in which the board or commission is acting in a quasi-judicial capacity with respect to the rights or interests of a person. The bill specifies that such exclusion does not affect the right of a person to be heard as otherwise provided by law.

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; or

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[6] 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 university's 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).

[7] *Keesler*, *supra* note 3, at 660-61.

[8] The trial court was the Circuit Court of the Seventh Judicial Circuit, in and for Putnam County, Florida. *See* the trial court's "Order Granting Motion for Summary Judgment," September 28, 2010, at 1-3 (on file with the Governmental Oversight and Accountability Committee).

[9] *Id*. at 6.

[10] 2011 WL 5124949 (Fla. 5th DCA 2011).

- An official act involving no more than a ministerial act.

The bill authorizes a board or commission to adopt reasonable rules or polices to ensure the orderly conduct of a public meeting.[11] Such rules or policies must be limited to those that:

- Limit the time an individual has to address the board or commission;
- Require, at meetings in which a large number of individuals wish to be heard, that a representative of a group or faction on an item, rather than all of the members of the group or faction, address the board or commission;
- 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 creates a presumption that the board or commission is acting in compliance with the act 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 bill authorizes circuit courts to issue injunctions 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 bill requires the court to 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 attorney fee provisions do not apply to a state attorney, to his or her duly authorized assistants, or to any officer charged with enforcing the provisions of the act. The bill does not appear to authorize courts to assess attorney fees for appellate costs.[12]

The bill specifies 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's effective date is July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The Florida Constitution provides that no county or municipality may be bound by any general law that mandates it to spend funds or to take an action requiring the expenditure

[11] Executive branch agencies that are subject to the Florida Administrative Procedure Act (ch. 120, F.S.) *must* adopt through the rulemaking process (s. 120.54, F.S.) any agency statement defined as a rule by s. 120.52, F.S. Section 120.52(16), F.S., defines "rule" to mean each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

[12] The Sunshine Law, in contrast, provides for attorney fees at both the circuit court and appellate court levels (s. 286.011(4)-(5), F.S.).

of funds unless the Legislature determines that such law fulfills an important state interest *and* one of specified other requirements is met.[13] Certain laws, including those with an insignificant fiscal impact, are exempt from the mandates restrictions of the section.[14]

This bill requires counties and municipalities to take actions that may require the expenditure of funds. If so, the bill may be exempt if the fiscal impact is insignificant.

If the bill has a significant fiscal impact, it may still qualify for an exception if it contains a legislative finding that it fulfills an important state interest *and* meets one of the other specified requirements. The bill does not contain a finding that it fulfills an important state interest; however, it may meet one of the other specified requirements. The bill applies to boards and commissions of all state agencies and authorities and all agencies and authorities of counties, municipal corporations and political subdivisions; therefore, it appears to apply to all persons similarly situated. The bill also could meet one of the other specified requirements by passing with a two-thirds vote of the membership of each house.[15]

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[13] Article VII, s. 18(a) of the Florida Constitution. The specified other requirements are:
- Funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure;
- The Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality;
- The law requiring such expenditure is approved by two-thirds of the membership in each house of the Legislature;
- The expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; *or*
- The law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance. *Id*.

[14] Article VII, s. 18(d) of the Florida Constitution. Other laws that are exempt from the mandates requirements are:
- Laws adopted to require funding of pension benefits existing on the effective date of Art. VII, s. 18 of the Florida Constitution;
- Criminal laws;
- Election laws;
- The general appropriations act;
- Special appropriations acts;
- Laws reauthorizing but not expanding then-existing statutory authority; and
- Laws creating, modifying, or repealing noncriminal infractions. *Id*.

[15] A two-thirds vote of the membership of each house requires a two-thirds vote of *all* members, not just of those present and voting.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Governmental entities may incur additional meeting related expenses because longer meetings may be required when considering items of great public interest. The amount of those potential expenses is indeterminate and will vary depending on the magnitude of each issue and the specific associated meeting requirements.

In addition, the uncertainties in the bill could generate lawsuits over its meaning and application to particular situations. The cost of defending such suits would be indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Municipal/County Mandates Restrictions

The bill does not include a legislative finding that it fulfills an important state interest. It is suggested that such a finding be added.

Rulemaking

The bill authorizes a board or commission to adopt limited 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 appear to allow rulemaking to govern the manner of selecting such representatives.

It is unclear whether the bill's restrictions on rules or policies of a board or commission apply to all public meetings of such board or commission, only to public meetings at which the public must be given an opportunity to be heard, or only to the *portions* of public meetings in which the public is given an opportunity to be heard. If interpreted to apply to all public meetings of a board or commission, this bill may supersede existing policies.

The constitutional separation of powers doctrine[16] prevents the Legislature from delegating its constitutional duties.[17] Because legislative power involves the exercise of policy-related discretion over the content of law,[18] any discretion given an executive branch agency to implement a law must be "pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program."[19] Although the bill authorizes, but does not require, boards and commissions to adopt certain rules or policies, executive branch agencies are required to adopt as a rule a statement of general applicability that implements law or policy and that imposes a requirement not specifically required by statutes or existing rule.[20] The bill prescribes the items that such rules or policies may address.

It is suggested that the effective date of the bill be postponed to October 1, 2013, to allow such boards and commissions time to promulgate rules to implement the bill.

Drafting Issues

The bill does not create a definition for "board or commission," although a more extensive description is given at the beginning of the bill. It is suggested that a definition for "board or commission" be specified.

The bill appears to use the terms "proposition" and "item" interchangeably to refer to an act for which the opportunity to be heard is required. It is suggested that the bill be amended to conform all such references to the term "proposition."

Lines 54-57 of the bill exempt a meeting in which a board or commission is acting in a quasi-judicial capacity with respect to the rights or interests of a person from the right to speak requirement, and specifies that such exemption does not affect the right of a person to be heard as otherwise provided by law. It is suggested that "with respect to the rights or interests of a person" be deleted to prevent confusion over whom or what constitutes a "person."

The bill authorizes circuit courts to issue injunctions for the purpose of enforcing the act and provides for the assessment of attorney fees in circumstances in which an enforcement action is filed, but locates the attorney fee provisions before the enforcement authorization. It is suggested that the enforcement authorization be relocated before the attorney fee provisions.

It is suggested that the references to "the act" in the bill be replaced with "the section" for clarity.

Other Comments

The bill does not define the terms "proposition," "reasonable proximity," "ministerial act," "factions," and "groups."

[16] Article II, s. 3 of the Florida Constitution.
[17] *See Florida State Bd. of Architecture v. Wasserman*, 377 So.2d 653 (Fla. 1979).
[18] *See State ex rel. Taylor v. City of Tallahassee*, 177 So. 719 (Fla. 1937).
[19] *See Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978).
[20] *See* note 11.

The bill does not specify what is considered an "unreasonable delay" when deciding if the public's opportunity to be heard should be usurped.

It is unclear whether lines 74-78 of the bill provide that a board or commission that adopts rules or policies in compliance with the act and thereafter follows them is deemed to be acting in compliance, or that such actions create a rebuttable legal presumption.

It is unclear whether a state board's or commission's denial of someone's right to speak may constitute an agency action challengeable under the Administrative Procedure Act. In cases in which an administrative remedy is available, a plaintiff may be required to exhaust all administrative remedies before pursuing a civil remedy.[21]

As currently drafted, each state or local board or commission may create its own rules or policies governing the right to speak. 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 specifies that circuit courts may issue injunctions to enforce the provisions of the act. It is unclear whether this could be interpreted to exclude civil remedies other than injunctions and the attorney fees also explicitly authorized by the bill.

The bill does not appear to authorize attorney fees for appellate costs if a board or commission is found to have violated the act.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[21] *See*, for example, *Orange County, Fla. v. Game and Fresh Water Fish Commission*, 397 So.2d 411 (Fla. 5th DCA 1981).