HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 355 Public Meetings
SPONSOR(S): Kiar and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	14 Y, 0 N, As CS	Williamson	Williamson
2) Rulemaking & Regulation Subcommittee	11 Y, 3 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. In both cases, the court found 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 provides that the opportunity to be heard is subject to reasonable rules or policies adopted by the board or commission. It limits the scope of the rules and policies and requires each board or commission subject to the Administrative Procedure Act (APA) to adopt the rules under provisions in the APA. Only boards or commissions subject to the APA are authorized to adopt the limited rules and policies. Consequently, most local boards and commissions would not have authority to adopt rules implementing the law.

Finally, if a board or commission adopts rules or policies in compliance with the law and follows the rules or policies when providing an opportunity for the public to speak, it is presumed that the board or commission is acting in compliance with the requirement that citizens be given the opportunity to be heard.

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

This bill may be a county or municipality 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.

The Legislature is authorized by Article I, s. 24(c), to provide exemptions from the open records and open meeting requirements upon a 2/3 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.[1] The board or commission must provide reasonable notice of all public meetings.[2] 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.[3] Minutes of a public meeting must be promptly recorded and be open to public inspection.[4]

Right to Speak at Meetings

The State 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.[5]

In *Keesler v. Community Maritime Park Associates, Inc.*,[6] 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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[1] Section 286.011(1), F.S.

[2] *Id.*

[3] Section 286.011(6), F.S.

[4] Section 286.011(2), F.S.

[5] 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, e.g., 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).

[6] 32 So.3d 659 (Fla. 1st DCA 2010).

> Relying on the language in *Marston*,[7] 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.[8]

The second case, *Kennedy v. St. Johns Water Management District,*[9] 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.

Effect of 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 does not define a board or commission for purposes of the new requirements. For example, the Sunshine Law provides that it applies to 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.

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

It is unclear what is meant by "reasonable proximity" because the term is not defined.

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; or
- A meeting in which the board or commission is acting in a quasi-judicial capacity with respect to the rights or interests of a person, 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 usurped.

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[7] 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).

[8] *Keesler* at 660-661.

[9] 2011 WL 5124949 (Fla. 5th DCA 2011).

The bill authorizes a board or commission to adopt reasonable rules or policies to ensure the orderly conduct of public meetings. Boards or commissions subject to the Administrative Procedure Act[10] must adopt rules under ss. 120.536(1) and 120.54, F.S., governing the opportunity to be heard. The bill provides that rules or policies of a board or commission may:

- Limit the time that 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; or
- Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard.

The bill provides that the opportunity to be heard is subject to reasonable rules or policies adopted by the board or commission to ensure the orderly conduct of a public meeting. However, the bill limits the scope of the rules and policies and requires each board or commission subject to the Administrative Procedure Act[11] to adopt the rules under ss. 120.536(1) and 120.54, F.S. Rules or policies adopted by the board or commission are limited to rules or policies that:

- Designate a specified period of time for public comment;
- 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 representatives of groups or factions on an item, rather than all of the members of the groups or factions, address the board or commission; or
- 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.

Only boards or commissions subject to the Administrative Procedure Act are authorized to adopt the limited rules and policies. As a result, most local boards and commissions would not be authorized to adopt rules to implement the law.

Finally, if a board or commission adopts rules or policies in compliance with the law and follows the rules or policies when providing an opportunity for the public to speak, it is presumed that the board or commission is acting in compliance with the requirement that citizens be given the opportunity to be heard. A presumption in the law may be overcome. Some presumptions are overcome by the presentation of reliable evidence inconsistent with the fact presumed. Other presumptions are overcome by clear and convincing evidence. As the bill does not specify the meaning of the presumption, the courts would determine the force of the presumption. A true safe harbor principle would make it clear that if the conditions were met, that the actor meeting the conditions would be deemed in compliance as a matter of law.

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 an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[10] *See* chapter 120, F.S.
[11] *See* chapter 120, F.S.

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.[12]

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

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 increased 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. The exceptions to the mandates provision of Art. VII, s. 18, of the Florida Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes a board or commission to adopt reasonable rules or policies to ensure the orderly conduct of public meetings. Boards or commissions subject to the Administrative Procedure Act (APA) must adopt rules under ss. 120.536(1) and 120.54, F.S., governing the opportunity to be heard. The bill provides guidelines regarding the rules or policies that may be adopted by a board or commission subject to the APA. Boards and commissions subject to the APA include state agencies, school boards

[12] According to the Commission on Ethics, "the only potential concern would be an increase in the length of the meetings and the possible need, and fiscal impact, of Commission members extending their stay in Tallahassee." Analysis of HB 355 (2012) by the Commission on Ethics (on file with the Government Operations Subcommittee).

and local boards and commissions having a jurisdiction extending beyond one county, as well as other entities that are expressly made subject to eh APA by law or judicial decision. Thus, most local boards and commissions are not covered by the APA and would not have authority under the bill to adopt rules implementing the law. Some of those boards and commissions may have rulemaking authority sufficient to organize their own meetings, but would not likely have authority to define what a reasonable time might be for a person to testify at such meetings. Thus the bill leaves a great gap between the rulemaking authority necessary to implement the law and the actual authority such boards and commissions actually possess.

For boards and commissions governed by the APA, the bill provides guidance for rulemaking. However, the bill authorizes limitations on time each individual may speak, but not limitations on total time allotted for public comment. The bill requires that representatives of factions or groups address the board, but does not allow rulemaking to govern the manner of selecting such representatives. Neither does the bill define factions or groups. It also does not provide for rulemaking for the division of time between those addressing the board or commission.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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 is 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.

Boards and Commissions

The bill governs the opportunity for the public to be heard at public meetings of a board or commission. The bill does not define a board or commission for purposes of the new requirements. It is suggested that the bill be amended to clarify that it applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision" as provided in the Sunshine Law.

Exceptions

The bill provides three exceptions: emergencies that do not permit unreasonable delay; ministerial acts; an administrative hearing adjudicating the rights or interests of a person.. However, the bill does not exempt meetings that have been properly exempted from the open meeting law pursuant to the constitution.[13] For instance, current law exempts from the open meetings requirements, those meetings that would reveal a security system plan or portion thereof that is confidential and exempt from the open records law.[14] Thus, the bill would require a board or commission to permit public comment on confidential matters that involve sensitive public security information. It would also allow public comment on closed meetings involving competitive negotiations[15] and litigation.[16] The bill may, therefore, invite public advocacy on such confidential matters and could undermine the public necessity that justified the exemption from the open meeting and/or open records requirements.

Rules and Procedures

The bill provides that the opportunity to be heard is subject to reasonable rules or policies adopted by the board or commission. It limits the scope of the rules and policies and requires each board or commission subject to the Administrative Procedure Act (APA) to adopt the rules under ss. 120.536(1) and 120.54, F.S. As currently drafted, the bill only authorizes boards or commissions subject to the APA to adopt the limited rules and policies. Local governments generally are not subject to the APA. As such, the bill could be interpreted in three ways:

[13] Art. I, s. 24(c), Fl. Const., provides that the Legislature may enact exemptions from public records and public meetings requirements.
[14] Section 286.0113(1).
[15] See S. 286.0113(2).
[16] See S. 286.011(8).

1. Local boards and commissions would not be afforded the same opportunity to adopt the limited rules and policies;
2. Local boards and commissions would not be limited in the rules and policies they could adopt; or
3. Local boards and commissions would have to adopt rules and policies under ss. 120.536(1) and 120.54, F.S., if they wanted to adopt any rules or policies.

As such, it is suggested that the bill be amended to clarify the authorization to adopt rules or policies. Also, as described under B. RULE-MAKING AUTHORITY, above, the bill could more comprehensively address practical matters necessary to ensure orderly meetings when public participation is required.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 18, 2012, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment removes placement of the provisions from the Sunshine Law and, instead, places the provisions in a new s. 286.0114, F.S. It also removes the fines, penalties, and attorney's fees. The bill removes the provision providing that if the board or commission violates the provisions governing the right to speak, then the actions of the board or commission are nullified. Finally, it removes the public meeting exemption.

The analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.