

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** HB 855 Special Districts

**SPONSOR(S):** Payne and others

**TIED BILLS:** **IDEN./SIM. BILLS:**

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**FINAL HOUSE FLOOR ACTION:** 117 Y's      0 N's      **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

HB 855 passed the House on March 11, 2020, as CS/SB 1466.

State and local government websites are subject to Title II of the Americans with Disabilities Act (ADA), which prohibits state and local governments from discriminating against a qualified disabled person because of a disability unless a modification of policy or procedure is unreasonable, alters the nature of the service, or causes the government an undue financial or administrative burden. The United States Department of Justice (DOJ) administers Title II. While not having provided any regulations on how state and local government websites can comply with the ADA, the DOJ has issued an ADA Best Practices Tool Kit for state and local governments, which provides suggestions and checklists. Under Title II of the ADA, state and local governments may be sued and many have recently faced increased litigation relating to state and local government website access.

In 2018, the voters adopted Amendment 12, revising Article II, section 8 of the Florida Constitution, related to ethics in government. Included in the revision was a prohibition against public officers and public employees abusing their position to obtain a "disproportionate benefit" as defined by the Florida Commission on Ethics.

The bill reduces the information that a special district must post online by authorizing a special district to satisfy the statutory requirement to post the most recent financial audit online by providing a link to the report maintained on the Auditor General's website. The bill also removes the requirement for special districts to post facility reports and meeting materials online.

The bill clarifies that compliance by board members and public employees of independent special districts, especially those of community development districts (CDDs), with the requirements of the statutory ethics code in the performance of their duties is not an abuse of their position under the new constitutional provision. The bill also excludes certain acts or omissions by board members or employees of special districts, including CDDs, from being considered abuse of public position under Article II, section 8(h)(2) of the Florida Constitution, if such acts or omissions are authorized under specific provisions of the Florida Code of Ethics.

The bill may have a positive fiscal impact on local governments and does not appear to have a fiscal impact on the state.

The bill was approved by the Governor on June 23, 2020, ch. 2020-77, L.O.F., and is effective on July 1, 2020, except as otherwise provided.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Present Situation

##### Special Districts

A “special district” is a unit of local government created for a particular purpose, with jurisdiction to operate within a limited geographic boundary. Special districts are created by general law, special act, local ordinance, or rule of the Governor and Cabinet.<sup>1</sup> A special district has only those powers expressly provided by, or reasonably implied from, the authority provided in the district’s charter. Special districts provide specific municipal services in addition to, or in place of, those provided by a municipality or county.<sup>2</sup>

A “dependent special district” is a special district where the membership of the governing body is identical to the governing body of a single county or municipality, all members of the governing body are appointed by the governing body of a single county or municipality, members of the district’s governing body are removable at will by the governing body of a single county or municipality, or the district’s budget is subject to the approval of the governing body of a single county or municipality.<sup>3</sup> An “independent special district” is any district that is not a dependent special district.<sup>4</sup>

According to the Department of Economic Opportunity’s (DEO) Special District Accountability Program Official List of Special Districts, as of March 12, 2020, the state had 1,762 special districts. There were 1,127 independent districts and 635 dependent districts.<sup>5</sup>

Special districts are governed generally by the Uniform Special District Accountability Act (Act).<sup>6</sup> The Act, initially passed in 1989,<sup>7</sup> created ch. 189, F.S., to centralize provisions governing special districts. The Act applies to the formation,<sup>8</sup> governance,<sup>9</sup> administration,<sup>10</sup> supervision,<sup>11</sup> merger,<sup>12</sup> and dissolution<sup>13</sup> of special districts, unless otherwise expressly provided in law.<sup>14</sup> The Act also provides a statement of legislative intent providing that the Legislature sought to improve the accountability of special districts to state and local governments as well as promote more effective communication and coordination in the monitoring of required reporting.<sup>15</sup>

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<sup>1</sup> See ss. 189.031(3), 189.02(1), and 190.005(1), F.S. See, generally, s. 189.012(6), F.S.

<sup>2</sup> 2018 – 2020 Local Gov’t Formation Manual, p. 62, available at <https://myfloridahouse.gov/Sections/Documents/loadoc.aspx?PublicationType=Committees&CommitteeId=3025&Session=2019&DocumentType=General Publications&FileName=2018-2020 Local Government Formation Manual Final.pdf> (last visited January 9, 2020).

<sup>3</sup> S. 189.012(2), F.S.

<sup>4</sup> S. 189.012(3), F.S.

<sup>5</sup> See Department of Economic Opportunity, *Official List of Special Districts Online, Special District Statewide Totals as of March 12, 2020*, available at <http://specialdistrictreports.floridajobs.org/webreports/StateTotals.aspx> (last visited March 12, 2020).

<sup>6</sup> S. 189.01, F.S., *but see* ch. 190, F.S. (community development districts), and ch. 191, F.S. (independent special fire control districts).

<sup>7</sup> Ch. 89-169, Laws of Fla.

<sup>8</sup> See ss. 189.02 (creation of dependent special districts) and 189.031, F.S. (creation of independent special districts).

<sup>9</sup> See s. 189.0311, F.S. (charter requirements for independent special districts).

<sup>10</sup> See s. 189.019, F.S. (requiring codification of charters incorporating all special acts for the district).

<sup>11</sup> See s. 189.0651, F.S. (oversight for special districts created by special act of the Legislature).

<sup>12</sup> Ss. 189.071 and 189.074, F.S.

<sup>13</sup> Ss. 189.071 and 189.072, F.S.

<sup>14</sup> See, e.g., s. 190.004, F.S. (Ch. 190, F.S. as “sole authorization” for creation of community development districts).

<sup>15</sup> S. 189.06, F.S.

## Reporting Requirements and Oversight

Special districts are subject to oversight and review by state and local governments to better determine the need for the continued existence of a district, the appropriate future role and focus of a district, improvements to the function or service by a district, and the need for any transition, adjustment, or special implementation periods or provisions.<sup>16</sup>

Special districts created by special act are subject to review by the Legislative Auditing Committee at a public meeting for not complying with reporting requirements under the Act, as well as oversight matters in general.<sup>17</sup> Special districts created by local ordinance or resolution are subject to review by the chair, or the equivalent, of the local governing body.<sup>18</sup> Special districts created or established by rule of the Governor and Cabinet may be reviewed as directed by the Governor and Cabinet.<sup>19</sup> Special districts not subject to other oversight may be reviewed as directed by the President of the Senate and the Speaker of the House of Representatives.<sup>20</sup>

State agencies administering funding programs to eligible special districts are responsible to oversee the use of such funds by the special district, including reporting the existence of the program to the Special District Accountability Program within DEO.<sup>21</sup>

### *Maintaining Official Websites*

Special districts are required to maintain an official website and list certain information on the website.<sup>22</sup> An independent special district is required to maintain a website separate from the local governing body's official website.<sup>23</sup> A dependent special district may maintain a separate website but is only required to be prominently displayed on the homepage of the local general purpose government's website with a hyperlink to the pages that provide the information required by statute.<sup>24</sup>

Every special district is required to post, at a minimum, the following information on its official website:

- The full legal name, mailing address, e-mail address, telephone number, and website uniform resource locator of the special district.
- The public purpose of the special district.
- The primary contact information for the special district for purposes of communication from DEO.
- The name, official address, official e-mail address, and, if applicable, term and appointing authority for each member of the governing body of the special district.
- The fiscal year of the special district.
- The full text of the special district's charter, the date of establishment, the establishing entity, and the statute or statutes under which the special district operates, if different from the statute or statutes under which the special district was established.
- A description of the boundaries or service area of, and the services provided by, the special district.

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<sup>16</sup> S. 189.068(1), F.S. Any final recommendations from the oversight review process, which are adopted and implemented by the appropriate level of government, may not be implemented in a manner that would impair the obligation of contracts.

<sup>17</sup> S. 189.0651(2), F.S.

<sup>18</sup> S. 189.0652(2), F.S. Dependent special districts not created by special act may be reviewed by the local general-purpose government upon which it is dependent. See s. 189.068(2)(c), F.S.

<sup>19</sup> S. 189.068(2)(d), F.S.

<sup>20</sup> S. 189.068(2)(e), F.S.

<sup>21</sup> S. 189.065(1) and (2), F.S. The list of participating special districts must indicate if a district is not in compliance with state funding program requirements.

<sup>22</sup> S. 189.069(1), F.S.

<sup>23</sup> S. 189.069(1)(a), F.S.

<sup>24</sup> S. 189.069(1)(b), F.S.

- A listing of all taxes, fees, assessments, or charges imposed and collected by the special district, including the rates or amounts for the fiscal year and the statutory authority for the levy of the tax, fee, assessment, or charge.
- A code of ethics adopted by the special district, if applicable, and a hyperlink to generally applicable ethics provisions.
- The budget of the special district and any amendments thereto.
- The final, complete audit report for the most recently completed fiscal year and audit reports required by law or authorized by the governing body of the special district.
- A listing of its regularly scheduled public meetings.
- The public facilities report, if applicable.
- The link to the Department of Financial Services' website.
- At least seven days before each meeting or workshop, the agenda of the event, along with any meeting materials available in an electronic format, excluding confidential and exempt information. The information must remain on the website for at least one year after the event.<sup>25</sup>

## Federal and State Laws Regulating Access to Records by Disabled Individuals

### *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 (ADA) was enacted to place persons with disabilities on an equal, not advantageous, footing to those without disabilities.<sup>26</sup> The ADA has three parts: Title I applies to employers, Title II applies to public entities, and Title III applies to private entities.

The ADA does not restrict the imposition of greater protection for individuals by other federal, state, or local laws,<sup>27</sup> and does not require covered entities to accommodate or modify their processes for individuals who are not actually disabled.<sup>28</sup>

### *Public Entities*

Title II of the ADA prohibits public entities from excluding the participation in or denying the benefits of their services, programs, or activities to qualified individuals with a disability,<sup>29</sup> or otherwise discriminating against such individuals, because of the disability.<sup>30</sup> For purposes of the ADA, the term “public entities” includes the state and local governments, state and local agencies, and special districts.<sup>31</sup> To meet the definition of a qualified individual with a disability, the person must be eligible for receipt of the public benefit with or without a reasonable modification.<sup>32</sup>

If the need is obvious or upon request,<sup>33</sup> a public entity must:

- Make reasonable modifications to its rules, policies, or practices;
- Remove architectural, communication, or transportation barriers; or

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<sup>25</sup> S. 189.069(2)(a), F.S.

<sup>26</sup> *Kornblau v. Dade Cnty.*, 86 F.3d 193 (11th Cir. 1996) (holding disabled individual was not entitled to parking space in private employee parking lot closest to county government services building).

<sup>27</sup> 42 U.S.C. s. 12201(b).

<sup>28</sup> 42 U.S.C. s. 12201(h).

<sup>29</sup> A person is a ‘qualified’ individual with a disability with respect to licensing if he or she, with or without reasonable modifications, ‘meets the essential requirements’ for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. s. 12131(2). *See also Fla. Bar v. Clement*, 662 So. 2d 690, 700 (Fla. 1995), as amended (November 28, 1995).

<sup>30</sup> 42 U.S.C. s. 12132.

<sup>31</sup> 42 U.S.C. s. 12131(1).

<sup>32</sup> 42 U.S.C. s. 12131(2).

<sup>33</sup> *See McCullum v. Orlando Reg’l Healthcare*, No. 6:11-cv-1387-Orl-31GJK, 2013 WL 1212860, at \*4 (M.D.Fla.2013); *see also Smith v. Rainey*, 747 F. Supp. 2d 1327, 1338 (M.D.Fla.2010).

- Provide auxiliary aids and services when necessary to accommodate an individual with a disability.<sup>34</sup>

A public entity must provide auxiliary aids and services in a timely manner and in an accessible format, and must protect the privacy and independence of the individual.<sup>35</sup> An accommodation or modification that fundamentally alters the nature of the activity, service, or program, or that causes the public entity an undue financial or administrative burden is not reasonable or necessary.<sup>36</sup>

### *Federal Regulations*

The Department of Justice (DOJ) is responsible for administering Title II.<sup>37</sup> In 2010, DOJ took the position that internet website access fell within the scope of the ADA, even in the absence of explicit language. Therefore, public entities communicating through web-based applications or otherwise providing internet services must ensure that individuals with disabilities have equal access to such services or information unless it would alter the nature of the product or cause the entity an undue burden. To date, DOJ has not promulgated any regulations on this issue.<sup>38</sup>

The Civil Rights Division of DOJ released a Best Practices Tool Kit for state and local governments.<sup>39</sup> In the toolkit, DOJ provides suggestions for how governments may design their websites and recommends referencing the Worldwide Web Consortium's (W3C) Web Content Accessibility Guidelines 2.0 (WCAG 2.0), an internationally accepted resource for conformance standards. For documents posted online, DOJ suggests governments posting documents online in Portable Document Format (PDF), or other image-based format, also post a version in Rich Text Format (RTF), or other text-based format, to allow compatibility with assistive technologies. The toolkit includes a checklist to help local governments assess the accessibility of their websites. Although the toolkit is available as a resource, state and local governments are not required to use the toolkit.

### *Section 508 of the Rehabilitation Act of 1973*

Federal agency website accessibility is not regulated under the ADA but primarily under section 508 of the Rehabilitation Act of 1973 (Section 508).<sup>40</sup> Public entities are not required to follow these guidelines. However, Florida requires its state agencies, which includes the executive, legislative, and judicial branches, to follow Section 508 when providing public and employee access to electronic information and data.<sup>41</sup> Under Section 508, when federal agencies develop, procure, maintain, or use electronic and information technology, they must give employees and members of the public with disabilities access to that information that is comparable to the access available to those without disabilities.

### *State Law*

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<sup>34</sup> See 42 U.S.C. s. 12131(2).

<sup>35</sup> 28 C.F.R. s. 35.160(b).

<sup>36</sup> See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 (1999).

<sup>37</sup> See 28 CFR parts 35 (Title II) and 36 (Title III).

<sup>38</sup> DOJ stated in its 2010 comments, "The Department expects to engage in rulemaking relating to website accessibility under the ADA in the near future." Department of Justice, *2010 Guidance and Section-by-Section Analysis (Attorney General's Comments)*, available at [https://www.ada.gov/regs2010/titleII\\_2010/titleII\\_2010\\_regulations.htm#a35102](https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#a35102) (last visited December 17, 2019).

<sup>39</sup> DOJ, ADA Best Practices Tool Kit for State and Local Governments, Chapter 5, available at <https://www.ada.gov/pcaatoolkit/chap5toolkit.htm> (last visited December 17, 2019). The Tool Kit contains a notice that some chapters may not fully reflect the current ADA.

<sup>40</sup> See 29 U.S.C. s. 794d, s. 508 of the Rehabilitation Act; 47 U.S.C. s. 255, and s. 255 of the Telecommunications Act. There is proposed legislation currently in the U.S. Congress that would research the best guidance for state and local governments providing website access. See H.R. 4099 (2019).

<sup>41</sup> See ss. 282.601-282.606, F.S.

Part II of ch. 282, F.S., regulates the accessibility of electronic information among state agencies. Executive, legislative, and judicial branches of state government must ensure that state employees with disabilities have access to and are provided with electronic information and data comparable to the access and use by state employees who do not have disabilities, unless an undue burden would be imposed on the agency.<sup>42</sup> Similarly, individuals with disabilities who are members of the public must be provided with access to and use of electronic information and data comparable to that provided to nondisabled members of the public, unless an undue burden would be imposed on the agency.<sup>43</sup>

Each state agency must develop, procure, maintain, and use accessible electronic information and information technology in conformance with federal law,<sup>44</sup> absent an undue burden. If an agency claims compliance will impose an undue burden, it must provide proof an alternative method allows the individual to use the information and data.<sup>45</sup> These accessibility provisions do not apply to local governments.<sup>46</sup>

### *Case Law Involving Access to Electronic Information*

Section 508 does not authorize a private, non-administrative right of action.<sup>47</sup> Individuals seeking to enforce Section 508 must file an administrative complaint with the offending federal agency.<sup>48</sup> To establish a claim under Title II, a plaintiff must establish he or she had a disability, was denied a public benefit or other discrimination, and the denial of benefits or discrimination was because of the plaintiff's disability.<sup>49</sup> A plaintiff has standing where there is an injury-in-fact, a causal connection between the asserted injury-in-fact and challenged action of the defendant, and the injury will be redressed by a favorable decision. Standing to seek injunctive relief also requires an allegation of facts giving rise to an inference that the plaintiff will suffer future discrimination by the defendant.<sup>50</sup>

While currently there appears to be no Florida appellate court decision resolving a challenge to state agency website accessibility, there have been a number of federal cases in recent years. In *Nat'l Ass'n. of Deaf v. State*, hearing impaired individuals sued the Florida Senate and House of Representatives claiming the failure to put closed captions on live and archived videos of Florida legislative sessions violated the ADA.<sup>51</sup> The case survived a motion to dismiss because the court found the right to participate in the democratic process is a fundamental right that properly abrogates the state's Eleventh Amendment immunity.<sup>52</sup> The litigation appears to be ongoing.<sup>53</sup> Local governments are facing continued federal litigation in the absence of official rules on ADA compliance for government website and electronic document access. The case law is new and unsettled, but there are two emerging legal theories currently being used to determine if a case is viable. Some courts have relied on the standing analysis in Title III (governs ADA issues concerning private companies) website access cases to resolve Title II cases.<sup>54</sup> Other courts have adopted a new Title II rubric based, in part, on the connection the plaintiff has with the defendant-government.<sup>55</sup>

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<sup>42</sup> S. 282.601(1), F.S.

<sup>43</sup> S. 282.601(2), F.S.

<sup>44</sup> Including Section 508 and 36 C.F.R. part 1194.

<sup>45</sup> S. 282, 603, F.S.

<sup>46</sup> See ch. 282, F.S.

<sup>47</sup> See 29 U.S.C. s. 794(d) and *Latham v. Brownlee*, 2005 WL 578149, at \*9 (W.D. Tex.2005).

<sup>48</sup> 29 U.S.C. s. 794(d).

<sup>49</sup> *Kornblau v. Dade Cnty.*, 86 F.3d 193 (11th Cir. 1996).

<sup>50</sup> *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001).

<sup>51</sup> *Nat'l Ass'n of Deaf v. State*, 318 F. Supp. 3d 1338, Case no. 18-cv-21232-UU (S.D. Fla. 2018)(case is pending).

<sup>52</sup> "Order of Motion to Dismiss Based on Sovereign Immunity," *Id.* (June 18, 2018).

<sup>53</sup> See *Nat'l Ass'n of Deaf v. State*, 945 F.3d 1339 (11th Cir. 2020)(affirming the lower court's denial of defendant's motion to dismiss).

<sup>54</sup> See *Gil v. Broward Cnty.*, No. 18-60282-CIV, 2018 WL 4941108 (S.D. Fla. 2018).

<sup>55</sup> See *Price v. City of Ocala*, 375 F. Supp. 3d 1264 (M.D. Fla. 2019)(reasoning Title III analysis is the wrong standard to apply to Title II website access cases because Title III requires a nexus between a physical place and the alleged violation), and *Gil v. City of Pensacola, Fla.*, 392 F. Supp. 3d 1493 (N.D. Fla. 2019).

The Title III standing analysis requires impeded access to a physical public accommodation in order to find a plaintiff has standing to sue.<sup>56</sup> The new three-factor standing analysis for Title II website access cases considers, in addition to totality of the relevant facts:

- The plaintiff's connection with the defendant governmental entity;
- The type of information that is inaccessible; and
- The relation between the inaccessibility and the plaintiff's alleged future harm.<sup>57</sup>

Some governments argued that these cases are not ripe for adjudication because DOJ has not yet promulgated regulations. Courts have generally dismissed this argument, with one court emphasizing that DOJ has had eight years to comment further or promulgate rules on website accessibility compliance but failed to do so.<sup>58</sup>

### Implementation of Amendment 12, Lobbying and Abuse of Office by Public Officers

Amendment 12 was adopted during the 2018 election.<sup>59</sup> Effective December 31, 2020,<sup>60</sup> Amendment 12 prohibits public officers and public employees from abusing their public positions in order to obtain a "disproportionate benefit" for:

- The public officer or employee;
- The officer's or employee's spouse, children, or employer; or
- For any business:
  - With which the public officer or public employee contracts;
  - In which the officer or employee is an officer, a partner, a director, or a proprietor; or
  - In which the officer or employee owns an interest.<sup>61</sup>

Amendment 12 further provides that by October 1, 2019,<sup>62</sup> the Florida Commission on Ethics (Commission) must define by rule the term "disproportionate benefit" and prescribe the requisite intent for finding a violation of the prohibition against abuse of public position.<sup>63</sup> Following adoption of the Commission's rule, Amendment 12 requires the Legislature to enact implementing legislation establishing penalties for violations of the prohibition against abuse of public position, to take effect December 31, 2020.<sup>64</sup>

#### *Rulemaking by the Florida Commission on Ethics*

As required by Amendment 12, the Commission, by rule effective on September 30, 2019, defined the term "disproportionate benefit" and prescribed the requisite intent for finding a violation of the prohibition against abuse of public position by a public officer or public employee in order to obtain a disproportionate benefit.<sup>65</sup> "Disproportionate benefit" is defined as a benefit, privilege, exemption, or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of his or her public duties.<sup>66</sup> The rule provides that the public officer or public employee acted, or refrained from acting, with the requisite intent for finding a violation of the prohibition against abuse of public position if the public officer or public employee acted, or refrained from acting, with a

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<sup>56</sup> See *Gil v. Broward Cnty., Fla.*, 2018 WL 4941108 (S.D. Fla. 2018).

<sup>57</sup> See *Price v. City of Ocala, Fla.*, 375 F. Supp. 3d 1264 (M.D. Fla. 2019).

<sup>58</sup> See *Open Access for All, Inc. v. Town of Juno Beach, Fla.*, "Order Denying Defendant's Motion to Dismiss," Case no. 9:19-CV-80518-ROSENBERG/REINHART, 2019 WL 3425090 (S.D. Fla. July 29, 2019)(case dismissed on other grounds August 15, 2019).

<sup>59</sup> Div. of Elections, Fla. Dep't of State, *November 6, 2018 General Election*, available at <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE=> (last visited Feb. 11, 2020).

<sup>60</sup> Art. XII, s. 38, Fla. Const.

<sup>61</sup> Art. II, s. 8, Fla. Const. See Note.

<sup>62</sup> Art. XII, s. 38, Fla. Const.

<sup>63</sup> Art. II, s. 8, Fla. Const. See Note.

<sup>64</sup> Art. XII, s. 38, Fla. Const.

<sup>65</sup> Fla. Admin. Code R. 34-18.001.

<sup>66</sup> Fla. Admin. Code R. 34-18.001(2)(2019).

wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties.<sup>67</sup>

### *The Florida Code of Ethics*

The Code of Ethics for Public Officers and Employees (Code of Ethics)<sup>68</sup> contains standards of ethical conduct and disclosures applicable to public officers, employees, candidates, lobbyists, and others in state and local government, with the exception of judges.<sup>69</sup>

The purpose of the Code of Ethics is to promote the public interest, maintain the respect of the people for their government, and ensure that public officials conduct themselves independently and impartially, not using their offices for private gain other than compensation provided by law.<sup>70</sup> While seeking to protect the integrity of government, the Code of Ethics also seeks to avoid the creation of unnecessary barriers to public service. Criminal penalties, which initially applied to violations of the Code of Ethics, were eliminated in 1974 in favor of administrative enforcement. The Legislature created the Commission on Ethics that year “to serve as guardian of the standards of conduct” for public officials, state and local. The Governor appoints five of the Commission’s nine members and the President of the Senate and Speaker of the House of Representatives appoint two each. No more than five Commission members may be members of the same political party, and none may be lobbyists, or hold any public employment during their two-year terms of office. A chair is selected from among the members to serve a one-year term and may not succeed himself or herself.<sup>71</sup>

The Code of Ethics prohibits public officers and public employees from doing business with the public entity of which the official is an officer or employee.<sup>72</sup> The Code of Ethics also prohibits conflicting employment or contractual relationships between public officers or public employees and any business entity or agency regulated by or doing business with the public entity of which the official is an officer or employee.<sup>73</sup> There are certain exemptions:

- If the public entity is a special tax district created by general or special law, limited specifically to constructing, maintaining, managing, and financing improvements in the land area over which the district has jurisdiction, or when the district is organized pursuant to ch. 298, F.S. (water control districts), then employment or contracting with an entity doing business with the special district by a public officer or employee of the district is not prohibited by the Code of Ethics or deemed a conflict.<sup>74</sup>
- The prohibitions against doing business with one’s agency may be waived for a person serving on an advisory board by the body that appointed the person to the advisory board.<sup>75</sup>
- In addition, no person is considered to violate the Code of Ethics if:
  - Within a city or county the business is transacted under a rotation system;
  - The business is awarded under a system of sealed, competitive bidding to the lowest or best bidder who meets certain additional criteria;
  - The purchase or sale is for legal advertising in a newspaper, for any utilities service, or for passage on a common carrier;
  - An emergency purchase or contract must be made in order to protect the health, safety, or welfare of the citizens of the state or political subdivision of the state;

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<sup>67</sup> Fla. Admin. Code R. 34-18.001(4)(2019).

<sup>68</sup> Ch. 112, Part III, F.S.

<sup>69</sup> Florida Commission on Ethics, *Ethics Laws*, available at <http://www.ethics.state.fl.us/Research/EthicsLaws.aspx> (last visited Feb. 11, 2020).

<sup>70</sup> S. 112.311, F.S.

<sup>71</sup> Florida Commission on Ethics, *Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees*, 1 (2020), available at

<http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf?cp=2020211> (last visited Feb. 11, 2020).

<sup>72</sup> S. 112.313(3), F.S.

<sup>73</sup> S. 112.313(7)(a), F.S.

<sup>74</sup> S. 112.313(7)(a)1., F.S.

<sup>75</sup> S. 112.313(12), F.S.



- The business entity is the sole source of supply;
- The total amount of transactions do not exceed \$500 per calendar year; and
- Several other conditions exist related to bank officers, university transactions and purchases by public officers or employees in a private capacity.<sup>76</sup>

Elected public officers do not violate the Code of Ethics for maintaining an employment relationship with a tax-exempt organization as long as certain conditions are met.<sup>77</sup> Certain exemptions are provided for local government attorneys.<sup>78</sup> While a state public officer is prohibited from voting on any matter the officer knows would inure to the officer's special private gain or loss,<sup>79</sup> a commissioner of a community redevelopment agency or an officer of an independent special tax district elected on a one-acre, one-vote basis, is not prohibited from voting on such matters.<sup>80</sup>

### Community Development Districts

Community development districts (CDDs) are a type of special-purpose local government intended to provide basic urban community services in a cost-effective manner. These independent special districts<sup>81</sup> are created pursuant to and governed by the Uniform Community Development District Act of 1980.<sup>82</sup> The Act lays out the exclusive and uniform procedures for establishing and operating a CDD.<sup>83</sup> CDDs provide a means to manage and finance the delivery of basic services and capital infrastructure to developing communities without overburdening other governments and their taxpayers.<sup>84</sup> As of March 12, 2020, there were 716 active CDDs in Florida.<sup>85</sup>

CDDs are created either by local ordinance or the Florida Land and Water Adjudicatory Commission (FLWAC).<sup>86</sup> CDDs of less than 2,500 acres are established by ordinance of the county having jurisdiction over the majority of the land in the area in which the CDD will be located, with certain exceptions.<sup>87</sup> CDDs that lie wholly within a municipality are created by municipal ordinance.<sup>88</sup> CDDs that are 2,500 acres or more are established by petitioning the FLWAC to adopt an administrative rule creating the district.<sup>89</sup> CDDs remain in existence unless dissolved pursuant to statute, merged with another district, or all authorized services are transferred to a general-purpose unit of local government.<sup>90</sup>

A CDD is controlled by a five-member board of supervisors (board) elected by the landowners of the district. Each landowner is entitled to one vote for each acre owned. Landowners or their employees

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<sup>76</sup> S. 112.313(12)(a)-(j), F.S.

<sup>77</sup> S. 112.313(15), F.S.

<sup>78</sup> S. 112.313(16), F.S.

<sup>79</sup> S. 112.3143(2), F.S.

<sup>80</sup> S. 112.3143(3)(b), F.S.

<sup>81</sup> A "special district" is "a local unit of special purpose...government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet." S. 189.012(6), F.S. An "independent special district" is characterized by having a governing body the members of which are not identical in membership to, nor all appointed by, nor any removable at will by, the governing body of a single county or municipality, and the district budget cannot be affirmed or vetoed by the governing body of a single county or municipality. S. 189.012(3), F.S.

<sup>82</sup> S. 190.001, F.S.

<sup>83</sup> See ss. 190.004 and 190.005, F.S.

<sup>84</sup> S. 190.002(1)(a), F.S.

<sup>85</sup> Florida Department of Economic Opportunity (DEO), Division of Community Development, Special District Information Program, *Official List of Special Districts Online, Active Special District Function Totals as of December 5, 2019*, at <http://specialdistrictreports.floridajobs.org/webreports/functiontotals.aspx> (last visited March 12, 2020).

<sup>86</sup> S. 380.07, F.S. The FLWAC consists of the Administration Commission, which is composed of the Governor and Cabinet.

<sup>87</sup> S. 190.005(2), F.S.

<sup>88</sup> S. 190.005(2)(e), F.S.

<sup>89</sup> S. 190.005(1), F.S.

<sup>90</sup> S. 190.046(2), F.S.

are not prohibited from serving on the board.<sup>91</sup> A new board election, held among the qualified electors of the district, occurs when the board proposes to exercise its ad valorem taxing authority or six years after the formation of the district (10 years for districts exceeding 5,000 acres).<sup>92</sup>

The board is authorized to exercise general and special powers within the constraints of applicable comprehensive plans, ordinances, and regulations of the local general-purpose government.<sup>93</sup> General powers include the authority to assess and impose ad valorem taxes<sup>94</sup> within the district and to issue bonds.<sup>95</sup> In part, the special powers over public improvements and community facilities include, unless prohibited elsewhere,<sup>96</sup> the power to finance, fund, plan, establish, acquire, construct, equip, operate, and maintain facilities and basic infrastructures for:

- Water management and control for the lands within the district;
- Water supply, sewer, and wastewater management, reclamation, and reuse;
- Bridges or culverts in certain instances; and
- District roads and road improvements.<sup>97</sup>

In addition to the exemptions provided under the Code of Ethics, a stockholder, officer, or employee of a landowner within the CDD may serve on the board or be an employee of the district.<sup>98</sup>

### *Opinion by the Florida Commission on Ethics*

After Amendment 12 was adopted, the members of the Board of Supervisors for the Bay Laurel Center CDD were unsure whether the exemptions under the Code of Ethics that authorized them to serve on the board if they also were employed by, had an interest in, or were customers of the district's developer would apply to the new prohibition against abusing a position to obtain a disproportionate benefit, even if they complied with all applicable statutes. On October 30, 2019, the Commission issued an opinion responding to their petition. After examining the amendment, the rule defining "disproportionate benefit" and determining the requisite intent necessary to find the abuse of position, and the sections in the Code of Ethics currently providing exemptions for they conduct and circumstances described in the request, the Commission determined that the supervisors would not violate the constitutional prohibition provided they complied with all statutory requirements.<sup>99</sup>

### **Effect of the Bill**

The bill reduces the information that a special district must post online. If the special district has submitted its most recent final, complete audit report to the Auditor General, the bill authorizes the district to post a link to the audit report on the Auditor General's website rather than posting the audit report on its website. The bill also removes the requirement for districts to post facility reports and meeting materials online. Although the facility reports and meeting materials will not be posted online, the records will continue to be available for inspection and copying upon request.

The bill clarifies that board members and public employees of special districts in general, and CDDs in particular, do not abuse their public positions under the recently-adopted provisions of Article II, section

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<sup>91</sup> S. 190.006(1), F.S.

<sup>92</sup> See s. 190.006, F.S.

<sup>93</sup> See s. 190.004(3), F.S.

<sup>94</sup> DEO lists four CDDs with ad valorem taxes as a revenue source: Palms of Terra Ceia Bay CDD, Port Labelle CDD, Portofino Springs CDD, and Tampa Palms CDD. Only the Port Labelle CDD reported ad valorem revenue in 2018 in the amount of \$507,518. See DEO, *Official List of Special Districts Online*, at <http://specialdistrictreports.floridajobs.org/webreports/criteria.aspx> (last visited Dec. 17, 2019).

<sup>95</sup> S. 190.011, F.S.

<sup>96</sup> S. 190.005(1)(f) and (2)(d), F.S.

<sup>97</sup> S. 190.012, F.S.

<sup>98</sup> S. 190.007(1), F.S.

<sup>99</sup> CEO 19-23 (October 30, 2019), at <http://www.ethics.state.fl.us/Documents/Opinions/19/CEO%2019-023.htm> (last visited March 12, 2020).

8(h)(2) of the Florida Constitution if they commit acts or omissions authorized under the statutory exemptions in the Code of Ethics codified in s. 112.313(7), (12), (15), or (16), F.S., or s. 112.3143(3)(b), F.S. The bill further clarifies that board members do not abuse their public positions if they commit acts or omissions in connection with a vote if they follow the procedures required by s. 112.3143, F.S., which requires the member to disclose the relationship.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

See Fiscal Comments.

#### 2. Expenditures:

None.

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

To the extent that private companies are maintaining special district websites, there may be a negative fiscal impact on such companies due to local governments no longer needing to place as many documents online and to ensure ADA compliance of such documents.

### D. FISCAL COMMENTS:

There may be a positive financial impact on special districts that are no longer required to post and maintain certain meeting materials and documents online.