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FISCAL IMPACT REPORT

SPONSOR Smith/Ivey-Soto ORIGINAL DATE 01/24/15
 LAST UPDATED 03/18/15 HB 378/aHJC

SHORT TITLE Require Oral Public Comment At Meetings SB _____

ANALYST Cerny

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate		Recurring	

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 392

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Office of the Attorney General (AGO)
- Department of Finance and Administration (DFA)
- General Services Division (GSD)
- Regulation and Licensing Division (RLD)
- Department of Game and Fish (DGF)
- Energy, Minerals and Natural Resources Department (EMNRD)
- Office of the State Engineer (OSE)
- Aging and Long-Term Services Department (ALTSD)
- Human Services Department (HSD)
- Department of Health (DOH)
- Medical Board (MB)

SUMMARY

Synopsis of HJC Amendment

House Judiciary Committee amendment to House Bill 378 would amend the Open Meetings Act (OMA) Section 10-15-1 –NMSA 1978 to require that a public body permit oral public comment at any meeting governed by the OMA, before final action is taken.

The HJC amendment deletes Section 1C and instead adds this new language:

“C. A public body shall provide an opportunity for oral public comment on matters

within the authority of the public body.”

This section was the only new language amending the statute in the original bill. By substituting this language for that which appeared in the original bill, HB 378 as amended assures that oral public comment shall be provided for in meetings of public bodies, on matters within the authority of the public body. This is less restrictive than the original language as it does not mandate anything other than the opportunity for such comment, but more restrictive in that public bodies now do not have discretion to permit oral public comment or not.

On p. 5, line 25 of the bill, Section C is not among those subsections listed as *not* applying to meetings that are closed. This appears to mean that even at closed meetings, oral public comment must be provided for. This may not represent the intent of the HJC amendment. See Technical Issues below.

Synopsis of Original Bill

The public body would have the discretion to permit the oral public comment during a general comment period or immediately prior to the action being taken.

The bill would also require that public bodies allow a “reasonable amount of time” for individuals to speak, and would require that the public body “allow for a diversity of viewpoints to be presented.”

FISCAL IMPLICATIONS

HB 378 includes no appropriation. Its fiscal impact is indeterminate.

A few responding agencies stated that mandating oral public comment on each action item on every public body's agenda may result in an increase in meeting times for public bodies statewide.

To the extent this requires public bodies to schedule more meetings to accomplish all their work, the bill may increase operating costs of public bodies. Costs associated with additional public meetings would include publishing notice of meetings in newspapers, costs of transcription to produce meeting minutes, and payment of mileage and per diem to any members entitled to receive reimbursement.

SIGNIFICANT ISSUES

All public bodies are required to conform with the OMA. Many, perhaps a majority, already allow time for public oral comment. SB 378 would mandate that time for such oral comment be included in public meetings.

AGO analysis states that HB 378 would significantly change the policy of the OMA as expressed in Sec. 10-15-1A:

Currently the OMA requires that all meetings of a public body, in which a quorum is present, allow for persons to *attend* and *listen* to the deliberation of the proceedings. HB 378 would provide the public with the opportunity to attend, listen, and participate in all

public meetings. Requiring public bodies to allow for public comment may have many unintended and far reaching consequences.

The act as drafted does not provide any exceptions to requiring public comment prior to a public body taking action. For example, there may be circumstances in which a public body may wish to limit repetitive, incompetent and irrelevant comments.

Another instance in which boards must restrict public comments arises in licensing adjudications. For example, many boards restrict comments related to pending adjudications in order to avoid any potential tainting of the board, and to avoid allegations of the board being biased by the disclosure of the public comments.

RLD concurs with the potential for tainting Boards and Commissions, stating:

Currently, the majority of Regulation and Licensing Department (RLD) Board and Commission members vote on complaints under the heading of a complaint number. They do not know who filed the complaint or who the complaint is against. This is to ensure that an unbiased decision is made. By requiring public comment, the Complainant or Respondent would be able to address the Board or Commission prior to a decision being made and possibly taint the Board or Commission.

DFA analysis stated:

The State Board of Finance (SBOF) is staffed by the Board of Finance division of DFA. The SBOF currently accepts public comment in writing from any interested person who wishes to comment on an item before the SBOF. At the discretion of the chairperson of the SBOF, the SBOF occasionally accepts oral public comment at its meetings. The SBOF has typically found that written public comment is more helpful than oral public comment because it can often be reviewed in advance of the SBOF voting on a matter, and therefore SBOF members have more time to give written public comment meaningful consideration. Written public comment becomes part of the SBOF's permanent records, and therefore may be reviewed verbatim at any point in the future. In addition, the SBOF's meetings are currently quite lengthy, and receiving public comment in writing allows for a more efficient use of the SBOF's quorum time.

DGF states that the Interstate Stream Commission holds regularly-scheduled monthly public meetings to discuss and make decisions on matters of public policy:

Under current law, as a matter of discretion, the Commission generally allows oral public comment on the policy matters before it prior to making a decision, except in rare instances when there is not enough time during the meeting. The bill would make the Commission's general practice of allowing oral public comment mandatory. It would also force the Commission to find time for oral public comment even when time is limited, which at most might cause some inconvenience.

The primary public bodies associated with EMNRD that would be impacted by HB 378 are the Oil Conservation Commission, the Mining Commission and the Coal Surface Mining Commission. The major rulemaking and adjudicatory actions of these bodies already include public participation in their processes.

MB analysis states that:

The main issue with requiring the allowance of oral public comment at any public meeting relates to licensing and disciplinary actions. Because cases are presented to the Board with no identifying information at the complaint stage, with only a case number for reference, allowing oral comment creates a high potential for the Board to become tainted. The medical community in New Mexico is a small one, and if a physician known to members of the Board orally addresses the Board regarding licensure or potential discipline, such a member may not be able to remain objective. If members then recused themselves for this reason, there may not be a quorum for the vote.

Additionally, with regard to disciplinary hearings, a physician and the physician's attorney may have the means to travel to the meeting and address the Board. There are many complainants (members of the public) who may not have the resources to do so, thus the physician would have an opportunity to address the Board about the case, while the complainant does not. This would create a situation in which financial status has the potential to influence the outcome of an investigation, which is not the case when both sides are relegated to producing evidence for their cases in writing, as is currently done.

TECHNICAL ISSUES

The opening clause of Subsection H (amended Subsection I) should read: "The provisions of subsections A, B, C and H of this section do not apply to: ..." so that meetings exempted from other provisions of the OMA are also exempted from requiring oral public comment.

HB 378 is written very broadly to require public comment before "any action within the authority" of the body. Thus, bodies would presumably be required to allow public comment before they took any final action such as adopting the minutes of a previous meeting or approving the agenda for a meeting or even adjournment.* Is this the intent?

OTHER SUBSTANTIVE ISSUES

The Uniform Licensing Act (ULA), Sections 61-1-29 to -31, NMSA 1978 mandates how public comment shall be received and recorded in proceedings by a board to adopt, amend or repeal rules or regulations. House Bill 378 may conflict with the ULA.

AMENDMENTS

AGO analysis recommends:

Perhaps substituting the word "may" for "shall" in subsection C, line 23 of page 2, will alleviate many of the concerns listed above.

Revise the first sentence of proposed new Subsection C to read:

"As a general rule, a public body shall permit . . . in Subsection B of this section, *except for disciplinary or other proceedings in which due process and fairness may warrant limiting or prohibiting public comment in order not to prejudice an agency decision.*"

Additionally, a recommended exception to the requirement for public comment is as

follows: "This provision does not apply if the administrative record has been closed."

MB analysis recommends:

If "shall" is not substituted by "may", Line 23 should be followed by "...except for disciplinary or other proceedings in which due process and fairness may warrant limiting or prohibiting public comment in order not to prejudice an agency decision."

Additionally, a recommended exception to the requirement for public comment is as follows: "This provision does not apply if the administrative record has been closed."

CAC/je/bb/je