

**THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA**

**WILLIAM STETSON KENNEDY and
SANDRA ANNE PARKS,**

Plaintiffs,

vs.

**ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT and
SEMINOLE COUNTY**

Defendants.

CASE NO. 2009-0441-CA
DIVISION: 53

FINAL JUDGMENT

THIS CAUSE comes before the Court upon plaintiffs' Amended Complaint. The Court has previously granted summary judgment in favor of defendants. For the reasons expressed in the Court's Order Granting Summary Judgment,

IT IS ADJUDGED that Final Judgment should be, and is hereby, entered for defendants, that plaintiffs take nothing from this action and go hence without day.

Dated, September 27, 2010

EDWARD E. HEDSTROM
Circuit Judge

EDWARD E. HEDSTROM, Circuit Judge

Copies to:
Michael L. Howle
Lauren E. Howle
William H. Congdon
William Abrams
Barbara Johnston
Ann E. Colby

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CASE NO. 2009-0441-CA
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ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon the Motion for Summary Judgment filed by defendant St. Johns River Water Management District (the "District") on April 21, 2010 and amended April 27, 2010. A hearing was held on September 2, 2010.

Plaintiffs filed a two-count amended complaint ("Complaint") against the District seeking a declaratory judgment that the District violated section 286.011, Florida Statutes, (the "Sunshine Law") by allegedly preventing certain people from speaking at a public meeting and by failing to move the meeting from its headquarters to a different venue capable of holding every person the District reasonably expected to attend the meeting.

On December 7, 2009, defendant Seminole County (the "County") was granted the right to intervene in this action as a defendant. In March 2010, the parties filed stipulations as to certain facts and evidence, and in April 2010, the District filed the motion before the Court. The County joined the motion. Plaintiffs neither filed a response nor any affidavit directed to the District's motion. At the hearing, no objection was made to the stipulated facts or evidence.

The Court, upon review of the oral argument, and the pleadings, stipulations, affidavits and other filed documents, finds there is no genuine issue as to any material fact with respect to the Motion for Summary Judgment and rules in favor of the defendants.

FACTS

The Court has considered the following facts, all of which are deemed relevant, and which the parties have stipulated to as admissible:

On April 13, 2009, the Governing Board of the District held a meeting at its Palatka Headquarters to consider and take final action on a Recommended Order ("RO"). An administrative law judge ("ALJ") had issued the RO in Division of Administrative Hearings case number 08-1316. At issue in the administrative case was the proposed approval of Seminole County's application to the District for a consumptive use permit. The RO, after a recitation of findings of fact and conclusions of law, ultimately recommended issuance of the permit.

St. Johns Riverkeeper, Inc. ("Riverkeeper"), represented by plaintiffs' counsel, initiated the administrative case by filing a petition objecting to a recommendation by District staff that the District's Governing Board issue the permit. The Riverkeeper based its standing to contest the permit on the substantial interests of its members and their residence. The District referred the matter to the State of Florida Division of Administrative Hearings ("DOAH").

A two-week evidentiary hearing was held after which the ALJ issued the RO. The Riverkeeper and other parties to the case filed exceptions to the ALJ's RO. The District's Governing Board scheduled and properly noticed the April 13 meeting to consider exceptions filed by the parties and to hear oral argument before voting on a final order in the case.

The April 13 meeting was held in the District's Governing Board room at the District's headquarters in Palatka, Florida. The Governing Board room is located within a public building.

Governing Board meetings have been conducted in the District's Governing Board room on a monthly basis since the building was constructed in 1990. The Governing Board room is the largest meeting room at the District's headquarters. It has an occupancy limit of 183 persons. Signs indicating this occupancy limit are posted on two doors in the room.

The District scheduled the April 13 meeting as a single-item agenda meeting. In addition, all staff, with the exception of those participating in the proceedings, were instructed not to attend the meeting. District staff were also prevented from parking in a general parking lot to keep it reserved solely for members of the public attending the meeting. Additionally, the District installed equipment in the two largest meeting rooms, after the Governing Board room, at District headquarters to provide a live audio and video feed of the meeting. Between the three rooms, the District provided space to accommodate 270 people at the April 13 meeting.

The April 13 meeting had the largest public attendance at a Governing Board meeting in District history. For the first time at a Governing Board meeting, the number of persons arriving exceeded the available seating capacity. After the meeting rooms reached capacity, the District did not allow additional persons to enter those rooms. As individuals left a meeting room that was at capacity, a corresponding number of individuals were allowed to enter the room. After the meeting started, the District set up a computer with external speakers so individuals outside the building could view and hear the proceedings.

The April 13 meeting was also well attended by the media. At least 14 representatives of the media were present, including nine newspaper reporters, three television reporters with camera operators, and two radio reporters.

The April 13 meeting began at approximately 1:00 p.m and ended at approximately 8:00 p.m. without a break for dinner. When the meeting began, the Board's Chair stated: "For those

that are represented or are in membership with the Riverkeeper, we will rely on the Riverkeeper and the counsel to present on behalf of the Riverkeeper members.” The public comment portion of the meeting began at approximately 3:45 p.m. and ended at approximately 6:00 p.m. Dozens of individuals spoke against issuance of the permit. Two individuals spoke in favor of permit issuance.

The meeting was recorded and minutes were taken, and both the recording and the minutes were filed with the Court as items of evidence stipulated to as to admissibility.

CONCLUSIONS OF LAW

The plaintiffs alleged two violations of section 286.011(1), Florida Statutes, (“the Sunshine Law”) in the Complaint. In Count I, the plaintiffs allege the District violated the Sunshine Law by requesting that members of the Riverkeeper not address the Governing Board during the public comment portion of the meeting. In Count II, the plaintiffs allege the District violated the Sunshine Law by failing to provide facilities large enough to hold to reasonably accommodate each person who was reasonably expected to attend the public meeting. Based on the above undisputed facts, the plain meaning of the statute, and previous judicial interpretations thereof, the Court concludes the District did not violate the Sunshine Law. The defendants are therefore entitled to summary judgment in its favor as a matter of law.

Plaintiffs’ claim in Count I is based upon the notion that the Sunshine Law gives the public the right to speak. The controlling authority on this point of law is *Keesler v. Community Maritime Park Associates, Inc.*, 32 So.3d 659 (1st DCA 2010), which holds that the Sunshine Law does not give the public the right to speak at a meeting of a Sunshine body. The court in *Keesler* relied upon the comments of the Florida Supreme Court in the case of *Wood v. Marston*, 442 So.2d 934 (Fla. 1983), and concluded that the Sunshine Law does not give the public the right to

speak. *Id.* at 660-1. In *Wood*, the Florida Supreme Court found the Sunshine Law applied to a search and screen committee formed to assist in the selection of a law school dean, but the court went on to say that “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*, at 941. The *Keesler* court found this language to be “clear and unambiguous,” and declined to broadly construe the Sunshine Law as granting the public the right to speak. *Keesler*, at 661.

Plaintiffs argue only one case, *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969), in support of their Count I claim. In *Doran*, the Florida Supreme Court addressed the issue of whether the Sunshine Law was constitutional. *Id.* at 699. In concluding the Sunshine Law was constitutional, the court opined in dicta:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country... Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and be heard at all deliberations wherein decisions affecting the public are being made.

Id. Although statements by the Florida Supreme Court made in dicta are persuasive, they are not binding on this court. *Continental Assur. Co. v. Carroll*, 485 So.2d 406, 408 (Fla. 1986) (“Such dicta is at most persuasive and cannot function as ground-breaking precedent.”).

The issue of whether the Sunshine Law provides the public with the right to speak was squarely addressed by the *Keesler* court. The *Keesler* court examined the same language from *Doran* that plaintiffs have cited, but was more persuaded by the Florida Supreme Court’s statements regarding participation in *Wood*. The *Keesler* court noted that *Wood* represented a later, “clear and unambiguous” statement of the Florida Supreme Court on the issue of participation

under the Sunshine Law and determined that no such right existed. *Keesler*, at 660-1. Plaintiffs have not provided any conflicting authority. Accordingly, the opinion of the First District Court of Appeal in *Keesler* is binding on this court. *Pardo v. State*, 596 So.2d 665, 666-67 (Fla. 1992).

Defendants also make a convincing alternative argument. Defendants argue that even if the Sunshine Law did provide the public with the right to speak, the due process rights of the other parties to the proceeding would have been violated if Riverkeeper members had been allowed to speak during the public comment period because of the quasi-judicial nature of the meeting. The Riverkeeper was a party to the administrative proceedings, which were governed by the procedural rules of chapter 120, and was represented by counsel. Riverkeeper had an opportunity to present oral argument at the meeting and did so. Because the evidentiary hearing in the administrative proceedings had concluded and the Administrative Law Judge's recommended order had been issued, no party or member of the public, including Riverkeeper members, could present evidence during the public comment period of the April 13, 2009, meeting. *General Development Utilities, Inc. v. Hawkins*, 357 So.2d 408, 409 (Fla. 1978); *Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin.*, 678 So.2d 421, 425 (Fla. 1st DCA 1996); § 120.57(1)(l), Fla. Stat. If allowed to speak during the public comment period, Riverkeeper members could offer only arguments, not facts, to be considered by the Governing Board. Accordingly, comments made by Riverkeeper members during the time allocated for public comment would have unfairly extended the time allocated to Riverkeeper for oral argument, thereby implicating the due process rights of other parties to the proceeding.

Because, as clearly articulated in *Keesler*, the Sunshine Law does not require the public be allowed to speak, plaintiffs' claim in Court I fails as a matter of law. Additionally, had the Riverkeeper members been allowed to speak at the April 13, 2009, meeting, the due process

rights of the other parties to the proceeding would have been violated. Therefore, summary judgment for defendants as to Count I of the Complaint is proper.

Plaintiffs allege in Count II of their Complaint that the District had a duty under the Sunshine Law to provide a venue that held every member of the public who was reasonably expected to attend the April 13, 2009, meeting. Further, that the District breached that duty by failing to rent or otherwise secure a different meeting place that was large enough to hold every individual member of the public who was reasonably expected to show up at the meeting.

Does a duty to move a meeting location exist? Neither the text of Article I, section 24 (b) of the Florida Constitution nor the text of section 286.011(1), Florida Statutes, explicitly refers to such a duty. Rather, the key language in both dictates that meetings shall be “open to the public.” Because section 286.011 does not define “open,” the Court shall apply the plain and ordinary meaning to the word. *Webster’s Collegiate Dictionary* 813 10th Edition, defines “open,” when that word is used in the sense of “open to the public” as “not restricted to a particular group or category of participants.”

The duty expressed in the plain language of the Sunshine Law then is to provide a venue that does not restrict particular individuals or groups of individuals from attending. This duty is consistent with section 286.011(6), Florida Statutes, which prohibits meetings from being held in locations that are discriminatory or that unreasonably restrict access. It is also consistent with section 286.26, Florida Statutes, which specifically requires collegial bodies to provide access to physically handicapped persons who request to attend meetings.

Plaintiffs however, urge a different interpretation of the Sunshine Law than the one derived from the plain and ordinary meaning of the statutory text. Although plaintiffs have not provided the Court with a case addressing the size of meeting venues, plaintiffs suggest that

Rhea v. School Board of Alachua County, 636 So.2d 1383 (Fla. 1st DCA 1994) stands for the notion that meeting venues should be determined case-by-case, based on a weighing of the public's interest in having a reasonable opportunity to attend the meeting and the collegial body's need to conduct the meeting in specific place. The *Rhea* court was asked to determine whether a meeting was open to the public when it was held, not in a school board's usual meeting location, but rather one-hundred miles away in another county. In concluding that the out-of-county meeting site denied the relevant public – Alachua County citizens – a reasonable opportunity to attend, the *Rhea* court used a balancing of the interests test. Implicit in the analysis was the judicial assumption that the balancing of the interests test was only required because the meeting had been moved from its normal location. In other words, the public would have had a reasonable opportunity to attend the meeting if the meeting had taken place in the board's usual meeting place.

In the instant case, the District held its meeting at the District governing board's usual meeting place and in the largest meeting room at the District's headquarters. The Sunshine Law does not require more. Indeed, imputing such a requirement would run afoul of established rules of statutory construction. As stated in *Dascott v. Palm Beach County*, "this Court cannot construe the unambiguous Sunshine Act in away which would extend, modify, or limit, its express terms or its reasonable and obvious implications so as to be an abrogation of legislative power" (988 So.2d 47, 48 (2008) (internal punctuation and citation eliminated)).

Further, imputing such a requirement would be counter to the rule of statutory construction that courts should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences. *Florida Dept. of Environmental Protection v. ContractPoint Florida Parks, LLC*, 986 So.2d 1260 (Fla. 2008). The consequences of plaintiffs' suggested interpretation are illustrated by the analysis of the Supreme Court of New Mexico in *Gutierrez v. City of Albu-*

querque, 631 P.2d 304 (1981). The Gutierrez court stated that a New Mexico plaintiff's interpretation of that state's sunshine law, similar to the suggested interpretation of Florida law by plaintiffs' in this case, would give opportunistic citizens a means to impair or impede the effective workings of political subdivisions.

This narrow view would permit invalidation of any action by a public body by the simple method of overflowing the Chambers. Thus, the Council, to be safe, would have to hire the football stadium or hold its meetings in a wide open space. Even then, *reductio ad absurdum*, if a tree or other obstruction stood between an individual and the Council, he could claim that he was not permitted to "attend".

Gutierrez at 306.

In the absence of any Florida case law, the *Gutierrez* case is instructive, given the similarity of its open meetings provisions and the similarity of facts to those stipulated here. New Mexico's open meeting requirements are equivalent to Florida's. Public meetings in New Mexico must be conducted so that "*all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.*" §10-15-1, New Mexico Statutes, (emphasis added). The facts in *Gutierrez* are also very similar to those here. In *Gutierrez*, an Albuquerque City Council meeting was conducted in its chambers, which had a capacity of 156 persons. Once the capacity of the room was reached, people were not allowed in. Loudspeakers were set up and were operative during at least part of the meeting so that those outside the meeting room could listen.

The *Gutierrez* court concluded, as this Court concludes:

Construing the statute consistent with these policies, we conclude that the words used mean only that the governmental entity must allow reasonable public access for those who wish to attend and listen to the proceedings. We hold that the City Council meeting fully met the requirements of the Open Meetings Act as we have construed it. The meeting was held in a hall designed to accommodate a large number of spectators. When the size of the crowd exceeded the capacity of the hall, every effort was made to allow those who could not gain entrance to listen to the proceedings. The City Council even went beyond the requirements of the Open Meetings Act and allowed members of the public to address the Council

and present their views for over two hours. *A meeting could hardly be more open or more public.*

Gutierrez at 307 (emphasis added).

Although not a case addressing the size of meeting venues, plaintiffs cite to the Florida Supreme Court's opinion in *Doran*, in an attempt to support their claim. The *Doran* court stated in *dicta* that a national source of strength was "the right of the public to be present . . . when decisions affecting the public are being made." *Doran* at 699. Plaintiffs claim that this general statement by the Florida Supreme Court in its first Sunshine Law case should be read as a requirement that each individual desiring to attend, rather than the "public" at large, has the right to be present. Plaintiffs' reading of *Doran* is incorrect because the right to be present is a *public* right and not a right available to each individual who wishes to be present. See *Silver Express Company v. District Board of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So.2d 1099 (Fla. 3d DCA 1997) ("The Sunshine Law . . . was enacted so as to permit any citizen to vindicate the *public's* interest in open government.")(emphasis added).

The consequence of plaintiffs' reading of *Doran* is that meeting venues would need to be changed whenever a collegial body reasonably expects that more individual members of the public will attend than the capacity of a designated or noticed meeting room. Moreover, when asked to provide the Court with proposed guidance for collegial bodies to follow in implementing a move-the-meeting requirement, plaintiffs were unable to articulate a rule, much less one that specified with sufficient definiteness and certainty that collegial bodies would readily know what they must do or refrain from doing without speculation and conjecture. See *Doran* at 698 - 699 (finding statute and lower court judgment satisfied due process requirement of warning those to whom the law applies of what conduct is proscribed). This Court is unwillingly to create a vague

rule, particularly one that would require the expenditure of public funds, and then apply it retroactively to the District.

The Court holds that the Sunshine Law does not require public meetings to be moved from their noticed venue when that venue is the normal meeting place and the largest meeting room available to the collegial body. The parties have stipulated that the April 13, 2009, meeting was properly noticed and held at the District's governing board meeting room. In addition, that the meeting room was the usual meeting place for the governing board and the largest room at the District's headquarters has also been stipulated by the parties. Therefore, summary judgment for defendants as to Count II of the Complaint is proper. Accordingly, it is

ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of the defendants District and Seminole County

Dated, September 27, 2010

EDWARD E. HEDSTROM
Circuit Judge

EDWARD E. HEDSTROM, Circuit Judge

Copies to:
Michael L. Howle
Lauren E. Howle
William H. Congdon
William Abrams
Barbara Johnston
Ann E. Colby

Fifth District Court of Appeal Case Docket**Case Number: 5D10-3656****Final Civil Other Notice from Putnam County****WILLIAM STETSON KENNEDY AND SANDRA ANN PARKS vs. ST. JOHNS
RIVER WATER MANAGEMENT, ETC., ET AL.****Lower Tribunal Case(s): 09-441-CA**

03/08/2012 11:09

Date Docketed	Description	Date Due	Filed By	Notes
10/27/2010	Case Filing Fee			
10/27/2010	Notice of Appeal Filed		Appellant	MED./D.S.
11/03/2010	Notice of Appearance		Appellee	AND W.ABRAMS,ESQ
11/05/2010	Notice of Appearance		Appellee	
11/08/2010	Docketing Statement Appellant			AA Michael L. Howle 018137
11/09/2010	ORD-Order Declining Mediation as Inappropriate			SIGNED BY HON PALMER
01/21/2011	Mot. for Extension of time to file Initial Brief		Appellant	
01/25/2011	Order Granting EOT for Initial Brief	02/17/2011		ATTYS EMAIL BRFS IN COMPLIANCE WITH AO5D08-01
02/08/2011	Received Records			4VOL
02/08/2011	Supplemental Records			1VOL
02/17/2011	Motion To File Amicus Curi. Brief		Amicus for Appellant	
02/22/2011	Initial Brief on Merits		Appellant	
02/28/2011	Amicus Curiae Brief		Amicus for Appellant	
03/11/2011	Mot. for Extensio of time to file Answer Brief		Appellee	
03/14/2011	Mot. for Extensio of time to file Answer Brief		Appellee	
03/30/2011	ORD-Permitting Amicus Curiae Brief			& 2/28BRF IS ACCPETED
03/30/2011	Order Granting EOT for Answer Brief	04/14/2011		BOTH 3/11 AND 3/14MOTS ARE GRANTED
04/13/2011	Request for Oral Argument			AE Arnold W. Schneider 183156
04/13/2011	Appellee's Answer Brief		Appellee	
04/15/2011	Request for Oral			AE William Abrams 159735

	Argument			
04/15/2011	Appellee's Answer Brief		Appellee	
04/15/2011	Appendix for Answer Brief		Appellee	
05/03/2011	Notice of Change of Address		Appellant	
05/04/2011	Request for Oral Argument			AA Michael L. Howle 018137
05/04/2011	Mot. for Extension of Time to File Reply Brief		Appellant	
05/05/2011	Order Granting EOT for Appellant's Reply Brief	06/03/2011		ATTYS EMAIL BRFS IN COMPLIANCE WITH AO5D08-01
06/06/2011	Appellant's Reply Brief		Appellant	TO SEMINOLE CTY ANS BRF;STRICKEN PER 6/17ORDER
06/06/2011	Appellant's Reply Brief		Appellant	TO ST JOHN RIVER ANS BRF
06/06/2011	Motion For Attorney's Fees		Appellant	
06/07/2011	Order to Show Cause	06/17/2011		W/I 10DAYS AA SHOW CAUSE WHY THE TWO REPLY BRFS SHOULD NOT BE STRICKEN AND AA BE REQUIRED TO FILE A SINGLE REPLY BRF
06/16/2011	RESPONSE		Appellant	PER 6/7ORDER
06/17/2011	Miscellaneous Order			AA'S 6/16RESPONSE IS ACCEPTED. AA'S REPLY BRF TO ST. JOHN RIVER IS ACCPETED AND 2ND REPLY BRF TO SEMINOLE CTY IS STRICKEN
09/30/2011	Miscellaneous Docket Entry			SUGGESTION OF DEATH;AA Michael L. Howle 018137
09/30/2011	Miscellaneous Motion		Appellant	LEAVE YIELD TIME IN OA
10/06/2011	Grant Miscellaneous Motion			AA'S 9/30MOT IS GRANTED AND 9/30NOTICE SUGG IS NOTED
10/10/2011	Notice of Appearance		Appellant	
10/12/2011	Miscellaneous Docket Entry			AMENDED CERT OF SERVICE;AA Jonathan D. Kaney, Jr. 115251
10/13/2011	Oral Argument Date Set			
10/25/2011	Affirmed - Per Curiam Affirmed			
10/25/2011	Deny Attorney's Fees			
11/14/2011	Mandate			
12/19/2011	Returned Records			