

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 181 Sponsorship of State Greenways and Trails

**SPONSOR(S):** Appropriations Committee, Agriculture & Natural Resources Subcommittee, Slosberg

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/CS/SB 268

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	14 Y, 0 N, As CS	Cunningham	Blalock
2) Rulemaking & Regulation Subcommittee	14 Y, 1 N	Miller	Rubottom
3) Appropriations Committee	21 Y, 0 N, As CS	Helpling	Leznoff
4) State Affairs Committee	15 Y, 1 N	Deslatte	Hamby

### SUMMARY ANALYSIS

The Florida Greenways and Trails Act was established to conserve, develop, and use Florida's natural resources for healthful and recreational purposes, as well as to provide people access, where appropriate, to environmentally sensitive lands and wildlife. The act creates the Florida Greenways and Trails System and identifies the general powers of the Department of Environmental Protection (DEP). The Office of Greenways and Trails (OGT), an office within the DEP's Division of Recreation and Parks, facilitates the establishment of the Florida Greenways and Trails System. Among its responsibilities, the OGT manages eight state trails and the Marjorie Harris Carr Cross Florida Greenway. The OGT also subleases state acquired properties to local governments for management. Currently, there is no mechanism for the OGT to generate revenue through naming rights or advertising on any of these state-owned properties.

This bill authorizes the DEP to enter into a concession agreement with a not-for-profit entity or private business or entity for commercial sponsorship to be displayed on state greenway and trail facilities or property. The DEP is authorized to establish the cost for entering into these concession agreements. Signage or displays are limited to one per trailhead or parking area and one per public access point, and are authorized in seven specified trails and greenways. The size of any sign or display located at a trailhead or parking area cannot exceed 16 square feet, and signs or displays located at public access points cannot exceed 4 square feet.

The concession agreements administered by the DEP must be for a minimum of 1 year and may be terminated for just cause with 60 days advance notice by the DEP. Before installation, each name or advertising display must be approved by the DEP. The bill specifies that the DEP shall ensure that the size, color, materials, construction, and location of all signs are consistent with the management plan for the property. All costs pertaining to the signage must be paid by the concessionaire.

Eighty-five percent of the proceeds must be deposited in the appropriate DEP trust fund that is the source of funding for management and operation of state greenway and trail facilities and properties. Fifteen percent of the proceeds must be deposited into the State Transportation Trust Fund for use in the Traffic and Bicycle Safety Education Program and the Safe Paths to School Program administered by the Department of Transportation.

The section of law created in the bill is named the "John Anthony Wilson Bicycle Safety Act."

The bill appears to have a positive but indeterminate fiscal impact on state government revenues. However, the federal Department of Transportation has not yet stated conclusively whether the receipt of income from proposed uses under the bill would negatively impact the allocation or use of federal funds. The bill also appears to have an indeterminate but likely insignificant negative fiscal impact on the DEP, which will need to expend funds for staff time involved in developing the rule to implement this bill and to establish the program, as well as to develop and manage concessionaire agreements.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Present Situation**

Chapter 260, F.S., was established to conserve, develop, and use Florida's natural resources for healthful and recreational purposes, as well as to provide people access, where appropriate, to environmentally sensitive lands and wildlife. Chapter 260, F.S., also creates the Florida Greenways and Trails System and identifies the general powers of the Department of Environmental Protection (DEP). The Office of Greenways and Trails (OGT), an office within the DEP's Division of Recreation and Parks (DRP), facilitates the establishment of the Florida Greenways and Trails System. Among its responsibilities, the OGT manages seven state trails, the Marjorie Harris Carr Cross Florida Greenway, and has three additional facilities currently in development.<sup>1</sup> The OGT also subleases state acquired properties to local governments for management. The OGT administers the Recreational Trails Program, a federally funded competitive grant program, which provides financial assistance for local communities to develop trails. According to the OGT, portions of the Greenways and Trails System receive certain funding from the federal Department of Transportation (USDOT), which has recently indicated that generating income from these facilities may impact the receipt of federal funds by the state. The USDOT has not yet stated conclusively whether the receipt of income from naming concessions or its proposed uses under the bill would negatively impact the allocation or use of federal funds.

Section 260.016, F.S., sets forth general powers that the DEP is authorized to use in managing and overseeing the Florida Greenways and Trails System. These powers include charging user fees or rentals, but do not specifically authorize DEP to sell naming rights or allow commercial displays. The DEP is authorized to negotiate with private land owners the terms under which those lands may be accessed and used as part of the Greenways and Trails System.<sup>2</sup> The DEP and the Department of Transportation (DOT) are authorized to coordinate on the abandonment of road rights-of-way for use in the Greenways and Trail System.<sup>3</sup>

The public policy of the DRP in administering the lands under its authority is detailed by statute and includes the promotion of the state park system for the use, enjoyment, and benefit of the public, to acquire and conserve property indicative of Florida's original environment, and to administer the development, use, and maintenance of these lands.<sup>4</sup> The DRP is authorized to grant privileges, leases, concessions, and permits for the use of land for the accommodation of visitors in the various state parks, monuments, and memorials. These leases, concessions, and so on may be made without advertising or competitive bid, but may not be transferred by the lessee, concessionaire, and so on without consent from the DRP.<sup>5</sup> Within the park system, the DRP by rule prohibits the sale of any merchandise or the display of items for sale without prior authorization; the activity must not adversely affect park resources, must not impair existing contracts, must provide a needed visitor service, and must be consistent with park management practices pursuant to statute.<sup>6</sup>

Currently, there is no mechanism for the OGT to generate revenue through naming rights or advertising on any of these state-owned properties nor any process to seek the best compensation for granting such rights. When the state acquires personal property or services, a competitive public process is required to curb any improprieties in the acquisition and to ensure public funds are spent equitably and effectively.<sup>7</sup> Contracts for construction of public buildings are made through competitive bidding.<sup>8</sup>

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<sup>1</sup> Information accessed from website of OGT at <http://www.dep.state.fl.us/gwt/state/default.htm> (last accessed on 1/19/2012).

<sup>2</sup> Section 260.016(3), F.S.

<sup>3</sup> Section 260.0161, F.S.

<sup>4</sup> Section 258.037, F.S.

<sup>5</sup> Section 258.007(3), F.S.

<sup>6</sup> Rule 62D-2.014(14), F.A.C.

<sup>7</sup> Section 287.001, F.S.

Competitive bidding is also required before the Board of Trustees of the Internal Improvement Trust Fund enters into agreements leasing state lands for oil and gas extraction in exchange for royalty payments to the state.<sup>9</sup> Before obtaining a permit for an oil or gas well, the applicant must post a security assuring its compliance with all safety and environmental requirements under Florida law. The security must be made payable to the State of Florida and executed by the applicant's owner or operator as principal and by a surety approved by the General Counsel for the DEP.<sup>10</sup>

No sign may be placed in the right-of-way of a road in a State Park Road System. The DOT has the power to order the removal of an improperly-placed sign, but cannot authorize the placement of any sign prohibited by a local government entity with jurisdiction.<sup>11</sup> The general regulation of outdoor advertising is placed under the DOT.<sup>12</sup> Unless exempt by statute, no sign may be erected in the State Highway System without a permit from the DOT.<sup>13</sup> It is not clear whether all the signage provided under the authority of the bill would be exempt from the present permitting requirements.<sup>14</sup>

### **Effect of Proposed Changes**

The bill creates s. 260.0144, F.S., authorizing the DEP to enter into a concession agreement with a not-for-profit entity or private business or entity for commercial sponsorship to be displayed on state greenway and trail facilities or property. The bill does not mandate that the DEP enter into such an agreement through any public process such as publication and bidding, does not specify whether DEP may enter into concession agreements with more than one vender, and does not specify the scope and compatibility with existing uses of the proposed content for any signage.

A concession agreement must be administered by the DEP and must include the following requirements:

- The agreement must be for a minimum of 1 year, but can be for a longer period under a multi-year agreement, and may be terminated for just cause with a 60-day advanced notice by the DEP. The bill specifies that just cause for termination includes, but is not limited to, violation of the terms of the concession agreement or any provision of the bill.
- Before installation, each name or sponsorship display must be approved by the DEP.
- The DEP must ensure that the size, color, materials, construction, and location of all signs are consistent with the management plan for the property and the standards of the department, and do not intrude on natural and historic settings.
- All costs of a display, including its development, construction, installation, operation, maintenance, and removal must be paid by the concessionaire.

Signs shall contain only a logo selected by the sponsor and sponsorship wording constructed as follows; "... (Name of the sponsor)... proudly sponsors the costs of maintaining the ... (Name of the greenway or trail)..."

The bill specifies that sponsored greenways and trails are authorized only at the following:

- Florida Keys Overseas Heritage Trail.
- Blackwater Heritage Trail.
- Tallahassee-St. Marks Historic Railroad State Trail.

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<sup>8</sup> Section 255.0525, F.S.

<sup>9</sup> Sections 253.47, 253.53, F.S.

<sup>10</sup> Rule 62C-26.002

<sup>11</sup> Section 337.407, F.S.

<sup>12</sup> Section 479.402, F.S.

<sup>13</sup> Section 479.07, F.S.

<sup>14</sup> Section 479.16, F.S. For example, currently signs not in excess of 8 square feet owned by and relating to the facilities and activities of units or agencies of government are exempt from DOT permitting, which may conflict with the bill's provision for signs or displays up to 16 square feet at trailheads or parking areas if such a location also intersects the State Park Road System. Section 479.16(12), F.S.

- Nature Coast State Trail.
- Withlacoochee State Trail.
- General James A. Van Fleet State Trail.
- Palatka-Lake Butler State Trail.

Signage or displays must be in compliance with s. 337.407 and s. 479.11(8), F.S.,<sup>15</sup> and shall be limited as follows:

- One large sign or display, not to exceed 16 square feet in area, may be located at each trailhead or parking area.
- One small sign or display, not to exceed 4 square feet in area, may be located at each designated trail public access point.

The bill does not provide for the DEP to coordinate its control of signs by concessionaires when that overlaps with the DOT's statewide authority to regulate signs affecting state rights-of-way.

Commercial sponsorship pursuant to a concession agreement are for public relations or advertising purposes of the not-for-profit entity or private sector business or entity, and are not to be construed by such as having a relationship to any other actions of the DEP.

The above provisions do not create a proprietary or compensable interest in any sign or display site or location.

Proceeds from concession agreements must be distributed as follows:

- Eighty-five percent must be deposited into the appropriate DEP trust fund that is the source of funding for management and operation of state greenway and trail facilities and properties.
- Fifteen percent must be deposited into the State Transportation Trust Fund for the use in the Traffic and Bicycle Safety Education Program and the Safe Paths to School Program administered by the Department of Transportation.

The bill grants the DEP with the authority to adopt rules to administer this program.

#### B. SECTION DIRECTORY:

**Section 1.** Cites the act as the "John Anthony Wilson Bicycle Safety Act."

**Section 2.** Creates section 260.0144, F.S., authorizing the Department of Environmental Protection to enter into concession agreements for commercial sponsorship to be displayed on state greenway and trail facilities or property if certain requirements are met; provides for the distribution of proceeds from such concession agreements.

**Section 3.** Provides an effective date of July 1, 2012.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The authority to enter into concession agreements for commercial sponsorship on state greenway and trail facilities and property will result in an increase to certain DEP trust funds. The bill also provides that 15 percent of the proceeds from concession agreements shall be deposited into the

<sup>15</sup> Sections 337.407 and 479.11(8), F.S., prohibit advertising signs from being placed in the right-of-way of any road on the interstate highway system, the federal-aid primary highway system, the State Highway system, or the State Park Road System.

State Transportation Trust Fund for use in the Traffic and Bicycle Safety Education Program and the Safe Paths to School Program administered by the Department of Transportation. However, the amount of revenue that might be realized is not known at this time.

In addition, portions of the Greenways and Trails System receive certain funding from the USDOT, which has recently indicated that generating income from these facilities may impact the receipt of federal funds by the state. The USDOT has not yet stated conclusively whether the receipt of income from proposed uses under the bill would negatively impact the allocation or use of federal funds.

The bill does not provide specific guidance on calculating the “proceeds” the DEP is to receive under any concession agreement. The use of a bidding process would assist to establish the amount to be paid in a public and competitive manner.

2. Expenditures:

According to the DEP, the department will need to expend funds for staff time involved in developing the rule to implement this bill and establish the program, as well as to develop and manage concessionaire agreements. The specific fiscal impact associated with that time is unknown, but likely insignificant.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Sponsorship of brand names and services provided by non-profits and private sector businesses could have a potential positive fiscal impact.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

a. Control of Content in Allowed Signs

The bill requires the DEP’s approval prior to the installation of a display. It is not clear whether the intent of this language is to provide authority to regulate the content of a message communicated by a display or simply whether the signage meets material and construction standards. The provision may give rise to claims based on alleged interference with constitutionally protected free speech if the DEP approves or disapproves a sign or display based on the content of the speech. Notable is a DEP rule that controls the time, place, and manner of free speech activities consistent with uses of the particular park, public safety, and to prevent interference with other visitors’ enjoyment of the park facilities.<sup>16</sup>

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<sup>16</sup> Rule 62D-2.014(18), F.A.C.

Because valid Florida law prohibits placing signs within certain property controlled or regulated by the state,<sup>17</sup> the terms of the bill in conjunction with existing law effectively asserts the state's legitimate interests in the forms of speech allowed on state-owned or controlled lands through a grant of limited exclusivity to "sponsor" a state program. Freedom of speech protections are extended to so-called "commercial speech," those statements pertaining to proposed commercial transactions, which the government is able to regulate to assert a substantial governmental interest.<sup>18</sup> Because the bill only authorizes the DEP to grant a concession for a commercial use where the activity is presently proscribed, Florida has a clear interest in allowing only those forms of speech that are consistent with the present use of the land. The bill in its present form provides specific guidance as to the scope of wording, but not logos, which the DEP may permit under the concession agreements.

#### b. Impairment of Contracts

Where access to certain private property for the Greenways and Trails system is by agreement between the property owner and DEP, placing signs on such property under a subsequent concession agreement without a modification to the existing contract may be construed as an improper impairment of existing contract rights.<sup>19</sup> The concession agreements should expressly state the availability of certain property for signage is subject to existing agreements with private property owners. As these property use agreements expire or are renegotiated, replacement use agreements should include an express provision about the placement of signs under applicable concession agreements. Instances should be limited as signage will only be approved for trailheads or parking areas and public access points at the seven designated trails.

#### B. RULE-MAKING AUTHORITY:

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>20</sup> Rulemaking authority is delegated by the Legislature<sup>21</sup> through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"<sup>22</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>23</sup> To adopt a rule an agency must have an express grant of authority to implement a specific law by rulemaking.<sup>24</sup> The grant of rulemaking authority itself need not be detailed.<sup>25</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>26</sup>

This bill gives the DEP the authority to establish rules regarding commercial sponsorship on state greenway and trail facilities or property. However, the bill does not provide for the manner of choosing prospective concessionaires, how the DEP coordinates with the DOT about the regulation of design, materials, and content of proposed signs, or the coordination by the DEP of concession contracts with existing agreements for the use of private party lands in the Greenways and Trails System. Without sufficient statutory standards and guidelines, rules proposed by DEP to implement the provisions of the bill may be challenged and prevented from going into effect.

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<sup>17</sup> Section 479.07, F.S.

<sup>18</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980); *Kortum v. Sink*, 54 So. 3d 1012 (Fla. 1<sup>st</sup> DCA 2010).

<sup>19</sup> Art. I, s. 10, U.S. Const.; Art., I, s. 10, Fla. Const.

<sup>20</sup> Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>21</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>22</sup> Section 120.52(17), F.S.

<sup>23</sup> Section 120.54(1)(a), F.S.

<sup>24</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>25</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>26</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not provide for the manner of choosing prospective concessionaires, how the DEP attains the best price, how the DEP coordinates with the DOT about the regulation of design, materials, and content of proposed signs, or the coordination by the DEP of concession contracts with existing agreements for the use of private party lands in the Greenways and Trails System. The bill references s. 337.407 and chapter 479, F.S., to incorporate the signage requirements administered by the DOT, but does not distinguish signs developed and emplaced pursuant to proposed s. 260.144 from the DOT's regulatory authority.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 15, 2012, the Appropriations Committee amended and passed CS/HB 181 as a committee substitute. The CS:

- Removes DEP's authorization to enter into concessions for naming rights;
- Specifies just cause for termination of a concession agreement;
- Specifies that only one large sign be allowed per trail head or parking area and one small sign per public access point;
- Authorizes seven specific trails and greenways for sponsorship;
- Authorizes the DEP to establish cost for entering into a concession agreement;
- Specifies that the DEP shall ensure that the size, color, materials, construction, and location of all signs are consistent with the management plan for the property and the standards of the department, do not intrude on natural and historic settings; and
- Specifies that all signs shall contain only a logo selected by the sponsor and specified wording.

This analysis is drawn to CS/CS/HB 181.

On January 11, 2012, the Agriculture & Natural Resources Subcommittee amended and passed HB 181 as a committee substitute (CS). The CS:

- Changed the word "advertising" to the word "sponsorship" throughout the bill.
- Added mandated compliance with s. 337.407, F.S, and Ch. 479, F.S.
- Added a 60-day notice period should the department choose to end a concession agreement for just cause.
- Added paragraph (5), which clarifies that concession agreements under this section do not create proprietary or compensable interests in any sign or display site or location.
- Changed the allocation of revenue from this section from 90 percent to 85 percent allocated to the appropriate Department of Environmental Protection trust fund; and from 10 percent allocated to district school boards which must be used to enhance funds for the school district's bicycle education program or Safe Route to Schools Program, prorated by population, to 15 percent allocated to the State Transportation Trust Fund for use in Florida Traffic and Bicycle Safety Education program and the Florida Safe Routes to School program.