

STORAGE NAME: h0891.lgva.doc

DATE: April 9, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
LOCAL GOVERNMENT & VETERANS AFFAIRS
ANALYSIS – LOCAL LEGISLATION**

BILL #: HB 891

RELATING TO: Daytona Beach/Submerged Lands/Lease

SPONSOR(S): Representative Wiles & others

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) LOCAL GOVERNMENT & VETERANS AFFAIRS (SGC)
 - (2) NATURAL RESOURCES & ENVIRONMENTAL PROTECTION (RIC)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This bill requires the State of Florida to lease state-owned submerged lands to the City of Daytona Beach if the City of Daytona Beach acquires ownership of an existing pier on state-owned submerged lands for the purpose of redeveloping its downtown.

This bill provides for a 35-year lease with the City of Daytona Beach for \$5,000 annually (increasing by an additional \$5,000 at each successive 5-year interval). This bill also provides lease terms.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

In 1845, the federal government conveyed ownership of all lands that lie beneath the navigable waters in this state, up to the ordinary high water mark, to Florida, upon its statehood. See *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339, 342 (Fla. 1986). No surveys were required to delineate the boundaries of these sovereign lands and the title vested in the Legislature to be held in a public trust for the people. The Florida Constitution currently reflects the state's ownership right of such lands. The Florida Constitution provides:

The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Art. X, s. 11, Fla. Const.

After this conveyance, the federal government no longer had title or an ownership interest in these lands. As such, the federal government no longer had the power to re-convey these lands.

In 1856, the Legislature adopted the "Riparian Act of 1856." The purpose of this act was to benefit commerce and promote the building of warehouses and other facilities that would benefit the landing and storage of goods, which was currently prevented due to the State owning the submerged lands necessary to construct such facilities. See *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893). The act conveyed all rights, interest and title to lands covered by water lying in front of any tract of land owned by a citizen for public purposes. *Id. at 641*. These tracts of land must be lying upon any navigable stream, bay of the sea, or harbor and be filled in to erect facilities that promote commerce.

In 1921, the Legislature enacted chapter 8537, Laws of Florida, 1921, known as the "Butler Act," whose purpose was to encourage the improvement of submerged lands in the interest of commerce and navigation to those land owners whose lands extend to the high-water mark. The intent of the act was to improve and develop Florida's waterfront. See *City of West Palm Beach v. Board of Trustees of Internal Improvement Trust Fund*, 714 So. 2d 1060, 1062 (Fla. App. 4th DCA 1998), reh'g, reh'g en banc and cert. denied (August 4, 1998), reh'g granted and aff'd, *City of West Palm Beach v. Board of Trustees of Internal Improvement Trust Fund*, 746 So. 2d 1085 (Fla. 1999). In order to obtain title to the submerged land abutting their property, the submerged land had to be bulkheaded or filled in or permanently improved from the high water mark in the direction of the channel. *City of West Palm Beach*, 746 So. 2d at 1089. This was a new condition from the Riparian Act of 1856. A riparian landowner's land must be abutting streams, or waters of the bay or

harbor. The State would only divest title to the submerged lands that had been bulkheaded, filled in or permanently improved. *Id. at 1090.*

In 1957, the Legislature expressly repealed the Butler Act, after 36 years of the development of Florida's coastline with, chapter 57-362, Laws of Florida, known as the "Bulkhead Act of 1957." This repeal was due to a change in public policy and the concern for citizen rights in submerged State lands. See *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assocs.*, 512 So. 2d 934, 938 (Fla. 1987). Upon repeal, the title to all submerged lands was vested to the Board of Trustees to the Internal Improvement Trust Fund. However, the Legislature confirmed title to submerged lands for those upland riparian owners that had filled or developed the submerged lands prior to the repeal of the Butler Act. *City of West Palm Beach*, 746 So. 2d at 1086. Upon request, the Board of Trustees of the Internal Improvement Trust Fund (Board) issues a disclaimer to each upland owner

In the 1970s, the Board began requiring the compensation to the State for public and private activities on submerged lands that generate revenues or exclude traditional public uses. Preexisting structures were given the option to be registered as "grandfathered structures" and avoid lease fees until 1998.

Florida Statutes and Florida Administrative Code

Section 253.03, Florida Statutes, provides the duties and powers of the Board as it relates to lands vested in the State, including the lease of submerged lands. The Board is authorized to adopt rules that provide for the assessment and collection of reasonable fees for leases. In 1998, the Legislature created section 253.0345, Florida Statutes, to authorize special event agreements by the Board. These agreements are for boat shows and displays in, or adjacent to, established marinas or government-owned upland property. The duration of these special events shall be no longer than 30 days. The intent of this section is that an individual applying for a special event agreement does not have to be a riparian upland owner for a submerged land lease or any other mechanism for approval of the use of submerged lands. The Trustees are to balance the riparian rights of the upland owners and the economic interests of the public and the state. In addition, this section specifies that this special consent of use shall not be allowed to harm natural resources in the area where the temporary structures would be placed.

Rule 18-21.003, F.A.C., defines terms to be used within the rules relating to the management of sovereign submerged lands. "Riparian rights" is defined as those rights incident to lands bordering upon navigable waters, as recognized by courts and common law. "Riparian owner" is defined as waterfront owners along a river or stream and "littoral owner" means waterfront owners abutting an ocean, sea or lake. However, riparian owner often describes all waterfront owners. See *Board of Trustees of the Internal Imp. Trust Fund*, 512 So. 2d at 935. This rule defines "public interest" as those demonstrated economic, social and environmental benefits that accrue to the public at large, and which exceed the costs of the proposed action. In considering whether a lease serves a public interest, the Board must consider the project and its purpose to be served by the lease.

The policies, standards and criteria that the Board should use in determining whether to approve a lease is provided in rule 18-21.003, F.A.C. This rule provides that activities on sovereign submerged lands must include some of the following requirements:

- They must be consistent with the public interest;
- They must be provided for in a lease that contains terms, conditions and restrictions deemed necessary to protect and manage sovereign lands;
- They must provide for equitable compensation for those leases which generate revenues or preempt general use; and

- They must be limited to water dependent activities unless the Board determines, on a case-by-case basis, that an exception is in the public interest.

A lease for use of submerged lands is required for all revenue generating and income related activities. Rule 18-21.005, F.A.C.

The Board is authorized to provide 25-year extended leases pursuant to rule 18-21.008, F.A.C. These leases are for existing or proposed facilities where the use of the sovereign submerged lands and the structure have or are expected to have an expected life, or amortized period, equal to or greater than the requested lease term. To be eligible, the following must be shown:

- The facility provides access to public waters and submerged lands for the public on a first-come, first-served basis;
- The facility is constructed, operated, or maintained by a government, or is funded by a government's secured bonds, which have a term greater than or equal to the lease terms; and
- The extended term is necessary to satisfy unique operational constraints.

If a facility satisfies the above requirements, the applicant must then:

- Demonstrate compliance with this chapter;
- Minimize potential adverse impacts as a result of construction and use of the facility;
- Agree to comply with the extended lease terms;
- Demonstrate compliance with previous lease terms, if applicable;
- Agree to comply with applicable laws and rules; and
- Submit an application for a lease pursuant to rule 18-21.008(1)(a) which complies with such subsection.

Once approved, the following provisions are applicable to an extended lease:

- The effective date of the lease term is the date of the lease approval by the Board.
- The first annual lease fees are assessed beginning on the date of execution of the new lease or modified lease, and the first annual lease fee payment for new leases or modified leases must be made within 30 days of execution of the lease.
- The lease must provide provisions relating to lease fee adjustments and annual payments.
- To renew a lease, the lease must: be approved by the Board; there must be compliance with all applicable statutes and rules; a payment of a \$200.00 non-refundable processing fee; and payment of all fees assessed under rule 18-21.011.
- A lease may be terminated for: non-compliance with any material term or condition of the lease to be renewed; evidence of the applicant's previous trespass, damage, or depredation to sovereign submerged land caused by the facility or use; or failure to pay any assessed fees or fines. A renewal cannot be granted unless all such non-compliance is corrected.
- A lease may be assigned, in whole or in part, under certain conditions.
- The Department of Environmental Protection staff must, at least every five years, inspect the site and determine compliance with the lease terms. Non-compliance with any material lease term, or evidence of trespass, damage, or depredation to sovereign submerged land caused by the facility or use, results in termination of the lease, corrective action, or enforcement pursuant to applicable laws and rules.

At the expiration or cancellation of a lease, the former lessee is required to remove all structures and equipment from the leased area in accordance with the lease terms. If the former lessee fails to remove all structures and equipment, the Board issues an order requiring the former lessee to remove the structures and equipment from the leased area. If the former lessee fails to comply with

the order, the Board imposes a fine; removes the structures and equipment; and recovers the cost of removal from the former lessee. If a former lessee failed to pay an imposed fine, the fine is imposed as a statutory lien.

Rule 18-21.011, F.A.C., provides for the payment and fees for sovereign submerged lands. The annual fee for extended leases is calculated with the following formula:

Annual lease payments = annual lease fee for standard leases (the greater of 6% of the annual rental value from the wet slip rental, the base fee, or the minimum annual fee) multiplied by $(1 + .01X)$, where X = the term of the lease in years.

Rental value is the gross receipts from the wet slips rentals. The base fee is computed at the rate of \$0.1130 per square foot per annum. This base fee is revised each year based on the CPI. The minimum annual fee is \$339, which is also annually adjusted by the CPI.

There is also a surcharge on all new leases in the amount of 25% of the base fee.

The Department is authorized to negotiate annual leases for restaurants and other nonwater dependent uses. In negotiating the fee, the Department considers appraised market values, benefits, and profits gained if the lease is approved.

Main Street Pier

The historic pier at Daytona Beach has been an attraction providing entertainment and recreation for the area since the 1920s. The pier extends 1,050 feet over the Atlantic Ocean. The tract of land that the pier begins extends 102 feet north and south along the waterfront. This area is approximately 15,300 square feet of dry sand and is rarely covered in water.

The City of Daytona Beach has established the Main Street Redevelopment Area to enhance the City of Daytona Beach's entertainment, sports, and convention-related venues. The current cost of public and private projects completed or under construction within this area is approximately \$358 million. An integral element of the City of Daytona Beach's redevelopment plan is the continuation and expansion of non-water dependent activities at the Main Street Pier. The City is planning on the development of activities on the pier that include: restaurants, a sky viewing tower, a cable car ride, historic dance pavilion and a fishing pier. The improvements to the pier is estimated to add \$138 million in improvements to the Main Street Area; attract 2,000,000 new visitors; and provide 1500 new jobs. In addition, estimates are that over the next 30 years, the project will generate in excess of \$265 million in sales and ad valorem taxes benefiting the City of Daytona Beach.

Currently, the existing pier has never been under a lease. In February 2000, the current upland owner (McMillian and Wrigth, Inc.) was denied a Butler Act disclaimer. According to a letter from the Department of Environmental Protection, the application for disclaimer was denied due to the Butler Act not applying to the sovereign submerged lands under the pier. For the Butler Act to apply, the structure must be located on a navigable stream, bay, or harbor, not on the Atlantic Ocean. In addition, the disclaimer was denied on the basis that the Butler Act does not apply to public bathing beaches, which applies to Daytona Beach.

C. EFFECT OF PROPOSED CHANGES:

This bill requires the State of Florida to lease state-owned submerged lands to the City of Daytona Beach if the City of Daytona Beach acquires ownership of an existing pier on state-owned submerged lands for the purpose of redeveloping its downtown.

This bill provides for a 35-year lease with the City of Daytona Beach for \$5,000 annually (increasing by an additional \$5,000 at each successive 5-year interval. This bill also provides lease terms.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: This section directs the State to lease submerged lands to the City of Daytona Beach. This section provides a legal description of the proposed lease area.

Section 2: This section proposes that the City of Daytona Beach lease be for a term of 35 years and that the city pay the Board of Trustees \$5,000 annually for the first five years, thereafter increasing the lease payment in increments of \$5,000 for each successive 5-year anniversary of the lease. The fees are submitted to Department of Environmental Protection and shall be used to monitor and administer the lease. This section provides that the lease commences on July 1, 2001 and terminates June 30, 2036.

Section 3: This section states that the purpose of this lease is for furthering the City of Daytona Beach's downtown redevelopment initiative. This section allows the City of Daytona Beach to use the submerged lands for nonwater-dependent activities. This section provides that the lease becomes void if the city is unable to acquire or if the city relinquishes ownership after the purchase of the existing pier.

Section 4: This section provides that this lease is contingent upon and does not become effective until the city has acquired ownership of the pier.

Section 5: This section provides that the City of Daytona Beach may make no claim of title or interest to the land by reason of occupancy or use, that all title and interest is vested in the State, and that the City of Daytona Beach may not make any claim that the land may be purchased, sold or resold.

Section 6: This section provides that the City of Daytona Beach has a leasehold or fee simple title interest in the upland property adjacent to the pier during the duration of the lease. If that interest is terminated, the State may terminate the lease, at its option. In addition, if the upland property is sold or its lease terminated, the City of Daytona Beach is required to inform potential buyers of the existing lease of adjacent state lands and the terms and conditions of the lease.

Section 7: This section requires the City of Daytona Beach to be responsible for investigating any claims arising out of the lease, at its expense. This section also holds the State harmless from claims and lawsuits.

Section 8: This section requires the City of Daytona Beach to assume all responsibility for liabilities and improvements, including drainage, special assessments or taxes during the term of the lease.

Section 9: This section prohibits the City of Daytona Beach from knowingly permitting any nuisance or illegal activity in the leased area. This section also prohibits the entry of gambling ships, or similar vessels, which engage in "cruises to nowhere." This section defines "cruises to nowhere" as ships that leave and return to the State without any intervening stop, and any watercraft that carries passengers to and from such ships.

Section 10: This section requires the City of Daytona Beach to maintain the pier and any other structures in good repair. This section prohibits the construction of a dock or pier on the leased property that might be destructive to wildlife. This section requires that all garbage, debris and sewage be disposed of properly at an appropriate upland site. This section also allows the Department of Environmental Protection to inspect the premises at any reasonable time.

Section 11: This section requires the City of Daytona Beach, at its own cost, to remove any structures and equipment from the leased property at the end of the lease term. Unpaid costs will constitute a lien on the city's adjacent upland property.

Section 12: This section requires the City of Daytona Beach to obtain any required United States Army Corps of Engineers permits prior to any authorized construction.

Section 13: This section prohibits the reassignment of this lease unless there is further legislative action.

Section 14: This section requires the City of Daytona Beach to always comply with all laws of the State and all administrative rules adopted under the laws of the State that are not inconsistent with this act.

Section 15: This section provides a severability clause.

Section 16: This section provides an effective date of upon becoming a law.

III. NOTICE/REFERENDUM AND OTHER REQUIREMENTS:

A. NOTICE PUBLISHED? Yes No

IF YES, WHEN?

December 26, 2001

WHERE?

The News-Journal; Daytona Beach, Volusia County

B. REFERENDUM(S) REQUIRED? Yes No

IF YES, WHEN?

C. LOCAL BILL CERTIFICATION FILED? Yes, attached No

D. ECONOMIC IMPACT STATEMENT FILED? Yes, attached No

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill could be accomplished without legislation. Rather than requesting a lease pursuant to ch. 253, F.S., and applicable Department of Environmental Protection rules, the City of Daytona Beach is proposing to use the provisions of this act as the terms of lease instead of standard lease terms and conditions.

This bill proposes to exempt itself from the following Florida administrative rules:

- Instead of the maximum 25-years allowable as described in section 18-21.008(2)(a)2., Florida Administrative Code, the bill provides for a 35-year lease;
- Instead of the lease being based on the current fee schedule as described in section 18-21.011, Florida Administrative Code, the bill proposes a fixed rate of \$5,000 annually for the first five years, increasing every successive five years by another \$5,000.

According to the Department of Environment Protection's Division of State lands, a lease as proposed in this bill would generate a minimum of \$1.3 million over the next 35 years based on current lease fees. Pursuant to this bill, the City of Daytona Beach would pay \$735,000 over the 35-year period. The State stands to lose approximately \$600,000 in revenues as a result of this bill.

Concerns have been expressed that the bill proposes to use the provisions established in the bill and not use the approved standard lease conditions. The bill omits provisions necessary to maintain control of state-owned submerged lands. The bill does not include all of the standard submerged lands lease conditions including the definition of liveaboards, the right to terminate the lease, assessment of late fees, nondiscrimination clauses, etc. The bill is not renewable or assignable. To assign or transfer would require legislative action.

Although the proponents of this bill recognize that they qualify for a 25-year lease under section 18-21.008(2)(a), Florida Administrative Code, a 35-year lease is needed in order to make the project successful, as the bond terms that are being proposed are greater than 25 years.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

A strike-everything amendment is being offered by Representative Wiles. This amendment, among other things, provides standard submerged land lease provisions.

VI. SIGNATURES:

COMMITTEE ON LOCAL GOVERNMENT & VETERANS AFFAIRS:

Prepared by:

Staff Director:

Laura Jacobs, Esq.

Joan Highsmith-Smith