

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: CS/SB 1122

INTRODUCER: Community Affairs Committee and Senator Martin

SUBJECT: Protection of Historical Monuments and Memorials

DATE: February 8, 2024

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McVaney</u>	<u>GO</u>	<b>Favorite</b>
2.	<u>Hunter</u>	<u>Ryon</u>	<u>CA</u>	<b>Fav/CS</b>
3.	_____	_____	<u>FP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

SB 1122 creates the Historic Florida Monuments and Memorials Protection Act.

The bill preempts local government actions that relocate, remove, damage, or destroy a monument or memorial. The bill expresses intent that the state, through the Division of Historical Resources (Division) protect, preserve, and ensure that each monument or memorial is not removed, damaged, or destroyed, throughout the state.

The Florida Historical Commission, for monuments or memorials, or the Department of Veteran's Affairs, for military monuments or memorials, has authority to recommend action, its deferral, or no action, on any issue regarding the protection or preservation of a monument or memorial. The Division must make the ultimate decision on the issue in a written format with an explanation of its bases therefor.

An elected or appointed local government official that enacts or enforces a local ordinance, regulation, or rule that impinges on the state's regulation of the removal, damage, or destruction of an historic Florida monument or memorial is subject to a civil fine of up to \$1,000. The official is also subject to a separate civil action in which actual damages, up to \$100,000, and attorney fees and costs may be awarded.

The local government's ordinance, regulation, or rule must be declared invalid by a court, and is subject to a permanent injunction prohibiting its enforcement.

The local government is separately liable for restoration of the monument or memorial. If it lacks the funds to do so, the State must restore the monument or memorial and withhold all arts, cultural, and historic preservation funding from the local government until reimbursement is made. Another provision of the bill requires a local government that seeks to remove, damage, or destroy a monument or memorial to place a good faith estimate of the funds needed to replace the monument or memorial in an escrow account.

Any local government that seeks to relocate a monument or memorial may only do so temporarily as a result of military necessity or a construction or infrastructure project on the property on which the monument or memorial is sited. They must follow specific procedures to do so, including:

- Providing notice to the Division of the decision to remove and later replace or relocate the monument or memorial;
- Returning the monument or memorial after the need ceases, or the project is complete; and
- If it is impossible to return the monument or memorial to its original location, returning it to a prominent place, as close as possible to the original location, within the same county or municipality in which it was originally located, that provides similar prominence, honor, visibility, and access.

The bill will likely have an indeterminate impact on state and local government expenditures related to the preservation, removal, or destruction of monuments and memorials.

The bill grants the Department of State, in consultation with the Department of Veterans' Affairs, rulemaking authority to implement the bill.

The bill takes effect July 1, 2024.

## II. Present Situation:

### Department of State

The Department of State (DOS), created by s. 20.10, F.S., is composed of six divisions: Elections, Historical Resources, Corporations, Library and Information Services, Arts and Culture, and Administration. The head of the DOS is the Secretary of State (Secretary). The Secretary is appointed by and serves at the pleasure of the Governor, and is confirmed by the Senate.

### Division of Historical Resources: Chapter 267, F.S.

The Division of Historical Resources (Division) within the Department of State is charged with encouraging the identification, evaluation, protection, preservation, collection, conservation, and interpretation of information about Florida's historic sites and properties or objects related to Florida's history and culture.<sup>1</sup> This includes cooperating with federal and state agencies, local governments, and private entities to accomplish their duties.

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<sup>1</sup> Florida Department of State, Division of Historical Resources, *About*, <https://dos.fl.gov/historical/about/> (last visited Jan. 19, 2024). See also, s. 267.031, F.S.

The Division is comprised of the following Bureaus:

- Bureau of Historic Preservation;
- Bureau of Historical Museums; and
- Bureau of Archeological Research.<sup>2</sup>

The Florida Historical Resources Act<sup>3</sup> was established to preserve archaeological sites and objects of antiquity for the public benefit.<sup>4</sup> The Act recognizes Florida's historic properties as an important legacy to be valued and conserved for present and future generations. Accordingly, it is Florida's policy to lead, assist, administer, and encourage public entities and private citizens to preserve the state's historic environment and resources.<sup>5</sup>

The Florida Historical Commission (Commission) was created to enhance public participation and involvement in the preservation and protection of Florida's historic and archaeological sites and properties. The Commission's membership must include a licensed architect with historic preservation and architectural history expertise; a professional American historian; an architectural historian; a prehistoric archaeologist; and an historic archaeologist.<sup>6</sup>

The Commission's duties include providing assistance, advice, and recommendations to the Division of Historical Resources and its director for:

- Establishing priorities for the identification, acquisition, protection, and preservation of historic and archaeological sites and properties.
- Establishing criteria for use in assessing the significance of historic and archaeological sites.
- Evaluating proposals for historic preservation grants administered by the division.
- Providing an active outreach program to encourage public understanding of and involvement in the preservation of the state's historic and archaeological sites and properties.
- Identifying and expressing public goals for historic preservation and gathering public ideas necessary for the formulation of alternative policies.
- Recommending rules relating to the historic preservation programs administered by the division.
- Protecting and preserving Florida's historic and archaeological sites and properties.

Any action taken by the Commission requires a majority vote of the members present at its meeting.<sup>7</sup>

### ***Florida Historical Marker Program***

The Florida Historical Marker Program is designed to raise public awareness of Florida's cultural history and to enhance the enjoyment of its historic sites by citizens and tourists. These markers tell stories of the places and people who created Florida, by identifying the churches,

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<sup>2</sup> *Id.*

<sup>3</sup> Sections 267.011-267.1736, F.S.

<sup>4</sup> Section 267.14, F.S.

<sup>5</sup> Section 267.061(2)(a), F.S.

<sup>6</sup> Section 267.0612(2), F.S.

<sup>7</sup> Section 267.0612(5), F.S.

schools, archaeological sites, battlefields, and homes that represent Florida's past.<sup>8</sup> The official Florida historic markers are markers awarded, approved, or administered by the Division.<sup>9</sup> A "Florida Heritage" marker is a one that identifies people, events and places, including buildings, structures, objects and archaeological sites that are of local, regional or statewide historic significance relating to Florida history, culture, and ethnic heritage.<sup>10</sup>

The Division is responsible for the administration of all aspects of the Florida Historic Marker Program, including the application process, selection and designation of properties, persons or events to be marked and the placement and maintenance of the markers.<sup>11</sup> There are approximately 1,200 markers throughout the state currently.<sup>12</sup> While the current list of Florida Historical Markers has all the approved and created markers, some have yet to be installed or have been removed without notice to the Bureau of Historic Preservation.<sup>13</sup>

### **Criminal Penalty for Destruction of a Memorial**

Section 806.135, F.S., provides that it is a second degree felony<sup>14</sup> for any person to willfully and maliciously destroy or demolish any memorial or historic property, or to willfully and maliciously pull down a memorial or historic property, unless authorized by the owner of the memorial or the historic property.

The term "historic property" is defined as any building, structure, site, or object that has been officially designated as a historic building, historic structure, historic site, or historic object through a federal, state, or local designation program. A "memorial" is defined as a plaque, statue, marker, flag, banner, cenotaph, religious symbol, painting, seal, tombstone, structure name, or display that is constructed and located with the intent of being permanently displayed or perpetually maintained; is dedicated to a historical person, an entity, an event, or a series of events; and honors or recounts the military service of any past or present United States Armed Forces military personnel, or the past or present public service of a resident of the geographical area comprising the state or the United States. The term includes, but is not limited to, the following memorials established under ch. 265, F.S.:

- Florida Women's Hall of Fame;
- Florida Medal of Honor Wall;
- Florida Veterans' Hall of Fame; 1A
- POW-MIA Chair of Honor Memorial;
- Florida Veterans' Walk of Honor and Florida Veterans' Memorial Garden;
- Florida Law Enforcement Officers' Hall of Fame;

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<sup>8</sup> Florida Department of State, Florida Division of Historical Resources, *Historical Markers*, <https://dos.fl.gov/historical/preservation/historical-markers/> (last visited Jan. 16, 2024).

<sup>9</sup> Rule 1A-48.002(3), Fla. Admin. Code

<sup>10</sup> Rule 1A-48.002(3)(b), Fla. Admin. Code

<sup>11</sup> Rule 1A-48.003(1), Fla. Admin. Code

<sup>12</sup> Florida Department of State, *Florida Historical Marker List*, <https://apps.flheritage.com/markers/> (Jan. 16, 2023).

<sup>13</sup> Email from Jeremy Heiker, Florida Historical Marker Coordinator, Department of State, to Gabriela Limones-Borja, Legislative Analyst, Senate Committee on Governmental Oversight and Accountability (Jan. 16, 2024, 4:15 EST) (on file with the Senate Committee on Governmental Oversight and Accountability).

<sup>14</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082(9)(a)3.c. and 775.083(1)(b), F.S.

- Florida Holocaust Memorial;
- Florida Slavery Memorial; and
- Any other memorial located within the Capitol Complex, including, but not limited to, Waller Park.

Section 806.135, F.S., also requires the payment of restitution, which includes the full cost of repair or replacement of such memorial or historic property.

### **Monuments**

Section 265.111, F.S., defines “monument” to mean a permanent structure such as a marker, statue, sculpture, plaque, or other artifice, including living plant material, placed in remembrance or recognition of a significant person or event in Florida history.

### **Local Government Powers**

The Florida Constitution grants counties and municipalities broad “home rule” authority that did not exist prior to the ratification of the 1968 Constitution.<sup>15</sup> Non-charter county governments may exercise those powers of self-government that are provided by general or special law.<sup>16</sup> Counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.<sup>17</sup> Municipalities have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions and provide municipal services, and exercise any power for municipal purposes except when expressly prohibited by law.<sup>18</sup>

### **Immunity for Official Conduct**

The general rule under the common law is that legislators enjoy absolute immunity from liability for performance of legislative acts.<sup>19</sup> Absolute immunity for legislators has historically been recognized as a “venerable tradition” that has withstood the development of the law since pre-colonial days.<sup>20</sup> Courts have upheld absolute immunity for legislators at all levels of lawmaking, including federal, state, and local government levels.<sup>21</sup> The courts’ reasoning behind such holdings is that when legislators hold legislative powers, they use them for the public good, and

<sup>15</sup> See, FLA. CONST. art. VIII, s. 5 (1885) (“powers, duties[,] and compensation of county commissioners shall be prescribed by law”) and FLA. CONST. art. VIII, s. 8 (1885) (“The Legislature shall... prescribe [municipal] jurisdiction and powers[.]” See also, *City of Trenton v. State of New Jersey*, 262 U.S. 182, 186 (1923) (“In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state.”), *Bowden v. Ricker*, 70 Fla. 154 (Fla. 1915) (“Under the provision of s. 5 of art. 8 of the [1885] Constitution that powers and duties of county commissioners ‘shall be prescribed by law,’ the authority of such officials is only such as may be conferred by statutory regulations.”))

<sup>16</sup> FLA. CONST. art. VIII, s. 1(f).

<sup>17</sup> FLA. CONST. art. VIII, s. 1(g).

<sup>18</sup> FLA. CONST. art. VIII, s. 2(b); see also s. 166.021(1), F.S.

<sup>19</sup> See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

<sup>20</sup> *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998). For additional examples of where absolute immunity of legislative acts has been recognized, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Hough v. Amato*, 269 So. 2d 537 (Fla. 1st DCA 1972); *Jones v. Loving*, 55 Miss. 109 (1877); *Ross v. Gonzales*, 29 S.W.2d 437 (Tex. Ct. App. 1930).

<sup>21</sup> *Bogan*, 523 U.S. 44.

are exempt from liability for mistaken use of their legislative powers.<sup>22</sup> Furthermore, courts fear that allowing personal liability could distort legislative discretion, undermine the public good by interfering with the rights of the people to representation, tax the time and energy of frequently part-time citizen legislators, and deter service in local government.<sup>23</sup>

When unlawful ordinances have been enacted, the freedom from personal liability does not make the legislative product itself valid.<sup>24</sup> In such instances, affected citizens have been able to challenge the validity of such ordinances by suing to have them declared invalid or have a court enjoin enforcement.<sup>25</sup>

Courts have found that legislators may be subject to personal liability when they lack discretion.<sup>26</sup> Such situations typically exist when legislators are subject to an affirmative duty, such as when a law or court order has directed them to levy a tax. Such acts are labeled “ministerial,” as opposed to “legislative,” acts.<sup>27</sup> Arguably, an express and clear preemption would remove discretion from local government officials seeking to engage in lawmaking in the preempted field.

### III. Effect of Proposed Changes:

**Section 1** designates the provisions of the bill the “Historic Florida Monuments and Memorials Protection Act.”

#### Definitions

**Section 2** defines the following terms, among others:

- A “local government” means any city, county, school district or other public educational institution, or any other political subdivision of the state and its agencies.
- An “historic Florida military monument or memorial” means a historic Florida monument or memorial that honors or recounts the military service of any past or present military personnel, including any armed conflict since settlers from other countries came to what is now the United States.
- An “historic Florida monument or memorial” means a permanent statue, marker, plaque, flag, banner, cenotaph, religious symbol, painting, seal, tombstone, or display constructed and located on public property which has been displayed for at least 25 years with the intent of being permanently displayed or perpetually maintained and which is dedicated to any persons, places, or events that were important in the past or that are in remembrance or recognition of a significant person or event in state history.

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<sup>22</sup> *Id.* at 50-51 (citing *Jones*, 55 Miss. 109).

<sup>23</sup> *Id.* at 52.

<sup>24</sup> *Tenney*, 341 U.S. at 379.

<sup>25</sup> *See, e.g., Bogan*, 523 U.S. 44; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Tenney*, 341 U.S. 367.

<sup>26</sup> *Bogan*, 523 U.S. at 51-52.

<sup>27</sup> *See Id.*

## **General State Responsibilities Regarding Monuments and Memorials**

**Section 2** provides Legislative intent that Florida act to protect each historic Florida monument or memorial from removal, damage, or destruction. It further provides that “[a]ccurate history belongs to all Floridians in perpetuity...and the state has an obligation to protect and preserve such history.”

### ***State Restoration of a Removed, Damaged, or Destroyed Monument***

A local government that removes, damages, or destroys a monument or memorial by enacting or enforcing a local ordinance, regulation, or rule that impinges on the state’s exclusive occupation of such regulation must pay to restore the monument or memorial to its original condition or location, or as relocate it as close as possible. This restoration or relocation must occur within 3 years after the initial removal, damage, or destruction. If the local government cannot afford to do so, then the state must pay for such restoration or relocation. The Department must withhold any arts, cultural, and historic preservation funding from the local government until it has reimbursed the state for the cost of restoration or relocation.

### ***Division Authority Regarding Protection, Preservation, or Relocation of a Monument or Memorial***

The Division must seek the recommendation of the Commission on any issue regarding the protection, preservation, or relocation of an historic Florida monument or memorial. For historic Florida military monument or memorial, the Division must seek a recommendation from the DVA. The Division must provide a written record of its decision (whether it be to act, defer action, or not make an action) and the basis therefor.

### ***Rulemaking Authority***

The Department, in consultation with the DVA, may adopt rules to implement the bill.

## **Preemption of Local Authority and Related Limitations**

**Section 2** creates s. 267.201(2)-(3), F.S., which generally preempts a local government’s authority to removal, damage, or destroy an historic Florida monument or memorial by:

- Voiding all existing local government<sup>28</sup> ordinances, regulations, rules, actions, and executive actions regarding the removal, damage, or destruction of historic Florida monuments or memorials.
- Stating the intent to provide statewide uniformity on actions regarding historic Florida monuments or memorials through the division, and in the case of historic Florida military monuments or memorials, through the Division in consultation with the DVA.
- Declaring state occupation of the whole field of policy regarding the removal, damage, or destruction of historic Florida monuments or memorials to the exclusion of any existing or future local government ordinance, regulation, or rule, or any action by an elected or appointed local government official.

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<sup>28</sup> The bill defines a “local government” as “any municipality, county, school district, state college, state university, or any other political subdivision of the state.”

***Relocation as a Result of Military Necessity, Construction, or Infrastructure Project***

**Section 2** creates s. 267.201(6), F.S., which allows a local government's authority to relocate a historical monument or memorial only temporarily and due to military necessity, or a construction or infrastructure project.

Before the monument or memorial's removal, the local government must place a good-faith estimate of the value necessary to relocate the monument or memorial into an escrow account. A local government that decides to temporarily remove a monument or memorial from its location due to military necessity, or a construction or infrastructure project must notify the Division within 10 days of its decision on a form prescribed by the Department in consultation with the DVA.

The local government must move the monument or memorial during its temporary relocation to a site of similar prominence, honor, visibility, and access within the same county or municipality in which it was originally located.

After the period of military necessity or completion of the project, the local government must relocate the monument or memorial to its original location. If it cannot be returned to its original location, the local government must consult with either the Department in consultation with the Commission, and for a military monument or memorial, the DVA, to determine a location for the monument or memorial with similar prominent, honor, visibility, and access within the same county or municipality.

The local government must again notify the Division in writing within a reasonable time, but no more than 30 days from, the cessation of the military need or the completion of construction or infrastructure project. This notification is not required to be on a standardized form developed by the Department.

***Civil Penalties and Related Liabilities***

**Section 2** creates s. 267.201(4), F.S., to prohibit, and civilly penalize, the enactment or enforcement of any local ordinance, regulation, or rule by a local government or elected or appointed local government official that violates or impinges on the Legislature's occupation of the field of removal, damage, or destruction of historic Florida monuments or memorials.

A court must declare invalid a local government's ordinance, regulation, or rule that violates or impinges on the Legislature's occupation of the field of removal, damage, or destruction of historic Florida monuments or memorials. The court must also issue a permanent injunction against the local government which prohibits it from enforcing the ordinance, regulation, or rule.

An elected or appointed local government official who knowingly and willfully enacts or enforces a local ordinance, regulation, or rule that violates or impinges on the Legislature's occupation of the field of removal, damage, or destruction of historic Florida monuments or memorials is subject to a civil fine of up to \$1,000. Public funds cannot be used, except as required by applicable law, to defend or reimburse the unlawful conduct of an elected or appointed local government official who is found to have knowingly and willfully acted in such a manner.



Specified groups or individuals may bring a separate civil action for declaratory or injunctive relief in any circuit court that has jurisdiction over the local government or elected or appointed local government official who is named as the defendant in an action that alleges a violation of s. 267.201(4), F.S., based on the enactment or enforcement of any local ordinance, regulation, or rule that impinges on the state's occupation of the field of regulation of the removal, damage, or destruction of an historic Florida monument or memorial. The plaintiff may also request actual damages, limited to \$100,000, and reasonable attorney fees and costs. The bill vests this right to bring suit in (1) a group involved in the design, erection, or care of a subject monument or memorial, (2) a member thereof, (3) a group that regularly uses the monument or memorial for remembrance, or (4) a person who does so.

**Section 3** provides that if any provision of the act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can still have valid effect. The provisions of this act are therefore severable.

**Section 4** provides the bill takes effect July 1, 2024. However, section 2 provides that its provisions apply retroactively to monuments that have been removed, damaged, or destroyed on or after July 1, 2018.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The county and municipality mandate provisions of Article VII, section 18 of the Florida Constitution may apply because the bill may require local governments to expend funds to restore monuments and memorials removed or relocated in the past five years. Article VII, section 18 (a) of the Florida Constitution provides in part that a county or municipality may not be bound by a general law requiring a county or municipality to spend funds or take an action that requires the expenditure of funds unless certain specified exemptions or exceptions are met.

None of the constitutional exceptions appear to apply.

Article VII, section 18 (d) provides eight exemptions, which, if any single one is met, exempts the law from the limitations on mandates. Laws having an “insignificant fiscal impact” are exempt from the mandate requirements, which for Fiscal Year 2024-2025 is forecast at approximately \$2.3 million.<sup>29,30</sup> However, any local government costs associated with the bill are speculative and not readily estimable for purposes of determining whether the exemption for bills having an insignificant fiscal impact applies.

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<sup>29</sup> FLA. CONST. art. VII, s. 18(d).

<sup>30</sup> An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times \$0.10. See Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Impact*, (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf> (last visited Feb. 6, 2024).

If the bill does qualify as a mandate, in order to be binding upon cities and counties, the bill must contain a finding of important state interest and be approved by a two-thirds vote of the membership of each house.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

**Retroactive Application**

Section 2 of this bill provides that this act will void all prior local government ordinances, regulations, and executive actions regarding the removal, damage, or destruction of historic Florida monuments or memorials. This bill will therefore operate retroactively.

Pursuant to Florida case law, even when the Legislature clearly intends for a statute to apply retroactively, a court will reject such an application if the statute: impairs a vested right, creates a new obligation, or imposes a new penalty.<sup>31</sup> However, statutes that do not alter contractual or vested rights, and only relate to procedure can be applied retroactively.<sup>32</sup>

The Florida Supreme Court has recognized that a statute may be applied retroactively if it meets the following conditions.

- There is clear evidence that the Legislature intended to apply the statute retroactively.
- Retroactive application is constitutionally permissible.<sup>33</sup>

In determining whether a retroactive application is constitutional, courts have generally held that due process considerations prevent retroactive legislation that impairs vested rights.<sup>34</sup> However the Supreme Court has determined that this general rule is not absolute, and that courts have identified factors “to balance the considerations permitting or

<sup>31</sup> *Fla. Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.*, 67 So.3d 187, 194-95 (Fla. 2011); *Mendez v. Progressive Express Ins. Co.*, 35 So. 3d 873 (Fla. 2010). See also *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999) (stating that “[t]he general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively).

<sup>32</sup> *Menendez, supra* note 41.

<sup>33</sup> *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999); See also *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA 2004).

<sup>34</sup> *State Dept. of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981).

prohibiting an abrogation of value.”<sup>35</sup> In one case, the Supreme Court weighed the following three factors in considering the validity of retroactive legislation.

- The strength of the public interest served by the statute.
- The extent to which the right affected is abrogated.
- The nature of the right affected.<sup>36</sup>

The provisions that allow individuals to be personally civilly liable for their official actions as legislators may implicate a due process concern as it regards fines levied for past actions.

However, as drafted, it is not clear that there will be a retroactive effect of the civil liability for appointed or elected local government officials. While the bill states that the provisions regarding liability of a local government or appointed or elected local government official apply to any monuments or memorials removed, damaged, or destroyed on or after July 1, 2018—the violation requires an act that “impinges upon the State’s exclusive occupation of the regulation of the removal, damage, or destruction of historic Florida monuments or memorials.” The State preemption will not go into effect until July 1, 2024. Therefore, local government actions taken prior to July 1, 2024 will not have impinged on the state occupation of the field.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

Government officials who violate the prohibitions in the bill face fines. Creating significant penalties on government officials for making policy decisions or carrying out invalid regulations or ordinances may deter public service.

The Department of State may incur several costs related to the implementation and carrying out of the bill. In particular, the Department may see an increase in administrative costs related to the:

- Development of a rule to adopt a form for the reporting of the removal of a monument or memorial from its location due to military need, or a construction or infrastructure project.
- Maintenance of records relating to notice of removal or replacement of a monument or memorial during construction.

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

- Increased need for meetings of the Florida Historical Commission to determine permissible actions relating to the state’s monuments and memorials.
- Additional duties within the Division of Historical Resources to make all recommendations about the protection, preservation, or relocation of an historic Florida monument or memorial.

The Department of Veterans’ Affairs may see an increase in workload relating to additional duties created by the bill.

## VI. Technical Deficiencies:

The bill uses “monument or memorial” on lines 89, rather than the defined term “historic Florida monument or memorial.”

It is unclear whether a local government must submit its decision to relocate a monument or memorial as a result of military necessity, or a construction or infrastructure project, to the Division’s decision making authority outlined in lines 141-153 of the bill. If it is the intent for the Division to be able to override such a decision, the bill sponsor may wish to add timeframes and other required procedures for clarity.

It is not clear whether a specific officer within the Division of Historical Resources has final authority to make a decision on any issue regarding the protection, preservation or relocation of an historic Florida monument or memorial. Additionally, it is unclear whether the Florida Historical Commission or the Division of Historical Resources makes these decisions—line 137-138 makes reference to consultation with the Florida Historical Commission, while lines 148-153 contemplate a decision made by the Division of Historical Resources on the basis of a recommendation from the Florida Historical Commission.

## VII. Related Issues:

### Standing

For standing, Florida courts require the party prosecuting the claim to be the real party in interest or be expressly authorized by statute to bring the claim on behalf of the real party in interest. Rule 1.210 of the Florida Rules of Civil Procedure provides, in pertinent part:

(a) Parties Generally. Every action may be prosecuted in the name of the real party in interest, but . . . a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause. Persons having a united interest may be joined on the same side as plaintiffs or defendants, and anyone who refuses to join may for such reason be made a defendant.

## Civil Liability and Damages

The State Constitution provides that “the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.”<sup>37</sup> In most instances, the aggrieved party is limited to sue for the actual damages incurred.<sup>38</sup>

A statute may subject a person to civil liability for damages caused by the person’s criminal behavior. “Civil liability” is defined by Black’s Law Dictionary as the “debt or legal obligation from a private wrong amounting to the damage done.”<sup>39</sup>

### *Punitive damages*

In any civil action, no claim for punitive damages is permitted unless there is a reasonable showing by evidence in the record, or proffered by the claimant, which would provide a reasonable basis for recovery of such damages.<sup>40</sup> A defendant may only be held liable for punitive damages if the trier of fact finds the defendant was personally guilty of intentional misconduct<sup>41</sup> or gross negligence.<sup>42,43</sup> Punitive damages may not exceed the greater of:

- Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
- The sum of \$500,000.<sup>44</sup>

If the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain the court may award an amount of punitive damages not to exceed the greater of:

- Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
- The sum of \$2 million.<sup>45</sup>

If the fact finder determines that, at the time of injury, the defendant had a specific intent to harm the claimant and the defendant’s conduct did in fact harm the claimant, then there shall be no cap on punitive damages.<sup>46</sup>

Lines 76-91 grant standing to bring a civil action for the removal, destruction, or damaging of a monument or memorial. This language could be interpreted two ways. The first is that these parties are granted standing to sue on behalf of the injured property owner (the government,

<sup>37</sup> FLA. CONST. art. I, s. 21.

<sup>38</sup> See, e.g., *Public Defender, Eleventh Judicial Circuit of Fla. v. State*, 115 So.3d 261, 282 (Fla. 2013).

<sup>39</sup> “Civil Liability,” Black’s Law Dictionary 435 (9th ed. 2009).

<sup>40</sup> Section 768.72(1), F.S.

<sup>41</sup> “Intentional misconduct” means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. Section 768.72(2)(a), F.S.

<sup>42</sup> “Gross negligence” means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. Section 768.72(2)(b), F.S.

<sup>43</sup> Section 768.72(2), F.S.

<sup>44</sup> Section 768.72(1)(a), F.S.

<sup>45</sup> Section 768.73(1)(b), F.S.

<sup>46</sup> Section 768.73(1)(c), F.S.

since this bill applies only to monuments and memorials located on public property). This appears consistent with Rule 1.210 of the Florida Rules of Civil Procedure. If the party is successful in the suit, the damages would be payable to the injured property owner. The second interpretation is that these parties are granted standing to seek redress based on the damages to those particular parties (rather than the injured property owner). In this case, punitive damages may not apply because there is no monetary loss. The damages for this civil action are limited to actual damages, but not more than \$100,000. The parties granted standing in lines 88-91 have no property interest in the damaged, and therefore their actual damages may be difficult to prove.

The fine applied in lines 69-71 could vary widely, depending on the source of the local government's violative action. For example, if a mayor decides to remove a statue, the fine would be \$1,000; if a 7-person city commission makes the decision, the fine could be \$7,000. It is also unclear whether a commissioner who did not vote with the majority to take the violative action is liable to the same extent as those who approved the measure because the elected body takes the action, not the individual.

### **Action without Local Ordinance, Regulation, or Rule**

It appears that a local government's or local government official's action to remove, damage, or destroy an historic Florida monument or memorial without the enactment or enforcement of a local ordinance, regulation, or rule make be authorized under the bill, as s. 267.201(4) only discusses penalties for violations of actions pursuant to a local ordinance, regulation, or rule.

### **Statutes Affected:**

This bill creates section 267.201 of the Florida Statutes.

## **VIII. Additional Information:**

### **A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

#### **CS by Community Affairs on February 6, 2024:**

- Limits the provisions to historic Florida monuments or memorials that are located on public property, and which have been displayed for at least 25 years;
- Bases the civil liability of a local government official on his or her enactment or enforcement of any local ordinance, regulation, or rule that impinges on state regulation of the removal, damaging, or destructing of historic Florida monuments or memorials, rather than on the act of destruction, damage, or removal itself.
- Allows a separate determination of liability against a local government or local government official based on their violation of the bill. A court may assess actual damages incurred, but the award may not exceed \$100,000.
- Removes the bill's provision of state authority to place a contextual marker or plaque near a monument or memorial.
- Grants authority to make any determination regarding the protection, preservation, or relocation of a Florida historic monument or memorial to the Division of Historical Resources, rather than the Florida Historical Commission.

- Removes the timeframe after the completion of a construction or infrastructure project by which a local government must restore a monument or memorial to its original location, or, if that is not possible, a substantially similar location.
- Extends the retroactive application of the bill from October 1, 2020 to July 1, 2018.
- Grants rulemaking authority to the Department of State.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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