

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1251 Preservation of Memorials

SPONSOR(S): Roach

TIED BILLS: **IDEN./SIM. BILLS:** SB 1690

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Public Management Subcommittee	15 Y, 0 N	Villa	Smith
2) Judiciary Committee		Mawn	Luczynski
3) State Affairs Committee			

SUMMARY ANALYSIS

Various memorials have been created throughout the state recognizing historical events or significant accomplishments of the state's residents. No law specifically protects such memorials from malicious damage, destruction, or removal, but a person who willfully and maliciously places graffiti or otherwise vandalizes, injures, or damages the real or personal property of another, including a memorial, commits criminal mischief, punishable as:

- If the damage to property is \$200 or less, a second degree misdemeanor.
- If the damage to property is between \$200 and \$1,000, a first degree misdemeanor.
- If the damage to property is greater than \$1,000, a third degree felony.

A minor who commits criminal mischief by placing graffiti on any public or private property may have his or her driving privilege revoked, suspended, or withheld for up to one year. To reduce such a drivers' license revocation, suspension, or withholding, the minor may elect to perform community service in the form of cleaning graffiti from public property.

HB 1251:

- Creates the Historical Memorials Preservation Act, providing that any person that damages, destroys, takes, or removes a memorial without proper authorization is civilly liable for the full cost of repairing or replacing the memorial, treble damages, attorney fees, and court costs associated with an action brought to recover damages for the memorial's repair or replacement.
- Provides that anyone who willfully damages, defaces, or removes a memorial commits a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine.
- Provides that a minor choosing to reduce his or her driver's license suspension, revocation, or withholding via community service may apply the cleaning of graffiti on memorials or the general cleanup of parks dedicated to veterans or historic sites towards the community service requirement.
- Prohibits a plaque, sign, or any other object that would obstruct the view of a memorial on public property, or that would convey information about the memorial, from being placed on or next to a memorial in existence on or before January 1, 2019, without the express written approval of the Secretary of State.

The bill may have a positive indeterminate fiscal impact on state government as it creates a new criminal offense that may increase the need for prison beds and a new civil cause of action that may increase judicial workload.

The bill provides an effective date of October 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Memorials

Various memorials, monuments, and places of recognition have been created throughout the state recognizing historical events or significant accomplishments of Florida residents. Some of these memorials are located on the grounds of the Capitol Complex¹, including the:

- Florida Women's Hall of Fame;
- Florida Medal of Honor Wall;
- Florida Veterans' Hall of Fame;
- POW-MIA Chair of Honor Memorial;
- Florida Veterans' Walk of Honor;
- Florida Veterans' Memorial Garden;
- Florida Law Enforcement Officers' Hall of Fame;
- Florida Holocaust Memorial; and
- Florida Slavery Memorial.²

No law specifically protects such memorials, monuments, and places of recognition from malicious damage, destruction, or removal.

Civil Liability and Treble Damages

A statute may subject a person to civil liability, including treble damages, for damages caused by the person's behavior. "Civil liability" is the quality, state, or condition of being legally obligated or accountable for civil damages.³ "Treble damages" are damages, authorized by statute, that are three times the amount of actual damages the fact-finder determined is owed to the victim.⁴

Criminal Mischief

A person commits criminal mischief if he or she willfully and maliciously⁵ injures or damages real or personal property belonging to another, which may include a memorial, including the placement of graffiti or other acts of vandalism.⁶ Criminal mischief is:

- If the damage to property is \$200 or less, a second degree misdemeanor punishable by up to 60 days imprisonment and a \$500 fine.⁷
- If the damage to property is between \$200 and \$1,000, a first degree misdemeanor punishable by up to one year imprisonment and a \$1,000 fine.⁸

¹ Section 281.01, F.S., defines capitol complex to mean portions of Tallahassee, Leon County, Florida, commonly referred to as the Capitol, the Historic Capitol, the Senate Office Building, the House Office Building, the Knott Building, the Pepper Building, the Holland Building, and the curtilage of each, including the state-owned lands and public streets adjacent thereto within an area bounded by and including Monroe Street, Jefferson Street, Duval Street, and Gaines Street. The term also includes the State Capital Circle Office Complex located in Leon County, Florida.

² See Ss. 265.001-265.006, F.S.

³ *Civil Liability*, Black's Law Dictionary (11th ed. 2019).

⁴ *Treble Damages*, Black's Law Dictionary (11th ed. 2019).

⁵ "Maliciously" means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage may be caused to another person or the property of another person. The determination of maliciousness is based on the circumstances surrounding the conduct which caused the damage. See *Walker v. State*, 154 So.3d 448 (Fla. 3d DCA 2014).

⁶ S. 806.13(1)(a), F.S.

⁷ If the offender has one or more criminal mischief violations, then the charge must be reclassified as a third degree felony. S. 806.13(1)(a)4. and (1)(b)1., F.S.

⁸ If the offender has one or more criminal mischief violations, then the charge must be reclassified as a third degree felony. S. 806.13(1)(a)4. and (b), F.S.

- If the damage to property is greater than \$1,000, a third degree felony punishable by up to five years imprisonment and a \$5,000 fine.⁹

If the offense is related to the placement of graffiti, the offender is required to perform 100 hours of community service that, if possible, involves the removal of graffiti. If not possible, the offender is required to perform at least 40 hours of community service.¹⁰ Furthermore, in addition to any other criminal penalty imposed, the offender must pay a fine of:

- At least \$250 for a first offense;
- At least \$500 for a second offense; and
- At least \$1,000 for a third offense.¹¹

Special Penalties for Minors

Currently, a minor who commits criminal mischief by placing graffiti on any public or private property may have his or her driving privilege revoked, suspended, or withheld for up to one year, in addition to other penalties.¹² To reduce such a driver's license revocation, suspension, or withholding, a minor may elect to perform community service by cleaning graffiti from public property at a reduction rate of one day per hour of community service performed.¹³

Effect of the Bill

Memorials

HB 1251 creates the "Historical Memorials Protection Act" ("Act"). The bill defines the term "memorial" to mean 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 this state or the United States. The term includes, but is not limited to, the following memorials established by law:

- The Florida Women's Hall of Fame;
- The Florida Medal of Honor Wall;
- The Florida Veterans' Hall of Fame;
- The POW-MIA Chair of Honor Memorial;
- The Florida Veterans' Walk of Honor and Florida Veterans' Memorial Garden;
- The Florida Law Enforcement Officers' Hall of Fame;
- The Florida Holocaust Memorial;
- The Florida Slavery Memorial; and
- Any other memorial located within the Capitol Complex, including Waller Park.

The bill also prohibits the placement of any plaque, sign, picture, marker, exhibit, notice, or other object that would obstruct the view of a memorial on public property, or that would convey information about such memorial, on or adjacent to any memorial existing on or before January 1, 2019, without the express written approval of the Secretary of State.¹⁴

⁹ This punishment may be aggravated if the court finds the defendant to be a habitual felony offender. Ss. 775.084 and 806.13(1)(b)3., F.S.

¹⁰ S. 806.13(6)(b), F.S.

¹¹ If the offender is a minor, the parent or legal guardian of the minor is liable along with the minor for payment of the fine. However, the court may decline to order a person to pay the fine if the court finds the person indigent or otherwise unable to pay the fine. S. 806.13(6)(a) and (c), F.S.

¹² S. 806.13(7), F.S.

¹³ S. 806.13(8), F.S.

¹⁴ The Division of Historical Resources within the Florida Department of State administers a state historic preservation program and directs the State Historical Marker Program, designed to inform the general public about persons, events, structures, and other topics relating to the history and culture of the state. Ss. 267.031(4)(h) and 267.074, F.S.

Criminal Mischief

The bill provides that a person who willfully damages, defaces, or removes a memorial that is owned or erected by a governmental entity, museum, historical society, or a similar public or private organization, or a memorial located in a cemetery or on a grave or tombstone, commits a third degree felony, punishable by up to five years' imprisonment and a \$5,000 fine.

The bill also allows a minor who commits criminal mischief and chooses to reduce his or her driver's license revocation, suspension, or withholding with community service to apply the cleaning of graffiti on memorials or the general cleanup of parks dedicated to veterans or historic sites to such community service at the rate of one day for each hour of community service performed.

Civil Liability and Treble Damages

The bill provides that any person that damages, destroys, takes, or removes a memorial without returning the memorial to its original position and condition is civilly liable for the full cost of the memorial's repair or replacement unless such person was authorized to take or remove the memorial by the memorial's owner for the purpose of restoring or repairing the memorial. Additionally, such person is liable for treble damages, attorney fees, and court costs to the memorial's owner associated with any action brought to recover damages for a memorial's repair or replacement. Further, the bill gives a resident of this state, a historical preservation organization, a military veteran, a veterans' organization, or a law enforcement or benevolent organization standing to seek enforcement of the Act through civil action in the circuit court in the county in which the damaged, destroyed, or removed memorial is located.

B. SECTION DIRECTORY:

Section 1: Provides that this act may be cited as the "Historical Memorials Protection Act."

Section 2: Creates s. 265.710, F.S., relating to civil liability for damaging, destroying, or removing memorials; enforcement.

Section 3: Amends s. 806.13, F.S., relating to criminal mischief; penalties; penalty for minor.

Section 4: Provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on state government, as it creates a new criminal offense that may increase the need for prison beds and a new civil cause of action that may increase judicial workload.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may increase costs to a person wrongfully damaging, defacing, or removing a memorial, as such person could be liable for treble damages in addition to costs of the memorial's repair and replacement. Further, the bill makes the willful damaging, defacing, or removal of a memorial owned or erected by specified entities a third degree felony, increasing the potential fine an offender must pay to \$5,000.

Additionally, the bill authorizes the payment of attorney fees and costs to the memorial's owner in an action to recover the costs of the memorial's repair or replacement but not to a person bringing an action to enforce the Act. Attorney fees are not available in Florida unless expressly allowed by contract or statute, meaning the person bringing an enforcement action would have to pay his or her own attorney fees.¹⁵

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

In 2009, the United States Supreme Court, in *Pleasant Grove City v. Summum*, held that memorials are a form of government speech¹⁶ protected by the First Amendment of the United States Constitution.¹⁷ In reaching this determination, the *Pleasant Grove* Court noted the government's long history of using memorials to speak for the public and the public's common understanding as to the role of memorials in conveying government messages.¹⁸ In light of this ruling, the bill may implicate First Amendment concerns as it appears to authorize a memorial's removal only for the purpose of repair or replacement and to require that a memorial be returned to its original location and condition. The bill also prohibits a local government from placing signs and other contextualizing objects near a memorial without the Secretary of State's consent. Thus, the bill may require local governments to engage in speech by requiring the continued display of a memorial, or may prevent the local

¹⁵ See *Price v. Tyler*, 890 So. 2d 246 (Fla. 2004), quoting *Bidon v. Dept. of Professional Regulation*, 596 So. 2d 450 (Fla. 1992) ("Attorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing their recovery.").

¹⁶ Under the government speech doctrine, a government may promote its own viewpoint, even by means of selecting among private speakers. See Mary Jean Dolan, *Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 Cath. U. L. Rev. 7 (2009), available at <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3150&context=lawreview> (last visited Feb. 14, 2020).

¹⁷ *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

¹⁸ *Pleasant Gove City v. Summum*, 555 U.S. at 470.

government from speaking in the form of a contextualizing sign or object without the Secretary of State's consent, which may violate a local government's free speech rights.

Additionally, by not limiting the bill to memorials on public property, the bill may violate the free speech and private property rights of a private citizen or organization by requiring the continued display of a memorial on property owned by such a citizen or organization.

B. RULE-MAKING AUTHORITY:

This bill does not confer rulemaking authority. However, such authority may be necessary to allow the Department of State to implement the part of the bill requiring the Secretary of State's express written authorization for the placement of specified signs, markers, and other objects near memorials.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that a person who willfully damages, defaces, or removes a memorial owned or erected by specified entities commits a third degree felony. However, the bill does not create an exception for a person who takes such an action with the memorial owner's authorization. Thus, the bill could subject a person acting with authorization to criminal penalties.¹⁹

Further, the prohibition against placing signs near memorials without the Secretary of State's approval applies only to memorials existing on or before January 1, 2019, so that memorials erected after this date are not afforded the same protections as earlier-erected memorials. Though the title of the bill suggests that it is intended to protect "historical" memorials, it is unclear why the bill makes such a distinction.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

¹⁹ For example, under the bill, a city employee directed by the city to remove a memorial from a city park following a unanimous vote of the city commissioners authorizing such action may face criminal penalties for removing the memorial.