

LEGAL MEMORANDUM

TO:

FROM:

RE: Executive Branch Authority Over City Parks / Monument Removal

DATE: December ____, 2023

I. Introduction

This memorandum will address the Mayor’s authority and governance over the City of Jacksonville’s parks in general and whether the Mayor is protected from penalties, either from City Council or the Legislature and Governor, for exercising that authority over parks as she sees fit (here, the removal of a monument within a City park without the use of City funds). This memorandum will also briefly address whether the specific monument at issue, the Monument to the Women of the Southland in the City’s Confederate Park, is a historic monument entitled to specific protections under Chapter 307 of the City’s Ordinance Code.

II. Questions Presented

- A. What is the Mayor’s authority over the City’s parks?
- B. What role does City Council play in governing parks (here, the removal of a monument within a park without using City funds)?
- C. Can the Governor’s Office penalize or remove the Mayor for exercising her authority over a City park (here, the removal of a monument within the park)?

D. Is the Monument to the Women of the Southland (Confederacy) a historic monument entitled to special protection under the City's Ordinance Code, and if so, what is the recourse for its removal and relocation?

III. Short Answers

A. Both the City Charter (Article 24) and the Code of Ordinances (Title III, Chapter 28) give the executive branch (Mayor) exclusive authority over the City's parks and their property and exclusive authority to appoint a parks director.

B. The City Council has authority to adopt and implement the Mayor's budget, which includes allocations of funds for parks. However, Council cannot encroach upon or override the Mayor's exclusive executive authority under the Charter and Code as part of the executive branch's allocated powers. To do so would violate the Charter and Code, as well as separation of powers principles. For example, Section 11.12 of Budget Ordinance 2022-504 concerned Council's allocation of budget funds for removal and relocation of remaining confederate monuments within the City pursuant to the approved Capital Improvement Plan ("CIP"); it did not encroach upon the Mayor's executive authority.

C. The Governor cannot implement an unconstitutional statute retroactively to penalize the Mayor from exercising her exclusive executive powers over parks under the consolidated City's unique Charter. Nor can the

Governor remove the Mayor under the Florida Constitution. The City has broad home rule powers over its own governance and property.

D. Lastly, the Monument to the Women of the Southland, although located in Confederate (now Springfield) Park in the Springfield Historic District, is arguably not designated as a historic monument subject to the protections and requirements of Section 307 of the Ordinance Code. If the monument was a “contributing structure” to the historic district, and thus entitled to such protections, the Code process for its removal and relocation (with potential civil penalties if not followed) could apply, but there would be no further recourse to challenge the monument’s removal.

IV. Discussion

A. The Mayor’s Exclusive Executive Authority Over the City’s Parks.

Article IV of the City of Jacksonville Charter addresses the division of powers among the legislative, executive and judicial branches of the consolidated government. Section 4.01 states that “[n]o power belonging to one branch of the government shall be exercised by either of the other branches, except as expressly provided in this charter.” As such, there is a clear and specific separation of powers within the City Charter, and no branch can encroach upon the powers of a co-equal branch. *See also* Charter § 4.02 (allocation of certain powers and duties)¹; *Chiles v. Children of A, B, C, D, E and F*, 589 So. 2d 260, 263-64 (1991) (separation of powers doctrine prohibits any branch of state government from encroaching

¹ Charter Section 4.03 further spells out specific grants of executive power to Council, giving the Council executive power to appoint and remove JEA Board members. No further grant of executive powers to Council is provided in the Charter.

upon powers of another and prohibits delegation of assigned powers). The balance of power cannot be reallocated among co-equal branches and one co-equal branch cannot exercise oversight over another branch. *See id.* at 268-69; *see also Alqawasmeh v. State*, 328 So. 3d 321, 322 (Fla. 2d DCA 2021) (operation and control of jail within the province of executive and legislative branches, not the judicial branch).

In Jacksonville, the Mayor is an elected constitutional officer under Section 6.02 of the City Charter and Article II, Section 8 of the Florida Constitution. Under Section 6.04 of the Charter, the Mayor holds the executive power of the consolidated government and is the chief executive and administrative officer of the consolidated government. The Mayor is responsible for the conduct of all executive and administrative departments of the consolidated government, and she shall administer, supervise and control all departments and divisions created by the Charter or adopted by Council as part of the Ordinance Code. She appoints all department directors (subject to Council approval), and they serve at her pleasure.

Section 24.01 of the Charter states that there shall be a director of each of the City's departments who is responsible for all department operations. The Mayor appoints each director (confirmed by Council) and each director serves until removed by the Mayor. The Mayor also sets the rules and regulations of each department. The Mayor supervises and controls all matters in each department, and the director is responsible for the functions of the department and control of its property. Also, under Section 24.02, the work of each department shall be divided

into divisions with division chiefs appointed by the Mayor (confirmed by Council) and serving at the Mayor's pleasure.

Chapter 21 of the Ordinance Code governs the general powers of the executive branch, with the structure of the executive branch divided into departments under Section 21.101. The department is the principal unit of the executive branch and performs its functions. Code § 21.101(a). Department directors execute the powers vested in that department and make recommendations to the Mayor under Code Section 21.104.

Parks, Recreation and Community Services is an executive department of the executive branch under Chapter 28 of the Ordinance Code. The department organizes and operates the City's parks. The director of parks is appointed by the Mayor (confirmed by Council) and serves at the pleasure of the Mayor. The director operates the maintains the parks and authorizes expenditures of funds appropriated by Council. Code § 28.103.

Notably, pursuant to Code Section 106.441, the executive Department of Parks, Recreation and Community Services also handles City donations, including donations of monuments. The parks director sends a memorandum containing final details of the donation project to the Mayor, who may accept or reject the donation. The Mayor then has specific authority under Code Chapter 28 to administer, operate, plan, promote and organize parks as well as the authority to identify and coordinate improvements to parks. Thus, the powers granted in Chapter 28 encompass matters such as locating, relocating, placing, and removing monuments

from parks. The Mayor, through the director of parks, therefore has the power to remove monuments from City parks.²

In short, as shown above, the Mayor has exclusive authority over the conduct of departments within the City under the Charter and Code, and parks is one such department under executive branch control. The Mayor is the exclusive executive with authority over the operation and administration of the City's parks and parks property, through an appointed director serving until removed by the Mayor. Council appropriates budgetary funds for the operation and maintenance of the City's parks but cannot encroach upon the executive power to maintain and control the parks and their property.

B. Council's Budgetary Authority.

The City Council's legislative powers are specifically listed in Article V of the Charter. They include the power to "review the budgets and appropriate money to the consolidated government and any independent agencies which request appropriations from the consolidated government..." Charter § 5.07. They also include the power to make City laws, levy taxes, fix salaries, and appropriate travel and relocation expenses. *See id.* In short, Council adopts laws (ordinances) and controls the City purse. *See also Chiles*, 589 So. 2d at 265 (power to

² Section 106.441 of the Code also contains limits on the authority to accept donations on behalf of the City. A donation may be accepted only with the understanding that such acceptance does not obligate the City in any way or put any conditions or restrictions upon the City. The Code does not permit the Mayor to accept any gift which would "limit the general government in the exercise of its government functions," require any naming rights, or obligate the City in terms of City services or public funds.

appropriate funds is exclusively legislative). As discussed above, Council does not encroach upon operations under the purview of the executive branch.

Importantly, while Council can change the Charter by ordinance, under Section 3.01(e)(2) of the Charter, governing the general powers of the consolidated government, “[a]ny change in this chapter made by ordinance which affects...the distribution of powers among elected officers...cannot become effective without approval by referendum of the electors as provided in s. 166.031, Florida Statutes.” Council therefore cannot change the Mayor’s exclusive powers under Article VI of the Charter by ordinance without approval from the voters.

The City Council allocates and appropriates budgetary funds for the operation of parks, but as shown above, the actual operation and control of parks is part of the executive branch. Council cannot change the executive branch’s powers and authority over parks without violating the City Charter and Ordinance Code. *See also Alsop v. Pierce*, 155 Fla. 185, 197-98 (Fla. 1944) (city commission rule violated Jacksonville charter as being beyond legislative powers, as charter gave mayor authority to suspend city officers and control police force).

In 2022, by Budget Ordinance 2022-504, Council provided in Section 11.12 for confederate monument removal, relocation, remaining, or renaming, as part of the approved CIP (Ordinance 2022-505). This section was part of the City’s budget to allocate funds for the potential removal of confederate monuments; it should not be construed as an encroachment upon the Mayor’s authority over the Parks Department and her ultimate control over the operation and maintenance of the

City's parks and the property located therein. Without the allocation of funds by Council, but through the use of non-City budgetary funds, the Mayor can remove and relocate a monument from the City park as part of the Executive Branch's control over the parks department.³

C. The Florida Legislature and the Governor's Authority.

In November of this year, legislation was introduced in the Florida House of Representatives to "protect" monuments. Known as the "Historical Monuments and Memorials Protection Act," HB 395 would require the protection and preservation of historical monuments and give the Governor the power to punish local officials who remove, damage or destroy monuments with personal civil monetary penalties. The bill purports to preempt all local control and authority over monuments. It also gives the Governor the power to remove local officials from office. The bill has not passed the legislature or been signed into law but would go into effect July 1, 2024. Crucially, if passed the law purports to be retroactive to January 1, 2017.

The new law would likely be unconstitutional in two respects. First, it is an unconstitutional restraint on the City's home rule powers. The consolidated City's

³ The discussion concerning the language used in Budget Ordinance Section 11.12 at the City's Finance Committee meeting on August 23, 2022, illuminates this point. During that meeting it was made clear the Mayor had included \$500,000.00 in the budget for removal of the City's remaining confederate monuments, but the Budget Ordinance concerned *how that money would be used* – i.e., for removal, relocation, remaining or renaming of the monuments. The money would be in the budget for any of these options, to be determined after a period of "community engagement," which to this office's knowledge has not yet occurred. In short, the Budget Ordinance appropriating monies for Council to allocate as it sees fit does not change the Mayor's executive powers over parks under the Charter when no City budget funding is involved.

home rule Charter is part of Florida law and gives the City exclusive authority over its own governance. *See* Fla. Stat. § 163.410. The Charter controls the City's governance and cannot be usurped by the State.

The City has preempted governance powers, including the power of the executive branch, to itself through its own home rule Charter adopted pursuant to Article VII, Sections 1(g), 3 and 6(e) of the Florida Constitution. *See* Fla. Stat. § 166.021(3)(d). Because it operates under its own charter, the City has “all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors,” and by charter can “enact county ordinances not inconsistent with general law.” Art. VIII, § 1(g), Fla. Const.

The new law purports to limit and override the powers given to the consolidated City by its duly enacted Charter under Florida law, and thus would violate the Florida Constitution. *See also* Fla. Stat. § 166.021(4) (“[t]he provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution.”). Section 166.02, governing municipal powers in Florida, further states that it is the “intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.” The new law conflicts with the City's Charter and Florida law and violates the City's constitutional home rule powers.

Second, even if the new law was not an unconstitutional restraint on previously granted Charter home rule powers, it would be unconstitutionally retroactive. Statutes cannot be constitutionally applied retroactively if they impair vested rights, create new obligations, or impose new penalties. *See Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 692 (Fla. 5th DCA 2002) (holding that amendment to comparative fault statute changing civil damages recovery could not be applied retroactively); *McGann v. Florida Elections Commission*, 803 So. 2d 763, 764-65 (statutes cannot be applied *ex post facto* to authorize sanctions for acts or omissions antedating the enactment that were not sanctionable at the time they took place). In this case, there is no statute prohibiting the removal or relocation of monuments (which belong to the City), and the proposed new law, providing for new obligations and prohibitions with extremely harsh penalties, could not be constitutionally applied retroactively. This new law would create wholly new legal obligations and sanctions that did not previously exist at the time of the actions, and thus would exceed the legislature's power and violate constitutional due process. *See R.A.M. of South Fla., Inc. v. WCI Communities, Inc.*, 1210, 1216-17 (Fla. 2d DCA 2004).

Retroactive removal of a local official for valid actions under local law and charter, which were not legally prohibited at the time of the actions, would be particularly unconstitutional. As discussed above, the Mayor has complete and exclusive executive authority over the parks in the City, and the property therein. Monuments are donated City property. Thus, the Governor would exceed his

authority in removing an official for acting within her authority based on completely new, and unconstitutional, legal grounds. *See also Warren v. DeSantis*, 631 F. Supp. 1188, 1202 (N.D. Fla. 2022) (claim that removal of elected state attorney was based on First Amendment retaliation and thus exceeded the Governor’s constitutional authority).

Aside from the potential new law, the Florida Supreme Court in *Warren v. DeSantis*, 365 So. 3d 1137, 1139-40 (Fla. 2023), recently discussed (in dicta) the Governor’s power under Article IV, Section 7 of the Florida Constitution to suspend from office any “state officer” for grounds such as “neglect of duty” and “incompetence.” The Florida Constitution then grants the State Senate the ultimate power to remove the state official. *See id.* The Court went on to explain that the judiciary has a very limited role in these proceedings and can only review the Governor’s order on its face to determine whether the order enumerates a constitutional basis for suspension. *See id.* Importantly, however, not only does this analysis address *state* constitutional officers, but the Court’s dicta discussion was never applied to the facts in *Warren*, where a state attorney was suspended by the Governor, because the petitioner unreasonably delayed bringing his petition to challenge the executive order. *See id.* at 1142-43. Here, not only is there a strong argument that a locally-elected mayor is not a “state official” or officer, there would be no constitutional basis for the Governor to suspend the Mayor based on “neglect of duty” or “incompetence” when there is no constitutional law preventing the local removal of a monument located in a City park.

Article III of the City Charter lays out the powers of the consolidated government. Section 3.01 states that the City “[s]hall have and may exercise any and all powers which counties and municipalities are or may hereafter be authorized or required to exercise under the Constitution and the general laws of the State of Florida, including, but not limited to, all powers of local self-government and home rule not inconsistent with general law conferred upon counties operating under county charters by s. 1(g) of Article VIII of the State Constitution; conferred upon municipalities by s. 2(b) of Article VIII of the State Constitution; conferred upon consolidated governments of counties and municipalities by section 3 of Article VIII of the State Constitution; conferred upon counties by ss. 125.85 and 125.86, Florida Statutes; and conferred upon municipalities by ss. 166.021, 166.031, and 166.042, Florida Statutes; all as fully and completely as though the powers were specifically enumerated herein.” Thus, under its unique Charter, the City “may exercise all governmental, corporate, and proprietary powers to enable the City of Jacksonville to conduct county and municipal functions, render county and municipal services and exercise all other powers of local self-government; all as authorized by the constitutional provisions mentioned in subsection (a) and by ss. 125.86(2), (7), and (8) and 166.021(1) and (3), Florida Statutes.” Charter § 3.01(b).

In other words, the Charter, enshrined in Florida law, uniquely controls the powers of the consolidated government, including the executive branch. Importantly, the powers of the consolidated government “shall be construed

liberally in favor of the consolidated government...” as “[i]t is the intent of this article to grant to the consolidated government full power and right to exercise all governmental authority necessary for the effective operation and conduct of the government of the City of Jacksonville and all of the affairs of the consolidated government and to secure to the consolidated government the fullest extent of county and municipal home rule consistent with the Constitution and general laws of the State of Florida.” Charter § 3.02.

The City Charter therefore gives unique, strong governance to the consolidated City and protections for the powers enumerated in the Charter, thereby providing the Mayor with stronger protections for lawful actions pursuant to her exclusive powers under the Charter and Ordinance Code, as discussed above. There would be no constitutional basis to sanction or remove the Mayor based on a newly-enacted law with new restrictions conflicting with her Charter-given executive powers. *See also Telli v. Broward County*, 94 So. 3d 504, 513 (Fla. 2012) (holding that term limits in county charter did not violate the Florida Constitution, as charter counties have the ability to “govern themselves as that broad authority has been granted to them by home rule power through the Florida Constitution”); *Snipes v. Telli*, 67 So. 3d 415, 417 (Fla. 2011) (holding that Florida Supreme Court has broadly interpreted home rule powers of charter counties). Nor would the Florida Constitution provide a separate basis for the Governor to suspend the locally-elected Mayor, with strong authority under the Charter and Ordinance Code, for “neglect or duty” or “incompetence” when she would simply be

exercising her given legal and exclusive executive authority over the City's parks and property therein.

E. The Confederate Monument's Location in a Historic District.

Lastly, the question has been raised as to whether the Monument to the Women of the Southland (Confederacy), located in Confederate Park (now known as Springfield Park) in the City's Springfield Historic District, was specifically identified as being included in the historic district designation as a "contributing structure," thereby entitling it to special protections under the City's Historic Preservation and Protection Code, Chapter 307 of the Ordinance Code.

Historical evidence suggests that the monument has not been designated as a "contributing structure" to a historic district. In the 1991 Ordinance establishing the Springfield Historic District, parks and monuments are identified as "significant characteristics" of the Springfield Historic District. *See* Ordinance 91-733-570 (enacted January 28, 1992). However, nowhere in the Ordinance creating the Springfield Historic District does it *specifically* list the Monument to the Women of the Southland (Confederacy) as a "contributing structure" to the historic district. As such, a strong argument can be made that the monument is not a contributing structure entitled to special protections under Chapter 307 of the Ordinance Code. As discussed above, it is a monument donated and accepted by the City and under the purview of the executive branch.⁴

⁴ Of course, Council does have legislative power to enact an ordinance designating monuments as historic structures entitled to protection under Section 307 of the Code, but has not done so.

If, however, the monument is a historic structure, or the Council creates a City law designating it and other monuments as historic structures, then it would be entitled to protections under the Historic Preservation and Protection Code, including specific processes required for its removal from the historic district and potential relocation. The process would require the Administration to obtain a certificate of appropriateness (“COA”) to remove and relocate the monument, with the Jacksonville Historic Preservation Commission (“JHPC”) making the determination of appropriateness after a quasi-judicial hearing. Appeals of the JHPC’s decisions (by the Mayor or, potentially, citizens who presented written or oral testimony at the public hearing) are to the City Council. Code § 307.106(b).⁵ City Council decisions can then be appealed to the circuit court.

The question then becomes: what would happen if the Mayor removed the historic monument without following the requirements of Chapter 307 of the Ordinance Code? The Administration would likely be given an appropriate amount of time to obtain a COA, but if it did not do so, rolling daily fines could be imposed by a special magistrate under Section 307.111 of the Code. The Planning and Development Department enforces the provisions of Chapter 307, and fines shall be no less than \$100.00 per day. Code § 307.111(a). An action for civil penalties could potentially be brought in court under Section 307.111(3) and could potentially include injunctive relief. However, the likelihood of fines imposed in a

⁵ Notably, the monument in Springfield Park is not surrounded by other similar structures that would be negatively impacted by its removal and relocation, which could relocate the monument to another site with historic significance. These factors weigh in favor of appropriateness to obtain a COA. See Code §§ 307.106(k), (o).

“City versus City” situation seems low, even if a COA is needed and is ultimately denied. Again, as discussed above, it is this office’ opinion that a COA is not needed to remove and relocate the monument from the park.

Finally, no individual would have a federal or state cause of action to challenge the Mayor’s decision to remove the monument. The federal constitution does not restrict the City’s power to remove monuments and statues from its government-owned public spaces, even if the City decides to keep some monuments and not others. The City may choose to remove only confederate monuments from City parks. Courts have rejected constitutional challenges including challenges based on the First Amendment, Due Process and Equal Protection.⁶

V. Conclusion

The Mayor has exclusive authority over the City’s parks and parks property, through the parks director, as provided in the Charter and Code. This authority

⁶ Monuments located on government property are considered “government speech,” and the First Amendment does not regulate government speech. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 471-72 (2009); *see also Monumental Task Committee v. Foxx*, 2017 WL 914056 *9 (E.D. La. 2017) (granting City’s summary judgment motion, as citizens group did not possess any constitutional right in the “aesthetic and cultural well-being of the city and in preservation of monuments”); *McGraw v. City of New Orleans*, 215 So. 3d 319, 328-29 (La. App. Ct. 2017) (dismissing complaint seeking to enjoin the take-down of three confederate monuments and reasoning that a citizen group did not have any property rights in the monuments, which were “city things on public property.”). Courts have also rejected plaintiffs’ arguments that they had standing by virtue of their relation to confederate soldiers or some other confederate heritage. *See, e.g., Callan v. Fischer*, 2016 WL 6886870 (W.D. Ky. 2016) (denying standing where plaintiff alleged being a distant relative of confederate leaders); *Bray v. Fenves*, 2016 WL 3083539 *1-2 (Ct. App. Tx. 2016) (holding that plaintiffs’ desire to preserv[e] and honor [] the history of lineage of soldiers did not grant plaintiffs’ standing to challenge removal of confederate statues).

cannot be encroached upon by another co-equal branch of government. Therefore, the Mayor has the power to remove a parks monument, without the use of City funds. The State Legislature and Governor cannot retroactively enforce a new law protecting monuments that are in the City's control and ownership, as to do so would violate the consolidated City's home rule charter powers, as well as constitutional due process. Because the monument at issue here is not a historic monument, it is not entitled to special protections under the City's Code, and even if it was so entitled, there is little recourse for the Mayor exercising her executive authority over parks to remove the monument. In short, the Mayor has executive authority to remove a monument from a City park.

If you have further follow-up questions or concerns, please do not hesitate to contact me.