

STORAGE NAME: h0011s1.sgc.doc
DATE: March 1, 2002

HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: CS/HB 11
RELATING TO: Easements / Cemetery Ingress & Egress
SPONSOR(S): Council for Smarter Government, Representative Bense and others
TIED BILL(S): none

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

- (1) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
 - (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 14 NAYS 0
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

Current law provides that the family and descendents of a deceased person have an easement for visiting to, and maintenance of, the gravesite of their deceased relative. This bill provides that the members of any not-for-profit organization whose purposes include the preservation of Florida's history may utilize that same easement, provided that the organization notifies the Division of Historical Resources of the Department of State of the organization's intent to utilize this easement right.

This bill also provides that prisoner labor may be used to maintain an abandoned cemetery.

This bill does not appear to have a fiscal impact on state or local government.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

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

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

This bill may slightly increase government by providing for additional persons who may enter the lands of others for the limited purpose of maintenance of cemeteries that the landowner has allowed to fall into disrepair.

B. PRESENT SITUATION:

Chapter 704, F.S., is entitled "Easements". Section 704.08, F.S., provides that the relatives and descendants of any person buried in a cemetery have an easement for ingress and egress for the purpose of visiting the cemetery at reasonable times and in a reasonable manner. The owner of the land may designate the easement. If the cemetery is abandoned or otherwise not being maintained, such relatives and descendants may request the owner to provide for reasonable maintenance of the cemetery, and, if the owner refuses or fails to maintain the cemetery, the relatives and descendants have the right to maintain the cemetery.

The property rights of the owner of real property as to property upon which graves have been placed is described as:

Where an owner of land has appropriated a small part thereof as a private burying ground, and it has been used as such, the land cannot be conveyed or devised so as to interfere with such use, and he and his grantees, devisees, and heirs hold the title in trust for the benefit of those entitled to burial in it, who also have a right to visit it for the purpose of repairing, beautifying, and protecting the graves and grounds, and for these purposes a right of ingress and egress from the nearest public road, to be exercised at reasonable times and in a reasonable manner In a conveyance or devise of land, part of which the owner appropriated as a private burying ground, it is not necessary to expressly reserve the right of burial therein; such reservation being implied, and the purchaser charged with notice of the fact that it has been dedicated to burial purposes, and of the rights of those entitled to use it.¹

In examining title to real property, if a burial ground is specifically set aside, a title insurance agent must follow these instructions:

¹ *Mingledorff v. Crum*, 388 So.2d 632, 635-36 (Fla. 1st DCA 1980), quoting from *Hines v. State*, 126 Tenn. 1, 149 S.W. 1058, 42 L.R.A. (N.S.) 1138.

When old burial grounds or cemeteries come to the attention of a [title insurance agent], they should not be ignored. Notice of these may come from recitals in instruments in the chain of title, references on old plats or maps, inspection of the property, common community knowledge, information given by the owner of the property, references on current surveys, etc. If the boundary of the burial ground or cemetery is delineated in a recorded instrument, it should be excluded from the legal description of the property to be insured in a [title insurance] policy. In addition, if it appears that the burial ground or cemetery is landlocked or access to it appears to be across the remaining property to be insured, an exception in the [title insurance] policy should be made for an easement to reach the burial ground or cemetery.²

Where a burial ground is believed to exist on any portion of the property, title insurance companies generally require that there be the following exception to any title insurance policy insuring the property:

No title insured to so much of the property herein described as constitutes a burial ground nor are any areas used for access insured free of the easement to reach the same. There may be bodies and remains of deceased persons interred therein and there are or may be rights and easements in favor of others to maintain and visit said burial ground and to inter bodies and remains therein or to remove bodies and remains therefrom.³

In general, it is unlawful for any person to willfully and knowingly destroy, mutilate, deface, injure, or remove any tomb, monument, gravestone, burial mound, earthen or shell monument containing human skeletal remains or associated burial artifacts, or other structure or thing placed or designed for a memorial of the dead, or any fence, railing, curb, or other thing intended for the protection or ornamentation of any tomb, monument, gravestone, burial mound, earthen or shell monument containing human skeletal remains or associated burial artifacts, or other structure before mentioned, or for any enclosure for the burial of the dead, or willfully destroys, mutilates, removes, cuts, breaks, or injures any tree, shrub, or plant placed or being within any such enclosure.⁴

Section 946.40, F.S., provides for the use of prisoners in public works projects. There is no provision for use of prisoner labor to maintain or improve private lands.

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 704.08, F.S., to provide that the members of any not-for-profit organization whose purposes include the preservation of Florida's history have an easement for ingress and egress for the purpose of visiting the cemetery at reasonable times and in a reasonable manner. If the cemetery is abandoned or otherwise not being maintained, the members of such organizations may request the owner to provide for reasonable maintenance of the cemetery, and, if the owner refuses or fails to maintain the cemetery, the members of such organizations have the right to maintain the cemetery. Before the members of such an organization may utilize the easement, the organization must notify the Division of Historical Resources of the Department of State of the organization's intention to utilize s. 704.08, F.S.

² TN 25.03.11A. (Attorney's Title Insurance Fund, Inc.; December 2000).

³ *Id.*

⁴ Section 872.02, F.S.

This bill also amends s. 946.40, F.S., to provide that prisoner labor may be used to maintain an abandoned cemetery.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes".

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

It is possible that this bill may perhaps be an expansion of the statutory easement, and thus a taking. However, the law already allows for an easement to the actual descendants of persons buried in a gravesite for maintenance of such gravesite. It is not a far stretch to appoint an organization to stand in the shoes of the family where family cannot be found or perhaps (in the case of unmarked graves), cannot be determined. It is also arguable that, as gravesites cannot be disturbed, moved, or built upon; and an easement to such gravesites is currently in law; such property would likely have no monetary value. Where property has no value, the owner of such property would presumably have no measure of damages for any taking of such property.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The phrase "members of any not-for-profit organization whose purposes include the preservation of Florida's history" is not defined in the bill. Landowners and organizations could possibly be confused to which specific groups the phrase refers.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On October 23, 2001, the Committee on Judicial Oversight adopted one amendment to HB 11. The amendment requires that before the members of a not-for-profit organization may utilize the easement for visiting and maintenance of a cemetery, the organization must first register with the Division of Historical Resources of the Department of State. Additionally, by this amendment the right of members of a not-for-profit organization to utilize the easement for visiting and maintenance of a cemetery is made subordinate to the rights of the family of the deceased.

On February 26, 2002, the Council for Smarter Government adopted one amendment to the bill, adding the provision regarding use of prisoner labor in maintaining abandoned cemeteries. The bill was then reported favorably as a committee substitute.

VI. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

Lynne Overton, J.D.

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Nathan L. Bond, J.D.

Council Director:

Don Rubottom