



## MEMORANDUM OF LAW

To: Rona Kobell, Maryland Sea Grant

From: Terra Bowling, Research Counsel II, National Sea Grant Law Center

Re: Abandoned Cemetery Preservation in Maryland (NSGLC-18-04-03)

Date: July 17, 2018

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### **Advisory Request Summary**

In May 2018, you requested background information from the National Sea Grant Law Center for your article about the challenges facing abandoned historically black cemeteries in Maryland. As noted in your email, the cemetery in question is slowly ceding way to marshland, and it is unclear how or whether the gravesites can be preserved. Please note, the information below is legal research provided for education and outreach purposes and does not constitute legal advice or representation of Maryland Sea Grant or its constituents.<sup>1</sup>

Our research findings are summarized below, but we encourage you to reach out to the Coalition to Protect Maryland Burial Sites (<http://cpmbbs.org/>). They have several online resources regarding the laws and regulations in Maryland, and news about upcoming events. They also have information about financial assistance programs, such as the Trader Foundation for Maryland Burial Sites grant programs. The Coalition may be able to provide interested parties with specific guidance regarding preservation options in the state.

For cemeteries threatened by sea level rise or flooding, there are three main options: preserve the cemetery, relocate the graves, or record gravesites but allow flooding to continue. To proceed with any of those actions, it is important to establish what state law allows and identify any potential resources.

### **Preservation**

There is nothing in Maryland state law saying that a cemetery must protect and care for graves in perpetuity. Historic cemeteries are not likely to be “perpetual care” cemeteries, in which families pay into a fund to ensure that gravesites are maintained in perpetuity. In Maryland, “The owner of a burial lot is responsible for the care of a memorial or

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monument placed on the burial lot.”<sup>2</sup> For abandoned cemeteries, the owner of the lot may be unknown, but there are resources to help identify the owner of land encompassing a burial site. A county courthouse would likely have records of the current and previous owners of the land in question. Local historical or genealogical societies or libraries are other potential sources for information on the history of a cemetery.<sup>3</sup> If an owner still cannot be identified, there are several resources for preservation of historic cemeteries.

First, the local government in which the site is located may repair or maintain burial sites within their jurisdictions at the request of or with permission of the owner of the burial site.<sup>4</sup> State law also authorizes local governments to appropriate money, solicit donations, provide incentives for charitable organizations or community groups to donate their services, and develop community service programs to allow those required to perform community service hours to “maintain and preserve a burial site or to repair or restore fences, tombs, monuments, or other structures located in a burial site...”<sup>5</sup> Groups who might provide assistance with preservation include: local schools, community associations, garden clubs, local law enforcement offices with workers under a community service sentencing program, local historical and genealogical societies, Boy Scouts, and Girl Scouts.

Maryland also allows any “person in interest” to request access from the owner of a burial site or of the land encompassing a burial site for the purpose of restoring, maintaining, or viewing the burial site.<sup>6</sup> A “person in interest” is identified as a person who: is related by blood or marriage or domestic partnership to the person interred; has a cultural affiliation with a person interred in a burial site; or has an interest in a burial site that the Office of the State’s Attorney for the county where the burial site is located recognizes is in the public interest after consultation with a local burial sites advisory board or, if such a board does not exist, the Maryland Historical Trust.<sup>7</sup> The statute contains a sample form agreement for access. Except for willful or malicious acts or omissions, the owner of a burial site or of the land encompassing a burial is not liable for damages to a person who enters on the land for the purposes of viewing, restoring, or maintaining the graves.<sup>8</sup> A person who enters land for these purposes will be responsible for ensuring that his conduct does not damage the land, the cemetery, or the gravesites, and will be liable to the property owner for any damage caused as a result of the access.<sup>9</sup>

Although state law authorizes preservation, there does not seem to be a requirement to do so. This has been the outcome in other states with similar laws. In one New Jersey case, a plaintiff sought to use the state Historic Cemeteries Act to protect a small historic

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<sup>2</sup> MD. CODE ANN., BUS. REG. § 5-503 (e)(1).

<sup>3</sup> The Maryland Office of Cemetery Oversight registers and regulates cemeteries; however, it does not regulate abandoned cemeteries, family cemeteries, or non-operational cemeteries.

<sup>4</sup> MD. CODE ANN., REAL PROP. §14-122(b).

<sup>5</sup> *Id.* §14-122(c).

<sup>6</sup> *Id.* § 14-121.

<sup>7</sup> *Id.* § 14-121(a)(4).

<sup>8</sup> *Id.* § 14-121(e).

<sup>9</sup> *Id.* § 14-121(f).

African-American cemetery connected to the St. James A.M.E. Zion Church, which existed from approximately 1851 until 1873. The Historic Cemeteries Act authorizes local governments to restore historic cemeteries.<sup>10</sup> The court ruled that although the Act authorized preservation, it did not require any affirmative action by the local government to protect the graveyard from a zoning variance.<sup>11</sup> In West Virginia, plaintiffs brought action against a pipeline construction company alleging grave desecration in violation of a state statute that protects gravesites of historical significance.<sup>12</sup> The statute is narrowly tailored to protect unmarked grave of historical significance.<sup>13</sup> In this instance, among other rulings, the court found the graves were marked and did not meet the requirements for protection under the law.

Local historical or genealogical societies are other potential sources for assistance with the preservation a cemetery. At the state level, Preservation Maryland is a group “dedicated to preserving Maryland’s historic buildings, neighborhoods, landscapes, and archaeological sites through outreach, funding, and advocacy.”<sup>14</sup> Another statewide group that provides information and resources for cemeteries is the Coalition to Protect Maryland Burial Sites, mentioned above. The Maryland Historical Trust can provide information on archaeological site surveys and requirements for listing the cemetery on either the Maryland Register of Historic Places or the National Register.<sup>15</sup> For state owned or controlled properties on the state register, the state must ensure that they are not “transferred, sold, demolished, destroyed, substantially altered, or allowed to deteriorate significantly.”<sup>16</sup> The state also requires review of actions that affect listed historic properties and also requires compensation if an historic property is damaged by the state.<sup>17</sup>

The National Register of Historic Places is the official list of the Nation’s historic places worthy of preservation. Authorized under the National Historic Preservation Act of 1966, it is intended to coordinate and support public and private efforts to identify, evaluate, and protect historic and archeological resources. A cemetery may be eligible for the National Register if it derives its primary significance from: graves of persons of transcendent importance, the age of the burials, distinctive design features, association with historic events, or if the resource has the potential to yield important information. Capital grants are available to eligible applicants for projects of acquisition, rehabilitation and restoration of historic property that is part of the National Register or eligible to be on the National Register. The National Historic Preservation Act requires any federal agency that owns or controls sites on the registry assumes preservation duties.<sup>18</sup>

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<sup>10</sup> N.J. STAT. ANN. § 40:10b1-3.

<sup>11</sup> *Harris v. Borough of Fair Haven*, 317 N.J. Super. 226, 721 A.2d 758 (Ch. Div. 1998).

<sup>12</sup> *Gen. Pipeline Const., Inc. v. Hairston*, 234 W. Va. 274, 765 S.E.2d 163 (2014)

<sup>13</sup> W. VA. CODE § 29-1-8a.

<sup>14</sup> Preservation Maryland, <http://www.preservationmaryland.org/>.

<sup>15</sup> Maryland Historical Trust, Md. Dep’t of Planning, <http://mht.maryland.gov/>.

<sup>16</sup> MD. CODE ANN., State Fin. & Proc. § 5A-326.

<sup>17</sup> *Id.*

<sup>18</sup> 54 U.S.C. § 306101.



If floodwaters have dislodged caskets from cemeteries during a declared disaster, those graves may be eligible for Federal Emergency Management Agency (FEMA) disaster relief on a case-by-case basis.<sup>19</sup> FEMA can provide assistance for reburial expenses if the grave was in a family burial plot on private property.<sup>20</sup> The person who incurred reburial expenses must register for FEMA assistance to request help with these expenses. Public cemeteries may be eligible for assistance through FEMA's Public Assistance program.<sup>21</sup>

Despite the availability of resources and the authorization under state law, the act of preserving coastal historic cemeteries can be controversial. Bulkheads or other hardened structures used to prevent flooding often lead to adjacent shoreline loss. The structures must be constantly expanded to protect from further erosion. For instance, the North Carolina Department of Environmental Quality gave Dare County a grant of \$162,000 to construct a bulkhead to protect the Outer Banks Salvo cemetery, which was slipping into the sea. One commentator noted, "Assuming the community is willing to continue to pay for such extensive maintenance, or that the state will pony-up taxpayer funding after future hurricanes, with time, this cemetery will probably protrude into the sound like a mini-peninsula as the adjacent shorelines continue to erode back. With the rising sea, the next big storm with onshore winds from the sound will likely cause the loss of the cemetery, bulkhead or no bulkhead."<sup>22</sup>

### **Relocation**

A second and more permanent solution is to relocate the graves. Pursuant to state law, human remains or a gravestone, monument, or marker may be removed from an abandoned, private cemetery if the removal is authorized in writing by the state's attorney of the county in which the cemetery containing the human remains or gravestone, monument, or marker is located and the human remains or gravestone, monument, or marker is placed in an accessible place in a permanent cemetery.<sup>23</sup> Notice of any proposed relocation of remains must be published in a newspaper with general circulation in the county in which the burial site is located for 15 days.<sup>24</sup>

### **Recording**

Recently, a more common option is to only record the graves and allow the flooding to continue. In Louisiana, researchers have embarked on a mapping project to map and record many of the rural cemeteries that are "sinking."<sup>25</sup> Instead of attempting to relocate these cemeteries, efforts have been focused on recording them so that future historians

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<sup>19</sup> *Disaster Funeral Assistance*, FEMA, <https://www.fema.gov/disaster-funeral-assistance>.

<sup>20</sup> *Id.*

<sup>21</sup> *Public Assistance: Local, State, Tribal, Nonprofit*, FEMA, <https://www.fema.gov/public-assistance-local-state-tribal-and-non-profit>.

<sup>22</sup> Orrin H. Pilkey and William J. Neal, *THE NEWS & OBSERVER* (May 29, 2018), <https://www.newsobserver.com/latest-news/article211957469.html>

<sup>23</sup> MD. CODE ANN., CRIMINAL LAW, § 10-402.

<sup>24</sup> *Id.* §§ 10-402 and 10-404.

<sup>25</sup> Tristan Baurick, *New Book Explores Louisiana's Sinking Cemeteries*, *THE TIMES-PICAYUNE* (Oct. 26, 2017).

[https://www.nola.com/environment/index.ssf/2017/10/book\\_explores\\_louisianas\\_sinki.html](https://www.nola.com/environment/index.ssf/2017/10/book_explores_louisianas_sinki.html)

and genealogists can access the information. The majority of national and international actions meant to preserve a cemetery from flooding involve community efforts like those seen in Louisiana.

### **Liability**

If flooding at the cemetery is attributable to a neighboring landowner, there may be legal recourse. Generally, there are three doctrines with regard to liability for surface water<sup>26</sup> discharge onto another's property: the common enemy rule, the civil law rule, and the reasonableness rule. The common enemy rule allows that water is the common enemy to all, so a property owner can take action to protect his or her property from damage despite any damage to the neighboring property.<sup>27</sup> The civil law rule states that an owner is liable for altering the natural flow of water on their land that results in harm to another landowner. The reasonableness rule states that landowners are allowed to make reasonable use of their property and will only be liable for damage resulting from altering the flow of surface water if their reason for the change was unreasonable.

In Maryland, courts have used a combination of the civil law rule and the reasonableness rule. "...The Court has unhesitatingly recognized the right of the dominant owner to the continuance of natural drainage, thus making clear that, in Maryland, the doctrine of "reasonableness of use" is but a qualification to, and not a substitute for, the civil law rule."<sup>28</sup> Essentially, the landowner changing the course of the water must use reasonable precautions to protect the other landowner. The application of the rule is fact specific and therefore varies from case to case. Maryland courts have defined the scope of the rule. It has been applied to prevent the dominant landowner from:

- 1) increasing materially the quantity or volume of water discharged onto the lower land;
- 2) discharging water in an artificial channel or in a different manner than the usual and ordinary natural course of drainage;
- 3) putting upon the lower land water that would not have flowed there if the natural drainage conditions had not been disturbed;
- 4) causing dirt, debris, and pollutants to be discharged onto the lower land; or
- 5) otherwise creating a health hazard.<sup>29</sup>

In one Maryland case, a cemetery filed an action for periodic flooding of a part of its cemetery lands by the stream that ran through the cemetery against the upper landowners.<sup>30</sup> The cemetery claimed the upper landowners negligently caused excessive water, silt, debris and dirt to be deposited on its lands, and sought injunctive relief. The appellate court affirmed the trial court's award of monetary damages against the upper landowner and reversed and remanded the trial court's order refusing injunctive relief to the cemetery corporation.

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<sup>26</sup> There is no definition for "surface water" in Maryland.

<sup>27</sup> 109 Am. Jur. Proof of Facts 3d 403 (2009).

<sup>28</sup> *Mark Downs, Inc. v. McCormick Properties, Inc.*, 51 Md. App. 171, 183–84 (1982).

<sup>29</sup> *Id.*

<sup>30</sup> *Parklawn, Inc. v. Giant Food, Inc.*, 262 Md. 148 (1971).



In New York, the state Attorney General sued a developer for discharging stormwater that caused flooding at a cemetery, resulting in the relocation of 18 graves.<sup>31</sup> The complaint charged that the developer violated several state environmental laws regarding the discharge of stormwater. The suit also claimed that the developer's activities constituted a public nuisance under state law, as they injured the property, health, safety or comfort of several individuals. The court ordered the developer to remedy the illegal discharge, and when he did not, he was placed in jail.<sup>32</sup>

I hope you find the above information useful. Please contact us with any follow-up questions. Thank you for bringing your question to the National Sea Grant Law Center.

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<sup>31</sup> Summons and Verified Complaint, *New York v. James C. Stevens III* (Nov. 13, 2014). [https://ag.ny.gov/pdfs/summons\\_and\\_verified\\_complaint.pdf](https://ag.ny.gov/pdfs/summons_and_verified_complaint.pdf).

<sup>32</sup> Robert Harding, *Cortland County Man Jailed for Illegal Stormwater Runoff That Damaged Cemetery*, THE CITIZEN (Feb. 10, 2017), [https://auburnpub.com/blogs/eye\\_on\\_ny/cortland-county-man-jailed-for-illegal-stormwater-runoff-that-damaged/article\\_2e035faf-2b42-5c16-8d9a-0318d6cdd6cd.html](https://auburnpub.com/blogs/eye_on_ny/cortland-county-man-jailed-for-illegal-stormwater-runoff-that-damaged/article_2e035faf-2b42-5c16-8d9a-0318d6cdd6cd.html).