

Not Gone, Often Forgotten

Hidden Cemeteries Perplex Developers

Small cemeteries were common in rural America. However, the custom and many of the sites have been forgotten as urban development has progressed. Developers expanding into the countryside sometimes inadvertently encroach on hidden, unmarked graves. Texas laws are designed to preserve cemetery sites, and the developer can be held responsible even though the disturbance is unintentional. Strict legal procedures specify the course of action to be followed when a cemetery is discovered.

By Judon Fambrough

The Poltergeist movies filled theaters nationwide with their version of horrors that await unsuspecting developers who disturb long-forgotten cemeteries. But while real life developers will not see their children spirited into television sets for encroaching on ancestral burial grounds, the modern developer may be haunted with a set of different problems.

Encroachment entails a trespass onto another's property. Typically, encroachments occur where improvements cross property lines. Surveys protect against encroachments.

There is one encroachment, however, surveys cannot avert. That is encroachments on hidden, forgotten and unmarked cemeteries revealed by bulldozers clearing land for a subdivision. It is a problem associated primarily with urban sprawl into rural areas.

What, if anything, can the developer do? Must the cemetery be preserved? Can it be moved? What steps can developers and appraisers take to minimize legal entanglements over cemeteries? Generally, if the remains cannot be removed legally, the cemetery must be preserved. Preservation may decrease the value of the project several ways. Less land is available for development. Property adjoining the cemetery may command lower prices. And, the law may impose the cemetery maintenance cost on the developer and ultimately on the subdivision.

What are the legal alternatives for removing a newly discovered cemetery from a proposed subdivision?

From the outset, the developer must realize that disinterment (exhuming bodies) is discouraged by Texas law because "it is repugnant to the sentiment of humanity." Numerous statutes have been passed by Texas legislators striving to ensure final, undisturbed repose. For instance, burial plots are exempt from public improvement assessments and all public taxes (Texas Property Code, Article 912a-11a). Both the homestead and one or more lots held for use as sepulchers (burial plots) are protected from attachment by creditors (Texas Property Code, Section 41.002 [a]).

In assessing the possibility of moving a cemetery, the developer must first determine whether the land has been dedicated for cemetery purposes. Dedication may be either formal or informal. Generally, formal dedications require a recorded instrument either granting or reserving the grounds for burial purposes. Starting in 1934, cemetery associations are required to formally dedicate land by surveying and filing a plat in the county clerk's office. A search of the county deed records should reveal formal dedications.

Informal dedications require less. One Texas case indicates two things are necessary: an enclosure of land for use as a cemetery and the actual interment (burial) of bodies. (See *Smallwood v. Midfield Oil Co.*, 89 S.W. 2d 1086.) The case of *Damon v. State*, 52 S.W. 2d 368, however, held that no particular instrument or ceremony was required to dedicate a tract. Its actual use as a cemetery was sufficient. The erection of an enclosure was not mentioned.

If dedication is evident, the cemetery cannot be disturbed until the dedication is removed (Texas Revised Civil Statutes, Articles 912a-10 and 912a-11). Removal of the dedication may be granted by a district court of the county in which the cemetery is located. One of the following two things must be shown: (1) proof that all bodies have been removed (or that none were ever buried) and that the premises are no longer used or required for cemetery purposes; or (2) the maintenance of the cemetery has been enjoined or abated as a nuisance (Article 912a-25).

A *nuisance*, in the literal sense, means an annoyance. As used here, it means that the maintenance (and possibly the location and

use of the cemetery) obstructs the reasonable and comfortable use of the surrounding property.

A nuisance may be private, public or both, depending on the number of people affronted. A private nuisance offends one or a few persons while a public nuisance offends the public at large. A cemetery may be a private, a public or both a private and public nuisance, depending on its location.

If the cemetery is located within a city of more than 25,000 inhabitants or within five miles of such a city's municipal boundaries, and if its maintenance or location and use are declared a nuisance, it is a public nuisance. The governing body of the city may abate it as a nuisance and enjoin its continuance. In other words the governing body of the city may require the nuisance (cemetery) to be removed by issuing an injunction.

If, on the other hand, the cemetery is located outside the municipal boundaries of a city of more than 25,000 inhabitants, regardless of distance, and if its maintenance or location and use are declared a nuisance, the district attorney may abate it as a nuisance and enjoin its continuance.

Any neglected cemetery, regardless of location, may be a private nuisance. Old cemeteries, for which a perpetual care and endowment fund has not been regularly and legally established, may be abated and their continuance enjoined. The suit must be brought by inhabitants in the surrounding area who can prove the cemetery's neglect is offensive.

Once the cemetery's existence has been abated and enjoined, two Texas statutes describe where the bodies may be reinterred. The governing officials of any incorporated town in which the cemetery is located may authorize the removal of all bodies, monuments and tombs to a perpetual care cemetery (Article 912a-25).

If the old cemetery is located in a county having 525,000 inhabitants or more, either the court abating the nuisance or the city council of the city in which the cemetery is located may authorize the removal of all bodies, monuments and tombs to a perpetually endowed cemetery (Article 930a-1[2]). If there is no perpetually endowed cemetery in the county, removal is permitted to a nonperpetual care cemetery that has provided for assessment for future care.

The definitions and creation of perpetual care cemeteries, perpetually endowed cemeteries and nonperpetual care cemeteries are treated in Texas Civil Statutes, Articles 912a-1 through 912a-31. Also, the mention of a nonperpetual care cemetery "that has provided for assessment for future care" certainly opens the possibility of the developer being held liable for that assessment.

If the enjoined cemetery is located outside a town or city in a county having less than 525,000 inhabitants, no Texas statute specifies the location for reinterment.

Failure to get the dedication removed means the cemetery must be preserved. The developer, by law, holds title to the cemetery in trust and must bear the cost of its maintenance unless the city or commissioners court of the county assumes the responsibility pursuant to the relevant Texas statutes. Furthermore, the developer must allow relatives visitation rights, the right to decorate the graves and the right to protect the graves from desecration. (See *Gibson v. Berry Cemetery Assn.*, 250 S.W. 2d 600.)

If the developer needs to move the bodies to get the dedication removed, or if the developer discovers the lack of dedication, the next step is to physically remove the bodies.

Disinterment is permitted upon securing the proper consents (Article 912a-22). The written consent of both the cemetery association (if there is one) and the surviving spouse is required. In the absence of a surviving spouse, the consent of the children is needed; and if none, the consent of the deceased's parents. In the absence of the deceased's parents, the consent of the deceased's brothers and sisters is necessary.

Texas case law has held that "ordinary diligence" must be used to find the deceased's heirs to secure their permission. Failure to comply exposes the developer both to criminal and civil liability.

The failure to locate the required individual(s) or the cemetery

association(s) does not mean the development cannot continue. Upon notice to the respective individuals and cemetery association and after a hearing conducted by the appropriate county court, the county court's consent is sufficient (Article 912a-22). A necessary and compelling (or laudable) reason for disinterment must be demonstrated to the court, however.

If the cemetery is abated as a nuisance and enjoined, it appears the consent of the cemetery association and next of kin is not required. However, this interpretation is based on the wording of the statutes and not case law.

One Texas case has held that the condition of the gravesite was not a compelling reason for moving a body. At present, no Texas appellate case has held the erection of a proposed subdivision is a necessary and compelling reason for the cemetery's removal. Therefore, securing the necessary consents is foremost to avoid the issue from ever reaching the county court.

The abandonment of a cemetery would appear to have some impact on the developer's ability to have the bodies moved. Would the developer not, in essence, be doing the public a favor by moving the remains to a well-kept, public cemetery? So far, this argument has not found favor in Texas.

Once property has been dedicated for cemetery purposes, neither the dedication nor title to the right to use the sepulture is affected by dissolution of the association, by nonuse or by alienation (Article 912a-11).

Abandonment of unused portions of nonperpetual care, private cemeteries operated by a nonprofit organization is permitted (Article 931c). However, the statute does not provide a means for abandoning the entire cemetery.

Nondedicated cemeteries may be abandoned, but proof is difficult. Texas case law holds that no recent burials and neglected graves do not establish abandonment. As long as the buried "awaken sacred memories in the living," no abandonment can occur.

On May 24, 1989, however, the Texas Supreme Court upheld an appellate court's decision on abandonment. The case of *Haney v. Purcell Co., Inc.*, No. C-7949, involved a developer building on a known cemetery. The finding of abandonment, however, did not negate the plaintiffs' causes of action for negligence, fraud, breach of express warranty, breach of implied warranty of merchantability and violations of the DTPA.

If the proper permission for removal is obtained, a written order from the health department must be secured before exhuming begins (Article 912a-21). Also, it is the duty of the person or persons removing the cremated or uncremated remains to keep and maintain a true and correct record showing the date the remains were removed, the name and age of the person removed, when these particulars can be conveniently obtained, and both the cemetery and the exact plot therein where the remains were reinterred. A record of the information must be provided to the cemetery of reinterment. If the remains are not reinterred, a record of other disposition must be kept.

The failure to abide by the prescribed laws exposes the developer to both criminal and civil liability.

It is a Class A misdemeanor for a person to intentionally or knowingly desecrate a place of burial (Texas Penal Code, Section 42.09). The statute defines *desecrate* to mean "deface, damage or otherwise physically mistreat in a way the actor knows will seriously offend one or more persons likely to observe or discover his action." The term *person* includes corporations.

It is also a Class A misdemeanor to abuse a corpse (Texas Penal Code, Section 42.10). A person commits this offense if, not authorized by law, he or she intentionally or knowingly disinters, disturbs or removes a human corpse. A Class A misdemeanor is punishable either by a fine of not more than \$2,000 or confinement in jail for a term not to exceed one year, or both. It appears that the desecration of each grave and the abuse of each corpse could be construed as a separate offense.

As to civil liability, the surviving spouse or next of kin has an action for the violation and desecration of the grave where the body is buried. The surviving spouse or next of kin may recover for the wrongful removal of a body. Mental anguish may be recovered both by the next of kin and by individuals having "close friendly feelings or love prior to the deceased's death." In addition, a court of equity has the power to enjoin the unauthorized disinterment of bodies.

Any civil action for damages for disinterment and reburial of bodies or for mental anguish must be brought within two years. Generally, the two-year period begins when the conduct occurs or the plaintiff(s) should have known of the occurrence, whichever is later. In this instance, however, the statute of limitations starts at the time the wrongful act is committed, not when the plaintiff(s) learn of it. Furthermore, the statute of limitations is not tolled (suspended) by failure of the defendant to comply with the statutes regulating the removal of bodies.

The legal ramifications of a hidden cemetery on a proposed subdivision go beyond the developer's attempt to remove it. The developer, and possibly the lender, may try to shift the liability to another party. Appraisers are prime candidates.

Appraisers, on the other hand, should have a standard disclaimer in their appraisals concerning items that are not readily apparent or visible. The presence of hidden, unmarked cemeteries and rare,

endangered plants are among the things that should be included.

More fundamentally, however, the developer should foresee and contractually address the possibility of an unknown cemetery on the property. At minimum, the developer should personally inspect the property prior to purchase and possibly view topography and aerial maps for old cemetery locations. In the purchase agreement, provisions should be included to reduce the purchase price if a cemetery is discovered during the preparatory stages of development.

As urban sprawl continues, more and more cemeteries will be discovered by developers. Texas laws are designed to preserve cemetery sites. There is no easy procedure for developers having them removed. Consequently, appraisers should draft disclaimers in their appraisals and developers should include special contractual provisions in purchase agreements to avoid having to bear the legal and financial risks.

This article is for information only and is not a substitute for legal counsel. ☒

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