

# The Future of Small and Family Cemeteries

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## Introduction

Thank you for inviting me and please know that I am very happy to be here. I am not an attorney, nor do I play one on TV; although I did stay at a Holiday Inn last night. But on a more serious note, I have been an expert witness, recognized by the courts, in one federal case, five circuit courts in South Carolina, one equity court in South Carolina, and one state court in Louisiana – so I do have some experience. On average, Chicora receives about one call a week concerning an abandoned or neglected cemetery.

So, let me begin this talk with a quote from Decimus Magnus Ausonius, a Roman poet and teacher of rhetoric who lived in 4<sup>th</sup> century AD France:

Death comes even to the monumental stones and the names inscribed thereon.

I think the point is clear, even in the 4<sup>th</sup> century, the wisest realized that nothing, not even memorials, were permanent. This is something that clearly, we have forgotten – and while that isn't worth criticizing in itself, the fact that society has not been willing to talk about it, but rather, as with so many other unpleasant tasks, simply postpones the issue, is worth discussion. As I'll also note in several examples, when society has been willing to tackle the issue, we should be astonished at the naiveté, if not total disingenuous nature of the discussions.

We all know that small cemeteries (sometimes not so small, in reality), are tucked in corners of fields, in woods, and even on back lots in urban settings. It has been estimated by Christine Dixon (2015) in the *Wake Forest Journal of Law and Policy* that there are at least 30,000 cemeteries scattered across North Carolina, of which less than 200 are “registered” with the state and regulated pursuant to the North Carolina Cemetery Act.

Chicora conducted a two-year cemetery survey in Richland County, South Carolina, identifying 544 cemeteries, or the equivalent of one cemetery every 882 acres. That's the equivalent of approximately 23,200 cemeteries in South Carolina (Trinkley and Hacker 2014).

Florida estimated that they have over 1,500 abandoned or neglected cemeteries – which I find tragically too conservative (Pappas 1999:6).

Recall that in 1970 HUD estimated that cemeteries occupy nearly 2,000,000 acres of land in the United States (Lehrer 1974:182). In 2018, there were 2,813,503 deaths, of

which about 53.5% were cremated, leaving 1,505,224 to occupy 2,427 acres or 3.8 square miles. While miniscule in a country of 3 million square miles, it grows in size when we consider how many are eventually walked away from.

## **The Problem**

So why do we have a cemetery problem? I have come up with over 20 “reasons.” Let’s list these in no particular order. Please also understand that many of these overlap.

### **1. Many municipal cemeteries operated (and continue to operate) using a business plan based on losing money – forcing future taxpayers to pay for the maintenance of cemeteries.**

As early as 1950, one authority commented that the “basic error that has led to the neglect of a cemetery is usually poor administration and financing. This is particularly true of municipal cemeteries. The users of such cemeteries have said ‘It is tax-supported, therefore, it will always be maintained in good condition.’ This confidence has been ill-advised” (American Society of Planning Officials 1950:7).

In 2006, Bob Fells, External Chief Operating Officer of the International Cemetery and Funeral Association remarked that too many municipal cemeteries “are run using a business model of a charity,” with plot prices being set to break even and too low to cover future maintenance needs. Fells argues that if a municipality operates a cemetery, it should use proper long-range financial planning to ensure that down the road the municipality won’t face large amounts of deferred maintenance, requiring taxpayer funding (Capels and Senville 2006:8).

### **2. State laws require too little funding of perpetual care funds.**

In 1950, it was already noted that earnings on perpetual care funds were dropping and maintenance costs, especially for labor, were rising (American Society of Planning Officials 1950:23).

### **3. The financial situation of Church congregations owning cemeteries declines and they seek to either walk away or force the property on the state.**

What right does a religious body have to force care of its parishioners onto the general public? In fact, what right does any group have to “take the money and run?”

This problem can be broadened by rephrasing it as allowing *any* current operator to “walk-away” from a cemetery. Since too many cemeteries face reality only as they reach capacity, we must prohibit any cemetery from forming without an adequate perpetual care fund (Capels and Senville 2006:7).

#### **4. Many state laws exempt religious, fraternal, and municipal cemeteries from trust fund requirements – creating a future problem.**

To this problem is added the fact that many of these organizations have been granted tax exempt status, placing additional pressures on local governments (Zollmann 1916:394). Do these organizations' boards not have a fiduciary responsibility (see Rounds 1988:184)? Does this not result in the members of the governing board exposing themselves to be enjoined and held personally responsible for injuries?

Getches (1967) argues that the tax exempt status of cemeteries should be re-examined since there exists today, at least in commercial cemeteries, a profit motive that did not exist previously; as a result, "eleemosynary activity can no longer serve to justify cemetery tax exemptions."

#### **5. A lack of zoning in many jurisdictions allows the creation of new "family cemeteries."**

These "new" family cemeteries simply provide the basis for future problems. Failure to control the problem today passes the problem to future generations.

#### **6. A lack of centralized cemetery databases.**

You can't manage what you don't know exists. How many cemeteries? How many financially stable? How many failing? How many already abandoned? Ask these questions and, for the most part, you can expect a quizzical look in response. Part of this problem, however, is that fundamentally, politicians don't want to know – as one told me to my face – "If I know how many abandoned cemeteries there are, I'll be forced to do something about it."

#### **7. Inefficiency of current criminal sanctions to deter vandalism, cemetery theft, and associated problems.**

The laws we have are diluted by both prosecutorial and judicial discretion. The best face we can put on this is that prosecuting attorneys must manage the limited time and resources as well as those of other parts of the correctional system, when weighing full prosecution as opposed to a negotiated plea (Batchelder 2014:20). This is a political problem – our legislators must fund the laws they enact.

#### **8. Unwillingness or inability of law enforcement to aggressively investigate cemetery crimes.**

This seems to be a repeat of the problem with prosecutors. But I will also note that too often citizens fail to demand better – and sadly we often get what we deserve.

#### **9. Lack of funding for meaningful preservation efforts.**

This might be expressed as a failure of society to understand that you can't maintain "abandoned" cemeteries without money – and this generally means a dedicated tax levy or funding through existing fees.

We are a society that wants without giving. No one wants to pay their taxes unless they are personally affected. Dixon (2015:7) argues that statutes must be enacted to give authority to impose a tax on residents that will be shared equally among counties to defray the costs of dealing with abandoned and neglected cemeteries. Others argue for very minor fees, such as an additional \$10 fee on death certificates and burial permits. It seems only fair to force the dead, in Biblical terms, to "bury the dead."

#### **10. Preventing descendants and researchers from reasonable, but unfettered, access to cemeteries.**

Too many states – including South Carolina – have gutted common law by establishing statutory "protections" of property rights that courts generally have ruled don't exist. Such an approach makes it all too easy for unscrupulous property owners to destroy cemeteries unbeknownst to descendants who must wade through a bureaucratic morass to achieve their "rights."

#### **11. Failure of law schools to teach cemetery law resulting in few attorneys prepared to represent clients in cemetery cases.**

One of the only law schools I have found with a dedicated cemetery class is that taught by Tanya D. Marsh, Esq. at Wake Forest. She is also the author of perhaps the only legal textbook dealing with cemetery law.

#### **12. Failure of title searches to identify the possibility of a cemetery coupled with the failure to acquire title insurance.**

Taking a title back 20 years is almost guaranteed not to find any evidence of most cemeteries. Perhaps this decision could be mitigated by title insurance, yet this is not required by any state (although it may be required by the mortgage holder).

#### **13. Failure of land surveyors to receive any specialized training in recognizing cemeteries or boundary determinations.**

Why do we rely on a profession with no training to document the presence of cemeteries, much less legally determine their boundaries? Doing so leads to situations such as the one I found of the "incredible shrinking cemetery" – three surveys, three different surveyors, and three boundaries, each smaller than the last. Collusion or incompetence?

#### **14. Failure of courts to develop a mature and consistent law of cemeteries.**

It seems that both attorneys and judges are extraordinarily unprepared for cemetery cases. Marsh suggests this is at least the result of the law being organized around two categories: people and things. Cemeteries, however, “exist in limbo” between the two. So, not only do we need better training of attorneys, I’d argue that we need better education of the judiciary, perhaps by ensuring that more law clerks have the training that judges lack (see, however, Joiner and Seidemann 2019 for evidence of some judicial consistency).

### **15. Inability of descendants/public to establish standing.**

Often, those affected by cemetery loss and abandonment have no right to relief in the courts, since often they are required to have a closer family connection to establish desecration than to obtain access (Brophy 2006:1495; Shaffer 2003).

Is it so difficult to envision the day, or situation, when there is no one left with standing to represent the rights of the dead? Or that there is no one within visiting distance to discover that legal action is necessary? Does not the loss of a cemetery affect us all? Is this appropriate?

Standing can also be lost – and this should be a very strong warning to anyone with a family cemetery somewhere in the woods. One court ruled, “where the family has ceased to visit the cemetery and where they have so long neglected to care for it that the ground is no longer recognizable as a cemetery, the family burial ground has been abandoned, and with it the private standing of the descendants to require that those who own the land abstain from using the land for other purposes” (quoted in Shaffer 2003:495).

### **16. Failure to fully appreciate that “abandonment” doesn’t mean the cemetery no longer exists.**

South Carolina declares in statute, “the conveyance of the land upon which the cemetery or burying ground is situated without reservation of the cemetery or burying ground shall be evidence of abandonment for the purposes of this chapter.” Anyone with more sense than our legislators should realize this leaves the door open to making cemeteries “disappear” by virtue of a property sale.

### **17. General inability to sell lots in an abandoned cemetery as a means of income.**

An effort has been made to generate income from abandoned burial grounds that still possess open plots. The theory has been proposed that the burial easement was extinguished by abandonment on the basis of nonuse. Legal authorities suggest it is highly unlikely that the courts will accept this argument and that those proposing it will be unable to establish intent to abandon a sold but unused cemetery lot, especially 50 years after the fact. This eliminates the only legitimate source of income for such properties.

## **18. Laws that allow municipalities to accept cemeteries, but provide no funding or require action.**

Let's look at one example, in North Carolina (and many other states) abandonment allows – but does not require – counties to assume care of a cemetery. This is nearly useless verbiage. Stressed for income as is and faced with a public unwilling to pay taxes for much of anything, local politicians are unable to find a spine and take action (Dixon 2015:17).

If we wish to accomplish anything meaningful, abandonment needs to trigger an obligation – not an option.

## **19. Laws that make it difficult to achieve disinterments, even as a last option.**

The belief that, “nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed” might well have been appropriate when uttered in 1859 (quoted in Brophy 2006:1499), but is it still as appropriate?

## **20. The “I didn't know” excuse.**

This excuse is the first refuge of the bulldozer operator and the property owner. In terms of owners, Brophy reminds us, “In the case of bona fide purchases, there has to be some kind of notice of the existence of the easement —which in this case will be some kind of evidence of the cemetery. That evidence will also be necessary to show that the holders of the right of access have not abandoned the easement” (Brophy 2006:1480). This evidence is almost always present, if not as grave markers, then by east-west body-sized depressions. Sometimes it rests in the oral history of the community, sometimes on maps older than the 20 years the title search extended – but it exists if one only opens one's eyes and is willing to accept unwelcome truth.

If it becomes impossible to prove in criminal court that a bulldozer operator destroyed a cemetery knowingly and willfully, perhaps we need to turn to tort action?

Need we really remind the politicians, attorneys, and judges that as early as 1856, Samuel B. Ruggles asked, “does not every dictate of common sense and common decency demand a common protection, for the grave and all its contents and appendages?” and, “the dead will find protection, if at all, in the secular tribunals.”

## **21. Nothing left to preserve.**

There are times, as a result of either professional archaeological excavations or the intrusion of plowing or bulldozers that one can argue nothing is left. Brophy warns us, “it is critical that a cemetery retain its hallowed character; otherwise, the cemetery is liable to be moved. And when the location of a cemetery is lost, the relatives of people buried there lose their special rights to protect the cemetery. They are left with no more rights than the general public, which means they have no rights.” (Brophy 2006:1505)

## **22. Society that promotes greed.**

Is there really any cogent argument that society has not devolved to the point where a great many are certain that they are entitled to whatever they desire to do, achieve, or own at any given moment? Frankly, what else is left after legal arguments are stripped away from a legal case where a purchaser of property wants to build on top of a cemetery?

### **What Has Been Suggested?**

In 1999, the State of Florida formed a task force to examine the problem of abandoned and neglected cemeteries (Pappas 1999). The panel developed proposed legislation that would “provide a structure, process and sources of funding.” This included a grant-in-aid program with funding from a variety of sources, including a one-time appropriation by the legislature, and a fee on death certificates.<sup>1</sup> Nothing was enacted and the full report cannot even be found on-line any longer.

Not even a decade later, the City of Jacksonville repeated the process, this time with a “blue ribbon panel” (Anonymous 2007). Their report was even less responsive. The big suggestion was to create volunteer organizations to conduct maintenance of these cemeteries – inclusive of “landscape maintenance, cleaning of graves, gravestone repair, etc.” (Anonymous 2007:6). To prove this was a viable solution the report pointed to two non-profits: the Gravely Hill Friends, Inc. and the Cemetery Recovery and Preservation Trust. Yet these organizations had failed within the decade.

This should very clearly illustrate that while friends may be useful in raising funds, encouraging public support, and providing very special action, including forming a constituency, they are entirely incapable and unsuccessful in assuming maintenance and allowing government entities to avoid using public funds. It is disingenuous of politicians to suggest otherwise.

Nothing further has come of the Jacksonville “blue ribbon” report.

In 2014, the Ohio legislature formed a cemetery law task force (Anonymous 2014). This task force offered no substantive analysis. They even could not reach a political consensus on the common law right of descendants being allowed access to cemeteries! It appears that nothing was done as a result of the recommendations.

A master’s thesis from the University of Georgia (Smith 2001) suggested that land trusts be used for cemetery preservation – another suggestion which has received no

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<sup>1</sup> An example of at least one such successful program can be found in Connecticut, see <https://portal.ct.gov/OPM/IGPP-MAIN/Grants/Neglected-Cemetery-Account/Neglected-Cemetery-Account-Grant-Program---HOME-PAGE>, although one can debate whether straightening stones is a beneficial use, compared to other actions.

traction. It is likely the biggest issue is that cemeteries are generally small and much more difficult to maintain than vacant woods or parklands.

Much earlier, in 2002, the National Trust for Historic Preservation announced that it was working with the Association for Gravestone Studies to develop suggested legislation. That too, disappeared in the fog of memory.

## **Conclusions**

I must remind you that Shaffer warned, “the “problem” of these burying grounds will certainly be solved— either by the decaying hand of time and inaction, or by the reasoned and deliberate action of all involved” (Shaffer 2003:498). So far, there is absolutely no question that the hands of time are winning.

Perhaps the problem is that we are all contributing – me, you, everyone. There are funeral homes that dig graves in wanton disregard for who might already be present, motivated by profit; there are preservationists that want to preserve everything, with no plan for how to achieve this goal. There are municipal cemetery directors who continue to beg for maintenance, all the while knowing that they can’t possibly survive by giving away plots. There are citizens who I am sure are otherwise decent, but who don’t want to pay for anything. There are politicians who lack the will to take hard positions and migrate from being a politician to being a statesman. There are conservators who continue to make repairs, knowing that the money is far more desperately needed elsewhere, such as in maintenance. There are friends groups that can’t think beyond spraying on some D/2 and spending a few hours cleaning.

We have met the enemy and he is us. And until we are willing to spend money – not flap our jaws, nothing will be accomplished and we will have turned the problem over to time and inaction.

Let me remind you that when we begin talking about funding the maintenance of every abandoned cemetery, we begin talking about very substantial money. Llewellyn (1998:243-261) explained in 1998, that an average yearly maintenance cost for the most basic maintenance by unskilled individuals, is about \$2,500. Inflation has increased that to about \$4,000. Now multiply that by even 10 abandoned cemeteries (\$40,000), or 300 (\$1.2 million). The costs become astronomical. <sup>2</sup>

Perhaps more fundamentally, we are beginning to reassess that perhaps some of the more radical options should be considered. Can we really preserve all cemeteries? They are everywhere and many of them have colonial, or military, or founders, or slave burials. We

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<sup>2</sup> Perhaps a closer to “real world” situation is that the 1,500 cemeteries that Florida estimates needs assistance would require \$6 million dollars every year, for perpetuity. Even if \$3 were generated by each death certificate, that would produce only \$615,000 per year. More pointedly, are there no children that need food, no educational programs, no environmental issues that might take precedence? I think most would agree that under some circumstances, the needs of the dead must yield to the needs of the living.

can't preserve all old houses, we can't preserve all archaeological sites. We walk away from these resources on a daily basis.

In the absence of adequate financial resources, we need to begin thinking about how to mothball cemeteries – making them easier to maintain, less likely to be a cause for liability, and less likely to be vandalized. Perhaps we should also begin to reassess our view that moving a cemetery is a last option. Is a site that no one is willing to spend money on really sacred?

If these sound as harsh options, I am certainly open to discussion. In fact, it seems essential that society begin this process of talking seriously – more discussion, less blue ribbon political circuses might arrive at some meaningful reforms.

At present, however, I don't believe the future of cemeteries is especially bright.

I began with a quote, so it seems only reasonable to end with one. This one is from J.D. Salinger, "When you're dead, they really fix you up. I hope to hell when I do die somebody has sense enough to just dump me in the river or something. Anything except sticking me in a goddam cemetery. People coming and putting a bunch of flowers on your stomach on Sunday, and all that crap. Who wants flowers when you're dead? Nobody."

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