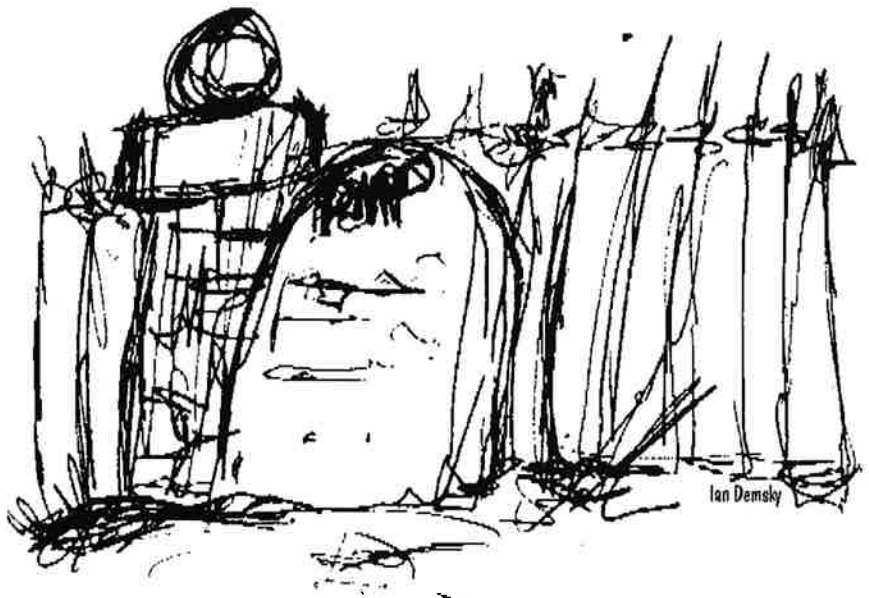


ACQUISITION OF RIGHT OF WAY INVOLVING CEMETERIES

BY PHILIP J. DiBLASI

Small rural family or community grave yards can represent a significant logistical problem to the individual charged with



acquiring land for today's large scale developments. Worse yet, is the scenario that involves "accidental discovery" with the edge of a bulldozer blade. In each state they are covered by a patchwork of laws intended to protect these small poorly marked cemeteries. The intent of this article is to assist you in understanding specific information about cemetery placement and traditions that will aid in avoiding them prior to inception of your projects. And hopefully, to avoid exposing someone's great, great grandfather with a D-9.

My expertise is within the states of the eastern United States and I would remind those of you from other states to check your individual state laws concerning the protection of small family grave yards and the mechanisms for dealing with them. Also, each state has a usually small and under funded agency responsible for cemetery protection. In Kentucky, this agency is found within the Office of the Attorney General. However, in other states, it can be found within the insurance community or within the funeral industry. A telephone call to a local funeral director asking them what agency regulates their activities will usually get the name and address of a contact who can provide copies of all the necessary laws and regulations.

Another avenue for information concerning the laws and regulations would be to contact a state agency such as the state department of transportation. Typically, they have a staff of individuals who are responsible for dealing with cemeteries. And in many cases have established a set of internal guidelines that they would be willing to share with you.

But these groups mentioned above, do not provide information about where grave yards can be found, they can only provide information on how you can legally deal with them.

LOOKING THROUGH THE RECORDS

The recent upsurge in interest in genealogy can actually be of some help to you and it can also result in considerable hindrance to project completion. Many states have genealogical and historical societies that preserve cemetery information. You should be aware that the data held by state genealogical and historical societies is difficult to access because of the manner in which it is stored.

Usually these data are organized by county and, if kept on maps, are on county maps that provide only general location information. Frequently, the data was collected years ago and properties are described by their, then current, landowners. Individual county genealogical and historical societies can also provide location information concerning local grave yards.

Be forewarned, however, that as soon as you contact the local societies; that the word will spread and local opposition to moving a grave yard will swell. In many states, if descendant's permission is not obtained, it is nearly impossible to move a grave yard.

Recently, regulation changes have now allowed for the inclusion of family and rural graveyards on the National Register of Historical Places. The NRHP was initially designed to preserve sites (both historic and pre-historic) from destruction by federal activity. Typically, standing structures are what most people think about when they think about NRHP sites.

Because of these recent changes to the NRHP regulations, records concerning the location and composition of cemeteries have been kept by State Historic Preservation Officers and State Archaeologists. Should you be working in a state where either of these two agencies are actively collecting cemetery information, you will find their level of record keeping very useful (Sites are recorded using Universal Transverse Mercator and Longitude and Latitude and usually marked on 7.5 minute U.S. Geological Survey topographic quadrangles). The problem with these agencies is that they have been keeping their records for only a short period of time and as a result their databases will be small and incomplete.

So where does the state of the records leave you, when you can't find any cemeteries within the proposed project area? Let's say you've searched all of the records and files of the groups listed above and have not found a cemetery. What are your next steps?

GET SOMEONE TO LOOK FOR YOU

The easiest next step would be to have someone else do the work for you. If the proposed project requires an archaeological assessment under Section 106 of the National Historic Preservation Act, you can get the archaeologists to do the work and find the cemeteries.

If your project is being completed with federal funds or with a federal

permit or license, it will require an archaeological assessment under Section 106. Should this be the case, all you would have to do is add the requirement that all cemeteries be reported by the archaeological assessment of the impact area.

Since archaeologists are trained to locate all areas of human activity (called sites) and will be walking over the entire project area at proscribed intervals; they can be required to report the cemeteries as they would any other site within the project area.

If however, your project is not covered under Section 106, yet you are still concerned about cemeteries an archaeologist can be hired to locate them for you. If your budget does not allow for hiring archaeologists and the problem of finding and delineating the cemeteries falls upon your shoulders then, here are a few guidelines that will help you.

First, is a "complete" deed search for all the properties that will be impacted by the proposed project. When I say complete, I do not mean what is currently accepted as a deed search—usually 10 or 20 years or the last four or five owners which ever comes first. Deed searches of this nature, usually provide a covenant that states "except any and all easements present." This type of deed search is nearly useless for finding cemeteries.

When I say a complete deed search; I mean a deed search that examines deeds that date to at least the mid-19th century or late 18th century. Frequently, in deeds from this period there is a special note of a deed exception to the transfer of land that specifically mentions the family grave yard. Family grave yards are frequently mentioned when property is sold outside the family. The intent of mentioning them in deeds is to restrict the new landowner from using the grave yard and allowing future descendants access and use of the cemetery.

If all of the above mentioned means still do not provide information on the location of cemeteries, the last resort is to physically examine the proposed project area for signs of a cemetery or the criteria used by people historically for the placement of family grave yards.

CONDUCTING ON-SITE SEARCHES

The typical rural family cemetery pattern found by this investigator throughout Kentucky and nearby states demonstrates they are usually found in the highest or one of the highest points on a family's property. In many cases, these cemeteries are "just outside visual range" of the residence, but within several hundred meters. The burial placement is usually at the highest point on the property. Burial placement is rarely on side slopes, but can be found on the crest of a ridge.

In cases where rural community cemeteries are used for numerous decades and grow to the point where the tops of hills are full, they have been known to bury on side slopes. In modern commercial cemeteries, where all space is used for burial, rows are laid out with little regard for the contours. However, it should be noted that hill tops and eastern exposures typically command higher prices, because they are considered "premium" burial sites. This preference is most likely a holdover from rural burial patterns.

One of the most obvious physical objects that indicate the presence of a cemetery is a fence made of rock, brick or cast iron. However, subsequent landowners have been known to scavenge cemetery fences for other uses. Monuments are also obvious indicators of burial. But the type of monuments used, their present condition and even their presence vary widely.

For example, some people mark graves with field stones. They may have chosen this form of monument because it is "simple" or "natural". Or they may have used field stones because they intended to replace the stones with formal monuments, but never got around to it. In other cases individuals may not have had sufficient means to have formal monuments brought to the burial site.

There have been innumerable instances where monuments have been removed, destroyed, or scavenged from the cemetery. The presence of any stones that should not be there (for geological reasons- such as sand-

What happens if, during ground clearing, your worst nightmare—the accidental discovery of a cemetery— is realized?

stone slabs on a "limestone ridge") is a good indicator of the presence of a grave yard.

Rural cemeteries are frequently sites of exotic vegetation. In many cases, individual graves are "marked" with plantings such as those in the yucca family, known variously as yucca, soap plant or Joshua Tree. In other cases, entire cemeteries can be found because they are blanketed with ground cover that has been planted and over the years has spread. One of the most common ground covers found in this region is *Vinca minor*. *Vinca* is also known as periwinkle or cemetery ivy. Less frequently, *Hedera helix* or English ivy can be found covering cemeteries.

Should you be out there in the field looking for cemeteries in the spring, keep an eye out for daffodils and iris. These too, are occasionally used to mark individual graves. If you encounter any exotic plant or tree, the immediate area should be searched for monuments and depressions.

Rarely, will you find a cemetery where there is no exotic vegetation or rocks marking graves. Occasionally, all you can find is a series of rectangular depressions. These depressions, representing adults, are typically six feet long and two feet wide. But, you have to remember the mortality rate in

the 18th and 19th centuries was very high and many children can be found buried in smaller graves.

In terms of the grave lay out and individual orientation, most cemeteries fall within a norm. Clusters of graves in settings are indicative of familial clusters and when found in pairs usually are the graves of married couples. When more than two graves are found, that usually is indicative of couples and their unmarried children. Large clusters of graves can represent extended families over several generations. In some cases, when the cemetery contains only the remains of a single family who occupied the property over several generations, small clusters of graves are commonly found. These clusters of graves typically represent the patriarch and matriarch and sub-adult children (i.e., never married or died in infancy) in one cluster; their adult children and their off-spring in other clusters.

The orientation of the graves with the long axis being east to west, is also significant. Protestant burial patterns reflect the belief in burial that "faces" the rising sun. This is allegorically related to the second coming of the Son of God. Individuals are buried with their heads to the west and their feet to the east. Thus, the dead can rise for the second coming, which is supposed to come from the east.

Should you encounter rectangular depressions, a short metal probe can be used to probe the ends of the long axis (particularly to the west). Graves, even those where the headstones have been removed, may have rubble present, that was used as a footer for the monuments.

But, what happens if you have completed all the steps I have described and during initial ground clearing your worst nightmare, the accidental discovery of a cemetery, is realized?

I would recommend a proactive approach. To do this, you must look at the existing state laws and consult your attorney general and other legal counsel. In almost all states the grave is considered sacred and the descendants (those who have "standing") have certain rights. But, the problem is that the laws and regulations that exist



MUSTANG ENGINEERING, INC.
The Industry Excellence
FOR ALL OF YOUR R/W NEEDS:

- Appraisal Studies
- Permitting
- Title Abstracting
- R/W Acquisition
- Survey Permission
- Uniform Act Projects
- Due Diligence Studies
- Condemnations
- Expert Testimony
- Computerized Tracking

ADDITIONAL SERVICES

- Route Studies
- Survey & Mapping
- Engineering P/L Systems
- Total Turn Key Projects
- Inspection - Onshore and Offshore
- Project Management

On Schedule - On Target - On Budget

Monroe, LA Office

Mustang Engineering, Inc.
 P. O. Box 4848
 Monroe, Louisiana 71211
 (318) 322-3000
 Fax 318-322-3440

Main Office

Mustang Engineering, Inc.
 16001 Park Ten Place, Ste. 500
 Houston, Texas 77084
 (713) 578-0070

SANLI PASTORE & HILL

The Measure of Value

Specialists in Eminent Domain Valuations

- Compensable Goodwill Loss
- Leasehold Interest
- Expert Witness Testimony
- Real Estate
- Economic Research & Analysis
- Lost Profits & Damage Calculations
- Machinery & Equipment

Valued Clients

The Metropolitan Transit Authority of Los Angeles
 The Metropolitan Transit Development Authority of San Diego
 The Law Firm of Laskin & Graham
 Santa Ana Unified School District
 Caltrans
 The Law Firm of Goldfarb & Lipman
 The Law Firm of Stradling, Yocca, Carlson & Rauth
 The Law Firm of O' Melveny & Myers
 The City of Emeryville

Principals in Los Angeles

Nevin Sanli, ASA
 Thomas Pastore, MBA, AM, CPA, CFA

Additional Credentials

PhD., MAI, MBA, ASA & Real Estate Broker
 5 Affiliates in the U.S., 7 Affiliates Internationally



3679 Motor Avenue, Suite 201
 Los Angeles, CA 90034
 Telephone: 310/837-6678 Fax: 310/837-6260

in many states were written during a time when families were less mobile and people actually cared for the "old family grave yard".

Today, these grave yards are all but forgotten and it is the developer who ends up paying when one is found. I have two recommendations for proactive action: first, is to place the responsibility on the previous owner and second to complete a thorough search of all the documents and property prior to beginning construction.

During the actual acquisition of property consider having a special clause written into the purchasing agreement that places the responsibility of resolving or moving any cemeteries (both known and unknown) on the previous landowner. Alternately, seeking legislative relieve from these types of situations is another option. You can focus lobbying efforts to enact legislation that requires previous landowners to disclose the presence of all cemeteries on their property (disclosure of the condition of property is common in many states).

Another approach would hinge upon the fact that burying grounds or cemeteries do not "belong" to a property owner and they can not sell property that does not belong to them.

In many states landowners can not sell a grave yard or cemetery. This is why a complete deed search is needed (or regulations that require disclosure of a cemetery). Should there be no record of a cemetery within the written records and no obvious physical remains were found and your company or agency has examined other records you are in a better position to defend the accidental discovery as just that, "an accident".

Retroactively, had you completed and documented a reasonably thorough search of the written documents and the property itself, you should immediately have the construction halted and attempt damage control. In many states, universities such as the University of Louisville have archaeologists who are capable of identifying the limits of cemeteries and recovering the remains for moving to another site, if necessary. □

Philip J. DiBlasi is Staff Archaeologist, Program of Archaeology, University of Louisville, Ky.