

CEMETERY LAND USE AND THE URBAN PLANNER

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Cemeteries pose a special problem to the urban practitioner because of the traditionally favored position which land used for burials has held. Burial practices have largely been determined by superstition, religion and a regard for sanitation and health.¹ Thus, from the pyramids of Egypt through the churchyards of Europe to the modern memorial parks, civilizations have given cemeteries special protection.²

Although the separation of church and state has theoretically secularized the law of burial in the United States, religious custom has been recognized by the courts.³ As the courts struggle to find a legal rationale for spiritual concerns,⁴ the urban planner is faced with the problem of finding sufficient land to be permanently allocated for the use of sepulture which will meet the moral and legal prescriptions of society.⁵

This Note will focus on the legal principles with which the urban practitioner must work. The problems can be divided into two cate-

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1. P. JACKSON, *THE LAW OF CADAVERS* 10-14 (2d ed. 1950) [hereinafter cited as JACKSON].

2. *Id.* at 10-20.

3. One state supreme court has said:

The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited all civilized nations, and many barbarous ones, regard, in some measure at least, as consecrated ground. In old Saxon tongue the burial ground of the dead was "God's acre."

Dwenger v. Geary, 113 Ind. 106, 112, 14 N.E. 903, 907 (1888). See also *Chopin v. Dauphin*, 48 La. Ann. 1217, 20 So. 681 (1896).

4. Much of this struggle stems from the difficulty that American colonial courts experienced when they chose to discard the ecclesiastical church law, since the law of sepulture judges had attempted to integrate the spiritual customs of society into the common law rules of real property and contracts. See JACKSON 25-28.

5. W. GOODMAN, *PRINCIPLES AND PRACTICE OF URBAN PLANNING* 231-32 (4th ed. 1968); AMERICAN SOCIETY OF PLANNING OFFICIALS, *PLANNING ADVISORY SERVICE REPORT NO. 16, CEMETERIES IN THE CITY PLAN 1* (July, 1950) [hereinafter cited as ASPO REPORT].

gories: where and how to locate proposed cemeteries; and how to deal with pre-existing cemeteries in an urban area.

I. LOCATION OF PROPOSED CEMETERIES

It is estimated that cemeteries occupy nearly two million acres of land in the United States.⁶ The problem, however, is not the amount of land being used for burials, but rather that much of this land is choice urban property.⁷ The possibility of the dead overcrowding the living was recognized as far back as 1821.⁸ Although the problem of cemetery land use did not receive due recognition in this country until much later,⁹ the use of land for cemetery purposes has now become a publicized concern for urban planners.¹⁰

A primary consideration in cemetery land use is that cemeteries must be located within easy commuting distance of population centers—a necessity which the courts have protected.¹¹ Thus, as an urban area grows, it will engulf cemetery lands which were originally established on the quiet outskirts of the city.

Another important consideration in the location of cemeteries is its relative permanence.¹² Consequently, the planner is forced to plan much further into the future.

6. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *CEMETERIES AS OPEN SPACE RESERVATIONS* 1 (1970) [*hereinafter cited as HUD REPORT*].

7. ASPO REPORT 2.

8. *See* Gilbert v. Buzzard, 161 Eng. Rep. 1342 (Consistory Ct. of London 1820):

A comparatively small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis must be surrounded by a circumvallation of church yards, perpetually enlarging by becoming themselves surcharged with bodies; if indeed land owners can be found willing to direct their ground from the beneficial uses of the living to the barren preservation of the dead.

Id. at 1350.

9. As recently as 1950 a prominent legal authority on the subject said, "The compelling reason that the dead might crowd out the living does not exist here." JACKSON 357-58.

10. ASPO REPORT 1-2; *Grave Squeeze*, NEWSWEEK, Sept. 16, 1968, at 94.

11. "Burial places are indispensable. Convenient to the city of the living, a depository of the dead must be established and maintained." *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 195, 22 Am. R. 71, 74 (1873). *See also* *Hertle v. Riddle*, 127 Ky. 623, 629, 106 S.W. 282, 284 (1907). For the proposition that burial places are not subject to absolute prohibition see notes 29-30 and accompanying text *infra*.

12. For the proposition that society and the courts are reluctant to move dead bodies once they are buried see notes 88-97 and accompanying text *infra*.

In planning for cemeteries it must be recognized that not only will a considerable area of land be used for the purpose, but that it will be probably so used in perpetuity, for once reserved, burial grounds are rarely moved both to the practical and to the legal difficulties involved.¹³

A. *General Principles of Regulation*

The location and use of lands devoted to cemeteries are subject to the state or local police power.¹⁴ Although the traditional justification for the use of police power over the location of cemeteries is the conservation of public health,¹⁵ some courts have looked at other considerations of public welfare.¹⁶ At least one court has extended the meaning of public welfare and found that regulation of cemeteries with a view toward promoting the economic prosperity of a city was a valid use of the police power.¹⁷ As Justice Holmes suggested, however, the source of local authority to regulate cemeteries is not necessarily dependent upon public welfare principles; the power may be constitutional merely as being traditionally inherent in local government.¹⁸

[T]he extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and habits of the community count for more than logic. Since, as before the making of the constitutions, regulations of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World.¹⁹

13. W. GOODMAN, *supra* note 5, at 231.

14. *Laurel Hill Cemetery v. City & County of San Francisco*, 216 U.S. 358 (1910); *Faulk v. Buena Vista Burial Park Ass'n*, 152 S.W.2d 891 (Tex. Civ. App. 1941). Cemeteries have always been subject to regulation. In ancient cultures there is evidence of segregated burial places and restrictions enforced by taboos. Subsequent control by the church regulated cemetery location until the doctrine of separation of church from state became prevalent. Thus, regulation of burial has always been deemed a proper subject of habitual or legislative regulation. See JACKSON 187-88.

15. *Bryan v. City of Birmingham*, 154 Ala. 447, 45 So. 922 (1908); *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (Mo. App. 1941); *Moritz v. United Brethren Church*, 269 N.Y. 125, 199 N.E. 29 (1935).

16. See, e.g., *Mensi v. Walker*, 160 Tenn. 468, 26 S.W.2d 132 (1930), *appeal dismissed*, 283 U.S. 791 (1931) (use of police power in the location of cemeteries was valid in relation to streets and highways).

17. *Beth Hamedrosh Anshe Calicia Congregation v. Village of Brooklyn*, 44 Ohio L. Abs. 522, 65 N.E.2d 298 (Ct. App. 1945).

18. See cases cited note 15 *supra*.

19. *Laurel Hill Cemetery v. City & County of San Francisco*, 216 U.S. 358, 366 (1910).

The use of the police power to regulate cemeteries may be directly exercised by the state²⁰ or delegated to local authorities.²¹ A distinction between general and specific grants of legislative power by the state to the municipalities is made by the courts, however, when dealing with the validity of an ordinance regulating cemeteries. When an ordinance is passed pursuant to the express grant of police power to a municipality, the ordinance is regarded as an act of the state legislature and cannot be invalidated by the courts as being unreasonable because the legislative determination of what is reasonable cannot be pre-empted by a judicial determination.²² Thus, the only way to invalidate an ordinance passed under a specific grant of authority by the state is either to find that the delegation is a violation of the state constitution²³ or that federal constitutional rights have been invaded.²⁴ On the other hand, an ordinance regulating the location of cemeteries under a general grant of the police power to a municipality will be invalidated if the court finds that such an ordinance is not a reasonable use of the delegated power because the question of whether any ordinance is within the power delegated is for judicial determination.²⁵

B. Prohibition

Prohibition of cemeteries within the city limits is not recommended by urban planners. They reason that since cemeteries appear to be a cultural necessity they will locate in areas just outside the city limits.²⁶ As the city grows, those cemeteries which have been

20. *E.g.*, *Moritz v. United Brethren Church*, 269 N.Y. 125, 199 N.E. 29 (1935); *Faulk v. Buena Vista Burial Park Ass'n*, 152 S.W.2d 891 (Tex. Civ. App. 1941).

21. *E.g.*, *Carpenter v. Borough of Yeadon*, 151 F. 879 (C.C.E.D. Pa. 1907); *Odd Fellows' Cemetery Ass'n v. City & County of San Francisco*, 140 Cal. 226, 73 P. 987 (1903).

22. *See, e.g.*, *Carpenter v. Borough of Yeadon*, 151 F. 879 (C.C.E.D. Pa. 1907); *Catholic Bishop v. Village of Palos Park*, 286 Ill. 400, 121 N.E. 561 (1918).

23. *Catholic Bishop v. Village of Palos Park*, 286 Ill. 400, 121 N.E. 561 (1918).

24. *In re Smith*, 143 Cal. 368, 77 P. 180 (1904); *Park Hill Dev. v. City of Evansville*, 190 Ind. 432, 130 N.E. 645 (1921).

25. *Carpenter v. Borough of Yeadon*, 151 F. 879 (C.C.E.D. Pa. 1907); *Alosi v. Jones*, 234 Ala. 391, 174 So. 774 (1937); *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (Mo. App. 1941).

26. ASPO REPORT 15.

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arbitrarily placed outside the city limits, devoid of municipal regulation, will impede future municipal growth.

The use of negative control of location, however, is limited in value. "Outside the city limits" is no answer if the planning is for a county, for a metropolitan area, or for a region. It is a shortsighted solution for even those who are only concerned with the area within the city corporate boundary lines. Many cities may be expected to grow and annex additional land. In the future, these cities may be faced with annexing a previously banned cemetery, or the logical direction of city growth may be thwarted by the presence of the cemetery.²⁷

The prospect of absolutely prohibiting interments must, however, be a tempting prospect for a city. The most recurring complaint is that the customary tax-exempt status of cemeteries causes financial hardships upon city government.²⁸ New York City is on the brink of fiscal crisis resulting in part from land depletion—nearly one-third of its property is tax exempt.²⁹ At least one court has ruled that such fiscal considerations sufficiently concern the public welfare to enable the municipality to pass an ordinance prohibiting future burials.³⁰ Furthermore, unless properly assimilated into the regional master plan, a cemetery may impede the logical pattern of future growth of the area.³¹

Many courts have held that a city may not absolutely prohibit cemeteries.³² The courts' primary objection to prohibition occurs where there is sufficient open space and no apparent nuisance or impediment to the city.

27. *Id.*

28. The public necessity, quasi-public character and the traditional exemption enjoyed by churches has led to a general underlying policy of exemption from taxation and assessment. See JACKSON 267-81.

29. HUD REPORT 38.

30. Where 7% of the village's total area was devoted towards tax-exempt cemeteries, an ordinance prohibiting future burials was valid in order to secure the right economic conditions. *Beth Hamedrosh Anshe Calicia Congregation v. Village of Brooklyn*, 44 Ohio L. Abs. 522, 65 N.E.2d 298 (Ct. App. 1945).

31. ASPO REPORT 15-16.

32. *E.g.*, *City of Park Ridge v. American Nat'l Bank & Trust Co.*, 4 Ill. 2d 144, 122 N.E.2d 265 (1954); *Village of Villa Park v. Wanderer's Rest Cemetery Co.*, 316 Ill. 226, 147 N.E. 104 (1925); *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. R. 71 (1873); *Faulk v. Buena Vista Burial Park Ass'n*, 152 S.W.2d 891 (Tex. Civ. App. 1941).

Where the place in which it is proposed to bury the dead is remote from human habitations, or is close to but a few dwellings, the absolute prohibition of interments is an unreasonable restriction of a lawful business, not fairly justified or required for the preservation of the public health, and will not be sustained by the courts.³³

It is generally accepted, however, that a city may prohibit cemeteries within its boundaries if the city is densely populated.³⁴ Furthermore, statutes prohibiting burials within short distances of a densely populated city's boundaries have been held valid.³⁵ Some statutes have been passed which make it compulsory for a cemetery to get the approval of a local authority before the cemetery is established.³⁶ As a result, while not totally prohibiting cemeteries, courts and legislatures have subjected their location to careful scrutiny.

C. Zoning

As opposed to prohibition of cemeteries, zoning implies planned location in accordance with surrounding land use, the master plan, and the future logical growth of the city.³⁷ In general, cemeteries should be located in residential zones.³⁸ While there may be some reluctance to residing near a cemetery, the emotional attitude of the public is against placing them in or near commercial and industrial development.³⁹ At least one court has, however, declared a cemetery a commercial use.⁴⁰

Many zoning ordinances allow religious functions as exceptions to

33. *Laurel Hill Cemetery v. City & County of San Francisco*, 152 Cal. 464, 93 P. 70 (1907), *aff'd*, 216 U.S. 358 (1910). *See also* *Hume v. Laurel Hill Cemetery*, 142 F. 552 (C.C.N.D. Cal. 1905) (ordinance which prohibited burials in entire county embracing large amounts of unoccupied land was found unreasonable use of police power).

34. *Laurel Hill Cemetery v. City & County of San Francisco*, 152 Cal. 464, 93 P. 70 (1907), *aff'd*, 216 U.S. 358 (1910).

35. *See Franklin v. Pietzsch*, 334 S.W.2d 214 (Tex. Civ. App. 1960).

36. *E.g.*, *Gordon v. Commissioners of Montgomery County*, 164 Md. 210, 164 A. 676 (1933); *Wojtkowiak v. Evangelical Lutheran St. Johns Church*, 142 Misc. 264, 255 N.Y.S. 180 (Sup. Ct. 1931).

37. Zoning ordinances have been found to be a constitutional means of regulating cemeteries. *Shumaker v. Dalton*, 51 F.2d 793 (D.C. Cir. 1931).

38. ASPO REPORT 17.

39. *Id.*

40. *North Side Property Owners Ass'n v. Hillside Memorial Park*, 70 Cal. App. 2d 609, 161 P.2d 618 (1945).

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the restrictive uses of residential districts. This has caused a problem where a cemetery operated by a religious organization has claimed an exception to the ordinance as a religious use. In *Appeal of Russian Orthodox Church*⁴¹ the court held that a cemetery was not a "religious use" as that term was used in an ordinance allowing such uses in residential or agricultural districts.⁴²

Another problem associated with zoning of cemeteries is the possibility that cases upholding ordinances prohibiting mortuaries in residential districts because of their psychological and depressive effect on the neighborhood⁴³ may be applied by analogy to cemeteries. Although no court has ruled directly on that issue, the court in *Russian Orthodox* in upholding the exclusion of a cemetery from a residential district rejected the notion "that the men who drew up this zoning ordinance meant that a beautiful home should have a cemetery next door"⁴⁴ Thus, courts may show sympathy to residential neighbors of a cemetery. It is doubtful, however, that courts would exhibit similar sympathy for a person whose residence was adjacent to any other open space use, such as a park.

D. Condemnation of Lands for Cemetery Use

Because of the broad powers of eminent domain inherent in local government, land acquisition for cemetery purposes is rarely a problem. The two requirements for condemnation of land for burial purposes are a delegation of condemnation power by the state legislature and the use of the condemned lands for public purpose.⁴⁵

The burial of the dead in a place designated for that purpose and in which any member of the community may acquire burial rights is considered a public use. Land to be used for such purpose may be acquired by eminent domain.⁴⁶ Accordingly, the general public

41. 397 Pa. 126, 152 A.2d 489 (1959).

42. For definitions of the term "religious uses" in regards to residential zoning districts see E. YOKLEY, *ZONING LAW AND PRACTICE* 180 (3d ed. 1967) and cases cited therein.

43. *See, e.g.*, *Jack v. Tourant*, 136 Conn. 414, 71 A.2d 705 (1950); *Arthur v. Virkler*, 144 Misc. 483, 258 N.Y.S. 886 (Sup. Ct. 1932).

44. 397 Pa. at 131, 152 A.2d at 492 (dissenting opinion).

45. *See generally* JACKSON 233-35.

46. *See, e.g.*, *People v. Forrest Home Cemetery Co.*, 258 Ill. 36, 101 N.E. 219 (1913); *Peru Cemetery Co. v. Mount Hope Cemetery*, 224 Ind. 202, 65 N.E.2d 844 (1946); *City of Caruthersville v. Faris*, 237 Mo. App. 605, 146 S.W.2d 80 (1940).

must have the right of burial in the cemetery,⁴⁷ but the use will not cease to be public merely because there is a varying charge for lots in different parts of the cemetery, thereby excluding all but the wealthy from certain portions of the cemetery land.⁴⁸

Where the power to condemn land for cemetery purposes has been expressly delegated to a municipal corporation, the courts will not question the necessity of the exercise of such power, in absence of the abuse of the right.⁴⁹ Consequently, it will look to the particular site chosen,⁵⁰ or the amount of land being taken.⁵¹ There is some question, however, whether a municipality can condemn lands for burial use through a general delegation of authority under eminent domain.⁵²

The authority to condemn lands for cemetery use may be delegated to a private corporation.⁵³ Thus, if a private cemetery can meet the requirements of public use, it could be vested with eminent domain power by the legislature.⁵⁴ If the cemetery, however, exerts excessive control over the conditions for burial, or discriminates in any way to make burial exclusive to any particular class, it will lose its public character and cannot be endowed with eminent domain power.⁵⁵

II. CONTROL OF PRE-EXISTING CEMETERIES

A problem of the urban planner which is perhaps even more troublesome than the location of proposed cemeteries is how to deal with pre-existing cemeteries. Older cemeteries were built on sites which were, at that time, on the outskirts of the metropolitan area,

47. *E.g.*, *Evergreen Cemetery Ass'n v. Beecher*, 53 Conn. 551, 5 A. 353 (1886).

48. *Id.*

49. *E.g.*, *City of Winchester v. Ring*, 312 Ill. 544, 144 N.E. 333 (1924).

50. *Crowell v. Londonderry*, 63 N.H. 42 (1884).

51. *City of Winchester v. Ring*, 312 Ill. 544, 144 N.E. 333 (1924) (not an abuse of discretion for municipality of 1,800 residences to condemn 12 acres for cemetery use).

52. Where an express grant is not given, the municipality may not condemn lands for cemetery use. *E.g.*, *Town of Eaton v. Bouslog*, 133 Colo. 130, 292 P. 2d 343 (1956). *Contra*, *City of Caruthersville v. Faris*, 237 Mo. App. 605, 146 S.W.2d 80 (1940).

53. *See* cases cited note 46 *supra*.

54. *See* cases cited note 46 *supra*.

55. *Starr Burying Ass'n v. North Land Cemetery Ass'n*, 77 Conn. 83, 58 A. 467 (1904).

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but now are within the inner core of the city. As land development continues, cemeteries, as open space within a developing area, increase in value for commercial and residential use. Furthermore, there is a premium on usable open space within the inner city to counterbalance the dehumanizing effects of high density land coverage.⁵⁶

To accentuate the problem of pre-existing cemeteries even further, many of these cemeteries have been poorly maintained or abandoned.⁵⁷ Poorly maintained and crowded cemeteries, like other neglected and crowded land uses, also depress the surrounding neighborhood.⁵⁸

A. *Cemeteries as a Nuisance*

One means of controlling a pre-existing cemetery is to have it designated a nuisance. As a general rule, a cemetery is not a nuisance per se.⁵⁹ Consequently, in order to have land devoted to burials declared a nuisance the complainant must prove that it is a nuisance *in fact*,⁶⁰ or that it fails to meet some statutory requirement.⁶¹ If declared a nuisance by a court of equity, the cemetery may be ordered to discontinue operations.⁶²

Whether a cemetery constitutes a nuisance in fact will depend

56. HUD REPORT 4.

57. *Id.* at 3.

58. ASPO REPORT 6. The report also comments that:

[E]xisting cemeteries become problems when they fall into dis-use, when their care is neglected, when the land is needed for another use, when they lie in the path of some needed public improvement. The old cemetery may become a health hazard. Even when it is carefully maintained, many persons feel that a cemetery in a neighborhood will depress property values. Municipal administrators dislike cemeteries because they are part of the ever increasing list of tax-exempt properties.

Id. at 4.

59. *See, e.g.,* Hume v. Laurel Hill Cemetery, 142 F. 552 (C.G.N.D. Cal. 1905); Morton v. St. Patrick's Roman Catholic Church Soc'y, 56 Misc. 71, 105 N.Y.S. 1100 (Sup. Ct. 1907); Mensi v. Walker, 160 Tenn. 468, 26 S.W.2d 132 (1930), *appeal dismissed*, 283 U.S. 791 (1931).

60. *E.g.,* Symmonds v. Novelty Cemetery Ass'n, 21 S.W.2d 889 (Mo. App. 1929); Board of Health v. Lewis, 196 N.C. 641, 146 S.E. 592 (1929).

61. Magler v. Kansas, 123 U.S. 623 (1887); People v. New York Edison Co., 159 App. Div. 786, 144 N.Y.S. 707 (1913).

62. JACKSON 210-11. The burden of proof, however, is on the complainant and the burden is often onerous. *See* Comment, *Cemetery Abandonment and Disinterment of Human Remains*, 35 ALBANY L. REV. 320, 323 (1971).

upon its own particular circumstances.⁶³ The complaint may be brought by public authorities⁶⁴ or by an injured private party.⁶⁵ The majority of cases in which the courts have found that a cemetery constituted a nuisance usually involved an intrusion of odor or pollutants into the surrounding air or water supplies, to the detriment of public health.⁶⁶ On the other hand, since a cemetery is not a nuisance per se, it is not a nuisance merely because it might become one in the future⁶⁷ due to its presence depreciating the surrounding land values⁶⁸ or its proximity to neighboring residential areas.⁶⁹ Courts have also rejected claims of future nuisance based on probable traffic congestion,⁷⁰ a large number of pre-existing cemeteries in the community,⁷¹ or objections for purely aesthetic reasons.⁷² Since courts have found, however, that mortuaries can be enjoined as a nuisance in a residential area, a minority of cases have found that the depressing effects of a cemetery in a residential district may cause the cemetery to be regarded as a nuisance in fact.⁷³

63. *Hume v. Laurel Hill Cemetery*, 142 F. 552 (C.C.N.D. Cal. 1905); *Normandy Consol. School Dist. v. Harral*, 315 Mo. 602, 286 S.W. 86 (1926); *Morton v. St. Patrick's Roman Catholic Church Soc'y*, 56 Misc. 71, 105 N.Y.S. 1100 (Sup. Ct. 1907).

64. *Village of Villa Park v. Wanderer's Rest Cemetery*, 316 Ill. 226, 147 N.E. 104 (1925).

65. *Sutton v. Findley Cemetery Ass'n*, 270 Ill. 11, 110 N.E. 315 (1915).

66. *Union Cemetery Co. v. Harrison*, 20 Ala. App. 291, 101 So. 517 (1924) (noxious and disagreeable odors); *Payne v. Wayland*, 131 Iowa 659, 109 N.W. 203 (1906) (proximity to town's water supply). The plaintiff must show proof of probable injury. *Braasch v. Cemetery Ass'n of the Evangelical Lutheran Christ Soc'y*, 69 Neb. 300, 95 N.W. 646 (1903).

67. *Village of Villa Park v. Wanderer's Rest Cemetery*, 316 Ill. 226, 147 N.E. 104 (1925).

68. *Hume v. Laurel Hill Cemetery*, 142 F. 552 (C.C.N.D. Cal. 1905); *Normandy Consol. School Dist. v. Harral*, 315 Mo. 602, 286 S.W. 86 (1926).

69. *Braasch v. Cemetery Ass'n of the Evangelical Lutheran Christ Soc'y*, 69 Neb. 300, 95 N.W. 646 (1903). One court, however, seemed to emphasize that the cemetery was in a lower-class residential zone. *Antenucci v. Hartford Roman Catholic Diocesan Corp.*, 19 Conn. Supp. 131, 110 A.2d 495 (Super. Ct. 1954).

70. *McCaw v. Harrison*, 259 S.W.2d 457 (Ky. 1953).

71. *Normandy Consol. School Dist. v. Harral*, 315 Mo. 602, 286 S.W. 86 (1926).

72. *Village of Villa Park v. Wanderer's Rest Cemetery Co.*, 316 Ill. 226, 147 N.E. 104 (1925); *Jones v. Highland Memorial Park*, 242 S.W.2d 250 (Tex. Civ. App. 1951).

73. *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1959); *Overby v. Piet*, 163 So. 2d 532 (Fla. App. 1964). *But cf.* *Young v. St. Martin's Church*, 361 Pa. 505, 64 A.2d 814 (1949) (expressly rejecting the analogy between funeral homes and mortuaries and cemeteries).

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Although a cemetery may not be a nuisance in fact, it may be held to be one in law.⁷⁴ Since a statute may define what constitutes a nuisance,⁷⁵ a cemetery may be declared a nuisance,⁷⁶ and a statute may prescribe a mode of conduct of a cemetery which, when violated, will also cause a determination of a nuisance.⁷⁷

As a practical matter, nuisance law is ineffectual in controlling pre-existing cemeteries because of the heavy burden of proof, the necessity of showing probable injury, and the political difficulty of persuading the state legislature to act.⁷⁸

B. Eminent Domain

Another method for solving the urban planner's dilemma regarding the pre-existing cemetery is use of the government's eminent domain power.⁷⁹ There is no doubt that the legislature has the power to take lands devoted to burial purposes by condemnation,⁸⁰ but if the cemetery is public, the lands may not be taken by a municipal government without an express delegation of power from the state legislature.⁸¹ Also, at least one state statute provides for immunity from municipal condemnation even for private cemeteries.⁸²

Even where exercise of the eminent domain power is not hampered by a lack of express legislative authorization, there are often other obstacles encountered in the condemnation procedure. Courts will not make a presumption of the necessity of taking a particular piece of land and will often determine whether a necessity exists by balanc-

74. JACKSON 209-10.

75. *Mugler v. Kansas*, 123 U.S. 623 (1887).

76. *Campbell v. Kansas City*, 102 Mo. 339, 13 S.W. 897 (1890). But such a determination cannot be made by a municipality without evidence of a nuisance in fact. *Rosehill Cemetery Co. v. City of Chicago*, 352 Ill. 11, 185 N.E. 170 (1933); *City of St. Joseph v. Georgetown Lodge*, 222 Mo. App. 1076, 11 S.W.2d 1082 (1928).

77. *Furstenberg v. Brissey*, 28 Okla. 591, 115 P. 465 (1910).

78. See *Cemetery Abandonment and Disinterment of Human Remains*, *supra* note 62, at 322-24.

79. ASPO REPORT 5.

80. *In re Board of Street Openings*, 133 N.Y. 329, 31 N.E. 102 (1892).

81. *Eden Memorial Park Ass'n v. Superior Ct.*, 189 Cal. App. 2d 421, 11 Cal. Rptr. 189 (1961). *Contra*, *City of New Orleans v. Christ Church Corp.*, 228 La. 184, 81 So. 2d 855 (1955). See also *Evergreen Cemetery Ass'n v. City of New Haven*, 43 Conn. 234, 21 Am. R. 643 (1875); *In re New York, L. & W. Ry.*, 99 N.Y. 12, 1 N.E. 27 (1885).

82. See N.Y. NOT-FOR-PROFIT CORP. LAW § 1401(k) (McKinney 1970).

ing the interests in maintaining the status quo (retaining the cemetery) against the convenience of taking that particular land by the government.⁸³ This is further tempered by the fact that some statutes require that before cemetery lands are put to other uses, there must be a proper disinterment and re-interment of the remains,⁸⁴ and courts are reluctant to disturb the repose of the deceased.⁸⁵

The result of all this is that even the state's absolute right to appropriate property for a public purpose is, in practice, somewhat less than absolute, when applied to cemeteries. Government planners are forced to try every feasible alternative before attempting to take cemetery land, rather than face the uncertainties of eminent domain proceedings in that area. Thus, land which might be better devoted to another use often becomes the bed of a new highway because it is not protected by the special treatment afforded the nearby cemetery.⁸⁶

Some relief is given by the courts, however, when the cemetery is abandoned or in disrepair.⁸⁷ As one court stated when faced with a condemnation suit for an old cemetery:

We certainly cannot be sure that the lawmakers, if they had known of this cemetery, disused for burials for 50 years, and never more to be used for that purpose, located in the midst of a dense and teeming population, would have preferred that it should remain appropriated for the resting place of the long since dead, rather than that it should be devoted to use for the comfort, welfare, and health of the living. We cannot say that the taking of such a cemetery for such a use is such an unreasonable, unnatural, impolitic, or unjust thing⁸⁸

83. *See, e.g., In re Board of Street Openings*, 133 N.Y. 329, 31 N.E. 102 (1892).

84. *See, e.g., CAL. HEALTH & SAFETY CODE ANN.* § 7900 (Deering 1961); *MICH. STAT. ANN.* § 5.3074 (1969); *N.J. STAT. ANN.* § 40:60-25.33 *et seq.* (1967) (providing an elaborate system for public acquisition of old cemeteries and disinterment of bodies); *N.Y. MEMB. CORPS. LAW* § 81 (McKinney 1941); *OHIO REV. CODE ANN.* § 1721.01 (Page 1964) (limiting eminent domain to lands not containing graves); *PA. STAT. ANN.* tit. 9, §§ 2, 43 (1965).

85. JACKSON 405.

86. *Cemetery Abandonment and Disinterment of Human Remains, supra* note 62, at 324-25.

87. JACKSON 405.

88. *In re Board of Street Openings*, 133 N.Y. 329, 334, 31 N.E. 102, 103 (1892).

C. *Disinterment*

The most prominent obstacle in the path of the urban planner who wishes to convert a cemetery to another use is society's reluctance to move a cadaver once it is buried. Whether it is practical or not, disinterment is required whenever a cemetery is abandoned.⁸⁹

There is a deep historical basis for society's abhorrence of disinterment.⁹⁰ In ancient Rome, a body, once buried, could be removed only with the rarely granted permission of the governor.⁹¹ Early Danish law condemned to death any person found guilty of disturbing the dead, and the felon's body was "to lie forever unburied and unhonored."⁹² English common law held that disinterment was a misdemeanor even if done for a laudable or pious purpose.⁹³ A noteworthy display of the abhorrence of moving buried bodies was made by Shakespeare, who could easily bring himself to joke about the disinterment of "alas poor Yorick," but in regards to his own remains, had his epitaph read:

Good friend for Jesus' sake
forbear
To dig the dust enclosed
here;
Blest be the man that spares
these stones,
And cursed be he that moves
my bones.

European countries, faced with critical land shortages, eventually changed their views on disinterment. In England, the purchase right to interment customarily remained so long as it took the body to decompose.⁹⁴ Similarly, in France and other Latin countries, the burial lot is often rented out, and when there is no one available to

89. N.Y. NOT-FOR-PROFIT CORP. LAW § 1401(r) (McKinney 1970); JACKSON 402.

90. JACKSON 101-05.

91. *Pierce v. Proprietors of Swanpoint Cemetery*, 10 R.I. 227, 235-36 (1872).

92. REPORT OF RUGGLES, LAW OF BURIAL, 4 Brad. Surr. 503, 525 (N.Y. 1857) (Appendix).

93. *Thompson v. Hickey*, 8 Abb. N. Cas. 159, 168, 59 How. Pr. 434, 438 (N.Y. Sup. Ct. 1880).

94. *See Wilson v. Read*, 74 N.H. 322, 68 A. 37 (1907). *See also Gilbert v. Buzzard*, 161 Eng. Rep. 1342 (Consistory Ct. of London 1820) (court disallowed burial in iron coffin since the owner of lot purchased only a right to normal dissolution which would be delayed by the metallic coffin).

continue the payments, the bones are dug up and thrown into a corner of the cemetery.⁹⁵ In the United States, possibly because of the easy availability of lands, there developed a presumption of a perpetual right to remain interred in one lot.⁹⁶ The grave was held to be not only the *domus ultima*, but the *domus aeterna*.⁹⁷

The strict common law rule that all disinterments were illegal was later altered in this country, but only slightly. Judge Cardozo, speaking for the Court of Appeals of New York stated the rule: "The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose."⁹⁸ Thus, a court will allow disinterment only in cases of extreme exigency, which almost never occur in civil actions.⁹⁹ Nevertheless, it is clear that the state legislature is empowered to order the removal of bodies from a cemetery by exercise of its police power.¹⁰⁰ Thus, in a leading disinterment case, *Kincaid's Appeal*,¹⁰¹ the court found that a special statute which, after reciting the necessity of removal because of the neglected condition of the cemetery, provided for disinterment, was a constitutional use of police power not necessitating compensation to the relatives of the deceased.¹⁰² The constitutional basis for such statutes is that the purchaser of a cemetery lot does not acquire an estate in fee;¹⁰³ all he purchases is a mere right of burial, subject to proper regulation under the police power.¹⁰⁴ Thus, a statute which orders

95. JACKSON 358.

96. *Wilson v. Read*, 74 N.H. 322, 68 A. 37 (1907).

97. *Brendle v. German Reformed Congregation*, 33 Pa. 415 (1859) (not only the last home, but the eternal home).

98. *Yome v. Gorman*, 242 N.Y. 395, 403, 152 N.E. 126, 129 (1926).

99. See *German Evangelical St. Marcus Congregation v. Archanbault*, 383 S.W.2d 704 (Mo. 1964) (court would not allow abandonment and disinterment of remains in order to relieve insolvency of religious cemetery corporation). See also *Cemetery Abandonment and Disinterment of Human Remains*, *supra* note 62; Note, *Moving Cemeteries to Build Low-Income Housing—A Violation of the "Right to Rest in Peace"*, 6 VAL. U.L. REV. 96, 99-101 (1971).

100. *E.g.*, *Masonic Cemetery Ass'n v. Gamage*, 38 F.2d 950 (9th Cir. 1930); *Kincaid's Appeal*, 66 Pa. 411 (1870). See Annot., 71 A.L.R. 1040 (1931).

101. 66 Pa. 411 (1870).

102. *Id.*

103. *Masonic Cemetery Ass'n v. Gamage*, 38 F.2d 950 (9th Cir. 1930); *Hollywood Cemetery Ass'n v. Posell*, 210 Cal. 121, 291 P. 397 (1930); *Seale v. Masonic Cemetery Ass'n*, 217 Cal. 286, 18 P.2d 667 (1933); Note, *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378 (1961).

104. *The Cemetery Lot: Rights and Restrictions*, *supra* note 103.

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a cemetery to be abandoned is not a taking without just compensation to the owners of the lots, since they are losing no property right.¹⁰⁵

Another constitutional issue involved with compulsory disinterment by statute is whether the deceased has any constitutional rights which have been violated. Do the dead have a right to privacy which prohibits their being disturbed in their repose?¹⁰⁶ At least one early court recognized that the dead have rights which must be protected:

The sentiments and feeling which people in a Christian State have for the dead, the law regards and respects, and however it may have been anterior to our legislation on the subject of cemeteries, the dead themselves have rights, which are committed to the living to protect, and in doing which they obtain security for the undisturbed rest of their own remains.¹⁰⁷

More recent cases, however, have rejected the notion that the rights of a person continue after death.¹⁰⁸ The reason for rejecting the constitutional rights of the dead is that the "[d]ecedent's rights, being personal, could not survive . . . death and cannot validly be urged The same reasoning applies to the asserted invasion of decedent's privacy."¹⁰⁹

Another possible constitutional issue concerning the disinterment of human remains is that compulsory disinterment interferes with the free exercise of religion where a religion prohibits disinterment.¹¹⁰ But in light of Supreme Court decisions finding that religious customs must give way to secular goals of society,¹¹¹ disinterment, when

105. *Id.*

106. For a general statement of the constitutional right to privacy see *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See also* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

107. *Thompson v. Hickey*, 8 Abb. N. Cas. 159, 167, 59 How. Pr. 434, 438 (N.Y. Sup. Ct. 1880).

108. *E.g.*, *Cordell v. Detective Publications, Inc.*, 419 F.2d 989 (6th Cir. 1969) (right of recovery for invasion of deceased's right of privacy, by publishing a gruesome account of the murder of her daughter, was denied); *Ravellette v. Smigh*, 300 F.2d 854 (7th Cir. 1962) (taking blood sample from a cadaver was not an invasion of deceased's right to privacy).

109. *Ravellette v. Smigh*, 300 F.2d 854, 857 (7th Cir. 1962).

110. *See generally Moving Cemeteries to Build Low-Income Housing*, *supra* note 99, at 104-06.

111. *See Braunfeld v. Brown*, 366 U.S. 599 (1961) ("Sunday Closing Law" was constitutional even though it caused hardship on Orthodox Jewish merchants

utilized for the public welfare, probably does not violate the first amendment.

D. Solutions

The urban planner is faced with society's demand for more land to be used for burials, while at the same time there is a desperate need for open spaces in the cities' high density areas. This dilemma is accentuated further by cultural and religious mores which impede innovation. Despite these obstacles, there has been some innovative solutions to the cemetery problem.

The first truly innovative plan in the western world for the disposal of bodies was formulated in Basel, Switzerland in 1919.¹¹² Called *Hörnli Gottesacker*, the scheme was to select a large (125 acres) plot of land on which all future burials for the city would be made. All existing cemeteries were to be maintained until 1952, after which time the municipal authorities could use the land for whatever purposes they wished. All burials are now made at the city's expense, and the grave is maintained free of charge for twenty years. At the end of that time the family has to buy the grave and pay for maintenance at a high price, or the grave will be used for further burials. Basel is convinced that this plan will solve its cemetery problems forever, and no additional land will ever be required.¹¹³

A plan similar to *Hörnli Gottesacker* was implemented in San Francisco.¹¹⁴ Legislation was enacted in 1921 and 1923 to remove all cemeteries from the city and prohibit future burials. Most of the graves were moved to Colma, on the outskirts of San Francisco, and this small town soon became a "cemetery city." Today, Colma has 500 living inhabitants, most of whom are connected with the funeral business, and 90,000 dead inhabitants in graves.¹¹⁵

Another plan for the disposal of bodies is to encase them above ground in large buildings. Accordingly, remains could be placed in

who must remain closed on Saturday); *Davis v. Beason*, 133 U.S. 333 (1890) (a religious sect can be made illegal if its practice is harmful to society); *Reynolds v. United States*, 98 U.S. 145 (1878) (illegalization of polygamy was not an unconstitutional interference with the Mormons' right of religious practice).

112. ASPO REPORT 22-23.

113. *Id.*

114. HUD REPORT 18-19.

115. *Id.*

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multi-story mausoleums which could hold as many as 20,000 bodies in a fraction of the space used in a conventional cemetery.¹¹⁶

Recognizing the wastefulness of urban land, planners have also developed innovative ideas to make existing cemeteries a more useful part of the urban environment.¹¹⁷ Consequently, some cities have recently made efforts to convert cemeteries into useful open spaces. In Cambridge, Massachusetts a cemetery fulfills a second function as a botanical garden.¹¹⁸ In California, Forest Lawn Memorial Parks Cemetery, with no traditional monuments, contains copies of classic sculpture, fountains, mosaics, the world's largest framed picture, and has been an attractive setting for over 25,000 weddings.¹¹⁹

Probably one of the most promising cemetery schemes has been the conversion of old neglected cemeteries into permanent green space preserves. In a pilot plan, Pulaski, Tennessee with the aid of a government grant, had remarkable success in converting a dilapidated graveyard into a beautiful park.¹²⁰

Thus, despite a history of frustration for the planner who has dealt with the problem of cemeteries in urban areas, there is some hope for solutions. It may still be too early to detect a trend, but it seems that the planner has acquiesced in the legal and ethical obstacles to eminent domain and disinterment and has pursued a new course of renovating existing cemeteries to make them a useful part of the urban environment.

116. Wall Street Journal, Oct. 6, 1969, at 11, col. 1.

117. Fisher, *Cemeteries Becoming Critical Factor in Land-Use Planning as Urban Areas Grow*, 27 J. HOUSING 527 (Nov. 1970). See HUD REPORT 18-20.

118. HUD REPORT 19-20. Fisher states: "[N]ow that urban areas are growing and the search for open space has become intense, the wastefulness of many urban graveyards, which are often large, poorly maintained, and underused, is being increasingly recognized." Fisher, *supra* note 117, at 527.

119. HUD REPORT 20.

120. *Id.* at 46-61.

