

STAFF REPORT
June 10, 2009

Agenda Item: Application for a Type III Certificate of Appropriateness (CR-09-061) to allow the relocation of an existing cemetery located at 431 Pharr Road - Property is zoned RG-3.

Applicant: Brandon Marshall
P. O. Box 925, Stone Mountain

Facts: Currently there is an approximately .174-acre site that fronts on Pharr Road, immediately adjacent to Frankie Allen Park, a City of Atlanta public park. On that site is a cemetery associated with the former Mt. Olive Baptist Church containing approximately 45-50 graves to 100-120 graves, depending on the source of information cited in the Applicant's submission. The Applicant proposes to relocate the graves to a perpetual care cemetery. The relocation is submitted by the Applicant in accordance with a city ordinance (06-O-1162) passed by City Council and signed by the Mayor in the summer of 2006, which follows the process set out in O.C.G.A. Sec.36-72-1 et seq. by which an interested party may apply for a permit to be allowed to move human remains and burial objects. This would be the Commission's second review of such a proposed relocation, the first being done in 2006-2007 for a cemetery on Hollywood Road in northwest Atlanta.

The Staff would note that unlike standard certificate of appropriateness applications the Commission hears, the Commission does not approve or deny cemetery relocation applications. As required by the City ordinance, the Commission is to "make a written recommendation to the City Council no later than 15 days following the public hearing with respect to the sufficiency of the notice to descendants, the plan for mitigation, the disturbance and adverse effects on the cemetery or burial ground, the survey of the cemetery, and plans for disinterment and reinterment." (emphasis added by Staff).

Analysis: The following code sections apply to this application.

Per Section 6-4043(e) of the Land Development Code:

(10) The commission shall hold public hearings and make recommendations to the City Council for the issuance of permits to move or disturb cemeteries or graveyards in accordance with the procedures set forth in Chapter 38 of Part 2 of the Atlanta City Code as amended.

Chapter 38 of Part 2 of the Atlanta City Code:
Article III. Cemetery or Burial Ground Disturbance Permit

38-60. Intent

The Urban Design Commission (UDC) shall have the power to hear, grant or deny applications for a cemetery or burial ground, as defined in paragraphs (3) and (5) of O.C.G.A., Section 36-72-2, as amended, disturbance permit in accordance with the powers delegated to the City by O.C.G.A. Sec.36-72-1 et seq. as amended.

38-61. Procedures

Applications shall be filed with the Director, Urban Design Commission or their designee and shall include any supporting material as required by the rules of the Commission or this Section. Upon receipt of a complete application and the supporting material the UDC shall place the application on a regularly scheduled meeting agenda for public hearing, cause due notice of the time and place thereof to be published and give notice to surrounding property owners and descendants of those located in the cemetery or burial ground subject to the application. UDC staff shall review the information submitted and submit a findings of fact and recommendation to the Urban Design Commission for their review and recommendation.

38-62. Application.

Application for a permit shall include, at a minimum, the following information:

- (a) Evidence of ownership of the land on which the cemetery or burial ground is located in the form of a legal opinion based upon a title search;
- (b) A report prepared by an archeologist as defined in paragraph (2) of O.C.G.A. Section 36-72-2, as amended, stating the number of graves believed to be present and their locations as can be determined from the use of minimally invasive investigation techniques, including remote sensing methods and the use of metal probes, which activities shall not require a permit;
- (c) A survey prepared by or under the direction of a registered surveyor showing the location and boundaries of the cemetery or burial ground based on an archeologist's report.
- (d) A plan prepared by a genealogist as defined in paragraph (7) of O.C.G.A. Section 36-72-2, as amended, for identifying and notifying the descendants of those buried or believed to be buried in such cemetery. If those buried or believed to be buried are of aboriginal or American Indian descent, the genealogist, in preparing the notification plan, shall consult with the Council on American Indian Concerns created pursuant to O. C.G.A. Section 44-12-280, as amended, and shall include in the notification plan not only any known descendants of those presumed buried but also any American Indian tribes as defined in paragraph (2) of O.C.G.A. Section 44-12-260, as amended, that are culturally affiliated,; and
- (e) A proposal for mitigation or avoidance of the effects of the planned activity on the cemetery or burial ground. If the proposal includes relocation of any human remains or burial objects, the proposal shall specify the method of disinterment, the location and method of disposition of the remains, the approximate cost of the process, and the approximate number of graves affected.

38-63. Identification and notification of descendants

The applicant shall implement its plan for identifying and locating descendants no later than the date the application is submitted to the Director, Urban Design Commission. The UDC staff shall review the applicant's plan for identifying and notifying the descendants of the deceased persons and may require as a condition for issuing a permit that the applicant implement additional reasonable attempts to identify and locate descendants. Notice to possible descendants shall include information on how to contact the City and a summary of the rights of descendants under this chapter. The UDC shall promptly inform any descendant who indicates an interest in the disposition of the human remains and burial objects regarding any proposals for mitigation, the terms of any permit issued, the time an displace of any scheduled public hearings, and appeal procedures and events.

38-64. Public hearing; decision of City Council

- (a) The commission shall conduct the public hearing within 60 days of the filing of an application and shall make a written recommendation to the City Council no later than 15 days following the public hearing with respect to the sufficiency of the notice to descendants, the plan for mitigation, the disturbance and adverse effects on the cemetery or burial ground, the survey of the cemetery, and plans for

disinterment and reinterment. The applicant shall be required to post the nearest public road and the burial ground not less than 30 days prior to both public hearings to be conducted by the UDC and the hearing before City Council.

Chronology of Submissions / Materials / Correspondence

In accordance with the state law and city ordinance, an application for a permit to relocate the Mt. Olive Cemetery was submitted to the Urban Design Commission on March 30, 2009. The original submission including the following items:

1. A synopsis of the proposal with a very short narrative and photographs of the current conditions and a hand written sign posted on the property;
2. A copy of a fax showing a price quote for removal and reburial actions;
3. “Genealogy Report – Mount Olive Cemetery – Pharr Rd” by Lucas Moreno, dated November 21, 2008 (“Moreno Report”);
4. “Archeological Delineation of the Abandoned Mount Olive Church Cemetery, City of Atlanta, Fulton County, Georgia” by Thomas H. Gresham, RPA, Southeastern Archeological Services, Inc., dated March 7, 2008 (“Gresham Report”);
5. Excerpt from report with section title “II. Cemetery Delineation” by unknown author, unknown date;
6. Excerpt from report with section title “definition of services” by unknown author, unknown date;
7. Quitclaim deed dated January 26, 2008 from INVESTGA.COM LLC to Community Renewal, LLC filed in Fulton County Superior Court; and
8. Copy of internet-based GIS plat of property.

Since the submission of the application there has been one deferral of the Application in order to comply with the various forms of public notice that are required, as well as address concerns outlined by the Staff in the email sent to the Applicant on April 22, 2009:

“ Mr. Marshall –

In preparation for today’s Commission meeting, even though you have requested a deferral of your application, I have gone ahead and reviewed the application for the relocation of the abandoned cemetery at 431 Pharr Road. In reviewing the application, I have found several deficiencies and/or missing pieces of documentation, as called for the City Ordinance:

Substantive:

1. “Evidence of ownership of the land...in the form of a legal opinion based upon a title search” (Section 38-62(a)) – The quitclaim deed provided with the application is not sufficient to meet this requirement. Please provide the required documentation to our office.
2. “A report prepared by an archeologist... “ (Section 38-62 (b)) – The Gresham report is sufficient, however there is an excerpt of another report (with a section title of “II. Cemetery Delineation” and noted as pages “5” and “6”) that contains slightly different conclusions as to the location and number of graves. Please provide clarification as to which report is conclusive, why the two reports came to different conclusions, the author and date of the second report, and why only a section of the second report is included in the application.
3. “A survey prepared by or under the direction of a registered surveyor showing the location and boundaries of the cemetery based on a archeologist’s report” (Section 38-62(c)) – No such survey was included with the application. The copy of the GIS plat provided with the application does not meet this requirement. Please provide such a survey to our office.
4. “A plan prepared by a genealogist...for identifying and notifying the descendants of those buried or believed to be buried in such cemetery...” (Section 38-62(d)) - The Moreno report appears to be minimally sufficient, although the Staff is concerned that the Atlanta History Center, Atlanta City Directory, and similar resources appear to not have been consulted by Mr. Moreno or at least were

mentioned in there were consulted. I would recommend that Mr. Moreno expand his narrative to fully explain his efforts to identify and notify potential descendents.

The additional notification procedures outlined on page 10 of the Moreno report should be initiated and completed prior to the Commission making their decision on the application. Please provide documentation that this notification work has been initiated and when it will be completed.

5. "A proposal for mitigation or avoidance of adverse effects of the planned activity on the cemetery..." (Section 38-62 (e)) – It is not clear from the documentation where the remains will be moved to, who will be actually doing the disinterment and reinterment, and who prepared the untitled and undated two-page description of these actions. Please provide this information.
Further, the price quote included with the application is for 42 adults and 8 infants for a total of 50 moves (preprinted on the top of the page), while there are handwritten notes that state "13 children – 5 adolescents – 27 adults" for a total of 45 moves. Both of these figures are different then the Gresham archeological report. Please provide clarification as to these differences.

Procedural:

1. The Applicant is required to "...to post the nearest public road and the burial ground not less than 30 days prior to both public hearings to be conducted by the UDC and the hearing before the City Council." (Section 38-64(a)) – The hand-written sign put on the property and along the road with your name and phone number do not satisfy this requirement as the signs did not mention the pending public hearing before the UDC or the reason for the public hearing (i.e. the intent of the applicant to relocate burial remains from the property.) In addition, there is no legal documentation (i.e. notarized affidavit) that such posting occurred 30 days prior to the pending public hearing.

Other:

1. All of the materials submitted to our office must be complete documents, dated, indicate authorship, and be clean, unmarked copies (no faxes of faxes with handwritten notes).

If you had not requested a deferral on your own, given that there is additional public notices that would have taken 30 days minimum to complete and several outstanding pieces of documentation likely will take some time to produce, the UDC Staff would have recommended that your application be deferred to a future Commission meeting at least 30 days from tomorrow's meeting.

I would like to set-up a short meeting with you to discuss the pending schedule, given that the public notice work and the hearing date need to be coordinated so that the requirements of the ordinance can be met.

In the few previous cemetery relocation reviews the Commission has done, the applicant and UDC Staff have had to work closely to met all the requirements of the ordinance, including those that come after the UDC's public hearings in the City's legislative process. I look forward to doing the same with your team.

Please contact me to set-up the aforementioned meeting. Thank you."

On April 27, 2009, the Applicant met with the Staff to review the email and discuss the various notice procedures called for in the City's ordinance.

On May 6, 2009, the Applicant submitted an additional package of information, including:

1. A title report from Southeast Title Corporation, Inc. dated April 20, 2009;
 2. An amendment to the Moreno Report, by Lucas Moreno, dated May 4, 2009;
 3. "Plan for Reinterment and Disinterment – (In conjunction with R. S. Webb Plan)", by Dawn Memorial, Inc., dated April 30, 2009;
 4. "Disinterment / Exhumation Details" by R.S. Webb and Associates, dated April 30, 2009;
- and

On May 12, 2009, the Applicant provided an affidavit noting the physical posting of the property, per the City's ordinance. Shortly after May 28, 2009, the Applicant provided a copy of a survey of the proposed property in question.

On June 8, 2009, the Applicant faxed an additional package of information, including a title report from Greater Atlanta Title, LLC, dated October 12, 2008, and a short narrative from the Applicant disputing some claims by interested parties. On June 9, 2009, the Staff received a package of deed, tax, and Fulton County recordation information from Southeast Title Corporation, Inc.

The Staff would also note that since the filing of the application, over time the Staff has received information and documents from persons / parties interested in the application, including:

1. an additional archeological delineation report from 2005 by TRC ("TRC Report");
2. a GSU student report and PowerPoint presentation on Bagley Park by Susan Conger ("Conger Report") from December, 2008;
3. additional deed documents and information contesting the validity of a recent tax sale involving the property; and
4. emails, including one from a descendent of four of the deceased.

Analysis of Materials Submitted to Date

The Staff has the following conclusions regarding all the materials submitted to date, as referenced by the City ordinance section / paragraph number:

38-62 (a) – Evidence of ownership

The Applicant has provided copies of two titles searches, one effective October 12, 2008 and one effective April 20, 2009. The earlier of the two titles reports was prepared for Weissman, Nowack and Curry, but no legal opinion was produced as a result of that title search. The second of the two title reports, also noted as a "certificate of title", was apparently signed by a staff attorney from the title corporation, although the signature on the copy submitted to the Staff is illegible and partially erased / blanked out. If the Applicant can produce a complete copy of the April 20, 2009 title report / certificate of title with a full attorney's signature, the Staff finds that the Applicant has meet the specific requirements of the ordinance.

The Staff makes this specific finding while acknowledging the substantive concerns about the chain of title raised by the interested parties. It is the Staff's understanding that their concerns focus on whether or not the property was ever taxable, thus being subject to a tax sale for unpaid taxes, and thus could have ever been purchased through a tax sale by the Applicant.

The Staff would recommend that the Applicant provide for the Commission files an original, signed, complete, and accurate copy of the April 20, 2009 title report / certificate of title.

38-62(b) – Archeologist report

The Staff finds that the Gresham Report is sufficient, although it does raise questions about the circumstances of the cemetery, which are referenced below. The Staff would note that the Gresham Report concludes as follows:

“...in regard to the principal task of this report, we believe there are between 75 and 120 graves present, with the possibility of even more. We are quite confident about the boundaries of the cemetery that we delineated as shown in Figure 8.”

In its initial review of the Gresham Report documented in its email to the Applicant of April 22, 2009, the Staff raised concerns about an apparent excerpt from another archeological report. The Staff has learned that this excerpt is from the TRC Report. Though requested by the Staff, the Applicant did not provide a full copy of this report, nor try to explain the differences between the Gresham Report and the TRC Report, even though the Gresham Report specifically references the earlier work. The TRC Report was provided by interested parties.

38-62(c) – Land survey

The Applicant has provided a survey by a registered land surveyor that shows a proposed property boundary that is essentially a square aligned to be parallel but set back from Pharr Road. Within that proposed property boundary is a graphic labeled as: “approx. loc. boundary line of cemetery”. The Staff has several concerns about this survey.

First, the shape or overall size of the cemetery boundary does not match that shown in the Gresham Report. For example, the Gresham Report shows a suggested cemetery “width” about the length of the retaining wall along Pharr Road. The survey shows a cemetery shape / “width” approximately half that distance. Further, the polygon shape shown on the Gresham Report is different from that shown on the survey. Lastly, the TRC Report (which the Gresham Report “strongly encourages” the Applicant to investigate and consult) suggests that there might be two graves to the east of the currently understood cemetery boundary. That TRC Report notes that their investigation of the area in and around the understood eastern edge of the cemetery was inconclusive.

Second, the survey does not put the proposed property boundary in context with the adjacent private properties, the Pharr Road right-of-way, Frankie Allen Park, and as-built features. This is particularly significant considering that the Gresham Report notes that there are grave sites immediately behind the retaining wall along Pharr Road, which according to the proposed property boundary would be outside the property boundary. Additionally, the Gresham Report specifically states: “It should be noted that some graves extend into the right-of-way of Pharr Road, based on a right-of-way (ROW) marker at the northwest corner of the cemetery.” Further, there are non-historic and potentially historic built features in the area, such as the potentially historic, brick coping outline shown in the Gresham Report, that are not shown on the survey. Non-historic features that should be shown on the survey would include utility poles, sidewalks, street signage, etc.

Third, there is basic information that would normally be shown on a complete survey that is not included. There are no right-of-way lines; no “point of beginning reference”, no adjacent property lines, and no existing boundary markers are shown, such as right-of-way markers, stakes, or pipes. Further, it is not clear that the rebar indicated as the corner points of the proposed boundary were set or found in the field. The Staff would add that in contrast, the Gresham Report provides specific in-the-field references / indicators that they used to delineate the cemetery.

Lastly, the survey copies submitted to the Staff are not to scale.

The Staff would recommend that the Applicant provide an original, signed, complete, accurate, and to-scale survey that includes all standard survey information, references all as-built features in and around the proposed property, and that accurately reflects the cemetery boundary recommended in the Gresham Report.

38-62(d) – Genealogist report and notification plan

As noted in the April 22, 2009 email to the Applicant, the Staff was concerned about the sufficiency of the work by Moreno, although it did note that the report was “minimally sufficient” as to meeting the City ordinance. Further, it advised the Applicant to implement the two notice recommendations included at the end of the Moreno report; posting the property with the notice of the request and directly people to contact the Commission office or come to the June 10th hearing; and running an ad in the *Fulton County Daily Report*. According to the affidavit and copy of the notice text filed with the Staff, the property was posted on May 7, 2009 advising interested parties about the process and the upcoming hearing.

The Applicant has not supplied documentation that the later of the two notice efforts was initiated or completed. The Staff would recommend that the Applicant provide a publishing/publisher’s affidavit regarding the text, frequency, and length of the running of the notice in the *Fulton County Daily Report* to confirm that its satisfies the Moreno Report recommendation.

However, information has been provided by interested parties that raise concerns about the thoroughness of the notification and follow-up efforts by the Applicant. The Staff understands that the notification work undertaken by the Applicant has resulted in the identification of at least one descendent (Elon Osby) of four people buried in the cemetery. Ms. Conger informed Ms. Osby of the proposal after seeing the sign posted on the property. This descendent, who also is the granddaughter of William Bagley (for whom the park was named) has contacted our office. She indicated the following in her email on June 8, 2009:

“I have spoken with most of the few remaining descendents of Bagley Park who have relatives buried there and none of them knew anything until I called them.”

“In 2005, the property was owned by St. Mark Church, Rev. Leroy Barnes, who bought the property for the taxes and from the point of their purchase the property became tax-exempt.”

“I have tried to reach Rev. Barnes but failed, but his wife said that he didn’t deal with the cemetery anymore.”

The Conger Report also refers to Ms. Osby and adds additional information about the cemetery and descendents of those buried there. The reports notes:

“The Mount Olive Cemetery is the area of most concern in terms of preservation and rehabilitation [per Ms. Conger’s assessment]...Pastor Leroy McClendon (now deceased) of Mount Olive Church asked Reverend Leroy Barnes of St. Mark Missionary Baptist to assist in caring for the cemetery as many of the original descendents attend his church.”

“...the previously mentioned oral interview with one of the few remaining descendents, Elon Osby, points to a desire to commemorate the cemetery...[such as] the installation of headstones and a visible plaque describing the original neighborhood and its history is the preference of Ms. Osby.”

In the reports appendix, the following citations of note are listed, including those related to previous efforts to improve the cemetery by the Community Housing Resource Center:

“Bagley Family (courtesy of Elon Osby)

BagleyPark-Fallen EOsby interview 12-3-08 (conducted by author)

Bagley Lineage

BagleyFamilyPhotos

UncleJohnnyBagley

WmBagleyJr-ribshack

Community Housing Resource Center Project – 2005

CommHousingCtrGRANT

TRC-Mt Olive Arch Rpt FINAL 5-10-05

CommHousingCtr-OralInterview2-Macedonia Park

CommHousingCtr-OralInterview3-Macedonia Park

CommHousingCtr-OralInterview4-Macedonia Park

CommHousingCtr-OralInterview5-Macedonia Park

CommHousingCtr-OralInterview-Macedonia Park

CommHousingCtrQUES-FORMER RESIDENTS AND DESCEDEENTS OF MACEDONIA PARK”

In conclusion, the Staff finds that there is substantial additional follow-up work that needs to be done with descendents of those buried in the cemetery. The Staff’s conclusion is based on the following:

- original concerns about the identification and notification efforts by Moreno;
- apparent efforts and fruitful identification results by Ms. Conger;
- apparent efforts and fruitful identification results by the now defunct Community Housing Resource Center, including a potential list of descendents;
- contact from Elon Osby and her documented interest in the future of the cemetery;
- Elon Osby’s contact with other descendents about the proposal and their lack of information;
- indication by several sources that there are descendents of those buried in the cemetery who were or are attendees of St. Mark Church; and
- Applicant’s previous contact with the pastor of St. Mark Church.

The Staff would recommend that the Applicant complete additional identification and notification efforts taking advantage of documents provided to the Staff; individuals who have completed previous research on the cemetery, former neighborhood, and park; and contacting the already identified descendent to request any assistance she is willing to give.

38-62(e) – Mitigation / disinterment plan

Taking into account the latest version of the proposed disinterment and reinterment plan documents, the Staff finds that they are sufficient and technically meet the City Ordinance. The remains will be removed from the subject cemetery by Dawn Memorial Cemetery staff under the supervision R.S. Webb and Associates (specifically Steve Webb) and reinterred at Dawn

Memorial Cemetery, in Decatur, Georgia. Mr. Webb will not supervise the reinterment, but will prepare a report of the disinterment process and his findings thereof.

However, the Staff finds that given the apparent interest in the future of the cemetery by at least one known descendent, descendent(s) likely also have an interest in the specific proposal to disinter the burials, as well as interest in the final reinterment of the burials if they are in fact disinterred from the subject property. The Staff would recommend that the Applicant specifically solicit the opinions of descendents as to the appropriateness of the proposed disinterment and the potential reinterment site if the burials are in fact disinterred from the subject property.

The Staff would recommend that, when finished, any disinterment report prepared by R.S. Webb and Associates be provided to Dawn Memorial Cemetery or any other final reinterment site, and the Atlanta History Center for archival reference and future use.

The Staff would also recommend that the Applicant provide for the Commission files final, original, signed copies of both the Dawn Memorial Cemetery's "Plan for Reinterment and Disinterment" dated April 30, 2009 and the R. S. Webb and Associates' "Disinterment / Exhumation Details" dated April 30, 2009.

Other Items of Concern

In the April 22, 2009 email, the Staff noted the requirement to post the cemetery and the nearest road at least 30 days prior to the hearing. The Applicant's submitted affidavit attests to such posting.

Staff Recommendation: Based upon the following:

- a) The application and accompanying documentation is incomplete, unclear, or unfinished, per the State Law and Sec. 38-62 and 38-63 of the City Code;
- b) The proper public notice of the hearing has been accomplished, per Section 38-61 and 38-64 of the City Code;

Staff recommends deferral of the Application for a Type III Certificate of Appropriateness (CR-09-061) to allow the relocation of an existing cemetery located at 431 Pharr Road, to allow time for the Applicant to address the following issues:

1. The Applicant shall provide for the Commission files an original, signed, complete, and accurate copy of the April 20, 2009 title report / certificate of title, per Section 38-62(a);
2. The Applicant shall provide an original, signed, complete, accurate, and to-scale survey that includes all standard survey information, references all as-built features in and around the proposed property, and that accurately reflects the cemetery boundary recommended in the Gresham Report, per Section 38-62(c);
3. The Applicant shall provide a publishing/publisher's affidavit regarding the text, frequency, and length of the running of the notice in the *Fulton County Daily Report* to confirm satisfaction of the Moreno Report recommendation, per Section 38-62(d);

4. The Applicant shall complete additional identification and notification efforts taking advantage of documents provided to the Staff; individuals who have completed previous research on the cemetery, former neighborhood, and park; and contacting the already identified descendent to request any assistance she is willing to give, per Section 38-62(d);
5. The Applicant shall specifically solicit the opinions of descendants as to the appropriateness of the proposed disinterment and the potential reinterment site if the burials are in fact disinterred from the subject property, per Section 38-62(d) and (e);
6. When finished, any disinterment report prepared by R.S. Webb and Associates shall be provided to Dawn Memorial Cemetery or any other final reinterment site, and the Atlanta History Center for archival reference and future use, per Section 38-62(e);
7. The Applicant shall provide for the Commission files final, original, signed copies of both the Dawn Memorial Cemetery's "Plan for Reinterment and Disinterment" dated April 30, 2009 and the R. S. Webb and Associates' "Disinterment / Exhumation Details" dated April 30, 2009, per Section 38-62(e); and
8. The additional documentation and research shall be completed and evidence there of submitted at least eight (8) days prior to the Commission meeting to which this application has been deferred.