#### **Item 5 - Correspondence**

From: Diane E. Feuerherd

To: MCP-Chair

Cc: Mills, Matthew; Susie Scofield; Crane, Brian; Soo Lee-Cho

Subject: Paramount Construction, Inc. / 5200 Murray Road / Removal of Property from Burial Sites Inventory

**Date:** Wednesday, May 20, 2020 11:45:59 AM

Attachments: <u>image003.png</u>

2020.05.20 Ltr to Chair Anderson, re Paramount Construction, Inc with exhibits.pdf

#### Dear Chair Anderson:

Good morning. This law firm represents Paramount Construction, Inc., the owner of the residential property at 5200 Murray Road in Chevy Chase. Please see the attached letter, concerning the removal of the property from the County's Burial Sites Inventory, as a result of the favorable judgment in the litigation concerning the same.

Thank you for your consideration.

Sincerely,

Diane E. Feuerherd

Attorney



200-B Monroe Street = Rockville, MD 20850 T: 301.762.5212 = F: 301.762.6044

website | vCard | confidentiality | email



200-B MONROE STREET, ROCKVILLE, MARYLAND 20850 P: 301.762.5212 F: 301.762.6044 WWW.MILLERMILLERCANBY.COM All attorneys admitted in Maryland and where indicated.

PATRICK C. MCKEEVER JAMES L. THOMPSON LEWIS R. SCHUMANN JODY S. KLINE JOSEPH P. SUNTUM ROBERT E. GOUGH DONNA E. MCBRIDE (DC) GLENN M. ANDERSON (FL) SEAN P. HUGHES (DC) CATHY G. BORTEN (DC) MICHAEL G. CAMPBELL (DC, VA) SOO LEE-CHO (CA)
DAVID A. LUCAS (DC)
DIANE E. FEUERHERD
CHRISTOPHER L. YOUNG (VA)
CALLIE CARNEMARK (VA)
JAMES T. ROTH (DC)

May 20, 2020

By Email Only
Casey Anderson, Chairman
Montgomery County Planning Board
M-NCPPC
8787 Georgia Avenue
Silver Spring, MD 20910
MCP-Chair@mncppc-mc.org

Re: Paramount Construction, Inc.

5200 Murray Road, Chevy Chase, MD 20815 ("Property") Removal of Property from the Burial Sites Inventory,

As a Result of a Final Judgment in *Paramount Construction*, *Inc.* v.

Scofield, et al., Case No. 447344-V

#### Dear Chairman Anderson:

This law firm represents Paramount Construction, Inc., the owner of the residential property at 5200 Murray Road, Chevy Chase, Maryland 20815 ("Property").

In May of 2019, Paramount Construction noted its objection to the inclusion of its Property in the Burial Sites Inventory (HP-324 "Shoemaker (Isaac) Family Cemetery"), in part because whether there was a cemetery on the Property was the subject of pending litigation in the Circuit Court for Montgomery County, *Paramount Construction, Inc. v. Susan Werner Scofield*, Case No. 447344-V ("Litigation"). A copy of our letter of objection, dated May 14, 2019, is enclosed as **Exhibit 1** for reference. On May 16, 2019, Soo Lee-Cho, Esq. of this firm appeared on behalf of the Paramount Construction at the Planning Board's hearing concerning the Inventory and further objected to the Property's premature inclusion in the Inventory. In response, the Planning Board indicated that it would honor the outcome of the pending Litigation and remove the Property from the Inventory, if the Circuit Court determined there was no burial site on the Property. A copy of the transcript of the hearing is enclosed as **Exhibit 2**; the pertinent discussion is located at 28:10 to 31:5 ("CHAIR ANDERSON: . . . So if you're going to court to argue about this, when you're done arguing about it, and the court decides whether you are right or you are wrong, you can just

send an email to our staff and append the judgment and say here it is. And they can send it to the Planning Board as a consent item and we could be done with it. Is that satisfactory? MS. LEE-CHO: We would agree.")

On January 7, 2020, the Circuit Court entered a final Opinion and Order in the Litigation, finding "that Plaintiff [Paramount Construction] has met its burden of proof in this matter; and that there is no 'burial site' on the Plaintiff's Property known as 5200 Murray Road, Chevy Chase, Montgomery County, Maryland." (Exhibit 3). While we acknowledge that the defendants have noted an appeal to the Court of Special Appeals, the Circuit Court's decision has not been stayed and constitutes the Court's final Opinion/Order.

Based on the foregoing, Paramount Construction requests that the Planning Board, pursuant to the instruction of the May 16, 2019 hearing, remove the Property from the Burial Sites Inventory.

Please contact Soo Lee-Cho (<u>slcho@mmcanby.com</u>) to discuss this matter further. I will be on maternity leave, beginning May 22, 2020 and returning on or around August 24, 2020. Thank you for your consideration.

Sincerely,

MILLER, MILLER & CANBY

: Fwerherd

Diane E. Feuerherd

Cc: Matthew T. Mills, Esq. (<u>matthew.mills@mncppc.org</u>), Principal Counsel for M-NCPPC Susan W. Scofield (<u>scofieldlaw@aol.com</u>),

Defendant and Counsel for remaining Defendants in the Litigation Dr. Brian Crane, PhD (Brian.Crane@montgomeryplanning.org)

# EXHIBIT 1



200-B MONROE STREET, ROCKVILLE, MARYLAND 20850 P: 301.762.5212 F: 301.762.6044 WWW.MILLERMILLERCANBY.COM
All attorneys admitted in Maryland and where indicated.

PATRICK C. MCKEEVER JAMES L. THOMPSON LEWIS R. SCHUMANN JODY S. KLINE JOSEPH P. SUNTUM ROBERT E. GOUGH

DONNA E. MCBRIDE (DC)
GLENN M. ANDERSON (FL)
SEAN P. HUGHES (DC)
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MICHAEL G. CAMPBELL (DC, VA)

SOO LEE-CHO (CA)
DAVID A. LUCAS (DC)
DIANE E. FEUERHERD
CHRISTOPHER L. YOUNG (VA)
CALLIE CARNEMARK (VA)
JAMES T. ROTH

May 14, 2019

By Regular Mail and Email
Casey Anderson, Chairman
Montgomery County Planning Board
M-NCPPC
8787 Georgia Ave.
Silver Spring, MD 20910
MCP-Chair@mncppc-mc.org

Re: Montgomery County Planning Board Meeting on May 16, 2019

Agenda Item #3 ("Adoption of the Burial Sites Inventory and Guidelines")

HP-324 "Shoemaker (Isaac) Family Cemetery"

Property Owner Paramount Construction Inc.'s Objection to Inclusion of

**Property in Inventory Pending Litigation** 

Dear Chairman Anderson and Members of the Montgomery County Planning Board:

This law firm represents Paramount Construction, Inc., the owner of 5200 Murray Road in Chevy Chase, Maryland ("Property"), which has been identified within the draft Burial Sites Inventory and Guidelines as containing a portion of the "Isaac Shoemaker Family Cemetery" (or HP-324).

Paramount Construction has repeatedly objected to identifying its Property, or any portion thereof, as a burial site. There are no recorded deeds or plats that identify a cemetery on the Property. Several descendants of Isaac Shoemaker and neighbors who do not like having a developer as a neighbor, all led by Nancy Shoemaker Werner, point to an exclusion of 1/7 of an acre "burial plot" in the deed conveying the 60-acre farm in the 1920s. No plat, survey of the land, or metes and bounds description of the burial plot exists. As a matter of law, "testimony of a surveyor as to the location of the boundaries on the ground is necessary because as to the identity of the land . . . a deed seldom, if ever, proves itself." *Porter v. Schafer*, 126 Md. App. 237, 266 (1999) (cleaned up). After the archeological study confirmed that there was no evidence of a burial site on the Property, Paramount Construction filed an Action to Quiet Title, in which Ms. Werner

is a defendant, *Paramount Construction, Inc. v. Susan Werner Scofield*, Case No. 447344-V ("Litigation"). The trial is set for this Thursday, May 16, 2019.

When Ms. Werner submitted the Isaac Shoemaker Family Cemetery (HP-324) for Inventory consideration in 2018, she cited the Litigation on Page 3 of the Inventory Form.

In March of this year, Paramount Construction received a letter from Rebecca Ballo of the Planning Department's Historic Preservation Program, concerning the draft inventory. Undersigned counsel responded in kind to Ms. Ballo, and the Program's archeologist Dr. Brian Crane. First, on March 19, Dr. Crane wrote by email that the subject cemetery was not located on Paramount Construction's Property: "The location they mapped appears to be in the neighboring lot, but very close to the boundary with 5200 Murray Road." Next, on March 22, undersigned counsel submitted a written objection to identifying the Property as a burial ground. Finally, also on March 22, Ms. Ballo confirmed receipt of the objection, forwarded to legal staff for review, and indicated that she would follow up if additional information was needed. Copies of Dr. Crane's March 19 email, Paramount Construction's objection letter and Ms. Ballo's response are enclosed. No further correspondence from the Planning Department with Paramount Construction was made, including no notice of the Planning Board's May 16 meeting and no clarification that the burial ground is located on 5200 Murray Road, rather than the subject Property.

Because of the Litigation, which includes a careful investigation of the Maryland Land Records and an archeological study of the subject ground that together refute the existence of a burial ground on the Property, as well as render Paramount Construction and its counsel unable to attend the Planning Board's May 16 meeting, we ask that the Planning Board stay consideration of including the Property (Isaac Shoemaker Family Cemetery or HP-324) within the Inventory until a final judgment in that case is reached.<sup>4</sup> Alternatively, we ask that the Planning Board clarify and confirm that HP-324 is <u>not</u> located on Paramount Construction's Property.

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<sup>&</sup>lt;sup>1</sup> The materials for Agenda Item No. 3, in Attachment B, make reference to the "2006 Inventory" related to HP-324. This is incorrect, as HP-324 was not considered until 2018. The map of the 2006 Montgomery County Cemetery Inventory Digital Map (<a href="https://www.montgomeryplanning.org/historic/education/documents/map.pdf">https://www.montgomeryplanning.org/historic/education/documents/map.pdf</a>) does not include the subject property.

<sup>&</sup>lt;sup>2</sup> "Isaac Shoemaker Family Cemetery Form," Montgomery County Cemetery Inventory Revisited, *available at* <a href="https://mcatlas.org/filetransfer/HistoricPreservation/Cemeteries/324\_Shoemaker\_Family\_Chevy-Chase\_2018/324\_Shoemaker\_Family\_Chevy-Chase\_2018\_Survey.pdf">https://mcatlas.org/filetransfer/HistoricPreservation/Cemeteries/324\_Shoemaker\_Family\_Chevy-Chase\_2018\_Survey.pdf</a>. Page 3 of this Form identifies the Litigation:

On May 4, 2018, attorneys for the owner of the residential parcel at 5200 Murray Road, Chevy Chase, Maryland, 20815, have filed Civil Action No. V447344 regarding the cemetery. Nancy Shoemaker Werner and Susan Werner Scofield have filed a Rule 2-214 Motion to Intervene. Descendants of Isaac and Ann Shoemaker, as well as the neighboring community of Brookdale, are concerned that the Isaac Shoemaker family burial ground is under threat of imminent development.

<sup>&</sup>lt;sup>3</sup> A copy of Dr. Crane's email of March 19, 2019 is enclosed.

<sup>&</sup>lt;sup>4</sup> Even if Paramount Construction's request to stay is denied,

Thank you very much for your consideration.

Sincerely,

MILLER, MILLER & CANBY

DraneFeverherd

Diane E. Feuerherd

Cc: Susan Werner Scofield (<u>scofieldlaw@aol.com</u>), counsel for Nancy Shoemaker Werner Brian Crane, PhD (<u>Brian.Crane@montgomeryplanning.org</u>)

# EXHIBIT 2



# Transcript of Planning Board Meeting

**Date:** May 16, 2019

Case: Transcription Services

**Planet Depos** 

**Phone:** 888.433.3767

Email:: transcripts@planetdepos.com

www.planetdepos.com

# Transcript of Planning Board Meeting Conducted on May 16, 2019

THE MONTGOMERY COUNTY PLANNING BOARD OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION TRANSCRIPT 0 F PROCEEDINGS I T E M 3 8787 Georgia Avenue Silver Spring, Maryland 20910 May 16, 2019 12 Volume 1 of 1 13 BEFORE: 14 Casey Anderson, Chair 15 Norman Dreyfuss, Vice-Chair 16 Natali Fanzi-Gonzalez, Commissioner 17 Gerald R. Cichy, Commissioner 18 Tina Patterson, Commissioner 20 Job No.: 246665 21 Pages: 1 - 37 22 Transcribed by: Molly Bugher

1 and associated appendices that we developed to 2 implement that inventory, and the review of 3 certain projects under the purview of this Board. 4 And to review the results of the public outreach 5 and that we have been conducting since February, 6 and the modifications that we have made. Once 7 again, the inventory and guidelines are intended 8 to implement two ordinances that the County 9 Council passed in October of 2017. Code 33A17 10 requires the Planning Board to create and maintain 11 an inventory of all the burial sites and 12 cemeteries in the County. And that's it defined 13 as, essentially, any place where a person has been 14 buried, including ashes in a columbarium, but not 15 ashes that have been sprinkled on the ground. And 16 that went into effect in February of 2018. County 17 Code 1831 requires that the Planning Board protect 18 burial sites during review of preliminary plan 19 applications. Essentially, if a preliminary plan 20 for a subdivision is brought before the Board for 21 review, if there is a cemetery within the parcel, 22 it is to be parceled off separately in such a way

PROCEEDINGS

MR. BRIAN CRANE: Good morning and sorry

2

3 for the momentary technological kerfuffle. So

4 we're here to bring back the Burial Sites

5 Inventory and Guidelines. We briefed the Board

6 about these, about the draft inventory and

7 guidelines on February 21. And since that time we

8 have engaged in public outreach about the

9 inventory and guidelines, and consulted with a

10 number of institutional organizational,

11 governmental stakeholders about both. And have

12 made minor revisions to both the guidelines and

13 the inventory which we have described in our staff

14 report to you. I wanted to just take a few

15 minutes to review the three things that we did in

16 February just to bring everybody up to speed about

17 what this is. And I guess I actually need to --

18 sorry. I'm Brian Crane, I'm the archaeologist for

19 the History and Preservation program in the

20 Department of Planning. So our purpose and goals

21 this morning is to review the inventory as to its

22 scope, methodology, and purpose, The guidelines

1 as to preserve that for future generations. And,

if necessary, certain historical and

3 archaeological investigations are to be done to

4 establish the boundaries of that cemetery so that

5 it can be protected. Under certain limited

6 circumstances a cemetery can be moved if it's

7 simply not possible to parcel off the cemetery in

8 a way that allows for future use of the parcel to

9 go forward. And that went into effect in July of

10 2018. The inventory itself was created through

11 the efforts of many volunteers, initially between

12 2004 and 2010. It was a project that was led by

13 Peerless of Rockville, and it identified over 260

15 1 certess of receivine, and it identified over 200

14 cemeteries and burial sites across the county.

15 And the results of that were Inc. into MC Atlas.

16 Following the passage of the two ordinances in

17 October 2017 Montgomery Preservation Inc. mounted

18 a massive volunteer effort to revisit all of the

19 sites, or as many of them as possible in the

20 field, and to do additional historical research to

21 identify additional cemeteries and burial sites.

22 They have physically visited over 260 sites and

4

## Transcript of Planning Board Meeting Conducted on May 16, 2019

1 found through historical research an additional 50

2 sites. The results of those are in an updated

3 layer on MC Atlas. It includes three kinds of

4 sites; the majority over 240 points, are what are

5 considered to be known locations. Those are

6 locations where there is still physical evidence

7 of the cemetery visible on the surface, or where

8 historical research is very clear about the

9 location of a cemetery that may no longer be

10 plainly visible on the surface. There are also

11 approximately 74, approximate sites. Those are

12 sites that the historical research indicates there

13 was an area where a cemetery was located but we

14 don't know exactly where it was and those are

15 indicated by clear dots on the MC Atlas display as

16 opposed to green dots. There are also parcel

17 areas. Most of the items in the inventory are

18 represented by a single point. They don't include

19 any information about boundaries. The exception

20 to that are prehistorical archeological sites that

21 are int eh records of the Maryland Historical

22 Trust that are known to include human burials.

6

1 Those are mostly what archaeologist called

2 woodland village sites on islands, and areas along

3 the Potomac River. Those locations are considered

4 sensitive and so they are rendered in our

5 inventory as the boundaries of the parcels that

6 contain them. In the case of the sites, those are

7 large park areas and other large holdings along

8 the Potomac River. So the hatched area that you

9 see in several places along the Potomac River that

10 means that that parcel contains one or more known

11 burial sites, but the exact location is considered

12 to be sensitive. The records in the MC Atlas

13 inventory include a number of basic descriptive

14 fields and links to the forms created by

15 volunteers. The original cover sheet from the

16 2004 to 2010 inventory, and the more detailed

17 inventory forms that were prepared by Montgomery

18 Preservation Inc. in 2018. The guidelines that we

19 have been developing since last September are

20 intended to establish procedures to adequately

21 establish the boundaries of burial sites, to

22 establish standards, to ensure preservation of

1 those burial sites, establish standards to ensure

adequate maintenance of those sites going forward,

establish procedures for adding or deleting, or

4 excluding from the burial site inventory, and

establish procedures for making the data available

6 to the public electronically. The information

7 that we have made publicly available, we have

8 created a website that is linked from the historic

9 preservation website, which is internal, of

10 course, linked from the Planning Department

11 website; the URL is shown here. There is also

12 information about the inventory on the Montgomery

13 Preservation Inc. website, the volunteers who did

14 the cemetery revisit project; and they are also

15 available through an MC Atlas layer. Our website

16 includes information about the historical

17 background of the volunteer projects that created

18 the inventory, copies of the two ordinances passed

19 by the County Council, a copy of the draft

20 inventory that we briefed the Board on in

21 February, and links to the videos of the three

22 public meetings that we held in March and April.

1 We, as part of the public outreach, we sent

letters to all of the individuals and

organizations that are listed as owners of the

4 parcels that contain any of the points that were

on the inventory. And then, tracked the responses

6 that we received. People asked various questions

7 of us by phone, or letter, or email and we have

8 tracked each of those, and our responses to them.

We held a volunteer appreciation event for the

10 volunteers of the Montgomery Preservation Inc.

11 project in February. And then we had three public

12 meetings, the first on March 22nd in this

13 auditorium. And then to following public meetings

14 at the public libraries in Germantown and Olney.

15 Approximately 60 members of the public came to

16 those meetings. In addition, to that outreach, we

17 consulted with a number of governmental and

18 organizational stakeholder partners including all

19 of the ones that are listed here to get their

20 input both about the inventory and about the

21 guidelines. In terms of significant input that we 22 received that resulted in some modifications, the

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#### Transcript of Planning Board Meeting Conducted on May 16, 2019

1 Park Service wanted us to redact the precise

2 location information for all of the burial sites

3 on Park Service land. That is to say that they

4 considered those potentially sensitive, so those

locations are simply represented by the boundaries

of C&O Canal Park. Another significant --

COMMISSIONER DREYFUSS: When you say

they wanted you to redact them, meaning --

MR. CRANE: Meaning that the online map

10 doesn't show the exact spot where the burial is,

11 but rather shows the boundaries of the parcel that

12 contains it. So in that case, it's the boundaries

13 of C&O Canal Park.

COMMISSIONER DREYFUSS: Is that in terms

15 of identification and what they might be doing is

16 that kind of what the --

17 MR. CRANE: No, the detailed information

18 is available both to them and to the Planning

19 Department. It just means that other members of

20 the public can go to MC Atlas that yes, indeed,

21 the C&O Canal Park is known to contain burial

22 sites, but it doesn't tells them exactly where

1 they are. And that is consistent with the

2 guidelines that we prepared that where the

3 location information is considered sensitive.

4 That is, there's some concern that there may be

vandalism of that site. There is a provision to

6 essentially include the information that this

parcel includes a burial on it somewhere.

COMMISSIONER DREYFUSS: Okay. Thank

9 you.

10 MR. CRANE: The other significant input

11 that we received was from the Maryland Commission

12 mission on Indian Affairs, who would like us to

13 include in our guidelines reference to their

14 protocols for the recovery and recordation of

15 Native American burial sites. And essentially

16 that those burial sites are, when archaeologist

17 record them they should draw the remains, but not

18 photograph them and that those remain should be

19 reinterred in consultation with the Maryland

20 Commission on Indian Affairs, and reference to

21 consulting with them is included now in the

22 revised guidelines that we prepared. So the

1 physical revisions, we have been logging those.

2 So among the input that we received from the

public, several members came forward with

4 additional information that helped identify, in

some cases, errors in where the point had landed.

So where I could research and verify the new

7 information that we were given I updated the

8 inventory to reflect the corrected information.

9 And each of those is shown here. As I mentioned,

10 the guidelines we revise those in response to the

11 institutional input that I just mentioned, as well

12 as comments from the Board made at our February

13 21st meeting. So broadly speaking, what we did

14 was we refined the language about how the Board is

15 to consider the input of descendants for instances

16 where a cemetery may be located. We addressed the

17 applicability of the guidelines to crime scenes

18 specify that the guidelines are not intended to

19 apply human remains that are found associated with

20 a crime in a police matter. And applicability to

21 projects not subject to Planning Board review

22 saying in those cases -- say for example, a

10

1 building permit, the guidelines don't specifically

2 apply to those cases, but do represent best

3 practices that we would recommend in those cases.

Also, we added an infographic. We replace

Appendix D which was initially just a table with

6 item descriptions and dates, and what we hope is a

7 more informative infographic that will make the

8 information about the process a little easier to

9 understand for the public. Our next steps

10 essentially involve continuous improvement. As I

11 mentioned, we have over 70 locations that are

12 considered approximate in the inventory. And we

13 would like to do continuing historical and

14 archaeological investigations to refine those

15 locations so that we can describe them as known

16 points. We would like to do predictive modeling

17 research. We know that there are a large number

18 of burial sites that are necessarily missing from

19 the inventory. More than a third of Montgomery

20 County's population prior to the Civil War were

21 held in slavery, and yet, we have only a handful

22 of possible locations where enslaved persons may

12

## Transcript of Planning Board Meeting Conducted on May 16, 2019

1 have been buried. So we know that there are a

- 2 large number of, potentially scores, of additional
- 3 sites whose location has been lost to history.
- 4 But it may be possible to recover those through
- 5 historical and archaeological investigations. We
- 6 would like to, where possible, to replace the
- 7 points in the inventory with actual boundaries of
- 8 cemetery locations, which will help both property
- 9 owners and this Board and others to manage those
- 10 resources. We would like to do research into what
- 11 may potentially make certain of the cemetery sites
- 12 in our inventory historically significant. There
- 13 are a few that are currently listed on the
- 14 locational atlas for historic sites, like
- 15 Manakasie (phonetic) Cemetery, Aspen Hill Pet
- 16 Cemetery, and there are several others that are
- 17 either listed in their own right, or are included
- 18 within the boundaries of historic districts. But
- 19 we need to understand what potentially makes any
- 20 individual cemetery significant, and may make it
- 21 worthy of listing on the historical atlas, if that
- 22 is warranted. We also wish to create more user
  - 14
- 1 friendly versions of the guidelines and continue
- 2 doing public outreach and education programs, as
- 3 well as training programs for our partner --
- 4 governmental and organizational partners,
- 5 educational sessions for people here in the
- 6 Planning Department about land-use and with
- 7 Montgomery County Department of Planning Services
- 8 and others who will have questions about the
- 9 inventory and how to implement it. And our
- 10 recommendation is that the Board adopt the revised
- 11 inventory, and our revised Guidelines. I will be
- 12 happy to answer any questions you may have.
- 13 COMMISSIONER FANI-GONZALEZ: Good
- 14 morning. I apologize I missed the earlier part of
- 15 your presentation, but I did hear you speak to the
- 16 treatment of remains that are identified as those
- 17 of Native American communities. I'm assuming that
- 18 the same treatment would apply to other faith
- 19 communities and their designation regarding the 20 treatment of remains?
- 21 MR. CRANE: The guidelines provide for
- 22 the respectful treatment of any remains that are

- 1 identified pursuant to our guidelines. Among the
- 2 various cultural groups is that may have
- 3 affiliation with burial sites in the inventory,
- 4 only the Maryland Commission on Indian Affairs has
- 5 developed specific protocols for handling. There
- 6 aren't others. We did send a letter asking for
- 7 consultation from the Maryland Commission on
- 8 African-American affairs, for example; we haven't
- 9 heard back from them. We can pursue that further.
- 10 But the only specifically different procedures
- 11 that have been identified so far have been in
- 12 consultation with the Maryland Commission on
- 13 Indian Affairs.
- 14 COMMISSIONER FANI-GONZALEZ: May I
- 15 recommend then that you engage the Montgomery
- 16 County Interfaith Advisory Council and asked their
- 17 faith leaders that may have some insight as to the
- 18 treatment of remains from the various faith
- 19 communities so that we are somewhat comprehensive
- 20 but the language also in this document doesn't
- 21 limit us just to Native American communities, but
- 22 any tradition that has a specific treatment of
- - 1 remains, that we are sensitive to that. 2 MR. CRANE: We will.
  - 3 COMMISSIONER DREYFUSS: I've got a
  - 4 couple of questions, if I may. The Planning
  - 5 Director mentioned there is an effort to re-forest
  - 6 the ag reserve and talked about stream valleys
  - 7 more so. But in terms of work like that, would
  - 8 there be a working with whoever is doing that from
  - 9 the standpoint of burial sites? That's kind of 10 one question?
  - 11 MR. CRANE: Yes, we would.
  - 12 COMMISSIONER DREYFUSS: All right. I
  - 13 think you should be aware of that. It sounded
  - 14 like it was stream valleys which may or may not be
  - 15 appropriate burial sites but --
  - MR. CRANE: Yeah, we -- so far it
  - 17 appears that most of the burial sites are on more
  - 18 elevated locations, but yes, we would certainly be
  - 19 working with people here in the Planning
  - 20 Department about any other initiatives that may
  - 21 have an effect.
- 22 COMMISSIONER DREYFUSS: And then also,

16

#### Transcript of Planning Board Meeting Conducted on May 16, 2019

17 19 any Parks work that goes on; they are -- that's 1 consider. one of the things they check your list? MR. CRANE: Well, that's certainly the MR. CRANE: Oh, yes. My counterpart, in 3 intention of making the information in the 4 effect, about cemeteries is Jamie Coons and so inventory public through MSC Atlas, and our she's very well aware of the location of all the intention to conduct educational outreach to cemeteries and burial sites on park land and 6 Montgomery County agencies so that people are reviews impacts -aware of both the inventory and its associated COMMISSIONER DREYFUSS: One thing we had guidelines. 9 in Potomac somebody that actually to get to their COMMISSIONER DREYFUSS: The other thing 10 property I think they had to go through the German 10 too, is you talk about government partners and the 11 School, a very hard stream valley. They hired a 11 next Item 4 is this, I guess annual report to the 12 contractor to come in and take down some trees and 12 State Department of Planning. Are you in 13 apparently we cited them. In terms of that, is 13 communication with them on this? Are they aware 14 there any notice to people that do that type of 14 of this type of program in the counties, or our 15 work of -- these people didn't seem to be 15 County? 16 conscious. I thought maybe we should tell -- give 16 MR. CRANE: Well, we're certainly in 17 the kind of the sites that we have forest 17 regular communication with the Maryland Historical 18 conservation but, in terms of industry, people 18 Trust. 19 that do work? COMMISSIONER DREYFUSS: But the 19 20 MS. BALLO: Rebeccah Ballo for the 20 Department of Planning, the state -- the next item 21 record. Part of our work, as Brian had mentioned 21 is a report, and are they supportive and conscious 22 before, is going to be consulting with the 22 of that program? 18 20

1 Department of Permitting Services and other county

- 2 agencies, and also I believe, you know, to your
- 3 point, consulting with other professionals who
- 4 work on forest conservation plans and other tree
- 5 and forest efforts to make sure that we cover,
- 6 let's say the building and land use trades very
- 7 broadly about this topic and make the information
- 8 available to them. And again, also make the
- 9 information available to DPS and other people in
- 10 the county government who tend to be more front
- 11 line with some of the work that you're describing
- 12 so they are aware of this.

COMMISSIONER DREYFUSS: Yeah, I kind of

- 14 -- you know we have all this GIS information and
- 15 you say you want not to totally target the area,
- 16 some obscurity, but again it seems to me a kind of
- 17 a landscape contractor should be aware as far as
- 18 conservation and tell an owner, well, we can't do
- 19 what you've asked because you a burial site. I
- 20 don't know whether we would go that far, but just
- 21 to me it seems to protect, at least burial sites
- 22 in forest conservation, may be something to

- 1 MR. CRANE: I think in the report, you
  - 2 may be referring to, it is a report back to this
  - 3 Board each year about any revisions that we've
  - 4 made to the inventory and any recommendations.
  - 5 COMMISSIONER DREYFUSS: No, no. Just
  - 6 this one here. There is a requirement that we do
  - 7 an annual report.
  - 8 MR. CRANE: Oh, I see.
  - 9 COMMISSIONER DREYFUSS: And I guess my
  - 10 question is, are they aware of this program? Are
  - 11 they supportive of this program? Is this
  - 12 something they tell other state agencies about?
  - 13 It was just something to consider whether --
  - 4 MS. BALLO: We have reached out to them
  - 15 as well as to our counterparts in state highways
  - 16 as well. And we are happy to keep in
  - 17 communication with them, and to update them.
    - 8 COMMISSIONER DREYFUSS: Yeah, they
  - 19 should be aware. I guess we have the same program
  - 20 in Prince George's, and also here. So is it one
  - 21 of the more extensive programs in the state?
  - 22 Maybe there's something that could be done in

24

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2.1

other jurisdictions.

2 MR. CRANE: We have provided Maryland

SHA with a copy of the inventory.

COMMISSIONER DREYFUSS: It's just the

Department of Planning would be the one other.

The other thing is you mentioned Aspen Hill Pet

Cemetery; well, how does that fall in?

MR. CRANE: That's a good question. It

9 does not fall in under the purview of the

10 inventory because of the pets that are buried

11 there. However, there are more than 50 people who

12 are also buried there.

13 COMMISSIONER DREYFUSS: Buried there

14 with their pets, perhaps.

15 MR. CRANE: Yes.

COMMISSIONER DREYFUSS: Okay. 16

17 MR. CRANE: So it's for that reason.

COMMISSIONER DREYFUSS: Thank you. Very

19 good, appreciate your effort on all of this. You

20 know. I had been involved with Peerless and

21 understand that they had been advocates for this

22 program, and I think that's been very important.

COMMISSIONER PATTERSON: Counsel, I have

a question regarding the commentary that we

3 received from the community. Do we need to

address this? There is a request from a member of

the community asking us to take a position on a

6 stay.

MR. MILLS: It's at your discretion

whether or not you want to address it or not.

COMMISSIONER PATTERSON: And your

10 recommendation is?

MR. MILLS: My recommendation is that

12 you go ahead and decide one way or another whether

13 or not you want to include it in the inventory.

14 If the case that's pending somehow decrees that

15 there is a burial site on the lot one way or the

16 other, then that will be definitive. But it would

17 be of no harm if you were to include it in the

18 inventory today.

19 CHAIR ANDERSON: I just had a couple of

20 questions that are more general that I think might

21 go to this issue. There is a provision here that

22 says we have an annual update. But if you're a

1 property owner that thinks there isn't a cemetery

2 on your property, or you, or some other interested

3 party who thinks there is a cemetery on a property

4 and that that should be included, and there is

5 some time sensitivity to it. So, for example, if

6 you are a property owner does the fact that my

7 property appears on the cemetery lists may

8 effectively be like a cloud on the title if I'm

9 trying to sell it, or if I'm trying to develop the

10 land. Or conversely, somebody might say, you

11 know, the property owner is claiming there is no

12 cemetery there, but I think there is, and I want

13 to make sure that there is some official notice to

14 third parties that's there before they do anything

15 with the land, and they're going to apply for a

16 building permit, you know, next week. So I wonder

17 if it might be appropriate to create some

18 procedural option in here to say you don't have to

19 wait until the next annual report in order to

20 correct, or update information on the inventory.

21 And that might also address this specific issue

22 we're talking about here. So, you know, if it

22

1 appears or doesn't appear on this list today it's

2 totally without -- not only is it without

3 prejudice to whatever some court would decide, but

4 then there could be some very straightforward

5 process to say let's update the list and not have

6 to wait until next January 1st, or whenever it is

7 that the staff and Board get around to updating

8 the overall inventory.

9 MR. CRANE: I think in effect that's 10 what we've been doing, and the intent was that we

11 would track any changes to the inventory that we

12 made over the course of a year, and then report to

13 the Board what has changed since the preceding

14 year. And at that time, make any recommendations 15 or revisions to the procedures that we discovered

16 were necessary. I would say as a practical

17 matter, it's much easier to find evidence or the

18 existence of a cemetery than it is to prove that

19 it isn't there, in the presence of evidence that

20 suggests that it was. To quote an old adage in 21 archaeology, absence of evidence is not evidence

22 of absence. So if there was historical

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1 information that a cemetery was in a given

- 2 location, it may be difficult to prove that it
- 3 wasn't there. I mean it's not impossible.
- 4 Detailed historical research can show that it was
- 5 actually really somewhere else. Or archaeological
- 6 investigations can show that there is no evidence
- 7 that there were ever interments there. But it's
- 8 not a simple thing to do. I mean if there were
- 9 historical records, or memories, or some physical
- 10 evidence of a cemetery having once a been in a
- 11 location, it's very likely still there.
- 12 COMMISSIONER ANDERSON: Well, I guess
- 13 what I was hoping was that we could address some
- 14 concerns; well we have the one property owner who
- 15 is represented here today, but I can imagine this
- 16 will come up in the future where somebody realizes
- 17 maybe with out, you know, I'm sure we told
- 18 everybody that we're putting them on the list, but
- 19 some people threw their mail in the trash can with
- 20 the rest of the direct marketing solicitations.
- 21 And so they will wake up one day and say oh my
- 22 gosh, you know there's this list that the
- 1 government is maintaining that says there is a
- 2 cemetery on our property. I'm trying to sell my
- 3 house, or I'm --
- 4 MR. CRANE; We would certain --
- 5 CHAIR ANDERSON: So I just thought maybe
- 6 if we could write into the rules some mechanism to
- 7 say, at the request of any interested party that
- 8 they could submit a clarification or a
- 9 modification to the list and that the staff would
- 10 review that and then that could come to the
- 11 Planning Board. And if they are in agreement with
- 12 the staff perhaps it could be a consent item, or,
- 13 you know, the staff could make a recommendation
- 14 about whether or not to send that to the Board so
- 15 there would be a very simple way to correct our
- 16 inventory if that became -- if that were an urgent
- 17 issue. So we could just be very clear that that's
- 18 an available option. And conversely if somebody
- 19 thinks that there is a cemetery that we didn't
- 20 identify and there is some urgency to identify,
- 21 and likewise, that they could get that to the
- 22 staff to consider whether that should be sent to

- 1 the Board so the inventory could be updated
- 2 quickly. But it seems to me like that ought to be
- 3 -- there ought to be some amount of discretion on
- 4 the part of the staff as to whether or not whoever
- 5 is asking us to change the inventory has presented
- 6 evidence that satisfies either that they have a
- 7 reasonable basis for arguing that the inventory
- 8 should be changed.
- 9 MS. BALLO: And I believe that that's
- 10 how we've been doing it in practice over the last
- 11 couple of months since the draft inventory was
- 12 released, but we can craft some language to
- 13 clarify that within the guidelines about the
- 14 administrative staff.
- 15 CHAIR ANDERSON: Yeah, I think that
- 16 would be helpful and that way we could point to
- 17 something to say this is not -- this is within the
- 18 rules that there is a process and nobody needs to
- 19 be concerned that because they did or didn't. And
- 20 there was a cemetery that did or did not appear on
- 21 this list, that that will prevent, or foreclose
- 22 any appropriate modification, if the need arises.
- 26
- CHAIRMAN PATTERSON: And to your point
- 2 Ms. Ballo, again, it's after you adjudicated and
- 3 evidence provided and it's not just a matter of I
- 4 want this off of my -- I want my property off of
- 5 the list. There needs to be some type of
- 6 documentation or something to back up. And as you
- 7 said, absence doesn't mean that there is an
- 8 absence.
- 9 MS. BALLO: Correct.
- MR. MILLS: And clearly, if there were
- 11 something, as in the case that's been brought up
- 12 today, if the existence of the cemetery is part of
- 13 that quiet title action, which it may or may not
- 14 be, I can't tell from the docket entries, I've
- 15 looked at them. Then clearly if someone showed up
- 16 with a court decree saying so and so owns this
- 17 property and there's no cemetery on it, we would
- 18 be bound by that obviously.
- 19 CHAIRMAN ANDERSON: We would accept that 20 as dispositive.
- 21 COMMISSIONER PATTERSON: Exactly.
- MR. MILLS: That would be about as

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1 dispositive as it gets.

CHAIR ANDERSON: Right. So is that -- I

3 was hoping to try to make this not a long

- 4 discussion of one property, but is that -- if you
- 5 want to come up and maybe tell us -- well,
- 6 introduce yourself and tell us if that approach
- 7 is, you think, workable.
- SOO LEE-CHOE: For the record, Soo Lee-9 Choe, law firm of Miller, Miller & Canby on behalf 10 of Paramount Construction property owner of 5200
- 11 Murray Rd. in Chevy Chase. And the Chair did hit
- 12 on exactly our concern. For the Planning Board
- 13 today to move forward on adoption of an inventory
- 14 without that process being outlined in the
- 15 guidelines, we view as very problematic.
- 16 Essentially, you are taking an action without
- 17 having then the due process laid out for a
- 18 property owner to understand, you know, their
- 19 rights in terms of coming before this agency,
- 20 presenting additional information, and what
- 21 process they will face. In terms of the present
- 22 court case that is in trial actually this morning,

1 and which is I am here today before you as opposed

- 2 to the attorney on this case, the issue of the
- 3 existence of a burial site on my client's property
- 4 is at issue in the quiet title action. It is very
- 5 directly the issue. The property owner has --
- 6 well, the attorney Diane Feuerherd, of my office
- 7 has had communication with staff earlier this
- 8 year. And had communicated and discussed an
- 9 archaeological study that actually has been done
- 10 on my client's property to show that there is no
- 11 existence of a burial site, or any burial actually
- 12 on the property. That study, it's my
- 13 understanding that staff was aware of that study.
- 14 I have copies for the Planning Board and I would 15 like to --
- CHAIR ANDERSON: I don't mean to cut you 16 enough information to show --
- 17 off, but I was sort of hoping we could just
- 18 dispense with this whole discussion of what's
- 19 going on with this property by hopefully getting
- 20 some modification to the rule. So if you're going 21 to court to argue about this, when you're done
- 22 arguing about it, and the court decides whether

- 1 you are right or you are wrong, you can just send an email to our staff and append the judgment and
- say here it is. And they can send it to the
- Planning Board as a consent item and we could be
- done with it. Is that satisfactory?
- MS. LEE-CHO: We would agree. For the
- action today, for the inventory, we would request
- 8 that the property not be included because there is
- 9 a pending action, and it is in dispute. The way
- 10 you have it listed on your inventory isn't that
- 11 the -- on the Xtat column which is indicating
- 12 whether there is an existing burial site, it says
- 13 yes. And so it's -- staff has determined
- 14 irrespective of this pending controversy that
- 15 there is a burial site. So I would request that
- 16 this property, at least for now, be removed in the
- 17 inventory and pending the resolution of the case
- 18 then it can always be added.
- CHAIRMAN ANDERSON: Well, I don't know
- 20 how anybody else feels about this, but I think
- 21 it's very clear from the document appearing in
- 22 inventory does not say that anybody has

1 conclusively determined that anything is anywhere.

- It just says to the best of our knowledge today,
- 3 and we could be wrong, here is where the
- 4 cemeteries are. And so I'm just -- and again, I
- 5 don't want to speak for anybody else, but I just
- 6 think you should litigate this and come back and
- 7 tell us what the result was and we'll deal with it
- 8 accordingly. But nobody is saying that this is
- 9 not a finding by anyone that you have a cemetery,
- 10 right? It's simply a recognition of the fact that
- 11 possibly there was a cemetery at, or around, this
- 12 location on the map.
- MS. LEE-CHO: Exactly. To the best of
- 14 our knowledge and the best available research and
- 15 it has been made available to us that there is
- CHAIRMAN ANDERSON: (inaudible) morning,
- 18 but that subject to information and --
- 19 MS. BELLO: Correct.
- 20 CHAIRMAN ANDERSON: At any time?
- 21 MS. BELLO: And the guidelines in
- 22 Section 1(b), procedures for updating the

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1 inventory specifically do allow for new 2 information to come forward at any time that could 3 revise our findings and the GIS map. 4 CHAIRMAN ANDERSON: Right. And where I 5 was coming from is that we had made it very clear 6 and explicit in the rules that that can be revised 7 in a very simple and straightforward way anytime 8 anybody has any evidence they want to show to the 9 staff. Then we can do that, and everybody will 10 be, maybe not happy, but at least they can get 11 their issues sorted out. 12 MS. BELLO: Correct. 13 CHAIRMAN ANDERSON: Mr. Mills, is that 14 workable? 15 MR. MILLS: Yes, I believe it is. And I 16 would also point out that it's not as if anyone 17 from the Planning Department, to my knowledge, has 18 been subpoenaed or anything, or is participating 19 in the litigation that's taking place today. 20 CHAIRMAN ANDERSON: Yeah. Anybody else 21 have a different opinion? 22 CHAIRMAN DREYFUSS: What's the size of 14 was usubdivision? 34 the property you're talking about, approximately? 2 Do you know offhand, is it a single lot or is it 3 a subdivision? 4 MS. LEE-CHO: It is. Right, my clients 5 property is Lot 6, which is greater in size. But 6 death and the could and the could in question of Lot 6 is about 3,610 1 reservation specifically for the exentetory. And, and the could and the inventory with a few exceptions of 3 Native American burial sites, information we have 4 from the Maryland Historical Trust. All of the 5 workine in form the Maryland Historical Trust. All of the 5 burial sites in our inventory with a few exceptions of 3 Native American burial sites, information we have 4 from the Maryland Historical Trust. All of the 5 burial sites in our inventory with a few exceptions of a single point. So they don't have the boundaries. 7 COMMISSIONER DREYFUSS: But on a broad 8 farm, I mean it's on the farm. 9 MR. CANE: Correct, right. 10 COMMISSIONER DREYFUSS: It's on the 11 subdivision area, a built-up area. It could be 12 shifting one lot to another so to speak. 13 MR. CANE: Veah. But in th
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6 the portion in question of Lot 6 is about 3,610 CHAIRMAN ANDERSON: All in favor.
7 square feet of the property is in question. 7 IN UNISON: Aye.
8 COMMISSIONER DREYFUSS: Thank you. Just 8 CHAIRMAN ANDERSON: Opposed? That's
9 in terms of, obviously, if there's something that 9 approved. Thank you very much.
10 looks more formal, I wall, or something that it's   10 (End of discussion surrounding Item 3)
11 a cemetery, if there's some pictures you show,
12 like a single monument there, that's perhaps the
13 evidence, but then others are more speculative if 13
14 there's no physical 14
15 MR. CANE: Well 15
16 COMMISSIONER DREYFUSS: Could it be one 16
17 lot over, or in the case of a subdivision?
18 MR. CAIN: There are some that are 18
19 speculative. Those tend to be marked as 19
20 approximate locations rather than known locations.

37	
1 CERTIFICATE OF TRANSCRIBER	
2 I, Molly Bugher, do hereby certify that the	
3 foregoing transcript is a true and correct record	
4 of the recorded proceedings; that said proceedings	
5 were transcribed to the best of my ability from	
6 the audio recording and supporting information;	
7 and that I am neither counsel for, related to, nor	
8 employed by any of the parties to this case and	
9 have no interest, financial or otherwise, in its	
10 outcome.	
11	
12 North Broker	
13 Malla Daylar	
14 Molly Bugher	
15 DATE: June 11, 2019	
16	
17	
18	
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20	
21 22	
22	

# EXHIBIT 3

Clerk of the Circuit Court Montgomery County, Md.

#### IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PARAMOUNT CONSTRUCTION, INC.

Plaintiff,

:

Case No. 447344V

ALL PERSONS UNKNOWN, ET AL.

Defendants.

OPINION AND ORDER

This matter came before the Court for a court trial beginning on September 17, 2019, and concluding October 18, 2019. Having considered all evidence presented, this Court sets forth the following Opinion and Order.

#### I. FACTUAL BACKGROUND

Plaintiff Paramount Construction, Inc. ("Paramount") commenced a Quiet Title action in this matter on or about May 4, 2018. On August 21, 2019, this Court entered Partial Summary Judgment in favor of Plaintiff (DE #110) finding unequivocally that Plaintiff has legal title of the disputed property located at 5200 Murray Road, Chevy Chase, Maryland 20815 in the Brookdale Community ("Property"). The remaining issue for the Court's determination at trial is the issue of whether a burial site exists on the Property. Defendant Intervenors ("Intervenors") assert that they are direct descendants of Isaac Shoemaker, the original owner of the Property, and that the parcel of land entitled "Reservation" is the Shoemaker family burial site.

In 1839, the Property originated as part of a 140-acre farm owned by Isaac Shoemaker. Some 83 years later, Shoemaker's grandson sold 60 acres of the family farm to Francis Bennett

<sup>&</sup>lt;sup>1</sup> The words "burial plot," "burial site," "burial ground," and "reservation" are synonymous for purposes of this Court's opinion.

Clerk of the Circuit Court Montgomery County, Md. Poe. As part of this conveyance, there was a deed that reserved from the conveyance "exclusive, however, of a small burial plot located on the Perry boundary line near the River Road; containing 1/7 of an acre." Thereafter on February 6, 1925, the Property was sold to a new owner and, again, sold on July 2, 1925, to a subsequent new owner with the deed containing the same exclusion that was in Poe's deed.

In 1938, the new owner subdivided the Property and recorded Plat No. 905, among the land records for Montgomery County, Maryland. This plat included the Property in a block known as Parcel A. Shortly thereafter, the owner subdivided Parcel A into Plat No. 949, which created five lots and a "Reservation" that was "not included as part of the subdivision." Now, the Property is comprised of portions of Lot 1, Lot 2, and the Reservation.

In August of 1938, Lot 1 and Lot 2 were sold to Cooper Lightbown. Three months later, Lightbown sold the lots to Dean and Nelle Locke. On May 28, 1959, Locke sold the lots to James and Mary Corrigan. In 1972, the Corrigans acquired half of the Reservation that abutted their lots through a quitclaim deed. In 1989, Corrigan sold the lots with half of the Reservation to Roy D.R. and Paulette Betteley. The Betteleys continuously occupied the property until their deaths in 2007.

In 1992, the Betteleys sought to re-subdivide their property into two lots, Lot 6 and Lot 7. Lot 6 would contain their existing residence and half of the Reservation, while Lot 7 contained the remainder of their property that would create a buildable lot. On January 4, 1994, the Montgomery County Planning Board conducted a public review hearing regarding this real property. Following the hearing, the Board permitted the Betteleys to re-subdivide their property. No challenge was raised by anyone to the Betteley's title. Likewise, no assertions were made by anyone including Intervenors, that the half of the Reservation on their lot contained or was a burial site. The Betteley's then surveyed the new lots, and in 1997, the plat was recorded amongst the Montgomery

County, Maryland, Land Records as Plat No. 20479. Following their deaths, Mr. & Mrs. Betteley's son, Philip Betteley, obtained title to the real property in 2007, and lived there until selling Lot 6 to the Plaintiff in 2016, including the Betteley half of the Reservation.

Upon learning of the Intervenors' belief that the Reservation is a burial site, Plaintiff commissioned Dr. Phillip Hill of Archeological Testing and Consulting, Inc., to conduct a study and investigation of the disputed property and determine if the Reservation was, in fact, a burial site. Following his investigation, Dr. Hill determined that the Reservation was not a burial site, because there was no evidence of the presence of any grave markers or shafts on this portion of the subject property. Intervenors contend that four members of the Shoemaker family are buried on the Property, and, therefore, Plaintiff is abridged from developing the land in any manner that would disturb the burial site. Additionally, the Montgomery County Planning Board deemed it appropriate for a court to determine whether a burial site exists on Paramount's Property through litigation.

#### II. DISCUSSION

Plaintiff contends its Property is free of a burial site and should not be encumbered by Intervenor's claim that there are bodies buried on the Property. Intervenors argue that at least four bodies (who are members of the Shoemaker family) are buried on the Property and that the exclusion in the original deed from the Shoemaker property and the Reservation in the Woodward deed classify the Property as a burial site. In this cause of action, Plaintiff maintains the burden of proof (to wit: proof by a preponderance of the evidence) to establish that Plaintiff is entitled to the injunctive relief that it seeks from the court. At trial, Plaintiff presented evidence through exhibits and expert testimony from archeologist, Dr. Philip Hill. Intervenors presented evidence through exhibits and testimony from the owner of Paramount Construction, Mr. Brian Crane.

Circuit Court

Clerk of the C

Archeologist, Parks and Planning Commission; Nancy Werner, Intervenor; and Ambassador Richard Erdman.

A burial ground is defined as "an area of land where dead people have been buried." "Burial ground." The Merriam-Webster.com Dictionary, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/burial%20ground. Accessed 21 November 2019. Therefore, this Court must determine from the evidence received whether there are any bodies buried on the Property. The collective evidence presented during trial revealed that there were no markers consistent with bodies being buried on Plaintiff's portion of Property. Acknowledging that markers were not the only indicia of bodies being buried in the ground, Plaintiff commissioned expert archeologist, Dr. Philip Hill, to conduct an archeological study to determine if there was evidence of bodies in the ground.

Dr. Hill was qualified pursuant to Maryland Rule 5-702 and without objection, as an expert witness in the field of archeology. Dr. Hill opined that there are no bodies buried on the Property. His expert opinion was based on his extensive examination and hands on investigation of the area, as well as his education, training, and experience. Dr. Hill testified that he primarily works with land developers, lawyers, and the federal government, as well as local entities, including Montgomery County, Maryland, conducting the same type of studies on other parcels of land. Dr. Hill laid out the three-phase analysis he conducts on each of his archeological projects. First, Dr. Hill identifies the site, then he examines anything found near the site, and his final investigative phase involves data recovery. The extent of the data recovery phase is dependent on the client's wishes. For example, because archeology is inherently destructive; i.e.; when a client wishes to disturb a site by re-interment, he is required to present an impact design. Sometimes clients may elect not to contribute to such a disturbance and incur the costs of the impact design. Defense

Clerk of the Circuit Court Mantgomery Gounty, Ma

witness, Dr. Brian Crane—also an archeologist— testified that he is familiar with and has previously approved Dr. Hill's methods, his work, and this same three-step approach in other similar burial site investigations.

Here, Dr. Hill conducted his study of Plaintiff's property in April 2017 and prepared a report outlining his investigation. He testified that when he initially walked onto the Property, he did not observe any evidence of an above-ground cemetery. There were no depressions in the ground or headstones. He noted, however, that there was some periwinkle ground cover low to the ground. Dr. Hill explained the significance of the presence of periwinkle, indicating that it was commonly used by people to signify a cemetery. However, he also testified that the periwinkle cover alone is not sufficient to indicate the presence of a cemetery. If there were some other indicia of a cemetery, the presence of a periwinkle ground cover could add credibility to a claim that a cemetery exists on a site. Dr. Hill then engaged ground penetrating radar and physically backhoed trenches diagonally on the site seeking evidence of grave shafts. The diagonal trench method is used so that if human remains are detected, there is minimal disruption of the remains in their resting place. Dr. Hill explained that the diagonal pattern of the trenches is used to make sure he does not miss any evidence of a grave shaft or evidence of space in between grave shafts. After concluding his archeological investigation, Dr. Hill concluded with a reasonable degree of archeological certainty, that there is no evidence in this case of any burials on this site, relying primarily on the absence of grave markers, and lack of human remains or any exposed grave shaft features.

Through cross-examination, Intervenors attempted to discredit Dr. Hill's findings by attacking his methodology, which their own witness, Dr. Brian Crane, acknowledged is a commonly used standard method within the archeological community. However, Intervenors did

not call an expert archeologist or any other expert witness to contest Dr. Hill's findings or his expert opinion. Dr. Hill's expert opinion is uncontroverted.

Intervenors called Dr. Brian Crane, an archeologist employed by the Parks and Planning Commission, to testify as a fact witness pursuant to Maryland Rule 5-701.<sup>2</sup> Dr. Crane, who has been employed by the Commission for approximately a year, testified that he is tasked with reviewing renovation and development applications for places significant to Montgomery County historic preservation. Dr. Crane testified that the Montgomery County Planning Board is required to maintain an inventory of the cemeteries throughout the County. The inventory of cemeteries was initially created and maintained with the assistance of volunteers until it was statutorily required in 2018. Dr. Crane indicated that he is only familiar with the Shoemaker Cemetery because it appears on the inventory. He has never conducted his own investigation. However, Dr. Crane further explained that the Shoemaker Cemetery was added to the inventory during the time period when volunteers created the inventory and there was no specific method or other procedure required other than an application, to determine whether a purported cemetery actually contained burial sites.

Intervenors also called Nancy Werner, who testified that she is a direct descendent of Isaac Shoemaker (he is her second great grandfather). Werner testified that she has been interested in genealogy for over forty years and identified herself as an amateur genealogist. She explained that she researched most branches of her family over the years through archives, online searches, land records, historical societies, friends, and family. Werner also testified that she has visited the site

<sup>&</sup>lt;sup>2</sup> Pursuant to Maryland Rule 5-701, Dr. Crane was not permitted to be called by Intervenors as an expert witness based on the Court's ruling that Intervenors did not timely name him, at all, as a witness in their Pre-Trial Statement. Likewise, Intervenors did not advise Plaintiff or the Court of its intention to call Dr. Crane as an expert witness until the morning of trial, which had been calendared for a considerable period of time.

Clerk of the Circuit Court Montgomery County, Mct. where she believes the Isaac Shoemaker Cemetery is located since she was approximately ten years old (beginning in the 1940's) and has returned there multiple times to lay flowers on the site.

Werner testified that she developed an interest in having the Isaac Shoemaker Cemetery added to the Montgomery County Cemetery Inventory after she learned that the Samuel S. Shoemaker Cemetery was included in the Inventory (at a nearby, but different location), but the Isaac Shoemaker Cemetery was not included<sup>3</sup>. Ms. Werner submitted her application and collected as much information as she could locate to verify the Isaac Shoemaker Cemetery was located on the Property. She further testified that she submitted her application and supporting documentation to the Historical Preservation Society for Montgomery County in 2017. This was around the same time the Property was sold by Phillip Betteley to Plaintiff, Paramount. She acknowledged that she submitted her application at this time in her effort to prevent Plaintiff, Paramount, from developing the property because of her belief that at least four family members were buried in a cemetery on this property. She explained that her belief was based on funeral home records, correspondence from ancestors, and a book containing historical information about the family (including birthdays, dates of death, marriage dates, etc.). She "guesstimated" that Isaac Shoemaker began using the Property for burials around 1850-1883. Ms. Werner acknowledged Dr. Hill's finding that there are no markers or headstones currently on the Property, but it is her belief some of the burial sites were originally marked by headstones. However, no such evidence was presented at trial. During her research, Ms. Werner asked neighbors what happened to the headstones when she noticed they were missing. Ms. Werner was not permitted to testify to what any neighbors may have told her, as the Court sustained Plaintiff's hearsay objections.

<sup>&</sup>lt;sup>3</sup> Isaac Shoemaker was the son and direct descendant of Samuel Shoemaker.

On cross-examination, Ms. Werner was asked about her familiarity with the Samuel Shoemaker Family Cemetery, which is also located in the same general vicinity of Bethesda-Chevy Chase, Maryland, off Western Avenue, close to the Montgomery County-District of Columbia boundary line. However, the Samuel Shoemaker property was situated closer to Massachusetts Avenue than River Road. Ms. Werner indicated that she is familiar with the Samuel Shoemaker Cemetery, although she also testified that she had not previously seen the photographs of it which are maintained by the Montgomery County Cemetery Inventory. She testified that the Samuel Shoemaker Family Cemetery was a "long, long way to 5200 Murray Road," referencing Pl. Ex. 12, the aerial photograph of the collective area. Both Samuel and Isaac Shoemaker's parcels of land are depicted on the same aerial photograph.

Additionally, Intervenors offered Def. Ex. 6, which includes the Shoemaker Family Genealogy Book, specifically page 87, entitled "Samuel Shoemaker Section." On cross-examination, Ms. Werner acknowledged that the book indicates that Samuel and his wife and "many of his descendants" are buried in the Family Burial Ground on the Estate (Samuel's). Ms. Werner also agreed that Samuel Shoemaker's Will contained a provision that dedicated a portion of his farm was to be set aside as a family cemetery. Ms. Werner further testified that in the same Shoemaker Genealogy Book, under Isaac Shoemaker's name, no such reference to a burial site is made with regard to his property, again situated in the same general vicinity, but closer to River Road.

Plaintiff also inquired of Ms. Werner regarding Pl. Ex. 16 (also originally a part of Pl. Ex. 10. These photographs were separated out as Pl. Ex. 16.) The photographs are the "Photograph Log" for the Montgomery County Cemetery Inventory, depicting the Right-of-Way access path to follow in order to reach the Samuel Shoemaker Family Cemetery (walking between the 2 houses

located at 4961 and 4965 Allan Road, Bethesda, Maryland), as well as the stately wrought iron gate labeled "Shoemaker" that leads to the Cemetery, as well as photographs of the well-manicured, and meticulously maintained Samuel Shoemaker Family Cemetery.

Intervenor Werner also testified that she met Ambassador Erdman in approximately 2000 during one of her visits to this 1/7-acre strip situated in between adjacent properties. This is the area Ms. Werner refers to as the Isaac Shoemaker Cemetery. During that visit, she observed that two obelisk-type stones on Erdman's portion of the land had been moved. Ms. Werner believed those obelisks were markers of tombstones of her family members buried on Erdman's property. Ms. Werner testified that she learned one of the stones had been moved by Erdman and incorporated by Erdman into his decorative retaining wall situated on his property. The other stone Erdman relocated toward the back area of his property near rose bushes he planted in his yard.

At trial, Intervenors also called Ambassador Richard Erdman, who testified that he owns the property located at 5202 Murray Road. This property is situated directly adjacent to Plaintiff's lot at 5200 Murray Road. Erdman and his wife have owned and lived on the property since 1982. However, they were not physically present at 5202 Murray Road for long stretches of time, as they traveled back and forth to Algeria frequently for his employment. Erdman explained that although he has owned the adjoining property since 1982, he has only been informally involved with the Brookdale Citizens Association since 2016. This long-standing Association is a group of concerned citizens who expressed concerns regarding a potential threat to the status of a burial reservation on Erdman's property. Although Erdman had no knowledge that there was any issue involving any burial ground on the property when he purchased it, he learned shortly after purchasing his property that it was believed to contain half of an American Indian Reservation Burial Ground. As a result of that "Reservation" status, Erdman took the initiative and applied for

and received a property tax exemption through to the present time exempting him from paying property taxes for this portion of his and his wife's Montgomery County real property. Erdman testified that he received his property tax exemption by simply filling out a form and submitting it to the Maryland State Department of Assessments and Taxation. Erdman explained that he does not believe that Department conducts any type of study or investigation to determine the actual existence of a burial ground prior to granting an exemption such as the one he has been granted.

Although, Erdman was aware of the "Indian Reservation," he testified that he was not aware of the Isaac Shoemaker Cemetery until Ms. Werner approached him in the 2000's when she brought flowers to put on the site. At that time, Erdman testified that Nancy Werner asked him why the two obelisk stones had been moved. Erdman explained that he did not think much of what the stones were at that time, because a cemetery was "not on his mind." He told Ms. Werner that he decided to move them to their current location fully in his own yard to facilitate mowing his grass and to adorn his yard and garden with both obelisk stones. Erdman also testified that he has not received any complaints from Intervenors about his unilateral decision to move the stones, nor has he been asked to return either of them to their original locations.

During Erdman's cross-examination, the Court learned that he had, over time, also removed some of the unsightly Hemlock trees that were planted along the dividing line of the respective halves of the "Reservation." Then, sometime in 2006, with Phillip Betteley's permission, Erdman had all of the Hemlock trees in the remaining row in this same location removed, so to replace them all with Arborvitae trees. Erdman paid all expenses related to his relandscaping project. Erdman acknowledged on cross-examination that, at his direction, he had the new trees planted closer to the dividing line between the two halves of the "Reservation" (the area between then-owner, Betteley's, now Plaintiff's, property and his own). These trees and other

landscaping plantings are evidenced in Def's Ex. 3. Erdman acknowledged that the Arborvitae trees also visually divide the "Reservation" between his property and now Plaintiff's property. When asked, Erdman agreed that when he planted the new row of Arborvitae trees in 2006, they were placed in front of the Hemlocks, planting them closer to his side at 5202 Murray Road. Erdman also acknowledged that he had no knowledge as to whether the Arborvitae trees were planted on his property or Plaintiff's (formerly Betteley's), as he was not present for the actual planting.

With further inquiry from Plaintiff's counsel on this same issue regarding the actual placement of the new Arborvitae trees (Pl's Ex. 5, Dr. Hill's written report), Erdman then disputed their location as depicted in Dr. Hill's report.

Erdman acknowledged that Pl's Ex. 14, (Plat for this property, dated 1994), showed placement of Hemlock trees, not Arborvitae trees. However, once again contradicting his own testimony, Erdman also marked Def's Ex. 3 representing where the Arborvitaes were planted, rather than where the Hemlocks had been planted, confirming the 2006 re-planting/movement closer of the Arborvitaes to his property than to Plaintiff's property. Erdman also agreed with Plaintiff's counsel that the Arborvitaes have always been positioned closer to his property than the original Hemlock line of trees. As a result, the Arborvitae trees are not centrally placed in the "Reservation area," at Erdman's direction.

Cross-examination also revealed more details concerning the property tax exemption Erdman has received since the early 2000's for his one-half of the "Reservation" located between 5200 and 5202 Murray Road, Bethesda, Maryland. Erdman testified that after learning from Ms. Werner of her belief that the Isaac Shoemaker Cemetery is situated between the Betteley and Erdman lots, he filled out a Maryland SDAT Form and questionnaire. In response, Erdman

received the tax exemption for his half of the "Reservation." He also testified that to his knowledge, no one from Maryland SDAT has contacted him or visited his property. He successfully renewed his tax exemption in 2016, on a 3-year renewal basis.

Cross-examination also included Erdman's acknowledgement that he has never retained an archeologist to investigate what, if anything, is beneath the ground on his half of the "Reservation," at any time before or after he decided to move the stone obelisks from where they had been to his own yard. He indicated that he moved them early on in his ownership of 5202 Murray Road, placing the time somewhere between 1989 and 1994. Erdman further testified that he has never been asked by Intervenors to return the stones to their original location and would not be able to do so anyway as he cannot specifically identify the precise spot from where he removed them. Erdman testified that he cemented one of the stones into his own walkway, while he placed the other as a decorative object in his ivy garden.

Mr. Erdman maintained that while he gave no thought at all as to whether the stone obelisks had any purpose when he initially moved them, he also gave no consideration to any other purpose than that consistent with Intervenors' contention that they served as grave markers. On cross-examination, Erdman acknowledged that it is not a given that these stones are, in fact, grave markers, indicating that he moved them as they were an "inconvenience" to him when he mowed his yard. He further acknowledged that they could have served as property boundary markers, rather than cemetery markers.

Finally, upon Interveners request, the Court took judicial notice of the court file for the matter of *James Norton v. Maryland-Nat'l Capital Park & Planning Comm'n*, Case No.: 161691-V in the Circuit Court for Montgomery County, Maryland. That matter involved the same real property at issue in the instant case. A member of the Brookdale Citizen's Association challenged

the Planning Board's denial of Petitioners request in 1997 for reconsideration of the Planning Board's 1993 approval of subdivision plans to create a new residential lot from a larger parcel with an existing house in the community. Norton argued that a burial plot existed on the land. Included in the case file, also identified here as Def. Ex. 13, was a pleading that contained a memorandum dated January 13, 1993, from Gwen Marcus, Historic Preservation Coordinator, who reviewed the Planning Board's Preliminary Plan. Ms. Marcus' memo indicated that the Locational Atlas shows no reference to any burial ground in the area, but the tax map does refer to a burial lot. The Planning Board maintained that they considered both of these maps when rendering the 1994 Preliminary Plan. The new lot in that Preliminary Plan is not contiguous to the area of the burial plot and no construction was planned or approved for any area contiguous to the burial plot. As this court file evidences, prior litigation related to the same issue on the same parcel of real property resulted in the determination that there is no burial site on this Property; specifically, 5200 Murray Road, presently owned by Plaintiff.

The Court also observed various exhibits, including many photographs, depicting the stark contrast between the maintenance and condition of the grounds of the alleged Isaac Shoemaker Cemetery to the condition of the grounds of the Samuel Shoemaker Cemetery burial site. Photographs of the Samuel Shoemaker Cemetery from the Montgomery County Cemetery Inventory depict a well-manicured area, including a gate, statutes, and a bench, which clearly depict and identify the existence of a Shoemaker Cemetery. In significant contrast, photos of the area alleged to contain the Isaac Shoemaker Cemetery, which Nancy Werner, Intervenor, indicates she has visited since her childhood, appears unmaintained and contains thick overgrown brush, with no other indicia of burial plots or a cemetery on the property.

#### III. CONCLUSION

In making its determination, the Court is mindful of the sensitive nature of each of the parties' beliefs and positions in this matter. Having considered all the evidence presented, the Court determines that Plaintiff has, in fact, has met its burden of proof demonstrating by a preponderance of the evidence, that there is insufficient evidence to indicate that a burial site exists on Plaintiff's real property located at 5200 Murray Road, Chevy Chase, Maryland 20815.

Dr. Hill, an expert archeologist, testified that there is no physical evidence of bodies being buried on the property. Dr. Hill's testimony included his identification of circular planter holes. He explained that, in his expert opinion, these holes are not consistent with or representative of evidence of grave shafts on the Plaintiff's half of the land marked "Reservation." Dr. Hill also opined that the large soil disturbance present on the hill, likewise, was not indicative of a burial site or cemetery since the size and character of the disturbance was not consistent with that of a rectangular grave shaft. This finding formed part of his expert opinion and conclusion of his archeological investigation that no grave shaft features were found on the Plaintiff's real property. No evidence of a grave shaft, coupled with all of his other findings is consistent with his determination and expert opinion that no human remains are in the ground on Plaintiff Paramount's half of the "Reservation." Dr. Hill's expert opinion is uncontroverted.

Further, when asked, Dr. Hill clarified that in setting up his investigative area, he was careful to ensure that his study covered the full property area of 5200 Murray Road (Plaintiff's property). Additionally, he testified that he placed a marker 5 feet from Erdman's 2006 Arborvitae trees. This was of significance with regard to Erdman's movement of the boundary line with the replanting of the Arborvitae trees close to Erdman's property, thus covering a larger portion of the Reservation than just Plaintiff's one-half. As Dr. Hill explained, the backhoe he used extends two

feet beyond the 5-foot marker, for a total of five feet from where Erdman's new trees were installed. The significance of this is that when Erdman was cross-examined about the Arborvitae tree placement, he acknowledged that they were moved closer to his own property than the prior Hemlock line of trees which had been closer to the dividing line of the "Reservation," between Plaintiff's and Erdman's property. Pl's Ex. 14 and Def's Ex. 3, both evidence the 1994 survey drawing by the Park and Planning Commission, and both depict the tree line then being exactly on the property line of Plaintiff's half and Erdman's half, not closer to Erdman's as it now stands. The division of this "1/7 acre" having occurred when the Corrigans obtained their half of it through a quit-claim deed in 1972. As noted above, this is now Plaintiff's property.

Additionally, Intervenor's contentions that bodies are buried on the subject Property are not supported by any concrete evidence, but rather based on beliefs of family information passed down in the Shoemaker family. Inquiry into whether a burial site exists on the Property was previously raised and litigated in 1993. At that time, the Montgomery County Planning Board found no evidence of the presence of a burial site on the Property.<sup>4</sup> Similarly, no evidence has been presented to this Court demonstrating that bodies have been buried at this location. Additionally, despite testimony that members of the Shoemaker family have visited the property believing it to be the site of buried ancestors, Defendant Intervenors have never participated in previous litigation nor responded to previous public notices related to various subdivision plans concerning Plaintiff's property. This includes the 1993 Planning Board hearing where no one, including Intervenors, asserted any claims that the subject Property contains a burial site,

<sup>&</sup>lt;sup>4</sup> Plaintiff's Ex. 4 (which was admitted by way of stipulation of Defendant), contains the Montgomery County Planning Board Opinion dated February 14, 1997, in which the Board concluded: "In written and oral testimony, the BCA raised concerns about the possible location of a burial plot on the site. Staff testified that they were unable to find any evidence of burial grounds on the site. Staff and the Applicant also noted that the area identified on the record plat as a reservation for a burial plot is actually *located* on the adjoining property to the north."

notwithstanding large, highly visible notice signs having been prominently displayed along this corridor prior to Park and Planning's 1994 investigation and decision.

For the aforementioned reasons, on this day of Award 2020, this Court,

**FINDS**, that Plaintiff has met its burden of proof in this matter; and that there is no "burial site" on the Plaintiff's Property known as 5200 Murray Road, Chevy Chase, Montgomery County, Maryland; and it is further,

**ORDERED**, that Plaintiff is seized of absolute fee simple title and possession of that certain property known and described as:

Lot 6, Block 4, in the subdivision known as "BROOKDALE," as per plat thereof recorded in Plat Book 144 as Plat No. 20479, among the Land Records for Montgomery County, Maryland, being also known as 5200 Murray Road, Chevy Chase, Maryland 20815 (the "Property" or "Lot 6") and bearing Tax Account No. 07-03200081.

and it is further,

**ORDERED**, that the Defendant Intervenors are fully and permanently enjoined from asserting any estate, title, claim, lien or interest in or to Plaintiff's real property or any party-thereof.

CHERYL A. McCALLY, Judge

Circuit Court for

Montgomery County, Maryland

ENTERED

JAN 07 2020

Clerk of the Circuit Court Montgomery County, Md.

From: Crane, Brian

Diane E. Feuerherd; MCP-Chair To:

Cc: Mills, Matthew; Susie Scofield; Soo Lee-Cho

Subject: RE: Paramount Construction, Inc. / 5200 Murray Road / Removal of Property from Burial Sites Inventory

Date: Thursday, May 21, 2020 10:32:45 AM

image004.png Attachments:

image005.png image006.png image007.png image008.png image009.png image012.png

#### Dear Ms Feuerherd,

Thank you for your email. The record for the Isaac Shoemaker Family Cemetery as adopted by the Planning Board in May 2019 is shown as a single point within the parcel at 5202 Murray Rd, not 5200 Murray Rd. The locations of burial sites in the Montgomery County Burial Sites Inventory are shown as a single point for each site, which is not intended to represent the boundaries of those sites. For this reason, we do not believe there is a need to change the inventory record for this cemetery at this time. Records in the Burial Sites Inventory also include a link to forms prepared by volunteers with Montgomery Preservation, Inc provided by the Planning Department for informational purposes. The form for the Isaac Shoemaker Cemetery includes references to both 5200 and 5202 Murray Rd; this link has been removed from the record for the Isaac Shoemaker Family Cemetery pending the completion of any changes to the form warranted by the court's decision.

v/r



#### Brian D. Crane, PhD

Archaeologist Planner Coordinator

Historic Preservation Program 8787 Georgia Avenue, Silver Spring, MD 20910 brian.crane@montgomeryplanning.org

c: 202.288.9904 | o: 301.563.3402











**From:** Diane E. Feuerherd <defeuerherd@mmcanby.com>

Sent: Wednesday, May 20, 2020 11:45 AM **To:** MCP-Chair <mcp-chair@mncppc-mc.org>

**Cc:** Mills, Matthew <matthew.mills@mncppc.org>; Susie Scofield <scofieldlaw@aol.com>; Crane, Brian <Brian.Crane@montgomeryplanning.org>; Soo Lee-Cho <slcho@mmcanby.com>

Subject: Paramount Construction, Inc. / 5200 Murray Road / Removal of Property from Burial Sites Inventory

Dear Chair Anderson:

Good morning. This law firm represents Paramount Construction, Inc., the owner of the residential

property at 5200 Murray Road in Chevy Chase. Please see the attached letter, concerning the removal of the property from the County's Burial Sites Inventory, as a result of the favorable judgment in the litigation concerning the same.

Thank you for your consideration.

Sincerely,

#### Diane E. Feuerherd

Attorney



200-B Monroe Street Rockville, MD 20850 T: 301.762.5212 F: 301.762.6044

website | vCard | confidentiality | email

 From:
 Soo Lee-Cho

 To:
 MCP-Chair

Cc: Mills, Matthew; Crane, Brian; scofieldlaw@aol.com; Rob Maggin; Diane E. Feuerherd

Subject: AGENDA ITEM NO. 5 - MAY 28, 2020 PLANNING BOARD MTG - Burial Site Inventory Annual Update

**Date:** Tuesday, May 26, 2020 1:01:23 PM

Attachments: 2020.05.26 Ltr to Planning Board re Burial Site Inventory Annual Update - Paramount Construction, Inc w

exhibits.pdf

Importance: High

#### Dear Chairman Anderson,

Please see attached letter and exhibits for the Planning Board's consideration in re: *Annual Update* of the Burial Site Inventory scheduled for this week's agenda.

Thank you.

#### Soo Lee-Cho

Attorney



200-B Monroe Street = Rockville, MD 20850 T: 301.762.5212 = F: 301.424.9673

website | bio | vCard | confidentiality | email



200-B MONROE STREET, ROCKVILLE, MARYLAND 20850 P: 301.762,5212 F: 301.762,6044 WWW.MILLERMILLERCANBY,COM All attorneys admitted in Maryland and where indicated.

PATRICK C. MCKEEVER JAMES L. THOMPSON LEWIS R. SCHUMANN JODY S. KLINE JOSEPH P. SUNTUM ROBERT E. GOUGH DONNA E. MCBRIDE (DC) GLENN M. ANDERSON (FL) SEAN P. HUGHES (DC) CATHY G. BORTEN (DC) MICHAEL G. CAMPBELL (DC, VA)

SOO LEE-CHO (CA)
DAVID A, LUCAS (DC)
DIANE E. FEUERHERD
CHRISTOPHER L. YOUNG (VA)
CALLIE CARNEMARK (VA)
JAMES T. ROTH (DC)

May 26, 2020

By Email Only
Casey Anderson, Chairman
Montgomery County Planning Board
M-NCPPC
8787 Georgia Avenue
Silver Spring, MD 20910
MCP-Chair@mncppc-mc.org

Re: Planning Board Meeting of May 28, 2020 - AGENDA ITEM No. 5;

PUBLIC HEARING, WORKSESSION AND ACTION ON THE FIRST ANNUAL UPDATE TO THE MONTGOMERY COUNTY BURIAL SITE INVENTORY:

Paramount Construction, Inc. - 5200 Murray Road, Chevy Chase, MD 20815 ("Property")

Dear Chairman Anderson and Members of the Planning Board:

This letter is in response to Dr. Brian Crane's email of May 21,<sup>1</sup> responding to our letter to the Planning Board dated May 20, 2020 requesting that Paramount Construction's Property be formally removed from the Burial Sites Inventory, as a result of the ruling in *Paramount Construction*, *Inc. v. Scofield*, *et al.*, Case No. 447344-V ("Litigation") that there is no burial site thereon.

In Dr. Crane's email, he writes that there is no need to amend the Burial Sites Inventory records for the "Isaac Shoemaker Cemetery," in large part because the cemetery was identified as being located on Paramount Construction's Property by the Montgomery Preservation, Inc. ("MPI"), and specifically, in an MPI form that is no longer linked to the Burial Sites Inventory. However, a review of the current Inventory website, together with the Staff Report prepared by

<sup>&</sup>lt;sup>1</sup> A copy of Dr. Crane's email, dated May 21, 2020, is enclosed as Exhibit 1. In addition to the enclosures herein, we ask that the Planning Board also consider our letter submission of May 20, 2020, which is incorporated herein by reference and another copy may be provided upon request.

Dr. Crane for the "Burial Sites Inventory Annual Update," appear contrary to Dr. Crane's position in his May 21 email. Instead, these resources underscore the need to include the removal of Paramount Construction's Property as part of the pending Annual Update.

First, the MPI form, which identified the cemetery as being on Paramount Construction's Property (in addition to the abutting 5202 Murray Road property), was prepared by the primary defendants in the Litigation, Susan W. Scofield and Nancy W. Werner, who actively participated in the multi-day trial. According to the MPI form, it was submitted to the Planning Board in reaction to the Litigation. When the Circuit Court specifically ruled that there is no burial site on the Property (5200 Murray Road), it resolved that MPI's submission to the Planning Board is wrong.

Second, Dr. Crane simplifies this problem to a removal of the hyperlink to the MPI form.<sup>3</sup> However, through the Inventory records and the now-pending Annual Update, the Planning Board continues to endorse the MPI's submission as its own.

In the Inventory entry for the "Isaac Shoemaker Cemetery" (Exhibit 2), neither the words nor the GIS imagery provide any boundary or ownership detail. One cannot discern whether the Planning Board considers this cemetery to be located on 5200 Murray Road (Paramount Construction's Property) or 5202 Murray Road, or both. Instead, the Planning Board acknowledges the MPI as the source of the cemetery's background (on the left hand side of the screen, stating "Originator: Montgomery Preservation, Inc."); this directs the public to go to the MPI website for more information and, in turn, the MPI form that inaccurately identifies Paramount Construction's Property. Thus, even without the link, the Planning Board is still relying upon and pointing to the MPI form, and the overruled and inaccurate contention that this cemetery is, or could be, located on Paramount Construction's Property.<sup>4</sup>

By law, the Planning Board is required to identify the location and ownership of the cemetery. See Montgomery County Code, § 33A-17(d)(2) (requiring the Inventory to "include a map and a description of each burial site, including ownership information when available[.]") This statutory directive coupled with the specific circumstances under which Paramount Construction's Property was erroneously included in the Inventory via the MPI form, requires that the Planning Board expressly clarify in the Annual Update that the cemetery in question is not in fact located on the Property at 5200 Murray Road, in accordance with the Court ruling. Not doing so under the circumstances would continue to obfuscate the matter and leave a cloud on the title of Paramount's property.

<sup>&</sup>lt;sup>2</sup> Staff Report, "Burial Sites Inventory Annual Update" (May 20, 2020), available at <a href="https://montgomeryplanningboard.org/wp-content/uploads/2020/05/final\_burial\_sites\_update\_staff\_report\_05-20-20.pdf">https://montgomeryplanningboard.org/wp-content/uploads/2020/05/final\_burial\_sites\_update\_staff\_report\_05-20-20.pdf</a>.

<sup>&</sup>lt;sup>3</sup> The Planning Board included the "Isaac Shoemaker Cemetery" in the Burial Sites Inventory, based on the submission of MPI's form, which was prepared by the defendants in the Litigation: <a href="https://www.montgomerypreservation.org/wp-content/uploads/2018/11/324">https://www.montgomerypreservation.org/wp-content/uploads/2018/11/324</a> Shoemaker Family Chevy-Chase 2018 Survey.pdf.

<sup>&</sup>lt;sup>4</sup> The Planning Board's website for the Inventory endorses, and cites as the basis for the Inventory, the MPI forms. (https://montgomeryplanning.org/planning/historic/montgomery-county-burial-sites-inventory/montgomery-county-cemetery-inventory-revisited-project/).

Finally, while Dr. Crane's email suggests that the Planning Board's Staff cannot correct the MPI form for the "Isaac Shoemaker Cemetery," the Staff Report for the Annual Update states the opposite, identifying the revising of these forms among the ongoing Inventory initiatives. (See Staff Report, at 3 ("Updating the informational forms accompanying sites listed on the Burial Sites.")) Moreover, the Attachment A to the Staff Report includes a detailed log of all changes to the Inventory, but omits the subject issue. This change log can and must include an express statement that the "Isaac Shoemaker Cemetery" is not located on Paramount Construction's Property.

Removing the Property from the Burial Sites Inventory, in accord with the Planning Board's instructions provided in May of 2019, is simple. In the Annual Update's change log (Attachment A to the Staff Report), the Planning Board should acknowledge the Circuit Court's ruling that there is not a burial site on Paramount Construction, Inc.'s Property, contrary to the MPI form on which the Planning Board based its decision to include the "Isaac Shoemaker Cemetery" in the Inventory. And, the Planning Board Staff should amend the subject MPI form, pursuant to the ongoing Inventory initiatives, or otherwise not endorse MPI's position, as MPI continues to publish the subject form.

Thank you for your consideration. We look forward to further discussing this matter at this Thursday's Planning Board meeting.

Sincerely,

MILLER, MILLER & CANBY

Soo Lee-Cho

Diane Feuerherd

#### Enclosures

Cc: Matthew T. Mills, Esq. (matthew.mills@mncppc.org), Principal Counsel for M-NCPPC Susan W. Scofield(scofieldlaw@aol.com),

Defendant and Counsel for remaining Defendants in the Litigation Dr. Brian Crane, PhD (<u>Brian.Crane@montgomeryplanning.org</u>)
Rob Maggin, Paramount Construction, Inc.

## EXHIBIT 1

#### Diane E. Feuerherd

From: Crane, Brian < Brian.Crane@montgomeryplanning.org>

**Sent:** Thursday, May 21, 2020 10:33 AM **To:** Diane E. Feuerherd; MCP-Chair

**Cc:** Mills, Matthew; Susie Scofield; Soo Lee-Cho

Subject: RE: Paramount Construction, Inc. / 5200 Murray Road / Removal of Property from Burial

Sites Inventory

#### Dear Ms Feuerherd,

Thank you for your email. The record for the Isaac Shoemaker Family Cemetery as adopted by the Planning Board in May 2019 is shown as a single point within the parcel at 5202 Murray Rd, not 5200 Murray Rd. The locations of burial sites in the Montgomery County Burial Sites Inventory are shown as a single point for each site, which is not intended to represent the boundaries of those sites. For this reason, we do not believe there is a need to change the inventory record for this cemetery at this time. Records in the Burial Sites Inventory also include a link to forms prepared by volunteers with Montgomery Preservation, Inc provided by the Planning Department for informational purposes. The form for the Isaac Shoemaker Cemetery includes references to both 5200 and 5202 Murray Rd; this link has been removed from the record for the Isaac Shoemaker Family Cemetery pending the completion of any changes to the form warranted by the court's decision.

v/r



#### Brian D. Crane, PhD

**Archaeologist Planner Coordinator** 

Historic Preservation Program 8787 Georgia Avenue, Silver Spring, MD 20910 brian.crane@montgomeryplanning.org c: 202.288.9904 | o: 301.563.3402









From: Diane E. Feuerherd <defeuerherd@mmcanby.com>

**Sent:** Wednesday, May 20, 2020 11:45 AM **To:** MCP-Chair <mcp-chair@mncppc-mc.org>

Cc: Mills, Matthew <matthew.mills@mncppc.org>; Susie Scofield <scofieldlaw@aol.com>; Crane, Brian

<Brian.Crane@montgomeryplanning.org>; Soo Lee-Cho <slcho@mmcanby.com>

Subject: Paramount Construction, Inc. / 5200 Murray Road / Removal of Property from Burial Sites Inventory

#### Dear Chair Anderson:

Good morning. This law firm represents Paramount Construction, Inc., the owner of the residential property at 5200 Murray Road in Chevy Chase. Please see the attached letter, concerning the removal of the property from the County's Burial Sites Inventory, as a result of the favorable judgment in the litigation concerning the same.

Thank you for your consideration.

Sincerely,

#### Diane E. Feuerherd

Attorney

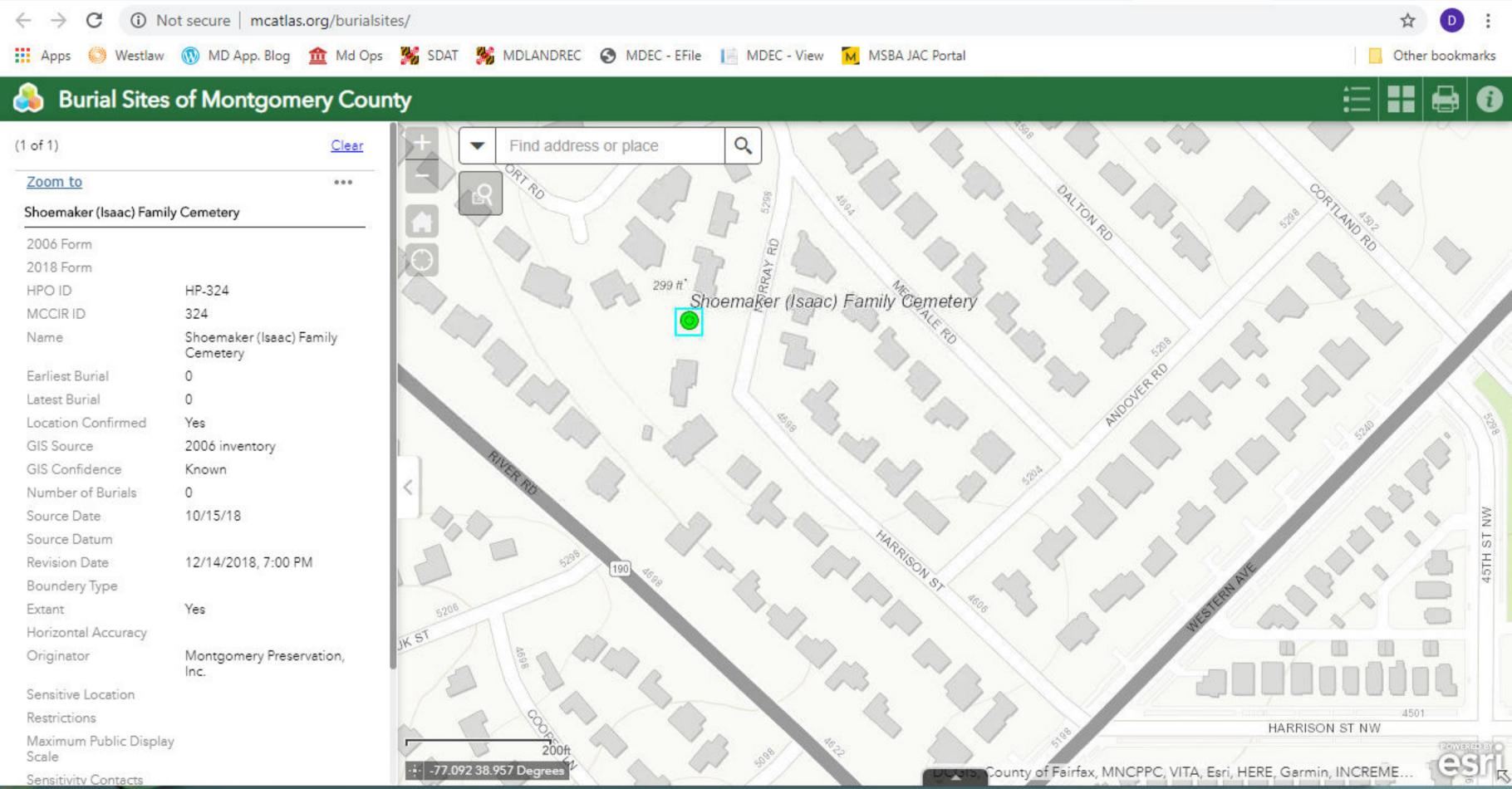


200-B Monroe Street Rockville, MD 20850 T: 301.762.5212 F: 301.762.6044

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## EXHIBIT 2



 From:
 Richard Sudol

 To:
 MCP-Chair

Cc: <u>Jill; Curt Judd; Linda; Faith; Michelle Engelmann; Crane, Brian</u>

**Subject:** Statement in support of removing the memory garden at Open Door Metropolitan Community Church from the

burial site inventory

Date:Tuesday, May 26, 2020 10:39:43 PMAttachments:Planning Board Support Letter 20200524.pdf

Please see the attached from the Board of Directors of Open Door Metropolitan Community Church

## Open Door Metropolitan Community Church

15817 Barnesville Rd., P.O. Box 127 Boyds MD 20841

May 24, 2020

Montgomery County Planning Board The Maryland National Park & Planning Commission 8787 Georgia Ave. Silver Spring, MD 20910

Dear Members of the Montgomery County Planning Board;

We are writing in support of the action recommended by the staff of the Historic Preservation Office in the Planning Department to remove our site from the Montgomery County Burial Site Inventory.

We became aware that Open Door Metropolitan Community Church in Boyds, MD was included in this inventory earlier this year. Upon researching the criteria for our memorial garden being included in the inventory, we found that it does not meet the criteria and therefore should be removed from said inventory.

In conversations with the staff in the History Preservation Office we confirmed that because the garden has no interments in it or on any of the church's property, the listing as an official burial site in the inventory was therefore inaccurate.

Further, we have spoken to past and present members of the congregation and have confirmed that there are no remains (other than sprinkled ashes) or urns there.

We remain, respectfully,

Rev. Dr. Jill McCrory, Interim Pastor

Mr. Curt Judd. Vice Moderator of the Board

Mr. Richard Sudol, Treasurer

Ms. Michelle Engelman, Board Member

Ms. Linda Gibeaux, Board Member

Ms. Faith Yiengst, Board Risk Officer

From: <u>Eileen McGuckian</u>
To: <u>MCP-Chair</u>

**Subject:** MPI testimony for Item 5 -- public hearing May 28, 2020

Date: Wednesday, May 27, 2020 11:18:14 AM
Attachments: MPI testimony to Planning Board 5.28.20 .docx

Dear Chairman Anderson and Members of the Planning Board,

Attached find testimony for the public hearing tomorrow, May 28, 2020, regarding the First Annual Update to the Montgomery County Burial Sites Inventory and Planning Board Design Guidelines.

I am registered to testify on behalf of Montgomery Preservation at the public hearing, and wanted to send this outline of my testimony in advance so you can follow along.

MPI appreciates this opportunity to express views and recommendations.

Thank you,

Eileen McGuckian, president Montgomery Preservation, Inc.

Elea Myuckian

301-468-7331

phileen3@verizon.net





Web: www.montgomerypreservation.org Email: mpi@montgomerypreservation.org

To Promote the Preservation, Protection and Enjoyment of Montgomery County's Rich Architectural Heritage and Historic Landscapes

#### FOR THE PUBLIC HEARING RECORD:

Annual Review of Montgomery County Planning Board Guidelines for Burial Sites Testimony May 28, 2020, submitted by Eileen McGuckian, president, on behalf of Montgomery Preservation, Inc.

#### **OUTLINE OF MPI TESTIMONY TO PLANNING BOARD**

#### **Commend Planning Board for**

approving the Cemetery Inventory, adopting Guidelines, hiring skilled Archaeologist

#### What has happened during the past year?

- · cemeteries appear more on the public radar, inventory better known
- new County laws have made a positive difference

#### **Inspiration to Owners and Neighbors:**

Young-Remsburg Family Cemetery -- ID#1 -- in Poolesville St. Mark's Methodist Church Cemetery -- ID#136 -- in Boyds Moses Hall Cemetery, Morningstar Tabernacle, ID#105 -- in Cabin John Dove Family Cemetery -- ID#305 - in Scotland Wesley Union Cemetery-ID#149 -- in Potomac

#### New subdivision review process protecting historic burial sites:

Shaw Family Cemetery – ID#168 -- in Clarksburg Zachariah Waters Cemetery – ID#219 -- in Germantown Aspin Hill Pet Cemetery – ID#162 -- in Aspen Hill

#### **Identification of Burial Sites located within parks in Montgomery County:**

Mt. Pleasant Church Cemetery – ID#111 -- in Norbeck Sarah Lee Family Cemetery -- ID#199 -- in Calverton Mother's Delight – ID#300 – in Boyds (MD DNR)

#### Disappointments in this new process ~~~ MPI would like to see:

- Matching of site data with Tax account IDs, liber/folio, owners
- More involvement with public through notice and publicity
- Announce news and upcoming meetings on MCPD/HP web page
- Track kept of removals from inventory so never lose a burial site
- Recommendations for improvements to laws and guidelines

#### What else is needed to improve situations in which burial sites are found?

MPI suggests refinements to the *Planning Board Guidelines for Burial Sites*:

- Broaden requirements to notice more than site owner
- More research on more identified sites, whittle down Lost and Unknown
- Specify what constitutes sufficient historic research
- Create an appeals process for contested cases
- Add HPC review of proposed updates and HPC input to Planning Board
- Recommend ways to strengthen County laws and regulations to protect sites

#### What MPI is doing now and will continue to do:

#### **Outreach:**

Continue to serve as a resource and assist all advocates and agencies Maintain historic cemeteries section on MPI website, programming when safe to do so Collaborate and mentor on research and documentation Provide best practices, information, and advice Assist with legal issues as needed

Nominate sites and assist others to nominate for Master Plan for Historic Preservation Maintain leadership roles and networking relationships with local advocates Work with local and State-wide organizations

Consider additional legislation to recommend to County and State

#### Follow up several 2018-19 recommendations of MCCI-R project:

Watch list of fragile and vulnerable burial sites Continue documentation Clean-ups, mapping workshops Nominations for Master Plan for Historic Preservation Identify sources of assistance and assistance

#### In Closing:

This past year has firmly established the value of the Cemetery Inventory and the Guidelines. The combination of dedicated property owners, passionate volunteers, and quality staff has confirmed the wisdom of the County Council and the Planning Board.

Montgomery Preservation looks forward to continuing to work with all of these entities and you to improve and enhance the situations of historic burial sites in Montgomery County.

Thank you, Liles Myuckine

Eileen McGuckian, president Montgomery Preservation, Inc. 
 From:
 Soo Lee-Cho

 To:
 MCP-Chair

Cc: <u>Diane E. Feuerherd; Rob Maggin</u>

Subject: RE: AGENDA ITEM NO. 5 - MAY 28, 2020 PLANNING BOARD MTG - Burial Site Inventory Annual Update

**Date:** Wednesday, May 27, 2020 11:21:27 AM

Attachments: 2020.05.20 Ltr to Chair Anderson, re Paramount Construction, Inc with exhibits.pdf

#### Ms. Coello,

Please circulate the attached letter and exhibits previously sent to the Chair/Planning Board on May 20, 2020 along with the letter submission made yesterday, the receipt of which you confirmed below.

The attached May 20<sup>th</sup> letter is referenced in yesterday's letter and relate to the same subject matter on tomorrow's agenda, i.e., Burial Site Inventory Update, but it did not call out the agenda item in the subject line so I wasn't sure if it was properly entered into the record. It should also be circulated to the other members of the Planning Board in addition to the Chair.

Thank you very much.

#### Soo Lee-Cho

Attorney



200-B Monroe Street Rockville, MD 20850 T: 301.762.5212 F: 301.424.9673

website | bio | vCard | confidentiality | email

**From:** MCP-Chair <mcp-chair@mncppc-mc.org>

**Sent:** Tuesday, May 26, 2020 2:48 PM **To:** Soo Lee-Cho <slcho@mmcanby.com>

Subject: RE: AGENDA ITEM NO. 5 - MAY 28, 2020 PLANNING BOARD MTG - Burial Site Inventory

Annual Update

Good afternoon,

This confirms receipt of your letter with exhibits for distribution to the Planning Board and staff to review.

Thank you,

#### Catherine Coello, Administrative Assistant

The Maryland-National Park and Planning Commission

Montgomery County Chair's Office 8787 Georgia Ave, Silver Spring, MD 20910

Main: 301-495-4605 | Direct: 301-495-4608 | Fax: 301-495-1320

www.MontgomeryPlanningBoard.org

**From:** Soo Lee-Cho <<u>slcho@mmcanby.com</u>>

Sent: Tuesday, May 26, 2020 1:00 PM

To: MCP-Chair < mcp-chair@mncppc-mc.org >

**Cc:** Mills, Matthew <<u>matthew.mills@mncppc.org</u>>; Crane, Brian

< Brian. Crane@montgomeryplanning.org>; scofieldlaw@aol.com; Rob Maggin

<<u>rob@paramountconstruction.net</u>>; Diane E. Feuerherd <<u>defeuerherd@mmcanby.com</u>>

Subject: AGENDA ITEM NO. 5 - MAY 28, 2020 PLANNING BOARD MTG - Burial Site Inventory Annual

Update

**Importance:** High

Dear Chairman Anderson,

Please see attached letter and exhibits for the Planning Board's consideration in re: *Annual Update* of the Burial Site Inventory scheduled for this week's agenda.

Thank you.

#### Soo Lee-Cho

Attorney



200-B Monroe Street Rockville, MD 20850 T: 301.762.5212 F: 301.424.9673

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200-B MONROE STREET, ROCKVILLE, MARYLAND 20850 P: 301.762.5212 F: 301.762.6044 WWW.MILLERMILLERCANBY.COM All attorneys admitted in Maryland and where indicated.

PATRICK C. MCKEEVER JAMES L. THOMPSON LEWIS R. SCHUMANN JODY S. KLINE JOSEPH P. SUNTUM ROBERT E. GOUGH DONNA E. MCBRIDE (DC) GLENN M. ANDERSON (FL) SEAN P. HUGHES (DC) CATHY G. BORTEN (DC) MICHAEL G. CAMPBELL (DC, VA) SOO LEE-CHO (CA)
DAVID A. LUCAS (DC)
DIANE E. FEUERHERD
CHRISTOPHER L. YOUNG (VA)
CALLIE CARNEMARK (VA)
JAMES T. ROTH (DC)

May 20, 2020

By Email Only
Casey Anderson, Chairman
Montgomery County Planning Board
M-NCPPC
8787 Georgia Avenue
Silver Spring, MD 20910
MCP-Chair@mncppc-mc.org

Re: Paramount Construction, Inc.

5200 Murray Road, Chevy Chase, MD 20815 ("Property") Removal of Property from the Burial Sites Inventory,

As a Result of a Final Judgment in *Paramount Construction*, *Inc.* v.

Scofield, et al., Case No. 447344-V

#### Dear Chairman Anderson:

This law firm represents Paramount Construction, Inc., the owner of the residential property at 5200 Murray Road, Chevy Chase, Maryland 20815 ("Property").

In May of 2019, Paramount Construction noted its objection to the inclusion of its Property in the Burial Sites Inventory (HP-324 "Shoemaker (Isaac) Family Cemetery"), in part because whether there was a cemetery on the Property was the subject of pending litigation in the Circuit Court for Montgomery County, *Paramount Construction, Inc. v. Susan Werner Scofield*, Case No. 447344-V ("Litigation"). A copy of our letter of objection, dated May 14, 2019, is enclosed as **Exhibit 1** for reference. On May 16, 2019, Soo Lee-Cho, Esq. of this firm appeared on behalf of the Paramount Construction at the Planning Board's hearing concerning the Inventory and further objected to the Property's premature inclusion in the Inventory. In response, the Planning Board indicated that it would honor the outcome of the pending Litigation and remove the Property from the Inventory, if the Circuit Court determined there was no burial site on the Property. A copy of the transcript of the hearing is enclosed as **Exhibit 2**; the pertinent discussion is located at 28:10 to 31:5 ("CHAIR ANDERSON: . . . So if you're going to court to argue about this, when you're done arguing about it, and the court decides whether you are right or you are wrong, you can just

send an email to our staff and append the judgment and say here it is. And they can send it to the Planning Board as a consent item and we could be done with it. Is that satisfactory? MS. LEE-CHO: We would agree.")

On January 7, 2020, the Circuit Court entered a final Opinion and Order in the Litigation, finding "that Plaintiff [Paramount Construction] has met its burden of proof in this matter; and that there is no 'burial site' on the Plaintiff's Property known as 5200 Murray Road, Chevy Chase, Montgomery County, Maryland." (Exhibit 3). While we acknowledge that the defendants have noted an appeal to the Court of Special Appeals, the Circuit Court's decision has not been stayed and constitutes the Court's final Opinion/Order.

Based on the foregoing, Paramount Construction requests that the Planning Board, pursuant to the instruction of the May 16, 2019 hearing, remove the Property from the Burial Sites Inventory.

Please contact Soo Lee-Cho (<u>slcho@mmcanby.com</u>) to discuss this matter further. I will be on maternity leave, beginning May 22, 2020 and returning on or around August 24, 2020. Thank you for your consideration.

Sincerely,

MILLER, MILLER & CANBY

: Fwerherd

Diane E. Feuerherd

Cc: Matthew T. Mills, Esq. (<u>matthew.mills@mncppc.org</u>), Principal Counsel for M-NCPPC Susan W. Scofield (<u>scofieldlaw@aol.com</u>),

Defendant and Counsel for remaining Defendants in the Litigation Dr. Brian Crane, PhD (Brian.Crane@montgomeryplanning.org)

## EXHIBIT 1



200-B MONROE STREET, ROCKVILLE, MARYLAND 20850 P: 301.762.5212 F: 301.762.6044 WWW.MILLERMILLERCANBY.COM
All attorneys admitted in Maryland and where indicated.

PATRICK C. MCKEEVER JAMES L. THOMPSON LEWIS R. SCHUMANN JODY S. KLINE JOSEPH P. SUNTUM ROBERT E. GOUGH

DONNA E. MCBRIDE (DC)
GLENN M. ANDERSON (FL)
SEAN P., HUGHES (DC)
CATHY G. BORTEN (DC)
MICHAEL G. CAMPBELL (DC, VA)

SOO LEE-CHO (CA)
DAVID A. LUCAS (DC)
DIANE E. FEUERHERD
CHRISTOPHER L. YOUNG (VA)
CALLIE CARNEMARK (VA)
JAMES T. ROTH

May 14, 2019

By Regular Mail and Email
Casey Anderson, Chairman
Montgomery County Planning Board
M-NCPPC
8787 Georgia Ave.
Silver Spring, MD 20910
MCP-Chair@mncppc-mc.org

Re: Montgomery County Planning Board Meeting on May 16, 2019

Agenda Item #3 ("Adoption of the Burial Sites Inventory and Guidelines")

HP-324 "Shoemaker (Isaac) Family Cemetery"

Property Owner Paramount Construction Inc.'s Objection to Inclusion of

**Property in Inventory Pending Litigation** 

Dear Chairman Anderson and Members of the Montgomery County Planning Board:

This law firm represents Paramount Construction, Inc., the owner of 5200 Murray Road in Chevy Chase, Maryland ("Property"), which has been identified within the draft Burial Sites Inventory and Guidelines as containing a portion of the "Isaac Shoemaker Family Cemetery" (or HP-324).

Paramount Construction has repeatedly objected to identifying its Property, or any portion thereof, as a burial site. There are no recorded deeds or plats that identify a cemetery on the Property. Several descendants of Isaac Shoemaker and neighbors who do not like having a developer as a neighbor, all led by Nancy Shoemaker Werner, point to an exclusion of 1/7 of an acre "burial plot" in the deed conveying the 60-acre farm in the 1920s. No plat, survey of the land, or metes and bounds description of the burial plot exists. As a matter of law, "testimony of a surveyor as to the location of the boundaries on the ground is necessary because as to the identity of the land . . . a deed seldom, if ever, proves itself." *Porter v. Schafer*, 126 Md. App. 237, 266 (1999) (cleaned up). After the archeological study confirmed that there was no evidence of a burial site on the Property, Paramount Construction filed an Action to Quiet Title, in which Ms. Werner

is a defendant, *Paramount Construction, Inc. v. Susan Werner Scofield*, Case No. 447344-V ("Litigation"). The trial is set for this Thursday, May 16, 2019.

When Ms. Werner submitted the Isaac Shoemaker Family Cemetery (HP-324) for Inventory consideration in 2018, she cited the Litigation on Page 3 of the Inventory Form.

In March of this year, Paramount Construction received a letter from Rebecca Ballo of the Planning Department's Historic Preservation Program, concerning the draft inventory. Undersigned counsel responded in kind to Ms. Ballo, and the Program's archeologist Dr. Brian Crane. First, on March 19, Dr. Crane wrote by email that the subject cemetery was not located on Paramount Construction's Property: "The location they mapped appears to be in the neighboring lot, but very close to the boundary with 5200 Murray Road." Next, on March 22, undersigned counsel submitted a written objection to identifying the Property as a burial ground. Finally, also on March 22, Ms. Ballo confirmed receipt of the objection, forwarded to legal staff for review, and indicated that she would follow up if additional information was needed. Copies of Dr. Crane's March 19 email, Paramount Construction's objection letter and Ms. Ballo's response are enclosed. No further correspondence from the Planning Department with Paramount Construction was made, including no notice of the Planning Board's May 16 meeting and no clarification that the burial ground is located on 5200 Murray Road, rather than the subject Property.

Because of the Litigation, which includes a careful investigation of the Maryland Land Records and an archeological study of the subject ground that together refute the existence of a burial ground on the Property, as well as render Paramount Construction and its counsel unable to attend the Planning Board's May 16 meeting, we ask that the Planning Board stay consideration of including the Property (Isaac Shoemaker Family Cemetery or HP-324) within the Inventory until a final judgment in that case is reached.<sup>4</sup> Alternatively, we ask that the Planning Board clarify and confirm that HP-324 is <u>not</u> located on Paramount Construction's Property.

.

<sup>&</sup>lt;sup>1</sup> The materials for Agenda Item No. 3, in Attachment B, make reference to the "2006 Inventory" related to HP-324. This is incorrect, as HP-324 was not considered until 2018. The map of the 2006 Montgomery County Cemetery Inventory Digital Map (<a href="https://www.montgomeryplanning.org/historic/education/documents/map.pdf">https://www.montgomeryplanning.org/historic/education/documents/map.pdf</a>) does not include the subject property.

<sup>&</sup>lt;sup>2</sup> "Isaac Shoemaker Family Cemetery Form," Montgomery County Cemetery Inventory Revisited, *available at* <a href="https://mcatlas.org/filetransfer/HistoricPreservation/Cemeteries/324\_Shoemaker\_Family\_Chevy-Chase\_2018/324\_Shoemaker\_Family\_Chevy-Chase\_2018\_Survey.pdf">https://mcatlas.org/filetransfer/HistoricPreservation/Cemeteries/324\_Shoemaker\_Family\_Chevy-Chase\_2018\_Survey.pdf</a>. Page 3 of this Form identifies the Litigation:

On May 4, 2018, attorneys for the owner of the residential parcel at 5200 Murray Road, Chevy Chase, Maryland, 20815, have filed Civil Action No. V447344 regarding the cemetery. Nancy Shoemaker Werner and Susan Werner Scofield have filed a Rule 2-214 Motion to Intervene. Descendants of Isaac and Ann Shoemaker, as well as the neighboring community of Brookdale, are concerned that the Isaac Shoemaker family burial ground is under threat of imminent development.

<sup>&</sup>lt;sup>3</sup> A copy of Dr. Crane's email of March 19, 2019 is enclosed.

<sup>&</sup>lt;sup>4</sup> Even if Paramount Construction's request to stay is denied,

Thank you very much for your consideration.

Sincerely,

MILLER, MILLER & CANBY

DraneFeverherd

Diane E. Feuerherd

Cc: Susan Werner Scofield (<u>scofieldlaw@aol.com</u>), counsel for Nancy Shoemaker Werner Brian Crane, PhD (<u>Brian.Crane@montgomeryplanning.org</u>)

## EXHIBIT 2



# Transcript of Planning Board Meeting

**Date:** May 16, 2019

Case: Transcription Services

**Planet Depos** 

**Phone:** 888.433.3767

Email:: transcripts@planetdepos.com

www.planetdepos.com

## Transcript of Planning Board Meeting Conducted on May 16, 2019

THE MONTGOMERY COUNTY PLANNING BOARD OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION TRANSCRIPT 0 F PROCEEDINGS ITEM3 8787 Georgia Avenue Silver Spring, Maryland 20910 May 16, 2019 12 Volume 1 of 1 13 BEFORE: 14 Casey Anderson, Chair 15 Norman Dreyfuss, Vice-Chair 16 Natali Fanzi-Gonzalez, Commissioner 17 Gerald R. Cichy, Commissioner 18 Tina Patterson, Commissioner 20 Job No.: 246665 21 Pages: 1 - 37 22 Transcribed by: Molly Bugher

1 and associated appendices that we developed to 2 implement that inventory, and the review of 3 certain projects under the purview of this Board. 4 And to review the results of the public outreach 5 and that we have been conducting since February, 6 and the modifications that we have made. Once 7 again, the inventory and guidelines are intended 8 to implement two ordinances that the County 9 Council passed in October of 2017. Code 33A17 10 requires the Planning Board to create and maintain 11 an inventory of all the burial sites and 12 cemeteries in the County. And that's it defined 13 as, essentially, any place where a person has been 14 buried, including ashes in a columbarium, but not 15 ashes that have been sprinkled on the ground. And 16 that went into effect in February of 2018. County 17 Code 1831 requires that the Planning Board protect 18 burial sites during review of preliminary plan 19 applications. Essentially, if a preliminary plan 20 for a subdivision is brought before the Board for 21 review, if there is a cemetery within the parcel, 22 it is to be parceled off separately in such a way

#### PROCEEDINGS

MR. BRIAN CRANE: Good morning and sorry

2

- 3 for the momentary technological kerfuffle. So
- 4 we're here to bring back the Burial Sites
- Inventory and Guidelines. We briefed the Board
- 6 about these, about the draft inventory and
- guidelines on February 21. And since that time we
- 8 have engaged in public outreach about the
- 9 inventory and guidelines, and consulted with a
- 10 number of institutional organizational,
- 11 governmental stakeholders about both. And have
- 12 made minor revisions to both the guidelines and
- 13 the inventory which we have described in our staff
- 14 report to you. I wanted to just take a few
- 15 minutes to review the three things that we did in
- 16 February just to bring everybody up to speed about
- 17 what this is. And I guess I actually need to --
- 18 sorry. I'm Brian Crane, I'm the archaeologist for
- 19 the History and Preservation program in the
- 20 Department of Planning. So our purpose and goals
- 21 this morning is to review the inventory as to its
- 22 scope, methodology, and purpose, The guidelines

- 1 as to preserve that for future generations. And,
- if necessary, certain historical and
- archaeological investigations are to be done to
- establish the boundaries of that cemetery so that
- it can be protected. Under certain limited
- 6 circumstances a cemetery can be moved if it's
- simply not possible to parcel off the cemetery in
- a way that allows for future use of the parcel to
- go forward. And that went into effect in July of
- 10 2018. The inventory itself was created through
- 11 the efforts of many volunteers, initially between
- 12 2004 and 2010. It was a project that was led by
- 13 Peerless of Rockville, and it identified over 260
- 14 cemeteries and burial sites across the county.
- 15 And the results of that were Inc. into MC Atlas.
- 16 Following the passage of the two ordinances in
- 17 October 2017 Montgomery Preservation Inc. mounted
- 18 a massive volunteer effort to revisit all of the
- 19 sites, or as many of them as possible in the
- 20 field, and to do additional historical research to
- 21 identify additional cemeteries and burial sites.
- 22 They have physically visited over 260 sites and

4

## Transcript of Planning Board Meeting Conducted on May 16, 2019

1 found through historical research an additional 50

2 sites. The results of those are in an updated

3 layer on MC Atlas. It includes three kinds of

4 sites; the majority over 240 points, are what are

5 considered to be known locations. Those are

6 locations where there is still physical evidence

7 of the cemetery visible on the surface, or where

8 historical research is very clear about the

9 location of a cemetery that may no longer be

10 plainly visible on the surface. There are also

11 approximately 74, approximate sites. Those are

12 sites that the historical research indicates there

13 was an area where a cemetery was located but we

14 don't know exactly where it was and those are

15 indicated by clear dots on the MC Atlas display as

16 opposed to green dots. There are also parcel

17 areas. Most of the items in the inventory are

18 represented by a single point. They don't include

19 any information about boundaries. The exception

20 to that are prehistorical archeological sites that

21 are int eh records of the Maryland Historical

22 Trust that are known to include human burials.

6

1 Those are mostly what archaeologist called

2 woodland village sites on islands, and areas along

3 the Potomac River. Those locations are considered

4 sensitive and so they are rendered in our

5 inventory as the boundaries of the parcels that

6 contain them. In the case of the sites, those are

7 large park areas and other large holdings along

8 the Potomac River. So the hatched area that you

9 see in several places along the Potomac River that

10 means that that parcel contains one or more known

11 burial sites, but the exact location is considered

12 to be sensitive. The records in the MC Atlas

13 inventory include a number of basic descriptive

14 fields and links to the forms created by

15 volunteers. The original cover sheet from the

16 2004 to 2010 inventory, and the more detailed

17 inventory forms that were prepared by Montgomery

18 Preservation Inc. in 2018. The guidelines that we

19 have been developing since last September are

20 intended to establish procedures to adequately

21 establish the boundaries of burial sites, to

22 establish standards, to ensure preservation of

1 those burial sites, establish standards to ensure

2 adequate maintenance of those sites going forward,

3 establish procedures for adding or deleting, or

4 excluding from the burial site inventory, and

5 establish procedures for making the data available

6 to the public electronically. The information

7 that we have made publicly available, we have

8 created a website that is linked from the historic

9 preservation website, which is internal, of

10 course, linked from the Planning Department

11 website; the URL is shown here. There is also

12 information about the inventory on the Montgomery

13 Preservation Inc. website, the volunteers who did

14 the cemetery revisit project; and they are also

15 available through an MC Atlas layer. Our website

16 includes information about the historical

17 background of the volunteer projects that created

18 the inventory, copies of the two ordinances passed

19 by the County Council, a copy of the draft

20 inventory that we briefed the Board on in

21 February, and links to the videos of the three

22 public meetings that we held in March and April.

1 We, as part of the public outreach, we sent

2 letters to all of the individuals and

3 organizations that are listed as owners of the

4 parcels that contain any of the points that were

5 on the inventory. And then, tracked the responses

6 that we received. People asked various questions

7 of us by phone, or letter, or email and we have

8 tracked each of those, and our responses to them.

9 We held a volunteer appreciation event for the

10 volunteers of the Montgomery Preservation Inc.

11 project in February. And then we had three public

12 meetings, the first on March 22nd in this

13 auditorium. And then to following public meetings

14 at the public libraries in Germantown and Olney.

15 Approximately 60 members of the public came to

16 those meetings. In addition, to that outreach, we

17 consulted with a number of governmental and

18 organizational stakeholder partners including all

19 of the ones that are listed here to get their

1) of the ones that are fished here to get their

20 input both about the inventory and about the

21 guidelines. In terms of significant input that we 22 received that resulted in some modifications, the

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12

### Transcript of Planning Board Meeting Conducted on May 16, 2019

1 Park Service wanted us to redact the precise

- 2 location information for all of the burial sites
- 3 on Park Service land. That is to say that they
- 4 considered those potentially sensitive, so those
- locations are simply represented by the boundaries
- of C&O Canal Park. Another significant --

COMMISSIONER DREYFUSS: When you say

- they wanted you to redact them, meaning --
- MR. CRANE: Meaning that the online map
- 10 doesn't show the exact spot where the burial is,
- 11 but rather shows the boundaries of the parcel that
- 12 contains it. So in that case, it's the boundaries
- 13 of C&O Canal Park.
- COMMISSIONER DREYFUSS: Is that in terms
- 15 of identification and what they might be doing is
- 16 that kind of what the --
- 17 MR. CRANE: No, the detailed information
- 18 is available both to them and to the Planning
- 19 Department. It just means that other members of
- 20 the public can go to MC Atlas that yes, indeed,
- 21 the C&O Canal Park is known to contain burial
- 22 sites, but it doesn't tells them exactly where
- 1 they are. And that is consistent with the
- 2 guidelines that we prepared that where the
- 3 location information is considered sensitive.
- 4 That is, there's some concern that there may be
- vandalism of that site. There is a provision to
- 6 essentially include the information that this
- parcel includes a burial on it somewhere.
- COMMISSIONER DREYFUSS: Okay. Thank
- 9 you.
- 10 MR. CRANE: The other significant input
- 11 that we received was from the Maryland Commission
- 12 mission on Indian Affairs, who would like us to
- 13 include in our guidelines reference to their
- 14 protocols for the recovery and recordation of
- 15 Native American burial sites. And essentially
- 16 that those burial sites are, when archaeologist
- 17 record them they should draw the remains, but not
- 18 photograph them and that those remain should be
- 19 reinterred in consultation with the Maryland
- 20 Commission on Indian Affairs, and reference to
- 21 consulting with them is included now in the
- 22 revised guidelines that we prepared. So the

- 1 physical revisions, we have been logging those.
- 2 So among the input that we received from the
- public, several members came forward with
- 4 additional information that helped identify, in
- some cases, errors in where the point had landed.
- So where I could research and verify the new
- 7 information that we were given I updated the
- 8 inventory to reflect the corrected information.
- 9 And each of those is shown here. As I mentioned,
- 10 the guidelines we revise those in response to the
- 11 institutional input that I just mentioned, as well
- 12 as comments from the Board made at our February
- 13 21st meeting. So broadly speaking, what we did
- 14 was we refined the language about how the Board is
- 15 to consider the input of descendants for instances
- 16 where a cemetery may be located. We addressed the
- 17 applicability of the guidelines to crime scenes
- 18 specify that the guidelines are not intended to
- 19 apply human remains that are found associated with
- 20 a crime in a police matter. And applicability to
- 21 projects not subject to Planning Board review
- 22 saying in those cases -- say for example, a

10

1 building permit, the guidelines don't specifically

- 2 apply to those cases, but do represent best
- 3 practices that we would recommend in those cases.
- Also, we added an infographic. We replace
- Appendix D which was initially just a table with
- 6 item descriptions and dates, and what we hope is a
- 7 more informative infographic that will make the
- 8 information about the process a little easier to
- 9 understand for the public. Our next steps
- 10 essentially involve continuous improvement. As I
- 11 mentioned, we have over 70 locations that are
- 12 considered approximate in the inventory. And we
- 13 would like to do continuing historical and
- 14 archaeological investigations to refine those
- 15 locations so that we can describe them as known
- 16 points. We would like to do predictive modeling
- 17 research. We know that there are a large number
- 18 of burial sites that are necessarily missing from
- 19 the inventory. More than a third of Montgomery
- 20 County's population prior to the Civil War were
- 21 held in slavery, and yet, we have only a handful
- 22 of possible locations where enslaved persons may

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1 have been buried. So we know that there are a

- 2 large number of, potentially scores, of additional
- 3 sites whose location has been lost to history.
- 4 But it may be possible to recover those through
- 5 historical and archaeological investigations. We
- 6 would like to, where possible, to replace the
- 7 points in the inventory with actual boundaries of
- 8 cemetery locations, which will help both property
- 9 owners and this Board and others to manage those
- 10 resources. We would like to do research into what
- 11 may potentially make certain of the cemetery sites
- 12 in our inventory historically significant. There
- 13 are a few that are currently listed on the
- 14 locational atlas for historic sites, like
- 15 Manakasie (phonetic) Cemetery, Aspen Hill Pet
- 16 Cemetery, and there are several others that are
- 17 either listed in their own right, or are included
- 18 within the boundaries of historic districts. But
- 19 we need to understand what potentially makes any
- 20 individual cemetery significant, and may make it
- 21 worthy of listing on the historical atlas, if that
- 22 is warranted. We also wish to create more user
  - 14
- 1 friendly versions of the guidelines and continue
- 2 doing public outreach and education programs, as
- 3 well as training programs for our partner --
- 4 governmental and organizational partners,
- 5 educational sessions for people here in the
- 6 Planning Department about land-use and with
- 7 Montgomery County Department of Planning Services
- 8 and others who will have questions about the
- 9 inventory and how to implement it. And our
- 10 recommendation is that the Board adopt the revised
- 11 inventory, and our revised Guidelines. I will be
- 12 happy to answer any questions you may have.
- 13 COMMISSIONER FANI-GONZALEZ: Good
- 14 morning. I apologize I missed the earlier part of
- 15 your presentation, but I did hear you speak to the
- 16 treatment of remains that are identified as those
- 17 of Native American communities. I'm assuming that
- 18 the same treatment would apply to other faith
- 19 communities and their designation regarding the
- 20 treatment of remains?
- 21 MR. CRANE: The guidelines provide for
- 22 the respectful treatment of any remains that are

- 1 identified pursuant to our guidelines. Among the
- 2 various cultural groups is that may have
- 3 affiliation with burial sites in the inventory,
- 4 only the Maryland Commission on Indian Affairs has
- 5 developed specific protocols for handling. There
- 6 aren't others. We did send a letter asking for
- 7 consultation from the Maryland Commission on
- 8 African-American affairs, for example; we haven't
- 9 heard back from them. We can pursue that further.
- 10 But the only specifically different procedures
- 11 that have been identified so far have been in
- 12 consultation with the Maryland Commission on
- 13 Indian Affairs.
- 14 COMMISSIONER FANI-GONZALEZ: May I
- 15 recommend then that you engage the Montgomery
- 16 County Interfaith Advisory Council and asked their
- 17 faith leaders that may have some insight as to the
- 18 treatment of remains from the various faith
- 19 communities so that we are somewhat comprehensive
- 20 but the language also in this document doesn't
- 21 limit us just to Native American communities, but
- 22 any tradition that has a specific treatment of
- 1 remains, that we are sensitive to that.
  - 2 MR. CRANE: We will.
  - 3 COMMISSIONER DREYFUSS: I've got a
  - 4 couple of questions, if I may. The Planning
  - 5 Director mentioned there is an effort to re-forest
  - 6 the ag reserve and talked about stream valleys
  - 7 more so. But in terms of work like that, would
  - 8 there be a working with whoever is doing that from
  - 9 the standpoint of burial sites? That's kind of
  - 10 one question?
  - 11 MR. CRANE: Yes, we would.
  - 12 COMMISSIONER DREYFUSS: All right. I
  - 13 think you should be aware of that. It sounded
  - 14 like it was stream valleys which may or may not be
  - 15 appropriate burial sites but --
  - MR. CRANE: Yeah, we -- so far it
  - 17 appears that most of the burial sites are on more
  - 18 elevated locations, but yes, we would certainly be
  - 19 working with people here in the Planning
  - 20 Department about any other initiatives that may
  - 21 have an effect.
  - 22 COMMISSIONER DREYFUSS: And then also,

16

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17 19 any Parks work that goes on; they are -- that's 1 consider. one of the things they check your list? MR. CRANE: Well, that's certainly the MR. CRANE: Oh, yes. My counterpart, in 3 intention of making the information in the 4 effect, about cemeteries is Jamie Coons and so inventory public through MSC Atlas, and our she's very well aware of the location of all the intention to conduct educational outreach to cemeteries and burial sites on park land and 6 Montgomery County agencies so that people are reviews impacts -aware of both the inventory and its associated COMMISSIONER DREYFUSS: One thing we had guidelines. 9 in Potomac somebody that actually to get to their COMMISSIONER DREYFUSS: The other thing 10 property I think they had to go through the German 10 too, is you talk about government partners and the 11 School, a very hard stream valley. They hired a 11 next Item 4 is this, I guess annual report to the 12 contractor to come in and take down some trees and 12 State Department of Planning. Are you in 13 apparently we cited them. In terms of that, is 13 communication with them on this? Are they aware 14 there any notice to people that do that type of 14 of this type of program in the counties, or our 15 work of -- these people didn't seem to be 15 County? 16 conscious. I thought maybe we should tell -- give 16 MR. CRANE: Well, we're certainly in 17 the kind of the sites that we have forest 17 regular communication with the Maryland Historical 18 conservation but, in terms of industry, people 18 Trust. 19 that do work? COMMISSIONER DREYFUSS: But the 19 20 MS. BALLO: Rebeccah Ballo for the 20 Department of Planning, the state -- the next item 21 record. Part of our work, as Brian had mentioned 21 is a report, and are they supportive and conscious 22 before, is going to be consulting with the 22 of that program? 18 20

1 Department of Permitting Services and other county

- 2 agencies, and also I believe, you know, to your
- 3 point, consulting with other professionals who
- 4 work on forest conservation plans and other tree
- 5 and forest efforts to make sure that we cover,
- 6 let's say the building and land use trades very
- 7 broadly about this topic and make the information
- 8 available to them. And again, also make the
- 9 information available to DPS and other people in
- 10 the county government who tend to be more front
- 11 line with some of the work that you're describing
- 12 so they are aware of this.
- COMMISSIONER DREYFUSS: Yeah, I kind of
- 14 -- you know we have all this GIS information and
- 15 you say you want not to totally target the area,
- 16 some obscurity, but again it seems to me a kind of
- 17 a landscape contractor should be aware as far as
- 18 conservation and tell an owner, well, we can't do
- 19 what you've asked because you a burial site. I
- 20 don't know whether we would go that far, but just
- 21 to me it seems to protect, at least burial sites
- 22 in forest conservation, may be something to

MR. CRANE: I think in the report, you

- may be referring to, it is a report back to this
- Board each year about any revisions that we've
- made to the inventory and any recommendations.
- COMMISSIONER DREYFUSS: No, no. Just
- this one here. There is a requirement that we do
- an annual report.
- 8 MR. CRANE: Oh, I see.
- COMMISSIONER DREYFUSS: And I guess my
- 10 question is, are they aware of this program? Are
- 11 they supportive of this program? Is this
- 12 something they tell other state agencies about?
- 13 It was just something to consider whether --
- MS. BALLO: We have reached out to them
- 15 as well as to our counterparts in state highways
- 16 as well. And we are happy to keep in
- 17 communication with them, and to update them.
- COMMISSIONER DREYFUSS: Yeah, they
- 19 should be aware. I guess we have the same program
- 20 in Prince George's, and also here. So is it one
- 21 of the more extensive programs in the state?
- 22 Maybe there's something that could be done in

24

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2.1

other jurisdictions.

2 MR. CRANE: We have provided Maryland

SHA with a copy of the inventory.

COMMISSIONER DREYFUSS: It's just the

Department of Planning would be the one other.

The other thing is you mentioned Aspen Hill Pet

Cemetery; well, how does that fall in?

MR. CRANE: That's a good question. It

9 does not fall in under the purview of the

10 inventory because of the pets that are buried

11 there. However, there are more than 50 people who

12 are also buried there.

13 COMMISSIONER DREYFUSS: Buried there

14 with their pets, perhaps.

15 MR. CRANE: Yes.

COMMISSIONER DREYFUSS: Okay. 16

17 MR. CRANE: So it's for that reason.

COMMISSIONER DREYFUSS: Thank you. Very

19 good, appreciate your effort on all of this. You

20 know. I had been involved with Peerless and

21 understand that they had been advocates for this

22 program, and I think that's been very important.

COMMISSIONER PATTERSON: Counsel, I have

a question regarding the commentary that we

3 received from the community. Do we need to

address this? There is a request from a member of

the community asking us to take a position on a

6 stay.

MR. MILLS: It's at your discretion

whether or not you want to address it or not.

COMMISSIONER PATTERSON: And your

10 recommendation is?

MR. MILLS: My recommendation is that

12 you go ahead and decide one way or another whether

13 or not you want to include it in the inventory.

14 If the case that's pending somehow decrees that

15 there is a burial site on the lot one way or the

16 other, then that will be definitive. But it would

17 be of no harm if you were to include it in the

18 inventory today.

19 CHAIR ANDERSON: I just had a couple of

20 questions that are more general that I think might

21 go to this issue. There is a provision here that

22 says we have an annual update. But if you're a

1 property owner that thinks there isn't a cemetery

2 on your property, or you, or some other interested

3 party who thinks there is a cemetery on a property

4 and that that should be included, and there is

5 some time sensitivity to it. So, for example, if

6 you are a property owner does the fact that my

7 property appears on the cemetery lists may

8 effectively be like a cloud on the title if I'm

9 trying to sell it, or if I'm trying to develop the

10 land. Or conversely, somebody might say, you

11 know, the property owner is claiming there is no

12 cemetery there, but I think there is, and I want

13 to make sure that there is some official notice to

14 third parties that's there before they do anything

15 with the land, and they're going to apply for a

16 building permit, you know, next week. So I wonder

17 if it might be appropriate to create some

18 procedural option in here to say you don't have to

19 wait until the next annual report in order to

20 correct, or update information on the inventory.

21 And that might also address this specific issue

22 we're talking about here. So, you know, if it

22

1 appears or doesn't appear on this list today it's

2 totally without -- not only is it without

3 prejudice to whatever some court would decide, but

4 then there could be some very straightforward

5 process to say let's update the list and not have

6 to wait until next January 1st, or whenever it is

7 that the staff and Board get around to updating

8 the overall inventory.

9 MR. CRANE: I think in effect that's

10 what we've been doing, and the intent was that we

11 would track any changes to the inventory that we

12 made over the course of a year, and then report to

13 the Board what has changed since the preceding

14 year. And at that time, make any recommendations

15 or revisions to the procedures that we discovered

16 were necessary. I would say as a practical

17 matter, it's much easier to find evidence or the

18 existence of a cemetery than it is to prove that

19 it isn't there, in the presence of evidence that

20 suggests that it was. To quote an old adage in

21 archaeology, absence of evidence is not evidence

22 of absence. So if there was historical

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1 information that a cemetery was in a given

- 2 location, it may be difficult to prove that it
- 3 wasn't there. I mean it's not impossible.
- 4 Detailed historical research can show that it was
- 5 actually really somewhere else. Or archaeological
- 6 investigations can show that there is no evidence
- 7 that there were ever interments there. But it's
- 8 not a simple thing to do. I mean if there were
- 9 historical records, or memories, or some physical
- 10 evidence of a cemetery having once a been in a
- 11 location, it's very likely still there.
- COMMISSIONER ANDERSON: Well, I guess
- 13 what I was hoping was that we could address some
- 14 concerns; well we have the one property owner who
- 15 is represented here today, but I can imagine this
- 16 will come up in the future where somebody realizes
- 17 maybe with out, you know, I'm sure we told
- 18 everybody that we're putting them on the list, but
- 19 some people threw their mail in the trash can with
- 20 the rest of the direct marketing solicitations.
- 21 And so they will wake up one day and say oh my
- 22 gosh, you know there's this list that the
- 1 government is maintaining that says there is a
- 2 cemetery on our property. I'm trying to sell my
- 3 house, or I'm --
- 4 MR. CRANE; We would certain --
- 5 CHAIR ANDERSON: So I just thought maybe
- 6 if we could write into the rules some mechanism to
- 7 say, at the request of any interested party that
- 8 they could submit a clarification or a
- 9 modification to the list and that the staff would
- 10 review that and then that could come to the
- 11 Planning Board. And if they are in agreement with
- 12 the staff perhaps it could be a consent item, or,
- 13 you know, the staff could make a recommendation
- 14 about whether or not to send that to the Board so
- 15 there would be a very simple way to correct our
- 16 inventory if that became -- if that were an urgent
- 17 issue. So we could just be very clear that that's
- 18 an available option. And conversely if somebody
- 19 thinks that there is a cemetery that we didn't
- 20 identify and there is some urgency to identify,
- 21 and likewise, that they could get that to the
- 22 staff to consider whether that should be sent to

- 1 the Board so the inventory could be updated
- 2 quickly. But it seems to me like that ought to be
- 3 -- there ought to be some amount of discretion on
- 4 the part of the staff as to whether or not whoever
- 5 is asking us to change the inventory has presented
- 6 evidence that satisfies either that they have a
- 7 reasonable basis for arguing that the inventory
- 8 should be changed.
- 9 MS. BALLO: And I believe that that's
- 10 how we've been doing it in practice over the last
- 11 couple of months since the draft inventory was
- 12 released, but we can craft some language to
- 13 clarify that within the guidelines about the
- 14 administrative staff.
- 15 CHAIR ANDERSON: Yeah, I think that
- 16 would be helpful and that way we could point to
- 17 something to say this is not -- this is within the
- 18 rules that there is a process and nobody needs to 19 be concerned that because they did or didn't. And
- 19 be concerned that because they and of didn't. And
- 20 there was a cemetery that did or did not appear on
- 21 this list, that that will prevent, or foreclose
- 22 any appropriate modification, if the need arises.
- 26
- CHAIRMAN PATTERSON: And to your point
- 2 Ms. Ballo, again, it's after you adjudicated and
- 3 evidence provided and it's not just a matter of I
- 4 want this off of my -- I want my property off of
- 5 the list. There needs to be some type of
- 6 documentation or something to back up. And as you
- 7 said, absence doesn't mean that there is an
- 8 absence.
- 9 MS. BALLO: Correct.
- MR. MILLS: And clearly, if there were
- 11 something, as in the case that's been brought up
- 12 today, if the existence of the cemetery is part of
- 12 today, if the existence of the centerery is part of
- 13 that quiet title action, which it may or may not
- 14 be, I can't tell from the docket entries, I've
- 15 looked at them. Then clearly if someone showed up
- 16 with a court decree saying so and so owns this
- 17 property and there's no cemetery on it, we would
- 18 be bound by that obviously.
- 19 CHAIRMAN ANDERSON: We would accept that 20 as dispositive.
- 21 COMMISSIONER PATTERSON: Exactly.
- MR. MILLS: That would be about as

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1 dispositive as it gets.

CHAIR ANDERSON: Right. So is that -- I

3 was hoping to try to make this not a long

- 4 discussion of one property, but is that -- if you
- 5 want to come up and maybe tell us -- well,
- 6 introduce yourself and tell us if that approach
- 7 is, you think, workable.
- SOO LEE-CHOE: For the record, Soo Lee-9 Choe, law firm of Miller, Miller & Canby on behalf 10 of Paramount Construction property owner of 5200
- 11 Murray Rd. in Chevy Chase. And the Chair did hit
- 12 on exactly our concern. For the Planning Board
- 13 today to move forward on adoption of an inventory
- 14 without that process being outlined in the
- 15 guidelines, we view as very problematic.
- 16 Essentially, you are taking an action without
- 17 having then the due process laid out for a
- 18 property owner to understand, you know, their
- 19 rights in terms of coming before this agency,
- 20 presenting additional information, and what
- 21 process they will face. In terms of the present
- 22 court case that is in trial actually this morning,

1 and which is I am here today before you as opposed

- 2 to the attorney on this case, the issue of the
- 3 existence of a burial site on my client's property
- 4 is at issue in the quiet title action. It is very
- 5 directly the issue. The property owner has --
- 6 well, the attorney Diane Feuerherd, of my office
- 7 has had communication with staff earlier this
- 8 year. And had communicated and discussed an
- 9 archaeological study that actually has been done
- 10 on my client's property to show that there is no
- 11 existence of a burial site, or any burial actually
- 12 on the property. That study, it's my
- 13 understanding that staff was aware of that study.
- 14 I have copies for the Planning Board and I would 15 like to --
- CHAIR ANDERSON: I don't mean to cut you 16 enough information to show --
- 17 off, but I was sort of hoping we could just
- 18 dispense with this whole discussion of what's
- 19 going on with this property by hopefully getting
- 20 some modification to the rule. So if you're going 21 to court to argue about this, when you're done
- 22 arguing about it, and the court decides whether

- 1 you are right or you are wrong, you can just send
  - an email to our staff and append the judgment and
  - say here it is. And they can send it to the
  - Planning Board as a consent item and we could be
  - done with it. Is that satisfactory?
  - MS. LEE-CHO: We would agree. For the
  - action today, for the inventory, we would request
  - 8 that the property not be included because there is
  - 9 a pending action, and it is in dispute. The way
  - 10 you have it listed on your inventory isn't that
  - 11 the -- on the Xtat column which is indicating
  - 12 whether there is an existing burial site, it says
  - 13 yes. And so it's -- staff has determined
  - 14 irrespective of this pending controversy that
  - 15 there is a burial site. So I would request that
  - 16 this property, at least for now, be removed in the
  - 17 inventory and pending the resolution of the case
  - 18 then it can always be added.
  - CHAIRMAN ANDERSON: Well, I don't know
  - 20 how anybody else feels about this, but I think
  - 21 it's very clear from the document appearing in
  - 22 inventory does not say that anybody has

1 conclusively determined that anything is anywhere.

- It just says to the best of our knowledge today,
- 3 and we could be wrong, here is where the
- 4 cemeteries are. And so I'm just -- and again, I
- 5 don't want to speak for anybody else, but I just
- 6 think you should litigate this and come back and
- 7 tell us what the result was and we'll deal with it
- 8 accordingly. But nobody is saying that this is
- 9 not a finding by anyone that you have a cemetery,
- 10 right? It's simply a recognition of the fact that
- 11 possibly there was a cemetery at, or around, this
- 12 location on the map.
- MS. LEE-CHO: Exactly. To the best of
- 14 our knowledge and the best available research and
- 15 it has been made available to us that there is
- CHAIRMAN ANDERSON: (inaudible) morning,
- 18 but that subject to information and --
- 19 MS. BELLO: Correct.
- 20 CHAIRMAN ANDERSON: At any time?
- 21 MS. BELLO: And the guidelines in
- 22 Section 1(b), procedures for updating the

32

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33	35
1 inventory specifically do allow for new	1 reservation specifically for the cemetery. And,
2 information to come forward at any time that could	2 you know, the inventory with a few exceptions of
3 revise our findings and the GIS map.	3 Native American burial sites, information we have
4 CHAIRMAN ANDERSON: Right. And where I	4 from the Maryland Historical Trust. All of the
5 was coming from is that we had made it very clear	5 burial sites in our inventory are represented by a
6 and explicit in the rules that that can be revised	6 single point. So they don't have the boundaries.
7 in a very simple and straightforward way anytime	7 COMMISSIONER DREYFUSS: But on a broad
8 anybody has any evidence they want to show to the	8 farm, I mean it's on the farm.
9 staff. Then we can do that, and everybody will	9 MR. CANE: Correct, right.
10 be, maybe not happy, but at least they can get	10 COMMISSIONER DREYFUSS: It's on the
11 their issues sorted out.	11 subdivision area, a built-up area. It could be
12 MS. BELLO: Correct.	12 shifting one lot to another so to speak.
13 CHAIRMAN ANDERSON: Mr. Mills, is that	MR. CANE: Yeah. But in this case it
14 workable?	14 was deed research. There was a reservation, that
MR. MILLS: Yes, I believe it is. And I	15 reservation got split into the two; into 5200 and
16 would also point out that it's not as if anyone	16 the lot that sort of the unaddressed lot
17 from the Planning Department, to my knowledge, has	17 between 5200 and 5202.
18 been subpoenaed or anything, or is participating	18 COMMISSIONER DREYFUSS: Okay. All
19 in the litigation that's taking place today.	19 right. Good. Thank you.
20 CHAIRMAN ANDERSON: Yeah. Anybody else	20 CHAIRMAN ANDERSON: Anybody else have a
21 have a different opinion?	21 different opinion about this? Okay. So I would
22 CHAIRMAN DREYFUSS: What's the size of	22 suggest we make a motion to approve the guidelines
34	36
1 the property you're talking about, approximately?	1 and inventory subject to the revision for an
2 Do you know offhand, is it a single lot or is it	2 explicit process for getting provisions made on an
3 a subdivision?	3 other than an annual basis.
4 MS. LEE-CHO: It is. Right, my clients	4 COMMISSIONER GONZALEZ: (Inaudible)
5 property is Lot 6, which is greater in size. But	5 COMMISSIONER PATTERSON: I second.
6 the portion in question of Lot 6 is about 3,610	6 CHAIRMAN ANDERSON: All in favor.
7 square feet of the property is in question.	7 IN UNISON: Aye.
8 COMMISSIONER DREYFUSS: Thank you. Just	8 CHAIRMAN ANDERSON: Opposed? That's
9 in terms of, obviously, if there's something that	9 approved. Thank you very much.
10 looks more formal, I wall, or something that it's	10 (End of discussion surrounding Item 3)
11 a cemetery, if there's some pictures you show,	11
12 like a single monument there, that's perhaps the	12
13 evidence, but then others are more speculative if	13
14 there's no physical	14
15 MR. CANE: Well	15
16 COMMISSIONER DREYFUSS: Could it be one	16
17 lot over, or in the case of a subdivision?	17
MR. CAIN: There are some that are	18
19 speculative. Those tend to be marked as	19
20 approximate locations rather than known locations.	20
21 In this particular case, it's a based on deed	21
22 research. There was a reservation, a deed	22

37	
1 CERTIFICATE OF TRANSCRIBER	
2 I, Molly Bugher, do hereby certify that the	
3 foregoing transcript is a true and correct record	
4 of the recorded proceedings; that said proceedings	
5 were transcribed to the best of my ability from	
6 the audio recording and supporting information;	
7 and that I am neither counsel for, related to, nor	
8 employed by any of the parties to this case and	
9 have no interest, financial or otherwise, in its	
10 outcome.	
11	
12 Mark Broker	
13 Malla Darlan	
14 Molly Bugher	
15 DATE: June 11, 2019	
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21 22	
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# EXHIBIT 3

Clerk of the Circuit Court Montgomery County, Md.

# IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PARAMOUNT CONSTRUCTION, INC.

Plaintiff,

:

Case No. 447344V

ALL PERSONS UNKNOWN, ET AL.

Defendants.

OPINION AND ORDER

This matter came before the Court for a court trial beginning on September 17, 2019, and concluding October 18, 2019. Having considered all evidence presented, this Court sets forth the following Opinion and Order.

### I. FACTUAL BACKGROUND

Plaintiff Paramount Construction, Inc. ("Paramount") commenced a Quiet Title action in this matter on or about May 4, 2018. On August 21, 2019, this Court entered Partial Summary Judgment in favor of Plaintiff (DE #110) finding unequivocally that Plaintiff has legal title of the disputed property located at 5200 Murray Road, Chevy Chase, Maryland 20815 in the Brookdale Community ("Property"). The remaining issue for the Court's determination at trial is the issue of whether a burial site exists on the Property. Defendant Intervenors ("Intervenors") assert that they are direct descendants of Isaac Shoemaker, the original owner of the Property, and that the parcel of land entitled "Reservation" is the Shoemaker family burial site.

In 1839, the Property originated as part of a 140-acre farm owned by Isaac Shoemaker. Some 83 years later, Shoemaker's grandson sold 60 acres of the family farm to Francis Bennett

<sup>&</sup>lt;sup>1</sup> The words "burial plot," "burial site," "burial ground," and "reservation" are synonymous for purposes of this Court's opinion.

Clerk of the Circuit Court Montgomery County, Md. Poe. As part of this conveyance, there was a deed that reserved from the conveyance "exclusive, however, of a small burial plot located on the Perry boundary line near the River Road; containing 1/7 of an acre." Thereafter on February 6, 1925, the Property was sold to a new owner and, again, sold on July 2, 1925, to a subsequent new owner with the deed containing the same exclusion that was in Poe's deed.

In 1938, the new owner subdivided the Property and recorded Plat No. 905, among the land records for Montgomery County, Maryland. This plat included the Property in a block known as Parcel A. Shortly thereafter, the owner subdivided Parcel A into Plat No. 949, which created five lots and a "Reservation" that was "not included as part of the subdivision." Now, the Property is comprised of portions of Lot 1, Lot 2, and the Reservation.

In August of 1938, Lot 1 and Lot 2 were sold to Cooper Lightbown. Three months later, Lightbown sold the lots to Dean and Nelle Locke. On May 28, 1959, Locke sold the lots to James and Mary Corrigan. In 1972, the Corrigans acquired half of the Reservation that abutted their lots through a quitclaim deed. In 1989, Corrigan sold the lots with half of the Reservation to Roy D.R. and Paulette Betteley. The Betteleys continuously occupied the property until their deaths in 2007.

In 1992, the Betteleys sought to re-subdivide their property into two lots, Lot 6 and Lot 7. Lot 6 would contain their existing residence and half of the Reservation, while Lot 7 contained the remainder of their property that would create a buildable lot. On January 4, 1994, the Montgomery County Planning Board conducted a public review hearing regarding this real property. Following the hearing, the Board permitted the Betteleys to re-subdivide their property. No challenge was raised by anyone to the Betteley's title. Likewise, no assertions were made by anyone including Intervenors, that the half of the Reservation on their lot contained or was a burial site. The Betteley's then surveyed the new lots, and in 1997, the plat was recorded amongst the Montgomery

County, Maryland, Land Records as Plat No. 20479. Following their deaths, Mr. & Mrs. Betteley's son, Philip Betteley, obtained title to the real property in 2007, and lived there until selling Lot 6 to the Plaintiff in 2016, including the Betteley half of the Reservation.

Upon learning of the Intervenors' belief that the Reservation is a burial site, Plaintiff commissioned Dr. Phillip Hill of Archeological Testing and Consulting, Inc., to conduct a study and investigation of the disputed property and determine if the Reservation was, in fact, a burial site. Following his investigation, Dr. Hill determined that the Reservation was not a burial site, because there was no evidence of the presence of any grave markers or shafts on this portion of the subject property. Intervenors contend that four members of the Shoemaker family are buried on the Property, and, therefore, Plaintiff is abridged from developing the land in any manner that would disturb the burial site. Additionally, the Montgomery County Planning Board deemed it appropriate for a court to determine whether a burial site exists on Paramount's Property through litigation.

### II. DISCUSSION

Plaintiff contends its Property is free of a burial site and should not be encumbered by Intervenor's claim that there are bodies buried on the Property. Intervenors argue that at least four bodies (who are members of the Shoemaker family) are buried on the Property and that the exclusion in the original deed from the Shoemaker property and the Reservation in the Woodward deed classify the Property as a burial site. In this cause of action, Plaintiff maintains the burden of proof (to wit: proof by a preponderance of the evidence) to establish that Plaintiff is entitled to the injunctive relief that it seeks from the court. At trial, Plaintiff presented evidence through exhibits and expert testimony from archeologist, Dr. Philip Hill. Intervenors presented evidence through exhibits and testimony from the owner of Paramount Construction, Mr. Brian Crane.

Circuit Court

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Archeologist, Parks and Planning Commission; Nancy Werner, Intervenor; and Ambassador Richard Erdman.

A burial ground is defined as "an area of land where dead people have been buried." "Burial ground." The Merriam-Webster.com Dictionary, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/burial%20ground. Accessed 21 November 2019. Therefore, this Court must determine from the evidence received whether there are any bodies buried on the Property. The collective evidence presented during trial revealed that there were no markers consistent with bodies being buried on Plaintiff's portion of Property. Acknowledging that markers were not the only indicia of bodies being buried in the ground, Plaintiff commissioned expert archeologist, Dr. Philip Hill, to conduct an archeological study to determine if there was evidence of bodies in the ground.

Dr. Hill was qualified pursuant to Maryland Rule 5-702 and without objection, as an expert witness in the field of archeology. Dr. Hill opined that there are no bodies buried on the Property. His expert opinion was based on his extensive examination and hands on investigation of the area, as well as his education, training, and experience. Dr. Hill testified that he primarily works with land developers, lawyers, and the federal government, as well as local entities, including Montgomery County, Maryland, conducting the same type of studies on other parcels of land. Dr. Hill laid out the three-phase analysis he conducts on each of his archeological projects. First, Dr. Hill identifies the site, then he examines anything found near the site, and his final investigative phase involves data recovery. The extent of the data recovery phase is dependent on the client's wishes. For example, because archeology is inherently destructive; i.e.; when a client wishes to disturb a site by re-interment, he is required to present an impact design. Sometimes clients may elect not to contribute to such a disturbance and incur the costs of the impact design. Defense

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witness, Dr. Brian Crane—also an archeologist— testified that he is familiar with and has previously approved Dr. Hill's methods, his work, and this same three-step approach in other similar burial site investigations.

Here, Dr. Hill conducted his study of Plaintiff's property in April 2017 and prepared a report outlining his investigation. He testified that when he initially walked onto the Property, he did not observe any evidence of an above-ground cemetery. There were no depressions in the ground or headstones. He noted, however, that there was some periwinkle ground cover low to the ground. Dr. Hill explained the significance of the presence of periwinkle, indicating that it was commonly used by people to signify a cemetery. However, he also testified that the periwinkle cover alone is not sufficient to indicate the presence of a cemetery. If there were some other indicia of a cemetery, the presence of a periwinkle ground cover could add credibility to a claim that a cemetery exists on a site. Dr. Hill then engaged ground penetrating radar and physically backhoed trenches diagonally on the site seeking evidence of grave shafts. The diagonal trench method is used so that if human remains are detected, there is minimal disruption of the remains in their resting place. Dr. Hill explained that the diagonal pattern of the trenches is used to make sure he does not miss any evidence of a grave shaft or evidence of space in between grave shafts. After concluding his archeological investigation, Dr. Hill concluded with a reasonable degree of archeological certainty, that there is no evidence in this case of any burials on this site, relying primarily on the absence of grave markers, and lack of human remains or any exposed grave shaft features.

Through cross-examination, Intervenors attempted to discredit Dr. Hill's findings by attacking his methodology, which their own witness, Dr. Brian Crane, acknowledged is a commonly used standard method within the archeological community. However, Intervenors did

not call an expert archeologist or any other expert witness to contest Dr. Hill's findings or his expert opinion. Dr. Hill's expert opinion is uncontroverted.

Intervenors called Dr. Brian Crane, an archeologist employed by the Parks and Planning Commission, to testify as a fact witness pursuant to Maryland Rule 5-701.<sup>2</sup> Dr. Crane, who has been employed by the Commission for approximately a year, testified that he is tasked with reviewing renovation and development applications for places significant to Montgomery County historic preservation. Dr. Crane testified that the Montgomery County Planning Board is required to maintain an inventory of the cemeteries throughout the County. The inventory of cemeteries was initially created and maintained with the assistance of volunteers until it was statutorily required in 2018. Dr. Crane indicated that he is only familiar with the Shoemaker Cemetery because it appears on the inventory. He has never conducted his own investigation. However, Dr. Crane further explained that the Shoemaker Cemetery was added to the inventory during the time period when volunteers created the inventory and there was no specific method or other procedure required other than an application, to determine whether a purported cemetery actually contained burial sites.

Intervenors also called Nancy Werner, who testified that she is a direct descendent of Isaac Shoemaker (he is her second great grandfather). Werner testified that she has been interested in genealogy for over forty years and identified herself as an amateur genealogist. She explained that she researched most branches of her family over the years through archives, online searches, land records, historical societies, friends, and family. Werner also testified that she has visited the site

<sup>&</sup>lt;sup>2</sup> Pursuant to Maryland Rule 5-701, Dr. Crane was not permitted to be called by Intervenors as an expert witness based on the Court's ruling that Intervenors did not timely name him, at all, as a witness in their Pre-Trial Statement. Likewise, Intervenors did not advise Plaintiff or the Court of its intention to call Dr. Crane as an expert witness until the morning of trial, which had been calendared for a considerable period of time.

Clerk of the Circuit Court Montgomery County, Mct. where she believes the Isaac Shoemaker Cemetery is located since she was approximately ten years old (beginning in the 1940's) and has returned there multiple times to lay flowers on the site.

Werner testified that she developed an interest in having the Isaac Shoemaker Cemetery added to the Montgomery County Cemetery Inventory after she learned that the Samuel S. Shoemaker Cemetery was included in the Inventory (at a nearby, but different location), but the Isaac Shoemaker Cemetery was not included<sup>3</sup>. Ms. Werner submitted her application and collected as much information as she could locate to verify the Isaac Shoemaker Cemetery was located on the Property. She further testified that she submitted her application and supporting documentation to the Historical Preservation Society for Montgomery County in 2017. This was around the same time the Property was sold by Phillip Betteley to Plaintiff, Paramount. She acknowledged that she submitted her application at this time in her effort to prevent Plaintiff, Paramount, from developing the property because of her belief that at least four family members were buried in a cemetery on this property. She explained that her belief was based on funeral home records, correspondence from ancestors, and a book containing historical information about the family (including birthdays, dates of death, marriage dates, etc.). She "guesstimated" that Isaac Shoemaker began using the Property for burials around 1850-1883. Ms. Werner acknowledged Dr. Hill's finding that there are no markers or headstones currently on the Property, but it is her belief some of the burial sites were originally marked by headstones. However, no such evidence was presented at trial. During her research, Ms. Werner asked neighbors what happened to the headstones when she noticed they were missing. Ms. Werner was not permitted to testify to what any neighbors may have told her, as the Court sustained Plaintiff's hearsay objections.

<sup>&</sup>lt;sup>3</sup> Isaac Shoemaker was the son and direct descendant of Samuel Shoemaker.

On cross-examination, Ms. Werner was asked about her familiarity with the Samuel Shoemaker Family Cemetery, which is also located in the same general vicinity of Bethesda-Chevy Chase, Maryland, off Western Avenue, close to the Montgomery County-District of Columbia boundary line. However, the Samuel Shoemaker property was situated closer to Massachusetts Avenue than River Road. Ms. Werner indicated that she is familiar with the Samuel Shoemaker Cemetery, although she also testified that she had not previously seen the photographs of it which are maintained by the Montgomery County Cemetery Inventory. She testified that the Samuel Shoemaker Family Cemetery was a "long, long way to 5200 Murray Road," referencing Pl. Ex. 12, the aerial photograph of the collective area. Both Samuel and Isaac Shoemaker's parcels of land are depicted on the same aerial photograph.

Additionally, Intervenors offered Def. Ex. 6, which includes the Shoemaker Family Genealogy Book, specifically page 87, entitled "Samuel Shoemaker Section." On cross-examination, Ms. Werner acknowledged that the book indicates that Samuel and his wife and "many of his descendants" are buried in the Family Burial Ground on the Estate (Samuel's). Ms. Werner also agreed that Samuel Shoemaker's Will contained a provision that dedicated a portion of his farm was to be set aside as a family cemetery. Ms. Werner further testified that in the same Shoemaker Genealogy Book, under Isaac Shoemaker's name, no such reference to a burial site is made with regard to his property, again situated in the same general vicinity, but closer to River Road.

Plaintiff also inquired of Ms. Werner regarding Pl. Ex. 16 (also originally a part of Pl. Ex. 10. These photographs were separated out as Pl. Ex. 16.) The photographs are the "Photograph Log" for the Montgomery County Cemetery Inventory, depicting the Right-of-Way access path to follow in order to reach the Samuel Shoemaker Family Cemetery (walking between the 2 houses

located at 4961 and 4965 Allan Road, Bethesda, Maryland), as well as the stately wrought iron gate labeled "Shoemaker" that leads to the Cemetery, as well as photographs of the well-manicured, and meticulously maintained Samuel Shoemaker Family Cemetery.

Intervenor Werner also testified that she met Ambassador Erdman in approximately 2000 during one of her visits to this 1/7-acre strip situated in between adjacent properties. This is the area Ms. Werner refers to as the Isaac Shoemaker Cemetery. During that visit, she observed that two obelisk-type stones on Erdman's portion of the land had been moved. Ms. Werner believed those obelisks were markers of tombstones of her family members buried on Erdman's property. Ms. Werner testified that she learned one of the stones had been moved by Erdman and incorporated by Erdman into his decorative retaining wall situated on his property. The other stone Erdman relocated toward the back area of his property near rose bushes he planted in his yard.

At trial, Intervenors also called Ambassador Richard Erdman, who testified that he owns the property located at 5202 Murray Road. This property is situated directly adjacent to Plaintiff's lot at 5200 Murray Road. Erdman and his wife have owned and lived on the property since 1982. However, they were not physically present at 5202 Murray Road for long stretches of time, as they traveled back and forth to Algeria frequently for his employment. Erdman explained that although he has owned the adjoining property since 1982, he has only been informally involved with the Brookdale Citizens Association since 2016. This long-standing Association is a group of concerned citizens who expressed concerns regarding a potential threat to the status of a burial reservation on Erdman's property. Although Erdman had no knowledge that there was any issue involving any burial ground on the property when he purchased it, he learned shortly after purchasing his property that it was believed to contain half of an American Indian Reservation Burial Ground. As a result of that "Reservation" status, Erdman took the initiative and applied for

and received a property tax exemption through to the present time exempting him from paying property taxes for this portion of his and his wife's Montgomery County real property. Erdman testified that he received his property tax exemption by simply filling out a form and submitting it to the Maryland State Department of Assessments and Taxation. Erdman explained that he does not believe that Department conducts any type of study or investigation to determine the actual existence of a burial ground prior to granting an exemption such as the one he has been granted.

Although, Erdman was aware of the "Indian Reservation," he testified that he was not aware of the Isaac Shoemaker Cemetery until Ms. Werner approached him in the 2000's when she brought flowers to put on the site. At that time, Erdman testified that Nancy Werner asked him why the two obelisk stones had been moved. Erdman explained that he did not think much of what the stones were at that time, because a cemetery was "not on his mind." He told Ms. Werner that he decided to move them to their current location fully in his own yard to facilitate mowing his grass and to adorn his yard and garden with both obelisk stones. Erdman also testified that he has not received any complaints from Intervenors about his unilateral decision to move the stones, nor has he been asked to return either of them to their original locations.

During Erdman's cross-examination, the Court learned that he had, over time, also removed some of the unsightly Hemlock trees that were planted along the dividing line of the respective halves of the "Reservation." Then, sometime in 2006, with Phillip Betteley's permission, Erdman had all of the Hemlock trees in the remaining row in this same location removed, so to replace them all with Arborvitae trees. Erdman paid all expenses related to his relandscaping project. Erdman acknowledged on cross-examination that, at his direction, he had the new trees planted closer to the dividing line between the two halves of the "Reservation" (the area between then-owner, Betteley's, now Plaintiff's, property and his own). These trees and other

landscaping plantings are evidenced in Def's Ex. 3. Erdman acknowledged that the Arborvitae trees also visually divide the "Reservation" between his property and now Plaintiff's property. When asked, Erdman agreed that when he planted the new row of Arborvitae trees in 2006, they were placed in front of the Hemlocks, planting them closer to his side at 5202 Murray Road. Erdman also acknowledged that he had no knowledge as to whether the Arborvitae trees were planted on his property or Plaintiff's (formerly Betteley's), as he was not present for the actual planting.

With further inquiry from Plaintiff's counsel on this same issue regarding the actual placement of the new Arborvitae trees (Pl's Ex. 5, Dr. Hill's written report), Erdman then disputed their location as depicted in Dr. Hill's report.

Erdman acknowledged that Pl's Ex. 14, (Plat for this property, dated 1994), showed placement of Hemlock trees, not Arborvitae trees. However, once again contradicting his own testimony, Erdman also marked Def's Ex. 3 representing where the Arborvitaes were planted, rather than where the Hemlocks had been planted, confirming the 2006 re-planting/movement closer of the Arborvitaes to his property than to Plaintiff's property. Erdman also agreed with Plaintiff's counsel that the Arborvitaes have always been positioned closer to his property than the original Hemlock line of trees. As a result, the Arborvitae trees are not centrally placed in the "Reservation area," at Erdman's direction.

Cross-examination also revealed more details concerning the property tax exemption Erdman has received since the early 2000's for his one-half of the "Reservation" located between 5200 and 5202 Murray Road, Bethesda, Maryland. Erdman testified that after learning from Ms. Werner of her belief that the Isaac Shoemaker Cemetery is situated between the Betteley and Erdman lots, he filled out a Maryland SDAT Form and questionnaire. In response, Erdman

received the tax exemption for his half of the "Reservation." He also testified that to his knowledge, no one from Maryland SDAT has contacted him or visited his property. He successfully renewed his tax exemption in 2016, on a 3-year renewal basis.

Cross-examination also included Erdman's acknowledgement that he has never retained an archeologist to investigate what, if anything, is beneath the ground on his half of the "Reservation," at any time before or after he decided to move the stone obelisks from where they had been to his own yard. He indicated that he moved them early on in his ownership of 5202 Murray Road, placing the time somewhere between 1989 and 1994. Erdman further testified that he has never been asked by Intervenors to return the stones to their original location and would not be able to do so anyway as he cannot specifically identify the precise spot from where he removed them. Erdman testified that he cemented one of the stones into his own walkway, while he placed the other as a decorative object in his ivy garden.

Mr. Erdman maintained that while he gave no thought at all as to whether the stone obelisks had any purpose when he initially moved them, he also gave no consideration to any other purpose than that consistent with Intervenors' contention that they served as grave markers. On cross-examination, Erdman acknowledged that it is not a given that these stones are, in fact, grave markers, indicating that he moved them as they were an "inconvenience" to him when he mowed his yard. He further acknowledged that they could have served as property boundary markers, rather than cemetery markers.

Finally, upon Interveners request, the Court took judicial notice of the court file for the matter of *James Norton v. Maryland-Nat'l Capital Park & Planning Comm'n*, Case No.: 161691-V in the Circuit Court for Montgomery County, Maryland. That matter involved the same real property at issue in the instant case. A member of the Brookdale Citizen's Association challenged

the Planning Board's denial of Petitioners request in 1997 for reconsideration of the Planning Board's 1993 approval of subdivision plans to create a new residential lot from a larger parcel with an existing house in the community. Norton argued that a burial plot existed on the land. Included in the case file, also identified here as Def. Ex. 13, was a pleading that contained a memorandum dated January 13, 1993, from Gwen Marcus, Historic Preservation Coordinator, who reviewed the Planning Board's Preliminary Plan. Ms. Marcus' memo indicated that the Locational Atlas shows no reference to any burial ground in the area, but the tax map does refer to a burial lot. The Planning Board maintained that they considered both of these maps when rendering the 1994 Preliminary Plan. The new lot in that Preliminary Plan is not contiguous to the area of the burial plot and no construction was planned or approved for any area contiguous to the burial plot. As this court file evidences, prior litigation related to the same issue on the same parcel of real property resulted in the determination that there is no burial site on this Property; specifically, 5200 Murray Road, presently owned by Plaintiff.

The Court also observed various exhibits, including many photographs, depicting the stark contrast between the maintenance and condition of the grounds of the alleged Isaac Shoemaker Cemetery to the condition of the grounds of the Samuel Shoemaker Cemetery burial site. Photographs of the Samuel Shoemaker Cemetery from the Montgomery County Cemetery Inventory depict a well-manicured area, including a gate, statutes, and a bench, which clearly depict and identify the existence of a Shoemaker Cemetery. In significant contrast, photos of the area alleged to contain the Isaac Shoemaker Cemetery, which Nancy Werner, Intervenor, indicates she has visited since her childhood, appears unmaintained and contains thick overgrown brush, with no other indicia of burial plots or a cemetery on the property.

## III. CONCLUSION

In making its determination, the Court is mindful of the sensitive nature of each of the parties' beliefs and positions in this matter. Having considered all the evidence presented, the Court determines that Plaintiff has, in fact, has met its burden of proof demonstrating by a preponderance of the evidence, that there is insufficient evidence to indicate that a burial site exists on Plaintiff's real property located at 5200 Murray Road, Chevy Chase, Maryland 20815.

Dr. Hill, an expert archeologist, testified that there is no physical evidence of bodies being buried on the property. Dr. Hill's testimony included his identification of circular planter holes. He explained that, in his expert opinion, these holes are not consistent with or representative of evidence of grave shafts on the Plaintiff's half of the land marked "Reservation." Dr. Hill also opined that the large soil disturbance present on the hill, likewise, was not indicative of a burial site or cemetery since the size and character of the disturbance was not consistent with that of a rectangular grave shaft. This finding formed part of his expert opinion and conclusion of his archeological investigation that no grave shaft features were found on the Plaintiff's real property. No evidence of a grave shaft, coupled with all of his other findings is consistent with his determination and expert opinion that no human remains are in the ground on Plaintiff Paramount's half of the "Reservation." Dr. Hill's expert opinion is uncontroverted.

Further, when asked, Dr. Hill clarified that in setting up his investigative area, he was careful to ensure that his study covered the full property area of 5200 Murray Road (Plaintiff's property). Additionally, he testified that he placed a marker 5 feet from Erdman's 2006 Arborvitae trees. This was of significance with regard to Erdman's movement of the boundary line with the replanting of the Arborvitae trees close to Erdman's property, thus covering a larger portion of the Reservation than just Plaintiff's one-half. As Dr. Hill explained, the backhoe he used extends two

feet beyond the 5-foot marker, for a total of five feet from where Erdman's new trees were installed. The significance of this is that when Erdman was cross-examined about the Arborvitae tree placement, he acknowledged that they were moved closer to his own property than the prior Hemlock line of trees which had been closer to the dividing line of the "Reservation," between Plaintiff's and Erdman's property. Pl's Ex. 14 and Def's Ex. 3, both evidence the 1994 survey drawing by the Park and Planning Commission, and both depict the tree line then being exactly on the property line of Plaintiff's half and Erdman's half, not closer to Erdman's as it now stands. The division of this "1/7 acre" having occurred when the Corrigans obtained their half of it through a quit-claim deed in 1972. As noted above, this is now Plaintiff's property.

Additionally, Intervenor's contentions that bodies are buried on the subject Property are not supported by any concrete evidence, but rather based on beliefs of family information passed down in the Shoemaker family. Inquiry into whether a burial site exists on the Property was previously raised and litigated in 1993. At that time, the Montgomery County Planning Board found no evidence of the presence of a burial site on the Property.<sup>4</sup> Similarly, no evidence has been presented to this Court demonstrating that bodies have been buried at this location. Additionally, despite testimony that members of the Shoemaker family have visited the property believing it to be the site of buried ancestors, Defendant Intervenors have never participated in previous litigation nor responded to previous public notices related to various subdivision plans concerning Plaintiff's property. This includes the 1993 Planning Board hearing where no one, including Intervenors, asserted any claims that the subject Property contains a burial site,

<sup>&</sup>lt;sup>4</sup> Plaintiff's Ex. 4 (which was admitted by way of stipulation of Defendant), contains the Montgomery County Planning Board Opinion dated February 14, 1997, in which the Board concluded: "In written and oral testimony, the BCA raised concerns about the possible location of a burial plot on the site. Staff testified that they were unable to find any evidence of burial grounds on the site. Staff and the Applicant also noted that the area identified on the record plat as a reservation for a burial plot is actually *located* on the adjoining property to the north."

notwithstanding large, highly visible notice signs having been prominently displayed along this corridor prior to Park and Planning's 1994 investigation and decision.

For the aforementioned reasons, on this day of Award 2020, this Court,

**FINDS**, that Plaintiff has met its burden of proof in this matter; and that there is no "burial site" on the Plaintiff's Property known as 5200 Murray Road, Chevy Chase, Montgomery County, Maryland; and it is further,

**ORDERED**, that Plaintiff is seized of absolute fee simple title and possession of that certain property known and described as:

Lot 6, Block 4, in the subdivision known as "BROOKDALE," as per plat thereof recorded in Plat Book 144 as Plat No. 20479, among the Land Records for Montgomery County, Maryland, being also known as 5200 Murray Road, Chevy Chase, Maryland 20815 (the "Property" or "Lot 6") and bearing Tax Account No. 07-03200081.

and it is further,

**ORDERED**, that the Defendant Intervenors are fully and permanently enjoined from asserting any estate, title, claim, lien or interest in or to Plaintiff's real property or any party-thereof.

CHERYL A. McCALLY, Judge

Circuit Court for

Montgomery County, Maryland

ENTERED

JAN 07 2020

Clerk of the Circuit Court Montgomery County, Md.

From: <u>Dawn Sikkema</u> To:

MCP-Chair Submission regarding the Cemetery Inventory Wednesday, May 27, 2020 12:02:46 PM Subject: Date: Cemetery Inventory submission.docx Attachments:

5203 Murray Road Chevy Chase, MD 20815

Casey Anderson, Chair Montgomery County Planning Board 8787 Georgia Avenue Silver Spring, MD 20910

May 27, 2020

### Chair Anderson:

My name is Dawn Sikkema. I live at 5203 Murray Road in Chevy Chase, diagonally across from the Isaac Shoemaker Family Cemetery. I have lived here since 1989, and over the years have observed the respect for and protection of the cemetery, and recently the threat to its preservation.

This cemetery is not on the Planning Board's agenda this week, but I want to bring to your attention crucial information that you may not know, although I submitted a letter to your staff in October so you may already have this information. I have been told that at the last cemetery inventory hearing (I was away on a business trip), the current owner of 5200 Murray Road objected to the inclusion of the Isaac Shoemaker Family Cemetery in the county's Inventory and the Board decided to defer its decision pending the outcome of a legal case in the Circuit Court. The crucial information is that the Planning Board already found, prior to 1997, that there is a burial plot on the 5200 Murray Road property, by comparing the Preliminary Plan showing a "Reservation" of land on the western portion of the site and the tax map with the notation "Burial Plot" in the corresponding area. The Planning Board not only made this finding, but its attorney advised the Circuit Court of the finding in 1997 in Norton v. MCPB, Civil Action No. 161691 (1996).

In hindsight, the facts are straightforward. Isaac Shoemaker had a farm located between River Road and what is now Wisconsin Avenue. He set aside a piece of land on his farm as a burial ground. He died in 1883 and was buried on his farm (his wife and two sons predeceased him and would have been buried there as well). His heirs sold the farm in 1924, with the exclusion of the burial ground of 1/7th of an acre. Donald Woodward and his sister Irene Woodward Parker eventually purchased the land, with a deed that again contained the exclusion of a 1/7th acre burial plot. Woodward and Parker created Brookdale in 1938, subdividing the land around the burial plot and changing the name of the street in front of the burial plot from Keokuk Street to Murray Road. The final plan of subdivision, Plat 949, shows the Isaac Shoemaker Family Cemetery located between Lot 2 (5200) and Lot 3 (5202) on Murray Road and marked: "RESERVATION—Not included in this subdivision." Shoemaker family members have continued to visit the Cemetery over the years.

In 1972, with no evidence of antecedent ownership, heirs of Irene Woodward Parker signed quitclaim deeds giving one-half of the Isaac Shoemaker Family Cemetery to the owner of 5200 Murray Road and the other half to the owner of 5202 Murray Road. (The title issue is before the Circuit Court as a claim of adverse possession.) The two halves of

the Cemetery were attached to the owners' deeds and described as "half of the panel containing 7620 square feet shown as 'reservation' on the plat of Block 4, Brookdale Subdivision Plat Book 14, Plat 949." The Maryland State tax authority treated the divided cemetery as a private cemetery that is tax exempt.

In 1989, a new owner of 5200 Murray Road sought to enlarge his property so as to subdivide it. He filed a Preliminary Plan to merge his standalone half of the Cemetery with his main lot and then to subdivide his lot. The neighbors objected and he assured them that the subdivision would not affect his part of the burial ground because the new lot would be on the other side of his house. James Norton, the President of the Brookdale Citizens' Association, wrote to the Planning Board that there was a burial plot on the land that the new owner was seeking to merge. An internal memorandum, first discovered by Norton in 1996, shows that the staff was unable to find a burial plot on Murray Road but could find one on Keokuk Street, Murray Road's former name. The merger and subdivision were approved with no consideration of a burial plot, despite the fact that staff noted in the 1993 public hearing summary that it had been confusing Keokuk Street and Murray Road. Vice Chair Floreen noted that the land identified as a "reservation" had now been incorporated into the 5200 property.

Norton discovered the staff memorandum in 1996 through an information request about the newly created lot. On November 6, 1996, he filed a motion for reconsideration of the Board's approval of the subdivision on the grounds that no evidence was presented at the September 30, 1993 public hearing that a 1/7th acre burial plot was part of the original land deed and that the Board had not taken into consideration the cemetery on the property as required by state statute. The Board held a hearing on his motion the next day and denied it on the procedural ground that it was not timely.

On December 2, 1996, Norton filed a petition for judicial review of the Board's decision in the Circuit Court for Montgomery County. The Planning Board's attorney told the Court: "the Preliminary Plan did show a reservation of land on the western portion of the site which corresponds to the area on the tax map that carries the notation 'Burial Plot'. Both maps were part of the Preliminary Plan record and both were considered by the Planning Board when it reached its decision. However, the new lot created in the Preliminary Plan is on the southern portion of the site, removed from the area notated as a burial plot. The new lot is not contiguous to the area of the burial plot and no construction was planned or approved for any area contiguous to the burial plot. Therefore, the Planning Board was not required to consider the burial plot when it approved the creation of the new lot proposed in the Plan."

One final note. Because the Planning Board's procedures are quasi-judicial, hearsay is permitted (Section 4.5), unlike in a court proceeding. Even if the Board had not already found that half of the burial plot is on the 5200 Murray Road lot, a court would not seem to be the correct forum for developing a full record about the historical existence of a cemetery.

Dawn Sikkema