



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 15, 2020

The Honorable Senfronia Thompson
Chair, House Committee on Public Health
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0317

Re: Authority of Fort Bend Independent School District to maintain a historic cemetery discovered on a school construction site (RQ-0326-KP)

Dear Representative Thompson:

You ask about the authority of a school district to maintain ownership of a cemetery discovered on its property during construction.¹ You explain that in April of 2018, Fort Bend Independent School District (“the District”) discovered the skeletal remains of 95 individuals at a school construction site. Request Letter at 1. You further explain that archeologists determined the site was “an unmarked burial ground of the former Imperial State Prison Farm” and that the remains were of individuals from “the state-sanctioned convict leasing system.” *Id.* In November 2019, the District formally reinterred the remains at the burial site where originally found. *Id.* You ask about the District’s ongoing authority to maintain the cemetery. *Id.*

Texas law recognizes various types of cemeteries and establishes different requirements for maintenance and operation depending on the cemetery at issue. *See generally* TEX. HEALTH & SAFETY CODE § 711.001(1), (30), (38) (defining, among other words, “abandoned cemetery,” “perpetual care cemetery,” and “unverified cemetery”). Significant requirements exist for individuals or entities that “engage in a business for cemetery purposes.” *Id.* § 711.021 (titled “Formation of Corporation to Maintain and Operate Cemetery”). Generally, any cemetery that begins its operations on or after September 1, 1993, must operate as a “perpetual care cemetery,” which requires a perpetual care trust fund for the general care, maintenance, embellishment, and establishment of the cemetery. *See id.* §§ 711.021(f), 712.021(c); *see also id.* §§ 711.001(30) (defining “perpetual care cemetery” as one “for the benefit of which a perpetual care trust fund is established”), 712.021(a)–(h) (explaining the requirements and purposes of a perpetual trust fund). No information provided with your request indicates that the District is “engag[ing] in a business”

¹*See* Letter from Honorable Senfronia Thompson, Chair, House Comm. on Pub. Health, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 20, 2019), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2019/pdf/RQ0326KP.pdf> (“Request Letter”).

related to the discovered cemetery or intending to operate a perpetual care cemetery. *See id.* § 711.021(a).

Distinct from a perpetual care cemetery, the Legislature defines “abandoned cemetery” as “a cemetery, regardless of whether it appears on a map or in deed records, that is not owned or operated by a cemetery organization, does not have another person legally responsible for its care, and is not maintained by any person.” *Id.* § 711.001(1). Upon discovery of an abandoned cemetery, a person must file notice of the discovery of the cemetery with the county clerk of the county in which the cemetery is located. *Id.* § 711.011(a).² The county clerk must send a copy of the notice to the Historical Commission (“the Commission”) and file the notice in the deed records of the county. *Id.* § 711.011(c). “The owner of property on which an . . . abandoned cemetery is located may not construct improvements on the property in a manner that would disturb the cemetery until the human remains interred in the cemetery are removed under a written order” of the state registrar and a district court, with certain exceptions. *Id.* § 711.010(a).

Consistent with these requirements for abandoned cemeteries, when the District’s contractors discovered the remains at the school construction site, the District stopped construction, notified the Commission, and filed the statutorily required notice of discovery of the cemetery. *In re Fort Bend Indep. Sch. Dist.*, 589 S.W.3d 301, 304 (Tex. App.—Houston [1st Dist.] 2019, no pet.). The District received judicial approval to exhume the remains, and its investigation concluded “that there were ninety-five graves on the property and that the remains were likely from male African-American prisoners who were part of the state’s convict-leasing program from the 1870s through 1911.” *Id.* While the District considered moving the remains to a municipal cemetery on adjacent land, it ultimately decided to reinter the remains where found. *Id.* at 305, 308–09.³ It modified its construction plans to avoid the cemetery land, and it currently maintains the cemetery designation on its property.⁴

The law prohibits a property owner who discovers human remains on his or her land from constructing improvements that would disturb the cemetery where the human remains are interred. TEX. HEALTH & SAFETY CODE § 711.010(a). However, if a property owner complies with this requirement, the law generally does not prohibit the property owner from continuing to own that land and maintain the cemetery.⁵ The Legislature established procedures by which other entities

²*See* Tex. Historical Comm’n, “Notice of Existence of Cemetery Form” (Instructions & Sample), https://www.thc.texas.gov/about/forms#cat_471.

³Once the district decided to reinter the remains where found, it filed a notice of nonsuit in the district court. *In re Fort Bend Indep. Sch. Dist.*, 589 S.W.3d at 311. Unless collateral matters remain, a nonsuit extinguishes a case or controversy from the moment the motion is filed or an oral motion is made in open court; the only requirement is the mere filing of the motion with the clerk of the court. *Id.* at 310 (quotation marks and citation omitted). Despite the nonsuit and no collateral issues, “the trial court continued to exercise jurisdiction over the merits of the suit and to make appointments of a guardian ad litem and master in chancery.” *Id.* at 311. The Court of Appeals ordered the trial court to vacate those orders and dismiss the underlying proceeding. *Id.* at 312.

⁴*See* Fort Bend Indep. Sch. Dist., *The Sugar Land 95: Historic cemetery discovered at the construction site of the James Reese Career & Tech. Center*, <https://www.fortbendisid.com/sugarland95>.

⁵With regard to an abandoned cemetery, a district court may order the removal of any dedication of land for cemetery purposes and move the human remains to “any other place on the owner’s property that the district court finds is in the public interest.” TEX. HEALTH & SAFETY CODE § 711.010(b)(3).

may take possession and control of abandoned, unkept, or historic cemeteries in certain instances. A municipality may, by resolution, take possession and control of a cemetery within its boundaries or extraterritorial jurisdiction “if the cemetery threatens or endangers public health, safety, comfort, or welfare.” *Id.* § 713.009(a) (titled “Local Possession and Control of Unkept or Abandoned Cemetery”). Separately, a county may use public funds to maintain a cemetery that is at least 50 years old. *Id.* § 713.028(a). In addition, a nonprofit corporation may petition the district court of the county in which a historic cemetery is located for authority to “restore, operate, and maintain the cemetery.” *Id.* § 715.002; *see* 13 TEX. ADMIN. CODE § 22.1(15) (defining “historic cemetery” as “a cemetery with at least one grave that is 50 years old or older”), *id.* § 22.6 (establishing procedure for designation as a historic cemetery). The nonprofit corporation must include with its petition a written plan describing the actions it will take regarding the cemetery and other details of operation. TEX. HEALTH & SAFETY CODE § 715.005. Upon making certain findings, a court may issue an order authorizing the nonprofit to “restore, operate, and maintain the cemetery.” *Id.* § 715.008(a). In the absence of a municipal resolution taking possession of the cemetery or a court order authorizing a different entity to maintain the cemetery, the District may continue to maintain the cemetery. *See* TEX. EDUC. CODE § 11.151(c) (“All rights and titles to the school property of the district . . . shall be vested in the trustees and their successors in office.”).

S U M M A R Y

The Legislature prohibits an owner of property on which an abandoned cemetery has been discovered from constructing improvements on the property in a manner that would disturb the cemetery. If a property owner complies with this requirement, the law generally does not prohibit the property owner from maintaining the cemetery on the land.

Pursuant to Health & Safety Code section 713.009, a municipality may, by resolution, take possession and control of a cemetery within its boundaries or extraterritorial jurisdiction if the cemetery threatens or endangers public health, safety, comfort, or welfare. Chapter 715 of the Health and Safety Code authorizes a district court to, upon making certain findings, issue an order authorizing a nonprofit corporation to restore, operate, and maintain a historic cemetery. In the absence of a municipal resolution taking possession of the cemetery or a court order authorizing a different entity to maintain the cemetery, the Fort Bend Independent School District may continue to maintain the cemetery discovered on its land in 2018.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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