



JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE
70804-9005

JUL 25 2014
OPINION 14-0101

Mr. Justin T. Augustine, III
Vice President
Veolia Transportation
2817 Canal Street
New Orleans, LA 70119

8-A-3 CEMETERIES

La. R.S. 8:304-306, 8:655, 8:671, *et seq.*, 25:931, *et seq.*
La. Atty. Gen. Op. Nos. 08-0135, 10-0018, 10-0234, 10-0258, 10-0259

Certain limited activities within an existing nonconforming use of a cemetery, while technically a violation of the dedication provisions of Title 8, are, under the facts provided, only subject to the Louisiana Unmarked Human Burial Sites Preservation Act.

Dear Mr. Augustine:

On behalf of the Regional Transit Authority ("RTA"), you have asked for the opinion of this office on matters related to the impacts of certain proposed activity on the dedication of certain property to cemetery uses under La. R.S. 8:304-306. Specifically, you inform us that the RTA is planning to develop a streetcar turnaround facility on Canal Boulevard in New Orleans, immediately north of City Park Avenue. This facility is being developed, according to your request, to enhance safety measures for commuters that use the streetcar line in the Canal Street corridor.

It has been long known that Canal Boulevard, at this location, was constructed over what was once known as Charity Hospital Cemetery No. 2. Archaeological investigations of the proposed project area have revealed that it is unlikely that any of the human remains that were interred in this cemetery during its use were removed during the construction of the current roadway. Instead, it appears that the existing burials were merely paved-over to make way for Canal Boulevard. Although unlawful when this impact to the cemetery originally occurred, this was not an uncommon practice during the historic period in New Orleans (and many other locations, for that matter).

Over the past several years, our office has opined numerous times on the interactions of the cemetery dedication laws (La. R.S. 8:304-306), the Louisiana Unmarked Human Burial Sites Preservation Act (La. R.S. 8:671, *et seq.*) ("the Unmarked Burials Act"), and the Louisiana Historic Cemetery Preservation Act (La. R.S. 25:931, *et seq.*), and modern development.¹ In these opinions, we have set forth a bright line rule that, once human remains are interred in a piece of property, that property is dedicated to cemetery purposes and cannot be used for any other activity until such time as the

¹ La. Atty. Gen. Op. No. 10-0018; La. Atty. Gen. Op. No. 10-0234; La. Atty. Gen. Op. No. 10-0258; La. Atty. Gen. Op. No. 10-0259. See also Ryan M. Seidemann & Rachel L. Moss, *Places Worth Saving: A Legal Guide to the Protection of Historic Cemeteries in Louisiana and Recommendations for Additional Protection*, 55 LOY. L. REV. 449 (2009).

dedication is removed pursuant to the procedures set forth in La. R.S. 8:306.² However, in these opinions, we have also recognized the practical reality that such mandates may, in some cases, be draconian in their application and scientifically unsound in their result. In these rare situations, it is often prohibitively expensive to remove all of the human remains interred in a particular area and to do so would compromise the preservation and scientific value of the human remains in general (not to mention the moral dilemma of treating human remains in a less than respectful manner). In these limited scenarios, we have recommended that, in consultation with archaeological professionals and the Louisiana State Archaeologist, reasonable mitigation and avoidance efforts may be undertaken to minimize the impacts to cemeteries and human remains that simply cannot or should not be moved in advance of new development of the area. In this regard, there is a technical violation of the dedication provisions of La. R.S. 8:304-306. However, reasonableness, respect, scientific integrity, and in the case of your current request, the safety of the public, may justify such a violation.

By way of example, in La. Atty. Gen. Op. No. 10-0018 and La. Atty. Gen. Op. No. 10-0259, the Federal Emergency Management Agency ("FEMA") sought direction on the application of the dedication provisions to the Thomy Lafon School site. This site was constructed atop a pauper's cemetery not dissimilar to the Charity Hospital Cemetery No. 2 at issue in this opinion request. However, due to damage sustained during Hurricane Katrina, the Lafon School was slated for complete demolition and redevelopment. In that scenario, FEMA asked whether the dedication provisions would allow for the redevelopment of the Lafon site without the removal of all human remains. We answered that question in the negative, noting that a complete redevelopment of the site would allow for the proper removal of all human remains in a manner that comported with the dedication provisions of Title 8 and that such a massive change to the use of the property would mandate a removal of the cemetery dedication before it was put to another use.

In your request, the RTA does not propose to demolish all of Canal Boulevard in order to construct its proposed streetcar turnaround. Indeed, the area of impact for this project would be contained within the existing road right-of-way, and would impact only a small portion of the road and underlying cemetery. Because you have not presented us with a wholesale (or even substantial) demolition of the offending construction (*i.e.*, the existing roadway), and considering the safety issues at play in this request, we believe that this is an appropriate situation in which to apply the rule of reasonableness with regard to the application of the dedication provisions.

² La. Atty. Gen. Op. No. 10-0234. In certain instances, such removal must be accomplished within the legal constraints of La. R.S. 8:671, *et seq.*, or La. R.S. 25:931, *et seq.*, or both. See generally, Ryan M. Seidemann, *Do Not Disturb: A Practical Guide for What Not to Do Around Cemeteries and Human Remains for the Louisiana Energy and Land Use Practitioner*, 2 LSU J. ENERGY LAW & RES. 239 (2014).

This is supported by our prior examinations in this area of the law. In La. Atty. Gen. Op. No. 10-0258, we noted with regard to existing structures that conflicted with a cemetery dedication:

We acknowledge the scenario with regard to currently existing nonconforming uses. If a nonconforming use was constructed, innocently or not, on dedicated cemetery property, it is a violation of La. R.S. 304-306 and the antecedents to those laws. However, if the nonconforming use is a permanent or semi-permanent structure, it may now be virtually impossible to remove the nonconforming use (especially if that nonconforming use is still in use). In addition, in many cases (especially those cases where there is no record of the existence of a cemetery or burial), the construction of a nonconforming use may have obliterated any evidence of the existence of a cemetery on the property. These realities create obvious enforcement problems, making the removal of nonconforming uses under many circumstances virtually impossible.

However, when, as in the situations presented by your opinion, the nonconforming uses have ceased and must undergo reconstruction to be fit for any future use, it is easier to enforce the law and remove the nonconforming use. In other words, when it is known or likely that a cemetery or human burials have been subject to a nonconforming use, such nonconforming use should be removed, if practicable, subject to the applicable requirements of the Unmarked Burials Act.³

In the current scenario, Canal Boulevard, itself, is the nonconforming use and it is definitely still in use. It would be a practical impossibility to mandate that the RTA, as part of its limited-impact streetcar turnaround, demolish the entirety of Canal Boulevard in the project area in order only to remove human remains that have already been impacted by a nonconforming use. Indeed, consultation with both RTA's archaeological contractor (Earth Search, Inc.) and the Louisiana State Archaeologist has led us to the conclusion that it is scientifically and morally ill-advised to remove all human remains encountered in the current project area. Such an effort would be a vain attempt to comply with the letter of the law without considering its practical impacts. Those impacts could lead to the excavation of only partial bodies – thus leaving parts of people in the ground and relocating other parts – a questionable moral outcome. Those impacts also would not likely further any research goals, as the samples obtained would be haphazard and would not likely constitute any meaningful analytical data set.

Our opinion is further bolstered by our previous analyses of these issues. In La. Atty. Gen. Op. No. 10-0258, we noted that compliance with the dedication provisions is unnecessary when the offending structure atop a cemetery will not be partially or wholly demolished in order to continue using that offending structure. In your opinion request, you assert that the use of the existing Canal Boulevard right-of-way to carry streetcar

³ La. Atty. Gen. Op. No. 10-0258 (internal citations omitted).

tracks does not constitute a "change in use" of the existing offending structure such that atonement for the sins of the past by way of the removal of human remains already impacted by a roadway is necessary. To be clear, RTA is not responsible for the earlier violation of the dedication provisions that resulted in the construction of Canal Boulevard atop a cemetery and to correct this mistake now, which would require the demolition of a substantial portion of Canal Boulevard, would be economically prohibitive to the entire streetcar project. Because of the moral and scientific impracticalities noted above and the practical problems of having the RTA correct a mistake made by others decades ago, we are of the opinion that, though a technical violation of the dedication provisions of Title 8, compliance with the Unmarked Burials Act alone in this case is the most appropriate course of action. This approach would mandate that all directly-impacted human remains in the path of the streetcar track improvement to Canal Boulevard would be protected and any unimpacted remains would be preserved beneath the existing road to be protected at a future date if and when other changes and improvements must be made to the road.

As noted throughout this opinion, our conclusions herein are unique. The safety, scientific, moral, economic, and practical factors involved in this one project have led us to conclude that, although the dedication provisions will not be vindicated by the streetcar turnaround project, this is a special scenario in which a deviation from that standard is appropriate. It is unlikely that this situation will present itself often, and this opinion is not intended to evidence a blanket exception to the mandatory compliance with the dedication provisions.

We hope this sufficiently answers your inquiry; however, if we may be of further assistance please do not hesitate to contact our office.

Sincerely yours,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

By: 

RYAN M. SEIDEMANN
Assistant Attorney General

JDC/RMS/tp

cc: Lucy L. McCann, Director, Louisiana Cemetery Board
Charles R. McGimsey, Ph.D., Louisiana State Archaeologist