

Mayo, Alyson

From: Mayo, Alyson
Sent: Tuesday, January 26, 2016 1:03 PM
To: Helen Shaw; Corelyn Senn (catspjs@tidewater.net); Cheryl W. Patten (cwpatten@tds.net); Garrett Corbin (GCorbin@memun.org)
Subject: LD 1328 --Legal Info

Hi Helen, Corelyn, Cheryl and Garrett,

Jon Clark wanted me to pass this along to you.

Hello all,

I understand your disappointment in coming this far with your legislation and running against legal issues. I wanted to give you a brief outline of this complicated area of law and the complex legal overlay. I also want to make clear that I have not indicated to the committee that it can't move forward with the bill; it's not my role to tell them what they can or can't do, only to advise them of legal issues they should consider. I have let the subcommittee know that both the AG's office and I believe the bill and amendment raise constitutional issues. The bill and amendment establish rights for certain persons and entities to access and use certain property. Whether establishing these rights can be legally justified in any particular context is a complicated question; whether they can be legally justified in all applicable contexts is more complicated.

As I think you are aware, the current status of rights and duties with respect to burying grounds is not simple. Corelyn's experience trying to get her town or an attorney to help settle her situation shows the complexity and difficulty. Helen's point about the difficulty of determining through deed research who owns a burying ground again highlights the complexity.

The legal issue we run into when trying to address these difficulties through new legislation is this: new laws that "clarify" rights may actually affect existing property rights. This is where the constitutional issues lurk. Again, given the complexity here, sorting out how any law change may affect existing property rights in every instance is difficult. I do not think, however, that what is proposed is merely a restatement of current rights: for instance, I do not see a basis for concluding that all spouses, ancestors and descendants of all persons buried in every family or ancient burying ground currently hold all the rights that the bill would establish for them.

As you doubtless well know, the ownership status of a burying ground can depend upon who originally established the burying ground and when it was established and may also be affected by whether the plot was recorded, whether it was fenced, whether the owners transferred the ground to another entity and how that was done and whether that transfer was done in accordance with then applicable law (for instance, under the 1839 law that Ms. Shaw references, it appears that certain family burying grounds could be alienated, but only if all "interested parties" consented), and so forth. Sorting out the current ownership rights with respect to any particular burying ground is far from simple (as I know you know). Resolving the complexity in all instances in favor of certain persons with respect to certain property rights (for instance, establishing for all descendants of persons buried in an ancient or family burying ground a right of access to do various things, including repairing stones and building fences) likely changes property rights in at least some and perhaps all instances.

As you also know, there are important differences between burying grounds created before 1880, between 1880 and 1937, and after 1937; there also appear to be differences among burying grounds established after 1937 depending up the size of the burying ground. Access rights or privileges to these burying grounds vary. For ancient burying grounds,

towns have certain rights and responsibilities with respect to maintenance, but these are limited depending upon "location and accessibility" and, under certain circumstances, the owners can "choose to deny access" and assume the responsibilities. There is also a provision in the law that provides certain access rights over intervening land to a family burying ground to the spouse, ancestors and descendants of persons interred in the burying ground; this provision likely applies prospectively to conveyances of the land around the burying ground occurring after the provision was enacted (I believe it was in 1991) and only to family burying grounds appropriated in accordance with the contextual law (apparently those created after 1937). Also note that the rights granted under these laws are further limited by the law itself: none of the provisions affect any "vested rights" of owners of cemeteries established prior to 1937. Current law also provides that repair and maintenance of a gravestone or fence in a burying ground requires written approval of the owner of the cemetery. Again, a complex web of rights and exceptions and limitations that are difficult to sort through for any particular burying ground. "Clarifying" these complexities by establishing a set of rights in all instances in favor of certain persons (again, for instance, giving all descendants of persons buried in any ancient or family burying ground certain rights) likely changes property rights in at least some and perhaps all instances. It may directly conflict with some settled rights under the existing laws. This, again, is where the constitutional issues arise.

For the Legislature to venture into this area and provide "clarity" by establishing certain rights across many contexts could significantly affect individual property rights. As private property rights are changed, limited or affected, constitutional issues arise. Analyzing these constitutional issues generally requires a case-by-case, fact-specific approach.

I understand the desire to try to clarify these matters through a new law. If the Legislature wants to venture into this area, it can. I have simply informed the committee, as I must, that both the AG's office and I believe doing so as the bill and amendment propose raise constitutional issues. While I offered to review this further, if the committee were interested, I should let you know that I don't presently have suggestions for how to achieve what I think you wish to achieve in a way that avoids the issues.

I hope this is helpful.

Jon

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