FILED IN OFFICE
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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

ELON BUTTS OSBY,	*	
	*	
Plaintiff,	*	CIVIL ACTION
	*	FILE NO. 2009CV174623
	*	
vs.	*	
	*	
BRANDON MARSHALL;	*	
INVESTGA.COM, LLC; and	*	
COMMUNITY RENEWAL, LLC,	*	
	*	
Defendant.	*	

FINAL ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The instant matter concerns Defendants' efforts to relocate a cemetery. It came before the Court on October 19, 2010 for a hearing on Defendants' Motion to Dismiss and Plaintiff's Motion for Summary Judgment. Having reviewed the record and considered the arguments and submissions of counsel, the Court finds as follows.

The parties do not dispute the following facts. Mt. Olive Cemetery is located on Pharr Road in the Buckhead area of Atlanta, near the entrance of Frankie Allen Park. Mt. Olive Cemetery was originally affiliated with Mt. Olive Methodist Episcopal Church which stood nearby. This church was located in an area formerly known as Macedonia Park which was a neighborhood of African-American residents that contained approximately 60 homes.[1] Other African-American communities were situated within walking distance. Although the precise number is unknown, Mt. Olive Cemetery contains the remains of approximately 70-120 African-Americans, most of whom are believed to have lived in Macedonia Park and the surrounding communities in the early 1900s. In the late 1940s / early 1950s Fulton County acquired and

demolished all of the homes in Macedonia Park as well as the Mt. Olive Methodist Episcopal Church building. The land acquired by Fulton County became a park. The cemetery property, however, remained titled in the church's name. The cemetery has been neglected in recent years. Few tombstones remain and graves are hard to delineate.

Beginning in approximately 1999, Fulton County began assessing taxes on the cemetery property which were not paid. Subsequently, Defendant Investga.com, LLC purchased the property at a tax sale.[2] It later transferred ownership to Defendant Community Renewal, LLC. Defendant Brandon Marshall is the principal of both these corporations. In 2009, Defendant Community Renewal sought permission from the City of Atlanta Urban Design Commission to move the bodies from Mt. Olive Cemetery to Dawn Memorial Gardens in Decatur, Georgia. This approval process was established by the City of Atlanta in conformance with O.C.G.A. § 36-72-4.

Plaintiff, a descendant of an individual buried in Mt. Olive Cemetery, brought the present action for declaratory judgment. She asserts the Mt. Olive Cemetery is a public cemetery and that its removal is prohibited by Georgia law. She also sought an injunction barring Defendants' further efforts to disturb and / or relocate the cemetery.

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[1] The area is sometimes referred to as Bagley Park.

[2] Cemetery property is exempted from all ad valorem property taxes. O.C.G.A. § 48-5-41 (2). As the Georgia Supreme Court has noted, "[o]ur civilization has respect for the burying places of its dead, and one way that this respect is shown is by the exemption of burial places from taxation. One reason perhaps why cemeteries are exempt from taxation is the difficulty of collecting a tax thereon and the obvious impropriety of selling the graves of the dead in order to pay the expenses of carrying on the government of the living." City of Atlanta v. Crest Lawn Memorial Park Corp., 218 Ga. 497 (1962).

While Plaintiff appears to question the taxation and sale of the Mt. Olive Cemetery by Fulton County, Plaintiff has not formally challenged the title transferred at the tax sale. The record contains little evidence regarding the decision to begin taxing the property or the actual tax sale. During the October 19, 2010 hearing, counsel for both parties offered hearsay statements regarding their understanding of events surrounding the tax sale in response to questions from the Court. While Plaintiff appears to question the taxation and sale of the Mt. Olive Cemetery by Fulton County, Plaintiff has not formally challenged the title transferred at the tax sale.

Ultimately, the Atlanta City Council adopted the recommendation of its Urban Design Commission and denied the Defendants' request. That decision has been appealed to the Superior Court of Fulton County and that appeal remains pending. *Community Renewal, LLC and Brandon Marshall v. The City of Atlanta*, Civil Action No. 2010CV183646.

Defendants' Motion to Dismiss

In their Motion to Dismiss, Defendants argue that Plaintiff does not have standing to pursue a declaratory judgment because the Atlanta City Council rejected their application to move the Mt. Olive Cemetery such that no justiciable controversy exists requiring the entry of a declaratory judgment. O.C.G.A. § 9-4-1 provides that Georgia's law of declaratory judgments is meant to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." The statute further notes that the law is to be "liberally construed and administered." Id. Based upon the Defendants' acknowledgment that they are appealing the adverse decision of the Atlanta City Council, the Court finds Defendants' argument to be without merit. Clearly, the legal status of the cemetery property remains in dispute. In light of the foregoing, it is hereby ordered and adjudged that the Motion to Dismiss Plaintiff's request for a declaratory judgment be DENIED.

Plaintiff's Motion for Summary Judgment

With regard to the Plaintiff's Motion for Summary Judgment, the Court is guided by Haslerig v. Watson, 205 Ga. 668 (1949), a landmark case on the issue of public cemeteries in Georgia.[3] In Haslerig, a landowner attempted to block public access to a cemetery that had been

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[3] In Haslerig, the Georgia Supreme Court considered the longstanding statute regarding public dedication of lands which, at the time, provided:

> If the owner of lands, either expressly or by his acts, shall dedicate the same to public use, and the same shall be so used for such a length of time that the public accommodation or private rights might be

located on his property for many years. Members of the community sought injunctive relief against the landowner alleging that he had no legal right to interfere with their use of the cemetery. In denying the landowner's motion for a new trial, the Georgia Supreme Court stated:

> It is well settled that land may be dedicated to the public for cemetery purposes. In the absence of statute, no particular form or ceremony is requisite to accomplish such a dedication. The intention of the owner of the land to dedicate it for a public cemetery, together with the acceptance and use of the same by the public or the consent and acquiescence of the owner in the long-continued use of his lands for such purpose, are sufficient. The dedication may be made by grant or written instrument, but it is not necessary that any conveyance shall be made or that there shall be any person capable of taking a conveyance otherwise than in trust. While acceptance by the public is necessary to complete the dedication, such acceptance may be implied from acts and from the use of the land; and when the dedication is beneficial, greatly convenient, or necessary to the public, an acceptance will be implied from slight circumstances. The notorious use of property as a burial ground for upwards of twenty years, with the knowledge and acquiescence of the owner, affords presumptive evidence of its dedication as a public cemetery but no particular time during which the land is used for burial purposes is necessary to prove dedication.
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> Haslerig, 205 Ga. at 683 (emphasis found in original).

Finally, the Supreme Court addressed the end result of such public dedication. "When a tract of land has been dedicated as a cemetery, it is perpetually devoted to the burial of the dead and may not be appropriated to any other purpose." Id. Following Haslerig, a long line of Georgia cases have held that public burying grounds cannot be disturbed. (See Plaintiff's

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> materially affected by an interruption of the enjoyment, he may not afterwards appropriate it to private purposes."

Code 1933 § 85-410. The current version of the statute, O.C.G.A. § 44-5-230, varies in form but not in substance from its predecessor.

> After an owner dedicates lands to public use either expressly or by his actions and the land is used by the public for such a length of time that accommodation of the public or private rights may be materially affected by the interruption of the right to use such land, the owner may not afterwards appropriate the land to private purposes.

Motion for Summary Judgment, p. 7). While it varies procedurally and factually from the present matter, a recent opinion of the Georgia Supreme Court acknowledged the distinction between public and private cemeteries and the different laws that govern if and how they may be disturbed. Hughes v Cobb County, 264 Ga. 128 (2004).[4]

In reviewing the evidence presented, including the report of Defendants' own genealogist and the undisputed testimony of Dorothy Walker and Edward Daughtery, individuals with first-hand knowledge of the cemetery dating from the time when the church and Macedonia Park community were in existence, the Court finds no disputed question of material fact that the cemetery, which served the surrounding African-American communities, was dedicated for public use.[5]

In light of the foregoing, it is hereby ordered and adjudged that Plaintiff's Motion for Summary Judgment on its request for declaratory judgment be GRANTED. Accordingly, pursuant to Haslerig and its progeny, the Court finds Defendants are barred from disturbing the Mt. Olive Cemetery or otherwise appropriating it for private use. In light of Defendants' continuing efforts to obtain a permit allowing them to relocate the cemetery, the Court also GRANTS Plaintiff's request for a permanent injunction such that Defendants are prohibited from taking further action to obtain a permit from the City of Atlanta government that would sanction the disturbance and / or relocation of the Mt. Olive Cemetery.

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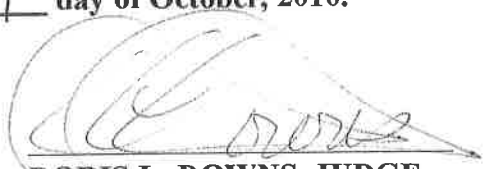
[4] Apart from Georgia law on the public dedication of a cemetery, Plaintiff has also presented a wide body of law from other jurisdictions holding that church cemeteries are or are generally considered to be public as opposed to private. (See Plaintiff's Reply Brief, pp. 2-3).

[5] Defendants urge the Court to make certain inferences regarding the nature of church cemeteries. "As anyone who is a member of church knows, it is a long- standing tradition that weddings, funerals, baptisms are performed for its members and not for the public at large. If non-members are allowed at all to have weddings or funerals or to be buried in a church plot, there is always a fee but most churches do not allow non-members access to these services at all. Cemeteries that are adjacent to churches are for the members and member's family members and not the public at large." (Defendants' Response, p. 5). The Court rejects this argument finding it is based merely on generalizations and assumptions. Wide variances exist between denominations and individual churches such that Court finds it is unable to make any reasonable inference about how church cemeteries generally operate.

[Signature on following page]

SO ORDERED this 29 day of October, 2010.



DORIS L. DOWNS, JUDGE
FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

cc:

W. Wright Mitchell, Esq
Constangy, Brooks & Smith LLP
230 Peachtree Street, NW
Suite 2400
Atlanta, GA 30303

Glenda S. Cook, Esq
235 Peachtree Street, NE
Suite 400
Atlanta, GA 30303