

SYMPOSIUM PANEL DISCUSSION

SHIFTING LANDSCAPES: 21ST CENTURY PROPERTY LAW

SEPTEMBER 30, 2022

Panelists

ALEX DICKERSON,* SCOTT WEISS,** & LISA HELTON***

Moderator

TRAVIS BRANDON†

Eric Rupenthal:‡ I'd like to invite the stage now Belmont Law's Property Professor, Professor Brandon will be moderating our panel today. So, if our panelists will come up to the stage.

Professor Brandon: All right. Thank you all for being here today. As you all are aware, both Nashville and the state of Tennessee have seen unprecedented growth over the last couple of decades, and there is no sign that the growth is slowing down.

Just in the news right now, we're seeing the development of the new Oracle campus on the Northeast side of the river, which is spurring even more development over there, and we've got, perhaps, an impending deal on the Titans Stadium. We've seen huge growth and along with that growth, have come some major challenges in terms of law and policy regarding land use.

The purpose of our panel discussion today is to invite several local experts here on property and land use law to talk about some of the major legal issues that they see in the field here in Nashville. To that end, we are very fortunate to have with us three very distinguished Attorneys who practice in different areas of the field. Let me begin by introducing our panel.

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I will start over to my right with Alex Dickerson. Alex is Senior Council for the Metropolitan National Department of Law, where he heads up the land use team. That team advises the Metropolitan Planning Commission, the Metropolitan Historic Zoning Commission, the Board of Zoning Appeals, the Department of Codes Administration, and various other metro boards and commissions. Alex has also defended Metro in litigation in various Davidson County Courts before the Tennessee Court of Appeals, and before the United States Court of Appeals for this second circuit.

To my left we have Scott Weiss. Scott is an attorney at the Ortale Kelley Law Firm here in Nashville, and his practice is dedicated primarily to the representation of Homeowner and Condominium Associations throughout Tennessee. His practice consists of more than 650 homeowner and condominium associations, and he provides a wide array of services in areas including, but not limited to, delinquent account collections, restrictions enforcement, rules and regulations, fine and enforcement policy, parliamentary services, and attendance at association annual and special meetings and meetings with the board of directors.

Last but not least, we have Lisa Helton, and Lisa is an attorney at Sherrard Roe. Her practice includes estate and trust litigation, appellate practice, general and commercial litigation, landlord-tenant law, representation of homeowners associations, homeowners association disputes, and IRS tax litigation and controversy.

Thank you all for being here today. What I've done is I've asked each of our different panelists to talk about some of the most important and interesting areas that they have seen developing in their practices here in Tennessee. Alex, would you like to start us off here?

Alex Dickerson: Sure. In the prior presentations, the government's taken a few hits and deservedly so, but I'm here to put the good back in government to show you how at least the local metro is helping you out. Helping out in our role in guiding new development to where it fits into what the public gets, because we represent them. Okay? Obviously, we support the general notion that the classic liberalism, that you should be able to use your land to its best possible use within reason.

For instance, perhaps you purchased a few acres over on First Avenue near the Travel America 20 years ago. It's just industrial land. Then a few years ago, someone come up and said, "Would you like to be part of Oracle? That's good, right? First off, if you did that, congratulations on your foresight. We want you to be able to develop in Nashville for intense developments as appropriate. But this does not work everywhere in Davidson County, there's only a few spots it does work. Most people, they don't really necessarily want this in their backyard. That's where city government comes in.

First, as a collective body, it's our job, and especially through the planning department, to think about how Nashville looks as a whole and how

it's going to look 25 years from now. We're supposed to be the forward-thinking-arm of this. For those of you who are familiar with Nashville Next, that's the city's planning document that guides us through these different areas.

Now, growing city of Nashville size has many different public interests that should be considered in considering whether how each particular development fits in. First, we want to foster strong neighborhoods. Most of us think of ourselves if you're from here as Nashvillians, but if you live in a good, strong community like East Nashville, then you think of yourself as an East Nashvillian or maybe you think of yourself as someone from Edgehill or think of someone from South East Nashville.

We want to encourage developments to fit in. Part of the way we do that is if you take developments to the planning commission, the strongest evidence and support for an opposition of a development is usually going to be the community members who come to that meeting and speak out. That's an important aspect of what we're looking at and how that fits.

We also want to balance the character of the county. If you spend a lot of time as a Belmont student around the campus, you may not know that there's a ton of rural land in Davidson County. Head out to Joelton sometime. It's some of the most rural land you're going to see, just like elsewhere in Tennessee. You know that Nashville wants each of these different types of areas because when a developer decides they want to put a sub-division up in this rural land, that's some of our strongest opposition comes from these residents who want to stay in rural land. It's our job to balance that.

We also want increased transit options and walkability. Here's a couple metro projects: The Rip Patton North Nashville Transit Center, that's set for construction this fall, and the 12th Avenue bikeway, which are under construction from NDOT now. Obviously, increasing transit options, reduces travel, reduces personal vehicle travel, and helps environmental footprint. That's all part of the public good.

Protecting environments. This is the Pinnacle's Green Roof. This was developer-initiated, but obviously still supported. This retains stormwater, reduces heat effects—all positive for the environment in new development.

Preserving history. This is Sunnyside Manor over at Sphere Park. It's home of the Metropolitan Historical Commission. A lot of what Metro does through various commissions is intended to protect history and individual buildings and neighborhoods.

Maintaining the uniqueness of Nashville. You may love Broadway bars, but they are what people think of when they think of Nashville. They're a unique identifier. They're part of our city. That area is protected in how it looks through a historical overlay that requires buildings to be of certain height and within certain design standards.

Maintaining view sheds and aesthetics. This is a view from Fort Negley downtown when planning downtown Code Design Review

Committee, when they look over new developments, they want to make sure they complement this view. They want to make sure that your building fits in with buildings that are around. Everything's not individualized. It's all part of a larger goal.

When it comes to the different departments that are involved in this, we have lots, and they're not all up here, but there are several different—a lot of the interests that we talked about before are satisfied by the market. You may have heard that by 2030 we estimate that we're going to be about 50,000 living units short of what we need. Well, developers are more than happy to fill that gap. They're happy to build that. They're also happy to provide transit options. If they don't have to put parking spaces in their big condos, they can use more rental units or for retail.

A lot of the market will satisfy what the public good needs, but when that doesn't happen, and when developers need a guiding hand, that's when these other agencies step in to help out. The tools depend on the type of development. If we're looking for intense development, here's an example of a proposed development 2nd & Peabody downtown. Some of the legal tools that we use for that, the downtown code, which is what this operates under, offers what's called an overall height modification option.

The base zoning in this area is much shorter than what you see here, it's around seven or eight stories. Of course, you know, it's a two-acre site, you are entitled to build a flat eight-story building with all the charm of the Pentagon in that space. However, if you'd like to make something that's just a little more contributing to Nashville, a little taller, a little prettier, nice little public park in there, you can use Metro's overall height modification process for that. Some of the things it values is upgrading public infrastructure can get you additional height, quality open space, improvement to the character of the neighborhood, and contribution to the skylines.

Historic preservation. This is a rendering of what's going to replace bombed-out buildings on Second Avenue. This is developer-led so I don't want to take it too much credit on Metro side, but what allowed Metro to have the leverage to ensure that something like this was put there instead of something else was the historic overlay that exists on Second Avenue that essentially requires design to look like what was there before. Through a lot of negotiation, a lot of discussion, what's being put there now looks substantially similar to what was there before, and that's really important for Second Avenue.

Historic preservation can also be accomplished by designating certain buildings as historical, which limits their ability to be demolished. We also have code provisions that allow adaptive residential uses of buildings that are—let's say there's an older warehouse on an artery that is, wasn't designed to be a residence, but if you adapt it to form a residence, then the code allows you to do that by right.

Subdivision info could be controversial, but this is the way that we bridge the gap in a lot of ways, is taking some areas that are meant to have

more suburban feel in the next 25 years and having good, appropriate infill. Now Metro code allows infill; we recently changed it to allow the infill subdivision regulations to progress in a way that more values the neighborhood they're fitting in because it is a transition, and we want to make sure that these new neighbors don't stand out so significantly from the areas that it becomes controversial.

Also, creating new neighborhoods. This is created through a specific plan zoning. It's a little bit different than your regular base zoning. What SP zoning does is it allows the developer to get some additional entitlements like height, but in exchange, they have to follow a final site plan that gets approved by the Planning Commission and Metro Council, which puts in concrete what they said they're going to do and allows us a little more oversight if they decide they want to change it up. Just a few good things that government does.

Professor Brandon: Thank you very much, Alex. Scott?

Scott Weiss: One thing professor Brandon forgot to mention as far as what I do is I'm representing so many homeowner associations throughout Tennessee, I'm also a psychologist on a regular basis, okay? I deal with a lot of drama, as you can imagine, and a lot of that is part of it. What I wanted to talk to you guys about mostly today is it's more of a trend that's going on that we're seeing in here—not just in Middle Tennessee, but throughout Tennessee and throughout the country really.

That's with the influx of corporate investors purchasing up properties, residential real estate solely for the purpose of leasing. I wanted to share some statistics about that with you and talk to you about how that's impacting community associations throughout Tennessee and really throughout the country, but mostly through Tennessee.

Alright, here's some statistics I wanted to share with you. How many residential homes do corporate investors own? Now, this is nationwide right now. I had broken down here by quarter. I don't have third-quarter information yet this year, but that's a lot of homes. 18%, 19.4%, 20%, there's a roughly 142 million residential homes in the United States, so do the math. That's a lot of homes throughout the country that corporate investors now own and understand, and I'll also reiterate this later, once corporate investors, let's say purchase homes, they own them forever. They're always off the residential real estate market, and they'll always be leased.

One thing that we just heard is developers as we all know here, they're developing and building on a rapid basis here in Middle Tennessee and Nashville, but as fast as they're building new homes, corporate investors are buying them right up. It's a fact that we deal with every day here.

Another interesting statistic that I found is that corporate investors buy nearly one in five residential homes nationwide. As I said, that's a lot of homes. And there's nothing to slow them down, particularly in this market

we're seeing right now. Nashville, total residential homes in Nashville are purchased, and now the percentage of homes purchased by investors was 22.7%. Again, a lot of homes in Nashville, that's up almost 10% from last year, and that's the total value of homes getting owned. That's the average sales price.

I do discussions with homeowners associations and boards a lot who are seeing in these trends in their neighborhoods and some who aren't. It depends. A lot of the arguments in opposition to, and I'll talk about leasing restrictions a little bit in a minute, but I get a lot of people saying, it's not a problem in our subdivision. We don't have that many homes that are owned by one or none at this point. That may be true, but it's common, number one.

Number two, I think the arguments I get are that our homes are half a million, 750,000, million-dollar homes, they're not targeting that purchase price, that level home, and that's just not the case. This is, of course, the median sales price, but it's also said the more homes that the corporate investors own that are now being taken off the residential real estate market forever with more increasing demand, particularly as we just started in Nashville we're all seeing in Nashville. That's going to drive up the cost of homes, there's more demand and less inventory on the market if we continue to experience those trends.

The value of homes is going to continue to go up and those homes are going to be in those price points. People don't think are going to be a target for these investors which actually are now, and it will be even more so in the future. How does this impact residential real estate market? As I've said, once these corporate investors own-- once they purchase the residential home, they never sell them. They will always own them and use them for rental purposes. They might package these homes and sell them on a secondary market as a real estate investment for us, part of a re-investment, but it will still always be owned by an investor and used for rental purposes.

Because they never sell these homes, again, it's off the residential real estate market forever, they'll never be back. This increases supply and demand needs as I said, versus less available inventory that equals the inflated property value, that reflects the prices that we're seeing. I'm not saying that that's the sole contributor to the increased sales prices and market values that we're seeing, but it certainly is a significant factor among other things. These inflated purchase prices, of course, people are lacking affordable housing for people and a lot of times forces people to rent.

What's happening is, with the cooperate investment, they're brilliant, because what they do is, they're creating basically a market for themselves that will be there forever. They will own the homes and people who want to buy the homes who can't afford to buy the homes will be renting from these corporate investors because that will be basically their only option at that point. It's a brilliant business model that they have. Unfortunately, I think, as you'll see here in this last bullet point, it's going to lead, in my opinion, to the death of the American dream of home-ownership for millions of

Americans. It's good for the bottom line, but I don't think it's good in the big picture or in the policy matter, either.

How's this impacting community associations? Corporate investors, they target homeowners and homeowner condominium associations, because these associations take care of the property. They keep it looking nice, they maintain it and that's part of the mandate on the association restrictive covenants, the corporate governing documents. One of the big negatives that I always bring up when I have conversations with my associates at the boards is, if these corporate investments buy too many properties that operate in your subdivision, what's going to happen is they'll be able to at some point be able to outvote everybody.

If they can outvote everybody, they can then change the governing documents, they can amend the documents, do whatever they want to do, restrict whatever they want to restrict, they can increase assessments, pass a special assessment. Basically have carte blanche to do whatever they want to do. I think there was a question from—

Audience: The very first condominiums that were ever built in the State of Tennessee were built in Nashville, and there was a restrictive covenant that you could not rent those units at all. They only had to be inhabited by family members—you could not rent them. How many of these particular homeownerships do not allow rental units in them? Because that would help alleviate this problem. If the Metro Council or Tennessee State Legislature would put a cap on the number of rental units in homeowner and these type situations.

Scott Weiss: That would definitely help. I don't know—you get the constitutional question about that kind of thing, is that an unreasonable restraint on alienation? I'm going to get to that in the next slide. Have you seen my slides?

[audience laughter]

Scott Weiss: She knows exactly where I'm going with it. You're right. We can spend all day on this topic alone, because there's case law in Tennessee that discusses what is a business use, and a lot of its association on restrictive covenants, have a restriction on leaving residential property within the HOA for business purposes. That's a whole different conversation and I don't think we'll post the time we need to have that discussion today. Again, once they have a controlling vote they can do anything they want at that point. Then what does that do to your investment, your home values, at that point? Especially for condos, this has a huge impact on condos because condos-- in order to qualify for Fannie Mae FHA loan financing, conventional financing, condo associations have to have a certain percentage of home units owned by owners and occupied by owners.

If it goes above that owner occupancy rate, they can lose that ability to get loan financing for those programs. Unit owner of those condos is going to be very limited to only having opportunities to sell to a cash buyer, which are the corporate investors, or do some owner financing arrangement with the purchaser in the future that they'll be very limited on what they'll be able to do with their unit at that point.

You'll see something at the bottom here, there's an example that is in a subdivision called Kingdom Crest Home Association out in Murfreesboro, and this is a very extreme example, that this subdivision was developed, I can't remember the developer's name. The development was about 120, 150 home subdivision, developer went under the bank, foreclosed, and took the property back.

A corporate investor purchased the entire subdivision, all the homes, which included 11 home individual homeowners who'd already purchased from that original developer builder. Now you have this corporate investor who owns 90 percent of the homes in the subdivision yet 11 people who basically have no say as to what happens to their homes anymore. What do they do? The question comes, what do they do at this point? Their options are now very limited as to what they can do. It's a very sad example, and it's an extreme example, but that's the type of thing that I think we're going to see much more of as this trend continues on and continues to grow.

Again, these are some common problems that I see with associations. Exterior maintenance, repairs, keeping landscaping up, keeping the subdivision the way it is when everybody purchasing there first drove to that subdivision and fell in love with it. A lot of these things are just not being taken care of and yes, the association does have power to enforce these restrictions, but it does become difficult and you'll see the first arrow there.

It becomes difficult to have a corporate investor located in Arizona or California and you don't know who to contact, many times how to contact them, or find the right person to contact at the company who can actually come out and force their tenant to maintain the property or send someone out to do the work and charge their tenants for it. It becomes extremely difficult and then if you can, as me, the attorney for the association attempts to try to enforce those different covenants in court, which I do a lot of, that's great and all well and good if I can get them served, number one but number two, even if I get a judgment, they're in California or Arizona, and yes, there's a way to domesticate judgments in other states, but it's just not practical to do in these types of situations.

It's extremely difficult to keep properties looking nice and enforcing their covenants when you have corporate investors who are out of state. Again, I just get all these questions here, how do they contact that person? What can they do when the person's unresponsive and then fines and liens? Yes, of course you have these powers that are usually within the Association Restrictive covenants. Again, trying to find a person at these corporations

who are out of state anyway is extremely difficult to enforce it and stuff. It makes it very difficult to enforce these.

Again, I've talked about legal action, litigation that can be done, judgments can be domesticated out of state, but it's a long drawn out process, and many times it's just not worth it. Yes?

Audience: Isn't the argument for a legislative fix to pass legislation that would require them to designate a person to be the contact.

Scott Weiss: I'm glad you brought that up because there actually is a law that says that now going into effect May 1st the last year and part of that it's the law that we actually talked about earlier where it passed, where now if it's the community association passes an amendment to a restricted covenant amending the governing documents. If they adopt an amendment to the restrictive covenants to place restrictions on long-term leasing leases that are 180 days or longer, then they must grandfather all existing owners in and allow them to lease if they want.

The other part of that law now does require that these corporate-owned properties to provide reliable contact information to the association, it's another part of that law. I'm glad you brought that up. That's one of the things I do a lot of, and I'm not sure how I'm doing on time here, that's why I'm talking fast, because I know I'm limited on time.

Okay, one of the things I do a lot of is I write amendments to restrictive covenants for Homeowners' Association to stop this corporate investing practice. This trend that we're seeing a lot of, and I don't specifically state in my amendment that there's no corporate investors allowed here, or I've had some people ask me, well, why can't we just say that no corporation can own more than two properties, three, whatever, or one property and yes, I suppose that's easy to get around. All you do is you set up subsidiary corporations or LLCs, and it's easy to get around that. So our draft language makes it extremely difficult for a corporate investor to purchase in an association by requiring they own and an occupancy period of time that they must own and live there in the unit or in the home for a certain period of time before they're even eligible for lease.

That basically kills their business model because they can't own and occupy for a year or two years. They can't be done and they're not going to pay somebody to live there, that's not cost-effective for 20% of the homes that they now own throughout the United States. It does make it extremely difficult, not impossible, but very difficult for a corporate investor to purchase after these amendments have been adopted by the association and it does require a percentage of the homeowners of the association so that can be difficult as well to get. We did have some questions. I know that I'm going fast, but I just want to-

Audience: Do you think you can enforce that provision? And I'm going to ask that question in terms of not allowing corporate investors to move in. You're essentially submitting a person or entity under definition of law of Tennessee from buying property. I found that in the new statute that allows and mandates all association or neighborhoods to be permitted to install a flag pole. There are flag pole for prohibitions and covenants in a subdivision, in my subdivision.

Now, people think that state law now provides that you can install a flag pole to fly the United States flag or the Tennessee flag, or I think it references other military units and such, but the covenants provide that you can't. I don't know if it's the law of Tennessee necessarily trumps the covenants that the members of that community, the owners association members have established for themselves in terms of what they want to install and allow on a subject. Have you seen?

Scott Weiss: Yes. There's a law, and it's actually not flag poles, its flags themselves. The United States flag and flags of the US military that cannot be prohibited by HOA from being flown in the neighborhood. Now they can prevent the size or the location and that type of thing but those flags, and that's also US flags also protected under federal law as well. You're right if the association has the restricted covenant says, and I see this a lot, no signs, no flags, no banners, yes, that law would trump or override that restriction in the association governing documents with regard to all flags and signs. With regard to the leasing situation, the restriction on that, as long- - and then there's a case law, this very well settled in Tennessee.

In fact, there was just a case, I believe that hit on the leading case in Tennessee just went to the court of appeals, they used the leading case as an example on another matter but the case law in Tennessee is, and most states follow this as well, when you have an association which has restrictive covenant, there is a mechanism for amending the governing documents, the restrictive covenants, as long as that mechanism is strictly complied with, all the Is are dotted Ts are crossed, you get the vote you need, you have a quorum for the meeting or whatever the amendment requirement is, as long as all that's met, then there can be no expectations of status quo on the part of all the owners and everything's going to stay the same forever.

Again, with that caveat that everything must be strictly complied with and meets all the notice requirements and all that so yes, it can be enforced. In fact, I do have to enforce violations of those leasing restrictions, not all the time, but it definitely happens and sometimes people intentionally violate it. It's difficult to enforce once it's done, once they violate it, and again, that's another discussion for another day I don't have time for that today, but it is enforceable. It does work, has been working. I've not had it challenged in court at all, not to say that it won't be and I wish it would, but frankly, I wish it could go to the Supreme Court so then we wouldn't have to

worry about it anymore but I do a lot of that kind of thing and it does work. Does that answer your question?

Audience: Yes, what is the style of that case?

Scott Weiss: I think it's the Inter-image's case. I can't remember the exact law but it's Inter-images out of East Tennessee. I'm sorry that's a different case. I'll have to get back to you. It's the Forest Crossing where there's the leasing restriction. It was leasing restriction but it's amendments in general. It was a Forest Crossing case. That's a 2012 or '14 case.

Professor Brandon: Thank you, Scott. We'll hand it over to Lisa.

Scott Weiss: I'm longwinded.

Professor Brandon: You're good. Hopefully, we'll have some time for questions at the end of the segment. Lisa, please.

Lisa Helton: I recognize that I'm probably the thing that's standing between you and lunch.

[audience laughter]

Lisa Helton: I'm going to try to be brief. When I was approached about speaking here today and the topic was development coming to Nashville, one very unique area of law that came to my mind immediately is cemetery law. I know that probably sounds strange. You're like, "Why Lisa?" The context is that a lot of developers are buying up family farms. Really large tracts of land that have been in families for forever in Tennessee, and they're building subdivisions.

More often than you would realize, they're going out. They've got this great plan for their subdivision and they realize that there is a family cemetery on the property. Sometimes it's not even apparent that there's a family cemetery. Sometimes you could be walking the land and not even realize there's a cemetery there. Having a cemetery right there doesn't necessarily mix well with the plans that they have for their property. We'll get a call from the developer asking, "Okay, we have a cemetery, we don't want it there. What do we do?" I know, it's fascinating. It's an area of law. I didn't leave law school thinking I want to do cemetery law but I do real estate litigation.

I do a lot of different things within real estate litigation and this came across my desk one day and I thought, "Wow, I really want to learn about this, it's fascinating." Once I learned about it, the cases just kept coming up. That's what I chose to talk about today. I also happen to love to talk about this and people usually like to hear about it around Halloween.

[audience laughter]

Lisa Helton: I know. Okay. Let's talk about some different scenarios. One of the first calls that I'll get is a developer has been doing some work on the property and they inadvertently disturb a grave site. They didn't realize there was a cemetery there. They started digging and they're seeing some things that are not just dirt. They call and they say, "What do I do? I've disturbed the cemetery." Okay, the very first thing they need to do is just stop. Stop what you're doing, walk away, turn the machines off, everybody out, because you've got some phone calls that you need to make immediately.

The first is to the Tennessee State Chief Medical Examiner. The second is to local law enforcement. The reason for these phone calls, I'm betting you guys can guess. You don't know as a civilian whether you've just disturbed a crime scene, or have you disturbed a family cemetery? You don't have the qualifications to know that. You are calling in these professionals to come take a look at the site to determine, "Are there any concerns?" This is really important because it's a crime to not comply with this. Not just beyond that and the moral and ethical concerns.

You all have probably seen some articles in the newspaper about developers who they disturbed a grave and they didn't make the appropriate calls and there's criminal implications. That just makes them look bad. The state medical examiner will come out. They have five days to come out and determine whether there's any concerns. Local law enforcement will also come out and determine if there's any forensic or criminal concerns.

The state medical examiner also has the duty to call the Tennessee Division of Archeology. They have the right to come to the site and recover any artifacts that are of interest to them. I've never actually seen it happen, but they reserve that right. Let's say everyone's come to the site. There's no concerns. This is a family cemetery. What do you do? You just have to rebury the remains in six months. It's always been interesting to me that you have six months to rebury them. Seems like a really long time to leave them out, but that's your legal requirement.

The state medical examiner also has the duty to call the Tennessee Division of Archeology. They have the right to come to the site and recover any artifacts that are of interest to them. I've never actually seen it happen, but they reserve that right. Let's say everyone's come to the site. There's no concerns. This is a family cemetery. What do you do? You just have to rebury the remains in six months. It's always been interesting to me that you have six months to rebury them. Seems like a really long time to leave them out, but that's your legal requirement. I would want to rebury them quickly.

[audience laughter]

Lisa Helton: That's just me. What happens if you need to move the body like we talked about? This isn't a, "I've accidentally disturbed and I need to rebury in six months, but I actually-- I don't want the cemetery to be there anymore." So, what you do is, time to call an attorney. Tennessee has a set of statutes that lays out a procedure for relocating a cemetery.¹ I forgot that I put all these cool effects in.

[audience laughter]

Lisa Helton: You can't just move any cemetery, you have to meet certain criteria. A cemetery has to be abandoned or neglected where there's some activity in the cemetery that just is not in keeping with the cemetery.² For example, let's say you're developing property, and here's the cemetery, and you're going to have a pool on one side and a parking lot on another. You might determine that that's not really respectful to the decedent or the deceased individual. So, you have a duty to, if you want to move the cemetery, you have to satisfy these criteria. Who can sue? The property owner can sue, certain governmental entities can sue, but the heirs can also sue also.

Sometimes I'll get calls from family members saying, my family cemetery is on this piece of property, they're developing it, they're not taking care of it, and I'd like to move my loved ones to a cemetery. They have the right to sue. You have to satisfy to the court that if you're going to move the cemetery, that you're going to do it with due care and decency. That wherever you're relocating the cemetery, it's going to be a proper location. It's not going to be right by the road, so the court, in my experience, is very interested in knowing that you're going to be doing this respectfully and in practice, when I do these type of cases, I always work with archeologists.

They're the ones who are qualified to actually do the relocation of the cemetery. What I usually like to do with them is have them create their reburial plan. It's a long and very detailed document about exactly how they're going to move these bodies. I'll attach that to my petition just so I've got it all in a nice package. One other thing that's fascinating about these cases is that when you're suing, the question comes, like, who's your defendant? Usually you have to have a defendant. You have a requirement under the statutes to locate the heirs-- I'm sorry?

[unintelligible]

Lisa Helton: Right. Yes. It's a really interesting project to be standing in the middle of a old family farm in Franklin and there's a bunch of cemeteries and maybe there's not even headstones. Your job as an attorney

1. T.C.A. § 46-4-104 (Current through Second Regular Sess. 2022-112).
 2. T.C.A. § 46-4-101 (Current through Second Regular Sess. 2022-112).

and your client's ethical duties are to locate the heirs. It becomes really challenging. A lot of times, you can look at different grave websites or ancestry, you're looking at property records to try to see who owned the property around the time that the decedents were buried. Sometimes you just simply can't locate anybody. What you do in that situation is you file a motion to serve via publication and you'll run an ad in the newspaper.

I would say most of the time we do find heirs and it's actually a pretty rewarding aspect of this practice to work with the heirs. I found, in my experience, sometimes you'll look at the heirs and maybe they're advanced in age and they may say to you, "Look, I knew the cemetery was out there and I used to keep it up, and I just can't get out there and do it anymore. It is neglected and I feel really bad about that."

You feel for them, and part of this whole legal process is that if you're granted the right to relocate the cemeteries, not only do you have to-- the relocation has to look really good, but a lot of times, there's an obligation to maintain the cemetery going forward. What I'm sure Scott's seen is that that obligation will be passed on to the HOA, so it becomes part of the common area. The HOA keeps up the cemetery going forward, but in my experience, I've found that the heirs really appreciate that and they feel like a burden's lifted off of them. That's actually a really cool, rewarding aspect of this practice. I'll show you guys some pictures. Before the cemeteries are actually relocated, you all heard me talk about how the archeologists create a reburial plan. Well, they need to know how many people are buried at the cemetery before they can do a good plan. You need to know the size of the cemetery so you know what space you can relocate it to. Sometimes I'll have clients say, I think there's two or three people buried, and the archeologists are like, "There's 15," and they can see it. It's fascinating to watch them work.

You can go to the site with them and they'll see indentations or they'll see the dirt is a little bit different. They'll see certain plants that are there that they'll say, "Well, I know that during this time period, Tennesseans tended to plant these plants when they buried someone," and you can see that the plants spread out every time. Remarkable. They'll do this process called delineation and you can see that in pictures they're going out and they're pulling back the top soil to try to get an idea of how many graves are there. They're not actually disturbing the graves, but even like—I don't know if this is a laser pointer.

[audience laughter]

Lisa Helton: You can see here, they've outlined a grave. They're not disturbing it. They've gone around it, but they can tell there, I think there's something there. Here you can see again, they'll start to outline some of the grave areas. This is a really good cool picture because you can see here the soil just looks a little different. They've outlined—I feel like you can see it, but they think there's a grave there. This is just an example of a reburial plan.

I don't know how well you guys could see it, but they've got all the way down to what they're going to plant in terms of vegetation.

I've had one case where we submitted a plan and the court wanted details of exactly where the landscaping was going to be. I feel like the courts feel an innate responsibility, especially since these cases are always filed in chancery court and that's a court of equity. I think the sense I have is that the court is still responsible to make sure this is done right.

Audience: I have never thought I'd involved in cemetery law. One of them is a volunteer with my son's Union Veterans Camp on Fort Negley. I've worked with Bob Mendez at the ground penetrating radar. People believe strongly that there are bodies there. We did find a high likelihood they were and stopped the entire process, with all the support.

Then I worked on a forest case out of Memphis, and we put together part of our settlement with Memphis green space in the city. This whole notion of okay, what are our steps to, one, disinter and repatriate, then we had to go through all of that process. It is one of those things that is very fulfilling and you got to remain true to that. You got to make sure you follow that process because if you don't, problems will ensue. Fortunately, those plots will be interred, it will just need a new cemetery. They will just need to go through all of the administrative levels of getting it to be in the cemetery, but then again with the experience too.

Audience: Yes. Do you believe this talk vaguely about when there's a development and the cemetery is on an edge of a beautiful section of the property, and they don't want to make the cemetery, how much simpler that is to meet the statutory requirements?

Lisa Helton: If they don't want to move the cemetery, they don't have to do anything. There's a certain-- I can't remember if it's 6 feet or 10 feet around the cemetery that you can't. Is it 10?³

Audience: Yeah.

Lisa Helton: That you can't have any activities, but you're totally allowed to leave the cemetery out of it.

Audience: Also, there has to be a quote for a dedicated easement for the heir to be able to visit the cemetery, so the goal is to not block the cemetery from the heir. It's a much simpler task to make sure there's an easement.

3. T.C.A. § 46-8-103(b)(1) (Current through Second Regular Sess. 2022-112).

Lisa Helton: Yes, that's true. The heirs always have the right to enter the property to visit the cemetery.⁴ You cannot block that. I know we just have a few minutes. I have a few more pictures I want to show you. Let's say your petition's been granted and you can start the removal process. You can see here they've removed the topsoil all the way and they've located it an actual grave. Here the archaeologists, you see them want to dig down in the ground removing by hand and that is the process. It's very tedious. They're just going layer by layer and it's because these materials have been in the ground sometimes a hundred years, so very fragile. You can't just take machinery to them or they'll collapse and so that it's done painstakingly and it's a very long process and very expensive, by the way.

Just another picture of the process there. You can see here they have removed most of the dirt from the casket. I think you can probably tell from this picture just how gradual it is. These are more pictures.

Sometimes I think family members, they have in their mind, if you're digging up a grave, they imagine what you see in the movies, where this casket comes out of the ground and there's a body. Most of the time that's not the case. Some of these graves are 50, 100, 150 years old and unless you just had a lot of money, you typically buried people in a wooden box. A lot of times there's really nothing left, so to speak, it's just dirt.

Sometimes you'll find what some want to be an adornment to a casket. I've seen different things like buttons or a hairpiece even, we've found dentures once, so it's interesting but most of the time there's really not much left. This is just a piece that was found on one of the caskets. An archaeologist did research and they were able to find who exactly manufactured this piece and when.

Another picture of they're about to actually move these caskets. These are really well intact and so they're able to secure them and move them with equipment. This is the picture of after the graves have been moved and they're-- this is the new grave site and so they're starting to fill it back in. You can see the headstones are in place. Just another picture of a beautiful adornment that we found. This is a casket.

Now this is probably a little bit of a shocking picture, but this is the situation I was telling you about where there's nothing really but dirt and so the archaeologists will reburial the dirt, but that's what they're-- that's the exercise is that there's really nothing left, but they'll still go through and move the dirt and bury it and we track of exactly, which grave they're moving.

Audience: Are the banker boxes showing where they probably were or no?

Lisa Helton: That's what's being reburied. It's buried in bunker boxes. I know it's, but what do you do? It's an interesting thing that's part of

4. See generally *Hines v. State*, 149 SW 1058 (Tenn. 1911).

the practice, but it really is, it's part of the practice just to go through the exercise. I wish I had the slide of what this looked want to before. You wouldn't have even known there was a cemetery and it looks so beautiful when they were done and they reburied and in an area where there were no trees so you wouldn't have disturbance of some trees.

The archeologist is trying to get a picture of me out at the site and I really went back and forth. I was like, "Is this professional or not?" I was not sure. Should I smile? Me trying to look professional and not smile. They were calling me Indiana Helton.

[audience laughter]

Lisa Helton: I used to have a slide where they actually showed human remains. I was doing this talk out with a historic group out in Bellevue at the library. I got to the slide that had the human remains and when I put it up on the screen, I kid you not, this huge fork of lightning came down, hit the parking lot and we lost power in the whole library for 15 minutes and I said, "Point taken."

[audience laughter]

Lisa Helton: I don't show that slide anymore. That's the presentation.

Audience: If I misunderstood this and you covered it. What is the actual property right that follows the obligation to rebury and preserve this land?

Lisa Helton: It's set forth in the statutes.

Audience: Is it like a property right in the individual or businesses, or is it a property right in the land in which they were buried?

Lisa Helton: It's interesting because let's say you just bought a piece of property and it has a cemetery and you don't want to move it. The only obligations you have are don't disturb it, keep that parameter around it, let the heirs visit.⁵ You don't have an obligation to keep up the cemetery but if you move it-

Audience: Right, but that is like a restriction on your use so there's got to be some property rights associated with the restriction on your use.

Lisa Helton: It's just simply through the statutory process.

5. *Id.*

Audience: It's like a utility company has an easement across your lawn to maintain that pipe but or whatever it's created by statutory rights for the heirs and the deceased.

Lisa Helton: In a sense, you're creating a new cemetery if you're choosing if you go through this process and it's granted. I think the law just places the burden on you to keep it up from there.

Audience: The sort of myth from where I'm from is that we wouldn't think of them as property rights, but **[inaudible]**

Lisa Helton: That's an interesting question.

Professor Brandon: Thank you so much, that was fascinating. Thanks to all of our panelists.

[audience applause]