

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

**BETHESDA AFRICAN CEMETERY
COALITION, REVEREND OLUSEGUN
ADEBAYO, DAROLD CUBA, GENEVA
NANETTE HUNTER, and MONTANI
WALLACE**

Plaintiffs,

v.

**HOUSING OPPORTUNITIES
COMMISSION OF MONTGOMERY
COUNTY**

Defendant.

Civil Action No.: 486734V

OPINION

The above-captioned matter came before the Court on September 27, 2021, for a hearing on Housing Opportunities Commission of Montgomery County's Motion to Dismiss the Complaint (Docket Entry No. 20); Plaintiffs' Opposition thereto (Docket Entry No. 29) as well as Plaintiffs' Motion for Preliminary Injunction (Docket Entry No. 10); Defendant's Opposition thereto (Docket Entry No. 27); and Plaintiffs' Reply in Support of Their Motion for Preliminary Injunction (Docket Entry No. 31). The Court heard arguments from the parties on the Motion for Preliminary Injunction and took the matter under advisement. All evidence and arguments having been considered, it is this **25th day of October 2021**, that the Circuit Court for Montgomery County, Maryland, makes the following findings with respect to the Motion for Preliminary Injunction:

I. FACTS

THE PARTIES

1. The Bethesda African Cemetery Coalition (“BACC”) is a non-profit organization created in 2019 by members of the Macedonia Baptist Church, some of whom are descendants of freed slaves who had been imprisoned on plantations in the River Road area.¹
2. The Coalition was established to stop the desecration of and require the memorialization of burial grounds on and around parcel 175, including Moses African Cemetery, and to preserve the rich but not widely known history of Black people in the River Road area.²
3. Reverend Olusegun Adebayo is the pastor of Macedonia Baptist Church.³
4. The Macedonia Baptist Church is located at the intersection of Clipper Lane and River Road in Bethesda, Maryland,⁴ approximately 0.5 miles from the Westwood Tower Apartments and Lot 175.⁵
5. As pastor of the Macedonia Baptist Church, Reverend Adebayo is responsible for the growth of congregation numbers as well as the physical and emotional well-being of the congregants, teaching the word of God, and preaching. In addition, he is charged with responding to the needs of the members of the church and the members of the community.⁶
6. According to Reverend Adebayo, “the church was the center of the community. Folks and members were farmers and worked in the immediate vicinity of the

¹ Complaint for Writ of Mandamus (“Complaint”) p. 4, ¶ 5.

² *Id.*

³ *Id.*, p. 4, ¶ 6.

⁴ *Id.*, p. 9, ¶ 24.

⁵ The Court researched the distance between both locations using Google Maps.

⁶ Tr. A., p. 257 ls. 7-12.

church. So, the church was the center of their lives. You know, marriages, weddings, you know, burials -- back in those days, they find a commonality and they find their humanity within the church community.”⁷⁸

7. The County Council of Montgomery County recognized that the Macedonia Baptist Church traces its heritage back for approximately 370 years, when the first Africans arrived on River Road and “is the sole surviving institution from the River Road African community.”⁹¹⁰
8. Montgomery County Executive, Marc Elrich, recognized that the Macedonia Baptist Church “represents the descendants of the first African community in Bethesda, Maryland located on River Road” and its “congregants have been steadfast advocates for the recognition, remembrance and respect of the Moses African Cemetery and all that the history of the cemetery represents.”¹¹
9. Darold Cuba, a Massachusetts resident, is the great-great-great-nephew of Nelson Warren, Sr., a member of the River Road free slave community who was buried in the River Road community in 1909.¹²
10. Mr. Cuba is also the great-great-nephew of Nelson Warren, Jr., who was buried in the River Road community in 1903.¹³
11. Geneva Nanette Hunter, a Maryland resident, is the great-great-niece of Cora Botts, who along with her husband, Jeremiah Botts, were buried in the Moses African Cemetery (“Moses Cemetery”).¹⁴

⁷ Tr. A, p. 258, ls. 15-25.

⁸ See also the Testimony of Mr. Harvey Matthews, Tr. A., pp. 61-62.

⁹ *Id.*, PI, Ex. 9 March 7, 2020, Proclamation of the County Council of Montgomery County Maryland.

¹⁰ Tr. A, p. 260.

¹¹ *Id.*

¹² *Id.* p. 4, ¶ 7.

¹³ Complaint, p. 4, ¶ 6.

12. Montani Wallace, a Maryland resident, is a relative by marriage of Rosa Mason. Ms. Wallace's husband is the great-great-nephew of Ms. Mason.¹⁵ Ms. Mason was buried in the Moses Cemetery in 1946.¹⁶
13. Defendant, the Housing Opportunities Commission of Montgomery County ("HOC") was established in 1974 to better respond to the County's need for affordable housing. HOC is authorized to acquire, own, lease, and operate housing; to provide for the construction or renovation of housing; obtain financial assistance from any public or private source to assist its housing activities; and arrange for social services, resident services and day care.¹⁷
14. Defendant is a government agency subject to this Court's mandamus power because, among other things: (1) it is Montgomery County's designated Public Housing Authority and Housing Finance Agency; (2) its governing body is the Board of Commissioners comprised of seven members, each of whom is appointed by the Montgomery County Executive and confirmed by the Montgomery County Council; (3) it receives state funding to provide affordable housing and supportive services; (4) it is required to comply with Maryland's Public Information Act and has a PIA representative; (5) it is subject to oversight by the inspector general's office; and (6) it is required to comply with the state's Open Meetings Act, which requires many State and local public bodies to hold their meetings in public.¹⁸

¹⁴ *Id.*, p. 5, ¶ 8.

¹⁵ *Id.*, ¶ 9.

¹⁶ *Id.*

¹⁷ HOC Website at <https://www.hocmc.org/about-hoc.html>.

¹⁸ Complaint, pp. 5-6 ¶ 10.

NATURE OF THE DISPUTE & PROCEDURAL POSTURE

15. The Property at issue in this case is Lot 175 in Bethesda, Maryland.¹⁹
16. Plaintiffs presented sufficient evidence that Moses Cemetery exists on Lot 175 and potentially lot 177.²⁰
17. Currently, the parking lot of the Westwood Tower Apartments sits above Lot 175.²¹
18. Plaintiffs filed a Writ of Mandamus (Docket Entry No. 1) on August 10, 2021, alleging that Defendant should be obligated to fulfill the requirements of Md. Code, Bus. Reg. §5-505 and Md. R. Prop. Sales Rule §14-401 prior to the sale of the Property.²²
19. Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry Nos. 10-11) on September 1, 2021.
20. Also, on September 1, 2021, Plaintiffs and Defendant made arguments regarding the Motion for Temporary Restraining Order with Defendant expressing oral opposition. This Court granted Plaintiffs' motion.
21. By agreement of the parties, the Preliminary Injunction hearing was scheduled for September 27, 2021.
22. Defendant subsequently filed a Motion to Dismiss the Complaint (Docket Entry No. 20) on September 7, 2021.
23. SBG Owner LLC ("Charger") filed a Motion to Intervene (Docket Entry No. 25) on September 14, 2021.

¹⁹ *Id.*, pp. 2-3 ¶¶ 1-3.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

24. Defendant filed an Opposition to the Motion for Preliminary Injunction (Docket Entry No. 27) on September 16, 2021.
25. Plaintiffs filed their Opposition to the Motion to Dismiss (Docket Entry No. 29) on September 22, 2021.
26. Subsequently, Plaintiffs filed their Opposition to the Motion to Intervene (Docket Entry No. 30) and a Reply in Support of the Motion for Preliminary Injunction (Docket Entry No. 31) on September 23 and 24, 2021, respectively.
27. At the September 27, 2021 hearing, after considering the pleadings and arguments of counsel, this Court denied Charger's Motion to Intervene.
28. At the conclusion of the September 27, 2021 hearing, this Court took the Defendant's Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction under advisement.
29. Subsequently, the parties filed written closing arguments on September 1, 2021.

HISTORICAL INFORMATION

30. The history of the Property is detailed extensively in the Complaint.²³ In addition, the Property was the subject of a 2017 report by the Ottery Group, an archaeological contracting firm commissioned by the Montgomery County Planning Board through the former owner of the Property Equity One, to study the Property in connection with Montgomery County's prior consideration of its development.
31. The Ottery Group's Historical and Cemetery Assessment for Parcel 175 of the Westbard Sector Plan Project, Bethesda, Montgomery County, Maryland ("Preliminary Report"), was "prepared at the request of Montgomery County

²³ Complaint, pp. 6-18.

Planning Department related to the initial study in the documentary research associated with the presence of a cemetery on Parcel 175.”²⁴

32. The Preliminary Report is based on a compilation of research supported by records from Montgomery County, the State of Maryland, the Watershed Alliance and other parties that collected records. Such records included historical newspapers, genealogical records, death notices, historical land records, aerial photographs, personal recollections, and oral history.²⁵
33. The Preliminary Report focuses on three specific goals: (1) to determine whether a cemetery existed on Lot 175, specifically determining the location of the cemetery and gravesites within it as well as circumstances surrounding its’ operation; (2) to determine the type of impact that occurred at the cemetery in association with the construction following the closure of the cemetery, including the sale in 1958 to Leo Furr; and (3) to assess the condition of the cemetery and the human remains within the cemetery based on what was known about the landscaping modifications, including the construction of Westwood Tower Apartments.²⁶
34. The Preliminary Report concluded that the Property was used as an African American burial ground for many years:

“There is ample evidence that the land containing parcel 175 (and the adjacent parcel 177) were utilized by White’s Tabernacle Number 39 for a cemetery starting in 1911. The fraternal society’s ownership of the property between 1911 and 1958 is unambiguous in the land records of Montgomery County, the purpose of White’s Tabernacle Number 39 was to provide for burial of the dead, and tax record accompanying the 1958 sale of the land to Leo Furr indicate usage for a burial ground. Neighboring White landowners responded to White’s

²⁴ Tr. A, p. 138 (citing the testimony of Mr. Lyle Torp).

²⁵ See PI, Plaintiffs’ Ex. 3, pp. 2-6; Tr. A, pp. 139-140.

²⁶ *Id.*, pp. 138-139.

Tabernacle Number 39 purchasing the land by protesting the establishment of an African American cemetery. Published death notices and corresponding death certificates for individuals residing in the River Road or in Washington DC associate White's Tabernacle Number 39, Rock Creek Baptist Church in Tenleytown, and Moses Cemetery in Friendship Heights, as opposed to the Moses Cemetery associated with Gibson Grove A.M.E. Zion Church located in Cabin John. These records establish that the cemetery existed and was used for burials through at least the mid-1940s, but do not provide evidence of precisely how many persons were interred within parcels 175 and 177, or at what locales within those parcels burials were located."²⁷

35. In the 1700s and 1800s, River Road contained four large plantations with numerous slaves.²⁸
36. The Moses Cemetery contains the remains of former enslaved persons who worked on the four plantations in the River Road area of Montgomery County, Maryland during the Civil War, as well as their descendants.²⁹
37. After emancipation in the 1860s, River Road in Bethesda became a thriving community of freed slaves.³⁰
38. One of the homes which was located on parcel 242 in the River Road freed slave community was that of William and Nelson Warren.³¹
39. Montgomery County Slave Statistics reflect that numerous members of the Warren family were slaves in the County. Specifically, the Montgomery County Slaves Statistics of 1867-1868³² indicates registration of the following slaves in 1864, at or just before the time of emancipation, in Montgomery County:

- (1) James Warren (age 38);
- (2) Sarah Ann Warren (age 37);
- (3) Henry Warren (age 19);

²⁷Complaint, Ex. 3 at 11.

²⁸ *Id.*

²⁹ Complaint, pp. 8-9.

³⁰ *Id.* at p. 9.

³¹ *Id.*

³² *Id.* at p. 10. (Accessed from Archives of Maryland Online).

- (4) Nancy Warren (age 17);
- (5) Rebecca Warren (age 15);
- (6) Eliza Warren (age 13);
- (7) Patrick Warren (age 11);
- (8) Minty Warren (age 9);
- (9) Albert Warren (age 6);
- (10) Kamit Warren (age 3); and
- (11) Michael Warren (age 1).³³

- 40. In 1907, Nelson Warren, Jr.'s daughter, Blanche Warren, married William Clipper, one of the Clipper brothers who moved to the River Road community after their parents' deaths in 1903 and 1907.³⁴
- 41. In 1910, a community cemetery called "Moses African Cemetery" was formed on the hill that includes parcel 175.³⁵
- 42. In 1911, White's Tabernacle No. 39 purchased the same land (parcels 175 and 177) for reinterment of a burial site from Tenleytown in the District of Columbia. It is unknown how many remains from the District of Columbia cemetery were reinterred by White's Tabernacle No. 39 on Lots 175 and 177.³⁶
- 43. In 1911, a group of adjacent landowners including James H. Loughborough petitioned Montgomery County commissioners to prevent the establishment of an African American cemetery on the land purchased by White's Tabernacle Number 39, demonstrating that the planned usage of the 1.04 acres as a cemetery was public knowledge.³⁷

³³ Complaint, Ex. 4 Montgomery County Slave Statistics, 1867-1868.

³⁴ Complaint, p. 9.; Ex. 5 at 13 (David Kathan, et. al, *The Forgotten African American Community of River Road* (2017)) (describing the Clippers' storied background).

³⁵ *Id.*

³⁶ *Id.*, Ex. 6 at 53-54 (David S. Rotenstein, *The River Road Moses Cemetery: A Historic Preservation Evaluation* (2018)).

³⁷ PI, Plaintiffs' Ex. 3- Preliminary Report Historical & Cemetery Assessment for Parcel 175, p. 6.

44. The White's Tabernacle No. 39 property became a registered cemetery and was also known as Moses Cemetery and Moses Macedonia Cemetery.³⁸
45. "Following the purchase by White's Tabernacle Number 39 in 1911, Parcels 175 and 177 would have received remains disinterred from Christian Cemetery in Tenleytown for reinterment in Montgomery County and an unknown number of additional burials from operation of the Bethesda cemetery between at least 1912 and 1944."³⁹
46. A report to the U.S. Senate entered into *The Congressional Record* in 1917 indicated that, between April 21, 1881, and July 25, 1910, the cemetery in Tenleytown contained 192 interments.⁴⁰
47. Parcel 175 was utilized by White's Tabernacle No. 39 for a cemetery between 1911 and 1958, and tax records accompanying the 1958 sale of the land indicate a usage as a burial ground.⁴¹
48. After lengthy deliberation in 1921, the U.S. Congress ordered the exhumation and reinterment of some bodies from Tenleytown into the Moses Cemetery.⁴²
49. From 1910-1935, death notices indicate at least the following burials in the Moses Cemetery owned by White's Tabernacle No. 39:

Name	Year of Death	Age
Charles Henry Brown	1912	72
Jeremiah Botts	1912	63
Mary Jackson	1912	78
(Robt) Henry Jackson	1914	84
John Burley	1915	84

³⁸ Complaint, p. 9.

³⁹ PI, Plaintiffs' Ex. 3, p. 7.

⁴⁰ U.S. Senate 1917.

⁴¹ *Id.*, Ex. 3 at 6-7, 11.

⁴² *Id.*, ¶¶ 20, 25-42.

Jeremiah Graves	1916	87
George Jackson	1917	37
Wm H. H. Brown	1921	82
Marie Blackenburg	1925	49
John Thomas	1925	Unknown
George Turley	1926	Unknown
Waytoga Jackson Burley	1926	81
George Frye	1926	Unknown
Emma Gray	1927	Unknown
Sarah J. Greene (Green)	1928	Unknown
Sarah J. Brown	1928	Unknown
Charles R. Brown	1929	58
Lucy Harper	1929	Unknown
Lydia Burgin	1930	Unknown
Cora Botts	1935	68 ⁴³

50. Further analysis of death notices indicate that the following members and descendants of the Warren family were buried near River Road, either on or around parcel 175, given the location of the Warren family home on parcel 242:

Name	Year of Death	Age	Recorded Location of Death
Nelson Warren, Jr.	1912	72	“Montgomery County”
Robert Allen Warren	1912	63	Burial Site Not Listed
Nelson Warren, Sr.	1909	64	Burial Site Not Listed
Nannie Warren	1913	33	“Near River Road”
Susan Elizabeth Warren	1928	70	“River Road”

51. WSSC carried out two infrastructure projects that crossed the 1.04 ac property of White’s Tabernacle in Bethesda and may have impacted Moses Cemetery: the Willett Branch Trunk Sewer in 1930, and the Willett Branch Storm Drain completed in 1963. WSSC records were examined in hopes of determining whether contractors on these projects noted the existence and/or condition of Moses Cemetery, encountered human remains, or formally relocated a portion of the cemetery.⁴⁴

⁴³ Complaint, pp. 10-11.

⁴⁴ Plaintiffs’ Ex. 3, p. 5.

52. Records of the Montgomery County Department of Assessments and Taxation of Leo Furr's purchase of the cemetery parcel in 1958, on file at the Maryland State Archive, note that the land was "used as a burial ground."⁴⁵
53. Between 1962 and 1963, WSSC completed a concrete-lined storm drain that channelized Willett Branch and realigned this waterway so that it crossed the former property of White's Tabernacle Number 39, forming the boundary between parcels 175 and 177.⁴⁶
54. In 2013, Equity One acquired Westwood Tower Apartments.⁴⁷
55. In December 2016, Equity One and the Montgomery County Planning Department proposed to commission and fund a historical and archeological study of the Westbard cemetery site. The Planning Department delayed the study pending availability of a firm preferred by members of the Macedonia Baptist Church and other groups.⁴⁸
56. In March 2017, Regency Centers acquired all of Equity One's holdings, including Westwood Tower Apartments.⁴⁹
57. From May-June 2017, the County sponsored mediations between the Montgomery County Government, the Planning Department, Regency Centers, HOC, and interested parties from the Westbard community, including Macedonia Baptist Church.⁵⁰

⁴⁵ *Id.* at pp. 6-7 (citing Montgomery County Department of Assessments and Taxation 1958).

⁴⁶ Plaintiffs' Ex. 3.

⁴⁷ Plaintiffs' Ex. 18 Westwood Tower Apartments Statement.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

58. Defendant HOC leased the property from 1977 to 2017.⁵¹
59. In January 2018, HOC completed the acquisition of Westwood Tower Apartments in line with the terms of the 1997 lease.⁵²
60. HOC paid \$20 million for the acquisition of the Property including the 212 residential units and surrounding parking area. The property includes parcels 175, 238, and 240.⁵³
61. Defendant has acknowledged the existence of a graveyard on Parcel 175 by posting the 2017 Preliminary Report on the HOC website.⁵⁴
62. As further evidence of Defendant's acknowledgement of the existence of a graveyard, in 2017, after purchasing the Property, Defendant promised the community that it would preserve and memorialize the burial ground; however, four years later, it has failed to do so.

SEPTEMBER 27, 2021 TESTIMONY

63. During the September 27, 2021, hearing, the Court received testimony from Harvey Matthews, Lyle Torp, Nanette Hunter, and Reverend Olusegun Adebayo for Plaintiffs as well as Kayrine Brown for Defendant.⁵⁵
64. Mr. Matthews, born in 1944 at Suburban Hospital in Bethesda, Maryland, was raised in the River Road community in a home approximately 200 yards from the Moses Cemetery.⁵⁶

⁵¹ HOC Staff Report: HOCs Support for Westbard Memorialization, https://hocmc.org/images/files/PressRelease/HOC_Staff_Report_on_Memorialization_Support_Jan_2019.pdf.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.*, ¶ 49; *id.*, Ex. 12 (“highlight how HOC supports the memorialization of the cemetery and the history of the former community”); Pl. Ex. 18.

⁵⁵ September 27, 2021, Hearing Transcript (“Tr. A”), p.

⁵⁶ *Id.*, p.55, ls. 3-6.

65. Mr. Matthews's parents lived in the home before he was born. He lived in the community from 1944 to 1959 or 1960.⁵⁷
66. According to Mr. Matthews, the River Road community included roughly sixty homes and about 205 residents.⁵⁸
67. Mr. Matthews described the community as a rural area where he was raised around horses, hogs, chickens, homing pigeons, and hunting dogs that his father used to train for the white people who lived nearby.⁵⁹
68. According to Mr. Matthews, the River Road community was a quiet place, where everyone had a garden, and no one locked their doors or barred their windows.⁶⁰
69. He described the Macedonia Baptist Church as the center of the River Road community, where community members ate, worshipped, and fellowshiped.⁶¹
70. He further testified that things changed when "real estate developers used trickery to steal property from residents by giving them drinks and/or getting them high, and then showing them a piece of paper, asking the individuals to sign with an X or their mark. Then thirty days later, some superior individual from the development company would tell the homeowners they must move and relocate."⁶² He described that over time, no members of the River Road community remained, as they had been forced out.⁶³

⁵⁷ Tr. A, p. 60, ls. 5-6, 15-19.

⁵⁸ *Id.*, p. 66, ls. 17-25.

⁵⁹ *Id.*

⁶⁰ *Id.*, p. 67, l. 16-p. 68, l. 4.

⁶¹ *Id.*, p. 258, ls. 15-25.

⁶² Tr. A, p. 68, ls. 16-22.

⁶³ *Id.*

71. He testified that Lot 175 was located near the schoolhouse on River Road and behind the Talbert's Ice and Beverage Store, behind what is now McDonalds.⁶⁴ He noted that during his youth, a Roy Rogers stood where the McDonalds is now located.⁶⁵
72. Most importantly, he recounted the existence of a burial ground on Lot 175. He stated that when it rained, he could see the "caskets in the base of clay hill."⁶⁶
73. Mr. Matthews provided first-hand knowledge of Lot 175. He vividly recalled how he would cross the adjacent gravel path going to and coming from school, five days per week. He testified that he would cut through the cemetery during his walk to school.⁶⁷
74. He described that the cemetery contained tall stones, set on a concrete plate slat. His uncle and cousin would create concrete grave markers in the shape of a cross.⁶⁸
75. He also recalled that many of the grave markers were merely stones that were taken from the creek; the interred persons name would be etched on the stone.⁶⁹
76. According to Mr. Matthews, the cemetery contained at least 200 grave markers.⁷⁰
77. He also had personal knowledge of the cemetery because as a child, he along with the other children in the River Road community played in it as no other

⁶⁴ *Id.*, p. 69, l. 16-p. 70, l. 12.

⁶⁵ *Id.*

⁶⁶ *Id.*, p. 70, ls. 11-12.

⁶⁷ *Id.*, p. 71, ls. 16-22.

⁶⁸ *Id.*, pp. 71-73.

⁶⁹ *Id.*, pp. 70, 72, 79, 103, 106.

⁷⁰ Tr. A, p.73, ls. 2-7.

public location existed for them to play. He noted that due to segregation, Black people were not allowed in nearby Glen Echo Park until the 1970s.⁷¹

78. During his later years and after he moved away from the River Road community, Mr. Matthews continued to visit the community because he held a part-time job at a service station on Westbard and regularly attended church on River Road at the Macedonia Baptist Church.⁷²
79. Mr. Matthews spent roughly eighty-five (85%) of his day at the service station, a “stone’s throw” from the cemetery.⁷³
80. He also testified that during the construction of the Westwood Tower Apartments, some of the bodies on the property were moved by the construction workers, but to the best of his knowledge others still remain on Lot 175.⁷⁴
81. Mr. Matthews also enlightened the Court about the bulldozing of bodies and stones, and potentially grave markers.⁷⁵ Using Plaintiffs’ Exhibit 16, an aerial map of the River Road community, Mr. Matthews marked the location of Moses Cemetery as being underneath the parking lot of the Westwood Tower Apartments.⁷⁶
82. Although he testified to not having any family members buried in the Moses Cemetery on Lot 175, Mr. Matthews, as a member of the Macedonia Baptist Church and one of the last surviving children in his family, testified he feels obligated to use his voice to advocate for the deceased and their families.⁷⁷

⁷¹ *Id.*, p. 73, l. 18-p. 74 l. 6.

⁷² Tr. A, p. 60, ls. 20-25.

⁷³ *Id.*, p. 60, ls. 20-25.

⁷⁴ *Id.*, p. 71, ls. 16-22.

⁷⁵ *Id.*, p. 103, ls. 1-25.

⁷⁶ *Id.*, p.

⁷⁷ Tr. A., p. 90, l. 22-p. 92, l. 1.

83. The Court finds Mr. Matthews credibly recounted his personal knowledge of Moses Cemetery and its relationship to the River Road community and the Macedonia Baptist Church.
84. The Court received testimony from Lyle Torp, the Managing Director of the Ottery Group, a consulting firm that specializes in archeological and historical preservation and cultural resource planning. Mr. Torp founded the Ottery Group over twenty years ago.⁷⁸
85. Mr. Torp is certified in archeology in the registry for professional archeologists and has served on “a number of committees and professional organizations.”⁷⁹
86. After an extensive *voir dire* by both parties, over the objection of Defendant, the Court recognized Mr. Torp as an expert in identification, evaluation, and the study of historical cemeteries.⁸⁰
87. Focusing on the 2017 Preliminary Report, Mr. Torps testified that historical records, including death notices, death certificates, historical newspapers, genealogical records, and land records were used to craft the report.⁸¹
88. Most importantly, he testified that there is no doubt that a cemetery exists on the property.⁸²
89. Regarding the death of Cora Botts⁸³, Mr. Torp concluded that Ms. Botts was buried in Moses Cemetery, based on her death notice⁸⁴ as well as her being a resident of the River Road community.⁸⁵

⁷⁸ Tr. A. p. 121, l. 14-p. 122 l. 2.

⁷⁹ *Id.*, p. 123, ls. 1-9.

⁸⁰ *Id.*, p. 137, ls. 4-10.

⁸¹ *Id.*, p. 139, l. 8- p. 140, l. 8.

⁸² *Id.*, p. 140, ls. 9-22.

⁸³ Pl. Ex. 23. 1935 Death Notice of Cora Botts.

⁸⁴ *Id.*

90. Mr. Torp explained that the death notices were corroborated with other evidence including notices in newspapers and obituaries.⁸⁶
91. He further testified that, in his expert opinion, it is highly unlikely that all the buried bodies on the land in question were removed because of land moving activities.⁸⁷
92. Although Defendant questioned Mr. Torp's opinion, Defendant was unable to provide any substantive evidence to refute Mr. Torp's opinion that it is likely human remains are located on Lot 175, the Westwood Tower Apartments parking lot.⁸⁸
93. Mr. Torp further explained that it is difficult to provide more information regarding the human remains without conducting non-invasive geophysics, geoprobe, and possibly actual excavation.⁸⁹
94. He noted that if there is a lot of human disturbance to graves⁹⁰, it does not matter where one's intended plot was located, the human remains could be anywhere on the parcel which becomes a larger technical problem.⁹¹
95. On its website, HOC posted the 2017 Ottery Preliminary Report, which indicated there was a cemetery on Parcel 175. The Court finds that by posting the report, Defendant was in effect acknowledging the existence of a burial ground on Lot 175.⁹²

⁸⁵ Tr. A, p. 147, ls. 6-25; *see also id.*, p. 148, ls. 1-25.

⁸⁶ *Id.*, p. 149 ls. 2-18.

⁸⁷ *Id.*, p. 159, l. 23- p. 160, l. 7.

⁸⁸ See Defendant's Cross Examination, Tr. A, pp. 206-247.

⁸⁹ *Id.*, p. 159, l. 2- p. 162, l. 22.

⁹⁰ See Tr. A, p. 69-60, 84-85 (explaining that Mr. Matthews testified that during the construction of Westwood Tower Apartments, he witnessed the use of bulldozers to dig and push some of the bodies around).

⁹¹ *Id.*, p. 159, l. 2- p. 162, l. 22.

⁹² *Id.*, pp. 168-170; see Pl. Ex. 18.

96. According to Plaintiffs' Exhibit 19⁹³, "an African American cemetery existed on Parcels 175 and 177 in the Westbard sector. This cemetery was located along the banks of the Willett Branch behind Talbert's and next to Westwood Tower Apartments. Development of the area, particularly the Westwood Towers, removed all vestiges of the cemetery in the late 1950s and 60s. Historical documentation of any movement of graves into and out of the cemetery, which will be termed the Westbard cemetery, does not exist. Based on the combination of historical research, review of land records, genealogical analysis and oral history, it is highly likely that the cemetery was used, and human remains were not removed from the site during development."⁹⁴
97. That "starting in 1880, the White's Tabernacle No. 29 Lodge of the Ancient Order, Ancient United Order of the Sons and Daughters, Brothers and Sisters of Moses, operated a graveyard near Tenleytown, called Moses Cemetery. White's Tabernacle No. 39 was a fraternal society that supported the local primarily African American Fort Reno community and was probably connected to the Rock Creek Baptist Church."⁹⁵
98. In his book, *Bury Me Deep*, Paul Sluby states, "that the graveyard was also sometimes known as either Rock Creek Baptist Cemetery or Christians of Tenley Cemetery."⁹⁶

⁹³ David Kathan, *et. al*, *History of Westbard Cemetery* (accessed on September 30, 2021 at https://static1.squarespace.com/static/5d8b866f28ac7b58bd12efc2/v/5dd4364f5789d1244d1df60a/1574188630329/westbard_cemetery_history.pdf; Pl. Ex. 19.

⁹⁴ Tr. A, pp. 177-178.

⁹⁵ Complaint, Ex. A.

⁹⁶ *Id.*, p. 178.

99. White's Tabernacle No. 39 purchased the land in 1911 along River Road in order to move the graveyard from Tenleytown. Deed records indicate that Frank and Katie Dodson sold the land to White's Tabernacle No. 39. Frank Dodson was the grandson of Charlotte Gray.⁹⁷ The Gray family owned the land along River Road where Talbert's and McDonalds are currently located. By that time, William Armstead Jones, the adopted son of Charlotte Gray, had grown up in the River Road community and became the minister of Rock Creek Baptist Church.⁹⁸
100. As Mr. Torp explained, using historical maps and records, they discovered that the cemetery lay under a parking lot next to Westwood Tower Apartments located opposite the Westwood Shopping Center off Westbard Avenue which was developed in the 1960s during a burst of commercial construction.⁹⁹
101. Eyewitness accounts suggest that, during construction, at least some of the remains were never removed. Arnold d'Epagnier, son of the architect of Westwood Tower Apartments, John d'Epagnier, reported that Laszlo Tauber, a real estate developer who along with his associates purchased part of the nearby former Posey planation to build the Westwood Shopping Center and the Westwood building on Westbard Avenue, believed paving over the cemetery was the best way to keep any human remains in place. Tauber directed drainage to be designed so that the later erosion would not uncover human remains.¹⁰⁰
102. Although there were claims that graves were moved from Moses Cemetery to Lincoln Park Cemetery or another cemetery west of Rockville near Route 28,

⁹⁷ Complaint, Ex. C.

⁹⁸ Tr. A, p. 179.

⁹⁹ PI, Plaintiffs' Ex. 25, p. 38; see also Tr. A, pp. 193-194.

¹⁰⁰ Tr. A, pp. 194-195 (reading from David Kathan *et al.*, *Tracing a Bethesda Maryland African American Community and its Contested Cemetery*, Washington History (Fall 2017).

such moves cannot be confirmed by state, county, funeral home, or cemetery records.¹⁰¹

103. Nanette Hunter has relatives that were buried in Moses Cemetery, including her twice great-aunt, Cora Botts and her husband Jeremiah.¹⁰²

104. According to an obituary:

“Botts, Cora, on Monday, February 4, 1935, at her residence, River Road, Bethesda, Maryland. Cora, the beloved wife of the late Jerry Botts and devoted aunt of Cassius, William and Bernard Parker, Ms. Agnes Masterson and Ms. Daisy Carrington, remains resting at the above residence. Funeral Thursday, February 7th at 1:00 p.m. from the Rock Creek Baptist Church, Rev. W. A. Jones, Pastor. Interment Moses Cemetery.”¹⁰³

105. To Ms. Hunter’s knowledge, Ms. Botts was buried in Moses Cemetery, on Lot 175.¹⁰⁴

106. The Court finds Ms. Hunter to be a credible witness.

107. The Court also heard from Reverend Abioise Olusegun Adebayo who was a credible witness.¹⁰⁵

108. When questioned about whether deeds were given to individuals buried in traditional African cemeteries, Reverend Adebayo testified that based upon his thirty (30) years of involvement in Macedonia Baptist Church, and other experience, the church sells burial plots to members at a nominal price. Members do not have individual deeds for particular plots. They simply know where their loved one is buried, and they visit that particular location.¹⁰⁶

¹⁰¹ Kathan *et al*, p. 38.

¹⁰² *Id.*, pp. 248-49.

¹⁰³ *Id.*, pp. 249-250.

¹⁰⁴ *Id.*, p. 253.

¹⁰⁵ *Id.*, pp. 255-297.

¹⁰⁶ Tr. A, pp. 267-268.

- 109.** He also testified that government officials in Maryland have recognized Lot 175 as Moses Cemetery.¹⁰⁷ Such admissions came from the director of Montgomery County Parks and the Director of HOC, Mr. Roy Priest, who made such an admission to Reverend Adebayo during an in-person conversation prior to the start of the pandemic.¹⁰⁸
- 110.** In addition to the private admissions to Reverend Adebayo, during a public HOC meeting conducted virtually using Zoom, Mr. Priest admitted that Lot 175 was the site of Moses Cemetery.¹⁰⁹
- 111.** Mr. Priest stated, “It’s a transaction that was presented to us. I am concerned about the fact that not only is a piece of real estate -- this piece of real estate also contains a cemetery, African-American cemetery referred to as White Tabernacle No. 39, Moses Cemetery.”¹¹⁰
- 112.** Sandra Youla, the Senior Planner/Historic Preservation Planning and Policy Division of the Montgomery County Planning Department, stated in a series of emails that “there was/is a black cemetery, no longer visible, in Westbard. The status of the remains is unclear--- some may have been removed, some may have been disturbed, and pushed down the hill by the construction team. . . . The cemetery is now two parcels--- Parcel 175 (see page 67 in WB PH Draft) and Parcel 177 (see page 81 in WB PH Draft). Most of the remains were probably buried on Parcel 175, now a paved parking lot for Westwood Tower Apartments

¹⁰⁷ *Id.*, p. 268.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, pp. 269-270; PI, Plaintiffs’ Ex. 39- Recording of July 2, 2021, HOC Zoom Meeting (referencing minute 29:38).

¹¹⁰ *Id.*, p. 270.

(a HOC building at 5401 Westbard Avenue). Parcel 177 is an unpaved parking area [owned] by adjoining industrial landowner.”¹¹¹

113. Ms. Kayrine Brown, the acting secretary, treasurer, and executive director, of Defendant testified on its behalf.¹¹²
114. According to Ms. Brown, a twenty-three-year employee of Defendant, HOC is a quasi-governmental entity that was created by the State as the housing authority of Montgomery County, Maryland.¹¹³
115. Ms. Brown testified that Charger submitted the winning offer for the Westwood Tower Apartments. In describing the purchase agreement, she noted it “was a competitive offer, and it ha[d] the most expedient closing date and it was the best offer in terms of the certainty of closing from a financial point of view, and that was important.”¹¹⁴
116. Ms. Brown acknowledged that while it is important to Defendant that the Property continues to operate as an apartment complex with some units restricted as affordable,¹¹⁵ the sales agreement between Defendant and Charger does not contain any language restricting Charger from building a structure on Lot 175.¹¹⁶
117. Based on Ms. Brown’s testimony, the Purchase and Sale Agreement (“PSA”), a document heavily scrutinized prior to its execution by both HOC and Charger’s lawyers, includes provision 17, which requires Purchaser to “use its commercially reasonable efforts and shall work in good faith to memorialize the historical

¹¹¹ Plaintiffs’ Ex. 40 p. 2; see also Tr. A., pp. 271-276.

¹¹² Tr. A, pp. 298-345.

¹¹³ *Id.*, p. 299.

¹¹⁴ *Id.* at p. 301, l. 24- p. 302, l. 4.

¹¹⁵ *Id.*, p. 303

¹¹⁶ Tr. A, pp. 318-319

significance of the land formerly owned by White’s Tabernacle No. 39 (Which is sometimes referred to as Moses Cemetery on River Road, River Road Cemetery, or Moses Cemetery), located on or below a portion of the Real Property.”¹¹⁷¹¹⁸

118. That the PSA contains the following provision:

17. MEMORIALIZATION. After Closing, Purchaser shall use its commercially reasonable efforts and shall work in good faith to memorialize the historical significance of the land formerly owned by White’s Tabernacle No. 39 (Which is sometimes referred to as Moses Cemetery on River Road, River Road Cemetery, or Moses Cemetery), located on or below a portion of the Real Property.”¹¹⁹

II. STANDARD OF REVIEW

In granting a preliminary injunction, the trial judge must exercise sound discretion in examining the four factors that must be found.”¹²⁰ The four factors that the court examines when considering the appropriateness of granting a preliminary injunction include: (1) the likelihood that the plaintiff will succeed on the merits; (2) the “balance of convenience” determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.¹²¹¹²² The party seeking the preliminary injunction has the burden of adducing facts necessary to satisfy these factors.¹²³

The “failure to prove the existence of even one of the four factors” precludes the grant of injunctive relief.¹²⁴ Regarding the factor of the likelihood of success on the merits, “the party seeking the interlocutory injunction must establish that it has a real probability of prevailing on

¹¹⁷ *Id.*, p. 323.

¹¹⁸ PI, Plaintiffs’ Ex. 36.

¹¹⁹ Plaintiffs’ Ex. 36.

¹²⁰ *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 300 (2004) (citing *Lerner v. Lerner*, 306 Md. 771, 776 (1986)).

¹²¹ *Department of Transportation v. Armacost*, 299 Md. 392, 404-05 (1984)) (citing *State Dep’t v. Baltimore County*, 281 Md. 548, 554–57 (1977)).

¹²² *See, e.g., Ademiluyi v. Egbuonu*, 466 Md. 80, 115. (2009).

¹²³ *Fogle v. H & G Restaurant*, 337 Md. 441, 456 (1995).

¹²⁴ *Id.*

the merits, not merely a remote possibility of doing so.”¹²⁵ Although the moving party has the burden of proving all four factors, the factors “are not like elements of a tort”¹²⁶ (inner citation omitted). Rather, the factors are “designed to guide trial judges in deciding whether a preliminary injunction should be issued.”¹²⁷ While the circuit court should give weight to each of the factors, the factors of likelihood of success on the merits and risk of irreparable injury “are generally considered to be the most significant.”¹²⁸

“In litigation between governmental and private parties, or in cases in which injunctive relief directly impacts governmental interests, ‘the court is not bound by the strict requirements of traditional equity as developed in private litigation.’”¹²⁹ Rather, “[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”¹³⁰

American Jurisprudence recognizes that when a tract of land has been dedicated¹³¹ as a cemetery, it is perpetually devoted to the burial of the dead and may not be appropriated to any other purpose, at least in the absence of any authorized exercise of the power of eminent domain.¹³² The owner of the fee is subject to a trust for the benefit of those entitled to use the land as a place of burial.¹³³ The owner has no right to recover the use of the land for any enjoyment or purpose of their own.¹³⁴ While the owner of a cemetery has a perfect right to sell

¹²⁵ *Id.*

¹²⁶ *DMF Leasing, Inc. v. Budget Rent-A-Car of Maryland, Inc.*, 161 Md. App. 640, 648 (2005).

¹²⁷ *Id.*

¹²⁸ *Ademiluyi*, 466 Md. at 114-15. .

¹²⁹ *Fogle*, 337 Md. at 456 (quoting *State Department of Health and Mental Hygiene*, 281 Md. at 555).

¹³⁰ *Maryland Comm’n on Hum. Rels. v. Downey Commc’ns, Inc.*, 110 Md. App. 493, 517 (1996) (quoting *Fogle*, 337 Md. at 456); see also *Space Aero Products Co., Inc. v. R.E. Darling Co., Inc.*, 238 Md. 93, 128, cert. denied, 382 U.S. 843, 86 S.Ct. 77, 15 L.Ed.2d 83 (1965)).

¹³¹ Dedication may be implied from acts and from the use of the land.

¹³² See 14 AM. JUR. 2D Cemeteries §§1, 42–44 (2000) (discussing rights of access and observing that “[p]ersons entitled to visit, protect, and beautify graves must be accorded ingress and egress from the public highway next or nearest to the cemetery, at reasonable times and in a reasonable manner.”);

¹³³ *Id.*

¹³⁴ *Id.*

and convey it as such, the owner can do nothing which interferes with the use of the land as such, or nothing which interferes with the use of the land as a cemetery, and the owner cannot restrict the rights of relatives and friends to visit and care for the graves.¹³⁵

III. DISCUSSION

[A] preliminary injunction is designed to preserve the court’s ability to render a meaningful decision on the merits by sustaining the status quo.”¹³⁶ A grant of preliminary injunction falls within the circuit court’s discretion and the appropriate frame of review is whether the circuit court abused its discretion in granting the preliminary injunction.¹³⁷ Plaintiffs have the burden of proving the four elements of a preliminary injunction. According to Plaintiff, because both Rule §14-401 and §5-505 are triggered upon sale, allowing Defendant to go forward with the sale will necessarily eliminate Plaintiffs’ relief under the statute.¹³⁸ At the hearing, Defendant reiterated its intention to close on October 8, 2021, without bringing the required lawsuit.¹³⁹ For the reasons stated below, the Court finds Plaintiffs satisfy each element of the preliminary injunction factors.

A. WHETHER PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS?

1. Parties’ Contentions

According to Plaintiffs, there are two independent and sufficient legal bases for this action: Md. R. Prop. Sales Rule §14-401 and Md. Code, Bus. Reg. §5-505.¹⁴⁰ Both statutes

¹³⁵ James J. Demma, *The Law of Cemeteries for the Maryland Land Surveyor*, “The Law of Land Boundaries for the Maryland Surveyor and Related Materials”; (2008); p.275 (citing 14 Am Jur 2d, Cemeteries, Title 21).

¹³⁶ *Ehrlich v. Perez*, 394 Md. 691,733 (2006).

¹³⁷ *Ademiluyi*, 466 Md. at 93 (quoting *Schade v. Maryland State Bd. of Elections*, 401 Md. 1, 33 (2007)); *see also Ehrlich v. Perez*, 394 Md. 691, 707 (2006).

¹³⁸ Plaintiffs’ Closing Argument, pg. 1 (Docket Entry No. 41).

¹³⁹ *Id.*

¹⁴⁰ To the extent this Opinion does not include the Court’s entire analysis and findings related to the provisions and requirements of Md. Code, Bus. Reg. §5-505 and Md. Rule. §14-401, the Court incorporates all findings made in the Motion to Dismiss, filed simultaneous to this Opinion.

contemplate the sale of a cemetery used for burial purposes, which applies in this case.¹⁴¹ Thus, Defendant is legally required to adhere to each. Plaintiff further contends that the evidence presented at the Preliminary Injunction (“PI”) hearing proves that parcel 175, the location of the Westwood Tower Apartments’ parking lot, contains a cemetery and thus, §5-505 compels Defendant to act.

Defendant argues that Plaintiffs’ claims fail as a matter of law because Md. Code, Bus. Reg. §5-505 is inapplicable.¹⁴² The evidentiary hearing, as Defendant asserts, confirmed that the statute does not apply. Defendant argues that Md. Code, Bus. Reg. §5-505 does not impose a mandatory duty. According to Defendant, by the terms of the statute, the use of the word “may” rather than “shall,” does not compel HOC to bring an action. Defendant cites *Uthus v. Valley Mill Camp, Inc.*¹⁴³ to support its argument, asserting that the Court of Appeals has long held that the term “may” in a statute is permissive. Plaintiffs offered no testimony to support their position, and their argument is devoid of multiple key required elements of the statute; (1) it is discretionary (i.e., “may”) not mandatory; (2) no deeds were executed or certificates issued to buyers of the lots; and (3) the sale of the Property here is not for “another purpose.” Defendant further argues that Maryland Rule §14-401 is inapplicable because the Maryland Judiciary cannot overrule a statute through a rule of procedure.

2. Analysis

Since the likelihood of success on the merits is a question of law, Plaintiff must prove that it has a real probability of prevailing on the merits, not merely a possibility of doing so.”¹⁴⁴ Regarding Defendant’s argument that Md. Code, Bus. Reg. §5-505 does not apply to the instant

¹⁴¹ Complaint; Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry Nos. 9-10).

¹⁴² Defendant’s Closing Arguments (Docket Entry No. 40).

¹⁴³ 472 Md. 378, 393 (2021).

¹⁴⁴ *Ehrlich v. Perez*, 394 Md. 691, 708-710 (2006).

case, the Court reiterates its detailed analysis from its Opinion denying Defendant’s Motion to Dismiss.

In order to assess Plaintiffs’ likelihood of prevailing on the merits, the Court must first conduct an analysis of the statutes. Maryland’s general principles of statutory construction are well settled.¹⁴⁵ The court’s goal “is to identify and effectuate the legislative intent underlying the statute.”¹⁴⁶ “To ascertain the Legislature’s intent, we first examine the plain language of the statute; if the language is unambiguous when construed according to its ordinary meaning, then we will ‘give effect to the statute as it is written’.”¹⁴⁷

MD. CODE, BUS. REG. §5-505 & MD. CODE, R. PROP. SALES RULE §14-401

With “statutory interpretation, our primary goal is always “to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional, or part of the [Maryland] Rules.”¹⁴⁸ “In divining this intent, a court must read the language of the law or ordinance in context and in relation to all of its provisions, and additionally, must consider its purpose.”¹⁴⁹ Even if a statute is unambiguous, a court may review the legislative history to confirm its understanding of the statutory language.¹⁵⁰

The Court reviewed case law and the legislative history of Md. Code, Bus. Reg. §5-505 and Md. Code, R. Prop. Sales Rule §14-401 in determining whether each statute creates a mandatory duty. Although there is limited case law on Md. Code, Bus. Reg §5-505, *Hickman ex rel Hickman v. Carven*¹⁵¹ explains that the Maryland Legislature provided for, and perhaps

¹⁴⁵ *Department of Health v. Kelly*, 397 Md. 399, 419 (2007).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 419 (quoting in part *Oakland v. Mountain Lake Park*, 392 Md. 301, 316 (2006)).

¹⁴⁸ *Doe v. Board of Elections*, 406 Md. 697, 712 (2008) (quoting in part *Barbre*, 402 Md. at 172 (2007)); see *International Association of Fire Fighters v. Mayor & City Council of Cumberland*, 407 Md. 1, 9 (2008).

¹⁴⁹ *F.D.R. Srouer Partnership v. Montgomery County*, 407 Md. 233, 245 (2009).

¹⁵⁰ See, e.g., *Kramer v. Liberty Property*, 408 Md. 1, 18-19 (2009); *Smith v. State*, 399 Md. 565, 578-79 (2007); *Mayor & City Council of Baltimore v. Chase*, 360 Md. 121, 131 (2000).

¹⁵¹ 366 Md. 362, 371 (2001).

requires, a court judgment prior to the sale of a burial ground.”¹⁵² This requirement is consistent with the “extensive regulations on the use and operation of land used for burial.”¹⁵³ Furthermore, Plaintiffs are correct that the Maryland Court of Appeals has long recognized a host of laws protecting burial grounds, what can and cannot occur on the land, and how to protect the property right of the deceased and their respective assignees or descendants.¹⁵⁴ Md. Code, Bus. Reg. §5-505 originated in the Maryland Act of 1868, ch. 211¹⁵⁵ and evolved over the past 100 years with several revisions.¹⁵⁶ The Maryland Act of 1868, ch. 211 required that before the sale passes under the Act, the proof must be sufficient to satisfy the Court that such sale is necessary, as well as for the interest and advantage of the parties in the place of the burial.¹⁵⁷

According to the 1924 statute¹⁵⁸:

In any case in which a burial ground has ceased to be used for burial purposes, and the said ground has been dedicated and used for burial purposes, and lots have been sold therein, and deeds executed or certificates issued to purchasers thereof, and it shall be considered desirable to dispose of said burial ground for other purposes, upon a bill being filed in any of the circuit courts of the State, in equity, in the city or county in which said burial ground is situated, setting forth the foregoing facts, and containing the names of the lot owners or their assignees so far as known, the court shall order notice by publication in one or more newspapers published in the county or city where such burial ground is situated, warning all the lot holders or other persons in interest, residents or nonresidents, adults or infants, to appear in court on or before the day fixed in said notice, to show cause why the relief prayed for should not be granted.

This law evolved to Art. 16 §119, which was amended in 1962 to reference the Maryland Rules.¹⁵⁹ The law was later codified as §5-505 without fundamental changes.¹⁶⁰ As

¹⁵² Citing Md. Code, Bus. Reg. § 5-505.

¹⁵³ *Id.* at 371.

¹⁵⁴ *Hickman ex rel Hickman*, 366 Md. at 371.

¹⁵⁵ Maryland Act of 1868 (taken from the Maryland State Archives: Volume 142, Pages 2706-7, available at <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000142/html/am142--2706.html>)

¹⁵⁶ An. Code, 1924, sec. 110. 1912, sec. 107. 1904, sec. 103. 1888, sec. 92. 1888, ch. 369. 1868, ch. 211. See also George P. Bagby, Editor. Annotated Code of the Public General Laws of Maryland (1911-1918).

¹⁵⁷ Vol. 142 pp. 2706-7.

¹⁵⁸ Horace E. Flack. Annotated Code of the Public General Laws of Maryland Art. 16, § 115.

previously mentioned, whether a particular statute is mandatory or discretionary does not depend upon its form, but upon the intention of the Legislature, to be ascertained from a consideration of the entire act, its nature, its object and the consequences that would result from construing it one way over another.¹⁶¹

Upon such consideration, the Court is not convinced that the Maryland Legislature created §5-505 to be permissive over mandatory.¹⁶² The Legislature implemented such protections for burial grounds as a means of respecting the final resting place of the deceased.¹⁶³

Furthermore, the Court does not agree with Defendant that §5-505 requires that the burial ground must be actively used for burials.¹⁶⁴ To the contrary, the statute expressly applies when (1) the ground has been dedicated and used for burial; (2) burial lots have been sold in the burial ground and deeds executed or certificates issued to buyers of the lots; (3) the ground has ceased to be used for burial; and (4) it is desirable to dispose of the burial ground for another purpose.¹⁶⁵

¹⁵⁹ In pertinent part: 119. In any case in which a burial ground has ceased to be used for burial purposes, and the said ground has been dedicated and used for burial purposes, and lots have been sold therein, and deeds executed or certificates issued to the purchasers thereof, and it shall be considered desirable to dispose of said burial ground for other purposes, *an action for the sale of said burial ground may be in accordance with the Maryland Rules.*

¹⁶⁰ An. Code, 1924, sec. 110. 1912, sec. 107. 1904, sec. 103. 1888, sec. 92. 1888, ch. 369. 1868, ch. 211. See also George P. Bagby, Editor. Annotated Code of the Public General Laws of Maryland (1911-1918).

¹⁶¹ *Bond v. Baltimore*, 118 Md. 159, 166 (1912).

¹⁶² See *Hitchins v. Mayor & City Council of Cumberland*, 215 Md. 315, 323, 138 A.2d 359, 362 (1958) (explaining that it is well settled law that the use of the words ‘shall’ or ‘may’ are not controlling, in determining whether a particular provision is mandatory or directory.”); *Hersh v. Welsh*, 179 Md. 270, 274, 18 A.2d 202, 204 (1941) (noting that “may” should “be construed ‘shall,’ or ‘must,’ in conformity with the established rule of law that where the duty to be performed, is for the benefit of the public or third persons it shall be so construed”); *Joshi v. Kaplan, Freeland, Schwartz & Bloomberg, P.C.*, 72 Md. App. 694, 699 (1987).

¹⁶³ An. Code, 1924, sec. 110. 1912, sec. 107. 1904, sec. 103. 1888, sec. 92. 1888, ch. 369. 1868, ch. 211. See also George P. Bagby, Editor. Annotated Code of the Public General Laws of Maryland (1911-1918).

¹⁶⁴ Md. Code, Bus. Reg. § 5-505.

¹⁶⁵ *Id.*

According to the September 14-15, 1984 Maryland Rules Committee Meeting Minutes, Rule §2-995 (1984 version of Rule §14-401) was presented to the Committee.¹⁶⁶ The rule clearly outlines that when Md. Code, Bus. Reg. §5-505, or its predecessors, is invoked, Rule §14-401 or its predecessor is triggered as a mandatory procedural rule determining what must be included in the complaint.¹⁶⁷ Rule §14-401 cross references Art. 16, §119, which authorizes a proceeding for the sale of a burial ground which has ceased to be used for that purpose. As Ms. Ogletree, Chairman of the Subcommittee on Property, articulated, Art. 16, §119 sets forth the substantive law governing the sale of burial grounds for a purpose other than burial and provides an action for the sale. As the September 14-15, 1984 Meeting Minutes showcase, Art. 16, §119 and Rule §2-995 (now Rule §14-401) assure that clear title is established for the purchase. An action for the sale of a burial ground could involve thousands of persons and the cost of moving the bodies usually makes alternative use of the property unfeasible.¹⁶⁸ Although such cases are rare, the Rules Committee understood the potential of such a case is not outside the realm of possibility, as we have here.¹⁶⁹

The Court does not agree with Plaintiffs that Md. Code, R. Prop. Sales Rule §14-401 creates a separate cause of action for which they can seek a writ of mandamus.¹⁷⁰ However, the Court instead finds that when Md. Code, Bus. Reg. §5-505 is invoked, Md. Code, R. Prop.

¹⁶⁶ In pertinent parts § 2-995(b): “the action for the sale of a burial ground shall commence by filing a complaint . . . and shall contain

- (1) The description of the burial ground sufficient to enable it to be located,
- (2) A statement that the ground has been dedicated and used for burial purposes,
- (3) A statement that the burial ground has ceased to be used for burial purposes,
- (4) A statement that lots within the burial ground have been sold and deeds executed or certificate issues to the purchaser, if any,
- (5) A list of names and last known address of all lot owners, or their assignees, if any, and
- (6) A statement that it is considered desirable to dispose of the burial ground for other purpose.

¹⁶⁷ *Id.*; see also Md. Code, Bus. Reg. §5-505.

¹⁶⁸ September 14-15, 1984 Maryland Rules Committee Meeting Minutes pp. 101-103.

¹⁶⁹ See also Maryland Register Vol. 23, Issue 14, Friday July 5, 1996; Vol. 25, Issue 24, Friday, November 20, 1998.

¹⁷⁰ Citing Plaintiff’s Opposition to the Motion to Dismiss (Docket Entry No. 29).

Sales Rule §14-401 is a mandatory procedural rule with which compliance is required.¹⁷¹ As Plaintiff correctly articulates, there are two excerpts of the statutory language that make crystal clear that the “for other use” language in the title to Rule §14-401 (“Sale for Other Use”) plainly refers to uses other than as a burial ground. It does not refer to the sale of property for current use but for use other than as a burial ground.¹⁷²

Based upon the above analysis, the Court finds Md. Code, Bus. Reg. §5-505 imposes a mandatory duty on an owner of a property to act prior to selling the property that is being used for a purpose other than as a burial ground. Once Md. Code, Bus. Reg. §5-505 is invoked, Md. Code, R. Prop. Sales Rule §14-401 serves as a mandatory procedural rule focused on what must be contained in the complaint.¹⁷³ Thus, Plaintiffs may bring a cause of action, the writ of mandamus, seeking enforcement of Md. Code, Bus. Reg. §5-505.

This Court agrees with Plaintiffs that there is overwhelming evidence, supported by historical records, that Lot 175 contains a cemetery where former slaves and their descendants were laid to rest.¹⁷⁴ The Court heard testimony from Harvey Matthews, a long-time member of the River Road community and eyewitness who testified to the presence of Moses Cemetery on Lot 175 prior to the construction of the Westwood Tower Apartments.¹⁷⁵ Mr. Matthews also testified that during the construction of the apartment complex, grave markers were

¹⁷¹ Md. Code, R. Prop. Sales Rule §14-401; September 14-15, 1984 Maryland Rules Committee Meeting Minutes pp. 101-103; see also Maryland Register Vol. 23, Issue 14, Friday July 5, 1996; Vol. 25, Issue 24, Friday, November 20, 1998.

¹⁷² *Id.*

¹⁷³ Md. Code, R. Prop. Sales Rule §14-401; September 14-15, 1984 Maryland Rules Committee Meeting Minutes pp. 101-103; see also Maryland Register Vol. 23, Issue 14, Friday July 5, 1996; Vol. 25, Issue 24, Friday, November 20, 1998.

¹⁷⁴ Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry Nos. 9-10); Plaintiffs’ Opposition to the Motion to Dismiss (Docket Entry No. 20); Plaintiffs’ Closing Argument (Docket Entry No. 41).

¹⁷⁵ See Tr. A, pp. 59-120.

destroyed.¹⁷⁶ He also testified to the cemetery containing at least 200 grave markings with many of the graves located on Lot 175, the very location of the Westwood Towers Apartments' parking lot.¹⁷⁷

Mr. Matthews's credible testimony was corroborated by Mr. Torp, an expert in the identification evaluation, and preservation of historic cemeteries.¹⁷⁸ Mr. Torp testified to the substance of his findings contained in the Ottery Report.¹⁷⁹ When the Property was sold to Leo Furr, the tax records reflected that the property was used as a "burial ground."¹⁸⁰ According to Mr. Torp, it is highly unlikely that the human remains were removed from the site during the development of the Westwood Tower Apartments.¹⁸¹ The Court finds that Moses Cemetery was used for burials through at least the mid-1940s, potentially into the 1950s.¹⁸² Based on the testimony, it is highly probable that the remains on Lot 175 were never properly removed and reinterred in another location.¹⁸³

Defendant is selling Westwood Tower Apartments to Charger.¹⁸⁴ However, Charger is not under any obligation not to build on or dig up Lot 175. Furthermore, Defendant has not honored the promises made to preserve and memorialize the burial ground on Lot 175. Defendant asserts that the sale of Westwood Tower Apartments will maintain the status quo but provides no evidence to support this assertion.¹⁸⁵ Furthermore, there is nothing in the PSA that requires Charger to leave the parking lot undisturbed.¹⁸⁶ In fact, the acting secretary, treasurer,

¹⁷⁶ *Id.*, p. 73.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*, pp. 121-245.

¹⁷⁹ Plaintiffs' Ex. 3.

¹⁸⁰ *Id.* at pp. 11, 13, 15, 17.

¹⁸¹ Tr. A., p. 178.

¹⁸² See Complaint, Plaintiffs' Ex. 3 pp. 8-11.

¹⁸³ Mr. Torp's testimony, Tr. A., pp.

¹⁸⁴ See I. pp. 4-11.

¹⁸⁵ *Id.*, pp. 298-320.

¹⁸⁶ *Id.*

and executive director of HOC, Kayrine Brown, testified that there is nothing in the regulatory agreement¹⁸⁷ between Defendant and Charger that prevents Charger from building on parcel 175.¹⁸⁸ At the hearing, Plaintiffs' counsel further questioned Ms. Brown on the existence of any legal or regulatory restrictions upon the Property.¹⁸⁹ Ms. Brown stated that the regulatory agreement between Defendant and Charger "establishes the restrictions on the rent, the restrictive units, the capital investment in the property, the reporting requirements, monitoring, enforcement, it is to be recorded as well by the way in the land records in the County, the term of the agreement, the restrictions, on the restricted units. And those are basically the key terms for the affordability and enforceability."¹⁹⁰ The Court interprets Ms. Brown's testimony and the regulatory agreement to mean that once Charger becomes the owner of the Property, Charger is not obligated by law or regulation to protect the Moses Cemetery.

LACK OF DEEDS OR CERTIFICATES

Although lack of deeds or certificates for a burial ground was not raised by Defendant, the Court finds it prudent to address it briefly. The Court does not agree with Defendant's previous assertion from Defendant's Motion to Dismiss that because Plaintiffs' evidence does not come in the form of a deed or certification it is insufficient. Md. Code, Bus. Reg §5-505(2) merely requires that the "burial lots have been sold in the burial ground and deeds executed or certificates issued to buyers of the lots." The rule does not require that Plaintiff's must present such information when filing the complaint. Furthermore, Rule §14-401 does not require deeds or certificates to be included when filing an action under Md. Code, Bus. Reg §5-505.

¹⁸⁷ PI, Defendant's Ex. 3.

¹⁸⁸ *Id.*, pp. 317-18.

¹⁸⁹ *Id.* 311-317.

¹⁹⁰ Tr. A, p. 311.

Assuming arguendo that deeds or certificates may be needed to confirm the sale of a burial plot, Plaintiffs present sufficient information to withstand this requirement. Defendant ignores the 1958 Maryland Tax and Assessment records reflecting the sale of the property to Leo Furr with a description of use as a “burial ground.”¹⁹¹

PERSONS OF INTEREST

Again, although Defendant does not raise the issue of whether Plaintiffs are persons of interest under the statute, the Court will nonetheless address it. Defendant previously claimed that Plaintiffs lack standing because Plaintiffs are not interested persons under the statute.¹⁹² Defendant’s positions disregard the information contained in the four corners of the Complaint, which includes exhibits such as signed affidavits by Plaintiffs, as well as slave records.¹⁹³ Rule §14-401 provides that notice must be given to “all lot owners or other persons in interest.”¹⁹⁴ Plaintiffs are correct that “persons in interest” is not defined in Chapter 400 of Title 14 (Sales of Property) of the Maryland Rules. However, it is defined in Md. Code, R. Prop. §14-121, which relates to access to burial sites.¹⁹⁵ Md. Code, R. Prop. §14-121(4) thoroughly defines a “Person in Interest.”¹⁹⁶ A person in interest can be a person with a cultural affiliation to the interred person(s). Cultural affiliation is defined as “a relationship of shared group identity that can be reasonably traced historically between a present-day group, tribe, band, or clan and an

¹⁹¹ Complaint, Plaintiffs; Ex. 3, pp. 11, 13, 15, 17.

¹⁹² Defendant’s Motion to Dismiss (Docket Entry No. 20).

¹⁹³ Plaintiffs’ Writ of Mandamus (Docket Entry No. 1).

¹⁹⁴ See Md. Code, R. Prop. Sales Rule 14-401(c).

¹⁹⁵ Md. Code, Real Prop. §14-121; Plaintiffs’ Opposition (Docket Entry No. 29).

¹⁹⁶ In pertinent part: “Person in Interest” means a person who: (i) is related by blood or marriage to the person interred in a burial site; (ii) is a domestic partner, as defined in §1-101 of the Health--General Article , of a person interred in a burial site; (iii) has a cultural affiliation with the person interred in a burial site; or (iv) has an interest in a burial site that the Office of the State's Attorney for the county where the burial site is located recognizes is in the public interest after consultation with a local burial sites advisory board or, if such a board does not exist, the Maryland Historical Trust.

identifiable earlier group.”¹⁹⁷ As previously mentioned, the Court “must read the language of the law or ordinance in context and in relation to all of its provisions, and additionally, must consider its purpose.”¹⁹⁸ Therefore, under Md. Code, Bus. Reg. §5-505 and Md. Code, R. Prop. Sales Rule §14-401, Plaintiffs have standing if they are “persons of interest” as defined in Md. Code, R. Prop. §14-121(a)(3)-(4).

Plaintiffs are persons of interest under Md. Code, R. Prop. §14-121(a)(3)-(4). The Bethesda African Cemetery Coalition (BACC) is a cultural organization with connections to the Moses African Cemetery and Macedonia Baptist Church. For Darold Cuba, Geneva Nanette Hunter, and Montani Wallace, this case is personal because they are the “relatives by blood or marriage” to Nelson Warren, Jr., Cora and Jeremiah Botts, and Rosa Mason, respectively.¹⁹⁹ Based upon the numerous exhibits Plaintiffs rely upon in their complaint, the Court reasonably believes that Nelson Warren, Jr., Cora and Jeremiah Botts, and Rosa Mason are among the many buried on Lot 175 of the Westwood Tower Apartments.

Plaintiffs provided the Court with substantial evidence (1) that Moses Cemetery exists on Lot 175; (2) that Md. Code, Bus. Reg. §5-505 imposes a mandatory duty of the seller prior to selling the property for another purpose; (3) seeking a writ of mandamus would require Defendant to comply with Bus. Reg. §5-505; (4) and such compliance would protect the remains of those buried on Lot 175 in Moses Cemetery. Therefore, Plaintiffs have proven a likelihood of success on the merits.

¹⁹⁷ Md. Code, R. Prop. §14-121(a)(3).

¹⁹⁸ *F.D.R. Srouf Partnership v. Montgomery County*, 407 Md. 233, 245 (2009).

¹⁹⁹ *Id.* at pp. 45, 10-11.

B. WHETHER PLAINTIFFS HAVE FAILED TO SHOW IRREPARABLE HARM?

1. Parties' Contentions

Plaintiffs argue that they will suffer irreparable harm because a denial of the preliminary injunction would result in silencing those seeking to protect the remains of their ancestors while demanding respect for their community.²⁰⁰ Plaintiffs reference Defendant's cross examination of Reverend Adebayo to challenge HOC's belief that descendants and community members need permission from HOC to pray over the graves of their ancestors.²⁰¹ Plaintiffs also reject Defendant's suggestion that the Purchase Sale Agreement and the purported protections afforded the Property in the Regulatory Agreement are illustrations that Plaintiff will suffer no harm.²⁰²

According to Defendant, Plaintiffs must "demonstrate that irreparable injury is likely in the absence of an injunction."²⁰³ A preliminary injunction will not "issue simply to prevent the *possibility* of some remote future injury."²⁰⁴ Defendant contends that Plaintiffs' witnesses' testimonies failed to establish that irreparable harm will result.²⁰⁵

2. Analysis

Irreparable harm is "a pliant term adaptable to the unique circumstances which an individual case might present."²⁰⁶ As the Maryland Court of Appeals has explained:

"an injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may be had in a court of law, so that to refuse the injunction would be a denial of justice. . . in other words, where, from the nature of the act, or from the circumstances surrounding the person injured, or

²⁰⁰ Plaintiffs' Closing Argument, p. 8. (Docket Entry No. 41).

²⁰¹ *Id.*; Tr. A, p. 158.

²⁰² *Id.*

²⁰³ *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008).

²⁰⁴ *Id.*

²⁰⁵ Defendant's Closing Argument, p. 5 (Docket Entry No. 40).

²⁰⁶ *State Comm'n on Hun Rels. v. Talbot Cty. Det. Ctr.*, 370 Md. 115, 140 (2002).

from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with the money.”²⁰⁷

As this Court clearly stated when it granted the Motion for Temporary Restraining Order²⁰⁸, Plaintiffs stand to lose their statutory right to compel HOC to comply with Md. Code, Bus. Reg. §5-505.²⁰⁹ If Defendant is allowed to sell the Property without compliance with the statute, then Plaintiffs no longer have any legal remedy to compel Defendant to adhere to Md. Code, Bus. Reg. §5-505 and Md. Rule §14-401.²¹⁰ The Court cannot ignore that Plaintiffs, African Americans, are seeking to preserve the memory of their relatives and those with whom they share a cultural affiliation. Nor can the Court ignore that as early as the 1930s when construction began in the River Road community, the deceased have been forgotten, forsaken, and their final resting places destroyed or, at a minimum, desecrated. The Court acknowledges that Plaintiffs and those with whom they share a cultural affiliation do not have many legal avenues to preserve Moses Cemetery.²¹¹ If the Court does not grant the preliminary injunction, then Defendant will sell the property to Charger, a private entity, which is not required to preserve or recognize the burial ground.²¹² Hence, Plaintiffs will be denied the opportunity to present their case in court. Because there is nothing in the contract between Defendant and Charger restricting what Charger can or should do with the Property, the Court concludes that Plaintiffs are at Charger’s mercy to preserve or memorialize the burial ground or reinter those buried there.

²⁰⁷ *Id.*

²⁰⁸ The Court also incorporates all findings and conclusions made when granting the Temporary Restraining order.

²⁰⁹ Plaintiffs’ Reply in Support of Their Motion for Preliminary Injunction (Docket Entry No. 31).

²¹⁰ *Id.*

²¹¹ The Court researched what legal remedies are available against Defendant and Charger to preserve the burial ground. Other legal remedies are triggered after the fact, once Charger has begun construction on the property.

²¹² Tr. A, pp. 318-321.

During Defendant's cross-examination of Reverend Adebayo, Defendant argued that Plaintiffs need permission to enter the Property to conduct the libation ceremony.²¹³ Per Md. Code, R. Prop. §14-121(b), "any person in interest may request the owner of a burial site or of the land encompassing a burial site that has been documented or recognized as a burial site by the public or any person in interest to grant reasonable access to the burial site for the purpose of restoring, maintaining, or viewing the burial site." Although Defendant may be correct that, per Md. Rule §14-121(b)²¹⁴, Plaintiffs need permission to conduct the libation ceremony on the premises, Defendant's argument also serves as an admission that in fact Lot 175 contains a burial ground.²¹⁵ The Court concludes that Defendant's argument is another example of Defendant admitting that Lot 175 contains a burial ground. Defendant makes such a statement only when it is beneficial or advantageous for it to sway this Court in its favor. Yet, Defendant has also come before this Court simultaneously begrudging that (1) Lot 175 no longer contains a burial ground; (2) that most, if not all, of the bodies were removed from the premises; or (3) that the burial ground never existed on Lot 175.²¹⁶ Plaintiffs' evidence strongly contradicts such assertions.²¹⁷

Legally, Md. Code, Bus. Reg. §5-505 and Md. Rule §14-401 provide such remedy.²¹⁸ Defendant should not be allowed to sell a property that was a vital part of the once thriving River Road community prior to Plaintiffs having the opportunity to seek Court involvement. The Court agrees with Plaintiffs that if they are unable to compel Defendant to abide by the

²¹³ Tr. A, pp. 294-296.

²¹⁴ The Court is not making a finding as to whether the fact that the parking lot of the Westwood Tower Apartments is in essence a public space as opposed to a private cemetery, negates the need for permission to enter pursuant to Md. Rule §14-121(b).

²¹⁵ Md. Code, R. Prop. §14-121(b).

²¹⁶ Defendant's Motion to Dismiss (Docket Entry No. 20); Defendant's Opposition to the Motion for Preliminary Injunction (Docket Entry No. 27); Defendant's Closing Argument (Docket Entry No. 40).

²¹⁷ See Complaint: Complaint, Plaintiffs' Ex 1-14; PI, Plaintiffs' Ex. 1-45; *contra* PI, Defendant's Ex. 1-3.

²¹⁸ See Md. Code, Bus. Reg. §5-505; Md. Rule §14-401.

statutes, then Plaintiffs will be forced to stand idly by while the burial sites of their ancestors or deceased persons with whom they share a cultural affiliation are sold to the highest bidder.²¹⁹

C. WHETHER THE HARM TO DEFENDANT OUTWEIGHS THE HARM TO PLAINTIFFS?

1. Parties' Contentions

Plaintiffs believe that the failure to grant injunctive relief would impose a far greater burden on Plaintiffs than the granting of relief would impose upon Defendant. Plaintiffs contend that if the Court denies the requested relief, Defendant may proceed with selling the property at issue to a private developer, thereby allowing the developer to move forward with any development, construction, or destruction it has planned for the lot, while this mandamus action is pending. Such a result would cause permanent injury to Plaintiffs, whose statutory right to have a voice in the determination of the future treatment of their ancestors and those with whom they share a cultural affiliation will essentially become meaningless.

Defendant states that HOC's harm, if an injunction were granted, is the risk of losing \$51 million (or a net gain of \$30 million) to continue its mission of providing affordable housing to an economically vulnerable population.²²⁰ As such, Defendant believes its harm outweighs the harm experienced by Plaintiffs because Plaintiffs do not have a statutory right to prevent the sale of an apartment building to a new owner who has agreed to continue the usage of the property.²²¹

²¹⁹ Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry Nos. 9-10).

²²⁰ Defendant's Opposition to the Motion for Preliminary Injunction (Docket Entry No. 27); Defendant's Closing Argument (Docket Entry No. 40).

²²¹ Defendant's Opposition to the Motion for Preliminary Injunction (Docket Entry No. 27); Defendant's Closing Argument (Docket Entry No. 40).

2. Analysis

Lot 175 was used as a burial ground from 1911 to 1958.²²² When the property was sold to Leo Furr, it was listed and described as a “burial ground”.²²³ Plaintiffs are the descendants of those buried on Lot 175 or those sharing a cultural affiliation with the River Road community and the Macedonia Baptist Church.²²⁴ As one of the last vestiges of the River Road community, the Moses Cemetery has personal and historical significance to Plaintiffs and the once vibrant River Road community.

Maryland courts apply the balance of hardship test. Application of this test requires the Court to weigh the likelihood Plaintiffs would suffer greater injury if the injunction was not granted against the harm Defendant would suffer if the injunction was granted.²²⁵ To determine whether the preliminary injunction should be granted, the Court must weigh the harm caused to Plaintiffs if the injunction is not granted, thereby allowing Defendant to sell the Property to Charger against the harm to Defendant if it is enjoined from selling the Property until it complies with §5-505.²²⁶

In analyzing the balance of conveniences, the Court is not persuaded by Defendant’s argument that merely requiring Defendant to comply with the statute would cause Defendant substantial harm that is greater than the harm Plaintiffs’ would suffer. Defendant seems to place more value on the monetary harm over the societal, historical, and racial harm caused by not granting the injunction. The Court acknowledges that while there may be economic harm resulting from the delay of the sale or need to find a new buyer, it would not rise to the level of harm Plaintiffs would suffer should the sale proceed without allowing the mandamus action to

²²² Complaint, pp. 1-5.

²²³ PI, Plaintiffs’ Ex. 3, p. 5.

²²⁴ Complaint, pp 2-4.

²²⁵ *East Vend Distribs.*, 396 Md. at 244-45; *Lerner v. Lerner*, 306 Md. 771, 783 (1986).

²²⁶ *East Vend Distribs.*, 396 Md. at 244-45; *Lerner v. Lerner*, 306 Md. 771, 783 (1986).

be litigated. If the preliminary injunction is not granted, Plaintiffs would not be able to pursue the protection of the remains of their ancestors and those with whom they share a cultural affiliation.

Bringing a writ of mandamus under Bus. Reg. §5-505 serves as Plaintiffs' only legal remedy to compel Defendant to seek the Court's involvement prior to the Property sale and argue that the remains be properly respected. Aside from the criminal statutes making it illegal to remove remains from existing graves, the Court has found that Maryland statutes provide few civil remedies to protect those buried on Lot 175.²²⁷ In direct contradiction of their prior acknowledgement of the burial ground, Defendant came before this Court refusing to recognize that Moses Cemetery exists on the Property despite evidence to the contrary.²²⁸ Increasing the likelihood of irreparable harm to Plaintiff, there are no terms in the agreement between Defendant and Charger to preserve and memorialize Moses Cemetery.²²⁹ Further, Charger is knowingly entering into the agreement without doing its due diligence to confirm the presence of the burial ground and ensure that the remains are respected.²³⁰ While this alone is not a guarantee that should the sale proceed Charger would not memorialize the burial ground, it arguably foreshadows what is likely to occur in the future should the Court decide not to intervene. Once the sale occurs, Plaintiffs are left without a legal remedy to demand that Charger, a private entity, respect the remains of the deceased buried on Lot 175. Once the property is sold, Plaintiffs are left with no redress to protect the cemetery.

It is imperative that the Court, as a court of equity, give significant weight to the lack of alternative remedies and the collateral consequences that will result from the sale of the

²²⁷ Md. Code, Criminal Law § 10-401-404; *contra* Md. Rule §14-401, Md. Code, R. Prop. §14-121

²²⁸ See Defendant's Motion to Dismiss (Docket Entry No. 20); Defendant's Closing Argument (Docket Entry No. 41).

²²⁹ Tr. A, pp. 318-321.

²³⁰ *Id.*

Property. For the sake of an expedited closing, the Court can neither disregard the damage to these grounds and the community that has already occurred, nor the damage that will likely result if Plaintiffs are not permitted to challenge Defendant's noncompliance with Md. Code, Bus. Reg. §5-505. Although this Court recognizes the harm Defendant may suffer, Defendant failed to provide evidence that (1) it could not find another bidder or (2) it would lose \$51 million by complying with the statute. Plaintiffs provided ample evidence of the irreparable harm they will suffer if Defendant does not comply with Md. Code, Bus. Reg. §5-505.

Thus, when balancing the potential harm of both parties, the Court finds that Plaintiffs would inevitably suffer much greater harm than Defendant if the preliminary injunction is not granted.

D. WHETHER IT IS IN THE PUBLIC INTEREST TO GRANT THE PRELIMINARY INJUNCTION?

1. Parties' Contentions

Plaintiffs assert four reasons why it is in the public interest to grant the preliminary injunction.²³¹ First, it is in the public interest to require that governmental entities comply with mandatory statutes.²³² Second, the notice procedures required under the statute exist for the benefit of the public.²³³ Third, it is never the case that the public interest is served when prioritizing profits over people.²³⁴ Fourth, Defendant provided the public with empty promises to investigate Lot 175 further and memorialize those buried there.²³⁵

²³¹ Plaintiffs' Closing Argument (Docket Entry No. 41), p. 10)

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

Defendant believes that Plaintiffs attempt to “ground their Complaint in the Black Lives Matter Movement is lodged to produce an emotional response.”²³⁶ Specifically, Defendant cites Plaintiffs’ claims that ‘this case is a matter of public interest because of police brutality and racism in the wake of the murders of George Floyd, Breonna Taylor and others’ . . . ‘an incredible movement is happening’ . . . ‘the public is demanding justice and Black voices be heard’.”²³⁷ Defendant does not think the public interest will be served in granting the preliminary injunction because the property is merely changing owners from HOC to Charger.²³⁸ The property is not undergoing construction plans immediately after Charger signs the contract.²³⁹ Further, Defendant rejects the notion that it has turned its back on Plaintiffs, explaining that Plaintiffs’ opportunity to have their voices heard has never been quashed by Defendant.²⁴⁰

2. Analysis

In deciding whether to grant the preliminary injunction, the Court must determine whether the public interest will be served. The public interest means “something more than an interest on the part of many members of the public, each from the standpoint of an individual.”²⁴¹ The Court of Appeals has acknowledged that “[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”²⁴² The regulation of cemeteries is in the interest of the public health and is within the police power of

²³⁶ Defendant’s Opposition to the Motion for Preliminary Injunction (Docket Entry No. 27)

²³⁷ *Id.* (citing Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry Nos. 9-10), p. 14).

²³⁸ *Id.*, p. 13.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Fogle*, 337 Md. at 456.

²⁴² *Id.* (citing *Space Aero Products Co., Inc. v. R.E. Darling Co., Inc.*, 238 Md. 93, 128, 208 A.2d 74, cert. denied, 382 U.S. 843, 86 S.Ct. 77, 15 L.Ed.2d 83 (1965)).

the state.²⁴³ Moreover, the preservation and understanding of Montgomery County, Maryland's history with slavery is essential to this County's continuing journey toward equality for all. Part of that history are the hardships and inequities faced by freed slaves in the years after Emancipation. It is these inequities that at least in part gave rise to their small insular communities such as the one on River Road, and the same inequities decades and generations later that resulted in the purposeful destruction of those communities by outside forces. To that end, treating the souls interred at Moses Cemetery with the equity and respect that they did not receive in life certainly is in the public interest.

As a court of equity, this Court has an obligation to ensure compliance with laws enacted by the Maryland Legislature, including Md. Code, Bus. Reg. §5-505 and Md. Code, R. Prop. Sales Rule §14-401, which were enacted to protect cemeteries and respect the remains of the deceased.²⁴⁴ Based on the legislative history of Bus. Reg. §5-505 and Rule §14-401, the Court acknowledges the general interest in regulating and protecting land currently and formerly used as a cemetery.²⁴⁵²⁴⁶ Regarding the specifics of this case, Plaintiffs presented ample evidence regarding the public interest in protecting Moses Cemetery. In contrast, Defendant mostly asserted the opposite using loosely related caselaw and limited factual support.

The Court heard from Mr. Harvey Matthews, one of the only surviving members of the River Road community.²⁴⁷ During his testimony, Mr. Matthews discussed the connections many in the Macedonia Baptist Church have to Moses Cemetery on Lot 175.²⁴⁸ The Court also

²⁴³ *Gordon v. Commissioners of Montgomery Cty.*, 164 Md. 210 (1933).

²⁴⁴ *Id.*; *Fogle* 337 Md. at 456.

²⁴⁵ September 14-15, 1984 Maryland Rules Committee Meeting Minutes pp. 101-103.

²⁴⁶ *See also* Maryland Register Vol. 23, Issue 14, Friday July 5, 1996; Vol. 25, Issue 24, Friday, November 20, 1998.

²⁴⁷ Tr. A, pp. 59-118.

²⁴⁸ *Id.*, pp. 62-67, 91.

heard from Ms. Nanette Hunter, the great-great niece of Cora and Jeremiah Botts.²⁴⁹ Ms. Hunter testified regarding her anger over not being informed of the pending sale, in light of her status as a descendant of Cora and Jeremiah Botts.²⁵⁰ Such testimony is relevant to the overall concern Plaintiffs have about the Property being sold without any respect or dignity being given to those buried on Lot 175.²⁵¹

Plaintiffs referenced the Black Lives Matter movement in their Motion for Temporary Restraining Order and for Preliminary Injunction (Docket Entry Nos. 9-10) to illustrate the overwhelming public support for justice and giving those historically silenced a platform to speak.²⁵² Further, Plaintiffs referenced the memorialization of a burial ground in New York City, which Defendant sought to differentiate because of impending construction at the same location.²⁵³

While the Court does acknowledge that there is a substantial need to rectify the wrongs of those historically silenced or marginalized in Montgomery County and the State of Maryland, more broadly, the Court does not view this as a reason for the public interest to favor Plaintiffs. The Court does in fact recognize Defendant's right to sell its property and Charger's right to enter into a contract with Defendant for such sale. However, after doing extensive research, the Court found that Maryland statutes provide few civil remedies to protect those buried on Lot 175 after the closing day of the sale.

Further, Plaintiffs have presented overwhelming evidence that (1) a burial ground exists on Lot 175; (2) some of the graves on the Property at issue were disturbed during the

²⁴⁹ Complaint, p. 5 ¶8. See also, Tr. A, pp. 250-260.

²⁵⁰ Tr. A, pp. 252-54.

²⁵¹ *Id.*

²⁵² Plaintiffs' Reply in Support of the Motion for Preliminary Injunction (Docket Entry No. 31, pp. 15-16).

²⁵³ Motion for Temporary Restraining Order and for Preliminary Injunction (Docket Entry Nos. 9-10); Defendant's Opposition (Docket Entry No. 27).

construction of Westwood Tower Apartments but that many bodies likely still remain on the property; (3) that the agreement between Defendant and Charger does not include any provision enabling Lot 175 to remain untouched; and (4) that prior to 2017, through its website and more recently through its Director, Mr. Priest, Defendant acknowledged that a burial ground was present on Lot 175. Moreover, Defendant continued to speak of memorializing the cemetery until, it seems, the signing of the PSA.²⁵⁴

The Court finds that the public interest weighs in favor of Plaintiffs because no other sufficient remedy exists to ensure that the remains on Lot 175 are protected and respected. Furthermore, there is ample evidence of community interest and connection to the property. The public interest here in Montgomery County regarding the fate of Moses Cemetery is equally strong. Significant numbers of community members have participated in meetings, protests, and other acts of civic engagement in protest of the treatment of those buried on Parcel 175 and the surrounding land.²⁵⁵²⁵⁶ The preservation of the history of River Road community, and specifically Moses Cemetery, will benefit not just the descendants of the buried individuals and those with a cultural affiliation, but also the citizens of Montgomery County and the State.

In addition, although Defendant is selling the Property to Charger, the Property remains a burial ground. Regardless of whether Charger decides to keep the parking lot, build on the lot, or dig up the lot, bodies of African Americans remain there. The families of the deceased have some rights to their ancestors' final resting place.²⁵⁷ As the Court in *Hickman v. Carven*

²⁵⁴ See Section I.

²⁵⁵ See Complaint, Ex. 11 (noting that “community activists have spent months demonstrating and testifying for the protection of a historic African-American burial ground in Westbard”).

²⁵⁶ Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry Nos. 9-10).

²⁵⁷ Citing 14 Am Jur 2d, Cemeteries, Title 21 for the “Black Letter Law” that “when a tract of land has been dedicated (dedication may be implied from acts and from the use of the land) as a cemetery, it is perpetually devoted to the burial of the dead and may not be appropriated to any other purpose, at least in the absence of any authorized exercise of the power of eminent domain. The owner of the fee is subject to a trust for the benefit of those entitled to use the land as a place of burial. The owner has no right to recover the use of the land for any

discussed “a place for the burial of the dead has characteristics differing from those of an ordinary tract of land...Through the ages, all civilized peoples have considered the final resting place of their dead as hallowed and sacred ground.”²⁵⁸ The Court has an obligation to ensure that such resting place is respected.

Furthermore, the past of River Road community, including those buried in Moses African Cemetery, should be preserved to allow those in the County to learn from the vestiges of slavery.²⁵⁹ The broader local community will benefit by Moses Cemetery being acknowledged and respected by the county. The Court agrees with Plaintiffs’ argument that the recent memorialization of a similar burial ground in New York City provides Montgomery County and the State of Maryland with a blueprint for determining what is in the public interest, to rectify the racial inequality permeated by slavery and Jim Crow.²⁶⁰ In sum, the public interest very strongly favors the issuance of a preliminary injunction.

enjoyment or purpose of their own. While the owner of a cemetery has a perfect right to sell and convey it as such, the owner can do nothing which interferes with the use of the land as such, or nothing which interferes with the use of the land as a cemetery, and the owner cannot restrict the rights of relatives and friends to visit and care for the graves.”

²⁵⁸ 366 Md. 362, 784 A.2d 31 (2001).

²⁵⁹ Plaintiffs’ Reply in Support of the Motion for Preliminary Injunction (Docket Entry No. 31); Plaintiffs’ Closing Argument (Docket Entry No. 41).

²⁶⁰ See Ex. B (History and Culture: African Burial Ground National Monument, National Park Service (April 26, 2019) (available at www.nps.gov/afbg/learn/historyculture/index.htm)).

IV. CONCLUSION

Having considered all of the factors as noted above, and the arguments of counsel, Plaintiffs' Motion for Preliminary Injunction (Docket Entry No. 10) shall be and is hereby **GRANTED**. An Order incorporating the Court's findings shall follow.



**Karla N. Smith, Judge
Circuit Court for
Montgomery County, Maryland**

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

**BETHESDA AFRICAN CEMETERY
COALITION, REVEREND OLUSEGUN
ADEBAYO, DAROLD CUBA, GENEVA
NANETTE HUNTER, and MONTANI
WALLACE**

Plaintiffs,

v.

**HOUSING OPPORTUNITIES COMMISSION
OF MONTGOMERY COUNTY**

Defendant.

Civil Action No.: 486734V

ORDER (PRELIMINARY INJUNCTION)

The above-captioned matter came before the Court on September 27, 2021, for a hearing on Housing Opportunities Commission of Montgomery County's Motion to Dismiss the Complaint (Docket Entry No. 20); Plaintiffs' Opposition (Docket Entry No. 29) as well as Plaintiffs' Motion for Preliminary Injunction (Docket Entry No. 10); Defendant's Opposition therein (Docket Entry No. 27); and Plaintiffs' Reply in Support of Their Motion for Preliminary Injunction (Docket Entry No. 31). The Court heard testimony and received evidence from the parties. Upon consideration of the entirety of the record, evidence and testimony presented, as well as the arguments made by counsel, it is this **25th day of October 2021**, by the Circuit Court for Montgomery County, Maryland, hereby:

ORDERED, that Plaintiffs' Motion for Preliminary Injunction (Docket Entry No. 10) shall be and hereby is **GRANTED**; and it is further

ORDERED, that the Housing Opportunities Commission shall be and hereby is preliminarily enjoined and precluded from proceeding with the sale of parcel 175 until the

Court makes a determination with respect to the granting or denial of Plaintiffs' Writ of Mandamus.



**Karla N. Smith, Judge
Circuit Court for
Montgomery County, Maryland**