

**AGENDA ITEM:
DATE:**

COUNCIL COMMUNICATION

INITIATED BY: Durham Heritage Commission

AGENDA ITEM: Request for approval by Town Council for the Heritage Commission (or parties acting under the aegis of the Heritage Commission) to clean, maintain, restore, and preserve trusted and untrusted burial grounds in Durham in accordance with RSA 289:14-a

CC PREPARED BY: Michael Behrendt, Town Planner

PRESENTED BY: Michael Behrendt, Town Planner and/or representatives of the Heritage Commission

AGENDA DESCRIPTION:

Poor condition of burial grounds

Craig Seymour, Chair of the Durham Cemetery Committee, and Mike Everngam, Chair of the Trustees of Trust Funds, reached out to the Heritage Commission (same body as the Historic District Commission) to express concern with the poor condition and lack of care of many burial grounds in Durham. They discussed the issue with the commission at its September 7, 2017 meeting.

Craig and Mike noted the following in a draft memorandum:

...The lack of care and maintenance of the more than 75 private burial grounds found throughout the Town is causing deterioration of gravestones, walls, and fences so that their historical value is being destroyed by neglect. This problem is especially obdurate because responsibility for upkeep of these private burial grounds is diffuse, poorly understood, and legally problematic. Moreover, this problem is on-going and surfaces at least several times each year when residents call/write the Town Council, Town Administrator, Cemetery Committee, Trustees of Trust Funds, or the Department of Public Works to complain about the appearance or condition of one of the these private burial grounds.

...In theory, the owners of the burial grounds will see to it that the burial grounds are adequately cared for and maintained. In practice, and at present, this theory isn't working since many burial grounds would not receive any care or maintenance were it not for caring volunteers, the DPW and the OR Middle School 8th grade social studies students. And despite their efforts, most burial grounds receive only minimal attention.

Of the 75 burial grounds, 45 have associated cemetery trusts. Cemetery trusts are “income only” trusts, intended for perpetual care. The fund balances in most of these trusts range from \$100 to \$600, with a few in the \$1000-\$3000 range, and one larger trust. The total of all of these trusts is \$38,500, which at today’s income rates will yield about \$850 per year. Thirty of the burial grounds are unsupported by funds.

While typical annual care and maintenance, i.e., raking up, trimming, cutting grass, and minor repairs isn’t expensive, it can’t be accomplished in today’s world with the level of resources available from the trusts. It is estimated that \$255 per burial ground per year would be required to care for and maintain the burial grounds in fair-to-good condition. This would be a budget impact of around \$19,125 annually if it were placed in the Town budget. Pursuing abandonment actions on neglected burial grounds would make the Town the owner and force the Town to maintain them.

Much more expensive and complicated is work on gravestones, other monuments, stone walls, iron fences, and gates which have suffered from, in many cases, decades of neglect. Many gravestones have become difficult to read or unreadable due to weathering and acid rain. Many gravestones, walls and fences are broken, fallen over, or otherwise damaged. State regulations forbid untrained persons from attempting to “clean” or “stand up” gravestones or associated works, requiring this maintenance to be done by persons specifically trained in graveyard/monument care. It is estimated that performing this kind of work in all the burial grounds could cost up to \$337,500...

Heritage Commission request

At its meeting on October 5, 2017, the Durham Heritage Commission voted unanimously to request approval from the Town Council for the Heritage Commission (or parties acting under the aegis of the Heritage Commission) to clean, maintain, restore, and preserve trusted and untrusted burial grounds (i.e. both those with and without a trust fund) in Durham. The motion was made in accordance with RSA 289:14-a. below.

State law

Here is the pertinent state law.

289:14-a Maintenance, Repair, and Preservation of Burial Grounds.

I. Any person or organization interested in caring for a burial ground which has not been maintained and the owner of which is unknown, or whose present address is unknown, may petition the selectmen, town council, mayor, or cemetery trustees for permission to clean, maintain, restore, and preserve that burial ground at the person's or organization's own expense. Upon approval of this petition on any conditions deemed appropriate, including the permission of the owner of the surrounding property, the selectmen, town council, mayor, or cemetery trustees shall require the person or organization to place an advertisement in a local newspaper providing notice that the burial ground is to be entered and that work is to be done, and notifying persons with a property interest in this burial ground who have objections to come forward by a date certain.

II. A petition under paragraph I may be granted notwithstanding the fact that the burial ground has not been declared abandoned pursuant to the procedure in RSA 289:20.

III. Any city, town, or public body shall be immune from civil liability in any action brought on the basis of any act or omission by any person who voluntarily and without compensation undertakes to maintain or to repair any burying ground.

IV. No private landowner permitting access over his or her property to a burial ground for the purpose of voluntary maintenance or repair of the burial ground shall be held civilly liable for any breach of duty resulting in injury to the person or damage to the property of those seeking to repair or maintain the cemetery.

V. After approval and notice required under RSA 635:6, II, any marker, gate, or other material removed for repair shall be stored and kept safely in a manner determined by the selectmen, town council, mayor, or cemetery trustees. Upon approval of the selectmen, town council, mayor, or cemetery trustees, a marker, gate, or other material deemed to be at risk of irreparable damage or loss may be placed permanently in a safe facility and the fact of its removal or replacement made visible in the cemetery or in public records.

A related provision to RSA 289:14-a regarding access reads as follows. This provision was not part of the Heritage Commission's motion.

289:14 Right of Way to Private Burial Ground. – Any person wishing to have a temporary right of entry over private land in order to enter a private burial ground enclosure to which there is no public right of way may apply in writing to the selectmen of a town or the mayor of a city stating the reason for such request, which may include the maintenance, repair, and preservation of the burial ground, and the period of time for which such right is to be exercised. The applicant shall also notify in writing the owner or occupier of the land over which the right of way is desired and obtain the written permission of the owner. The selectmen or mayor, in the exercise of discretion and in consultation with the cemetery trustees, may issue a permit for such temporary right of entry designating the particular place where the land may be crossed. The owner or occupier of the land may recommend the place of crossing which, if reasonable, shall be the place designated by the selectmen or mayor. The person exercising the right of entry shall complete the work on the cemetery and restore the right of way to its original condition, if it is disturbed.

Here is the link to all of RSA 289 which addresses cemeteries and burial grounds for those who are interested: <http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XXVI-289.htm>

List of burial grounds in Durham

See the attached spreadsheet which shows the burial grounds and cemeteries in Durham. According to Mike Everngam, the spreadsheet was created in the late 1970s by Phil Wilcox and has been updated since then (Mike is not sure by whom). It is the best record of private burial grounds in Durham, though it may contain errors.

According to Mike Everngam, the spreadsheet refers to some burial grounds as being “abandoned” but he said no formal abandonment actions have been undertaken. If a burial ground is legally abandoned the Town ends up being the owner and would be required to maintain it.

The Durham Public Works Department bills the Trustees of Trust Funds annually for any work that it does in these burial grounds.

Mike Everngam notes that, by state definition, there is only one “cemetery” in Durham, which is the Town cemetery on the Concord Turnpike (beyond Main Street) on the westerly side of town. This is the only cemetery owned by the Town. Durham maintains the burial ground on Schoolhouse Lane though the Town does not own that property. Under state law, “burial grounds” are owned by the descendants of the people buried there.

Janet Mackie, an officer of the Durham Historical Association, is an excellent resource for the Heritage Commission, as she is familiar with every burial ground in town.

Procedure

If the Town Council approves the request, I believe the appropriate next steps for the Heritage Commission, per the RSA, would be to:

- 1) Determine which specific burial grounds the Heritage Commission would like to work on, or at least determine the priorities for its work, confirming that they have not been maintained.
- 2) Clarify/confirm that the owners (the owners of the burial grounds rather than the owners of the underlying and surrounding land) are unknown or their address is unknown.
- 3) Obtain permission from the land owner(s) to perform work on the burial ground(s).
- 4) Place a notice in a newspaper that work will be performed on the burial ground(s) providing for objections as stated in the RSA.
- 5) Finalize plans for performing work at the burial ground(s) - who will do the work, what equipment and materials will be needed, when the work will be done, and other logistical matters – and coordinating with the landowner(s).

Note that the Heritage Commission is sponsoring a workshop on Saturday, October 14, from 9:00 am to 12:00 pm, at the Schoolhouse Lane Cemetery about maintaining burial grounds. Interested members of the public are welcome to attend.

LEGAL AUTHORITY: RSA 289:14-a

LEGAL OPINION: We will follow the RSA but could check with the Town Attorney if there are particular concerns.

FINANCIAL DETAILS:

The Heritage Commission is not asking for any funding from the Town at this time.

SUGGESTED ACTION OR RECOMMENDATIONS:

I move that the Durham Town Council approve the request of the Durham Heritage Commission granting permission to the Heritage Commission, including any parties acting under the aegis of the Heritage Commission, to clean, maintain, restore, and preserve trusted and untrusted burial grounds in Durham, pursuant to RSA 289:14-a. The Heritage Commission shall follow the requirements of RSA 289:14-a including placing necessary notices, obtain permission from and coordinate carefully with all affected landowners, and handle all appropriate logistical matters related to the planned work.