

Protecting And Preserving African-American Cemeteries In Texas

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Introduction

African-American cemeteries are sacred sites that provide important links to African-American history, cultural ties, and family connections. Many African-American cemeteries, however, are endangered due to abandonment, deteriorating conditions, vandalism, and development pressures. The following guide provides information on legal protections for older cemeteries in Texas and procedures that concerned residents, family members, and communities can follow to protect and preserve these threatened sites.

Any land containing human burials is automatically designated as a cemetery in Texas and is protected from redevelopment or destruction.¹ Once land is designated as a cemetery, it cannot be used for other purposes until the dedication is removed by court order. The construction of public utilities, such as telephone lines, are also restricted on cemetery land. Even with these legal protections, older burial sites can become highly endangered and eventually lost from history unless individuals and groups take proactive steps to protect and preserve these cemeteries. As the Texas Historic Commission notes, concerned individuals and groups are the “driving force in long-term preservation” of cemeteries.

Getting Started: Initial Steps to Take

1. Research the Cemetery's History and Legal Status

A critical first step in preserving a cemetery is conducting research on who owns the cemetery land and whether there is an organization already maintaining or legally responsible for the cemetery. You can search the county deed records to identify who is listed as the last owner of the cemetery property. Local property tax records may also provide ownership information. Additionally, talking to descendants of those buried in the cemetery may be beneficial, as well as talking to current and former residents in the area. This basic information-gathering stage is important to complete before going through more formal legal avenues or starting physical preservation of the cemetery.

2. Apply for a Historic Cemetery Designation

Another critical preservation act is creating a formal government record of the cemetery, through a Historic Texas Cemetery Designation (HTC).² You do not have to own the land to apply for the designation. An application costs \$25, and detailed instructions are available on the Texas Historical Commission's website, www.thc.texas.gov/cemetery. The Commission staff can provide assistance with the designation process and verify whether a cemetery has already been designated (see the Resource Section below for their contact information).

To qualify for the HTC designation, the cemetery must be at least 50 years old and deemed worthy of recognition for its historical associations. The Texas Historical Commission states that “[t]he very nature of a cemetery being a landmark of a family's or community's presence is considered to validate the criteria of historical associations.”³ With an HTC designation, a declaration of dedication is recorded with the Historical Commission and sent to the local County Clerk's office, providing record notice of the cemetery and its historic value to landowners, investors, and other parties.

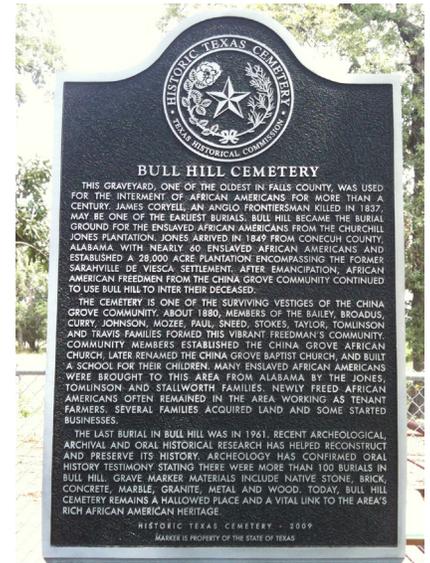
*This guide contains general legal information only, and is not intended as a substitute for the advice of an attorney. We welcome your questions, comments, and suggestions for improvements to this guide.

3. Obtain a Historical Marker

After obtaining an HTC designation, a cemetery may be further recognized with markers from the Texas Historical Commission. Landowner permission is required before a marker is placed on private land. Details about the various types of markers and the application processes are available on the Historical Commission website.⁴ The cost of the markers ranges from \$300 dollars for a small sign that could be placed on the cemetery's fence or another existing structure, up to \$1,875 for a large, stand-alone marker with narrative information about the cemetery.⁵ While the markers do not lend additional legal rights to the cemetery land, they can serve as an acknowledgment of the cemetery's importance and provide additional visual notice of the cemetery's presence.

4. Register the Cemetery with the Texas Historic Sites Atlas

The Texas Historical Commission maintains an online inventory and map of historic cemeteries and other historic sites, via the Texas Historic Sites Atlas, at <https://atlas.thc.state.tx.us>.⁶ Anyone can contact the Historical Commission to include a cemetery in the Atlas, and there is no fee for the registration. As with historical markers, the Atlas does not provide additional legal rights, but it provides a permanent marker of the cemetery's location and serves as a symbol of the cemetery's historic value.



large stand-alone marker

Additional Legal Protections

Unknown, Abandoned, and Unverified Cemeteries

The discovery of an unknown, abandoned, or unverified cemetery requires certain notice requirements, depending on the site.⁷ If you suspect a site is unknown, abandoned, or unverified, you can contact the Texas Historical Commission for guidance. The THC website contains additional information about the notification process, along with sample notices.⁸ Similar to the Historic Cemetery designation, filing a notice will lead to the cemetery being formally recorded in the government records. An abandoned cemetery is a cemetery that is not owned or operated by a cemetery organization, does not have another person legally responsible for its care, and is not maintained by any person. An unknown cemetery is an abandoned cemetery that does not appear on a map or in the county deed records. An unverified cemetery is a site with signs of one or more burials but no verification of unmarked graves by designated authorities or the Texas Historical Commission.

Protections against Theft, Vandalism, and Desecration

The Texas Penal Code includes several laws that prohibit theft, vandalism, and desecration of cemeteries.⁹ While law enforcement agencies are responsible for enforcing these state laws, the responsibility often falls upon communities to report violations. If you are aware of a suspected cemetery theft, vandalism, or desecration, you should notify your local county sheriff or police department.

The Right to Access a Cemetery

Texas law protects the right to visit cemeteries. For cemeteries located on private land with no public access route, anyone has the right to access the cemetery, so long as the cemetery is not unverified (see definition above).¹⁰ If a cemetery has not been verified, you will first need to file formal notification with the Texas Historical Commission, which will institute the cemetery verification process. The Texas Historical Commission can also help you confirm whether a cemetery has already been verified.

The landowner may designate the access route to the cemetery along with the hours of visitation, which must be reasonable. A visitor can access at other times after providing notice at least 14 days before the visit, as long as the proposed visitation time is reasonable.



Landowner Notification Process

The Texas Historical Commission has provided a step-by-step process for gaining access to a cemetery on private land. First, obtain the landowner's address through the county appraisal district and send a letter requesting permission to access the cemetery. The letter should suggest a date or range of dates at least 14 days in advance, along with your phone number or address for the landowner to respond to. Make a copy of this letter and keep it in your files. If the landowner does not respond, send a second letter with the same information by certified mail. This time include a copy of the access law with your letter.¹¹ Again, make a copy of this letter for your files.

If you are still unable to gain access to the cemetery after the second letter, write a third letter with the same information, but explain that you are copying the letter to law enforcement. Provide a date by which you want to hear back from the landowner and explain that if you do not receive a response by that date, you will contact local law enforcement. Again, attach a copy of the access law and mail the letter using certified mail. Keep one copy in your files and mail a second copy to your local law enforcement office along with a copy of the access law. If the landowner continues to refuse access, your best recourse is to file a lawsuit against the landowner.

Forming an Organization to Protect and Maintain a Cemetery

If a community group, cemetery plot owners, or descendants are interested in maintaining or operating a cemetery that is currently unmaintained, one option is to form a nonprofit organization to manage the maintenance and operations of the cemetery. The Texas Health and Safety Code provides a couple of options:

Option 1: Formation of a Nonprofit Cemetery Corporation by Plot Owners

Cemetery plot owners have authority under the Texas Health and Safety Code to organize a nonprofit corporation that can receive title to the cemetery land.¹² Plot owners are persons whose names are listed in the cemetery organization's office as the owner or who hold ownership documents from a cemetery organization, with the exclusive right to be buried at the plot.¹³ Being a descendant of the person interred in the plot does not make you the plot owner.¹⁴

In order to receive title, the plot owners must provide notice of an organizational meeting for at least 30 days before the date of the meeting, through publication in the local newspaper if it exists and a posting at the cemetery. A majority of plot owners at the meeting must authorize the incorporation of the nonprofit corporation and conveyance of land to the nonprofit. All plot owners of the cemetery become shareholders of the nonprofit corporation and can vote in the election of the officers and any other matters before the nonprofit. Future plot owners become shareholders as well.

After its formation, the nonprofit organization has the authority to subdivide cemetery property into lots and charge assessments on the property for general improvement and maintenance.¹⁵ The corporation may take any additional necessary action to carry out the organization's purposes, including borrowing money and conveying the organization's property.

In one example of this law being put to use, a nonprofit corporation formed by cemetery plot owners brought legal action against the trustees of an unincorporated cemetery association.¹⁶ The nonprofit corporation sought title to the real property and all of the funds collected or donated by the association for cemetery purposes. The cemetery in question was established in 1894 and deeded to certain named persons and their successors as trustees of the cemetery. In 2001, at a meeting consisting of 40 plot owners, 33 of the plot owners voted to incorporate as a nonprofit and take title to the land. The court granted title, but not the funds, to the nonprofit corporation. The nonprofit corporation now runs, maintains, and fundraises for the cemetery.¹⁷



Option 2: Petition for Conservatorship Under Chapter 715

If there is no organization currently in place with authority to maintain a historic cemetery, a new nonprofit corporation can be formed that is dedicated to preserving the cemetery.¹⁸ After filing a Certificate of Formation with the Texas Secretary of State, the incorporators of the nonprofit must file a petition in local district court requesting permission to serve as a conservator of the cemetery, with authority to restore, operate, and maintain the cemetery. The nonprofit's petition to the district court must include a detailed written plan estimating the costs of maintenance and describing how the nonprofit will maintain the cemetery.¹⁹ These procedures are governed by Chapter 715 of the Texas Health and Safety Code.

The following requirements must be met before a court will award control of the cemetery to the nonprofit:

- the nonprofit corporation has a religious, ethnic, historic, or cultural relationship to the cemetery;
- the cemetery is at least 75 years old;
- no viable organization of plot owners exists; and
- the cemetery endangers health, safety, comfort or welfare.²⁰

If a court grants the nonprofit authorization to maintain and operate the cemetery, the court will retain the ability to monitor the organization's progress in maintaining the cemetery. Following the court's order, the nonprofit corporation must hold an organizational meeting to elect a board of directors and provide the notice specified in Chapter 715.

The Chapter 715 process provides nonprofits with a conservatorship over the cemetery. While the nonprofit corporation is not listed as the owner in the deed records, the nonprofit has wide authority to care for the property, charge assessments, sell the right to be buried in unsold plots, and establish a trust fund for its perpetual care. The cemetery must be open to the public.²¹

If you decide to follow the Chapter 715 process, you should consult with an attorney. The Texas Historical Commission is also available for questions and guidance and may be able to connect you with other groups that have successfully obtained authorization to maintain a cemetery under Chapter 715.

Government Care and Control of Cemeteries

In many parts of Texas, local governments play an important role in maintaining cemeteries. A city has the authority to acquire and improve cemeteries in the county where the city is located, even if the cemetery is not inside the city, and can serve as a permanent trustee for the perpetual maintenance of the cemetery.²² If a cemetery is more than 50 years old, the county commissioner's court can use public funds, employees, and county inmates to help maintain the cemetery as long as the cemetery is not a perpetual care cemetery and not owned by a religious or fraternal organization.²³ The Historical Commission can provide additional information on this process including other counties that participate in cemetery maintenance.

Legislative Reforms

Another powerful avenue for protecting historical cemeteries is legislative reform. If you feel that state or federal laws could do more to protect these important monuments, you have the option of reaching out to your elected officials to express your opinions. Information on how to contact your elected officials can be found at <https://www.usa.gov/elected-officials>. Here is information on two laws that have been filed or adopted to strengthen cemetery preservation.

African-American Burial Grounds Network Act (H.R. 1179)

Earlier this year, Representative Alma Adams of North Carolina introduced a bill in Congress that, if passed, would establish the African-American Burial Grounds Network within the National Park Service.²⁴ The legislation would create a national network of historic African-American burial grounds and provide information, technical support, and federal monetary grants for the preservation and upkeep of these sites for future generations. As of November 2019, there were 43 representatives co-sponsoring the bill, none of whom are from Texas.²⁵

Virginia Funding Statute

In 2017, the Virginia State Legislature passed a law dedicating state funds to the preservation and maintenance of historic black cemeteries established before 1900.²⁶ Each qualified cemetery is eligible for \$5—the average cost of routine maintenance—multiplied by the number of graves of African Americans who lived at any time between 1800 and 1900 and are interred in the cemetery.

Best Practices for Physical Preservation

Before an individual or group takes over the care of a historic cemetery, it is important to research best practices for physical maintenance in order to preserve the cemetery. For example, mowing the grass without following best practices can harm fragile gravestones, as can cleaning gravestones. The Resources Section below includes resources for learning more about best practices in the physical preservation of cemeteries.

Resources on Cemetery Preservation

1. Texas Historical Commission, Cemetery Preservation Program

www.thc.texas.gov/cemetery

The Texas Historical Commission's Cemetery Preservation Program provides numerous resources on cemetery preservation, including fundraising ideas and strategies, cleaning historic gravestones, and the best ways to provide fencing and lighting for a historic cemetery. The Commission staff is available for questions and collaboration on non-legal topics related to cemetery preservation.

Staff Contact: Jennifer McWilliams, Cemetery Preservation Program Coordinator, 512-475-4506; jenny.mcwilliams@thc.texas.gov

2. Texas Historical Commission, HOW TO PROTECT HISTORIC CEMETERIES

<https://www.thc.texas.gov/public/upload/publications/preserving-historic-cemeteries.pdf>

This sixteen-page document by the Texas Historical Commission outlines best practices for maintaining cemeteries, including legal information as well as matters such as surveying the land and securing the cemetery.

3. Chicora Foundation

<http://www.chicora.org/cemetery-preservation.html>

Features information on how to preserve cemeteries such as tips on cleaning gravestones, lawn maintenance, and addressing safety concerns.

4. Saving Graves

<http://www.savinggraves.net>

Provides useful tips on preservation of cemeteries including cleaning guidelines and gravestone repair.

6. Texas Freedom Colonies Project

<http://www.thetexasfreedomcoloniesproject.com>

The Texas Freedom Colonies Project maps freedom colonies in Texas, engages with African-American communities, and identifies planning and historical preservation practices. The Project recently received a grant for an initiative that includes mapping historic African-American cemeteries.

End Notes

- 1 Texas laws governing the protection of cemeteries are contained in Chapter 711 of the Texas Health & Safety Code. See, specifically, Sections 711.010(a), 711.035(d), (f) & (g).
- 2 The laws and rules governing the Historic Texas Cemetery Designation process are set forth in Title 13, Chapter 22 of the Texas Administrative Code, Section 22.6.
- 3 Texas Historical Commission, Preserving Historic Cemeteries: Texas Preservation Guidelines, available at <https://www.thc.texas.gov/public/upload/publications/preserving-historic-cemeteries.pdf>.
- 4 Texas Historical Commission, Apply for a Historical Marker, available at <https://www.thc.texas.gov/preserve/projects-and-programs/state-historical-markers/apply-historical-marker>.
- 5 Texas Historical Commission, Official Texas Historical Marks and Sizes, available at <https://www.thc.texas.gov/public/upload/Marker%20Types%20-%202019.pdf>.
- 6 Texas Historical Commission, Atlas, available at <https://atlas.thc.state.tx.us>.
- 7 See Sections 711.001, 711.010, 711.011, and 711.0111 of the Texas Health & Safety Code for the laws governing unknown, abandoned, and unverified cemeteries. Legal regulations governing the implementation of these laws are contained in Title 13, Section 22.4 of the Texas Administrative Code.
- 8 Texas Historical Commission, <https://www.thc.texas.gov/preserve/projects-and-programs/cemetery-preservation/discovery-and-notice-existence>.
- 9 These laws include Texas Penal Code, Sections §28.03 (criminal mischief), 28.08 (graffiti), 31.03 (theft), and 42.08 (abuse of corpse).
- 10 The laws governing access to cemeteries are contained in Section 711.041 of the Texas Health & Safety Code. The Texas Court of Appeals has upheld these access rights in a court case granting descendants the right to access a private family cemetery located on private land. *Davis v. May*, 135 S.W.3d 747, 751 (Tex. App. —San Antonio 2003, pet. denied).
- 11 See Section 711.041 of the Texas Health & Safety Code for the law governing access to cemeteries. Available at: <https://statutes.capitol.texas.gov/Docs/HS/htm/HS.711.htm>
- 12 The process for forming a nonprofit corporation of plot owners and taking title to the cemetery is governed by Sections 711.022 through 711.024 of the Texas Health and Safety Code.
- 13 Section 711.001(32) defines “plot owners.”
- 14 The Texas Historical Commission has guidance about who owns a cemetery, available at <https://www.thc.texas.gov/preserve/projects-and-programs/cemetery-preservation/cemetery-laws/who-owns-cemetery>.
- 15 Section 711.042 of the Texas Health and Safety Code describes the rights of nonprofit cemetery organizations.
- 16 The court case is *McAnally v. Friends of WCC, Inc.*, 113 S.W.3d 875, 877 (Tex. App. 2003)
- 17 The cemetery is the Wilson Chapel Cemetery, and information about the cemetery as well as the nonprofit organization is available at: <https://friendsofwilsonchapel.webs.com/>.
- 18 The process for forming a nonprofit corporation to operate and maintain a cemetery is governed by Section 715 of the Texas Health and Safety Code.
- 19 For the exact requirements of what must be contained in the written plan, see Section 715.005 of the Texas Health and Safety Code.
- 20 The requirements are found at Section 715.004 of the Texas Health and Safety Code.
- 21 For information on the powers and duties of the nonprofit organization, see Section 715.014.
- 22 The provisions governing the rights of cities pertaining to cemeteries are contained in Chapter 713A of the Texas Health and Safety Code. For additional information, the Texas Municipal League has prepared a helpful Q&A guide available at <https://www.tml.org/DocumentCenter/View/164/Cemeteries—2016-08-PDF>.
- 23 These county rights are contained in Texas Health and Safety Code, Section 713.028.

- 24 More information on this bill is available at: <https://www.congress.gov/bill/116th-congress/house-bill/1179/text>. See also Press Release, "Reps. McEachin and Adams Introduce the 'African American Burial Grounds Network Act'" (Feb. 13, 2019), (<https://mceachin.house.gov/media/press-releases/rep-mceachin-and-adams-introduce-african-american-burial-grounds-network-act>).
- 25 A list of all Representatives sponsoring the bill is available at: <https://www.congress.gov/bill/116th-congress/house-bill/1179/cosponsors>.
- 26 For more information about this legislation (H.B. 1547), visit <https://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB1547>.