

Action

MEMORANDUM

October 27, 2017

TO: County Council

FROM: Jeffrey L. Zyontz, Senior Legislative Analyst

SUBJECT: Action - Bill 24-17, Land Use Information - Burial Sites; and
SRA 17-01, Approval Procedures - Burial Sites

PHED Committee Recommendation:

Bill 24-17

On October 16, the Committee (3-0) recommended approval of Bill 24-17 with the following amendments to Section 33A-17(d)2 and 3 that: 1) expand the scope of the inventory to the entire County¹; 2) allow updates as information becomes available; and 3) specifically allow inclusions and exclusions in the updating process.

These recommendations would revise Section 33A-17(d)2, at line 36, to read as follows:

- (2) The Planning Board must maintain, and revise as appropriate, an inventory of burial sites located in the County. The inventory must:
 - (A) include a map and a description of each burial site, including ownership information when available;
 - (B) be made available to the public electronically; and
 - (C) be updated at least annually or as information becomes available.
- (3) The Planning Board must establish a procedure for additions or exclusions to the burial site inventory. The procedures must include an outreach program.

On October 26, the Committee recommended the effective date be the date proscribed by law (90 days after the Bill becomes law).

¹ The Planning Board has no authority in municipalities that have their own zone but, under this direction, the burial site inventory may include sites in municipalities.

SRA 17-01

On October 16 and October 26, 2017, the Committee (3-0) recommended approval of SRA 17-01 with amendments. The Committee recommended requiring protection of any burial sites known to the applicant without regard to the burial site inventory. To that end, the Committee endorsed the following revisions:

Line 37 - location of any burial sites of which the applicant has actual notice or constructive notice or that is included in the Montgomery County Cemetery Inventory.

Line 54 - any burial site of which the applicant has actual notice or constructive notice or that is included in the Montgomery County Cemetery Inventory and located within the subdivision boundary is approved under Subsection 50-4.3.M; and

Line 66 - When a proposed preliminary plan includes a burial site of which the applicant has actual notice or constructive notice or that is identified on the Montgomery County Cemetery Inventory within the site, the applicant must satisfy the following requirements:

The Committee wanted the same treatment for seen and unseen and burial sites and greater specificity on “historical and archeological best practices”. To that end, The Committee recommended the following revision:

Line 70 - ~~[[If there is no surface evidence of the burial site, the]]~~ The applicant must use ~~[[historical and archeological best practices]]~~ the Montgomery County Planning Board Guidelines for Burial Sites to establish the location of the burial site.

The Committee agreed that there may be some circumstances where staking a burial site is unwise:

Line 73 - ~~[[The]]~~ Unless Planning Department Staff believes that vandalism concerns dictate otherwise, the corners of the burial site must be staked in the field before preliminary plan submittal. ~~[[The]]~~ If required, the stakes must be maintained by the applicant until preliminary plan approval.

The Committee agreed to greater specificity for the developer-produced on-site inventory. To that end, the following revision was recommended:

Line 79 - An inventory, that may include photographs, of existing burial site elements (such as walls, fences, gates, landscape features, fieldstones, grave locations, and tombstones) and their condition must be submitted as part of the preliminary plan application.

The Committee wanted to allow the Planning Board more discretion on how to maintain and preserve burial sites during and after development.

Line 85 - Delete subsection d:

[An appropriate fence or wall must be maintained or provided to delineate the burial site. The design of the proposed enclosure and a construction schedule must be approved by the Planning Board, before the approval of a record plat.]

The Committee wanted to allow additional Planning Board discretion to allow the relocation of a burial site. The Committee recommended the following provision to replace Section 4.3.M.3, starting at line 100:

3. Except under circumstances identified in Subsection 4, a burial site and graves must remain where they are found.

4. The Planning Board may determine that it is necessary to allow the relocation of a burial site if:
 - a. the retention of the burial site would result in denying the property owner reasonable use of their property;
 - b. the location of necessary infrastructure cannot be achieved; or
 - c. the possible improvements to the visibility and accessibility of the site by the relocation of graves make relocation appropriate.
5. Any Planning Board approval to allow the relocation of remains is conditioned on the State Attorney's approval to allow the relocation under State law.

The Committee recommended a July 1, 2018 effective date.

Background

Bill 24-17 was introduced on June 27, 2017. It would require the Planning Board to establish and maintain an inventory of burial sites. Under Bill 24-17 as introduced, the Planning Board would be required to revise that inventory annually as research reveals additional sites or errors in prior research.

Subdivision Regulation Amendment (SRA) 17-01, Approval Procedures - Burial Sites, lead sponsors Councilmember Rice, Council President Berliner, and Councilmember Leventhal, and co-sponsors Councilmembers Navarro, Hucker, and Elrich, was also introduced on June 27, 2017. SRA 17-01 would require burial sites identified in the inventory to be respected in the subdivision approval process. Although there are state requirements for the removal of human remains and for registered cemeteries, currently there is only one reference in County code dealing with development restrictions on cemeteries or burial sites, and that is limited to rural open space.² There are no obligations for developers to do archaeological research on their sites based on County law.³

Once identified as a burial site, under SRA 17-01, the burden shifts to the subdivision applicant to research and delineate the boundary of the burial site. As introduced, under SRA 17-01 the burial site would be protected from development unless that protection would amount to "taking" the property.

The Planning Board and Planning staff recommended approval of SRA 17-01 and Bill 24-17 with amendments. The Planning Board recommended allowing for more flexibility in determining when it is appropriate to relocate buried remains. The Board also recommended revisions to the inventory of burial sites to allow changes whenever they are discovered, not just annually. Beyond the Bill and SRA, the Board recommended the appointment of a special advisory committee to comprehensively explore additional legislation concerning burial sites and archaeological resources.

The Council held a public hearing on September 12, 2017. In general, testimony supported the approval of SRA 17-01 as the Council's first step in protecting burial sites. A number of people wanted to protect burial sites in all development processes. Testimony suggested burial site protections for situations like the Macedonia Baptist Church, where a sketch plan application was in process when the issue of preserving a

² Under Section 32-13, a cemetery is a place where disturbing the peace is a crime. Zoning code Section 59.3.5.4.A allows cemeteries and family burial sites under certain conditions. Rural open space must include cemeteries and burial grounds under Section 59.6.3.4.B.2.

³ The use of federal or state funds does trigger an obligation on the part of the active public agency to do proactive investigations. This process is required by Section 106 of the National Historic Preservation Act of 1966 (NHPA). Projects requiring review include actions with direct federal or state funding sources, permits, licenses, or other action with state or federal involvement.

burial ground was raised.⁴ Some testimony wanted to impose an obligation on developers to research burial sites on every development without regard to its identification on an inventory. There was testimony both for and against Planning Board discretion to allow the relocation of burial sites. Additional recommendations raised in testimony are addressed as issues below.

Issues

Should the inventory of burial sites be restricted to where the Planning Board is authorized to approve subdivisions?

Under Bill 24-17, the Planning Board must establish in an inventory of burial sites each site “located in an area of the County where the Planning Board is authorized to approve a subdivision.”⁵ As proposed, the inventory triggers actions under the subdivision process. The Council and the Planning Board lack zoning and subdivision authority in Brookeville, Poolesville, Laytonsville, Rockville, Barnesville, Gaithersburg, and Washington Grove. The Council has some authority, but no zoning and land use authority in these jurisdictions; the Planning Department has absolutely no authority in these municipalities. An inventory of burial sites that included these municipalities would be an academic exercise. **The Committee recommended having an inventory of the entire County.**

Staff does not recommend expanding the geographic scope of the inventory.

Should all subdivision applications be the subject of Phase I and Phase II archaeological studies?

SRA 17-01 would require preservation of a burial ground and archaeological investigations only when the site was identified on the Planning Board’s inventory of burial sites. A site not on the inventory would not have any obligation to do any archaeologic investigation. Testimony recommended requiring all subdivision applicants to do archaeological research before proceeding.

Archaeological investigations have 2 phases to determine the existence of any resources on a site going back to prehistoric times. The goal of a Phase I archaeological survey is to determine the presence or absence of archaeological resources within a project area.

A Phase I investigation consists of a combination of background research and fieldwork designed to identify resources and define site boundaries within a given project area. During the Phase I investigation, the entirety of the project area must be studied. Phase I investigations entail detailed archival and background research as to the possibility of a burial site. Phase I fieldwork also includes at least an onsite survey of the site and may include some limited digging. The use of specific field methods and techniques is dependent upon the type of ground cover present, the topographic setting, and the amount of observed disturbance. The Phase I study indicates whether a resource may be on the site.⁶ If there is some evidence of a burial site, a Phase II investigation would be required for the area in which the site is thought to be located.

A Phase II archaeological investigation is conducted to determine the exact extent of the resource. A Phase II study may include: evaluating areas of moderate and high artifact densities and determining the surface and subsurface limits of the site. The field methods and techniques may include systematic, controlled surface

⁴ The cemetery is not yet the subject of a preliminary plan application. There is a significant volume of written testimony looking for the Council to avoid the situation that developed regarding the Macedonia Baptist Church.

⁵ Bill 24-17 lines 39-41.

⁶ A phase II study also evaluates an archaeological site’s eligibility for inclusion in the National Register of Historic Places (NRHP).

collection, shovel tests, hand-excavated test units, and use of remote sensing techniques (ground penetrating radar). Field investigations should be designed to retrieve the information necessary without seriously impacting the contextual integrity of the site.

Some archaeologic information is available without costly research. A chain of title can be done fairly easily. The state maintains a registry of archaeological resources that is available to professionals without additional research. Because of the sensitivity of archeological site information, access to archeological site location data is restricted. It is generally available only to those who meet the Secretary of the Interior's Professional Qualification Standards. The availability of historic libraries and church histories can also reduce the cost of research.

Some counties require archaeologic investigations under certain circumstances. In Anne Arundel County, when a parcel or project area is deemed to have a high potential for resources, a survey may be required to identify potentially significant resources. Similarly, in Prince George's County, before the submittal of a preliminary plan of subdivision, potential applicants are encouraged to contact the Historic Preservation staff for an evaluation of archeological potential and a finding as to whether an archeological investigation is needed.⁷ Howard County maintains an inventory of burial sites. It requires additional research for those sites and any other sites found.⁸

While the cost of Phase I varies, depending upon conditions and other variables, it typically costs between \$1,500 and \$6,000. Variables may include: size of property, number of buildings, complexity of the current/historical use, integrity of the site, cultural affiliations, or other conditions.⁹

Some people who recommended archaeology for all subdivisions also wanted a public hearing on Phase I and Phase II studies (with notice to interested parties).¹⁰ That would add time and cost to an applicant.

As proposed, an applicant for a site on the inventory would be required to do an archaeology study to pin down the burial area. The issue for the Council is whether the obligations of a developer should be triggered by the inventory or whether every site in the County should be obligated to do additional research.

⁷ SRA 17-01 and Bill 24-17 are modeled after the Prince George's County code.

⁸ Howard County has a Cemetery Preservation Advisory Board to determine the existence of a burial site that is not on the inventory.

⁹ Acting Historic Preservation Supervisor, Phillip Estes, Planning Department staff; Jennifer Stabler, Ph.D., Archeology Planner Coordinator, M-NCPPC, Historic Preservation Section, provided the following:

The cost of the Phase I surveys does vary quite a bit depending on the size of the property and the types of field methods that will be used. The background historical research should be done first. In our office, I have usually done a chain of title and some basic background research that I hand off to the consultant archaeologists. I do that to help me to determine if a Phase I survey should be done on the property and to determine what resources might be present. The archaeologists usually do a pedestrian walk over of the property to identify areas for further testing. Steep slopes are generally visually examined but are not further tested with shovel test pits. The level areas are generally subjected to further testing. If there are plowed fields on the property, the archaeologists will generally perform a surface survey and identify artifacts visible on the surface. This should be combined with some shovel test pits to determine the stratigraphy of the site. In wooded areas or areas with vegetative cover, the archaeologists will generally dig shovel test pits at a set interval (50 ft. in Prince George's County) and screen for artifacts.

¹⁰Testimony also indicated that the State of Georgia required a Phase I review and a Phase II review, if warranted, for all property. Staff could only locate a statute from George that required investigation when development was proposed on a known cemetery site:

Georgia Code Section 36-72-4 G

No known cemetery, burial ground, human remains, or burial object shall be knowingly disturbed by the owner or occupier of the land on which the cemetery or burial ground is located for the purposes of developing or changing the use of any part of such land unless a permit is first obtained from the governing authority of the municipal corporation or county wherein the cemetery or burial ground is located, which shall have authority to permit such activity except as provided in Code Section 36-72-14.

The Committee recommended keeping the initial research burden on the Planning Board and imposing burdens on the private sector only when there is a reason to do so.

Should the protection requirement of the proposed SRA be applied to other steps in the development process?

If one considers that most zoning is applied by the Council without a landowner's application, the subdivision process is generally the first step in the development process. A requirement to only preserve sites in the subdivision process will not include all land undergoing development. The SRA only applied to preliminary plans. It does not apply to projects that have preliminary plan approval but have not gone to record plat.¹¹

There are other steps in the development process outside of subdivisions. A sketch plan or site plan approval may be required. A ZTA would need to be introduced to require burial site protection in those processes.¹² Actions at building permit would also require separate legislation.¹³

The later in the development process that the County requires changes due to the discovery of a burial ground, the more burdensome it is on a developer, but more burial sites will be preserved. The physical requirements for retaining a newly discovered burial site past preliminary plan may require redoing previously made decisions about what goes where on a site. Stopping a building permit application is extremely burdensome. On the other hand, once a grave is relocated, it will never be returned.

Testimony from the Historic Preservation Commission recommended a delay in approving Bill 24-17 and SRA 24-17 until a more comprehensive approach can be developed by a specially-appointed committee.¹⁴

Future legislative action is not precluded by the approval of SRA 17-01. The Committee recommended proceeding with Bill 24-17 and SRA 17-01.

What should happen if a burial site is not on the inventory but is discovered before Planning Board action?

As introduced, a burial site that is not on the inventory and discovered during development would be subject to state law.¹⁵ The Bill puts the burden on the Planning Department to develop and add to an inventory of sites

¹¹ A high percentage of land in the County has been through the subdivision process; however, it is common for new development or redevelopment to require a new subdivision (resubdivision) before proceeding.

¹² Although the Council is authorized to regulate zoning and subdivisions, the approval process is different. Zoning changes are approved without the involvement of the Executive. Subdivision approvals either require the Executive's approval or a Council override of an Executive veto.

¹³ The building permit process is purely administrative. There are no public hearings. DPS staff interprets code but it does not decide contested subjective issues. Burial sites discovered during construction are subject to state law on the removal of human remains.

¹⁴ In both physics and legislative action, there are 2 notable forces at work: inertia and entropy. In the absence of inertia, entropy wins.

"In high school, when I first heard of entropy, I was attracted to it immediately. They said that in nature all systems are breaking down, and I thought, 'What a wonderful thing; perhaps I can make some small contribution to this process, myself.'" George Carlin.

¹⁵ Maryland Criminal Law Code § 10-402

- (a) Except as provided in subsections (b) and (f) of this section, a person may not remove or attempt to remove human remains from a burial site.
- (b) Subject to subsection (c) of this section, the State's Attorney for a county may authorize in writing the removal of human remains from a burial site in the State's Attorney's jurisdiction:
 - (1) to ascertain the cause of death of the person whose remains are to be removed;

as it deems appropriate. Howard County has a process to examine the validity of claims made during the development approval process.

Howard County has a Cemetery Preservation Advisory Board to help the Planning Department determine the existence of a burial site that is not on the inventory. That procedure is not included in SRA 17-01 or Bill 24-17.

The program as proposed gives an incentive to everyone to forward their research on burial sites to Planning staff as soon as it is developed. It creates a disincentive for last-minute disclosures.

The Committee recommended extending the sites protected to include all sites of which the applicant has actual or constructive notice.

Should the proposed inventory be updated more than annually?

Perhaps a little history on the Montgomery County Cemetery Inventory posted on the Planning Board's website is in order. The Montgomery County Historic Preservation Commission (HPC) awarded a grant to Peerless Rockville and Historic Takoma in 2004 for the first phase of the cemetery inventory project. An initial database was created of all known cemeteries. Dedicated volunteers began the work of surveying each one. In 2005, Phase II built on the database, expanding it and working on a GIS map showing the locations of each cemetery and creating a list of the County's most threatened cemeteries.¹⁶

This web-available mapped inventory has not been updated since its creation.¹⁷ The Planning Board has not adopted the inventory in any form, except for hosting the information on its website. There has been no qualified archaeological staff to evaluate any later research for including or correcting the boundaries of sites.

The Bill as introduced requires that the inventory be maintained and updated annually. The Planning Board must establish a procedure for a person to request the addition of a burial site to the inventory (or the removal of a site if a more detailed archeological study indicates the absence of a burial site or a smaller site). The procedures must include an outreach program.¹⁸ This new program should allow the Planning Board to consider any facts sufficient to determine the validity of sites on the inventory it approves and justification for any future revision to that inventory.¹⁹ The Committee agreed that it is too limiting to restrict the inventory to

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- (2) to determine whether the human remains were interred erroneously;
 - (3) for the purpose of reburial; or
 - (4) for medical or scientific examination or study allowed by law.

- (c) (1) Except as provided in paragraph (4) of this subsection, the State's Attorney for a county shall require a person who requests authorization to relocate permanently human remains from a burial site to publish a notice of the proposed relocation in a newspaper of general circulation in the county where the burial site is located.

¹⁶ The project was peer reviewed by local historians and cemetery experts, including Mike Dwyer, Linda Layman, Jim Sorensen, Eileen McGuckian, and Janet Manuel, for accuracy and completeness.

¹⁷ <http://montgomeryplanning.org/planning/historic/montgomery-county-cemetery-inventory/>

¹⁸ Bill 24-17: The Planning Board must maintain, and revise as appropriate, an inventory of burial sites located in the County. The inventory must:

- (A) include each burial site located in an area of the County where the Planning Board is authorized to approve a subdivision;
- (B) include a map and a description of each burial site including ownership information when available;
- (C) be made available to the public electronically; and
- (D) be updated annually.

The Planning Board must establish a procedure for a person to request the addition of a burial site to the inventory. The procedures must include an outreach program.

¹⁹ When there is a reason to do so, it would be the obligation of the Planning Board to determine if there is sufficient evidence to add a burial site to the inventory. Exactly what that evidence is to warrant inclusion is left to the Planning Board's judgment.

annual updates. **The Committee recommended a revision to Bill 24-17 to require at least an annual update to the inventory and whenever facts warrant an update.**

Testimony suggested a public hearing on burial site decisions. There is nothing to prevent the Planning Board from holding a hearing whenever it approves or updates the inventory. It is the Board's practice to be open in its decision making.

Is there too much or not enough discretion to determine when the removal of human remains is appropriate?

There is a provision in SRA 17-01 for very limited Planning Board discretion, to allow state law to regulate the removal of human remains:

Without regard to Subsection 2, if the Planning Board determines that an accommodation of the burial site with the development cannot be accomplished without denying the property owner reasonable use of their entire property, then the Planning Board may approve a plan for development with the appropriate treatment of the burial site under State law.²⁰

This provision mirrors a similar provision in the Howard County Code. It allows a burial site relocation only when to do otherwise would result in the public "taking" of the property from the owner. Testimony objected to the flexibility in this provision.

Some historians and archaeologists believe that there are never circumstances where human remains should be removed. There was testimony to require the permission of descendants to relocate graves.

A zero tolerance for grave relocation would, at some point in the future, result in a Court ordering the County to pay for burial sites that it may not wish to own.

The Planning Board requested more flexibility to allow the removal of graves. Planning staff believes that deleting the word "entire" before the word "property" gives the Board that desired flexibility. There may be situations where it would be reasonable for the Planning Board to approve appropriate grave relocation under State law, even if the entire property has a reasonable use.

There is also testimony that recommended amending the provision in SRA 17-01 because it is too inflexible; the provision only applies to avoid a "taking" of the property. In Prince George's County, there are requirements for the preservation of a cemetery only when "there are no plans [by the developer] to relocate human remains to an existing cemetery." The Prince George's County provision is far more permissive than SRA 17-01. In blackletter code, the developer may choose to move graves; it is not the Planning Board's option to allow these moves. This is a bridge too far, in Staff's opinion.

Testimony suggested giving the Planning Board more flexibility to approve the relocation of a burial site "if the Planning Board determines that the burial site can be better honored and more accessible through relocation and accommodation of the burial site elsewhere within the development." This is far less discretion than that written into the Prince George's County law, but far more discretion than in SRA 17-01 as introduced.

If the Council trusts the Planning Board to make the judgment to determine when (if ever) grave sites are more accessible by relocation, it is a reasonable revision, given the competing goals in any development.²¹ The

²⁰ Lines 88-93.

²¹ Some who testified have no trust in the Board regarding burial sites and would like all authority in this area to be vested in a newly-created board.

phrase “better honor” may be too subjective. Any such decision by the Board to allow relocation would be controversial.²²

The Committee recommended the following provision to replace Section 4.3.M.3, starting at line 100:

3. Except under circumstances identified in Subsection 4, a burial site and graves must remain where they are found.
4. The Planning Board may determine that it is necessary to allow the relocation of a burial site if:
 - a. the retention of the burial site would result in denying the property owner reasonable use of their property;
 - b. the location of necessary infrastructure cannot be achieved; or
 - c. the possible improvements to the visibility and accessibility of the site by the relocation of graves make the relocation appropriate.
5. Any Planning Board approval to allow the relocation of remains is conditioned on the State Attorney’s approval to allow the relocation under State law.

Should there be a Cemetery Advisory Board?

Neither SRA 17-01 nor Bill 24-17 as introduced establish an advisory committee. Howard County established a Cemetery Preservation Advisory Board to advise the Planning Board on the existence of a previously unknown burial site:

The Department of Planning and Zoning, in consultation with the Cemetery Preservation Advisory Board, shall determine if the discovered area...above is a cemetery...²³

There was testimony to allow a newly created board with the authority to amend the inventory instead of allowing the Planning Board that authority. That is more authority than Howard County granted to its board. This makes sense only if the Council distrusts the Planning Board, which is not the case.

There is nothing to prevent the Planning Board from establishing and having the advice of an advisory board if it chooses to do so. **The Committee recognizes that the Planning Board has the flexibility to establish and maintain the burial site inventory and to use any advice in doing so.**

Should the Council establish a special advisory committee to determine the need for additional legislation to add protection to burial sites to other steps in the development process?

Testimony from the Planning Board suggested approval of what is before the Council and a study using a special advisory committee to determine if the protections should be expanded to other steps in the process.

Staff notes that the Planning Board is always free to recommend ZTAs and Bills for introduction at any time. The Board is also free to get advice from any source, without regard to whether that source is a consultant, residents, or committees that it establishes. **The Committee did not recommend Council establishment of a special committee.**

²² https://www.washingtonpost.com/local/dozens-of-bodies-buried-next-to-mgm-casino-outside-washington-will-be-moved/2017/09/26/935e99da-9fd4-11e7-84fb-b4831436e807_story.html?utm_term=.1ca4b05810ea

²³ Howard County Code, Title 16, Subtitle 13 Section 16.1305.

Can the Bill guarantee funding to staff the SRA's requirements?

SRA 17-01 and Bill 24-17 should not be approved without consideration of their fiscal impact. The fiscal impact provided by OMB concluded that the up-front cost would be \$156,000 to \$260,000, with staff being reassigned to this task for the existing work complement. In the alternative, it would require the addition of one staff member at \$118,300 annually, with an additional \$36,000 to equip the new employee. (Prince George's County has a full-time employee devoted to this work.) Staff believes that there will be up-front costs to develop the inventory AND a continuing need to review sites as they file for subdivision applications and develop the research on additional sites. It is unrealistic to assume that after the initial establishment of the inventory, no additional staff will be required. There are no qualified archaeologists on the Planning Department's payroll.

Testimony wanted guaranteed funding of staff support for developing and maintaining the cemetery inventory. This is not possible. The Council makes budget decisions in the annual budget process.

This packet contains:

Bill 24-17 (PHED Committee recommended)
Legislative Request Report
Fiscal and Economic Impact Statement
SRA 17-01 (PHED Committee recommended)

Circle #

1 – 4
5
6 – 9
10 – 17

Bill No. 24-17
Concerning: Land Use Information -
Burial sites
Revised: 10-27-17 Draft No: 8
Introduced: June 27, 2017
Expires: December 27, 2018
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmember Rice, Council President Berliner and Councilmember Leventhal
Co-Sponsors: Councilmembers Katz, Navarro, Hucker, and Elrich

AN ACT to:

- (1) require the Planning Board to establish and maintain an inventory of burial sites in the County; and
- (2) generally amend the law relating to land use information function of the Planning Department.

By amending

Montgomery County Code
Chapter 33A, Planning Procedures
Sections 33A-17

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Section 33A-17 is amended as follows:

Article 4. Land Use information functions

33A-17. [Land use information functions] Information and referral services.

(a) The Planning Board must provide [[informational]] information and referral services on County land use and related regulatory functions to interested members of the public. The services to be provided include technical assistance and information on:

- (1) master plans, including pending amendments;
- (2) zoning, including pending cases and pending text amendments;
- (3) subdivision control, including pending applications and amendments to Chapter 50;
- (4) growth policy and related regulatory requirements;
- (5) federal, state, and local environmental regulations; and
- (6) related administrative, regulatory, or legislative procedures applicable to the Planning Board, Office of Zoning and Administrative Hearings, Historic Preservation Commission, Board of Appeals, other County regulatory agencies, Washington Suburban Sanitary Commission, and County Council.

(b) A resource library must be maintained that contains:

- (1) relevant laws, regulations, and administrative procedures;
- (2) appropriate zoning and other maps;
- (3) administrative and legislative hearing schedules;
- (4) significant administrative and judicial land use decision; and
- (5) master plans, policy documents, planning studies, and other appropriate reference materials.

(c) All County departments, offices, and agencies must provide the planning department with:

(1) requested materials (other than confidential documents) to ensure the availability to the public of current information[,]; and

(2) the location and telephone number of the person or persons to whom inquiries may be referred.

(d) (1) In this subsection, a *burial site* means a physical location where human remains were buried in the earth, or entombed in a mausoleum or columbarium. A burial site includes a cemetery, but does not include the sprinkling of ashes from cremated remains.

(2) The Planning Board must maintain, and revise as appropriate, an inventory of burial sites located in the County. The inventory must:

(A) [[include each burial site located in an area of the County where the Planning Board is authorized to approve a subdivision;]]

[[B)] include a map and a description of each burial site, including ownership information when available;

[[C)](B) be made available to the public electronically; and

[[D)](C) be updated at least annually or as information becomes available.

(3) The Planning Board must establish a procedure for [[a person to request the addition of a]] additions or exclusions to the burial site [[to the]] inventory. The procedures must include [[a]]an outreach program.

Approved:

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Roger Berliner, President, County Council

Date

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Approved:

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Isiah Leggett, County Executive

Date

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This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Bill 24-17

Land Use Information – Burial Sites

DESCRIPTION:	The Bill would require the Planning Board to establish and periodically update an inventory of burial sites.
PROBLEM:	In the absence of an inventory land disturbances may unknowingly violate burial sites.
GOALS AND OBJECTIVES:	Provide an inventory of burial sites with an opportunity to update information. The Bill is a companion to Subdivision Regulation 17-01 which accommodates burial sites in the subdivision process.
COORDINATION:	Planning Department
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Jeff Zyontz, Senior Legislative Analyst, 240-777-7896
APPLICATION WITHIN MUNICIPALITIES:	To be researched.
PENALTIES:	Not applicable

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ROCKVILLE, MARYLAND

MEMORANDUM

July 17, 2017

TO: Roger Berliner, President, County Council

FROM: Jennifer A. Hughes, Director, Office of Management and Budget
Alexandre A. Espinosa, Director, Department of Finance

SUBJECT: FEIS for Bill 24-17, Land Use Information - Burial Sites

Handwritten signatures and initials:
JAH
A. Espinosa
for Alexandre Espinosa

Please find attached the fiscal and economic impact statements for the above-referenced legislations.

JAH:fz

cc: Bonnie Kirkland, Assistant Chief Administrative Officer
Lisa Austin, Offices of the County Executive
Joy Nurmi, Special Assistant to the County Executive
Patrick Lacefield, Director, Public Information Office
David Platt, Department of Finance
Dennis Hetman, Department of Finance
Jennifer Nordin, Office of Management and Budget
Felicia Zhang, Office of Management and Budget

Fiscal Impact Statement
BILL 24-17, Land Use Information – Burial Sites

1. Bill Summary

Bill 24-17 requires the Maryland National Capital Park and Planning Commission (M-NCPPC) Planning Board to create and maintain an inventory of burial sites in Montgomery County. This Bill is a companion to Subdivision Regulation 17-01 which includes burial sites in the subdivision approval process.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

No impact to revenues.

M-NCPPC estimates ongoing expenditures for one new Planner Coordinator position (\$118,300) and first year expenditures for supplies (\$36,000); however, the Office of Management and Budget (OMB) believes the upfront workload to create an inventory can be completed by a contractor and the ongoing workload is manageable through existing staffing levels.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

No impact to revenues.

M-NCPPC estimates ongoing expenditures for one full-time staff position and first year expenditures for supplies (vehicle, computer, furniture).

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Personnel Costs	\$118,300	\$118,300	\$118,300	\$118,300	\$118,300	\$118,300
Operating Expenses	\$36,000	\$0	\$0	\$0	\$0	\$0

Alternatively, OMB estimates the upfront workload can be completed in the first year by a contractor (\$156,000 - \$260,000 based on an hourly rate of \$75-\$125) and the ongoing workload can be absorbed by existing staff.

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Personnel Costs	\$0	\$0	\$0	\$0	\$0	\$0
Operating Expenses	\$156,000- 260,000	\$0	\$0	\$0	\$0	\$0

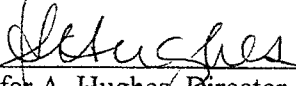
4. An actuarial analysis through the entire amortization period for each bill/regulation that would affect retiree pension or group insurance costs.

Not applicable.

5. Later actions that may affect future revenue and expenditures if the bill/regulation authorizes future spending.

Not applicable.

6. An estimate of the staff time needed to implement the bill/regulation.
M-NCPPC estimates one new position is needed to complete information assessments, fieldwork, mapping; and evaluations of development applications.
Alternatively, OMB estimates the upfront workload can be completed by a contractor and the ongoing workload can be absorbed by existing staff.
7. An explanation of how the addition of new staff responsibilities would affect other duties.
M-NCPPC estimates one new position will complete the workload and existing staff duties will not be affected.
Alternatively, OMB estimates the upfront workload can be completed by a contractor and the ongoing workload can be absorbed by existing staff.
8. An estimate of costs when an additional appropriation is needed.
Not applicable.
9. A description of any variable that could affect revenue and cost estimates.
Not applicable.
10. Ranges of revenue or expenditures that are uncertain or difficult to project.
Not applicable.
11. If a Bill is likely to have no fiscal impact, why that is the case.
Not applicable.
12. Other fiscal impacts or comments.
Not applicable.
13. The following contributed to and concurred with this analysis,
Karen Warnick, MNCPPC
Diane Jones, DPS
Greg Ossont, DGS
Emil Wolanin, DOT
Timothy Goetzinger, DHCA
Jennifer Nordin, OMB



Jennifer A. Hughes, Director
Office of Management and Budget

7/17/17
Date

Economic Impact Statement
Bill 24-17, Land Use Information – Burial Sites

Background:

This legislation would require the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission to establish and maintain an inventory of burial sites in the County. Subdivision Regulation 17-01 would require that such burial sites identified in the inventory be respected in the subdivision approval process.

1. The sources of information, assumptions, and methodologies used.

There are no sources of information, assumptions, or methodologies used in the preparation of the economic impact statement.

2. A description of any variable that could affect the economic impact estimates.

Not applicable.

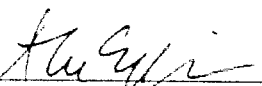
3. The Bill's positive or negative effect, if any on employment, spending, savings, investment, incomes, and property values in the County.

Bill 24-17 would have no economic impact on employment, spending, savings, investment, incomes, and property values in the County.

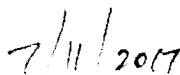
4. If a Bill is likely to have no economic impact, why is that the case?

Bill 24-17 would have no economic impact because it establishes and maintains an inventory of burial sites which does not have an impact on employment, spending, savings, investment, incomes property values.

5. The following contributed to or concurred with this analysis: David Platt and Robert Hagedoorn, Finance.



Alexandre A. Espinosa, Director
Department of Finance



Date

Subdivision Regulation Amendment No.: 17-01
Concerning: Approval Procedures – Burial sites
Draft No. & Date: 6 – 10/27/17
Introduced: June 27, 2017
Public Hearing: September 12, 2017
Adopted:
Effective:
Ordinance No:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN
MONTGOMERY COUNTY, MARYLAND**

Lead Sponsors: Councilmember Rice, Council President Berliner, and
Councilmember Leventhal
Co-sponsors: Councilmembers Navarro, Hucker, and Elrich

AN AMENDMENT to:

- 1) define burial sites;
- 2) require the identification of burial sites on preliminary plan applications;
- 3) require approved preliminary plans to appropriately preserve burial sites; and
- 4) generally add provisions to protect and preserve burial sites in the subdivision approval process.

By amending

Montgomery County Code
Chapter 50 “Subdivision of Land”
Section 50.2 “Interpretations and Defined Terms”
Section 50.4 “Preliminary Plan”

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by introduced Subdivision Regulation Amendment.</i>
[Single boldface brackets]	<i>Deleted from existing law by introduced Subdivision Regulation Amendment.</i>
<u>Double underlining</u>	<i>Added to the Subdivision Regulation Amendment by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the Subdivision Regulation Amendment by amendment.</i>
* * *	<i>Existing law unaffected by Subdivision Regulation Amendment.</i>

OPINION

Subdivision Regulation Amendment (SRA) 17-01, Approval Procedures – Burial Sites, lead sponsors Councilmember Rice, Council President Berliner, and Councilmember Leventhal, and co-sponsors Councilmembers Navarro, Hucker, and Elrich, was introduced on June 27, 2017.

SRA 17-01 would require burial sites identified in the inventory to be respected in the subdivision approval process.

In its report to the Council, the Montgomery County Planning Board recommended that the SRA be approved with amendments. The Planning Board recommended allowing for more flexibility in determining when it is appropriate to relocate buried remains.

The Council held a public hearing on September 12, 2017. In general, testimony supported the approval of SRA 17-01 as the Council's first step in protecting burial sites. A number of people wanted to protect burial sites in all development processes. Testimony suggested burial site protections for situations like the Macedonia Baptist Church, where a sketch plan application was in process when the issue of preserving a burial ground was raised. Some testimony wanted to impose an obligation on developers to research burial sites on every development without regard to its identification on an inventory. There was testimony both for and against Planning Board discretion to allow the relocation of burial sites.

The matter was refer to the Planning, Housing and Economic Development Committee. The Committee conducted worksessions on October 16 and October 25, 2017. The Committee recommended:

- requiring protection of any burial sites known to the applicant, without regard to the burial site inventory;
- the same treatment for seen and unseen and burial sites;
- greater specificity on the meaning of “historical and archeological best practices”;
- Planning Board discretion on staking out burial sites;
- greater specificity for the developer-produced on-site inventory;
- Planning Board discretion on how to maintain and preserve burial sites during and after development;
- Planning Board discretion to allow the relocation of a burial site.

The District Council reviewed Subdivision Regulation Amendment No. 17-01 at a worksession held on October 31, 2017 and agreed with the recommendations of the Planning, Housing, and Economic Development Committee.

For these reasons, and because to approve this amendment will assist in the coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District located in Montgomery County, Subdivision Regulation Amendment No. 17-01 will be approved as amended.

ORDINANCE

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following Ordinance:

1 **Sec. 1.** Chapter 50 is amended as follows.

2 * * *

3 **Division 50.2. Interpretation and Defined Terms**

4 * * *

5 **Section 2.2. Definitions**

6 All terms used in this Chapter that are defined in Chapter 59 or Chapter 49 have the
7 same meanings as the definitions in those Chapters, unless otherwise defined here.

8 In this Chapter, the following words and phrases have the meanings indicated.

9 * * *

10 **B.**

11 * * *

12 *Block:* Land area bounded by roads, other rights-of-way, unsubdivided acreage,
13 natural barriers, and any other barrier to the continuity of development.

14 Burial site: A physical location where human remains were buried in the earth, or
15 entombed in a mausoleum or columbarium. A burial site includes a cemetery, but
16 does not include the sprinkling of ashes from cremated remains.

17 * * *

18 **Article II. Subdivision Plans**

19 **Division 50.4. Preliminary Plan**

20 Except for an administrative or minor subdivision submitted under Divisions 50.6
21 and 50.7, the subdivider must submit a proposed subdivision to the Board for

approval in the form of a preliminary plan before the submission of a plat. The plan must show graphically, and supporting documents must demonstrate, the data needed for the Board to make the findings required by this Article.

Section 4.1. Filing and Specifications

* * *

B. *The drawing.* The subdivider must submit a preliminary plan drawing in a form required by regulations of the Board. Details and information must include:

* * *

7. graphic representation of the proposed subdivision, including:

* * *

j. lines showing the limits of each zone, if the property is located in more than one zone; [and]

k. all existing topography, structures, and paving on adjoining properties within 100 feet[.]; and

l. location of any burial sites of which the applicant has actual notice or constructive notice or that is included in the Montgomery County Cemetery Inventory.

* * *

Section 4.2. Approval Procedure

* * *

D. *Required Findings.* To approve a preliminary plan, the Board must find that:

1. the layout of the subdivision, including size, width, shape, orientation and density of lots, and location and design of roads is appropriate for the subdivision given its location and the type of development or use contemplated and the applicable requirements of Chapter 59;
2. the preliminary plan substantially conforms to the master plan;
3. public facilities will be adequate to support and service the area of the subdivision;
4. all Forest Conservation Law, Chapter 22A requirements are satisfied;
5. all stormwater management, water quality plan, and floodplain requirements of Chapter 19 are satisfied; [and]
6. any burial site of which the applicant has actual notice or constructive notice or that is included in the Montgomery County Cemetery Inventory and located within the subdivision boundary is approved under Subsection 50-4.3.M; and
- [6]7. any other applicable provision specific to the property and necessary for approval of the subdivision is satisfied.

* * *

Section 4.3. Technical Review

In making the findings under Section 4.2.D, the Board must consider the following aspects of the application.

* * *

65 M. Burial sites

66 1. When a proposed preliminary plan includes a burial site of which the
67 applicant has actual notice or constructive notice or that is identified on
68 the Montgomery County Cemetery Inventory within the site, the
69 applicant must satisfy the following requirements:

70 a. [[If there is no surface evidence of the burial site, the]] The
71 applicant must use [[historical and archeological best practices]]
72 the Montgomery County Planning Board Guidelines for Burial
73 Sites to establish the location of the burial site. [[The]] Unless
74 Planning Department Staff believes that vandalism concerns
75 dictate otherwise, the corners of the burial site must be staked in
76 the field before preliminary plan submittal. [[The]] If required,
77 the stakes must be maintained by the applicant until preliminary
78 plan approval.

79 b. An inventory, that may include photographs, of existing burial
80 site elements (such as walls, fences, gates, landscape features,
81 fieldstones, grave locations, and tombstones) and their condition
82 must be submitted as part of the preliminary plan application.

83 c. The placement of lot lines must promote long-term maintenance
84 of the burial site and protection of existing elements.

85 d. [[An appropriate fence or wall must be maintained or provided
86 to delineate the burial site. The design of the proposed enclosure
87 and a construction schedule must be approved by the Planning
88 Board, before the approval of a record plat.]]

89 [[e.]] The burial site must be protected by arrangements sufficient to
90 assure the Planning Board of its future maintenance and
91 preservation, as specified in the Montgomery County Planning
92 Board's guidelines for burial sites.

93 2. The Planning Board must require appropriate measures to protect the
94 burial site during the development process.

95 3. [[Without regard to Subsection 2, if the Planning Board determines that
96 an accommodation of the burial site with the development cannot be
97 accomplished without denying the property owner reasonable use of
98 their entire property, then the Planning Board may approve a plan for
99 development with the appropriate treatment of the burial site under
100 State law.]] Except under circumstances identified in Subsection 4, a
101 burial site and graves must remain where they are found.

102 4. The Planning Board may determine that it is necessary to allow the
103 relocation of a burial site if:

104 a. the retention of the burial site would result in denying the
105 property owner reasonable use of their property;

106 b. the location of necessary infrastructure cannot be achieved; or

107 c. the possible improvements to the visibility and accessibility of
108 the site by the relocation of graves make relocation appropriate.

109 5. Any Planning Board approval to allow the relocation of remains is
110 conditioned on the State Attorney's approval to allow the relocation
111 under State law.

112

* * *

113

Sec. 3. Effective Date. This amendment takes effect on July 1, 2018.

114

115 *Approved:*

116

117

118 _____
Isiah Leggett, County Executive

Date

119 *This is a correct copy of Council action.*

120

Linda M. Lauer, Clerk of the Council

Date