



## **A GRAVE ERROR**

The Ombudsman for Bermuda's Own Motion Investigation into the  
Demolition of Tombs  
in the Marsden Methodist Memorial Cemetery at Tucker's Point



*January 2014*



January 31, 2014

The Speaker, The House of Assembly  
The Hon. K. H. Randolph Horton, JP, MP  
Sessions House, 21 Parliament Street  
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present a Special Report of my Own Motion Investigation into the Demolition of the Tombs at the Marsden Methodist Memorial Cemetery in Tucker's Point.

This Report is submitted in accordance with sections 5(2)(b) and 24(2)(a) of the Ombudsman Act 2004.

5(2) Subject to this Act, the Ombudsman may investigate any administrative action taken by or on behalf of an authority

(b) on his own motion, notwithstanding that no complaint has been made to him, where he is satisfied that there are reasonable grounds to carry out an investigation in the public interest.

24(2)(a) Where any administrative action that is under investigation is in the opinion of the Ombudsman of public interest;... then the Ombudsman may prepare a special report on the investigation.

Yours sincerely,

Arlene Brock  
Ombudsman for Bermuda

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# A GRAVE ERROR

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### **Cover:**

*The cement top covers are distinguishable from the porous stone walls of the tombs in this photo of the cemetery taken in 2011.*

# A Grave Error

## The Ombudsman for Bermuda's Own Motion Investigation into the Demolition of Tombs at the Marsden Methodist Memorial Cemetery in Tucker's Point

### I. Introduction

On 10 February 2012 I tabled *Today's Choices: Tomorrow's Costs* ("Today's Choices"), a report into the process and scope of analysis for a 2011 Special Development Order ("SDO"). This report contained a number of recommendations for the then Ministry of the Environment, Planning and Infrastructure Strategy ("Ministry"). It is impossible to predict at the beginning of an investigation exactly what pertinent issues may arise and will warrant comment in the investigation report.

During our investigation we visited the Marsden Methodist Cemetery ("Cemetery") that is located just below the Rosewood Tucker's Point Golf Club ("Tucker's Point")<sup>1</sup> and practice tee (built pursuant to 1995 and 2000 SDOs). *Today's Choices* noted that "the golf course remains a source of considerable angst especially amongst some descendants of the owners from whom the lands were expropriated". Descendants of 1920 landowners who were removed from Tucker's Town as well as many others agree that the golf balls that rain daily onto the Cemetery from the practice tee above constitute desecration.<sup>2</sup>

As will be described later in this report, the Cemetery was the last relatively intact relic that evidences the communal life of a wholly unique population in Bermuda's 21 square miles and 400 year history. This population was removed from their lands in Tucker's Town pursuant to legislation in 1920 that granted development rights to the Bermuda Development Company to establish an exclusive tourism resort there. Today, the resort is known as Rosewood Tucker's Point.

In 2006, on its own initiative, the Forward Planning Unit of the Department of Planning ("Department") made the Cemetery a Historic Protection Area ("HPA") in the 2008 Bermuda Plan<sup>3</sup>. However, this

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<sup>1</sup> References to the owners of the resort are – depending on the time period – interchangeable: the Bermuda Development Company (of Furness Withy & Co. Ltd) who acquired the land in 1920; then Bermuda Properties Ltd. that purchased the land in 1958 – operating first as Castle Harbour, Marriott and now Tucker's Point.

<sup>2</sup> This is a very different order of desecration than that which occurred in the years before the practice tee was constructed when errant golf balls might find their way from the golf course through the thicket into the cemetery from regular golf games

<sup>3</sup> Comprised of Zoning Maps and the Planning Statement that sets out policies for all development for the ensuing decade.

designation is recorded only by a small coloured spot on the Bermuda Plan 2008 Zoning Maps. Although the Department's internal Historical Environment Issues Paper states: "Original Cemetery for the Tucker's Town residents that were forcibly relocated to make way for the Bermuda Development Company's real estate development in 1920", this is not a public document.

*Today's Choices* recommended that an "extra layer of protection" should be added for the Cemetery which was bordered by a wall, within which were nine tombstones:

*"I(e) List the graveyard as an Historic Building under s.30 of the Development and Planning Act (although already referenced under s.31 as an Historic Protection Area, a s.30 listing would add status and an extra layer of protection.)"*<sup>4</sup>

Under s.16 of the Ombudsman Act 2004, the Government must indicate: either (a) what they have done to implement my recommendations; (b) what they intend to do to implement; or (c) written reasons why they would not implement recommendations.

The Ministry responded on 30 April 2012 that it would implement this recommendation. The Ministry did not dispute the technical possibility or wording of the recommendation. Nothing was ever done over the next eight and a half months. The Ministry has not submitted any evidence to justify this delay. On the 15<sup>th</sup> and 16<sup>th</sup> of October 2012 the ancient tombstones were razed to the ground. This report seeks to understand why and how this was allowed to happen.

In January 2013 Marsden First United Church ("Marsden") – the institutional inheritor of the Cemetery – filed a planning application to landscape and erect a memorial and a net (as a barrier against the golf balls along the western length of the Cemetery). Citizens Uprooting Racism in Bermuda ("CURB") lodged a complaint with our office. CURB's complaint was that the Development Applications Board ("DAB") should consult with a broad range of stakeholders and not just the owners and Marsden as the Cemetery is a unique national treasure. It was CURB's complaint that brought to my attention the fact that the tombstones had been destroyed and that the Ministry and Department had failed to implement my recommendation. Therefore, I undertook – on my own motion under s. 5(2)(b) of the Ombudsman Act – to investigate the destruction.

Although the decision to remove the ancient tombstones was actually made by bodies that are not within my jurisdiction, the evidence is quite clear that they would not have destroyed the tombs had the

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<sup>4</sup> See Appendix A for sections 30 and 31 of the Development and Planning Act 1974 ("DPA").

Department started the process of consulting with them prior to mid-October in order to implement the recommendation. This report of what happened is particularly helpful in light of the misinformation that informed the decision. This report may also clarify some of the suspicions, misperceptions and even recrimination in the community regarding the motives and actions entailed in the demolition of the tombs.

## Some Definitions

### *Graves and Stones*

- Grave: underground where a body is buried
- Memorial: above-ground structures demarcating a grave
  - Headstone – an upright stone marker set at the head of a grave often inscribed with the names and dates of the person buried
  - Curbstone – outline of, or a circle of stones, bordering a grave
  - Pedestal Marker – plaque or stone marker flush to the ground
- Sarcophagi: coffin or tomb; usually made from stone; standing from the ground up, comprising the whole structure, not just the top / lid
- Tomb/stones (in this report): oblong walls above the surface marking the graves underneath.



*Examples of headstones and curbstones in the Garrison Cemetery, Devonshire, Bermuda*

### *Desecration*

- To damage, treat with disrespect or violate the sanctity of a holy place or object
- In addition to the removal, damage or destruction of human remains, common law in the US and UK deem the removal, vandalism and injury of burial grounds and tombstones to constitute desecration. In some US States, this is a crime.

Note: the graves underground at Tucker's Point were not disturbed by the activity of mid-October 2012. It is the tombstones above ground that were demolished.

## II. Maladministration: Was The Department Of Planning Negligent?

It cannot be forgotten that the recommendations in *Today's Choices* were intended to redress some of the deficiencies in the 2011 Tucker's Point SDO process that resulted from the Government's failure to require an Environmental Impact Assessment ("EIA") prior to approval of the SDO.<sup>5</sup> The EIA process includes recognition and public consultation on the built and human environments in addition to the natural environment. CURB made strenuous representations during the SDO objection period regarding the importance of the cemetery. Dr. Edward Harris, Bermuda's premier archeologist also questioned why the proposed SDO was silent about the Cemetery. Given these questions and an inevitable site visit, a comprehensive EIA process would have had to have taken the Cemetery into account.

As there was no EIA, it fell to my recommendation to raise the formal concern that the Cemetery merited a layer of protection in addition to HPA status. Had the Ministry and Department started to implement the recommendation between 1 May and 1 October 2012 (if only to schedule stakeholder consultation meetings) then it is quite likely (and was eventually conceded by the Ministry) that the removal of the tombs would have been prevented.

*Today's Choices* was circulated among the departments within the Ministry. Each was asked to address the specific recommendations that pertained to them in order to craft their statutory responses. The Permanent Secretary was of the view that, having submitted the statutory responses "Departments were simply expected to get on with the recommendations". However, he never directed anyone to do so, nor did he ever check on how relevant departments were getting on until a year later on 11 March 2013.<sup>6</sup>

I am informed that the civil service will "get on" with daily, usual tasks where it is well understood who must do what. However, for unusual or new tasks the typical ethos is to kick initiatives, decision-making

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<sup>5</sup> EIA is required by the 2001 UK Environmental Charter ("Charter") which was signed directly by the then Premier of Bermuda and sets out a legal obligation to undertake EIA before approval of major projects and development likely to have an adverse impact on the environment. This promise is a legal obligation under the jurisprudential doctrine of "Legitimate Expectation". The only Court that has reviewed the legal status of the Charter has judged that the Charter is a government policy. Accordingly, the public has a Legitimate Expectation that the government will follow its own policy. Further to two legal opinions and my own discussions with the relevant lawyer at the Foreign and Commonwealth Office, who had given our Government a "preliminary cursory view", I have set out mountains of evidence/ analysis that the Charter is legally binding on Bermuda. The Government disagrees but has never provided to me a shred of evidence for its opinion that the Charter does not set out legal obligations.

The UK Court of Appeal decided that it is improper for Ministries to disagree with Ombudsman's finding based only on opinion or whim – there must be a reasonable reason to dispute the finding. *R(Bradley and Others) v Secretary of State for Work and Pensions and Others* [2007] EWHC 242; [2008] EWCA Civ 36 [Therefore, without a reason to the contrary, my finding stands.]

<sup>6</sup> Five months after the destruction of the ancient stones, and a few days after my renewed inquiries.

and responsibility up the chain of command. With respect to my recommendation, a senior officer (“Officer”) asked the Director of the Department at least twice if the Permanent Secretary had authorized implementation of the recommendation. The response was “we told the Ombudsman we would do so”. The Officer did not believe that this was enough to proceed with the recommendation. He also did not believe that he could go above the Director’s head and ask the Permanent Secretary directly. Meanwhile the Director did not interpret the questions as requests to confirm authorization by the Permanent Secretary. Neither raised the issue again.

### **Department and Ministry Inaction**

“I have no evidence beyond a reasonable doubt that the failure of communication was intentional or just part of a civil service culture that resists taking action recommended in a report that is critical of them.<sup>7</sup> The standard of proof that guides Ombudsman conclusions is the civil standard, not the criminal standard. That is, is there a sufficient preponderance (51%) of evidence on which I may make reasonable inferences (note: this is also the standard for the United Nations Development Program Office of Audit and Investigations). Certainly, there is evidence that no one instructed the relevant officers to implement the recommendation. And certainly, no action was taken despite the Ministry’s undertaking to do so.

My past experience as well as concurrent evidence on a related matter are sufficient to alert me to the fact that the Department is not above: avoiding the principles by quibbling with peripheral technicalities; resisting my recommendations by focusing on what cannot be done rather than what can be done; and, giving me information that borders on being misleading.

For example: on a related matter of whether the studies that were set out in the Tucker’s Point SDO (in lieu of a comprehensive EIA) were adequate, an officer in the Department noted as late as 2013: ‘*We have not fully reviewed the studies to be able to say as yet if they are fully adequate to cover what we need to know about the proposed sites and range of possible impact and/or necessary mitigations.*’ Yet, the very next sentence says: “*I have indicated to Ms. Brock that any such receptor-focused studies can suffice to prove what we need demonstrated in terms of impacts and mitigations*”.

In the absence of proof beyond a reasonable doubt, I have good grounds to be skeptical of the Department’s enthusiasm to implement my recommendations based on the clear failure to take any steps to implement the recommendation to list the Cemetery and also on incontrovertible evidence that the Ministry was more keen to “get ahead of the Ombudsman” in the media than on taking accountability and redressing their inaction.

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<sup>7</sup> Fans of the UK comedy “Yes Minister” would recognize the dance around not giving or seeking instructions as one of the devices used to forestall any action at all. Unfortunately, this was not a laughing matter.

*[Not] Taking Accountability*

The Department's very first response to my initial inquiries about why the recommendation had not been implemented was that the Heritage Officer was off studying. After I pointed out that, in fact, an Acting Heritage Officer was in post even before *Today's Choices* was tabled, the Department admitted that my recommendation "slipped under the radar" as everyone was preoccupied with another project. In response to my question about why the expedited process under s.30 of the DPA was not deployed, the Department answered that there was no expectation of "imminent danger" that the tombs would be destroyed.

The Ministry and Department then contended that planning permission was not necessary to demolish the tombs. The definition in the Development and Planning Act 1974 ("DPA") of "development" (for which planning permission is required) includes "the carrying out of building, engineering or *other operations in, on, over or under any land...*" I asked if demolition of the graves constitutes "other operations". The Ministry responded that "it is unlikely that such action would have constituted development for which planning permission would have been required, as the development restrictions in Historic Preservation Areas relate specifically to altering a building and commencing or continuing a building operation". Naturally, that led to the question: what is a "building" – as the tombs definitely meet the definition of "any structure or erection of a permanent or semi-permanent nature" within the DPA's interpretation section that defines a "building".<sup>8</sup> The Ministry's response: "Under section 31, gravestones/headstones would not be defined as 'buildings' as the context is very specific to a building in the ordinary sense".<sup>9</sup> Actually, s.31 of the DPA does not say this at all.

Rather, s.31 provides that – "as far as is necessary" – in order to determine what it means to "alter a building or commence building operations", we may look to the 1950 Town of St. George (Protection of Buildings of Special Interest) Act (St. George Act).<sup>10</sup> That is, if there is a dispute about whether an action had the effect of altering a building, then the St. George Act is of assistance. However, in the case of the tombs, there can be no dispute that demolition altered them. It is therefore unnecessary to refer to

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<sup>8</sup> Several structures in the existing list of s.30 Listed Buildings are such structures (e.g. Dockyard Wall, Pender Road; Water tank at Dockyard gate; Cockburn Road Bridge, Sandys; Gateposts Park Gates; St. George's; Camber Road Boat Slip, Sandys).

<sup>9</sup> In any event, the time to have argued that the tombs do not constitute "buildings" and therefore cannot be listed under s.30 is not at this point when the Ministry and Department are being held accountable for their inaction. The appropriate time was in their 30 April 2012 statutory response to *Today's Choices*. Instead of filling in the "What Will Be Done to Implement the Recommendations" column, the Ministry should have answered in the column – "Reasons Why the Recommendations Will Not Be Implemented": the reason being that they did not believe that the tombs met the legal definition of "building". I therefore could have addressed their legal interpretation then.

<sup>10</sup> "Alter" includes removing "any external door, any window shutter, glass work, work of ornamentation or utility, or similar work fixture, feature or thing, being a part of or affixed to the building and in any degree affecting its external appearance".

the St. George Act. The confusion within the Department appears to arise from the fact that “building” is defined generally in the St. George Act as not including graves. That is because there are other legislation and policies that govern graves in the Town of St. George.

It is clear that s.31 of the DPA does not state that the St. George Act should be referred to for the purpose of defining a “building”; rather and only, “as far as it is necessary” for the purpose of determining what it means to alter a building or commence building operations. For the purpose of listing tombs (located outside the Town of St. George) under s.30, the tombs at Tucker’s Point certainly meet the DPA’s general definition of building: “any structure or erection of a permanent or semi-permanent nature”.

These hyper-legalistic contortions may strike some readers as attempts to cover backs, justify inaction and distance the Ministry and Department from accountability. There may well have been a genuine level of confusion as the interpretation of s.31 of the DPA was made by one person within the Department rather than with the benefit of considered legal opinion. However, I have obtained evidence that by denying that the tombs could be defined as “buildings”, the Ministry and Department hoped that my questions (implying their complicity in the destruction through inaction) would “fall away”.

The Department insists that Historic Protection Area status under s.31 of the DPA should have been a “red flag” for the decision makers to contact the Department prior to any alterations. Clearly, this “red flag” was inadequate as none of the decision makers did so. Thus the Department was caught equally as unaware as the public by the destruction, being informed only via the local press. Some Officers within the Department are of the view that “the actions appear to contravene both the Act and the Planning Statement as the historic character of this Cemetery has been altered”. The Director held a different view.

The 2011 failure to require an EIA that would have addressed the Cemetery has been compounded by the 2012 failure to begin implementation of the recommendation in a timely way. These failures ultimately resulted in the incomparable loss of a physical relic that encapsulated – in its stones – Bermuda’s entire cultural, social, political, economic and historical heritage.

As provided by the Ombudsman Act 2004, it is my duty to draw conclusions and to interpret the evidence on the civil standard of proof. Accordingly, I find evidence of maladministration by the Ministry and the Department in their negligence, poor internal communication, unreasonable delay and inexplicable failure to take any steps to implement my recommendation.

“The Ministry and Department insist that “Even if the recommendation had been implemented sooner, it would not have necessarily prevented those who actually destroyed the relics from doing so...persons sometimes undertake development without the necessary permissions.” Further, the Ministry and Department “do not agree that the Government has any liability at all for the destruction of the stones.”

There is no reason to disbelieve Marsden and Rosewood Tucker’s Point. Had they had any indication at all from the Department prior to mid-October that the Department was taking steps to list the Cemetery in accordance with an Ombudsman recommendation, they would not have proceeded with the demolition.



“When you go to visit the Cemetery, you feel something special.  
Most times you don’t go back, but, when you do, you have an uncanny feeling about it...  
It’s holy, it’s sacred.  
It’s a crime what’s been done.”<sup>11</sup>

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<sup>11</sup> This and other comments under photos throughout this report are from persons who are not members of CURB or TTHS.

### III. Good Intentions, Grave Error: *What Actually Happened?*

Notwithstanding such maladministration, it was neither the Ministry nor the Department who in fact actually authorized and executed the destruction of the tombstones.

The decision to remove the ancient tombstones was made by agreement of:

- Owners of the property – Bermuda Properties Ltd./Castle Harbour Ltd.; and Managers – Rosewood Hotels & Resorts
- Marsden First United Church
- Dr. Edward Harris, Director of the National Museum and Bermuda’s premier archeologist.

The decision was based on the mistaken assumption that the graves were “false”. This mistaken assumption was based in part on aerial photographs. Aerial photographs taken in 1962 did not reveal the Cemetery which was completely obscured by vegetation. However, aerial photographs from 1973 show partial clearance and some visible burials.<sup>12</sup> Aerial photographs of 2003 revealed a Cemetery comparatively free of overgrown vegetation with whitewashed sarcophagi.

#### *Descendants and cultural advocates - the Cemetery prior to destruction*

Aerial photographs are no substitute for eye witness evidence. In 1989 Mrs. Oda Mallory, the host of a popular radio show – ‘The Living Memories’ – was alerted to the existence of the Cemetery by a caller. Intrigued, she organized a visit accompanied by the late Bishop Chauncey Smith<sup>13</sup> and a videographer, escorted by two Castle Harbour employees (one of whom became aware of the tombs soon after being hired in 1963). Fortunately, Mrs. Mallory made an audio recording of the visit.<sup>14</sup>

The group can clearly be heard identifying and describing fifteen visible tombs. Nine were recognizable tombs and others were remnant stones. They were low to the ground, made in the old style of Bermuda graves. Only one or two had partial covers and all had tall bush and even trees growing out of them. The stones were old, grey Bermuda limestone. The visitors related stories about why the tops were missing and speculated that storms may have felled trees that, in turn, crushed several of the stone tomb walls.

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<sup>12</sup> According to the GPR Survey discussed below.

<sup>13</sup> The Bishop was able to point out where his own grandfather was buried in the north-west corner.

<sup>14</sup> Mrs. Mallory could not have known that 24 years later this tape would provide best evidence to authenticate other eye witness accounts of the state of the cemetery (we have heard from someone who found the cemetery through the thicket in the 1960s). Unfortunately, the videotape of the visit cannot be found. See Appendix B for extracts of the audio recording.

There was also a perimeter wall on the south and west sides of the Cemetery. The Castle Harbour employees noted that from time to time, the grass around the tombstones was mowed so that golfers could retrieve stray golf balls. However, they never interfered with the tombstones. The groundsman joked that “Aunt Dinna’s curse” would befall anyone who did not maintain the graveyard.<sup>15</sup> On Castle Harbour’s own map of the property, the area was marked as a “preserved open space” but not identified as a Cemetery. Mrs. Mallory suggested that the tombs should be covered and that the perimeter wall should be rebuilt with a “nice wrought iron gate”. The employees echoed their interest in repairing the Cemetery and adding an accurate plaque.

Two years later, the employees were responsible for rebuilding the Cemetery wall with a wrought iron gate. Critically, the vegetation growing out of the open tombs was cut. Concrete slabs were placed on top. Now retired, the groundsman is adamant that, in putting the concrete slabs on, he and the other workers *patched up* rather than *shaved off* in order to level the walls of the tombs. They were careful not to cut down or otherwise damage the existing limestone.

The evidence from this visit that the ancient limestone tombs existed and that the repairs done in 1991 were merely to cover them with cement tops is persuasive. I find this evidence to be far more logical than the notion that, sometime before the 1973 aerial photographs, Castle Harbour built “false sarcophagi” on a flat, barren golf course for no reason at all. Lamentably, the decision-makers deferred to the view developed by Dr. Harris (in casual conversations – unclear with whom) that the work done in 1991 constituted the erection of “false graves”. In a response to the media, he asserted: “The reconstructed graves were not in keeping with Bermuda traditional graves and such a reconstruction would not have taken place, if archeologist or heritage specialists had been consulted, as such reconstruction would not be considered the right thing to do, then or now.”

One person said it. Others repeated it. The Department adopted it. No one researched it. No one checked with long-term employees of Tucker’s Point or other descendants. No one questioned the logic: why would new construction utilize two materials – concrete for the tops and Bermuda limestone for the tomb walls? No one asked perhaps the most obvious question: was it a credible notion that an elite private tourist resort would suddenly build false tombs in the middle of its golf course – without reason, pressure, provocation or incentive?<sup>16</sup>

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<sup>15</sup> See history below.

<sup>16</sup> Dr. Harris’ seminal work on Bermuda’s historical forts has almost single-handedly elevated Bermuda’s status in the world of archeology. It is so very unfortunate that this notion of “false graves” was deferred to without research or further questions.

### *Tucker's Town Historical Society*

Sometime in 1991 before the repairs were carried out, Mr. Denny Richardson, a descendant of Tucker's Town residents and one of the eventual founders of the Tucker's Town Historical Society ("TTHS"), was informed by Bishop Smith exactly where to find the Cemetery. He had been looking for it for years but it was obscured by vegetation. He similarly describes fragmented Bermuda limestone tombs – without tops. He wrote a proposal to Tucker's Point that descendants be allowed to establish some rights of access and to clean up the site. He also conferred with Marsden, who in turn followed up with Tucker's Point.

The TTHS was founded in 1998. This group (as well as many Marsden congregants) can trace their ancestry not only back to Tucker's Town, but also directly to the 22 black signatories who had refused to sell in 1920 and petitioned the Legislature against the compulsory acquisition<sup>17</sup>. Although there is just a handful of active members, the TTHS can attract up to 60 supporters at public meetings. While the group does not have regular meetings and a strict structure<sup>18</sup> they have been well-known in Bermuda's heritage community for at least three decades as descendants and researchers of the history of Tucker's Town.

As part of "The Big Conversation" (a Government sponsored Bermuda Race Relations Initiative) members of the TTHS informed participants about the existence of the Cemetery and the history of the compulsory acquisition. The Cemetery became emblazoned in the public eye in March 2007 when "The Big Conversation" organized and filmed two busloads of a public visit to the Cemetery. Most unfortunately, Marsden was not invited to participate.

Although CURB pre-existed "The Big Conversation", the organization emerged with a larger informal, community mandate to promote remembrance and respect for Bermuda's heritage in addition to restorative justice in the arena of race. Since 2007 CURB has joined with the TTHS in advocating that the Cemetery be regarded as a national site.

### *Marsden First United Church*

For many descendants (whether congregants of Marsden or not) the Cemetery was a divisive relic seemingly abandoned in the closet of history. I have no doubt that Marsden is the institutional inheritor of

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<sup>17</sup> See history in section IV of this report. Two of the 24 petitioners were sympathetic whites who represented the Anglican Church, which held lands in Tucker's Town but had no chapel or congregation there. This petition is the best available contemporaneous documentary evidence of some of the landowners at the time.

<sup>18</sup> Its early charity status has lapsed as registration is required only for groups that raise funds from the public which it does not.

the 1920 Methodist Chapel at Tucker's Town. An AME Chapel also existed in Tucker's Town in 1920. However, it appears likely that documents and maps of that time naming the Cemetery as the "Methodist Cemetery" were intended to distinguish it from the AME denomination (that typically does not erect cemeteries) rather than to distinguish it from the Anglican Church (that owned land in Tucker's Town).

Between 1992 and 1996, negotiations between Castle Harbour and Marsden resulted in an unofficial and undocumented agreement that Marsden would be considered to be the "custodians" of the Cemetery. In November 1996, the Cemetery was re-dedicated by Marsden and named the Marsden Memorial Cemetery. The Church now holds commemorations there approximately every two years.

The failure of "The Big Conversation" to invite Marsden to participate in the visit to the Cemetery suggested an open challenge to Marsden's custodianship. Although the film did not directly name Marsden, some members felt that the film implied that Marsden had neglected the Cemetery for decades.<sup>19</sup> The 1920 land loss remains highly sensitive to this day. There appears to be hurt, confusion and possibly shame especially amongst the first and second generations after 1920. Marsden members who might have asserted custodianship much earlier consciously decided to respect their elders, many of whom simply did not (and still do not) want to hear or speak of the 1920 episode at all.<sup>20</sup>

Nevertheless, on 15 June 2007 Marsden met with the TTHS and CURB to discuss the daily desecration due to the golf balls and the need for ongoing upkeep. Mr. Richardson related his 1991 visit to the Cemetery. The TTHS contended that the Cemetery was of importance, not only for Marsden, but also for the many descendants throughout Bermuda. CURB emphasized the national significance of the Cemetery. In turn, Marsden asserted its custodianship of the Cemetery and expressed concern that the TTHS was quick to air issues in the media rather than speaking first and directly with Marsden. CURB questioned whether the Cemetery had ever been purchased by or conveyed to the Bermuda Development Company in 1920 and whether there was any record of the persons buried there. TTHS undertook to do this research. Marsden undertook to follow-up with Tucker's Point on how to deal with the golf balls.

TTHS and CURB left the meeting with the impression that Marsden had agreed to consult with TTHS on further decisions regarding the fate of the Cemetery. It is regrettable that such consultation did not take

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<sup>19</sup> The personal relationships of Marsden and Mr. Richardson who was previously a key member of Marsden has deteriorated. There are ongoing reciprocal accusations that each wishes to control decision-making about the cemetery.

<sup>20</sup> This was also a common coping mechanism throughout the Western Hemisphere amongst the generations after slavery. Their mantra was to forget the pain; "just move on".

place before Marsden entered into the agreement with Tucker's Point and Dr. Harris to remove the tombs in mid-October 2012. The TTHS is aggrieved that Marsden made the decision without the promised consultation. The strain and distrust in the relationship between these two descendant groups is reciprocal and remains palpable.

Marsden held an open community meeting after the fact on 29 October 2012 in order to get ideas on how to best memorialize the Cemetery. Dr. Harris made a powerpoint presentation. The TTHS have long expressed the view that the only solution is to redesign the golf course entirely to remove the practice tee above the Cemetery. Marsden favours erecting a net barrier. On 6 November 2012 Marsden met with three members of the TTHS, along with Dr. Harris, to discuss its application to the Department for protective netting, an extension of the wall to enclose the graves outside the current boundary, and a memorial monument. Marsden submitted the application on 24 January 2013.

Although the TTHS, Marsden and CURB ought to be natural allies in advocating for the sanctity of the Cemetery, the destruction of the tombs has opened a deeper rift of disrespect and recrimination. In particular, the view has been repeated that the very decision-makers who agreed to destroy the tombs cannot be considered model custodians with exclusive decision-making going forward.

#### *Owners and Managers of Tucker's Point*

The owners were fully aware not only that the tombs pre-existed the concrete slab tops but also that I had recommended additional "Listed Building" protection of the Cemetery under s.30 of the DPA. As part of the due process under s. 17 of the Ombudsman Act 2004 a director and an in-house lawyer read extracts relevant to Tucker's Point in the draft of *Today's Choices*. We also met for at least two hours.<sup>21</sup> They expressed absolutely no concerns about the recommendation to list the Cemetery. I am informed that this recommendation was presented to the Tucker's Point Board as acceptable.

Moreover, the owners were also fully aware that the Cemetery had been designated as an Historic Protection Area in the 2008 Bermuda Plan. Despite intense negotiations regarding other zoning issues (such as partial rezoning of the Golf Club land) Tucker's Point raised no objections to the zoning of the

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<sup>21</sup> Although the former director is retired, he was fully available to contact by the owners. He has an appreciation of the history and had "spent a great deal of time researching and trying to find the facts relating to what happened in 1920 and in the period since then". The lawyer no longer lives in Bermuda but as late as March 2013 was copied in emails with Tucker's Point regarding other planning applications.

Cemetery as an HPA. The Department was not alerted to Marsden's custodianship and therefore did not consult with the church during the zoning process.

When Rosewood assumed management of the Tucker's Point resort and golf club neither the owners nor the former managers conveyed this information in the handover. The new manager came on board in April 2012 but it was not until June 2012 that he learned of any concern about the Cemetery.<sup>22</sup> Rosewood was involved in the decision to remove the tombs given that their staff eventually did the actual excavation (and the work affected golf operations for two days). However, Rosewood deferred entirely to Marsden's decision-making.

One of the owners attended at least one meeting in June 2012 with Rosewood and Marsden. However, Rosewood and Marsden were not alerted to either the HPA status or my recommendation. It is fair to conclude that the Cemetery was never at the top of the priorities that the owners have been preoccupied with these past few years: the property is now in receivership.<sup>23</sup> In its management of resorts around the world, Rosewood is committed to the "sense of place" and has a reputation for sensitivity to the natural and human environments. In some ways, Rosewood was an innocent party to the demolition debacle.

### *The Archeologists*

Marsden's willingness to remove the tombstones was based primarily on recommendations made in a report titled "Marsden Memorial Methodist Church Cemetery Ground-Penetrating Radar Survey" ("GPR Survey") conducted in September 2011 by an archeologist from Wilfred Laurier University, Dr. John Triggs (who had done important voluntary work in Bermuda on other projects). Dr. Harris, project coordinator, had proposed the GPR Survey in order to "investigate the existing Cemetery for evidence of unmarked graves within the confines of the extant stone perimeter wall, and additionally to assess the area outside the stone walls for evidence of unmarked graves". Ironically, it was hoped that the results of the GPR Survey would be taken into consideration in order to mitigate the potential impact on the Cemetery from future construction or property maintenance. Rosewood Tucker's Point paid for the GPR Survey.

GPR is a non-invasive technology that can detect underground voids without disturbing the structures above ground. The GPR Survey did reveal a number of underground depressions and voids which suggest

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<sup>22</sup> As a courtesy, I had informed Rosewood headquarters in Texas about my investigation prior to tabling the report in February 2012. This was not conveyed to the managers on the ground who assumed management without reading *Today's Choices* (where they would have seen the recommendation).

<sup>23</sup> Ironically, the stated purpose of the 2011 SDO was to save the property financially.

the existence of probable graves within the confines of the Cemetery walls as well as two possible graves immediately on the outside of the north eastern perimeter wall. Golf course design activity prior to 1962 a bit further to the east of the Cemetery resulted in rubble and landfill which make it impossible for the GPR technology to determine if there are possible graves in that area.

The GPR Survey did not take the existing tombs within the Cemetery into account. Dr. Triggs reviewed the aerial photographs but did not examine the tombs themselves. There were no discussions of the fact that the concrete slab tops were distinguishable from the (albeit whitewashed) porous stones of the tomb walls. No one checked or otherwise tested the porous stone for age. No inquiries of historians or other stakeholders were made.<sup>24</sup> Instead, Dr. Triggs adopted the view (based on the aerial photographs and Dr. Harris' assertion) that the tombs were "false" and "new", possibly built in 1992.

The GPR Survey's mandate was limited to sub-surface anomalies, yet it fatally recommended that the above-surface "new sarcophagi" be removed. Dr. Triggs did add that "if the original grave features have been kept within they should be preserved, thus taking the Cemetery back in part to how it would have appeared prior to the 1920s abandonment".<sup>25</sup> The word "if" suggests that he genuinely did not realize that the walls of the tombs were the original features and that only the concrete slab tops were new.

Dr. Harris does not recall that in 2006, as part of the expert and public consultations for the 2008 Draft Bermuda Plan, the Department asked him to review the proposed list of Historic Protection Areas – that included the Tucker's Town Cemetery. Nor does he recall that protection of the Cemetery was mentioned during a visit he made with an official from the Department to Fort Bruere in Tucker's Town. Dr. Harris had strongly advocated that both the surviving underground magazine of this fort and a number of other fortification structures be given HPA status. Interestingly, even the locations of some of these forts were "conjectural" as there were no stones surviving above the surface.

In any event, early in 2011, like CURB, Dr. Harris had expressed his concern to the Department that the proposed 2011 Tucker's Point SDO "seems only to refer to the natural environment" and did not protect the Cemetery. It is quite surprising that neither Dr. Triggs thought of contacting the Department before making the recommendation to remove the tombs nor Dr. Harris thought of checking before implementing it. They had to have known, given their experience with other projects, that the Department

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<sup>24</sup> Curiously, although the GPR Survey report thanks the TTHS for their "discussions of the site...and abiding interest in the area", neither Dr. Triggs nor anyone in his team ever actually spoke with any of the members.

<sup>25</sup> The word "abandonment" reflects a gap in understanding of the true nature of the events in 1920.

is charged with ensuring that archeological assessments are done – even when a site is not an HPA or a Listed Building. I am informed that it is in the very nature of archeology to remove, even destroy, relics in order to study them. Unfortunately, this recommendation was not resisted by other voices.

The excavation of the tombs was overseen by Dr. Harris.<sup>26</sup> It happened that Dr. Triggs was in Bermuda in mid-October working on an entirely different project. Although Dr. Triggs had no prior discussions about the planned demolition, Dr. Harris invited him to observe and record anything if found. Dr. Triggs took no notes. He assumed that, during the year since the GPR Survey, there had been consultation leading to the decision to implement his recommendation to remove the “false sarcophagi”. Actually Marsden informed Tucker’s Point of their decision to remove the tombs (and to proceed with netting and landscaping) on 9 November 2011 just two months after the GPR Survey – a year before the demolition.

On 16 October, Dr. Harris emailed Tucker’s Point: “Thanks for meeting at the site yesterday. The men did a great job and I would like to suggest that the areas worked on be covered with soil and grass plugs as soon as possible, so that the Cemetery looks neat [sic] and tidy.” The stones were not retained. The TTHS became aware of the excavation and went to the site immediately before it could be tidied to take photographs and to publicize the incident.

The GPR Survey further recommended that the hibiscus hedge on the western side of the Cemetery be removed in order to preserve the area within the walls as a “dignified lawn”. This phrase – “dignified lawn” – set off a firestorm of umbrage and scorn, particularly from CURB and the TTHS. They ask: how could eradicating a significant, unique cultural and historical relic ever be considered dignified or respectful? CURB and others are concerned that non-Bermudians – without diligence, research, testing or consultation – would deign to recommend and (others) agree to the destruction of Bermuda’s heritage.<sup>27</sup>

While Dr. Triggs did not imagine that his recommendation could be viewed in this way, CURB has articulated what many – especially black Bermudians (who are neither descendents nor members of CURB) – have told me that they are feeling. The destruction of the tombs has struck a nerve and evokes the entire history and pain of slavery and the legacy of structural racism and white privilege in Bermuda.

Often, when issues of racial history and legacy are aired, people say – “get over it”.

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<sup>26</sup> He instructed which section of the perimeter wall had to be taken down so that the excavator machine could reach the tombs.

<sup>27</sup> Dr. Triggs takes issue with this and points to his voluntary work for other projects in Bermuda. He now says that he meant that only the lids be removed. However this is neither stated in the GPR Survey nor consistent with the recommendation of a dignified lawn. There is also no evidence of him objecting – during the excavation – that stones other than lids were being removed.

My considered view is – we cannot “get over it” until we go through it.



“This picture conjures up such emotions; they are still doing it to us”.

“How would they like it if someone went to St. *[various Churches were named]* and bulldozed their ancestors?”

“Come on – these are people’s families buried there”

“Dig up your own great-grandmother if you want to know how people lived in those days”.<sup>28</sup>

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<sup>28</sup> Some people believe that the sub-surface graves and remains were unearthed and interfered with. They definitely were not.

**A man without history is like a zebra without stripes.**

**-- West African Proverb**

#### **IV. Why Does This Cemetery Even Matter?**

At the turn of the 19<sup>th</sup> century, a small and independent free black community coexisted with a few whites still residing in Tucker's Town. They lived mainly by fishing and farming. The community was augmented by freed slaves after Emancipation in 1834 (by which time most of the white residents reportedly had moved to other parts of Bermuda although it appears that a few continued to own land there).

Methodism was first brought to Bermuda's shores in 1748 with the arrival of George Whitfield – whose express mission was to jettison the prejudices of the Anglican Church and to minister to blacks as well as whites.<sup>29</sup> Although a Methodist study class had existed in Tucker's Town since 1835, it was not until 1861 that the cornerstone was laid for the Methodist Chapel.

The African Methodist Episcopal Church in Bermuda<sup>30</sup> began with cottage home meetings in St. George's in 1866. In 1870 a minister from the British Methodist Episcopal Church ("BME") in Canada was invited to Bermuda by three prominent blacks who had become disenchanted with the growing adoption by the Methodist Church of the racism that existed throughout Bermuda. Legend has it that there was a division that resonates even today: between those who would venture into the bold new world of a black-led ministry versus those who were content with the white-led church.

The BME community was established in Tucker's Town in 1874. In 1877 a Mr. C.N. Gibbons donated land near Castle Harbour (the harbour) to erect the BME Chapel. This site was later abandoned in favour of property in the heart of Tucker's Town<sup>31</sup>. However, the chapel that was built there was destroyed by a

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<sup>29</sup> The first Methodist Society was not formed until after Joshua Marsden arrived in 1808. The following year the Methodist Society opened the first school for blacks on the island.

<sup>30</sup> The BME church evolved from the African Methodist Episcopal ("AME") Church in the US. Slaves in British territories were emancipated in 1834, three decades before the US Emancipation Proclamation. During that period, free blacks and escaped slaves in Canada were unable to safely attend AME conferences and events in the US. Accordingly, in 1856 the BME was carved out of the AME Church to enable escaped slaves to have a legal identity and administrative structure in Canada (in gratitude for the freedom they enjoyed in Canada they replaced the word 'African' with 'British' as Canada was still a British colony at the time). In May 1885 the BME re-amalgamated with the African Methodist Episcopal Church.

hurricane in 1880. A second chapel, erected on land purchased from B.D. Talbot in 1897,<sup>32</sup> stood until sale of the property to the Bermuda Development Company.

Despite the existence of two denominations in Tucker's Town, it is likely that members of the same nuclear and certainly extended families would have worshipped at one or the other, or even at both the Methodist and AME Chapels. As late as 1920, according to Mrs. Helen Wainwright<sup>33</sup> – the last surviving resident who was seven years old at the time of the compulsory acquisition – AME children used to go to Sunday School at the AME Chapel in the mornings and at the Methodist Chapel in the afternoons<sup>34</sup>.

It is equally likely that both Methodist and AME members were buried in the same Methodist Cemetery.

**Trading Places**, by D. McDowall, Bermuda [magazine], Summer 1996; *quotes in italics are from Today's Choices and 1920 Petitions to Legislature by developers or dissident residents.*

“By 1900, Tucker's Town was a tightly-knit, isolated community comprised of intertwined and extended families. A few whites remained, but it was fundamentally a black society. ..There were two churches, a school, a cricket pitch, a post office and a Cemetery on the knoll behind the church. Boats were still being built. Pigs were slaughtered, potatoes graded. Vegetables were despatched by cart to Hamilton for sale. The rhythms of life were woven through these activities. Children were given the rudiments of education.”

*By 1919, the Tucker's Town area was identified as the perfect mid-Atlantic site for elite visitors: “A stroll down Front Street might provide a glimpse of a vacationing university president, Woodrow Wilson, or literary celebrity, Mark Twain, or the author of the children's classic *The Secret Garden*, Frances Hodgson Burnett.”*

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<sup>31</sup> On 13 December 1920 Ebenezer Smith and George Basden had to petition the Governor to be empowered to sell this lot of land, measuring fifty by twenty-eight feet. The original trust deed was in the name of the BME and had to be amended to AME in order for the land to be sold. The petition explains that “a more commodious place of worship” was erected elsewhere in Tucker's Town.

<sup>32</sup> This land was conveyed in 1897 from B.D. Talbot and his wife to the Trustees of the AME Church, of which Mr. Talbot himself was one. The Bermuda National Archives have recently acquired these conveyance documents. B.D. Talbot was one of the largest and most prominent landowners in Tucker's Town. He also owned the local store. During the compulsory acquisition he demanded £25,000 for his 74 acres of property. The Bermuda Development Company first offered £6,500, and later £10,000 plus six acres of land and a house elsewhere. When Talbot refused, a jury was appointed. They awarded Talbot only £7,500.

<sup>33</sup> I interviewed Mrs. Wainwright on 6 September 2013. Her memory of the period of her life in and move from Tucker's Town is remarkably and charmingly robust. Her directions about specific locations – every curve and place name – is amazingly accurate.

<sup>34</sup> See Appendix C for extracts from our interview with Mrs. Wainwright.

*Furness Withy's application to the House of Assembly of February 17, 1920 requested the power to expropriate land which they claimed was "backward and undeveloped...of little economic value...very sparsely populated". The Bermuda Development Company Act (#1) 1920 granted the company the right to purchase the St. George's Hotel as well as 510 acres of land in Tucker's Town to develop a golf course, country club, hotels and cottages for tourism. The company's original goal was to re-sell 300 one acre plots for private ownership.]*

*About three-quarters of the residents had already agreed to sell, some only after a disputed and protracted arbitration process to determine the price. However, "On July 23, other, less accommodating Bermudian opinions began to be heard. A petition signed by 24 freeholders in the Tucker's Town area was presented to the Assembly [Parliament]. 22 of the 24 petitioners were all black. Together they owned 100 acres, and none of them wanted to leave...The petition jolted the colonial government into action".*

*The company characterized the petitioners who had refused to sell despite a "liberal" offer of cash or a replacement home elsewhere as indifferent... [who] failed to grasp the great advantages which will accrue to themselves and their neighbours by the intended development, and in some measure to the agitation of a few who for reasons of their own desire that the district shall remain in its present backward state.*

*The July 1920 petition to the Legislature by dissident residents contended: "they have established homes on these lands; and they follow vocations peculiar in some respects to the locality...Your Petitioners do not desire to part with or be deprived of their present homes and present vocations under any conditions whatever and they humbly beg to point out that no monetary compensation can adequately recompense them for the loss of their lands, houses, vocations and homes.*

*"The Bermuda Development Company Act #2 was introduced and pushed hurriedly through the House. This huge, detailed piece of legislation set out three procedures by which hold-out landowners could have their claims arbitrated. The act exuded a sense of British fair play steeped in common law precedent. Yet, for all its due procedure, the act left no doubt that expropriation was the unavoidable fate of the Tucker's Town die-hards."*

*"In the end, only one resident of Tucker's Town was actually physically evicted. Dinna Smith lived in a small house near Tucker's Town Bay. From the day she signed the original petition, she had never wanted to leave. Legend remembers her as short and pugnacious, so devoted to her home that if caught away from it she would risk torrents of rain and gale force winds to reach her own bed. Through the commission, she was awarded a new Sommersall Road home in Smiths. Still she refused to go. Finally, late in 1923, the police were called. Smith's possessions were removed and, when she once again refused to go, she was carried out. Her home was boarded up and old Tucker's Town ceased to exist. Dinna Smith remained embittered to her death".*

After World War I, Bermudian merchants were alarmed at the instability of steamship service much needed to import goods and export vegetables. They induced Furness Withy & Co. to provide reliable cargo service in exchange for rights to develop a mid-Atlantic tourist resort that would serve also to increase its passenger traffic. Furness Withy & Co. founded the Bermuda Development Company<sup>35</sup> that petitioned the Legislature on 27 February 1920 for approval to acquire 510 acres in Tucker's Town to build the resort. In response to resistance from some landowners in a petition dated 23 July 1920, the 26 August 1920 Bermuda Development Company Act (No. 2) set out a process for arbitration or compulsory acquisition if arbitration failed. Certain parcels of land were exempted: the AME Chapel, School House, Methodist Chapel, Methodist Cemetery, Cable House and War Department lands.<sup>36</sup>

By 1927 both the Methodist and the AME Chapels had completed the necessary legal work to convey their lands.<sup>37</sup> In 1923 the land on which the Methodist Chapel stood was exchanged for land at Harris' Bay on which the Bermuda Development Company built the new Methodist Church. There does not appear to have been a cash sale.<sup>38</sup> There is no evidence of a purchase or conveyance of the Cemetery. This would be consistent with the 1880 Methodist Church Act which prohibited the sale of "*any burial grounds or lands which shall have been used for burial purposes.*"<sup>39</sup>

The history of 1920 Tucker's Town is often characterized solely as a compulsory acquisition that was rejected by all of the residents. That is not the case. Some residents considered the offer by the Bermuda Development Company to be an opportunity to liquidate and to forge new lives. Some agreed to the first

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<sup>35</sup> Incorporated 5 July 1920, with an eight member board of directors, of whom three were Bermudians (two were members of the Legislature) and another was a long-term resident/businessman.

<sup>36</sup> The compulsory acquisition of such a large swathe of property for the benefit of private tourism development was unprecedented in Bermuda's history and has never happened since. A similar, unwelcomed expropriation did take place during World War II. Lands in St. David's were expropriated to build the Kindley airfield, now the L. F. Wade International Airport. However, it can be argued that that was for the benefit of a public project, not for a private company as was the case of the Bermuda Development Company.

<sup>37</sup> Before the AME Chapel could execute the sale, it had to sort out the Trustee Deed that originally held the land in the BME's name. The minutes of the 16 August 1928 AME Church Bermuda Annual Conference reveals that the sale of St. Philip's in Tucker's Town reaped £3,227. The sale was completed sometime between 1924 and 1926. The minutes from the 1925 Annual Conference are missing from the Archives.

<sup>38</sup> This was also the deal for the School House under the Tucker's Town School Act, 1923: the School House was built in 1883 "for use as a school room and a temperance hall and for the holding therein of meetings for such other educational and charitable purposes". The 1923 Act indicates that the Trustees "concluded an arrangement under which the Company has agreed to purchase a slot of land in the vicinity of the Devil's Hole Cross Road in Smiths parish and to erect upon the said lot a new school house". However, Mrs. Wainwright recalled that the new school was not ready by the time of the compulsory acquisition. Therefore children had to walk back to Tucker's Town for school from their new residences in Harris' Bay and Devil's Hole.

<sup>39</sup> The 1930 Methodist Church Act that established the Synod did provide for sale of cemetery land with permission of the congregation. However, by that time, there was no longer a congregation associated with the graveyard as the Methodist Chapel established a graveyard at its new location in Harris' Bay.

offers made. Others wanted or were resigned to sell, but not at the prices first offered. They went through the arbitration process. Others (holding a total of 100 acres) did not wish to sell at all. They suffered the compulsory acquisition and reputedly the least fair financial compensation.

There is still so much of this history that must be researched and told. It is neither widely known nor taught in Bermuda's schools. Disgracefully, key documents including the 1920 and 1921 Furness Withy & Co. files as well as the 1920 map attached to the August 1920 Bermuda Company Act (No.2) (delineating the size and coordinates of the exempted Chapels, School House and Cemetery) have all disappeared from the Archives.

As the last remaining physical relic<sup>40</sup> of this important history, the Cemetery carries significant emotional weight for the descendants (some of whom believe that the 1920 removal still impacts the fates of their families). There was actually opposition when Mrs. Mallory talked about the Cemetery on three radio programs in 1989. Today, I am aware of real trepidation that this episode will once again be aired in my report. However, the issue bears exposure. There can be no serious dispute that the Cemetery at Tucker's Town represents one of the most unique, rich and emotive narratives of national significance.<sup>41</sup>

As noted in *Today's Choices* (p.41) *"The graveyard does not simply prove that a community existed. Rather it is a testimony to a vibrant, well-organized community that met its own social, trading, economic and cultural needs"*.

This is significant because the Tucker's Town community provides evidence that refutes the notion that blacks in Bermuda over the centuries were passive and mere subjects of slavery and later white Bermudian administration and largesse. They were not monolithic. During the 1920 episode, they exercised full human agency with a diversity of responses to the changes thrust upon them.

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<sup>40</sup> B. D. Talbot's store and the Methodist Chapel buildings have long been renovated as private residences.

<sup>41</sup> CURB's effort to publicize the destruction of the tombs has received support, not only from individuals, but also from the Bermuda National Trust, BEST, Imagine Bermuda, the African Diaspora Heritage Trail, The Bermuda Historical Society, The Centre for Justice and overseas specialists in the arenas of race and restorative justice.

This is a story that goes far beyond a resort, a golf course, a church, and even a group of descendants.<sup>42</sup> This story goes to the heart of Bermuda's history and legacy of slavery. This is a story of neglect, expropriation, and disrespect. Moreover, this has also become a story of the evisceration of memory and culture – through lands taken, Archives emptied, memories lapsed and now, stones eradicated.



“Scars in the sand where grass refuses to prosper bear witness of tombstones removed.  
The distant sobs of Dinah Smith soon to be silenced and forgotten....”

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<sup>42</sup> The very notion about who can “own” heritage is seemingly fluid and often in the eye of the beholder. There are several long-standing international disputes about objects housed in European museums (e.g. the Egyptian bust of Cleopatra in the Berlin Museum and the Greek Parthenon Elgin Marbles in the British Museum). These Museums consider these objects to belong to them – indeed, the British Museum assert that the Marbles are an integral and essential part of the identity of the Museum itself.

## V. Principles and Examples of Practices regarding Historical Cemeteries

The obvious question then is – what next? How does Bermuda ensure that the history that this Cemetery represents continues to live, vibrate and educate? With respect to Marsden’s January 2013 application to erect a memorial, our cursory research has revealed a range of cultural preservation philosophies. Our research is certainly not exhaustive and was focused on law and practices regarding: a) cemeteries on private golf courses; and b) treatment of damaged historical cemeteries.

There is no one definitive approach. Generally – memorials are built usually when there are no known graves or the remains were cremated. When there are known graves, it is best practice to place or replace actual headstones or tombs. Exhumation or relocation of graves is acceptable only in exceedingly extreme cases with the consent of the descendants if possible. When private property is involved, such extreme action should be at the behest and for the benefit of descendants only (not for the benefit of land owners).

The law is not clear-cut. However, an 1825 UK case (recognized also by legal scholars in the US and Australia also) did establish that generally – descendants have priority decision-making rights regarding above ground structures (tombs, headstones, curbstones and other memorials) even over the rights of church and private owners of cemetery land. In the UK, most cemeteries are governed by ecclesiastical law with its own peculiarities. The US appears to have the most robust jurisprudence and there are extensive statutes in several states, largely about descendant rights of access (rather than about the care of historic cemeteries). There are impressive practical guidelines on preservation of historical cemeteries (even rules for private family burial plots) from Ireland and Australia.

The principles established by the Commonwealth War Graves Commission (“CWGC”) were developed over the past century to honour war dead but are applicable to any historical Cemetery.<sup>43</sup> The CWGC monitors over 20,000 field, church and hospital cemeteries around the world including 12 in Bermuda. The CWGC also directly owns and maintains 2,500 sites. CWGC principles are accepted by countries

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<sup>43</sup> Established by Royal Charter in 1917, the CWGC provides for graves and memorials and maintains records of the dead in World Wars I and II. The CWGC also provides advice to local and national governments throughout the world and receives support from diverse official and unofficial bodies including governments, diplomatic representatives, veteran’s organizations and private individuals. The CWGC employs over 1,000 employees around the world and commemorates some 1.7 million war dead.

throughout the world and its work is protected by a series of international agreements which recognize the CWGC as the leading authority responsible for the care of graves and memorials.<sup>44</sup>

The principles below are derived from and combine CWGC principles with information from leading scholars and Associations in the US and the UK. (Examples of practices are bulleted with principles underlined.)

### *1. Mark borders of historical cemeteries*

Known and potential historic cemeteries should be acknowledged, delineated and respected, even if the exact site location coordinates are not known. The CWGC ensures that constructed cemeteries all have perimeter walls.

- **Nonsuch Island, Bermuda** is a protected nature reserve. Between 1865 and 1910 it served as a yellow fever quarantine station and hospital. The cemetery in the centre of the island was established during that time. Since then the island has served as a marine research station, a home for delinquent boys (another painful and racialized story in Bermuda's history) and, presently, a living museum filled with Bermuda's native flora and fauna. Those interred on Nonsuch Island include members of the military, sailors, scientists and others. Many of the graves would have been marked with simple wooden crosses that have disintegrated over time. Nevertheless, cedar fencing was erected in 2000 to enclose the greatest concentration of the graves, despite many of them being no longer visible.
- After the yellow fever epidemic of 1853, the British garrison kept about half its soldiers encamped at **Ferry Point, Bermuda**. There are two cemeteries located in Ferry Point Park. The smaller one now stands simply as a small walled area with no visible memorials. (It is believed that the headstones were relocated to the Grenadier Lane Cemetery sometime after the 1950s.) The larger cemetery, Ferry Reach Military Cemetery, may have been established as a response to the high death rate of the 56<sup>th</sup> Regiment and the growing awareness that it is better to locate yellow fever cemeteries further away from human habitation. It has a large cross and two other memorials to commemorate soldiers from the 2<sup>nd</sup> Battalion 2<sup>nd</sup> Queens Royal Regiment who died during the yellow fever epidemic of 1864.

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<sup>44</sup> The CWGC advocates that cemeteries remain in place for perpetuity – no company or government authority can expropriate cemetery land. The CWGC assisted in this regard by helping the French Government to reconsider building a 3<sup>rd</sup> airport using expropriated cemetery land and similarly assisted the Government of Belgium to re-rout a multilane highway that was proposed to use cemetery land.

- At the private golf course of **Heritage Plantation Golf Club** in **Myrtle Beach, South Carolina**, local oral history claims that there is a slave cemetery on the golf course. The area is fully overgrown with vegetation over the decades. As slaves would not have been able to afford head or curbstones, the original physical markers were likely made out of wood and have long since decayed. The owners have fenced in the area that the graves are believed to be within. It is completely out of bounds to golfers and there is no maintenance. The cemetery is commemorated through a plaque that explains its historical significance and why there is an absence of grave markers. Despite being an historical landmark, there is no public access to the cemetery.
- The **Portmarnock Hotel and Golf Links** was built on the estate of a famous whiskey-making family in **Dublin, Ireland**. The Jameson family even built their own private golf course in 1858 – one of the oldest golf courses in Ireland. Despite being encircled by the golf course, the ownership of the Jameson cemetery was under dispute for many years. While the Hotel and Golf Links had indicated that they would maintain it, they did not possess the deeds of ownership for the cemetery and the local community was opposed to their caretaking. Instead the local Portmarnock Lion’s Club cared for the graveyard as the search for ownership unraveled. The hotel’s only involvement with the cemetery is to organize a right of way for family members wishing to visit. There is a sign notifying their patrons that the cemetery is private property, and that no golfers are allowed to trespass. The municipal council now takes care of the cemetery.
- The John P. Cook Cemetery, or Methodist Episcopal Church Cemetery as it is also known, rests in the middle of the **Rockaway River Country Club Golf Course** in **New Jersey** beside the 1<sup>st</sup> hole. Although the First Methodist Episcopal Church of Rockaway Valley /“Cook Church” relocated from the site in 1841, burials continued in the Cemetery up until 1907. There are no fences or walls gating the cemetery but it is marked as “out of bounds” with white stakes. There is regular mowing in and around the cemetery. Over 70 people are known to be buried there but only around twenty tombstones remain. Three trees were planted in memory of particular loved ones buried in the cemetery. These trees bore inscriptions of their dedications. Though they had grown so large that they were interfering with the layout of the golf course, the groundsmen refused to alter the trees. Unfortunately the trees were felled recently during Hurricane Sandy. Family descendants are free to arrange visits through the Country Club.

In the case of the Tucker's Point Cemetery, the GPR Survey itself recognized the principle of cemetery preservation and recommended that the Cemetery be restored to its "1920 character". It is just unfortunate that Dr. Triggs was misinformed and erroneously presumed that the 1920 character was a flat, barren ground without any surviving tombs. What do we know of the 1920 character of the Cemetery? Although the site plan attached to the Bermuda Development Company (No. 2) Act cannot be found in the records in the Archives of either the Colonial Secretary, Executive and Legislative Councils, or Furness Withy & Co., we actually do know the dimensions and coordinates of the perimeter wall of the Cemetery in 1922.

There is a 1922 site plan by Frank Olmsted, Jr. / Olmsted Associates who advised the Bermuda Development Company on the landscaping design.<sup>45</sup> Olmsted's professional and contemporaneous site plan is the best evidence for the size and coordinates of the Tucker's Town Cemetery at the time of the compulsory acquisition just two years earlier.

## ***2. Commemorate each known soul***

As long as there is a known grave or burial site, this should be acknowledged with a specific marker. This principle aims to respect the memory of the deceased by acknowledging them as individuals as much as could possibly be known and researched. Wherever there may be remains, then there should at least be headstones. If soil conditions cannot support the weight of the headstones, then pedestal markers flush with the ground level may be built.<sup>46</sup> One of the main products and functions of the CWGC is to manufacture standard, engraved headstones in consultation with relatives if possible. The fundamental principles that guide this task are:

- a) Each of the dead should be commemorated by name (if known) on the headstone or by an inscription on a memorial
  - b) The headstones and memorials should be permanent (preferably in stone)
  - c) The headstones should be uniform
  - d) There should be no distinction made on account of military or civil rank, race or creed.
- The graves in the Boer War Cemetery on **Long Island, Bermuda** have headstones, all of which were replaced in 1997. The old headstones had been damaged and worn down over the years. However, it is not certain that even these stones were the original ones from 1902.

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<sup>45</sup> Frank Olmsted, Sr. was the first and the most prolific and celebrated landscape architect in the US. He designed New York's Central Park, Mont Royal Park in Montreal, and the "Emerald Necklace" in Boston (half of that city's park land). His two sons who followed in his footsteps as Olmsted Associates designed Olmsted Point in Yosemite National Park.

<sup>46</sup> In at least one cemetery in Turkey, the soil conditions cannot support the weight of headstones so the CWGC erected pedestal markers (flush with the ground level) instead.

- The CWGC undertook to commemorate the burial site in a remote part of the **Scottish Highlands** where six airmen had crashed in 1941. The grave is so inaccessible that the only realistic way to reach the site is by helicopter, followed by a five mile trek. Originally, the CWGC planned an “alternative commemoration” in the nearest churchyard five miles away in the hamlet of Inchnadamp. However, the CWGC determined that, despite inherent transport challenges, it should preserve the integrity of the graves and therefore managed to place inscribed granite stone at the airmen’s remote resting place.
- In **Altavista, Virginia**, the location of a former slave cemetery was within one person of being lost forever. An elderly Pete Fauntleroy, the last person born at Avoca Plantation, relayed the exact location of a slave cemetery only five years before he died. There had been rumours of a burial ground for slaves of the Avoca Plantation but until that point nothing had been confirmed. What ensued was a massive undertaking to clear and protect the final resting place of the 28 known slaves buried there. The graves were marked with smoothed-over stones found at the site instead of headstones. After struggling to gain access to the cemetery for eight years, due to excessive jungle-like overgrowth and a sale of the property to a new owner, the town managed to secure the land by agreeing to a property exchange with the owner. An access road was laid and signs were posted to direct visitors from the Avoca Museum to the cemetery.
- The Pioneer Cemetery at Crosswater is located just east of the 11th fairway at **Crosswater Golf Club** in **Oregon**. Several early residents of Pioneer Deschutes County are buried there and there is a large sign detailing the historical information about the site. Some of the individual graves are fenced in, in addition to fencing around the entire cemetery. The grasses in the cemetery do not grow very tall and therefore are never mowed. Due to the fragility of the tombstones, Crosswater does not do any landscaping within the fence. While the cemetery is not open to members of the public, family members and guests of the deceased are welcome to visit at a prearranged time. They are yet to find a golf ball in the cemetery.
- The golf course at **Adare Manor Golf Club** in **Limerick, Ireland** wraps around a cemetery containing approximately 300 graves. All the tombs are visible and bear inscriptions on the headstones. A stone wall of approximately 1.2m in height surrounds the graveyard. It is an historic preservation site which includes the ruins of a 15<sup>th</sup> century Franciscan abbey. Golf balls do stray occasionally into the graveyard and are collected. While the cemetery is maintained by

the Golf Club, there is public access at all times. The oldest burial headstone is dated 1860. The Golf Club will soon put details of all headstones on the web access to the gravesite data.

With respect to the Cemetery at Tucker's Town, we know from Mrs. Mallory's audiotape that, as of 1989, there were 15 graves visible – eight or nine actual tombs as high as one foot as well as stones and depressions indicating another seven or eight graves. While there is no record of exactly who and how many people may be buried at the Tucker's Town Cemetery (especially given the Bermudian practice of burying generations on top of one another), we can thank the visitors of 1989 for counting. Accordingly, if the recommended community consultation determines that the principle of acknowledging each known soul should be honoured (and it is unclear what persuasive argument there could be for not doing so) we can say with confidence that there should be at least 15 tombs, headstones or other markers.

### *3. Replace and restore cultural cemeteries*

The CWGC often places headstones, approximately 2 feet apart if possible when soldiers are known to have been buried in an area but the exact location of each individual's remains might not be known. Where there are tombs, it is not at all in contravention of normal preservation practice to repair or reconstruct them.

- The Jennings were a prominent family in Bermuda in the 17<sup>th</sup> century. The small and ancient **Jennings Land Burial Ground, Bermuda** overlooking the North Shore near Flatts is the final resting place for two of the family members. The stone graves are unmarked. When the Bermuda Monuments Trust carried out a restoration of the site in 1955, they cleared the land, restored the graves and erected a rustic fence. Although there is no way of knowing how true the grave restorations are to the original monuments, they stand as a relic of the days when burials took place on family land.
- When Hurricane Fabian dislodged some trees on **Watford Island, Bermuda** in 2003, a forgotten convict cemetery was rediscovered. The skeletons of five convicts were briefly analysed to prove that they were historic (rather than recent deaths), as is required by the police. They were then reinterred in a walled military cemetery, built after the hurricane. A commemorative tablet was also erected. It is believed that over 400 unmarked convict graves are still on Watford Island.
- At **Quarry Oaks Golf Course in Nebraska** lies the graves of four pioneer children. When the golf course was being built, the architect designed the course around the graves. He positioned a tee box nearby so that golfers could stop and remember the children. He also erected a black

wrought iron gate around the graves. Although the original tombstones were stolen a few years after the graves were discovered, they were replaced later with other old stones.

- The CWGC had assisted in building a cemetery in the early 1920s just outside of **Berlin** in which World War I prisoners of war from India were buried. The cemetery was designed to represent “those of all faiths and none”. A perimeter cemetery wall and headstones denoting the number of persons buried were constructed. From the 1950s to the 1990s, the CWGC had no access to the cemetery which was in Soviet East Berlin. The cemetery had been used as a training ground for Soviet tanks and the headstones and perimeter wall were demolished. After the Berlin Wall came down, the CWGC was given permission to reconstruct the entire cemetery – with newly installed rows of headstones and reconstruction of a wall of remembrance (dedicated in May 2005 through the work of a joint committee of the CWGC and the countries of France and Germany).
- In February 2012, two World War I cemeteries in **Benghazi, Libya** were vandalized. Notwithstanding environmental and security challenges, the CWGC was able to obtain the agreement of local authorities to access the cemeteries. In March 2013, they began to replace the headstones and grave pedestal markers.

#### *4. Memorialize when impossible to commemorate known burials*

Memorials (other than headstones) are erected usually only when there are no known graves or when the remains were cremated.

- There are some 40 war dead from World War I buried in five different sites in **Belize**. It is not possible to maintain these sites and over the years the jungle has taken over. Some of the dead were buried in a cemetery and there are headstones still there to commemorate them. However, the CWGC decided in the 1920s to build a memorial that would commemorate all of Belize’s 40 war dead in one place approximately 3 – 5 kilometers away from the cemetery. In 2012 the Belize Tourism Board began refurbishment of this “Memorial Park” without informing the CWGC or obtaining its permission to interfere with the CWGC memorial (which the Government should have done according to a 1970 agreement between the Government and the CWGC). The original memorial was demolished but the plaque was saved. This original plaque has now been installed into a new ceramic tile wall. The new memorial will be monitored by the CWGC as are the headstones in the cemetery.

### 5. *Exhumation or relocation*

There are very few instances in the UK, Canada and elsewhere where remains buried in historical graveyards may be exhumed and re-interred elsewhere. This is done only in extreme cases where it is necessary in order to protect the remains or it is impossible to access and/or to maintain the burial site. This course of action is to be avoided at all possible costs – and only if all other attempts to maintain the burial site (such as fencing) have failed. While not unknown, removal of graves is not considered to be historically authentic or best conservation practice.

- One of the most well-known examples of re-interment was in 2003 in **New York City**. In Lower Manhattan the initial excavation in 1991 for the construction of the Ted Weiss Federal Building led to the discovery of a portion of a former slave cemetery. The entire 18<sup>th</sup> century cemetery is believed to hold as many as 20,000 bodies. City maps as early as the late 18<sup>th</sup> century showed that portions of the cemetery had been paved over. However the remains had been well preserved by nearly 20 feet of landfill which was deposited on the site in the early 19<sup>th</sup> century. At first, the developers excavated 419 remains. They planned to continue construction in an area destined for an underground parking garage after exhuming more than 200 other bodies that were estimated to be there. However, due to a massive public outcry the developers decided not to touch the 200 bodies. This decision required them to redraw their architectural plans. Twelve years after the graves were excavated, the 419 remains were finally reinterred in crypts. This is now called the African Burial Ground National Memorial <sup>47</sup>

With respect to the Tucker’s Town Cemetery, any scientific or archeological curiosity there may be in excavating the graves in order to exhume remains and conduct DNA studies cannot be the sole determinative voice of what happens to the Cemetery. The decision-making rights of descendants must take priority. The input of heritage preservation voices and other stakeholders must also be taken into account.

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<sup>47</sup> Dr. Michael Blakey at Howard University led a team of scientists who examined more than 1.5 million artifacts from the site. One set of the remains was that of a man whose coffin bore a symbol from a Ghanaian ethnic group. The symbol, called sankofa,, means roughly “going back to the past in order to build for the future”. It became the slogan of the project.

## VI. Recommendations

There is a continuum of options that Bermuda could choose for the Tucker's Town Cemetery – from full restoration of the tombs to the 1920s condition (as far as can be determined) to leaving the site in the current state of a barren “lawn”. There is no doubt that the latter course would not achieve the stated goal in the GPR Survey of putting the Cemetery as close as possible to its 1920 condition. Erasing our history simply cannot be an acceptable option. I recommend:

- 1) A final decision by the DAB regarding Marsden's January 2013 application to the Department for
  - a. an expansion of the Cemetery's perimeter wall to coincide with the GPR Survey
  - b. erection of a net to avoid the golf balls raining down from the practice tee
  - c. erection of a monument

should be delayed until such time as a robust community consultation is held on how best to memorialize the Cemetery.

- 2) However, the DAB should approve a temporary net or other barrier to be erected as quickly as humanly possible to address the immediate issue of the golf balls raining down from the practice tee above. The Historic Buildings Advisory Committee that advises the DAB has requested proof of the efficacy of a net to resolve the problem.<sup>48</sup>
- 3) For the long term, however, the temporary net may need to be removed and replaced with a different permanent solution that would: protect the Cemetery; be less obtrusive; and, be more attractive. Other suggestions regarding the type of barrier that should be built to stop the golf balls may evolve from the community consultation.<sup>49</sup>
- 4) The TTHS advocates that the practice tee be removed in order to arrest the daily desecration by golf balls. However, given the prohibitive expense of redesigning the golf course to remove the practice tee at this time when the property is in receivership, I cannot endorse this idea. Also, golf courses of the stature of Tucker's Point would lose income if they do not

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<sup>48</sup> The neighbouring Mid-Ocean Golf Club has erected such a (albeit unsightly) net and would no doubt give Tucker's Point the benefit of its experience and engineering. (In 1951, Bermudian investors established the Mid-Ocean Golf Club by purchasing 180 acres of the golf club, course and beaches owned by the Bermuda Development Company.)

<sup>49</sup> CURB has suggested a flowering trellis or arbour (similar to the walkway in Queen Elizabeth / Par-la-Ville Park)

provide a practice tee for golfers to warm up before golf games. Apparently, this practice tee is ideally located next to both the clubhouse and the first tee but unfortunately located above the Cemetery. However, it is not unknown for golf courses to be redesigned. If at some future time successor owners decide to do any extensive redesign, consideration should be given to the more reverent approaches to cemeteries that are exemplified above (Heritage Plantation, Portmarnock Hotel, Rockaway River, Crosswater, Adare Manor, and Quarry Oaks).

- 5) The perimeter wall should be built according to the site dimensions and coordinates in the 1922 Olmsted map and incorporating the two possible graves identified in the GPR Survey.
- 6) I recommend that the nine tombs be reconstructed. The principles of memorializing each soul and restoring the graves would be most applicable in this case. The tombs existed from sometime prior to 1920 until just a year ago. We have sufficient photographic and video evidence of their original location and coordinates.

Given all we have learned, my personal preference would be that: not only should the entire site be recreated based on the information gleaned from photographs, videos and the GPR Survey, but also that the story of the Cemetery be depicted in permanent bronze engraved plaques along the length of the exterior of the perimeter wall. This is an opportunity for the whole story to be told: one plaque each with a statement about: (a) the relatively autonomous late-1800s community; (b) the 1920 compulsory acquisition; (c) the 2012 demolition; and hopefully (d) the 2020 reconciliation. However, this is not my decision to make. My personal preference of how to reconstruct the Cemetery may not become the final decision.

- 7) This decision would be achieved best through a series of facilitated community conversations. Interested and specialist stakeholders include Tucker's Point, Marsden, TTHS, CURB, the Government's Department of Community and Cultural Affairs, the National Trust, the National Museum, the Bermuda Heritage Museum, the Bermuda Historical Museum, the Archives, the National Library, the Bermuda College History Department, and Imagine Bermuda as well as other descendants and the broader community. [I recommend that the facilitator team be Dr. Janet Ferguson and Mr. Glenn Fubler.]
- 8) The decision-makers who agreed to the demolition of the ancient stones, as well as the Government whose inaction enabled the decision to be made, should all equally contribute

- (25%) to the cost of reconstructing the tombs, headstones (where there were no tombs) and perimeter wall.<sup>50</sup> The Ministry vigorously rejects any legal liability. The liability arises, not from a legal cause of action but, from the maladministration of unreasonable delay and failure to implement the recommendation.
- 9) The Owners of the property bear some responsibility for the destruction due to their failure to inform the Managers about the Historic Protection Area status. They / Receivers and/or Successor owners should bear the cost of ongoing upkeep.
- 10) As it was the Government which, in the first instance, failed to: consider the Cemetery in the 1995 and 2000 SDOs; require a comprehensive EIA for the 2011 SDO; and implement the Ombudsman's 2012 recommendation, the Government<sup>51</sup> should be responsible for expediting a negotiation with the Receivers of Tucker's Point<sup>52</sup> to ensure that
- a. subsequent owners and managers of the golf course carry out the above recommendations (including a provision for payment for rebuilding) as well as other reasonable redress and responsibilities arising from the community consultation<sup>53</sup>
  - b. a protocol for periodic public access, including the construction of a discreet footpath
  - c. an undertaking that any future significant or extensive redesign of the golf course include consideration of repositioning the practice tee.
- 11) Generally the Ministry and Department should
- a. review and revise existing policies, guidelines and international best practices for archeological protections, excavation and works with a view to ensuring preservation of heritage throughout Bermuda
  - b. require pre-consultation with the Department prior to undertaking works on any site with possible national heritage importance and impose sanctions for failure to consult
  - c. publish, by listing on its website, the Department's internal list of Historic Protection Areas and the 2006 Historic Protection Issues Paper

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<sup>50</sup> The government can also contribute the cost of labour through the use of employees in the Ministry of Public Works.

<sup>51</sup> Recommendation 11: The Government will have to determine whether it is the Cabinet Office or Ministries of Environment or Finance or Tourism that leads this negotiation. In any event, this must be done with all deliberate speed.

<sup>52</sup> The Board of Castle Harbour Ltd no longer has any management control or responsibilities at Tucker's Point following the appointment of Receivers.

<sup>53</sup> Support can be found in US Court judgments where successor owners are bound to maintain cemeteries and to observe descendant rights of access.

- d. strengthen enforcement provisions and streamline processes for unauthorized operations. During this investigation, the Permanent Secretary noted: “even in cases where planning permission is required, people still go ahead and do what they want. But our enforcement provisions are laborious and not always effective.”

12) Descendants and indeed all of Bermuda should use this Cemetery as an axis around which we can work toward a measure of racial reconciliation throughout the Island. The year 2020 will mark the 100<sup>th</sup> anniversary of the compulsory acquisition. This is just seven years from now. Yet, if we do the work together, this could become an opportunity to explore, analyse, reconcile and celebrate as an entire community. Seven years may well be just the right amount of time to establish a vision and conclude a number of projects in addition to restoration of the Cemetery itself.

- a. This is an opportunity for everyone who has expressed interest and concern in the Cemetery to put their money where their mouths are - everyone can participate in raising funds together as a community to pay for written, engraved or digital remembrances. Although the decision-makers should pay for reconstruction of the tombs and the perimeter wall, memorialization (in the form of brass plaques or whatever is decided by the community consultation) should be contributed to by all interested stakeholders.
- b. In addition, the various descendants’ families could contribute their oral history and family memories to a publication. There is no need for all of the histories to agree. They are what they are – and we should be able to hear each other’s stories without judgment or rebuttal.
- c. There are likely to be many other achievable cultural, research, electronic and educational projects<sup>54</sup> that will arise from the community consultation, including materials to teach this history in the schools.

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<sup>54</sup> For example, Dr. Harris suggests plotting the land ownership based on research of conveyance documents.

## VII. Parting Thoughts

Throughout the world, no matter how different cultures and traditions may be, there is at the very least one fundamental impulse shared by the entire human family – we all seek to commemorate our ancestors and their remains in sacred ways. In a highly informative article, “Grave Matters: The Ancient Rights of the Graveyard”, University of North Carolina law professor Alfred Brophy<sup>55</sup> notes:

“The reverence we pay to ancestors is rarely deeper than in cemeteries... cemeteries have great power to remind us of the contributions that have been made; they are often the sites of celebration, even if sober, of the past and of our debts to the people buried in them.”

Of particular relevance, poignancy and parallel to Bermuda’s Tucker’s Town story, Brophy adds (with respect to slave cemeteries):

“The ancient right of the Cemetery has some magical power hidden within it to rebalance the power of landowners and those whose ancestors are buried on that land... And so one may soon see the descendants of people enslaved on southern plantations returning to those plantations to visit the graves of their ancestors and to talk about the meaning of the graves for remembering the role of slavery in our past. Cemetery visits offer something more, though. This is a metaphor for the reuniting of black and white in our common past. The master and the slave were bound together, and while once there was an obscene disparity of power between them, the relationship bound both of them tightly and together. In a sense, they could not exist without the other; the right to visit burial grounds is a tangible manifestation of the fact that the white and black communities are inseparable; we are tied together by our common past, our common humanity, our common nationality, and our common future. The exercise of the ancient right of the graveyard also offers the hope of recalling that common mission and of rebalancing the rights of slaves’ descendants and plantation owners’ descendants. And it offers the descendants of slaves a piece of property (an easement for access), however small, that their ancestors left for them.”

The grave experts with whom I spoke during the course of this investigation all concurred that there is a philosophical tradition in many parts of the world of memorializing the dead with stones. In the Judeo-Christian tradition, this may well derive from the Biblical scripture found in Joshua, Chapter 4, Vs 4-7:

<sup>4</sup> Then Joshua called the twelve men whom he had appointed from the children of Israel, one man from every tribe; <sup>5</sup> and Joshua said to them: “Cross over before the ark of the LORD your God into the midst of the Jordan, and each one of you take up a stone on his shoulder, according to the number of the tribes of the children of Israel, <sup>6</sup> that this may be a sign among you when your children ask in time to come, saying, ‘What do these stones *mean* to you?’ <sup>7</sup> Then you shall answer them that the waters of the Jordan were cut off before the ark of the covenant of the LORD; when it crossed over the Jordan, the waters of the Jordan were cut off. And these stones shall be for a memorial to the children of Israel forever.”

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<sup>55</sup> University of Alabama Public Law Research Paper, August 2005. (Summary: Appendix D; full article: [www.ombudsman.bm](http://www.ombudsman.bm).)

There is a belief, with roots in the Jewish Talmud, that souls continue to dwell for a while in the graves in which they are placed. Jewish grave monuments were traditionally mounds of stones. Visitors added stones to "the mound" to show we are never finished building the monument to the deceased and to tell the visitors that followed that others had also visited the grave. Symbolically, stone suggests the continuing presence of love and memory which are as strong and enduring as a rock.

The Cemetery within the Tucker's Point golf course must be understood to be a national heritage site with resonance even beyond its stones. It is more than a mere physical space. It is emblematic of a communal history known, dismissed and forgotten. It is a mirror for us to acknowledge the past as well as its living and institutional legacies. It is an opportunity for us all to rally around, remember and reconcile.

We cannot get over it until we go through it. If we in Bermuda are willing to open our minds and hearts, perhaps this episode gives us an opportunity to symbolize and effect our own Truth and Reconciliation – acknowledge accountability for what was done, then move forward. We need not be stuck in shame and recrimination. We cannot achieve reconciliation until we each – genuinely commit to throwing away blame, outrage, ego and hubris.

Persons of good will are capable of working together and taking the high road over the next seven years until 2020 (the 100<sup>th</sup> anniversary of the compulsory acquisition) to work together to create fitting tributes not only to bring dignity to the ancestors but also to bring unity to the living.

Now is the time for forgiveness, compassion, and mutual respect. Now is the time to honour and remember the brave and unique community of Tucker's Town and to appreciate and embrace their, and our, tumultuous history.

Now is the time for grace.

# **APPENDICES**

## APPENDIX A

### *DEVELOPMENT AND PLANNING ACT 1974*

#### *S. 30 Listed Buildings*

Buildings (or other structures) are listed in order to preserve their architectural or historic interest. The process of listing can happen in three ways:

- S.30(3): **an ordinary process** in which owners and occupiers are informed of an intention to list the building and are given at least 30 days to make representations and objections
- S.30(4): **an expedited process** in which Minister provisionally designates that a structure be listed and then the s.30(3) process of consultation with owners and occupiers must take place within 90 days. (Although not dictated by the DPA or Bermuda Plan, the Department typically consults with other stakeholders through the Historic Building Advisory Committee.) Past practice has been to use this expedited process only when there is an imminent threat of destruction of the structure. However, the statute itself does not actually limit this fast-tracking procedure to imminent threats

The third way by which buildings may be listed combines powers under sections 30 and 31.

- S.31(4): when a planning/development application is made within a HPA, the Development Applications Board (“DAB”) may determine “after consulting any body of persons appearing to have a special interest in preserving the heritage of Bermuda” that the building is of such historic, architectural or cultural importance that no future alterations ought to be made. If so, the building shall be deemed – automatically, without the s.30(3) or 30(4) consultation processes – to be a listed building. As with all DAB decisions, this is subject to an appeal to the Minister.

#### *S. 31 Historic Areas*

According to this section of the DPA, no person shall alter a building or commence/continue building operations in a Historic Protection Area (HPA) without obtaining planning permission.

- HPA zoning is supposed to act as a red-flag to the Board when they are reviewing development applications. The Board may refuse to grant planning permission if the development would cause detriment to: the established historic, architectural or cultural character of the area; or the aspect, appearance or view of the area.
- HPAs are shown on the Zoning Maps as a layer over either a Development Base Zone or a Conservation Base Zone.

HPA and listed building status are complimentary and not mutually exclusive. HPAs last for ten years while listed buildings are reviewed more regularly and can be amended by the Minister without public consultation.

## ***BERMUDA PLAN 2008***

Chapter 21: *Historical Environment Sites of Archeological Significance* (HSC.12(1)) of the Bermuda Plan sets out a careful process that requires that the Development Applications Board should make a determination of archeological significance before any development (construction or other operations) takes place:

The [Development Applications] Board may require the undertaking of a Preliminary Archaeological Assessment for any proposal impacting a Historic Protection Area or listed building or *any other site* that is deemed to have archaeological significance. (*emphasis added*)

If, at the conclusion of the Preliminary Archeological Assessment, the Board determines either that the area or building has no substantial archaeological significance or that the proposal will not have a substantial adverse impact on any archaeological resource, then no further review is required.

However, if the Board determines that there is archaeological significance then “the applicant shall be required to submit an Archaeological Management Plan detailing the archaeological works to be carried out in accordance with the Department of Planning’s Sites of Archaeological Significance Guidance Notes. The Archeological Management Plan should be prepared by a qualified archaeologist or historian in accordance with professionally recognized standards for cultural resource management and in consultation with the Department of Planning.

For the record, the 2008 Bermuda Plan defines “listed buildings” as “buildings, structures or groups of buildings” and sets out four grades of architectural or historical value. Of particular relevance:

Listed buildings may be classed as Grade “HM” or Historic Monument, Grade 1, Grade 2 or Grade 3.

Grade HM or refers to buildings, structures, or groups of buildings not originally intended for residential, commercial or administrative purposes but built as defensive structures, monuments, outbuildings or other ancillary structures, some of which may have become significant ruins... Their aesthetic value may be modest but their historic significance and structural interest make them of vital historic importance, and they are integral to both the Island’s history and to its cultural tourism.

## APPENDIX B

*Extract from audiotape of 1989 Visit to Tucker's Town Cemetery, with Oda Mallory (OM), aka Blondell, host of The Living Memories; Bishop Chauncey Smith (Bishop); a videographer; and two former Castle Harbour employees (Employee 1 & Employee 2).*

Employee 1: And there's probably about, I think there's 15 graves, we can count them exactly.

OM: Yes there are, 15, 15...

Employee 1: Now, back prior to '84, I really came in to the golf side maybe for a week. When the hotel was closed we had some time to do a few little things that you wouldn't usually do, quietly. And one of the things we did is we came down here and just put a machine through here, and cleaned out, it was all overgrown. Trees were grown up... So we cut it back. And you know the tornado that came through and the hurricane that came through? So we really chopped everything back. We keep it like this. We have no reason to but...

OM: Yes, Castle Harbour are the people who do keep it...

Employee 1: We keep it like this because, it's hallowed ground and I think that it should be kept like that.

OM: Well, what it looks like to me, is, that these were the old fashioned tombs. They're above ground, right? And they had tops on them?

Bishop: They all had tops on them.....but you see that one...

OM: But from the hurricane...

Bishop: You see that one down there?

OM: Yes.

Bishop: I believe that that would have been the height. This seems to have been built up at least one quart, to me. Seems to have been...Perhaps this would have been the height!

Employee 1: I don't know much about, old graves. Hmm the golf balls...

Bishop: Now when grandpa was buried...

OM: Your grandpa was buried to the north

Bishop: Pardon?

OM: Your grandpa was buried to the north of the graveyard, around the corner here.

Bishop: He would have to be in this area here.

OM: I see. Now what was your grandpa's name?

Bishop: We used to call him Grandpa Tommy... And I'm almost sure that the Bermuda Development Company built these walls around here...

OM: Oh did they?

Bishop: Because we had no walls to show our outward boundary there.

OM: I see...So, what it appears to me is that over the years, hurricanes, mini storms, tornadoes have in fact blown the tops of the tombs in. That's what it looks like to me. Do you understand?

Bishop: That could be...

OM: For instance, you have a big tree, if a big tree falls down on top of the tombs then it would break the top in...

OM: It's one of two things the way I see it. It's either they completely take them away or, make them look like...

Employee 1: I don't think so, hallowed ground is hallowed ground. Probably what should happen here is they should be kept as they are. I think they should be kept as they are. Uh, whether you go and put tops

on them or not, I don't know. But as I was saying, the property situation here is a little bit complex, I don't know an awful lot about it, from the time that the Furness Withy people took over the development. But somewhere in those agreements, I don't know I've never seen one, I've seen a lot of paper but I've never seen any agreements but our position as far as the golf course is concerned is that we would keep these... Yeah and they love that. And we're getting short of these kinds of places in Bermuda. And I think we should keep it like this. And whether or not it's brought back – and I don't think anyone would object to the graves being brought back to their original state – but I don't know what it means at this point. I don't know... As I was saying before, some of our people who have been here a long time claim that during the war this area was a camping ground. It's uh sheltered on all sides, so people had tents down here....

OM: I see...

Employee 1: People lived down here, and they probably had a few drinks and they came down here and a grave was cracked already or something, so they decided to poke around with it. You know how people get.

OM: Yes.

Employee 1: And we're left with this. But I see no reason why it can't be properly, and brought back to the best of its ability...

OM: Right...

Employee 1: If my mother and father were buried down here, or my grandfather was down here, I'd probably be down here tomorrow putting a roof on it, you know?

OM: Exactly, that's the way I feel about it.

Bishop: I will be 80 in November and as far back as I can remember it was here.

Employee 1: So it's at least 80 years old.

OM: Well, because I don't know this but I'll ask you this, and if you can't answer, you can't-- on your map is there, are the graveyards designated? Is it shown on any...

Employee 1: It's not designated as a graveyard.

OM: It's not...

Employee 1: No, it's...

OM: Show it as a graveyard...

Employee 1: This particular area that you're in now, this whole bit out here, is designated as a preserved open space...

Employee 1: But I, think things like this should be removed. Who does it I don't know. I would think the Church could make some representation to the owners of the property. There should be some kind of agreement where the Church takes on certain responsibilities and we do our bit. Certainly as long as I'm here, we'll keep it like this. I mean, this is not pristine, but there are a lot of graveyards in a lot worse state than this in Bermuda.

OM: Hey...that's right...

Employee 1: The Royal Naval Graveyards, up there, they don't keep them as well as they should.

OM: Yeah...But, but, the tops are on. The tops are on the graves up there. You know to have, I think, to have an open grave...

Employee 1: Mhm

OM: To me borders on being somewhat sacrilegious.

Employee 1: No one seems to know when the tops came off these graves.

OM: No.

Employee 1: I've never found anybody yet who can tell me when the tops were on and when they weren't on...

Employee 1: But I get the impression from the boys that are older around here and who have been working around here for a long time, that there was some, certainly was somebody messed with the graves back in the '40s...

OM: But you can tell me about it...

Employee 2: Well [X] used to tell me about it. He always used to say to me, if you don't keep that graveyard clean, then Aunt Dinna is going to put a curse, you know, or a curse is going to come to pass, for Bermuda Properties...

Employee 2: So what they said was, if you don't keep it clean, anything bad that befalls Bermuda Properties today will be your fault.

[Laughter]

Employee 2: I've taken it literally all these years. Can't sleep some nights...

OM: That's right, so you make sure and keep it tidy...

Employee 2: See that's what I was telling you, you see my guys say to me that during the war, you know when the troops were stationed in the hotel right, you know? They tell me, and you know this is second hand right, they tell me, they say that some of the service men exhumed the graves. I don't know what for, or why they would do it. Maybe it was pranks, maybe it was anything, I don't know. This is what they tell me...

OM: Mhm...

Employee 2: I suppose it's a possibility...because some of them are low down. If you take the ones over there for example... You with me? So we don't touch them, we just, kinda...

Employee 1: Go around them...

Employee 2: We just keep the stones about them and kept them reasonably clean. That was all that was done to them...

Employee 2: Well there's always been a hedge here as long as I've been here, 26 years.

OM: Really? Oh I see.

Employee 2: There's always been a hedge and all we've done is just...

OM: Trimmed...

Employee 2: Trimmed back, yeah.

OM: But one other thing too: don't you think they could have put a nice gate across here?

Employee 2: That's true yeah...

OM: A nice wrought iron, a nice wrought gate, with a little sign saying, whatever it is...

Employee 2: I must confess that we had plans to put something, because you've got a lot of people passing here, a lot of golf balls in here...

Employee 2: I mean it's not unique in a golf course you take some jollies it's the same thing... But there is this small piece down here. And about two or three years ago I was supposed to put a plaque up...I didn't want to put a plaque up if I didn't know what I was talking about.

OM: Yes that's true...

Employee 2: And I didn't want to put a plaque up if it wasn't accurate... So therefore, what I tried to do, I tried to research it. I went to see a couple of old, an old lady down in Devil's Hole, right because everything is by word of the mouth...

Employee 1: Oh there's another grave there...

OM: I think this is, yes see, see there's a whole line. See that line along there?

## APPENDIX C

*Excerpts from our 6 September 2013 interview with Helen Wainwright. At 99 years old, she is the last living descendent of Tucker's Town from 1920.*

HW: My mom brought me up in church. Mornings went to AME church, Sunday school was first thing on Sundays. Come out of that church, come home get a sandwich and go to the Methodist church in the afternoon. We started going to Methodist church got our family went to Sunday school in Methodist church. Had to stay until Sunday school was out then go to church.

...

HW: Sunday evening mostly my Mom would go to church again at Methodist. We enjoyed it. But the girls coming up with me didn't care about it.

...

HW: Practically all the kids was in and out the church. The Methodist children didn't associate with the AME Sunday School.

...

HW: My step father raised goats and we children looked after them...He would kill them and have them for our meals.

Omb: Did he sell them?

HW: No, my granny was the salesman, my granny would have pigs would kill them, salt them and sell them.

Omb: Where did your Granny sell them? In St. Georges?

HW: No, people would come to her house. My Grandma was the farmer, she loved to farm and she had we children cutting the potatoes and seeding to plant them.

...

Omb: What did you do for fun? Did you go on picnics?

HW: We went to Sunday school. We go out to the cricket matches. They had cricket down in Tucker's Town. My aunt Irene was a great cricketer. She was a good cricketer. Her and her sisters.

Omb: Did men and women play on same team?

HW: No, the girls would have their team. The girls would play Warwick and Somerset people.

...

Omb: Do you remember the gravesite?

HW: All I knew, I could imagine where my father was buried. It was like a little rise on the earth...

Omb: It was near the Methodist church wasn't it?

HW: No, it wasn't that far, three houses were on the south side.

...

HW: Well, as far as the Methodists members, I don't think they would want anything to do with the AME's. I don't think they would because I knew one member was never wanted their members, their children to go to any of their Sunday schools. The Methodist children never, not that I know of, went to the AME Sunday school.

...

Omb: So when you were 7, they said oh we are going to move and then you moved to Knapton Hill

HW: My mom got boxes and started packing up the silverware and pots and pans. That's all I knew. My mum said we had to move, but I never asked why.

Omb: After you moved did people talk about it?

HW: I hear very little but I would hear people say that we shouldn't have to move, you know. We were getting along very nicely and my Uncle Denton had a lot of palms and a vegetable garden. He had quite a lot of people working for him.

Omb: Anything else that's a good memory for you from those days? Do you recall if your parents were sad?

HW: No, I never heard, maybe my Aunt Julia was. But in the end we just packed and left.

HW: Let me tell you. Natural Arch, I was so shocked that I went after that terrible hurricane, I found the arch was gone and I said "my that was a natural arch". I was so hurt! But I said if the people hadn't been so mean and wouldn't let the blacks go swimming, that's why the Lord took it.

Omb: So that was someone upstairs saying you can't have it either.

HW: [laughing] .....Yes, that's right.

...

HW: Well I'm going to tell you, there was a lot of talk but I didn't know too much about. There was a lady everyone called her Aunt Dinna and she didn't want to move but they tell me, I didn't know it, they told me she had to move regardless. She had a vat of bread in the oven and they wouldn't even give her time for it to finish baking in the oven.

...

HW: It used to be rainy, so rainy, and cold. Our house wasn't far from the water.

...

HW: My teacher, her name was Marjorie Trott, she was the head teacher and her sister taught me. Oh my, I tell you, this head would get licks upon it!

Omb: They used to hit you for using your left hand...

HW: That's what she used to beat me for!

...

Omb: How many hours a day did you go to school?

HW: We had to make 9:00 to 12:00 for lunch then 3:00 go home.

Omb: Did you have lunch at school?

HW: I had to go Knapton Hill to Tucker's Town. We had to wait for the school to open. It wasn't built when we had to move.

Omb: When you were twelve/thirteen were you still in school?

HW: Yes, I think I was going to Devils Hole.

Omb: So you continued to go to Tucker's Town for a short time then to Devils Hole School?

...

HW: I always thought to myself I knew I would live to see the day when those people stole the land from us they would have to show some of us where we should have had it back. I went in Tucker's Town about four years ago, I had told a friend of mine my Uncle had the store down there. But I said I didn't remember if the shop was still there because we didn't have nothing to do with that. The building is there but I don't remember if the shop was still there. Cause when we moved out we didn't have nothing to go down there for but when we got out of there... 4 or 5 houses were still there...

Omb: Your uncle had 4 or 5 houses?

HW: Let me get it right, hold on...3, he had 3 houses and the shop was up and down because he lived upstairs.

...

HW: I really wish I could go there one more time. When I went to Tuckers Town and saw the rocks round the sea shore had been blasted out and houses put there I said to my do you think uncle would have done that? He had property right down to the water. The Tuckers Town people caused my Uncle to worry and he died, I thought it was terribly mean because he lost his big house.

...

HW: I remember where the grave was, I remember going to my daddy's funeral. Oh yes I do. When I saw him, cause my mom didn't tell me it was him, when I saw him I asked why didn't you tell me it was my daddy?

Omb: And your daddy was buried at that graveyard?

HW: Yes and I think I pretty well remember where it was because they tell me that I went and they told me to take hold of the wreath...

Omb: Was your daddy's grave inside the wall?

HW: Yes

Omb: So it was on the East side?

[HW: pointed out on the photograph of the Cemetery exactly where her daddy's grave was]

Omb: Did they have long burial services?

HW: I don't remember, I don't think they were very long.

Omb: Was it in the summer time or winter time when your daddy died?

HW: I think it was summer...

...

HW: I loved Tuckers Town because the breeze down there felt so good. Fresh, it was nice down there. We kids used to have fun.

## APPENDIX D

### Summary of “Grave Matters: The Ancient Rights of the Graveyard” by Alfred L. Brophy University of Alabama Public Law Research Paper, August 2005

- Ancient right of access to graveyards even on private property
  - Special protection in law:
    - (1) Implied easement across surrounding land to access the graveyard,
    - (2) Restriction on the desecration of graves,
    - (3) Right to bury relatives on the property, and
    - (4) Restrictions on the right of the owner of the graveyard to sell or mortgage the property or use it in ways inconsistent with Cemetery purposes.
- (1) The **Right of Access** defined by statute in some states and by case law in others.
- Where there is a lack of explicit reservation of an easement to access cemeteries on a private parcel of land, the courts employ several fictions:
    - (a) That the owners of the Cemetery impliedly granted an easement to the family members by virtue of permitting the burial, and
    - (b) That if the original landowner sells, there is an implied reservation of the easement by the Cemetery’s first owner in favor of the family members of the person buried in the Cemetery.
  - In cases where the Cemetery is landlocked, there could be a right of access even over property that was never owned by the same person as the Cemetery.
    - E.g. Missouri Statutes 214.132 (1997) “*Any person who wishes to visit an abandoned family Cemetery or private burying ground which is completely surrounded by privately owned land, for which no public ingress or egress is available, shall have the right to reasonable ingress or egress for the purpose of visiting such Cemetery. The right of access to such cemeteries extends only to visitation during reasonable hours and only for purposes usually associated with Cemetery visits.*”
    - However there are no case laws testing the limits of Missouri’s statute.
    - Virginia Code Ann. 57.27.1 (1993) gives family members and descendants, Cemetery plot owners and genealogical researchers a right of access across property where graves are located to visit and maintain the graves. The rights are limited to reasonable visitation and maintenance. Motorized vehicles are not permitted, unless roads are already established.
    - West Virginia’s code mirrors Virginia’s and also recognizes a right of access by friends (Code 37-13A-1 (2000)).
    - North Carolina provides that descendents of a deceased buried in a Cemetery, as well as other people with a “special interest”, may petition the superior court for an order to allow visitation and maintenance of the Cemetery. It also allows access across other parcels of land.
    - Vermont and Texas have similar statutes.
    - Florida F.S.A. 704.08 provides that, “*The relatives and descendants of any person buried in a Cemetery shall have an easement for ingress and egress for the purpose of visiting the Cemetery at reasonable times and in reasonable manner. The owner of the land may designate the easement.*”
    - Indiana’s statute grants the most limited rights of access to Cemetery land: one day each year (I.C. 6-1.1-6.8-15 (2001)).
    - Arkansas provides for the conversion of private cemeteries into public ones. The conversion allows for the court to appoint public or non-profit bodies to care for public cemeteries.
    - Arizona prohibits the sale of property that would leave a Cemetery landlocked.

- Oklahoma has one statute that provides for the establishment of streets and other ways of access to cemeteries; and another that provides a right of access by relatives to abandoned cemeteries on private land.
- Many states without statutes have case laws (e.g. Alabama, Kentucky, Missouri and Pennsylvania).
- The Texas Court of Appeals case *Davis v. May*, 2003, granted Marsha May the right to visit the graves of her great-grandfather and a few other relatives which were on land that was sold without any provision for access to the graves. May was granted one four hour visit every month.
  - The ruling adopted the broad language of the 1911 Tennessee Supreme Court opinion in *Hives v. State* that subsequent purchasers of the Cemetery make it subject to the implied easement for access and further burial: *“The graves are there to be seen, and the purchaser is charged with notice of the fact that the particular lot has been dedicated to burial purposes, and of the rights of descendants and relatives of those there buried.”*
- A 1995 case from Kentucky, *Commonwealth of Kentucky, Department of Fish & Wildlife Resources v. Garner*, found that the family members of those buried in a small plot on the state property should be given keys to the gates so that they could have access whenever they like.
- Key Steps to determine the right of access:
  - (a) Determination that the landowner initially consented to the burial on her land, what some courts refer to as “dedication”. A headstone seems to be sufficient, and less may be sufficient as long as there is some acknowledgement that people were openly buried in the Cemetery.
  - (b) Determination that the Cemetery is not abandoned and that there is still some connection between the people buried and those seeking access. If the Cemetery is abandoned and not being maintained, it is likely that the courts will allow access by family members so that people who are most interested can conduct care and maintenance. Such rights are explicitly contemplated by the Florida legislation.
  - (c) No case articulates a requirement that those seeking access actually knew the people they are visiting, but it is possible that people who are no longer able to trace a specific connection may have no right greater than that of other members of the public.

(2) **Right Against Desecration** are closely allied to the right of access to an ancestor’s grave. If the owner of the land were to destroy the Cemetery, there would be little left to visit.

- Many states make desecration a crime, such as the removal of human remains or disturbing the grave itself or the monuments around it.
  - C.R.S.A. 18-9-113, defines desecration as *“defacing, damaging, polluting or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover his action or its result”*.
  - Typically courts allow suit by family members of the people buried when cemeteries are disturbed through leveling or disruption of graves, removal or destruction of monuments, such as headstones, and removal of gates or other markers. Landowners who unilaterally remove headstones or bodies are liable to have punitive damage awards levied against them.

(3) The **Right to Further Burial** can be implied where a family purchases a series of plots in a Cemetery. Some courts have also implied a right to further burial in a private Cemetery once the Cemetery owner has consented to some burials.

(4) **Restrictions of the Sale of Cemeteries** that are public. In 1859, the Pennsylvania Supreme Court found that “*Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed*”.

- It is not the rights of the dead versus the rights of the living, but rather the rights of the living to have a place of memorial for the dead and the rights of other living people to use the land in a more productive fashion (according to their perception).
- On the other hand, public authorities, such as the municipal government, have the authority to relocate the dead for projects in the public interest. For instance, graves have been reinterred elsewhere for the purpose of converting a Cemetery into a street (New York Supreme Court) or into a railroad (Pennsylvania Supreme Court).
- There are more conflicts with respect to private landowners who wish to relocate cemeteries off of their property. If a Cemetery loses its hallowed character, it is more liable to be moved. When the location of a Cemetery is lost, the relatives of people buried there lose their special rights to protect the Cemetery. They have no more rights than the general public, which means they have no rights (see *Clarke v. Keating*, 170 N.Y.S. 187 finding that burial rights granted by a will in 1794 had been extinguished because the Cemetery had been run-down and around 1907 the bodies in the Cemetery had been moved to another Cemetery).

## APPENDIX E

### Questions of “Ownership”

#### *Could Tucker’s Town Cemetery be sold?*

The issue of ownership of cemeteries is not as straightforward as one might think. In 1923 the Methodist Chapel exchanged its building and land with the Bermuda Development Company “for other premises in Smiths parish on which the Company will erect a new Church”. There is no evidence that the Methodist Chapel sold or otherwise conveyed the old Cemetery in Tucker’s Town to the Bermuda Development Company. Neither Castle Harbour nor its successor company holds title to the Cemetery land.

This would be consistent with the 1880 Methodist Church Act that prohibited the sale, mortgage, conveyance of “any burial grounds or lands which shall have been used for burial purposes”. A few years after the sale of the Chapel land, the 1930 Methodist Church Act (that established the Methodist Synod, amongst other measures) provided for sale of a burial ground only with the consent of the majority of the congregation. The Tucker’s Town Cemetery no longer had an active congregation or further burials. There is no evidence that the congregation of the new Methodist Church asserted any rights to sell the Cemetery under the new law.

#### *Squatter’s rights?*

The question has been raised about whether the Bermuda Development Company eventually gained ownership of the Cemetery due to the fact that the Cemetery has been surrounded by private property for almost 100 years. Our cursory review of and discussions with Cemetery law experts is that normal common law legal ownership of land as a consequence of “adverse possession” (squatter’s rights) for over 22 years does not apply to known cemeteries. In the words of a 1911 US Court judgment that established rights of access by descendants to slave Cemetery established around 1851:

*Nor is the right barred by the statute of limitations, so long as the lot is kept enclosed, or, if unenclosed, so long as the monuments and gravestones marking the graves are to be found there, or other attention is given to the graves, so long as to show and perpetuate the sacred object and purposes to which the land has been devoted. No possession of the living is required in such cases, and there can be no actual ouster or adverse possession, to put in operation the statute of limitations, so long as the dead are there buried, their grave are marked, and any acts are done tending to preserve their memory and mark their last resting place.*<sup>56</sup>

#### *Land or Stones?*

In 1825 a UK Court made a precedent setting distinction between ownership of land and ownership of memorials. That is, while a church or private owner may own the land on which a Cemetery is situated, the rights (access and decisions) to the stones – whether headstones or curbstones – may actually be owned by the descendants.<sup>57</sup> The law in the UK is complicated by the fact that most cemeteries there are associated with church lands which are governed by ecclesiastical law rather than common law.

#### *Ownership versus Other Rights?*

Some courts in the US have also determined that physical ownership of cemeteries – even those landlocked within private property – does not extinguish certain rights held by family, descendants (and even in some cases friends of the deceased). In some cases, rights of access have even extended to

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<sup>56</sup> Hines v. State, 149 S.W. 1058, 1060 (Tenn. 1911) from Brophy: Grave Matters

<sup>57</sup> Spooner v Bewster (1825) 28 Rev Rep 613 ((1825) C. P 3 Bing 131).

genealogical researchers and other persons with a “special interest” in a Cemetery. It is not necessary to establish that descendants actually knew the persons buried.

Gravesite rights (whether by common law or statute; express or implied) generally include

- Access (reasonable times and path across private property when Cemetery is landlocked)
- Right to further burial (in restricted cases on private property)
- Restrictions on desecration of memorials, tombs, walls (in many places a crime; often also liable to civil punitive damages)
- Restrictions on sale of cemeteries

Such rights must of course be balanced with the rights of private property ownership – but Courts appear to have gone a fair distance to imply the right of reasonable access in particular. (See Appendix D for summary of “Grave Matters: The Ancient Rights of the Graveyard” by Professor Alfred Brophy.)

### *Legal Limbo*

In Bermuda the Methodist Church went through a divisive public and legal dispute about whether certain church lands belong to the Synod or to local church Trustees, in the event of a church leaving the Synod. Although Marsden First United is no longer a part of the local Synod, my understanding is that there is no intent, value in or appetite by anyone to legally dispute Marsden’s claim to the 1920 Methodist Chapel. Nevertheless, it must be noted that any legalistic approach to determining ownership (that several witnesses have raised) would be fraught with entirely unproductive and adversarial complications. In my opinion, there can be no doubt that Marsden First United Church is the natural inheritor of the Methodist Cemetery in Tucker’s Town.

However as a site of unique national significance, and also given the fact that descendants are not limited to the Marsden congregation, it is my considered opinion that inheritance does not connote exclusive decision rights regarding the 1920 Methodist Cemetery.

## APPENDIX F

### Tucker's Town Historical Timeline<sup>58</sup>

- **1616** – Bermuda Company instructed Governor Daniel Tucker to establish a settlement on the rocky spit along Castle Harbour. Tucker laid out streets, established a garrison, and encouraged settlers to support themselves through farming, whaling, pearl fishing and beachcombing for ambergris.
- **1660** – Some parts of the Anglican Holy Trinity “Hamilton Parish” Church were built. It is considered the oldest existing church in Bermuda
- **1740** – Battery placed at Tucker’s Town. It becomes part of heavily defended Castle Harbour
- **1799** – John Stephenson, an Irish Methodist Missionary, arrived in Bermuda to preach to blacks. He is arrested and imprisoned for 6 months between Dec 1800-June 1801 and left Bermuda in April 1802. The Wesleyan Methodist Church erected plaque in his honour in 1936
- **1808** – May 3: Joshua Marsden arrived in Bermuda from Halifax. He dedicated the first Methodist Chapel, Zion Chapel, in 1810. Marsden left Bermuda in April 1812
- **1830** – Marsden congregation took roots when John Crofts arrived in Bermuda. Within five years, the Tucker’s Town Methodist Society was formed with an accompanying Sunday school
- **1834** – August 1: Emancipation Day
- **1861** – Cornerstone laid for Methodist Tucker’s Town Chapel by Mr. Henry Hallet (contractor and builder). Added to Bailey’s Bay Methodist Circuit in 1869
- **1866** – St. John’s has early beginnings in cottage homes, such as the home of Benjamin Burchall of Park Gate, St. George (the gateposts may be a “Listed Building”)
- **1869** – August: Benjamin Burchall, William Jennings and Charles Rattery communicated with Bishop Willis Nazrey of the British Methodist Episcopal Church of Canada (“BME”) and invited him to come to Bermuda
- **1970** – Bishop Willis Nazrey arrived in Bermuda and returned in 1872 with Rev. R. R. Morris, the island’s first BME minister
- **1872** – St. John’s AME Church in Bailey’s Bay became the first established BME Church on the island. The 1<sup>st</sup> Annual Convention of the BME Church was held at St. John’s
- **1877** – C. N. Gibbons gave land near Castle Harbour to erect a BME Church. This site was abandoned in favour of another purchased from J. Talbot in the heart of Tucker’s Town
- **1877** – May: C. N. Gibbons was appointed to the Tucker’s Town Circuit (which included St. David’s Island and Harrington Sound). The number of members at the Tucker’s Town Church was 20 adults, 12 followers and 2 children
- **1880** – A big storm destroyed the BME Church. A “more commodious place of worship” was subsequently erected elsewhere in Tucker’s Town
- **1880** – December 13: The Wesleyan Methodist Church Act is enacted, which prohibits the sale, mortgage, demise or disposal of any burial grounds
- **1881** – Internationally the BME Church (Canada) merged with AME Church (US)
- **1883** – The Methodist School House is erected in Tucker’s Town
- **1885** – May: the Bermuda BME and AME Churches were united under the name of the African Methodist Episcopal Church.

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<sup>58</sup> By Ombudsman, not exhaustive.

- **1885** – May: 1<sup>st</sup> Annual Conference of the AME Church held at Temperance Hall in Crawl. There were 18 members from Tucker’s Town
- **1888** – A building programme was started for an AME Church at Tucker’s Town under Rev. J. Solomon Simmons
- **1889** – The Halifax-Bermuda cable was hauled to land in Tucker’s Town (cable house)
- **1890** – By this time there was a tightly knit isolated community of black farmers (Lamberts, Smiths and Talbots) who replaced the white landowners (Harveys, Trotts, Walkers and Sayles). A few whites remained, but essentially a black society evolved with two churches, a general store, a school, a cricket pitch, a post office and a Cemetery
- **1897** – An indenture was made to convey one acre of land from B. D. Talbot and his wife to the trustees of the AME Church in Tucker’s Town, where construction of the church had already begun
- **1900** – August 9: The AME Church, “St. Philip”, now completed, was dedicated by Bishop C. S. Smith. Membership had increased to 45 adults, 2 probationers and 57 Sunday school scholars
- **1907** – F. Goodwin Gosling purchased “The Clearing”, a 100 acre property in Tucker’s Town
- **1911** – Tourism boomed with more annual visitors --27,000-- than citizens
- **1917** – The Admiralty requisitioned the speedy steamer *Bermudian* for the war, killing the tourism trade. Until then the *Bermudian* had been operated by the Quebec Steamship Company
- **1919** – June: Three members of the Trade Development Board (TDB) – Arthur Black, Stanley Spurling, and John Hand – went to New York to find a steamship company
- **1919** – June 25: The TDB signed an interim letter of intent with Furness, Withy & Co (Furness Withy) pending approval by the Legislature in Bermuda. Furness Withy proposed to purchase£ the *Bermudian* from the Quebec Steamship Company, provided they received a five-year contract with an annual subsidy of £15,000 from the Bermuda Government
- **1919** – June 30: Parliament ratified the agreement with Furness Withy
- **1919** – July: TDB informed the Governor that it had agreed with Harry Blackiston, vice-president of Furness Withy in the US, to the “immediate construction of best obtainable 18-hole course and clubhouse close to Hamilton”
- **1919** – December: Sir Fredrick Lewis (president of Furness Withy), his colleague Harry Blackiston, New York architect Charles D. Wetmore and the “father of American golf”, Charles Blair Macdonald, came to Bermuda to design a golf course
- **1920** – The ships, *Fort St George* and *Fort Hamilton* (the resurrected *Bermudian*), started making weekly visits to Hamilton Harbour
- **1920** – February 27: Stanley Spurling presented to the House of Assembly the petition (dated 23 February 1920) from Watlington & Conyers, Furness Withy’s local agent, for the incorporation of the Bermuda Development Company (“BDC”)
- **1920** – July 5: The Bermuda Development Company received its incorporation with a board of directors consisting of Stanley Spurling, John Hand, F. Goodwin Gosling and Henry Watlington from Bermuda, and Sir Fredrick Lewis, Harry Blackiston, Charles Blair MacDonald and Charles D. Wetmore from New York and London.
- **1920** – July 23: A petition signed by 24 free-holders (22 black and 2 white) in Tucker’s Town was presented to the House of Assembly by Dr. T. H. Outerbridge. Heading the protestors was Anglican rector of Smith’s and Hamilton parishes, L. Laud Harvard

- **1920** – August 26: The Bermuda Development Company Act No. 2 was passed in the House of Assembly by a vote of 19 to two to allow for land acquisitions “by agreement”. Stanley Spurling moved the bill to pass
- **1920** – The Prince of Wales visited Bermuda
- **1920** – October 29: A. E. Bourne, a Hamilton merchant, wrote a letter to the Prince of Wales to “note the dark deed being enacted in Bermuda”
- **1920** – Furness Withy purchased the St. George’s Hotel and renovated it
- **1920** – December 8: The Governor sent a dispatch referring to The Bermuda Development Company Act and The Bermuda Development Company Act No.2. The final paragraph acknowledges that there “was some protest by a few residents in the neighbourhood against the compulsory acquisition of land by the Company, but there is no doubt that the Acts as they stand represent the wishes of the great majority of the inhabitants of the Colony”
- **1920** – December 13: Ebenezer Smith and George Basden, on behalf of the Trustees of the AME Church, petitioned the Governor in order to affect the sale of a small parcel of land upon which once stood the BME Church in Tucker’s Town. The trust deed did not give the trustees the power of sale, which prohibited the BDC from purchasing the property
- **1920** – F. Goodwin Gosling resigned from the House of Assembly to become Secretary for the BDC
- **1921** – B. D. Talbot was awarded £ 8,200 (£ 363,260/ \$557,749 in today’s dollars) by the jury for his 74 acres, instead of the £ 25,000 he had requested.
- **1921** – Dr. Outerbridge offered the BDC 40 acres for £ 4,750
- **1921** – The Tucker’s Town Roads Act came into effect
- **1921** – August: The AME Sunday School Convention was held in Tucker’s Town
- **1922** – The 18-hole Mid Ocean Golf Club opens in Tucker’s Town. The editor of the *American Golfer* called it “one of the most wonderful courses” he had ever seen
- **1923** – The final Tucker’s Town resident, Dinna Smith, was physically evicted from her home near Tucker’s Town Bay. Through the Commission she was awarded a new Sommersall Road home in Smith’s
- **1923** – Construction began on Furness Withy’s marquee hotel, the Castle Harbour
- **1923** – March 6: Rev. Jabez Ronald Saint, Chairman of the Bermuda District of the Methodist Church, petitioned the Colonial Secretary for his assent to a Bill that would change the corporate names of the local trustees and titles of the Wesleyan Methodist Church Acts 1880 and 1906. The proposed exchange of premises at Tucker’s Town for premises in Smith’s parish could not be carried out until such changes had been made. The first petition to amend the Wesleyan Church Acts was presented to the Governor on 15 December 1922, but he struck down the Bill because it did not include a clause “saving the rights of the Crown as is required by the Royal Instructions”
- **1923** –March 20: The Methodist Church Act, removed “Wesleyan” from titles of The Wesleyan Methodist Church Acts of 1880 and 1906 and from the corporate names of the local trustee boards to be replaced simply with “Methodist”
- **1923** – The Tucker’s Town School Act, authorized an agreement reached between Israel James Smith, Simeon Frederick Morton Trott and Ernest Douglass Philpott and the BDC to sell the school lot and building in Tucker’s Town in exchange for land and a new school house in the vicinity of Devil’s Hole Cross Road in Smith’s Parish
- **1923** – The Methodist Church relocated from Tucker’s Town to Smith’s parish

- **1924** – Furness Withy bought their second hotel, the Bermudiana, located on the Hamilton waterfront
- **1924** – August: According to the Minutes of the AME Annual Conference, the Bishop appointed a Committee on the sale of church property at Tucker’s Town. The Committee consisted of: Revs. A. Richardson, C. A. Stewart and C. B. Bell, and Bro. B D. Talbot and Sister Talbot. By the time of the May **1926** Annual Conference, the property had been sold. The Minutes from the 1925 Annual Conference are missing from the Archives.
- **1924** – August: Stanley Spurling, described as “one of Bermuda’s foremost citizens”, made remarks at the AME Annual Conference.
- **1926** – The TDB adopted the slogan “Come to Bermuda, Mid-Ocean Playground”
- **1926** – June 3: The new St. Philip AME Church in Harris’ Bay was dedicated
- **1928** – Furness Withy’s sleek new liner, the *Bermuda*, entered service with a weekly load of 690 first-class passengers. *Bermuda* eventually caught fire in June 1931 while berthed in Hamilton. In November 1931 the nearly rebuilt *Bermuda* once again caught fire in Belfast’s Workman Clark shipyard and was ultimately replaced by the *Queen of Bermuda* in 1933
- **1929** – December 18: At the AME Annual Conference a Special Session was held to hear the report from the Committee to whom the Conference had given power to use money borrowed from Tucker’s Town Church
- **1930** – July 28: The Wesleyan Methodist Church (Consolidation and Amendment) Act was enacted. This Act allows for the sale of burial grounds only with the “previous consent of the majority of the congregation of the church or chapel entitled to the benefits of the trusts in respect thereto”
- **1951** – Furness Withy sold 180 acres (including the golf club, courses and beaches) to the Mid Ocean Club Limited (a group of Bermudian investors) for £ 130,000
- **1958** – Furness Withy sold the hotel and remaining property in Tucker’s Point to Bermuda Properties Limited (parent company of the Castle Harbour Limited and related companies)
- **1973** –The Mid Ocean Club accepted its first black member
- **1974** – The Bermuda Development and Planning Act was enacted
- **1989** – According to the Tucker’s Point Club Board Member involved in Cemetery issues, mowing around the graveyard began at Marsden’s request. When he started working at Tucker’s Point Club a year earlier, the graveyard was hidden in scrub.
- **1989** – Oda Mallory, aka “Blondell”, interviewed Wilton Smith on “The Living Memories” about the Tucker’s Town graveyard. She made a site visit shortly thereafter with the late Bishop Chauncey Smith and a videographer
- **1992** – According to the Castle Harbour groundsman, tops were placed over the graves without destroying the original stones
- **1996** – November 24: The Marsden Congregation dedicated the plaque at the Tucker’s Town graveyard
- **2001** – August: Marsden Memorial United Methodist Church disaffiliates from United Church of Canada (because of the ordination and marriage of homosexuals) following the rules as defined by The Wesley Methodist Church Act 1930
- **2006** – Richard Lowry consults with Dr. Harris, the National Trust and Conservation Services on potential HPA status for the Tucker’s Town Cemetery
- **2007** – June: The Pastor and representatives from Marsden Church met with members of the Tucker’s Town Historical Society (TTHS), CURB and representatives from Tucker’s Point Club regarding the

desecration of the graveyard by golf balls. Recommendations were drafted and sent from Marsden Church to Tucker's Point.

- **2008** – The Department of Planning “The Bermuda Plan 2008: Planning Statement” marked Tucker’s Town graveyard as a Historic Preservation Area
- **2009** – April 14: The Senior Vice-President of Tucker’s Point wrote a letter to Craig Tucker regarding maintenance issues related to graveyard
- **2011** – Marsden Church celebrated its 150<sup>th</sup> Anniversary
- **2011** – July 13: The Pastor of Marsden Church wrote letters of the Minister of Public Works, the Minister of National Security and Tucker’s Point to resolve the issue of golf balls in the graveyard
- **2011** – August 30-31: A Ground Penetrating Radar Survey was conducted on the grounds of the graveyard which documented numerous graves within the walls and a few beyond the walls
- **2011** – November 5: The Wesleyan Methodist Church Synod issued an apology for the practice of racial segregation, which remained in effect until the 1960s
- **2012** – February 10: The Ombudsman released “Today’s Choices, Tomorrow’s Costs”
- **2012** – May 1: The Ministry of the Environment agreed to implement the Ombudsman’s recommendations
- **2012** – June 1: The Ombudsman tabled the Government’s response in the House of Parliament
- **2012** – October 15-16: The gravestones were removed from Tucker’s Town Cemetery
- **2012** – October 29: A meeting was by held by Marsden Church requesting input from the community on how the gravesite should be memorialized
- **2012** – November 6: A meeting with the Pastor and Trustee chairman of Marsden Church, the chairman and two members of the TTHS and Dr. Ed Harris was held to discuss a submission to the Department of Planning
- **2013** – January 24: Marsden Church put in an application to the Department of Planning
- **2013** – March 9: CURB launched an appeal for an in-depth consultative process on how the Tucker’s Town gravesite should be memorialized
- **2013** – March 15: A Government spokesperson tells the Royal Gazette that the “Department of Planning anticipates that the process to enable the Minister to consider the listing of the site as a historical monument pursuant to Section 30 of the Development and Planning Act 1974 would be concluded by 30 June 2013”.
- **2013** – March 18: The Ombudsman issued a press release announcing her investigation into the disappearance of the gravestones

*Researched documents pertaining to above and  
Acknowledgment of people who helped with invaluable research  
will be on website by 4 February 2014*

[www.ombudsman.bm](http://www.ombudsman.bm)

*In Memoriam: Mark Burgess who, initially with business partner D. Tiffin, designed Ombudsman for Bermuda logo and all Annual and Special Report covers and text layout. We miss you!*

