



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 9, 1978

ATTORNEY GENERAL OPINION NO. 78-257

Mr. Granville M. Bush
City Attorney
124 South Broadway
Sterling, Kansas 67679

Re: Cemeteries--Roads--Dedication

Synopsis: Continued public use of a road or alleyway within a cemetery owned and operated jointly by a city and township does not give rise to a public prescriptive right in such road or alleyway as a public road adverse to the board of trustees so as to foreclose the power of that board to close or alter such road or alleyway as it deems in the best interest of the cemetery.

* * *

Dear Mr. Bush:

As City Attorney for the City of Sterling, you inquire concerning the authority of a cemetery board to close a road in a cemetery. The cemetery in question, you advise, is jointly owned and operated by the City of Sterling and Sterling Township. Under K.S.A. 80-908, the mayor and the township trustee constitute a board of trustees having "full power and control" of the cemetery.

You advise that at a regular meeting of the board, it voted to close a road in the cemetery. As you point out, the statute is silent as to the powers of the board, except as stated above. The question has arisen whether the general public has acquired a prescriptive right in the use of the road. At 14 Am.Jur.2d, *Cemeteries*, § 37, the writer states thus in pertinent part:

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"Persons entitled to visit, protect, and beautify graves must be accorded ingress and egress from the public highway next or nearest to the cemetery, at reasonable times and in a reasonable manner. Moreover, avenues and alleyways within a cemetery which have been dedicated for use by persons interested in the lots, and by the public generally, must be kept open. A lot owner, at least, has the right to the free and unobstructed use of the alleys and driveways of the cemetery for the purpose of obtaining access to his lot, and the cemetery association may not grant easements in such alleys and driveways or subject the lot owners to the preferred rights of others. However, in some jurisdictions statutes permit cemetery associations, under certain prescribed conditions, to vacate thoroughfares and convert their areas in cemetery lots."

Assuming, of course, that the road in question has not been expressly dedicated to the public, the question of a public prescriptive right remains. The road is maintained, presumably, to provide access to members of the public who visit the cemetery. It is not, I assume, a part of the county or township road system, and has during the years of its use been maintained for and used exclusively by visitors to the cemetery. In *Shanks v. Robertson*, 101 Kan. 463 (1917), the court quotes approvingly from 37 Cyc. 21 thus:

"To establish a highway by prescription the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely under claim or color of right, and not merely by the owner's permission, and continuously and uninterruptedly, for the period required to bar an action for the recovery of possession of land or otherwise prescribed by statute. When these conditions are present a highway exists by prescription; otherwise not."

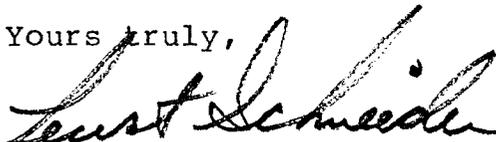
Although these rules are stated with particular application to public rights over privately owned land, the elements of dedication

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of property to public use appear to be equally applicable here. The board of trustees has an affirmative obligation to provide access to the public to all gravesites in the cemetery. The maintenance of a road or alleyway in the cemetery for a number of years is not necessarily consistent, in my judgment, with an intent and purpose of the board of trustees to constitute that road or alleyway a public road or highway. The board has full power and control over the land in the cemetery, and may, in my judgment, close any road or alley theretofore used by the public within the cemetery so long as such closure does not interfere with public access to any gravesites. Public use of a road within a cemetery does not create a prescriptive right in the public adverse to the board of trustees, in my estimation, so as to prohibit the board from closure of any such alleyway or road and the use of that land for gravesites, if it so determines.

I can find no reported decision squarely in point. However, applying the general rules by which public prescriptive rights are acquired in thoroughfares by public use, no such prescriptive right arises in this instance against a board of trustees, itself acting as a representative of a governmental unit or units, by continued user to compel the dedication of a cemetery road which has been maintained by that board so as to forfeit that board's continued authority over it, and its correlative authority to close or alter the road in accordance with the needs of the cemetery.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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