



STATE OF KANSAS

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May 6, 1982

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ATTORNEY GENERAL OPINION NO. 82- 102

Tom Burgardt
City Attorney
P. O. Box 1016
212 West Pine
Garden City, Kansas 67846

Re: Cities and Municipalities -- Cemeteries -- Power
of City to Acquire Cemetery and Adjoining Land

Synopsis: Pursuant to K.S.A. 12-1401, a city is empowered to establish or acquire cemeteries for public use, either through purchase or eminent domain. K.S.A. 1981 Supp. 12-1406, which sets a consideration figure of one dollar for the purchase of unsold cemetery land by a city, is part of an act applicable to second and third class cities, and so is not applicable to Garden City, Kansas. Even in the absence of empowering statutes, a city possesses the authority (under the home rule amendment to the Kansas Constitution) to purchase land adjoining a cemetery which is not being used for cemetery purposes. Cited herein: K.S.A. 12-1401, 12-1402, K.S.A. 1981 Supp. 12-1405, 12-1406, 12-1407, 12-1441, K.S.A. 13-14c01, 17-1313, 17-1367, Kansas Constitution, Article 12, Section 5.

* * *

Dear Mr. Burgardt:

As City Attorney for Garden City, Kansas, you request our opinion on a question concerning cemeteries. Specifically, you inform us that the city wishes to purchase a cemetery, together with surrounding undedicated land, from a cemetery corporation. You inquire as to which, if any, of the numerous, sometimes overlapping, statutes apply in this situation.

We are informed that the cemetery in question, Sunset Memorial Gardens, is located in Finney County near the city limits of Garden City. The cemetery itself comprises 5 acres of land, and, together with 17 additional acres of undedicated land, is owned by Sunset Memorial Gardens, Inc. That corporation, organized pursuant to K.S.A. 17-1307 et seq., now wishes to sell both the cemetery and the undedicated land, together with all other assets it owns, to the city. While the city intends to continue to operate the cemetery, it may use the adjoining land for other purposes.

Through the years, numerous statutes have been enacted dealing with the acquisition of cemetery property by a city under various circumstances. Some are clearly inapplicable here, due to wording which restricts them to specific situations. Among these would be included K.S.A. 13-14c01 (acquisition by first class cities of cemeteries located within their boundaries), K.S.A. 17-1313 (transfer following dissolution of cemetery corporation or sale of all lots), and K.S.A. 17-1367 (transfer following court determination that cemetery has been abandoned).

More helpful are the statutes found at K.S.A. 12-1401, et seq. A general grant of power is given by K.S.A. 12-1401, wherein it is stated:

"Any city or any township or city and township or two or more townships desiring to join may establish or acquire a cemetery for public use and may acquire land necessary for such purpose by condemnation, as provided by law: Provided, That before any township, trustee or trustees shall institute proceedings for the purpose of condemning land as aforesaid, they shall be requested so to do in writing, signed by at least twenty-five resident taxpayers of such township or of each township where more than one join in a common application: Provided further, That nothing herein contained shall be held to authorize the taking or appropriating of cemetery grounds owned or used by any religious body or denomination for burial purposes." (Emphasis added.)

Additional relevant statutes include K.S.A. 12-1402, which empowers a city to make and enforce all necessary rules and regulations regarding the care of the cemetery and the sale of lots, and K.S.A. 1981 Supp. 12-1441, which requires a city to continue operation for burial purposes of any cemetery it acquires.

While it could also appear that K.S.A. 1981 Supp. 12-1406 would apply to this transaction, in our opinion such is not the case. There, it is stated:

"The governing body is hereby authorized to purchase from a cemetery association, all of the unsold land belonging to the association for a consideration of not more than \$1. If such purchase is made, the city may assume complete control of all roadways and parking in and around the cemetery. Prior to the transfer, the proposed transfer of the cemetery association shall be published once each week for two consecutive weeks in the official city newspaper. If a protest signed by not less than 30% of the lot owners is not filed in the office of the city clerk of the city within 30 days after the first publication of the proposed transfer, the land may be transferred."

We base our conclusion on the fact that this statute was originally contained in an act of the legislature passed in 1913 at chapter 125. Also contained in that act were sections that now appear as K.S.A. 1981 Supp. 12-1405 and 12-1407. By its terms, K.S.A. 1981 Supp. 12-1405 is limited to townships and cities of the second and third class. Accordingly, K.S.A. 1981 Supp. 12-1406 must be read in pari materia with the preceding statute, leaving "the governing body" referred to therein as being only that of a second or third class city or a township.

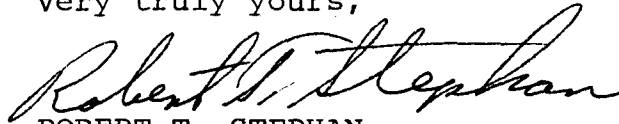
Although the above statutes appear to provide a statutory basis for the acquisition by the city of the cemetery owned by Sunset Memorial Park, Inc., nothing contained therein deals expressly with the adjoining undedicated land. In view of Article 12, Section 5 of the Kansas Constitution, however, such a deficiency is not a hindrance. That section contains what is commonly known as home rule authority for Kansas cities. Under home rule, a city is free to determine its "local affairs," subject to enactments of the legislature uniformly applicable to all cities and certain other limitations not relevant here. In that a city's purchase of non-cemetery land, even if from a cemetery corporation, is not proscribed or indeed dealt with by any of the above statutes, the city is free to proceed with this portion of the transaction under its constitutional authority.

In conclusion, pursuant to K.S.A. 12-1401, a city is empowered to establish or acquire cemeteries for public use, either through purchase or eminent domain. K.S.A. 1981 Supp. 12-1406,

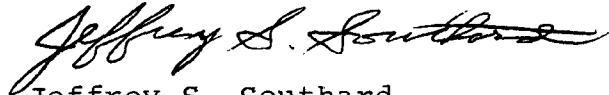
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Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle