



STATE OF KANSAS

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CONSUMER PROTECTION 296-3751

ATTORNEY GENERAL OPINION NO. 82-179

C. W. Naab
Mayor of Nickerson
P. O. Box 52
Nickerson, Kansas 67561

Re: Cities and Municipalities -- Cemeteries -- Care and Control; Police Power to Relocate Remains From Mausoleum

Synopsis: A city which operates a cemetery pursuant to the provisions of K.S.A. 12-1401 et seq. has full power to make and enforce all necessary rules and regulations pertaining to the care of such cemetery. This grant of power includes the ability to remove and reinter remains which are contained in a mausoleum that has become structurally unsound. In order to avoid potential liability, notice should be provided if possible to relatives of those persons whose remains are so transferred. However, a city is not required to obtain such relatives' consent prior to effecting such removal and reinterment. Cited herein: K.S.A. 12-1402, 17-1326.

* * *

Dear Mr. Naab:

As Mayor of the City of Nickerson, Kansas, you request our opinion on a matter which concerns the city cemetery. Specifically, you inform us that Wildmead Cemetery contains a mausoleum which was constructed of cement by a local resident in the 1920's. The structure, which contains the remains of the builder and his wife, is now in a condition of deterioration (due to failure of the building materials) such that repairs cannot practically be made. You inquire what steps the city is required to take in removing and reintering the remains prior to demolition of the mausoleum.

In examining the statutes of this state, it does not appear that any specific act of the legislature has addressed this particular question. While K.S.A. 17-1324 through 17-1327 concern the sealing of defective mausoleums and the reinterment of bodies contained therein, the basis for such action lies in potential health problems which may be created. Additionally, the authority to act is given to the secretary of health and environment, not the city or county in which the cemetery is located. K.S.A. 17-1326. However, given the presence of other, more general statutes, we believe the inapplicability of these statutes is not crucial.

Specifically, K.S.A. 12-1402 vests a city which operates a cemetery with "full power to make and enforce all necessary rules and regulations pertaining to the custody, control and care of the cemetery." The above statute is in effect a codification of the common law authority of a governmental body to exercise its police power over a cemetery. As noted in a prior case dealing with cemeteries, State ex rel. Stephan v. Lane, 228 Kan. 379, 392 (1980):

"The police power is wide in its scope and gives the governmental body broad powers to enact laws to promote the health, morals, security, and welfare of the people. Broad discretion is vested in the governing body to determine for itself what is deleterious to health, morals, or is inimical to public welfare. However, the governing body does not possess plenary power to pass legislation that is arbitrary, oppressive, or so capricious that it has no reasonable basis." (Citation omitted.)

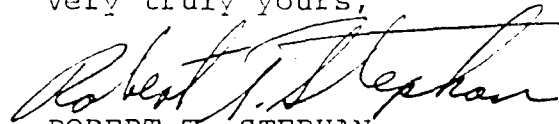
Other jurisdictions have also recognized that the police power can be used to protect the public health and welfare [Arlington Cemetery Corp. v. Bindig, 212 Ga. 298, 95 S.E.2d 378 (1947)], the public policy of protecting cemeteries against desecration [Eden Memorial Park Assn. v. Superior Ct., 189 Cal.App.2d 421, 11 Cal.Rptr. 186 (1961)], the need to maintain cemeteries in proper condition and appearance [Killian v. Brith Shalom Congregation, 154 S.W.2d 387 (Mo. 1941)] and the safety of those visiting the graves of relatives or friends. [Cedar Hill Cemetery v. Ball, 78 F.2d 220 (D.C. Cir. 1935).]

In light of the above, it is our opinion that the city may take whatever steps are reasonable to remedy the present situation at Wildmead Cemetery. The broad grant of police power authority which cities possess with regard to cemeteries (State ex rel. Stephan v. Lane, supra) would allow Nickerson

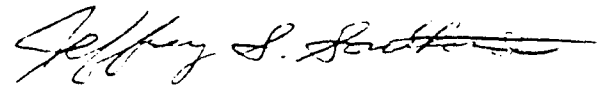
to remove the crumbling structure with or without the consent of the heirs of those who first erected it. This is not to say, however, that no consideration should be had for the sensibilities and feelings of the interested relatives. To avoid any potential liability in tort for the handling of the remains [see, e.g. Hamilton v. Individual Mausoleum Co., 149 Kan. 216 (1939)], reasonable efforts to notify the next of kin should be taken, as in fact you advise they already have. While exact details can be worked out at that time, a reinterment that resembles that initially had (i.e. two graves with two caskets, with each name identified on a marker) would avoid potential charges of arbitrary, capricious or unreasonable conduct on the part of the city, which will bear the cost of all removal and reinterment work.

In conclusion, a city which operates a cemetery pursuant to the provisions of K.S.A. 12-1401 et seq. has full power to make and enforce all necessary rules and regulations pertaining to the care of such cemetery. This grant of power includes the ability to remove and reinter remains which are contained in a mausoleum that has become structurally unsound. In order to avoid potential liability, notice should be provided if possible to relatives of those persons whose remains are so transferred. However, a city is not required to obtain such relatives' consent prior to effecting such removal and reinterment.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle