April 25, 2007

Dear Sir:

You have the following question: Can the City give to a private nonprofit cemetery organization (which is apparently not organized as a 501(c) organization), property for the purpose of its use as a cemetery?

A city is entitled under Tennessee Code Annotated, § 6-54-111 to give money to certain nonprofit charitable organizations and to certain nonprofit civic organizations. The cemetery association appears to qualify as a nonprofit charitable organization within the meaning of that statute. However, that statute authorizes only the gift of such organizations. But under the authority of § 6-2-201(8) of the city's charter, the city appears able to sell, and perhaps to give, real property to the cemetery association, under any reasonable terms the city wishes to attach to the sale or gift and that promotes the interests of the city in the cemetery. That conclusion is based on the proposition that the cemetery association is a financially viable entity that has the capacity to carry on a cemetery business. .

As I understand the facts, there is a cemetery within the municipal limits of the City. The cemetery was in existence probably 100 years before the city was incorporated. The city has never owned nor operated that cemetery nor any other cemetery, and is not interested in owning a cemetery. However, the city is trying to determine whether it can accept the conveyance of certain land from the U.S. Army, which owns all the land around the cemetery, and to convey that land to the private nonprofit cemetery association.

As far as I can determine, the question of whether a municipality in Tennessee can give property to a private nonprofit cemetery association has never been answered. Article II, § 29, of the Tennessee Constitution, provides that "The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law...." I have been unable to find a case in which Article II, § 29, has been applied to a gift of property by a local government to a private entity. Technically, the gift of property by the city to the cemetery association under the circumstances would not involve the expenditure of taxes raised by the city.

The question of whether the conveyance of property by a city to a developer without the exchange of money was for a public purpose arose in Bishop v. City of Burlington, 631 N.W.2d 656 (Wis. 2001). There the city was engaged in a redevelopment plan, and as a part of that plan conveyed to the developer a downtown parking lot, for which the developer agreed to the following obligations: rehabilitation of a certain building, the parking lot conveyance to the city

of a certain piece of property for park use, and a promise to maintain the parking lot as a public facility for three years and as a parking lot for 10 years.

The Court held that the conveyance did not violate the public purpose doctrine in Wisconsin. The case indicates that the public purpose doctrine in Wisconsin is similar to the public purpose doctrine in Tennessee. Both limit the expenditure of public funds to public purposes, but Bishop applied the public purpose doctrine to a real estate conveyances in which I which city funds were not appropriated. In support of its holding the Court pointed to a Wisconsin statute that gave municipalities power to acquire real property for public purposes, and to sell such property. The public purpose, said the Court, was advanced through the general economic improvement of deteriorating downtown property.

The Bishop Court also rejected the plaintiff's claims that the conveyance was an abuse of discretion because the conveyance did not reflect a fair consideration for the city. It reasoned that consideration need not necessarily involve money: :

In addition, we concur with the view held by courts in other states that it is proper when determining the adequacy of consideration of transfers of public property to private entities, to evaluate the entire transaction as a whole. Tomasic, 701 Pl.2d at 1334. The consideration may consist of benefits other than or in addition to, money, such as the public benefit which flows from the transfer and the obligations the private actor assumes under the agreement. See e.g. Burkhardt v. City of Enid, 771 P.2d 608, 611 ((Okla. 1989) (obligations assumed by private college and direct economic benefits expected to flow from its presence were adequate consideration); Bryant, 707 A.2d at 1081 (financial obligations of redeveloper and economic by-products of expected development were adequate consideration). We find support for this approach in Wisconsin case law, but only in the context of nonprofit corporations. See Rath 160 Wis.2d at 865, 467 N.W.2d 150 (nonprofit hospital's binding commitment to use property for health care is adequate consideration.) State ex rel. State Historical Soc'y v. Carrol, 2671 Wis. 6 24, 1 N.W.2d 723 (1952) (finding adequate consideration where no cash payment but obligations assumed by nonprofit foundations.).... [At 664-65]

We shall see below that if Article II, § 29 of the Tennessee Constitution is triggered by a gift of real property by the city to a cemetery association that such a gift may also meet the public purpose doctrine because of the nature of private cemeteries, and that in State ex rel. Association for the Preservation of Tennessee Antiquities v. City of Jackson, 753 S.W.2d 750 (Tenn. 1978), the Tennessee Supreme Court appears to have adopted a similar approach as did the Bishop Court with respect to the question of whether a particular real estate conveyance by a local government is an abuse of power. .

You yourself cited to me Tennessee Attorney General's Opinions 87-133 and 54 for consideration in answering your question. OAG Opinion 87-133 opines that a county could transfer a county hospital to a private nonprofit hospital, relying on three reasons: (1) Language

in state law similar to the language found in § 6-2-201(8); (2) Silence in the private act under which the hospital was created governing the disposition of the property; (3) The county had not adopted the County Purchasing Law, which contained certain restrictions on the alienation of county property. OAG Opinion 87-54 went the other direction, opining that the county could not donate county property to private nonprofit entities in the county, reasoning that: (1) Counties have no authority to donate property to private nonprofit entities; (2) A state statute authorizing counties to give gifts to private nonprofit entities similar to the statute that authorizes municipalities to do the same thing speaks only of gifts of money not of property; (3) The County had adopted the County Purchasing Law. The difference in the outcome of those opinions is obviously based on the fact that OAG opinion 87-133 dealt with the question of whether the county could sell the county hospital to a private nonprofit entity, while OAG 87-54 dealt with the question of whether the county could give its real property to certain nonprofit entities in the county. The treatment of the County Purchasing Law with respect to the alienation of county property does not apply to the City; the Municipal Purchasing Law contains no provisions governing the alienation of municipal real or personal property, and the General Law Mayor-Aldermanic Charter contains no restrictions on the alienation of either kind of municipal property. The question of whether a city can give, as opposed to sell, its real property to private nonprofit entities without express authority to give such property is probably a closer question with respect to cities than to counties.

Generally, counties require express authority to support their actions. But Tennessee municipalities operate under Dillon's Rule state. Dillon's Rule is the product of City of Clinton v. Cedar Rapids and Missouri Railroad Company, 24 Iowa 455 (1968), in which it is said that:

It is a general and undisputed proposition of law that a municipal corporation possess and can exercise the following powers, and no others: First, those granted express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation–not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.

[For the statement and application of this rule in Tennessee, see Miller v. Memphis, 178 S.W.2d 382 (1944); Penn-Dixie Cement Corporation v. Kingsport, 225 S.W2d 270 (1949); City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988).]

Under Dillon's Rule, as interpreted by the Tennessee courts, cities have implied, as well as express, powers. However, as that Rule itself states, implied powers must be "necessarily or fairly implied or incident to the powers expressly granted. In short, implied powers must derive from, and rest upon, express powers; they cannot be pulled out of thin air on the ground that the power would be desirable for municipality to hold.

As pointed out above, the City is chartered under the General Law Mayor-Aldermanic Charter.

Under §6-2-201(8), of that charter, municipalities have the express authority to "Acquire or receive and hold, maintain, improve, sell, lease, mortgage, pledge or otherwise dispose of property, real or personal, and any estate or interest therein, within or without the municipality or state." Tennessee Code Annotated, § 47-1-101 et seq. authorizes municipalities (and various other public and private entities) to own cemeteries, but neither that statute, nor any other statute that I can find expressly authorizes municipalities to give property to private nonprofit organizations for cemetery purposes.

Tennessee Code Annotated, § 6-54-111 does authorize municipalities to appropriate money to nonprofit charitable organizations and to nonprofit civic organizations. As defined by that statute, the term "Nonprofit civic organization" means "a civic organization exempt for taxation pursuant to § 501(c)(4) or (c)(6) of the Internal Revenue Code of 1954, as amended...." I doubt that a private nonprofit cemetery association qualifies for a municipal gift under that statute, and even if it did, the cemetery association in the City is apparently not tax exempt under that statute.

But there is no requirement under Tennessee Code Annotated, § 6-54-111 that a "nonprofit charitable organization" be recognized under § 501(c) of the IRS Code. Can a private nonprofit cemetery association be a "charitable organization" under Tennessee Code Annotated, § 6-54-111? The answer appears to be yes. A law review article in 58 Fordham Law Review, A GRAVE INJUSTICE; THE UNCHARITABLE FEDERAL TAX TREATMENT OF REQUESTS TO PUBLIC CEMETERIES, 705 (March, 1990), defines a "public cemetery as:

...a burial ground that is organized and operated by a nongovernmental, nonprofit association, company, or corporation and is held open to the use of the public. This definition is recognized in the common law. See, e. g. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 87, 58 A. 467, 469 (1904), David v. Rochester Cemetery Ass'n, 91 N.H. 494, 495, 23 A.2d 377, 378 (1941; 14 C.J.S. Cemeteries § 1 (1939) & Supp. 1989).

That rule appears to apply to cemeteries in Tennessee. It is said in Pope v. Alexander, 250 S.W.2d 51 (Tenn. 1952) that:

The general rule is that a valid charity is established where the purposes for which it is created is to maintain or upkeep a public cemetery. 10 Am.Jur., page 636, Sec. 74. As contra distinguished from a public cemetery the general rule is that where a trust is created for a private cemetery and to take care of private graves that it is void as a perpetuity.... 'It is now well settled that in the absence of a statute, a bequest for the perpetual care, improvement or embellishment of a tomb, monument, or burial lot of the testator, his family, relatives, or other individuals named is not a bequest for a charitable purpose, and is void as a perpetuity.' 10 Am.Jur., page 637, Sec. 75. [At 54]

There were two cemeteries in There were two cemeteries in Pope v. Alexander, above, both of

which were operated by the Brown's Church Cemetery Association. A decedent's will provided for two trusts, one for each cemetery. The question was whether one or both trusts were valid. The Court held valid the trust that pertained to the "public" cemetery, and struck down the trust that applied to the private family cemetery. The Court distinguished between the private and "public" cemeteries:

> In the first place the upkeep of the family lot or cemetery really is a family affair and not one in which the county or community or state is interested while the upkeep of the public cemetery is regard to the contrary. There is a social interest in the maintenance of the place where the dead of the town or of the county are buried. Such cemeteries as the Brown's Church Cemetery which is a church cemetery is naturally of a quasi public nature and their upkeep is generally, as far as we know, universally regarded as a charitable enterprise. Such a trust does not violate the rule against perpetuities while the trusts of a private character does so violate... [At 54]

The gift of property by the City to the cemetery association would not, of course, involve a trust, living or testamentary. But the distinction between public and private cemeteries does suggest that a public cemetery may be a charitable entity within the meaning of Tennessee Code Annotated, § 6-54-111, even though it does not qualify as a 501(c) organization. Presumably, the cemetery in question would "provide year round service benefitting the general welfare of the residents of the municipality," unlike the public cemetery in Pope v. Alexander, which probably did not because it was a Church owned cemetery.

The question of whether a state law authorizing local governments to spend public funds to maintain private roads to private cemeteries would be legal and constitutional arose in Tennessee Attorney General's Opinion 99-097. In opining that the answer was yes, the opinion pointed out that under state law, counties were already authorized to spend funds for such purposes, and that private acts allowing such expenditures by local governments would pass legal and constitutional muster. The Court reasoned that Article II, § 29k, of the Tennessee Constitution, the General Assembly could determine that the maintenance of private roads to private cemeteries serves a public purpose.

If that is true, there is no question but that cemeteries within (and outside) their boundaries are a public purpose; Pope v. Alexander, above, points to the same conclusion even when the city does not own the cemetery. I do not know if there are any conditions under which the U.S. Army is willing to give to the city the property in question, but in the absence of any such conditions, it is unlikely that the property would be "trust property." Obviously, if a condition of the gift is that it be used as a cemetery, the city would hold the property as trust property because cemeteries are held by cities as trust property. I have treated that issue below.

The gift of city property to a cemetery association probably complies with the public purpose doctrine. It is also likely that the cemetery in question is a "charitable organization" within the meaning of Tennessee Code Annotated, § 6-54-111. However, that statute does not authorize the

gift of property by municipalities. It is tempting to say that because that statute authorizes a city to give the cemetery association money, it implies that it can give the association property. But that statute is quite emphatic in its repeated reference to gifts of money. For that reason, I am reluctant to conclude that the city can give property to the association under that statute; the General Assembly spoke expressly of money, and used no language in that statute that implies money includes property.

But § 6-2-108(c) of the General Law Mayor-Aldermanic Charter permits the city to "sell...or otherwise dispose of" the city's property for a wide variety of purposes. In State ex rel. Association for the Preservation of Tennessee Antiquities v. City of Jackson, above, the Tennessee Supreme Court upheld a long-term lease by the City of Jackson to the Association for the Preservation of Tennessee Antiquities of the Casey Jones Railroad Museum, which the city owned. The museum had been operating at a considerable financial loss for the city. The Court reasoned that (which I quote a considerable length):

In the present case no question is raised as to the legality of the initial acquisition of the "Casey Jones Museum" by the City of Jackson or the property of its subsequent use by the City for the combined cultural, commercial and educational purposes shown in the record. It seems to use, therefore, at a minimum, that it was a matter of judgment to be exercised by the duly elected City officials as to whether the continued operation of that facility at a financial loss was or was not in the public interest and as to whether the leasing of the facility for operation under private management was or was not a suitable alternative. We find no abuse of discretion by the City officials in their decision to permit the removal of the residence and artifacts from their original site. The lease amply secures the City in the event of a default by tenant. The City may then terminate the lease short notice and require the tenant to restore the properties to the original site or to any other public location. No question is raised in the present record as to the solvency or responsibility of the tenant.

Insofar as prior cases have held that cities are without authority to dispose of publically owned facilities by lease, sale or otherwise, where the properties are held in a "governmental capacity," we are of the opinion that each case must be examined in light of its own facts and circumstances. Obviously cities must be and legally are free, within their charter provisions, to dispose of outmoded, surplus or unprofitable properties, where these are not held under a grant imposing a specific trust or other limitation upon ownership or use. [Emphasis is mine.]

In the present case the Jackson charter expressly confers upon the city, without limitation, the authority:

"To acquire or receive and hold, maintain, improve, sell, lease, mortgage, pledge, or otherwise dispose of any property, real or personal, and any estate or interest therein, within or without the City or State."

The charter also contains language that its terms are not to be deemed restrictive and that they shall be construed "...so as to permit the City to exercise freely any one or more such powers as to any one or more such objects for any one or more of such purposes."

We are not prepared to decide this case solely upon the proposition that the City may have acquired and held the "Casey Jones Museum" in part at least, in a "proprietary" capacity. On the other hand, we are of the opinion that appellants have failed to demonstrate that the subject lease is contrary to the public interest, that it represents a misuse or abuse of the discretion and authority of the Board of Commissioners, or that it is in any other way ultra vires or beyond the legitimate charter powers of the City. [At 775]

The language of the General Law Mayor-Aldermanic Charter authorizing the City to dispose of property is similar to the language of the Jackson City Charter authorizing that city to dispose of its property. That charter provision probably moves the City past the threshold question of whether it is authorized to sell or to give city-owned property to private entities. The case of Association for the Preservation of Tennessee Antiquities appears to come very near to suggesting that the City has broad discretion with respect to the terms under which it alienates city property. Indeed, the charters in both the City of Jackson and the City speak not only of the authority of the city to alienate property in the traditional ways--sale, lease, etc,–but of authority of the city to "otherwise dispose of property." Arguably, that authority constitutes implied authority for the City to gift the property in question to the cemetery association, given the public purpose nature of private cemeteries. In the alternative, the right of the city to sell property under its charter gives it the authority to sell the property to the cemetery association on terms it deems promotes the interest of the city in the expansion and continuation of the city.

That case also stands for the proposition that the courts would probably look at the viability of the cemetery association for the purpose of determining whether such a gift or sale of property to it would be an abuse of discretion on the city's part. In that respect, if the cemetery association is on shaky ground to the point it reflects no assurance that it can carry on a cemetery function, the courts may frown on the gift or sale. The City of Jackson in Association for the Preservation of Tennessee Antiquities, leased the property to the Association, with reasonably good assurances that the lease was financially advantageous to the city, and that the city could recover the property in event of the failure of the lease. The consideration the developer got in Bishop, and the consideration both the profit and nonprofit entities received in the cases to which the Court pointed in support of its holding, appeared to be considerable in terms of financial benefit for the city or, in the case of the nonprofit entities, assurances that they would perform some public purpose in which the local government had an interest. Presumably, the consideration the City would seek from the cemetery association in exchange for the land in question is a reasonably solid assurance that the land would be a secure burying place for its dead.

I am not sure about the financial circumstances of the cemetery association, but if that association flounders in administering an expanded cemetery, the city could find itself being

pressured to pick up the operation of the cemetery. Cities undoubtedly have the authority to operate cemeteries. It is said in Town of Pulaski v. Ballentine, 284 S.W. 370 (1926), that:

> We are of the opinion that the operation of a cemetery is a governmental function. Although sentiment is involved, the maintenance of a cemetery is in the interest of the public health and safety just as a park system [Citation omitted by me.]; the collection of garbage [Citation omitted by me.]; and the upkeep of a fire department. [Citation omitted by me.]. [At 371]

The same case declared that municipalities do not need a private act to establish a cemetery, that they were authorized to establish them by state statute [now Tennessee Code Annotated, § 47-1-101 et seq.], and:

> Under this statute any person or corporation may convey to a municipality land or property within the limits of said municipality or within five miles thereof, and such municipality may be and act as a trustee for said property to the same extent as a natural person. The effect of this statute is to authorize a town or city to hold property appropriated to burial purposes just like any other person, individual, or corporation. All property so dedicated is held in trust for the benefit of those entitled to internment therein. "Burial lots, whether public or private, are not the subject of trade or commerce." Hines v. State, 12 Tenn. 1, 149 S.W. 1058, 42 L.R.A. (N.S.) 1138. [At 371] [Emphasis is mine.]

Once having taken up the cemetery function, cities have a difficult time putting it aside. It appears difficult for cities to relieve themselves of trust property, especially cemetery trust property.

State v. Hines, 149 S.W. 1058 (1911), cited by the Court in Ballentine for the proposition that "Burial lots, whether public or private, are not the subject of trade or commerce," supports that conclusion. That language appears in Hines in this context:

> When land has been definitely appropriated to burial purposes, it cannot be conveyed or devised as other property, so as to interfere with the use and purposes to which it has been devoted. When once dedicated to burial purposes, and internments have there been made, the then owner holds title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust. The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.
>
> They also have the right to visit the cemetery for the purpose of repairing, beautifying, and protecting the graves and grounds around the same, and for these purposes they have the right of ingress and egress from the public road nearest the cemetery, to be exercised at reasonable times and in a reasonable manner.

Those who purchase property after it has been appropriate to burial purposes take it subject to the rights we have stated, without any express reservation in the will or deed under which they take. Such reservation is implied. 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. Burial lots, whether public or private, are not the subject of trade and commerce, and it is always presumed that they are not included in the sale of property which surrounds them. [Citations omitted by me.] [At 1959]

I doubt that any legal duty to assume the operation of the cemetery association arises from the city's sale or gift of property to the cemetery association, but a political duty might arise from such a gift or sale. Once in the cemetery business, it appears difficult for a city to get out of it.

Sincerely,

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