

## MEMORANDUM

FROM: Sid Hemsley, Senior Law Consultant

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RE: Leasing of Municipal Cemeteries

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The City owns a cemetery. It has entered into a long term-lease of the cemetery to a private firm. Under the lease, the firm agrees to maintain the cemetery. The city retains part of the funds from the sale of plots, and the private gets the remainder of the funds as payment for the upkeep of the cemetery.

Your question is: Is the lease of the cemetery legal?

As far as I can determine, this express question has never been answered in Tennessee, and has been answered in only one other state. In addition, even if the lease of cemeteries is legal in Tennessee, the question of whether any particular lease of municipal property to private entities is measured by the courts to determine whether it is an abuse of discretion. But as will be seen below, the lease of a cemetery to a private entity is the lease of property held by the City in trust. The leasing of trust property by a municipality, where it can be done at all, may be subject to a higher standard than abuse of discretion. For those reasons, I am not sure of the answer.

Tennessee Code Annotated, § 46-1-101 et seq. authorizes municipalities (and various other public and private entities) to own cemeteries. As far as I can determine, there is no statute that expressly authorizes municipalities that own cemeteries to lease them to private firms. However, in State ex rel. Association for the Preservation of Tennessee Antiquities v. City of Jackson, 573 S.W.2d 750 (Tenn. 1978), the Tennessee Supreme Court upheld a long-term lease by the City of Jackson to 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:

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 City is chartered under the General Law Mayor-Aldermanic Charter. Section 6-2-201(8) of that charter authorizes cities incorporated under that charter 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 of the state.

That charter provision moves the city past the threshold question of whether it is authorized to lease city-owned property to private entities. But the question of whether the city can even lease a cemetery to a private entity is more complicated. In Town of Pulaski v. Ballentine, 284 S.W. 370 (1926), the Tennessee Supreme Court declared with respect to the city's intention to acquire a cemetery, 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 did not need a private act to establish a cemetery, that they were authorized to establish them by state statute [now Tennessee Code Annotated, § 46-1-101 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.]

In Ritter v. Couch, 76 S.E. 428 (W. Va. 1916), the city of Charleston sold a city-owned cemetery to a private entity. The Court held that:

So, we do not think the town had capacity to sell this graveyard ground. Charged by the deed from Ruffner with the duty of holding for burial, charged by its own act of dedication to that use for many many years, by its sale to Couch it disowned and

abdicated its trust for the use of a private individual, which we said it could not do in *Pence v. Bryant*, 54 W. Va. 263, 47 S.E. 275. But this sale it was not furthering public weave, but private interest. The deed to Couch contemplated the appropriation of the ground to purposes other than burial, because it provided for removal of the dead in short order, by giving a license to do so of only four months... [At 433]

The Court reasoned that:

When once property has been dedicated for a special purpose, as for a burial ground, or where a city has dedicated it for that purpose, and persons have acted upon the faith of such dedication for burying their loved ones there, the city cannot devote the property to any other purpose. *Tiedman on Munic. Corp.* § 229. See Section 222. “It is manifest that a municipal corporation has no implied authority to dispose of lands which have been dedicated to it for public benefit; nor would such property be subject to sale for the payment of debts of the municipal corporation. Lands which are dedicated to the public use are not even alienable, when, on account of surrounding circumstances, they become unsuitable for the use for which they are dedicated.” Only the Legislature can authorize municipalities to dispose of them. Think of a lot, conveyed to a town for the purpose, in the minds of grantor and grantee both, of its use as a burial place, the grantor having already buried the bones of his ancestors, the lot used for so many years for burial, and practically filled with the hundreds of graves intended by both the grantor and grantee to be so used, dedicated by the municipality for this purpose to the public and used by the public; then think of the municipality selling it to a private individual by deed conferring upon him the right to remove the dead, for he claims absolute property, as the record showed. [At 431]

Note that in *State ex rel. Association for the Preservation of Tennessee Antiquities*, above, the Court said that, “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.*” If a city holds a cemetery “in trust for the benefit of those entitled to internment therein,” does that fact stop a city from leasing the cemetery to a private firm?

*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,” does not necessarily support 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]

[Also see Haserling v. Watson, 54 S.E.2d 413 (Ga. 1949); Huse v. Snodgrass, 47 N.W. 2d 696 (Mich. 1951).

But it does not appear to me that the *lease* of a municipal cemetery to a private firm is necessarily in violation of the trust. The only case I can find on that question is Ricker, Inc. v. City of Colon, 106 Caliope.4th 190 (2003). In that case, the City of Colon had leased its cemetery to Inland. The lease provided the Inland had total control of the management, operation and maintenance of the cemetery, and Inland paid to the city royalties of 12 percent of gross receipts of the cemetery operation. One of the questions in the case was whether the city could lease the cemetery to Inland. Yes it could, answered the court, reasoning that:

The City has the authority to do so under section 8130 and in conjunction with Civil code section 718, providing: “The property owned by, or that held by, or under the management and control of, any municipality, or any department or board thereof, may be leased for a period not to exceed 55 years.” In 1999, the cemetery was running a deficit of more than \$312,000. Consequently, the City and Inland entered into a lease for 55 years as permitted by statute. Moreover, the lease obviously serves the purposes of the public trust—in this instance, assuring the maintenance and upkeep of a public cemetery. [At 913]

[Section 8130 referred to in the above statute proved that, “The general management, conduct, and regulation of burials, the disposition of plots, and keeping the plots in order, are under the jurisdiction of the city owning the cemetery.”]

The California statute expressly authorized California municipalities to lease property for a term not to exceed 55 years. That was enough to support the lease of the cemetery. As to the “cemetery trust” issue, the court pointed out that the lease promoted the purposes of the public trust because the cemetery had been losing money. Even in Ritter, above, the city had *sold* and granted to the buyer an absolute deed, entitling the buyer to remove the dead. The *lease* of trust property held by governments that promotes the purpose of the trust has been upheld in other contexts.

The general law mayor aldermanic charter under which the City is chartered also authorizes the city to lease its property. However, I do not know if the lease of the cemetery at issue promotes the purposes of the cemetery trust. In particular, I do not know if the cemetery was losing money at the time it was leased to the private entity and whether such a loss was at least part of the reason for the lease. In addition, I have not seen the lease. If I were to venture a guess, I would guess that the lease provides that the cemetery will be used as a cemetery for the life of the lease.

The question of whether the lease of the city’s cemetery is an “abuse of discretion” or a violation of the city’s trust, depends upon the facts and circumstances surrounding the lease, including the terms of the lease itself.