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Reply to Topeka Office

February 1, 2021

Sen. Carolyn McGinn
Chair of the Local Government Committee
Kansas State Capitol
300 SW 10th St., Room 223-E
Topeka, KS 66612

Dear Madam Chair and Committee Members:

“The proper use of a cemetery lot is for burial purposes. It cannot be used for any other purpose.”

Lower v. Board of Directors, 274 Kan. 735, Syl. ¶ 2 (2002).

“All lots and tracts of land contained within the boundaries of a cemetery platted by a cemetery corporation are dedicated exclusively for burial purposes and cannot be used for any other purpose.”

Connolly v. Frobenius, 2 Kan. App. 2d, 18, 29 (1978) (citing K.S.A. 17-1302, *et seq.*; *Davis v. Coventry*, 65 Kan. 557 (1902)).

The law of Kansas since statehood is that cemetery grounds are only to be used for the burial of the dead. Senate Bill 97 is an ill-conceived attempt to change the law of this state that has stood for more than a century and has been relied on by generations of Kansans. This bill aims to override the public dedication of property for a cemetery for one reason only: The financial benefit of private corporations.

I represent Newcomer Funeral Service Group Inc., a Kansas-based company headquartered in Topeka that owns and operates cemeteries, funeral homes, and crematories and has provided funeral services for Kansans for decades. This letter will outline why and how SB 97 is trying to overturn the public dedication of property for cemeteries, dedications that can sometimes date back to the mid-19th century.

What SB 97 is trying to undo

This bill proposes to add a definition of the phrase “Purposes of sepulture” as used in the Cemetery Corporations Act (K.S.A. 17-1301, *et seq.*) to include commercial enterprises such as “mortuary and embalming facilities” and “such other purposes and uses necessary or incidental to any of the foregoing.” There is only one statute in the Act that currently uses the phrase “Purposes of sepulture”:

Such corporations shall have power to convey, by deed or otherwise, any lot or lots of the cemetery for *purposes of sepulture* . . .

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Every lot sold and conveyed in such cemetery shall be held by the proprietor, for the *purpose of sepulture* only, and shall not be subject to attachment or execution . . .
K.S.A. 17-1302 (emphasis added).

This law was enacted in 1868 — just seven years after statehood — and has remained largely unchanged since. The purpose of this law is clear. Someone who purchases a lot for a loved one’s final resting place should not have to wonder what the cemetery will become in the future. However, this proposed change would expressly authorize cemetery corporations to deed lots that had previously been dedicated for burial purposes to a private for-profit company that can then build a mortuary or embalming facility on cemetery grounds.

No one is arguing that mausoleums, columbariums and other interment spaces are not proper uses for cemetery grounds — those purposes perfectly fit within the use of the space for burial of the dead. But this bill attempts to allow embalming and mortuary facilities on cemetery grounds, which are commercial enterprises for the sale of goods and services.

“Sepulture” means “burial, grave or tomb.” It does not mean “to build a commercial enterprise” such as a mortuary or embalming facility or a crematory. Not only is it nonsensical to add language to the definition of a word that has nothing to do with its common meaning, but this would also betray the public dedication of property that when it was dedicated was for one purpose only: to be used as a cemetery and the burial of the dead.

SB 97 tries to circumvent dedication of property as a cemetery

This issue was addressed in the *Connolly* case cited above. In that case, a cemetery corporation wanted to build a mortuary on land previously dedicated as a cemetery for the “purpose of sepulture.” The Kansas Court of Appeals analyzed whether a mortuary is a proper use of land dedicated for burial purposes. The Court ultimately found:

“When a tract of land has been dedicated as a cemetery, it is perpetually devoted to the burial of the dead and may not be appropriated to any other purpose . . . [I]t must be held that the property in question can only be used as a place for burying the dead, and any other attempted use is an unlawful attempt to appropriate property dedicated for cemetery purposes to other uses, which cannot be done.”

Connolly, 2 Kan. App. 2d at 30 (quoting *Greenwood Cemetery, Inc. vs. MacNeill*, 213 Ga. 141 (1957)).

The *Connolly* decision rightly noted that the purchasers of the lots in the cemetery in question had no indication that a commercial enterprise later would be built on the cemetery grounds:

“The general rules set forth on the deeds to the cemetery lots and to the crypts give no indication to the more than 6,000 purchasers that any part of the area in which they have selected lots to bury their loved ones, or in which they themselves may eventually be buried, will be used for any commercial enterprise, whether it be the operation of a mortuary or

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buildings housing offices for collection departments, savings and loans, insurance, trust departments, or others.” *Id.* at 31.

This makes perfect sense. If you purchase a lot in a cemetery believing the area will continue as a cemetery, you should not have to worry that at some point in the future a business will be built and operated on the cemetery grounds.

It is also worth noting that the legislature in 2008 addressed how real estate that has been dedicated as a cemetery could be sold and developed. K.S.A. 17-1375 allows a cemetery corporation to sell excess real estate that has been dedicated as a cemetery but has not been platted into burial plots if several conditions are met. Notably, the corporation must determine that:

- (a) The sale and transfer of marketable title to such excess real estate for fair market value is necessary to allow the cemetery to meet current statutory maintenance and reserve requirements and its obligations to the beneficiaries of the trust;
- (b) the cemetery corporation will record restrictions or include restrictions in the deed of conveyance prohibiting the use of the excess real estate for sepulture, mortuary or crematorium uses;
- (c) such excess real estate is not reasonably required for future sepulture purposes considering all remaining real estate owned by the cemetery corporation will remain restricted to use solely for sepulture purposes;

K.S.A. 17-1375(a) – (c).

This statute specifically requires that the real estate cannot be used for “mortuary or crematorium uses” and that the funds are “necessary” to maintain the cemetery grounds. Also, there must be a determination that the excess real estate is not needed for future burial purposes. SB 97 is in direct conflict with this statute. K.S.A. 17-1375 strikes a reasonable balance of flexibility to sell excess cemetery ground, but only under certain conditions that guarantee that the cemetery itself does not lose its integrity.

In closing, we urge you to take a hard look at what this bill would do to long-standing law. While it looks like a benign addition of a definition, it would drastically alter the law of this state that has been relied on by Kansans for more than a century. Thank you for your consideration and please feel free to contact me if you have any questions or would like to discuss further.

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Sincerely,

/s/ Aaron R. Bailey
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Encl.