



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-7

The Honorable David Perryman
State Representative, District 56
2300 N. Lincoln Blvd., Room 540
Oklahoma City, OK 73105

September 6, 2018

Dear Representative Perryman:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

May a municipality use municipal resources to improve or maintain the grounds of, maintain records for, or collect and remit payments for plots in a privately-owned cemetery that is open to the public?

I.
BACKGROUND

In your request, you refer to Attorney General Opinion 1980-44, which concluded that the Oklahoma Constitution prohibits the use of municipal resources to improve property owned by a church, nonprofit corporation, or other private entity where such improvements are solely for the benefit of that entity. A.G. Opin. 1980-44 at 76. Moreover, the opinion concluded that even if the municipality were reimbursed for its expenses in making such improvements, it would not be *statutorily* authorized to take such action. *Id.* at 76-77. Finally, as you also note in your request, the conclusions reached in that opinion were premised on the understanding that the improvements in question would not inure to the benefit of the public. *See id.* at 76. Here, you ask a slightly different question: whether municipal resources may be used to provide services to a privately-owned cemetery *that is open to the public*, when the use of said resources may inure to the benefit of the public.

II. DISCUSSION

Our understanding is that your request is in regard to a statutory (or non-charter) municipality. It is well settled that such municipalities in Oklahoma may exercise only those powers that “are expressly granted or necessarily implied from a statute.” *Morehead v. Dyer*, 1973 OK 121, ¶ 8, 518 P.2d 1105, 1108; *see also City of Hartshorne v. Marathon Oil Co.*, 1979 OK 48, ¶ 6, 593 P.2d 97, 99 (“A city has no inherent power to act; it possesses and can exercise only those powers expressly granted, or incidental to power expressly granted, by the state.”).¹

The subject of cemeteries is addressed to some degree in the Oklahoma Municipal Code, which provides that “[a] municipal governing body shall have the power to purchase, lay out and regulate cemeteries.” *See* 11 O.S.2011, § 26-101. Municipalities are also authorized to create a board of cemetery trustees to have charge and control of the cemetery and which may, among other things, make rules and regulations governing the establishment, improvement, and management of the cemetery. *See id.* §§ 26-106 – 26-108. While these powers are broadly worded, they are limited to cemeteries that are *owned by the municipality*. *See also id.* § 26-102 (permitting municipality to pay assessments for improving grounds of municipal cemetery and “the avenues leading thereto”); *Henry v. City of Muskogee*, 1999 OK CIV APP 71, 986 P.2d 1151 (holding that municipal power to “pass rules and ordinances to regulate, protect, and govern the cemetery” pursuant to Title 11, Section 26-105 applies only to municipally-owned cemeteries and not to cemeteries owned or controlled by a church society or congregation).² The Municipal Code does not grant municipalities the express power to provide services to a privately owned cemetery, even one that is open to the public or otherwise benefits the public. Nor can it be fairly implied from the Municipal Code that such services may be provided to cemeteries *not* owned by the municipality.

Moreover, the Legislature has not remained silent regarding the maintenance and improvement of privately owned cemeteries. Rather, it has expressly provided methods through which private organizations may ensure the care of a cemetery. As an example, Title 8, Chapter 1 of the Oklahoma Statutes governs non-profit cemetery corporations. *See* 8 O.S.2011, §§ 1 – 18. Such entities have the power to “enclose, improve and embellish [cemetery] grounds, avenues and walks, and to erect buildings or vaults for its use,” and to prescribe bylaws so that “all the

¹ By contrast, the Oklahoma Constitution permits a municipality of over 2,000 residents to “frame a charter for its own government, consistent with and subject to the Constitution and laws of this State[.]” OKLA. CONST. art. XVIII, § 3(a); *see also* 11 O.S.2011, § 13-101. “A city which adopts a home-rule charter . . . is accorded full power of local self-government, and as such the city has the power to enact and enforce ordinances to protect the public peace, order, health, morals and safety of its inhabitants even though general statutes exist relating to the same subjects.” *Moore v. City of Tulsa*, 1977 OK 43, ¶ 2, 561 P.2d 961, 963. When a municipal charter is properly adopted and approved, it becomes the governing law of the municipality and controls over state law in all matters “relating to purely municipal concerns.” 11 O.S.2011, § 13-102(1); *see also id.* § 13-109 (“Whenever a charter is in conflict with any law relating to municipalities in force at the time of the adoption and approval of the charter, the provisions of the charter shall prevail and shall operate as a repeal or suspension of the state law or laws to the extent of any conflict.”).

² Similarly, a board of county commissioners is “authorized and empowered to utilize employees under its jurisdiction and county-owned tools, machinery, equipment, and materials for the purposes of opening and closing graves and maintaining and improving *any publicly owned cemetery or other cemetery within the county not owned and maintained by an individual or private organization*; provided that, where appropriate, a reasonable fee, not to exceed the actual cost of the service, may be charged for such services.” 8 O.S.Supp.2017, § 143 (emphasis added).

appliances and conveniences and benefits of a public and private cemetery may be obtained and secured.” *Id.* § 5. The legislature also provided a mechanism for non-profit cemetery corporations to maintain and preserve their property, requiring them to apply, appropriate, and use a portion of the proceeds arising from the sale of lots to “protecting, preserving, improving and embellishing the cemetery and its appurtenances[.]” *Id.* § 8. The board of directors of each cemetery corporation must appoint a superintendent to enforce the corporation’s bylaws, care for and protect the cemetery grounds, and oversee the construction and maintenance of improvements. *Id.* § 13.

The Legislature has also provided a mechanism to ensure the care and maintenance of other privately owned public cemeteries that are not necessarily non-profit in nature. The Perpetual Care Fund Act, 36 O.S.2011 & Supp.2017, §§ 7101 – 7112, requires most private for-profit cemeteries in the State to set aside not less than ten percent of their proceeds in a permanent trust fund known as the “Perpetual Care Fund.” *Id.* §§ 7103, 7108. Income from said funds shall be “used for improving, caring for, and embellishing the lots, walks, drives, parks and other improvements in the cemeteries and maintenance of office and care of records.” *Id.* § 7103.

Finally, the Legislature has also expressed its intent that cemeteries not become a burden on the State’s taxpayers:

To protect the citizens of the state, to promote the public welfare and public health thereof, ***and to prevent and guard against cemeteries from hereafter becoming a burden upon the community and the taxpayers of the state***, the following provisions are enacted in the exercise of the police power of the state.

8 O.S.2011, § 181 (emphasis added). The provisions referenced in that statute provide the county with authority to issue certificates of authority to organizations that allow such entities to locate and establish cemeteries within the county. There are several criteria the county must consider in making its decision, which speak to the private entity’s ability to operate and maintain a cemetery. *Id.* §§ 182 – 183.

In sum, the Legislature has spoken to the authority granted to municipalities with respect to municipal cemeteries, but omitted any mention of municipal authority with regard to privately owned cemeteries. “Legislative silence, when it has authority to speak, may be considered as giving rise to an implication of legislative intent.” *City of Duncan v. Bingham*, 1964 OK 165, 394 P.2d 456. In addition, the Legislature has provided mechanisms for the care and maintenance of privately owned and other publicly owned cemeteries. In these circumstances, it is clear that municipalities have not been given the authority to use municipal resources to improve or support privately owned cemeteries, regardless of whether they are open to the public.³

³ The lack of express or implied statutory authority permitting the use of municipal resources for the benefit of a privately-owned cemetery is the same regardless of whether the private owner is a for-profit entity or a not-for-profit entity. In addition, having concluded that municipalities lack such authority, we need not consider whether such a use of municipal resources violates Sections 14 or 17 of Article X of the Oklahoma Constitution.

It is, therefore, the official Opinion of the Oklahoma Attorney General that:

Municipalities do not have the authority, express or implied, to use municipal resources to improve or maintain the grounds of, maintain records for, or collect and remit payments for plots in a privately-owned cemetery that is open to the public.



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