

MEMORANDUM OF LAW

DATE: February 18, 1993

TO: JoAnn Waits, Mount Hope Cemetery, Property  
Department

FROM: City Attorney

SUBJECT: Mount Hope Cemetery Property and Trust Fund

Your memorandum of January 27, 1993, to Hal Valderhaug regarding Mount Hope Cemetery has been referred to me for response. You ask the following questions:

1. Can the unused portion of cemetery land be leased out to businesses? If so, what type of businesses would qualify? What steps are required to lease such land?

2. Can the interest that accrues on the Pre-Need Trust Fund be drawn out each year and used to subsidize the cemetery? If possible, what is required to do so? What, if any, restrictions apply in this case?

ANSWERS

1. The City may not lease the Mount Hope property for other than cemetery purposes without a two-thirds vote of the electorate and any such approved lease would require the continued use and maintenance of the cemetery.

2. The interest received from the Pre-Need Trust Fund cannot be used to subsidize the cemetery.

ANALYSIS

You asked whether the City can lease unused portions of cemetery land to "businesses." If so, what type of "businesses" would be allowed to lease property within Mount Hope Cemetery. Please see the attached opinions from this office dated August 25, 1955 and May 12, 1964 (attached as Exhibit A). You will note that this office has issued opinions since as early as 1955 which have concluded that Section 55 of the City Charter requires that any lease which results in the use of cemetery land for other than cemetery purposes would have to be authorized by a two-thirds vote of the electorate.

Section 55 of the City Charter states that: "All real property . . . for . . . cemetery purposes shall not be used for any but . . . cemetery purposes without such changed use or purpose having been . . . ratified by a vote of two-thirds of the

qualified electors . . . ."

The definition of cemetery as set forth in Section 7003 of the Health and Safety Code includes the following: A burial park for earth interments, a mausoleum for crypt or vault interments, and a crematory for cinerary interments. Therefore if the City wishes to lease property within Mount Hope Cemetery to businesses not related to a cemetery use as set forth in Section 7003, a two-thirds vote of the electorate is required.

In addition, this office has concluded in Opinion No. 73-5 by Hal Valderhaug dated July 19, 1973, (attached as Exhibit B) that even if the proposed leasehold use was for cemetery purposes, the City cannot legally turn over the management, control, regulation, improvements and embellishment of the cemetery to a proposed lessee. This conclusion is based upon Section 55 of the City Charter which states that: "The City Manager shall . . . have charge of the management, control, preservation, regulation, improvement and embellishment of all . . . cemeteries belonging to the City."

You also ask, whether the interest that accrues on the Pre-Need Trust Fund can be drawn and used to subsidize Mount Hope Cemetery. For purposes of this memorandum we are assuming that "subsidizing" the cemetery means to pay any extra costs incurred in its operation and maintenance.

The Trust Fund was created by the City Council for the purpose of collecting monies from individuals for the purchase of burial lots within the cemetery and for future burial services, such as grave openings and closings, vaults and liners. It is our understanding that when the services are performed by the City in the future, these individuals do not pay for any increase in the fees for such services or for such lots.

It is well established in California that the disposition of the income and of the principal from a trust instrument depends on the language of that trust instrument. (Union Nat. Bank v. Hunter, 93 Cal.App.2d 669) The Pre-Need Trust Fund was established by City Council Resolution R-264811 (attached as Exhibit C). The City Council authorized the establishment of a special Trust Fund (the Pre-Need Trust Fund) and directed that all interest earned on deposited monies be credited to the Trust Fund. The monies are to be expended out of the Pre-Need Trust Fund on an as-need basis, as determined by the Cemetery Manager at the time burial services are performed.

Consequently, it appears that the City Council intended that the interest received from this Trust Fund would support the City's capacity to furnish such services in the future, not to subsidize the cemetery.F

Ed Ryan, Auditor and Comptroller, by Memorandum dated August

21, 1985, states that the Council can specifically designate that all interest earned on deposited monies will be credited to the fund. The interest earned on these deposits would be pooled. Later, when the services were performed by the City, the fund would be billed according to the current fee schedule. If the fee charged exceeded the fee deposited then the pooled interest would be charged the difference.

We hope this assists you.

JOHN W. WITT, City Attorney

By

Ann Y. Moore

Deputy City Attorney

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Attachments 3

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