

March 30, 2011 Advisory Letter - Privately Owned Cemetery & Visiting Hours

The Honorable Timothy Z. Jennings
New Mexico State Senator
P.O. Box 1797
Roswell, NM 88202-1796

Re: Opinion Request—Privately Owned Cemetery & Visiting Hours

Dear Senator Jennings:

You have requested our advice about a district attorney's authority to prosecute a burial lot owner who visits a privately owned cemetery after the posted visiting hours. Specifically, you ask: (1) Does the owner of a privately owned cemetery have the authority to restrict a lot owner's entry to the cemetery? (2) Does posting signs stating the visiting hours along with a notice that trespassers will be prosecuted constitute proper notice to after-hours visitors that they may be prosecuted for criminal trespass? (3) May after-hours visitors to a privately owned cemetery that own lots in that cemetery be prosecuted for criminal trespass? According to your letter, "[t]he owner of the Memorial Lawn Cemetery [a privately owned cemetery] in Roswell has posted signs stating the visiting hours and a notice that trespassers will be prosecuted."

Based on our examination of the relevant New Mexico law and on the information available to us at this time, we conclude that an owner of a privately owned cemetery in Roswell does have the authority to restrict a lot owner's entry to the cemetery. We also conclude that after-hours visitors to a privately owned cemetery might be prosecuted for criminal trespass and that posting signs stating the visiting hours, along with a notice that trespassers will be prosecuted, does constitute proper notice regarding criminal trespass.

Cemetery Owner's Right to Restrict Entry

It is our understanding that there are both publicly owned and privately owned cemeteries in New Mexico. See NMSA 1978, §§ 3-18-8 (1965), 3-40-1 (1973). However, the state laws regarding activities at privately owned cemeteries are not on point. For example, there is a state law that licenses practitioners who handle and dispose of a dead human body, but it does not discuss visiting hours at the cemeteries. See NMSA 1978, §§ 61-32-1 to -31 (1993). There is also a set of state laws that regulate the financial transactions of "endowed" or "perpetual" care cemeteries that operate with certain types of trusts. See NMSA 1978, §§ 58-17-1 to -21 (2001). See also New Mexico Financial Institutions Division's website, www.rld.state.nm.us/fid/faq.html ("There is no state agency that regulates non-perpetual care cemeteries. However, the State Health Department will step in if the cemetery in question poses a health hazard to the community....")

Although there does not appear to be a New Mexico law that governs visiting hours at privately owned cemeteries,[1] state law authorizes a municipality to “regulate cemeteries within the planning and platting jurisdiction of the municipality.” NMSA 1978, § 3-18-8(C) (1965). This provides a municipality with sufficient authority to enact an ordinance that regulates citizen visiting hours, even on privately owned cemetery property. See Mitchell v. City of Roswell, 45 N.M. 92, 98, 111 P.2d 41 (1941) (“All property and property rights are held subject to the fair exercise of the police power; and a reasonable regulation enacted for the benefit of the public health, convenience, safety or general welfare” is not unconstitutional.). However, the City of Roswell, to the extent that it regulates private cemeteries, focuses only on regulating the *financial* transactions of the private owners. “Unfortunately the City of Roswell does not have any ordinances that govern the operations others than ... financial accountability.” Letter from J. Michael Kirk, Roswell Cemetery Board to AGO (Nov. 25, 2009).

In the absence of a state law or local ordinance governing this matter, we conclude the owner of a privately owned cemetery in Roswell is free to set visitation hours and limit the right of entry to the cemetery to certain times.[2]

After Hours Visitation as Criminal Trespass

In the absence of a more specific statute,[3] New Mexico’s general law regarding criminal trespass controls. NMSA 1978, Section 30-14-1 reads, in relevant part:

Criminal trespass consists of knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land....Whoever commits criminal trespass is guilty of a misdemeanor.

A person who desires to prevent trespass must post notices that prohibit all persons from trespassing on or entering the property. NMSA 1978, Section 30-14-6 describes what kind of a sign is sufficient to constitute a posted sign. It must be in English and “at least one hundred forty-four square inches in size”, “contain the name and address of the person who is authorized to grant permission to enter the property” and “be placed at the apparent way of access onto the property.” NMSA 1978, § 30-14-6(B) (1969).

Under the applicable law, a private cemetery owner may post signs restricting access to certain hours. If they are in accordance with Section 30-14-6, the signs would constitute proper “posted” notice to after-hours visitors that they may be prosecuted for criminal trespass. A person who knowingly entered or remained in a posted privately owned cemetery after visitation hours would be vulnerable to prosecution for criminal trespass under these set of circumstances.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the

attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY SHANDLER
Assistant Attorney General

[1] In contrast, Texas law specifically addresses a person's right of access to private cemeteries. See Tex. Health & Safety Code Ann. § 711.041 (1993) ("Any person who wishes to visit a cemetery or private burial grounds ... shall have the right to reasonable ingress and egress for ...visiting the cemetery ... during reasonable hours...."); see also 22-10-205 Tex. Admin. Code. § 205.2 (2009) ("[T]he term 'reasonable hours' ... should be interpreted to mean 8:00 a.m. to 5:00 p.m. on any of the week.").

[2] See N.M. Const. Art. II, § 4 ("All persons ... have ...the rights of ...protecting property...").

[3] Other states have criminal trespass laws that apply specifically to cemeteries. See, e.g., (Virginia) Va. Code. Ann. § 18.2-125 (1975) ("Trespass at night upon any cemetery-If any person, without the consent of the owner ...enter in the nighttime, upon the premises ... of any cemetery, either public or private, for any purpose other than to visit the ... grave of some member of his family, he shall be guilty of a Class 4 misdemeanor."); (Maine) Me. Rev. Stat. Ann. 17-A-2-17, § 402(1)(F) (2001) ("Criminal trespass—1. A person is guilty of criminal trespass if [a] ...person...enters ... a cemetery ... at any time between ½ hour after sunset or ½ hour before sunrise the following day, unless that person enters ... during hours in which visitors are permitted to enter ... by municipal ordinance or, in the case of a privately owned and operated cemetery, by posting.").