

**OP. NO. 04-002**

**CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE  
(EXEMPT PROPERTY).**

**TAXATION: TAX EXEMPT PROPERTY.**

**RELIGIOUS AND CHARITABLE MATTERS; CEMETERIES:  
CEMETERIES.**

**Question whether family cemetery is being operated for profit, for purposes of tax exemption, is determination of fact to be made by local taxing official. Land dedicated for family cemetery is limited to 300 acres.**

The Honorable Judy S. Crook  
Commissioner of the Revenue for Franklin County  
March 30, 2004

### **Issue Presented**

You inquire concerning the proper amount of acreage of a family cemetery located in Franklin County that may be exempt from local real property taxation, where only a portion of the cemetery is being used as a burial ground, and the remaining portion, which a court of competent jurisdiction has set aside for future expansion purposes, currently is not being used for purposes of burial. You further inquire whether there is a limit to the amount of land that may be dedicated for a family cemetery.

### **Response**

I am of the opinion that in interpreting the constitutional property tax exemption for "private or public burying grounds and cemeteries ... not operated for profit," the critical question is not what is the current use of property set aside for future expansion of the cemetery, but whether the cemetery is being "operated for profit" within the meaning of Article X, § 6(a)(3). This would also be the determining factor for purposes of the exemption found in § 58.1-3606(A)(3). It is further my opinion that whether the subject family cemetery is being "operated for profit," for purposes of constitutional and statutory tax exemptions is a question of fact for determination by the local taxing official. Finally, it is my opinion

that no more than 300 acres of land may be dedicated to a family cemetery.

### **Background**

You relate that you have received a request to exempt from local taxation, a 33.33-acre parcel and a 2.918-acre parcel of land as a family cemetery, based on two orders entered by the Circuit Court of Franklin County on August 24, 1987, and October 21, 2003.<sup>1</sup> The 2.918-acre parcel ("small parcel"), which contains the family cemetery, is enclosed by a brick wall and is exempt from local taxation. The trustees of the association that owns the cemetery are asking that the 33.33-acre parcel ("large parcel") surrounding the enclosed burying ground be exempted from local taxation, based on the court orders. You state that the large parcel is not being used for interment, but may be used for other purposes, such as recreation.

The small parcel has been used for family burial since at least 1921. The trustees acquired the large parcel in 1973. The court orders have held that both parcels have constituted a "cemetery" since the acquisition of the large parcel in 1973. Both court orders deem the large parcel to be an enlargement of the small parcel burial site, effective retroactively as of the date of acquisition in 1973. The Franklin Circuit Court has approved the bylaw provision adopted by the family cemetery association that the caretakers' lodge erected on the cemetery grounds shall never be used for monetary gain or profit.<sup>2</sup> In addition, the court has authorized the association to cut and sell annually only the timber from the large parcel as is necessary to maintain the cemetery.<sup>3</sup>

You relate that there has been no formal dedication restricting the future use of the large parcel for cemetery purposes, other than the court orders described above. The large parcel remains in its natural state at this time.

### **Applicable Law and Discussion**

Article X, § 6(a)(3) of the Constitution of Virginia exempts from real and personal taxation, "[p]rivate or public burying grounds or cemeteries, provided the same are not operated for profit."<sup>4</sup> The General Assembly has enacted a coordinate exemption in § 58.1-3606:

A. Pursuant to the authority granted in Article 10, Section 6 (a) (6) of the Constitution of Virginia to

exempt property from taxation by classification, the following classes of real and personal property shall be exempt from taxation:

....

3. Nonprofit private or public burying grounds or cemeteries.

A 1984 opinion of the Attorney General notes that the only self-executing exemptions from property taxation are those for publicly owned property, church property, nonprofit cemeteries, public libraries and nonprofit institutions of learning pursuant to Article X, § 6(a)(1)-(4).<sup>5</sup> The Franklin Circuit Court has twice ordered that the small and large parcels together constitute a cemetery, specifically with the large parcel constituting an enlargement of the existing cemetery which predates the 1971 Constitution<sup>6</sup> and the 1950 *Code of Virginia*.

A "burying ground" or "cemetery" is "a place set apart for the interment of the dead."<sup>7</sup> "A cemetery ... includes not only lots for depositing the bodies of the dead, but also such avenues, walks and grounds as may be necessary for its use or for shrubbery and ornamental purposes."<sup>8</sup> Under Virginia law, "[t]here is no particular form or ceremony necessary in dedicat[ing land] to public use [as a cemetery]."<sup>9</sup> The intent of the owner and the fact that the land is being used for cemetery purposes are all that is required.<sup>10</sup> Should there be any uncertainty in the reservation of the land for cemetery usage, the grantor may act within a reasonable period to cure it.<sup>11</sup> Moreover, it is equally clear that § 57-25 authorizes "enlargement" of a "cemetery already established."<sup>12</sup>

Notwithstanding this conclusion, in order to be entitled to property tax exemption, the cemetery must still be operated on a "nonprofit" basis. It is not the equivalent of "charitable."<sup>13</sup> Two circuit court opinions have considered the meaning of "nonprofit" in this context. In 1987, the Circuit Court of Henrico County ruled that income generated from a cemetery owned by an organization exempt from federal income tax must be used for cemetery purposes, in order for the land not being used for burial purposes to be exempt from property taxation:

It does not follow, however, that the [corporation owning the cemetery] is exempt from real estate taxes simply because it is exempt from income taxes. It is undisputed that real estate used for cemetery

purposes is not subject to County real estate taxes. The question here is whether or not the real estate which is not being used for cemetery purposes is exempt from real estate taxes simply because it is owned by a cemetery corporation. *The fact that the corporation is organized as a nonprofit cemetery corporation does not in and of itself exempt the corporation from the payment of real estate taxes where it is quite clear that the corporation is distributing money in the form of dividends to its stockholders and where the real estate held by the corporation is not being used as burial ground.*<sup>[14]</sup>

The Henrico Circuit Court relied on a 1984 decision in Arlington County as to the meaning of the words "profit" or "gain" in this context:

Whether a cemetery is operated for profit or not depends in a large measure on how the money derived from sales is used. The cases are clear that the mere fact of a profit, standing alone, does not equate with "operated for a profit." The key is what does the cemetery do with the money? If it is used for cemetery purposes, then no violation of the Constitutional conditions occur. If, however, it is used for the benefit of private parties, particularly stockholders, then "profit" or "gain" has been realized and the exemption is jeopardized. In *San Gabriel Cemetery Assn. v. Los Angeles County*, 122 P.2d 330 (1942), *the word profit was construed to mean "net earnings the benefit of which accrue directly or indirectly to the stockholders or members of the Association.*"<sup>[15]</sup>

Accordingly, the family cemetery is entitled to a self-executing exemption from property tax for the portion actually used as a burial ground, and the large parcel, which the Franklin Circuit Court specifically has set aside for its enlargement, is entitled to exemption if it is not being operated for profit. This is a question of fact for determination by the local taxing official.<sup>16</sup>

You further inquire whether there is a limitation on the amount of land that may be dedicated for a family cemetery. Section 57-26(2) authorizes a conveyance of no more than 300 acres of land for use as a cemetery.

## Conclusion

Accordingly, I am of the opinion that in interpreting the constitutional property tax exemption for "private or public burying grounds and cemeteries ... not operated for profit," the critical question is not what is the current use of property set aside for future expansion of the cemetery, but whether the cemetery is being "operated for profit" within the meaning of Article X, § 6(a)(3). This would also be the determining factor for purposes of the exemption found in § 58.1-3606(A)(3). It is further my opinion that whether the subject family cemetery is being "operated for profit," for purposes of constitutional and statutory tax exemptions is a question of fact for determination by the local taxing official. Finally, it is my opinion that no more than 300 acres of land may be dedicated to a family cemetery.

<sup>1</sup>You enclose with your request, copies of the orders pertaining to the family cemetery.

<sup>2</sup>The October 21, 2003, court order states that the trustees use the caretakers' lodge in carrying out their duties, such as taking care of the cemetery, and for receiving guests at funerals.

<sup>3</sup>The propriety of a circuit court's action on the same question presented in an official opinion request is not subject to review by this Office. See 1987-1988 Op. Va. Att'y Gen. 352, 352.

<sup>4</sup>For purposes of this opinion, "profit" means gain in the pecuniary sense.

<sup>5</sup>1984-1985 Op. Va. Att'y Gen. 336, 337 n.2.

<sup>6</sup>For purposes of this opinion, I assume that you do not inquire whether the enlargement of the family cemetery, the small parcel of which was in existence prior to the July 1, 1971, Constitution, is "grandfathered" under the rule that exemptions be liberally construed; rather, I apply the prospective rule of strict construction of property tax exemptions. See *Manassas Lodge No. 1380 v. County of Prince William*, 218 Va. 220, 223, 237 S.E.2d 102, 105 (1977) (concluding that Article X, § 6(f) prescribes rule of strict construction to apply prospectively to exemptions established or authorized by 1971 Constitution).

<sup>7</sup>1984-1985 Op. Va. Att'y Gen. 322, 322 (citing Black's Law Dictionary 179 (5th ed. 1979)).

<sup>8</sup>3B Michie's Jur. *Cemeteries* § 1, at 218 (1996).

<sup>9</sup>*Colbert v. Shepherd*, 89 Va. 401, 404, 16 S.E. 246, 247 (1892) (citation omitted).

<sup>10</sup>*Id.*

<sup>11</sup>See *id.* at 406, 16 S.E. at 247-48 (noting that deed conveying land expressly stipulated and agreed that family burying ground and monument included within its limits are excluded from grant)

<sup>12</sup>Section 57-25 authorizes the condemnation of land, in the manner prescribed in the statute, "to establish a cemetery for the use of a city, town, county or magisterial district, or to enlarge any such cemetery already established, [when] the title to land needed cannot be otherwise acquired." See *Temple v. City of Petersburg*, 182 Va. 418, 29 S.E.2d 357 (1944) (noting distinction between meanings of terms "establish" and "enlarge," as used in § 53, predecessor to § 57-25).

<sup>13</sup>*Westminster-Canterbury v. City of Va. Beach*, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989) (holding that Westminster, owned by nonstock, nonprofit corporation, was not entitled to tax exemption under classification statute, as it was not clear that it was organization conducted exclusively as charity or that its property was used exclusively for charitable purposes); see also 1998 Op. Va. Att'y Gen. 125 (defining what constitutes "charitable," "charitable purpose," and "charity").

<sup>14</sup>*Westhampton Mem'l Park, Inc. v. County of Henrico*, 9 Va. Cir. 231, 233, 1987 Va. Cir. LEXIS 47, at \*5 (1987) (emphasis added).

<sup>15</sup>*Columbia Mem'l Park, Inc. v. County Bd.*, 9 Va. Cir. 548, 549, 1984 Va. Cir. LEXIS 59, at \*2 (1984) (emphasis added).

<sup>16</sup>See 2002 Op. Va. Att'y Gen. 64 (question whether church property, used for certain church-related activities while being developed for its intended use, may be tax exempt is reserved for local commissioner of revenue or other appropriate taxing official). The Attorney General refrains from issuing opinions on questions of fact rather than questions of law. See *id.* at 96, 99, and opinions cited at 101 n.27.

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