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Improving the Image and Legal Status of the Burial Services Industry

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IMPROVING THE IMAGE AND LEGAL STATUS OF THE BURIAL SERVICES INDUSTRY

by

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INTRODUCTION:

The Subordinate Status of Funeral Homes and Cemeteries as Property Uses

Like members of the nouveau riche trying to gain acceptance by class-conscious high society, operators of funeral parlors and cemeteries must learn to cope with rejection. Neither form of land use is normally welcomed into a residential area;[1] and a funeral home occasionally has difficulty even gaining entrance into a business zone.[2] In many instances undertakers and graveyard proprietors could plausibly argue that their lack of acceptance is unjustified. After all, funeral parlors are commonly located in attractive residences, rarely cause much noise, and do not with regularity create large amounts of traffic.[3] In some ways, many cemeteries, with their well-tended lawns, flowers, and trees resemble parks. Nevertheless, although the courts tend to treat cemeteries more leniently than mortuaries,[4] both kinds of enterprise can realistically expect that their proposed

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[1] ". . . (T)he modern tendency to expand equity's protection of aesthetics and mental health has led the majority of jurisdictions to bar funeral homes and cemeteries from the residential sanctuaries of ordinarily sensitive people." Note, *Equity—Funeral Homes and Cemeteries as Nuisances*, 4 ARK. L. REV. 483, 484 (1950). ". . . (D)efendants have argued that something that causes only mental disturbance, such as a nearby cemetery or funeral home,cannot be a nuisance. However, the courts generally decide that such activities may be nuisances if the distress or fear they engender would cause substantial harm to an ordinary person". R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 416 (1984).

[2] Annotation, *Funeral Homes as Private Nuisance*, 8 A.L.R. 4th 324, 329 (1981); Sweet v. Campbell, 282 N.Y. 146, 25 N.E.2d 963 (1940).

[3] D. MANDELKER, LAND USE LAW 99 (2d 3d. ed. 1988).

[4] R. WRIGHT & S. WRIGHT, LAND USE IN A NUTSHELL 25 (2d ed. 1985). A possible explanation for this phenomenon is the general recognition that graveyards are an absolute necessity (at least until cremation becomes universal) and that, as a practical matter, they cannot be located too far away from the decedent's surviving relatives. In Young v. St. Martin's Church, 361 Pa. 505, 64 A.2d 814 (1949), the Supreme Court of Pennsylvania affirmed a judgment denying an injunction to restrain defendants from establishing a cemetery in a residential area, declaring:

> 'A repository of the bodies of the dead is as yet indispensable . . .' Burial grounds must be established where they are reasonably accessible to surviving relatives and friends, who naturally wish to visit the graves of their dear ones; they cannot, therefore, be located in the

entrance into a locality will be met with legal maneuvers to exclude them.[5]

The purpose of this article is to examine the reasons advanced for excluding funeral parlors and graveyards from predominantly residential neighborhoods, the legal devices most commonly employed to accomplish such exclusion, and the propriety of using the police powers of the state to bar a land use that may not always threaten to thwart any of the recognized aims that the police powers are intended to promote. Finally, the article will recommend some practical steps that operators of mortuaries and cemeteries might take in order to gain more public acceptance. To the extent that the law merely reflects the values, mores, and attitudes of society,[6] an improvement in the public image of funeral homes and graveyards should result in a reduction of the legal obstacles that they currently confront.

REASONS FOR BARRING FUNERAL HOMES AND CEMETERIES FROM PREDOMINANTLY RESIDENTIAL AREAS

Concerns about Physical Intrusions

The traditional reasons for excluding mortuaries and graveyards from residential districts were almost exclusively apprehensions about threats of a physical nature:[7]—e.g., worries about the danger or discomfort created by the spreading of

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> wild; and it would probably be impossible to find a suitable tract of land within any reasonable distance of built-up areas that would not be in more or less proximity to residential properties.

64 A.2d at 816. In the first sentence the court was quoting from Monk v. Packard, 71 Me. 309, (1880).

[5] Regarding funeral parlors, *see* Annotation, *Construction and Application of Zoning Regulations in Connection With Funeral Homes*, 92 A.L.R.3d 328, 332 (1979):

> . . . (T)he establishment and maintenance of funeral homes has generated litigation which seems out of proportion to the number of such uses or their importance in the whole scheme of community development, the reasons lying in the nature of the use and the circumstances which encourage frequent attempts to establish them in neighborhoods where they are unwelcome. *Id.* at 332.

Respecting cemeteries, *see* Annotation, *Zoning Regulations in Relation to Cemeteries*, 96 A.R.R.3d 921, 927 (1979):

> . . . (C)ounsel should anticipate that a proposed cemetery may be opposed by neighboring landowners or residents on grounds that such use will constitute a nuisance despite compliance with or relief from the zoning regulations. *Id.*

[6] "The law moves with the main currents of the society that it regulates. Each society has its own values, necessarily reflected in the ends that the legal order seeks to further." B. SCHWARTZ, THE LAW IN AMERICA 18 (1974).

[7] "Until about the end of the nineteenth century the only limitation on one's right to use his property as he pleased was the prohibition against inflicting upon his neighbors injury affecting the physical senses." Powell v. Taylor, 222 Ark. 896, 896, 263 S.W.2d 906, 906 (1954).

In Wescott v. Middleton, 43 N.J.E. 478, 11 A 490 (1887), *aff'd* 44 N.J. Eq.297 (1988), the New Jersey Court of Chancery dismissed an action to enjoin the operation of a funeral home in a predominantly residential section of Camden, saying: "Must the undertaker retire from the inhabited parts of our villages,

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disease germs, the generation (or attraction) of vermin, the dispersal of foul odors,[8] the production of excessive noise, and/or the creation of undue traffic congestion.[9] In *Blackburn v. Bishop* [10]and *Densmore v. Evergreen Camp, Woodmen of the World*,[11] where the courts affirmed judgments enjoining as nuisances the operation of undertaking establishments in residential localities, the judicial opinions disclose serious concern about the health risks posed by the location of defendants' mortuaries. In the former case the court declared:

> (W)e arrive at the following conclusions: . . . That it appears from the evidence that there is a constant danger to plaintiff's family from infectious and contagious diseases being carried to the plaintiff's residence by such carriers as mice, rats, insects, and the very air . . . . It further appears from the evidence of the physicians . . . that germs of diseases are not only carried by rats, mice, and flies, but that they can be carried through the atmosphere for at least 100 feet distance.[12]

And in *Densmore* the Supreme Court of Washington stated:

> There is evidence tending to show . . . that there is danger of infection and contagion from the proximity of the morgue, and the possibility of flies passing from one place to the other. This testimony is supported by physicians sworn as experts. . . . The maxim, 'Sic utere tuo ut alienum non laedas' [Use your own property in such a manner as not to injure that of another] expresses the well-established doctrine of the law.[13]

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towns, and cities? . . . It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the state . . . . In this case we have the broad . . . principle announced, that the injury must be *physical*, as distinguished from purely imaginative. It must be something that produces real discomfort or annoyance through the medium of the senses . . ." 11 A. at 492-94.

[8] *See* Clark v. Lawrence, 59 N.C. 73, 78 Am. Dec. 241 (1860), where the court said:

> The plaintiff alleged in his bill that the use of the church-yard as a cemetery exposed himself and his family to the effluvia arising from decaying bodies, by which the health of his family and the value of his lot would be irreparably injured . . . Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health . . . by corrupting the surrounding atmosphere . . . the court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief . . . .

78 Am. Dec. at 241-243.

[9] In Mensi v. Walker, 160 Tenn. 468, 26 S.W.2d 132 (1930), the court observed: "While not a nuisance per se, the location and maintenance of cemeteries might . . . disarrange the location of highways and streets . . ." 26 S.W.2d at 134.

[10] 299 S.W. 264 (Tex. Civ. App. 1927).

[11] 61 Wash. 230, 112 P. 255 (1910).

[12] *Blackburn*, 299 S.W. at 270-271. The funeral home was located within 30 feet of plaintiffs' northern property line. *Id.* at 271.

[13] 112 P. at 255-256. In the last sentence the court was quoting from Ross v. Butler, 19 N.J. Eq. 294, 97 Am. Dec. 654 (1868). *Accord*, Higgins v. Bloch, 213 Ala. 209, 104 So. 429 (1925), where the court quoted as follows from plaintiffs' complaint while affirming a decree overruling defendants' demurrer to plaintiffs'

Similarly, in *Lowe v. Prospect Hill Cemetery Association*[14] the Supreme Court of Nebraska affirmed a decree prohibiting, as a nuisance, the proposed extension of a graveyard in a residential area, graphically describing the danger represented by the contemplated extension:

> The evidence . . . shows, without conflict, that contagious and infectious diseases . . . are caused by the presence in the system, blood, stomach of the human of infinitesimal microscopic microbes, germs, living organisms; that on the death of the human these germs multiply and reproduce themselves in countless numbers; that in the grave they flourish in the liquids of the decomposing body . . . that they live for an indefinite length of time . . . that such a soil as that underlying the cemetery in controversy is not a germicide . . . that moisture sinking and seeping into the pores of the earth will carry these germs, living and active, from graves for considerable distances; that if moisture containing these germs seeps into a well, the germs will communicate to persons using the water the disease of which the body died from which the germ sprang . . .[15]

Among the cases in which a funeral parlor or cemetery has been excluded from a locality for physical reasons less compelling than concerns about life endangerment are *Saier v. Joy*,[16] *Beisel v. Crosby*, [17]and *Alosi v. Jones*.[18] In *Saier*, the Supreme Court of Michigan enjoined as a nuisance the establishment of a mortuary in a residential section of Lansing. The court expressed concern about the dispersal of formaldehyde odors and the depreciation in value of plaintiffs' neighboring properties.[19] *Beisel* reached a like result, but stressed different concerns. The Supreme Court of Nebraska approved the lower court's termination, as a nuisance, of a funeral home in a residential district of Omaha. The court believed the mortuary was causing

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injunction action: "Bodies so brought to such [undertaking] establishments are frequently of persons who have suffered death . . . for days before discovery, and in which decomposition has set in, and there is a constant menace to the health of nearby residents from cases where death was caused by infectious or contagious diseases." 104 So. at 430.

[14] 58 Neb. 94, 78 N.W. 488 (1899).

[15] 78 N.W. at 490-491. As in the *Lowe* decision, virtually all of the cases in which a proposed cemetery has been excluded from a residential district because of the perceived health threat posed to persons living nearby involve situations in which the planned graveyard was deemed likely to contaminate subterranean waters feeding plaintiffs' water sources. Among other such decisions are Jung v. Neraz, 71 Tex. 396, 9 S.W. 344 (1888); Nelson v. Swedish Evangelical Lutheran Cemetery Association, 111 Minn. 149, 126 N.W. 723 (1910); Payne v. Town of Wayland, 131 Iowa 659, 109 N.W. 203 (1906); and Town of Cheektowaga v. Sts. Peter and Paul Greek Russian Orthodox Church, 123 Misc. Rep. 458, 205 N.Y.S. 334 (1924).

[16] 198 Mich. 295, 164 N.W. 507 (1917).

[17] 104 Neb. 643, 178 N.W. 272 (1920).

[18] 234 Ala. 391, 174 So. 774 (1937).

[19] "Formaldehyde is extensively used by them [defendants] in embalming, deodorizing, and sanitation . . . It gives off a pungent odor, and it is quite doubtful to our minds that this odor would fail to reach adjacent houses, situated as close as these houses, especially in the summer time, when the plaintiffs would expect to have . . . their windows open . . . . We are satisfied . . . that the value of the plaintiffs' property would be materially decreased by the maintenance of defendants' business at the Lantz property." 164 N.W. at 508.

(among other problems) excessive noise and traffic congestion and was diminishing the value of nearby homes.[20] Finally, in *Alosi*, the Supreme Court of Alabama affirmed a decision prohibiting the renewed operation of an old cemetery which had not been used (for additional burials) for 25 years and which had been embraced within the city limits of Birmingham during this dormant period. The court noted that the old cemetery was seriously neglected, overgrown with weeds (partially concealing the tombstones), and that neighboring properties had been put to residential use during this time. The court said:

> Appellant argues that the citizen has an inherent property right to dedicate his lands to cemetery purposes, sell lots and operate same as a private enterprise, and that any interference therewith is arbitrary and oppressive unless the public health is or may be endangered thereby . . . . The police power is not limited to the protection of public health, although this is one of the fields in which it is most frequently applied . . . . There is no sound reason why such [police] powers should be segregated and limited in dealing with burials and public burial grounds.[21]

Note that most of the above-discussed cases excluding funeral homes and graveyards from residential localities for physical (nuisance-related) reasons are relatively old. This fact is explained not by any recent changes in the law--a physical nuisance is still enjoinable today[22] —but rather by improvements in undertaking and burial techniques, coupled with a reduction in the percentage of homeowners who depend upon wells for their water supply.[23] A modern undertaker is unlikely to practice his trade in such a manner as to generate or attract vermin or to emit loathsome odors. Today the operators of a cemetery located in or near an urban area are likely to employ motorized equipment for gravedigging (thereby reducing the temptation to "cheat" on burial depth and also permitting the prompt burial of persons who die in the winter). In addition, the increasingly common (sometimes mandatory)[24] use of sealed (concrete or stone) vaults to enclose caskets lessens the possibility that buried corpses will pollute underground water. As a result, there are currently not many occasions when a mortuary or graveyard will create a situation

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[20] To and from the premises an automobile hearse, with unavoidable noises, is driven night and day. Mourners and friends of the dead visit the place . . . . Funerals are weekly occurrences, and there were as many as two services in one day. The congestion in the street more than once prevented neighbors from stopping automobiles in front of their own doors . . . (P)roperty in the vicinity has decreased in value.

178 N.W. at 272-273. *Accord*, Williams v. Montgomery, 184 Miss. 547, 186 So. 302 (1939).

[21] 174 So. at 776 - 777.

[22] "Although nuisance law does not require a physical invasion, courts more easily find a nuisance when a defendant's land use has a physical impact on plaintiff's land . . . . Courts award either damages or an injunction in land use nuisance cases." MANDELKER, *supra* note 3, at 95.

[23] In 1910, 54.3 percent of this nation's population was rural and, therefore, depended mainly on wells to provide them with water. In 1988 only 22.9 percent of the country's population was rural. These percentages are found in *Statistical Abstract of the United States*, U.S. DEPARTMENT OF COMMERCE, in the 1965 (86th ed.) and 1990 (110th ed.) editions respectively.

[24] See 14 AM. JUR. 2d *Cemeteries* §34 (1964).

calculated to produce a lawsuit grounded on traditional (physical) nuisance grounds.

Psychological Objections

Although a modern funeral home or recently-established cemetery is unlikely to create a health threat or a stench problem, it nevertheless represents (unless effectively screened from view)[25] an ever-present reminder of death to persons living nearby. As one authority has noted, "Many courts have recognized that the location of a funeral home in the midst of an area strictly or predominantly residential in nature will create depressed feelings in normal persons residing nearby because of the constant reminder of death."[26] As a consequence, most courts are willing to enjoin, as a nuisance, the establishment of a mortuary in a residential district;[27] and some courts are willing to prohibit the location of a graveyard there.[28] Examples of cases in which a funeral parlor has been enjoined, mainly for psychological reasons, from operating in a residential neighborhood are *Fraser v. Fred Parker Funeral Homes*[29] and *Travis v. Moore.*[30]

In the former case, the Supreme Court of South Carolina affirmed a common pleas court decree disallowing the operation of an undertaking establishment in a residential section of Walterboro, quoting with approval the following statements of the common pleas judge:

> Its [the funeral home's] operation has caused depressed feelings to the plaintiffs, has been a constant reminder of death, has appreciably impaired their happiness, and with some has apparently weakened their powers to resist disease . . . and has materially interfered with the use of their several residences as homes, impairing their comfort and happiness, and the comfort and happiness of the members of their families . . . . Those opinions which follow the majority rule hold that if the undertaking establishment in a purely residential section, from its

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[25] Some proposals relating to such screening are found, *infra*, in the text accompanying notes 65 and 66.

[26] Annotation, *supra* note 2, at 328. Regarding cemeteries, *see* Annotation, *Zoning Regulations in Relation to Cemeteries*, 96 A.L.R.3d 921, 924 (1979): "Common objections to the establishment of a cemetery, especially in a residential neighborhood, have involved the adverse psychological effect on neighboring landowners or residents and the diminution of property values." *Id.*

[27] "Reminders of death . . . are depressing. When the neighborhood is clearly residential, the majority of courts enjoin the establishment of funeral parlors for these reasons." MANDELKER, *supra* note 3, at 99. *Also see* WRIGHT & WRIGHT, *supra* note 4, at 25.

[28] "Although it appears to be a well-settled rule that a cemetery is not a nuisance per se, the question of whether or not a cemetery is a nuisance in fact is to be determined by the circumstances of each case;" Annotation, *supra* note 26, at 928.

"A particular cemetery . . . may become a nuisance by reason of its location, or manner of use, depending upon conditions in the locality." Annotation, *Cemetery or Burial Ground as Nuisance*, 87 A.L.R. 760, 761 (1933).

[29] 201 S.C. 88, 21 S.E.2d 577 (1942).

[30] 377 So. 2d 609, 317 (Miss. 1979).

normal operations, causes depressing feelings to the families in the immediate neighborhood and is a constant reminder of death, [and] appreciably impairs their happiness . . . then such an establishment would constitute a nuisance.[31]

In *Travis* ,the Supreme Court of Mississippi, reversing the ruling of the trial court, enjoined the establishment of a funeral parlor in a residential area a short distance outside the city of Petal, declaring:

> The chancellor found that the only injury complained of by the appellants was that the conduct of the funeral home business at the proposed site would have a depressing effect upon them and their families by reason of its frequent reminders of death and that such was not sufficient to deny the construction of a lawful and necessary business . . . . The learned chancellor misinterpreted the Mississippi rule . . . which . . . relates to mental depression and anxiety rather than physical injury. We hold that appellants . . . are entitled to be protected in the enjoyment of their property rights without the intrusion of a funeral home business in their midst.[32]

Jones v. Trawick [33] is an illustrative case in which a proposed cemetery was excluded, as a nuisance, from a residential locality. Reversing the judgment of the trial court, the Supreme Court of Florida enjoined the creation of a cemetery in a residential section of Pensacola, stating:

> (W)e have decided to apply to cemeteries the rule applicable, by the great weight of authority, to funeral homes . . . . The evidence . . .

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[31] 21 S.E.2d at 579-80. Accord, Smith v. Fairchild, 193 Miss. 536, 10 So2d 172 (1942), where the Supreme Court of Mississippi enjoined the operation of a mortuary in a residential district of Hattiesburg. The court quoted and endorsed the following comments from Tureman v. Ketterlin, 304 Mo. 221, 263 S.W. 202 (1924):

> [T]he unknown dead in the morgue, and the visits of relatives seeking to identify them; the thought of autopsies, of embalming; the dread or horror, or thought that the dead are or may be lying in the house next door, a morgue . . . —all of these are conducive to depression of the normal person; each of these is a constant reminder of mortality. These constant reminders, this depression of mind, deprive the home of that comfort and repose to which its owner is entitled.

10 So. 2d at 174.

[32] 377 So. 2d at 612. Accord, Jack v. Torrant, 136 Conn. 414, 71 A. 2d 705 (1950), where the court said:

> The business was . . . especially harmful to the other properties on North Street, because a funeral business with its morgue, funeral processions and attendant activities is a particularly undesirable business . . . . The consciousness of the plaintiff Jack and his household of the use made of the basement room as a morgue and the transportation of human bodies over the defendants' adjacent driveway . . . had an immediate and continuing depressing effect upon them which substantially decreased their quiet and peaceful enjoyment of their home.

Id. at 711.

[33] 75 So. 2d 785, 50 A.L.R. 2d 1319 (FL. 1954).

was ample to sustain the plaintiffs' allegations that the existence of a cemetery would substantially interfere with the comfort, repose and enjoyment of their homes.... They did not buy them [their homes] with the expectation of living forever in the gloomy shadow of death... Nor can it be denied that an atmosphere of gloom and depression is not psychologically conducive to the happiness and contentment of a family. The constant reminders of death, the depression of mind, would, in our opinion, deprive the home of that comfort and repose to which its owner is entitled by law....[34]

In summary, even though the operators of mortuaries and cemeteries now generally employ technological advancements and improved procedures that minimize the kinds of physical threats that these institutions often produced in the past, proponents of funeral homes and graveyards continue to encounter strong resistance when they seek to enter residential districts. The occupation/activity has been largely sanitized, but the image has not.

REGULATION BY MEANS OF STATE LAWS AND LOCAL ZONING ORDINANCES

As the above discussion suggests, lawsuits in nuisance generally regulated the location of mortuaries and graveyards in the past. Today, however, this regulation is effectuated mainly by state statutes and local zoning ordinances, especially the latter.[35] It is now generally accepted that the state, in the exercise of its police power, can—either directly or by delegating appropriate zoning authority to political subdivisions—reasonably control the location of cemeteries and funeral homes.[36] In

[34] 75 So. 2d at 787-88. *Accord*, Young v. Brown, 212 S.C. 156, 46 S.E.2d 673 (1948), where neighboring property owners sued to enjoin the establishment of a cemetery in a residential locale near the city of Florence, South Carolina. Affirming the trial court's judgment overruling defendant's demurrer, the Supreme Court of South Carolina said:

> (T)he trend of modern authority is to give more consideration than formerly to the right of the owner to the reasonable and comfortable enjoyment of his property. And comfortable enjoyment means mental as well as physical comfort.... Emotions caused by the constant reminder of death may be just as acute in their painfulness as suffering perceived through the senses.... (W)e think that the maintenance of a cemetery may under certain circumstances constitute a private nuisance even though not detrimental to the health or offensive to the physical senses of those living nearby.

Id. at 679.

Some cases have held that notwithstanding its melancholy aspects, a graveyard does not constitute a nuisance, even in a residential area, unless it presents a health hazard or creates odor or noise problems. Annotation, *Cemetery or Burial Ground as Nuisance*, 50 A.L.R.2d 1324, 1339 (1956). Among such cases are: McCaw v. Harrison, 259 S.W.2d 457 (Ky 1953); Hardin v. Huckabay, 6 La. App. 640 (1927); and Jones v. Highland Memorial Park, 242 S.W.2d 250 (Tex. Civ. App. 1951).

[35] *See* R. ANDERSON, *AMERICAN LAW OF ZONING* 3d (1986) at §17.22 (concerning cemeteries) and § 17.25 (regarding funeral homes).

[36] Respecting cemeteries, *see* 14 Am. Jur. 2d *Cemeteries* 707 (1964) and regarding funeral parlors, see Annotation, *Construction and Application of Zoning Regulations in Connection With Funeral Homes* 92 A.L.R.3d 328, 333 (1979).

Franklin v. Pietzsch, [37] the Texas Court of Civil Appeals, enforcing a state statute restricting the location of cemeteries, quoted as follows from an earlier Texas case:[38]

> It is elementary that in the exercise of the police power the State may enact legislation reasonably tending to promote the health, comfort or welfare of the public .... Burial of the dead may not be prohibited and may not be unreasonably restrained. On the other hand, the place of burial in a particular locality may be reasonably regulated.[39]

Illustrative state statutes expressly relating to the location of cemeteries include: Illinois (where a law gives town officials the authority to have all of the bodily remains removed from a graveyard situated within the town and reburied at some "other suitable place" when "any good cause exists" to do so);[40] New York (where laws prohibit the acceptance or use of any additional land, in any city, village, or designated county, for cemetery purposes without obtaining the consent of the local legislative body);[41] Ohio (where, subject to specified qualifications, laws forbid the use of land for cemetery purposes within 100 yards of a dwelling house);[42] and Texas (where, subject to designated exceptions, a law disallows burials within specified distances of cities of varying sizes, ranging from one mile from small municipalities to five miles from large ones).[43] Generally speaking, however, control over the location of graveyards and funeral parlors is currently exercised principally by enacting local zoning ordinances.[44]

Zoning laws restricting the location of mortuaries and cemeteries commonly

[37] 334 S.W.2d 214 (Tex. Civ. App. 1960).

[38] Faulk v. Buena Vista Burial Park Association, 152 S.W.2d 891, 893 (Tex. Civ. App. 1941).

[39] *Franklin*, 334 S.W.2d 214, 217 quoting *Faulk*, 152 S.W.2d at 893.

[40] ILL. REV. STAT. ch 21 para. 2 (1988).

[41] N.Y. NOT-FOR-PROFIT CORP. LAW §1506(b) (McKinney 1991 Supp.) and N.Y. REAL PROP. LAW §451 (McKinney 1989).

[42] OHIO REV. CODE ANN. §§ 1721.03 (Anderson 1985) and 517.01 (Anderson 1986). The latter statute pertains to land located in townships.

[43] TEX. HEALTH & SAFETY CODE ANN. § 711.08 (Vernon 1981). This statute provides, in part, as follows:

> "(a) Except as provided by Subsections (b), (c), and (e), an individual, corporation, or association may not inter remains in a cemetery located:
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> (1) in or within one mile of the boundaries of a municipality with a population of 5,000 to 25,000;
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> (2) in or within two miles of the boundaries of a municipality with a population of 25,000 to 50,000;
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> (3) in or within three miles of the boundaries of a municipality with a population of 50,000 to 100,00;
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> (4) in or within four miles of the boundaries of a municipality with a population of 100,000 to 200,000; or
>
> (5) in or within five miles of the boundaries of a municipality with a population of at least 200,000."

Id.

[44] *Supra* note 35.

have been interpreted in a manner exhibiting little leniency toward either form of land use. For example, in *City of Le Mars v. Fisch*,[45] an action to enjoin the establishment of a funeral home in a "restricted residence district," the court was asked to rule on the validity and the inclusiveness of the following ordinance:

> It shall be unlawful to use or occupy any property within a restricted residence district in such a way as to be offensive, or which creates any added burden or disadvantage to any resident of said district.[46]

After deciding that the ordinance was not unconstitutionally vague, the Supreme Court of Iowa interpreted the language to bar funeral parlors, and commented:

> There was evidence of a reduced value of property nearby . . . that an atmosphere of depression prevailed due to the presence of the [funeral] home . . . Lawn parties and children's play under such circumstances would be unthinkable and a distinct disadvantage in the use of property as family homes . . . . We conclude a violation of Section 111 was established . . .[47]

In *Priest v. Griffin*,[48] the Supreme Court of Alabama reversed the trial court's approval of a variance allowing the operation of a funeral home in a residential zone of Florence, even though: The evidence tended to show that the City of Florence needed an additional funeral home; the proposed location was central and would not cause traffic problems; the proposed operation would be both quiet and modern; the contemplated architecture would harmonize with that of the neighboring properties;

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[45] 251 Iowa 149, 100 N.W.2d 14 (1959).

[46] LE MARS (IOWA) MUNICIPAL CODE ch. 27, § 111

[47] 100 N.W.2d at 17-19. Similarly, in Appeal of Angelone, 100 Pa. Cmwlth 193, 514 A. 2d 302 (1986), where an undertaker sought a special exception to use his residence for the purpose of conducting funeral viewings, the court ruled that a funeral home (which would not entail embalming) was not a "professional office" within the meaning of the following zoning ordinance provision:

> A professional office or home occupation shall be a permitted accessory use when authorized by special exception . . . . A professional office shall be understood to include the office or studio of a doctor . . . dentist, teacher, artist, architect, musician, lawyer, magistrate or practitioner of similar character. SPRINGFIELD TOWNSHIP (PA.) ZONING CODE §114-14E.

The court said:

> (T)he draftsmen of the statute must certainly be viewed to have considered the activities proposed by the appellant as belonging in the Business District . . . . Nor, in our view, does the willingness to refrain from embalming somehow cause the desired activity to come within the term 'professional office' for purposes of the involved ordinance.

514 A.2d at 303.

[48] 284 Ala. 97, 222 So.2d 353 (1969).

petitioner's irregularly-shaped lot was not well-suited for residential purposes; and, as the court acknowledged, the "public interest might better be subserved if [petitioner] were granted a variance . . . "[49] In justification of its decision, the court stated that variances should be granted sparingly and observed:

> While the architecture . . . may reduce or mitigate the impact, such appearance does not conceal the fact that the structure is used for a funeral home, to which a vast number of people not engaged in operating a place of this kind are sensitive and have psychological opposition. Such presence and operation . . . obtrudes on their mental privacy and relaxation and is depressing. They feel that they will get to their burial grave soon enough without being reminded of it every day by the operation of a funeral home.[50]

That courts interpret zoning laws no more leniently toward cemeteries than toward mortuaries is indicated by such cases as *Laurel-Hill Cemetery v. San Francisco*[51] and *Technical and Professional Services v. Board of Zoning Adjustment.*[52] In *Laurel-Hill Cemetery*, the United States Supreme Court affirmed a judgment of the California Supreme Court sustaining the validity of a municipal ordinance forbidding any additional burials within the city and county limits of San Francisco. Plaintiff-cemetery, which owned unsold burial lots worth $75,000, contended that the ordinance deprived plaintiff of property without due process of law[53] and cited scientific opinion that burials conducted in accordance with proper sanitary precautions normally present no health hazard to the occupants of neighboring lands.[54] Rejecting plaintiff's argument, Justice Holmes, who delivered the opinion of the court, declared:

> To aid its contention . . . that its cemetery . . . is in no way harmful, the plaintiff refers to the opinion of scientific men who have maintained that the popular belief is a superstition . . . . If every member of this Bench clearly agreed that burying grounds were centers of safety and thought the . . . Supreme Court of California wholly wrong, it would not dispose of the case . . . . Opinion may still be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we

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[49] 222 So.2d at 357.

[50] 222 So.2d at 356. In Mahoney v. City of Chicago, 9 Ill. 2d 156, 137 N.E.2d 37 (1956), the Supreme Court of Illinois upheld the validity of a zoning ordinance which excluded funeral parlors from an apartment house district while permitting nursing homes, schools, clubs, libraries, museums, hotels, and hospitals in such a district. The court rejected plaintiffs' argument that the ordinance was arbitrary, unreasonable, and unrelated to the public welfare, even though a hospital is more visually obvious than a funeral home, generates more traffic noise and congestion, and is as much a reminder of illness as is a funeral parlor a reminder of death.

[51] 216 U.S. 358 (1910).

[52] 558 S.W.2d 798 (Mo. App. 1977).

[53] 216 U.S. at 363.

[54] *Id.* at 364.

should not overthrow it merely because of our adherence to the other belief . . . . Tradition and the habits of the community count for more than logic.[55]

In *Technical and Professional Services*, the Missouri Court of Appeals affirmed the Board of Zoning Adjustment's decision denying petitioner a special use permit to establish a cemetery in an unincorporated, relatively undeveloped area of Jackson County. Under the county's zoning ordinance, the Board was authorized to grant special use permits for cemeteries (among other designated uses) "provided that in their [the Board's] judgment such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purpose of this [law]."[56] The Board's stated reasons for denying the use permit: that there was no need for a cemetery in the area; issuance of the permit might seriously injure the appropriate use of neighboring property; and establishment of the proposed cemetery would not conform with the general intent and purpose of the county's zoning ordinance.[57] Ruling that these non-health-related reasons were legitimate and agreeing that the evidence justified the Board's decision, the court said:

> (E)vidence introduced by the Intervenors substantiates that . . . burial facilities are 'negative words' to residential buyers and . . . the present of a cemetery would stifle development of adjoining property for residential purposes and concomitantly depress its value . . . . Under all the evidence the most enlightened view of this case is that the Board weighed the 'need' for a cemetery against . . . conservation of 'property and building values' and concluded that the scales tipped heavily in favor of the latter.[58]

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[55] *Id.* at 365-66. *Accord*, Beth Hamedrosh Anshe Calicia Congregation v. Village of Brooklyn, 44 Ohio Law Abs. 522, 65 N.E.2d 298 (1945). There the Cuyahoga County Court of Appeals sustained a 1940 zoning ordinance disallowing the establishment of any new cemetery and the enlargement of any existing cemetery within the village limits. Significantly, the court rested its decision primarily on economic (rather than health-related) considerations. Noting that seven percent of the land within the village was already (in 1940) being used for graveyard purposes, the court stated:

> Cemeteries do not pay taxes and the defendant village is carrying a heavy tax burden . . . . It is our opinion that under the police power the council of the village, in order to secure the 'prosperity' of the village . . . and to insure therein right 'economic conditions' . . . had the power to enact legislation whose purpose was to insure the proper diversified and symmetrical development of the village area."

Id. at 299.

[56] 558 S.W.2d at 800 (quoting) ZONING ORDER OF JACKSON COUNTY, MISSOURI, §16 (1973)). According to the law's preamble, the general intent of the ordinance was the "promotion of health, safety, morals, comfort, or the general welfare of the unincorporated portion of the county, to conserve property and building values, to secure the most economical use of land, and facilitate the adequate provision of public improvements, all in accordance with a comprehensive plan . . ." *See Id.*

[57] *Id.*

[58] 558 S.W.2d at 802 $ 802. *Accord*, Fairlawns Cemetery Ass'n v. Zoning Com. of Bethel, 138 Conn. 434, 86 A.2d 74 (1952). In Kincaid's Appeal, 66 Pa. 411, 4 Am. Rep. 377 (1870) the Supreme Court of Pennsylvania upheld the validity of a state statute authorizing the termination of an old Methodist cemetery

In short, the proponent of a new funeral parlor or cemetery should anticipate that its location may be restricted by a state statute or local zoning ordinance, and that any doubts about the law's validity or applicability will probably be resolved against the proposed mortuary or graveyard. Since the authority to zone is derived from the state's police power,[59] and the police power is confined to imposing reasonable regulations calculated to promote the public health, safety, morals, or general welfare,[60] the following question should be addressed: Assuming the facility has been designed so as to avoid creating significant traffic congestion and/or noise, does a modern, efficiently-operated, visually-attractive funeral home or cemetery violate any of the recognized police power aims? Admittedly, a majority of jurisdictions have by now construed "general welfare" to encompass the regulation of land exclusively or principally to achieve aesthetic goals.[61] However, unlike a junkyard or garish billboard, a visually-attractive funeral parlor or graveyard cannot (by definition) be called ugly. The only police power purpose that the described mortuary or cemetery can convincingly be said to defeat is promotion of the public health, which is interpreted as embracing mental health.[62] Even a tastefully designed funeral home or graveyard is undeniably a stark reminder of death, and there is probably merit in the argument that establishing such an institution in a residential area is likely to have a detrimental effect on the mental health of neighboring residents.[63]

RECOMMENDED WAYS FOR FUNERAL HOMES AND CEMETERIES TO GAIN GREATER LEGAL ACCEPTANCE

Since a mortuary or graveyard, by the nature of its function, will inevitably remind people of their mortality, and since it is this reminder that today principally accounts for these institutions' common exclusion from residential areas, is there anything that the operators (or proponents) of these indisputably legitimate enter-

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(in Pittsburgh), the removal of the bodies and tombstones to other graveyards in the metropolitan vicinity, and the sale of the land. The court commented:

> No one can doubt the power of the legislature to prohibit all future interments within the limits of towns or cities. In ancient times, in Greece and Rome, such was the universal rule. It was one of the laws of the twelve tables: *"Hominem mortium in urbe ne sepelite neve vicintate.'* [Translation: The dead shall not be buried within the walls of the town.]

66 Pa. at 423.

[59] R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 1, at 517 (footnote 1 and text accompanying same) (1984).

[60] R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 80 (1981).

[61] Zeigler, Visual Environment Regulation and Derivative Human Values- The Emerging Rational Basis for Modern Aesthetic Doctrine, 9 ZONING & PLANNING LAW REPORT 17-18 (March 1986).

[62] "The basis for upholding minimum size requirements normally relates to the mental and emotional health of the occupants of such structures . . ." R. WRIGHT & S. WEBER, LAND USE IN A NUTSHELL 138-39 (1978). In the second (1985) edition of the same work the authors state: "If public health is a legitimate concern of the police power, which it is, then reasonable minimums as to living space are and should be valid." *Id.* (2d ed.) at 186.

[63] *See* part II.B, *supra*.

prises can do to improve their legal status? It is submitted that the answer may be yes. If the goal is to achieve more societal (and thus, legal) acceptance, then the means is to soften the image. Although a *stark* reminder of one's mortality will very rarely be well received, a *subtle* reminder of same will not necessarily trigger a negative reaction. For example, at some level a person is reminded of his mortality every time he sees the fall leaves, or celebrates his birthday, or hears a song that was popular when he was a child. But these reminders, being subtle, are more likely to engender feelings of wistfulness and nostalgia than to produce depression. To the extent, then, that the operators of funeral parlors and cemeteries are able to more gently portray—without misrepresenting—their functions, they may be able to reduce social (and eventually, legal) resistance to their nearby existence. To this end, the writer recommends that the proponents/operators of mortuaries and graveyards consider taking such steps as the following:

Proposals Regarding Mortuaries

1. Delete such terms as "mortuary", "funeral home" and "undertaker" from the establishment's name. Among possible alternative terms are "memorial home", "memorial chapel", and "transition rites home."[64]

2. Surround the facility's entire parking lot with attractive, view-obscuring shrubbery and/or opaque fencing, in order to discreetly conceal the mourners and hearse from the neighbors. The building and grounds should be so designed as to render the mourners virtually invisible to neighborhood residents.[65]

3. Plan the building and landscaping so the facility is totally screened from the adjacent neighbors and partially (but not totally)[66] screened from the street. The visible part of the structure should unobtrusively blend in with the neighborhood. Although the building should be visually appealing, its beauty should be understated, since the goal is to be inconspicuous.

It is not suggested that adoption of the above recommendations would—or even *should*—result in mortuaries gaining acceptance into the *highest*-zoned residential districts. Funeral homes are, after all, a form of commercial enterprise and have no place in a purely residential zone. However, implementing the above suggestions might eventually lead to the acceptance of funeral parlors in those residential zones that admit professional practices and home occupations and should preclude the use of nuisance law to exclude mortuaries from unzoned areas.[67]

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[64] Newsweek magazine lists its obituaries of prominent persons under the heading "Transition." *See*, for example, *Transition*, NEWSWEEK, Feb. 11, 1991, 63.

[65] Whenever feasible, funeral processions (to the cemetery) should be arranged to depart from a church or synagogue, rather than from the mortuary.

[66] The owner will want mourners and prospective clients to be able to find his establishment without undue difficulty.

[67] See text accompanying note 27, *supra*.

Proposals Respecting Cemeteries

1. Eliminate such terms as "cemetery," "graveyard" and "burial ground" from the name. Suggested alternative possibilities include "memorial gardens," "memorial park," and "grounds of remembrance."

2. Surround the cemetery's entire periphery with attractive, head-high shrubbery in order to conceal the funeral parties and graveside services from the eyes of neighbors. Such shrubbery would also tend to absorb the sound of memorial tributes and hymns.

3. Place all of the tombstones (gravemarkers) flat on the ground and level with the surface, thereby rendering them relatively inconspicuous from the cemetery's entrances and exists. This would also prevent tombstones from falling over.

4. Locate the entrances and exits used by funeral parties at sites as remote as possible from the nearest residential properties.

5. Beautify the cemetery—especially those portions visible from the gateways—with an abundance of flowerbeds and attractive trees. Many cemeteries already do this.[68]

Adoption of the above five recommendations would give cemeteries the appearance and ambience of peaceful parks. Most neighborhood residents would still realize they are dwelling within a few hundred yards of a cemetery, just as most residents of most cities probably now know (if they ever think about it) that they are living within a few miles of a cemetery. But since the former, like the latter, would rarely encounter any visible signs or symbols of death, this knowledge would have minimal emotional impact upon them.

CONCLUSION

In the past, mortuaries and graveyards often constituted physical nuisances, but this is rarely a problem today. Improvements in undertaking and burial techniques and practices have largely eliminated such dangers as the transmission of disease, the generation or attraction of vermin, and the dispersal of offensive odors. However, a majority of people still object to having a funeral home or cemetery located near their home, primarily because of psychological objections. The zoning laws reflect this opposition. As long as there is widespread antipathy toward these institutions, the law, which mirrors public opinion, will impose barriers to establishing a funeral parlor or graveyard in any kind of residential district. It is submitted that implementation of the proposals recommended in Part IV will, over

[68] "Many cemetery organizations guarantee landscaping and permanent maintenance of the grave, vault, or crypt." 3 WORLD BOOK ENCYCLOPEDIA *Cemetery* 259 (1963).

time, lessen societal opposition and lead to a diminution in legal restrictions. It is unlikely that funeral parlors and graveyards will ever be actively pursued by a residential locality. They will never be the land-use equivalent of the homecoming queen. However, they eventually may be able to avoid being thrown off the campus.