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MEMORANDUM

TO: Mayor Augsburger, Village Council Members

FROM: F. Stephen Chamberlain, Village Solicitor

RE: Shannon Cemetery

Date: May 31, 2015

Executive Summary

The Shannon Cemetery is a current topic of controversy and is the subject of much speculation as to what is and is not legal. While expressing no opinion on the views of any person or persons raising questions about the suitability of plans to memorialize Shannon Cemetery, this memorandum is as a guide to Village elected and appointed officials as to legal issues. This was done by asking and answering five questions:

- 1. Who owns and controls Shannon Cemetery: Title to Shannon Cemetery is vested in the Village of Bluffton, Ohio by Deed from the Richland Township Trustees and by operation of law.*
- 2. Who decides what is done with Shannon Cemetery: The Village of Bluffton is responsible for the care and maintenance of Shannon Cemetery.*
- 3. Is the movement of headstones and placement of them in one area as a memorial and build a monument to those persons buried in the cemetery legal – Yes it is.*

4. In what ways can the Village of Bluffton oversee Shannon Cemetery: The Village may regulate, preserve and protect a cemetery under its jurisdiction by three different methods.

5. Has anyone done anything to Shannon Cemetery that is a criminal law violation ? No.

With this as a legal background, I believe that the Village Council can take comments and concerns from the public and other interested parties without the need for debating the law.

Lastly, Resolution 07-13 states that the Village supports a suitable and dignified memorial. It does NOT provide for any one plan or means of memorializing Shannon Cemetery. The Village of Bluffton is free to make any changes and amendments to any plan at any time.

Legal Issues

1. Who owns and controls Shannon Cemetery: Title to Shannon Cemetery is vested in the Village of Bluffton, Ohio by Deed from the Richland Township Trustees and by operation of law.

A. The Deed by which the Richland Township Trustees transferred the cemetery and responsibility for the cemetery was executed by the Trustees on October 12, 2010 and recorded in the Allen County Recorder's Office on December 28, 2010 in Volume 2010, Page 15719.

B. The Ohio Revised Code states as follows:

The title to and right of possession of public cemeteries and burial grounds located within a municipal corporation and set apart and dedicated as public cemeteries or burial grounds, and grounds used as such by the public but not dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, are hereby vested in the municipal corporation in which such cemetery or burial ground is located.

Ohio Rev. Code Ann. § 759.08 (West)

Therefore, by law and by deed, the Village of Bluffton, Ohio agreed to assume ownership of and responsibility for Shannon Cemetery on October 12, 2010.

2. Who decides what is done with Shannon Cemetery: The Village of Bluffton is responsible for the care and maintenance of Shannon Cemetery.

The legislative authority of a municipal corporation owning a public burial ground or cemetery, whether within or without the municipal corporation, may pass and provide for the enforcement of ordinances necessary to carry into effect sections 759.02 to 759.48, inclusive, of the Revised Code, and may regulate such public burial grounds and cemeteries, the improvement thereof, the burial of the dead therein, define the tenure and conditions on which lots therein shall be held, and protect such burial grounds and cemeteries and all fixtures thereon.

Ohio Rev. Code Ann. § 759.03 (West)

3. Is the movement of headstones and placement of them in one area as a memorial and build a monument to those persons buried in the cemetery legal – Yes it is.

In the case of Kuhn v. German Twp. Bd. of Trustees, No. 11733, 1990 WL 15740, at *3 (Ohio Ct. App. Feb. 21, 1990), Kuhn sued a Board of Township Trustees over several actions that Kuhn believed were unlawful. These included the removal of trees

separating the cemetery from adjacent residential property, moving headstones off of graves and onto a corner of the cemetery and construct a monument where those headstones would be displayed.

Kuhn specifically asked the Courts to:

Order of the Court requiring Defendants to exercise all due diligence in locating the proper gravesite and refixing at its proper gravesite all headstones and gravemarkers that have been moved from their proper location

Id at 2.

The appeals court, after reviewing the law and Kuhn's demands ruled against Kuhn and in favor of the Trustees.

This case presents issues that are exactly the same as the issues raised by those opposed to any removal of headstones in Shannon Cemetery.

The court found that:

The statute does not impose any specific duties with respect to the protection and preservation of cemeteries, but simply imposes a general duty to "provide for the protection and preservation of cemeteries." The exercise of this duty necessarily involves broad discretion. Furthermore, we do not read into the statute an obligation to maintain cemeteries in exactly the same form, without any changes, notwithstanding the changing character of the surrounding area.

Id. at 3.

The Court also found that care and maintenance of a cemetery by a governmental agency is a "public duty" and said:

We conclude that the duty of a township board of trustees to "provide for the protection and preservation of cemeteries under its jurisdiction" is a general public duty, and is not enforceable by a private individual

Id. As the Court stated, the governmental agency is in the best position to gage the needs of the cemetery and the desires of its citizens and that the elected officials are in the best position to carry out the duty of preservation and protection of a cemetery.

Therefore, it is the Village that ultimately determines the means by which Shannon Cemetery is protected and preserved.

4. In what ways can the Village of Bluffton oversee Shannon Cemetery: The Village may regulate, preserve and protect a cemetery under its jurisdiction by three different methods.

ONE: Direct control by the Village Council and Administration. This is the method that the Village of Bluffton uses currently. The Village Council and Administration directly control the Maple Grove Cemetery. A sexton is hired for day to day operations and the coordination of burials. The service department provides labor and services for mowing and general upkeep. The Village Council sets rates for the sale of burial plots and provides rules by Ordinance or Resolution for the Cemetery.

As it relates to Shannon Cemetery, this same method is employed currently. Although since Shannon Cemetery is NOT open for new burials, the Village does basic mowing maintenance and the Sexton has not been given specific instructions or guidance on the Shannon Cemetery.

TWO: The Ohio Revised Code provides that the Mayor may appoint a three member Board of Cemetery Trustees. The initial Appointments would be until the municipal election and then the Board Members would be given staggered 6 year terms.

The Board of Cemetery Trustees would then be responsible for the preservation, protection and improvement of the cemeteries of the Village. They would be able to provide planning and development of the cemeteries and otherwise control the day to day operations and policy goals of the Village as it relates to cemeteries.

This option is subject to Ohio Revised Code Section 733.68 that provides that only electors of the Village may be appointed to any office or Board of the Village and would include jurisdiction over all cemeteries of the Village, not just Shannon Cemetery.

THREE: The Mayor may create an Ad Hoc or Special Committee to look into just Shannon Cemetery pursuant to Rule 8 of the Council Rules (Ord. 9-14).

As an Ad Hoc committee or board, the Village can limit its mandate to Shannon Cemetery only. As per the rules, the Mayor could appoint non-council members to assist in work for the committee. The Ad Hoc Committee can act as a focal point for the Shannon Cemetery discussions so that Council as a whole is not dealing with every issue that would arise.

Such an Ad Hoc Committee would then make recommendations to the Council for review and approval along with requests for funding.

5. Has anyone done anything to Shannon Cemetery that is a criminal law violation ? No.

When Shannon Cemetery became an issue, an email was sent to Mr. Steiner and by him forwarded to Council members. The author of that email implied that the person or

persons who moved headstones had committed a criminal act and cited the Ohio Revised Code as support for that claim. The law she cited reads as follows:

- (A) No person, **without privilege to do so**, shall purposely deface, damage, pollute, or otherwise physically mistreat any of the following:
 - (1) The flag of the United States or of this state;
 - (2) Any public monument;
 - (3) Any historical or commemorative marker, or any structure, Indian mound or earthwork, **cemetery**, thing, or site of great historical or archaeological interest;
 - ...
 - (6) Any other object of reverence or sacred devotion.
- (B) Whoever violates this section is guilty of desecration.
- ...
- (C) As used in this section, “cemetery” means any place of burial and includes burial sites that contain American Indian burial objects placed with or containing American Indian human remains.

Ohio Rev. Code Ann. § 2927.11 (West)

Any citation to Ohio Revised Code Section 2927.11 in this situation is out of context. This law makes it a crime to deface, damage, pollute, or otherwise physically mistreat certain monuments, flags or parts of a cemetery. The movement of headstones at Shannon Cemetery does not meet any of these definitions. Furthermore, the statute specifically excludes acts by a person or persons who have a privilege to work on cemetery grounds. This includes the Village of Bluffton and its employees in the course of their duties and the current work being done by the citizens who have the permission and approval of their work by the Village Council.

The Village of Bluffton has title to the cemetery and any actions that improve or otherwise care for the cemetery are governmental functions exercised by the Village. As long as there is no exhumation of human remains (which require a different procedure) the removal or relocation of headstones is not in violation of criminal law and wholly within the discretion of the Village government.

RESOLUTION NO. 07-13

**A RESOLUTION IN SUPPORT OF PLANS FOR THE RENOVATION OF THE
SHANNON CEMETERY.**

WHEREAS, The Council of the Village of Bluffton, Ohio is the legal owner of the Shannon Cemetery and has the obligation to properly maintain the property; and

WHEREAS, a development plan for the property has been collaboratively designed to appropriately memorialize the deceased known to be buried in the cemetery; and

WHEREAS, The Council of the Village of Bluffton, Ohio desires to develop the property into a suitable, respectful memorial location for the deceased known to be buried there.

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE VILLAGE OF
BLUFFTON, OHIO:**

Section 1: The Council of the Village of Bluffton, OH supports the development of the property known as the Shannon Cemetery to memorialize those buried there in a respectful manner.

Section 2: The Village of Bluffton will endeavor, as funds are available, to move forward with the development of the property per the development plan as designed or may otherwise be modified.


Section 3: That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Resolution were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

Passed and Adopted this 9th Day of September, 2013, by the governing board of the Village of Bluffton, Ohio by the following vote:

Ayes: 5 Noes: 1 Abstain: 0

Attest:

Nancy L. Kindle
FISCAL OFFICER


MAYOR

Approved as to Form:



F. Stephen Chamberlain

VILLAGE SOLICITOR