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OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 81-604
of	:	DECEMBER 30, 1981
GEORGE DEUKMEJIAN Attorney General	:	
Victor D. Sonenberg Deputy Attorney General	:	

THE HONORABLE RAY JOHNSON, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following question:

In view of Health and Safety Code sections 8961.2 and 8961.3 which permit the burial of nonresident decedents in a public cemetery district facility if private facilities are not available within 15 miles of the decedent's residence and the nearest private facility is not closer than the nearest district facility, may the district lawfully authorize the burial of a decedent of a particular religious faith, who was not a resident of the district, in a cemetery consecrated under that faith and owned by the district, if there are private facilities within 15 miles of the decedent's residence but none of them consecrated for the burial of persons of the decedent's faith?

CONCLUSION

A public cemetery district may not lawfully authorize the burial of a decedent of a particular religious faith, who is not a resident of the district, in a cemetery consecrated under that faith and owned by the district if there are private facilities within 1 5 miles of the decedent's residence even though none of them are consecrated for the burial of persons of the decedent's faith, assuming such nonresident decedent is not otherwise eligible under specific statutory provisions for burial in a district cemetery.

ANALYSIS

The present question requires us to interpret the statutes which govern eligibility for burial in cemeteries maintained by public cemetery districts, and to consider the constitutional issues relating to religious freedom that might be raised by such interpretation. With respect to the relevant statutes we note that the formation and operation of public cemetery districts is provided for in division 8, part 4 (commencing with section 8890) of the Health and Safety Code.[1] As a general proposition only residents and taxpayers of a public cemetery district (or persons formerly in those categories who at the time purchased burial rights) and members of their families are permitted to be buried in a cemetery maintained by such a district. (§§ 8961, 8961.1.) However, the statute has enumerated several exceptions to this general proposition under which nonresidents (unrelated to residents and taxpayers of the district) can be buried in a district cemetery. Those exceptions that are pertinent to our question permit a nonresident to be buried in a district cemetery if "private facilities are not available within a radius of 15 miles of the decedent's residence (§ 8961.2) ,[2] if there is no private facility nearer to the decedent's residence than the nearest district cemetery (§ 8961.3),[3] and if the decedent was a resident

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[1]All section references are to the Health and Safety Code unless otherwise indicated.

[2]Section 8961.2 provides:

> "Where private facilities are not available within a radius of 15 miles of decedent's residence, a decedent not otherwise eligible for burial within a cemetery of the district may be interred therein and the district shall charge a nonresident fee established pursuant to Section 8894. The foregoing requirement as to charges shall not be applicable to the burial of indigents at public expense who may be interred at such rates as may be fixed by the trustees of the cemetery district."

[3]Section 8961.3 provides:

"Interment in a district cemetery under the provisions of Section 8961.2 shall be permitted only if both of the following conditions exist:

"(a) Decedent was a resident of this State at the time of his death.

of this state at the time of death. (*Ibid*.)[4]

The facts presented to us indicate that some years ago the Oroville cemetery district acquired property which included a cemetery that had been established and consecrated in the 1850s by members of a particular religious faith. (See § 9201 concerning the acquisition of preexisting cemeteries by a public cemetery district.) There have, for many years, been no burials in this cemetery which the district presently maintains. There is a community of persons of that particular faith in Chico which is outside the Oroville district. It is assumed that there are private cemeteries within 15 miles of Chico but that none of them are cemeteries consecrated under that faith. We are informed that the particular cemetery in the Oroville district is the only cemetery in the county consecrated for the burial of persons of that faith. Therefore those persons in Chico whose faith forbids burial in a cemetery nor so consecrated are desirous of securing the privilege of burial at the consecrated cemetery in the Oroville district, the apparent contention being that, in effect, there are no private cemeteries available within 15 miles of their residence or nearer to their residence than the consecrated cemetery in Oroville.[5]

"(b) There is no private cemetery nearer to decedent's place of residence than the nearest district cemetery, the distances measured in a straight line from the decedent's place of residence to the nearest private cemetery and the nearest district cemetery.

"The district which maintains the cemetery nearest in a straight line to decedent's place of residence shall allow the interment of the decedent in the cemetery if the charges prescribed by Section 8961.2 are paid. Any other district may permit the interment of such decedent in a cemetery which it maintains upon payment of such charges."

[4]Other statutory exceptions permit nonresidents to be buried in district cemeteries under specified conditions if the deceased had formerly been a resident for a continuous five-year period within the previous ten years (§ 8961.1), or if a district contracts with the county in which it is located to bury nonresident indigents (§ 8961.6), or if the nonresident is a member of a veterans' association owning a certain number of lots in the district cemetery. (§ 8961.9.)

For purposes of this opinion we assume char these additional exceptions are inapplicable to the circumstances under consideration here.

[5]The nonresidents in question desiring the opportunity for burial in the consecrated cemetery in the Oroville district contemplate payment of the foil coats of service and maintenance thus avoiding any costs to the Oroville district taxpayers resulting from such burial. Under any circumstances, however, the statute conditions the burial of eligible nonresidents in a district cemetery upon the payment of a nonresident fee (§§ 8961.1, 8961.2, 8961.3) which consists of an amount sufficient to maintain the grave area on a self-supporting basis and to pay the coat of the grave and services, plus a fifteen percent surcharge, plus a deposit in the endowment care fund. (§ 8894.) Thus since eligible nonresidents are already required to pay more than the full coats of burial and maintenance, such payment is not of itself sufficient to afford eligibility to a nonresident who is otherwise ineligible for burial in a district cemetery.

Thus the question we consider here is whether, within the meaning of section 8961.2, certain private cemeteries must be regarded as not "available" for purposes of allowing a person access to a district cemetery because, even though such private cemeteries are otherwise available to him, such person's religious convictions prevent him from utilizing those private cemeteries.

In this connection we note that the term "available" is not defined in the pertinent statutes, thus the rule of statutory construction which governs our interpretation of this term is that "[w]ords in a statute should be given their ordinary meaning unless otherwise clearly intended or indicated." (*Estate of Richartz* (1955) 45 Cal. 2d 292, 294; accord, *People* v. *Belleci* (1979) 24 Cal, 3d 879, 884; *People* v. *Wyrick* (1978) 77 Cal. App. 3d 903, 906–907.) As ordinarily understood, the term "available" according to Webster's Third New International Dictionary (1961) means "such as may be availed of: capable of use for the accomplishment of a purpose: immediately utilizable . . . : that is accessible or may be obtained: personally obtainable. . . ." (*Id*., p. 150.)

It can thus be seen that in its primary sense the word "available" refers to the thing to be used and denotes a quality of the thing itself: that quality which renders the thing capable of being used or obtainable. The word does not denote a preference or disposition of the user toward that thing. Therefore in accordance with the ordinary meaning of the word, something may be "available" even though the potential user, for his own reasons or preferences, may choose not to use it. Thus as recognized by the court in *Hooker Chemicals & Plastics Corp.* v. *Train* (2d Cir. 1976) 537 F. 2d 620, 636, the mere fact "[t]hat no plant in a given industry has adopted a pollution control device *which could be installed* does not mean that device is not 'available'." (Emphasis added.)

Likewise, in the present context, the mere fact that one, because of religious motivations, chooses not to be buried in a particular cemetery willing to accept him does not mean that cemetery is not "available."

If the preferences of the potential cemetery user were to be a factor in the determination of a private cemetery's availability, the Legislature could have modified any reference to a private cemetery or facility by a word such as "suitable." However, since there is no such modification in the statute indicating that other than the ordinary meaning was intended, we view the word "available," as used in section 8961.2, to refer to a private facility that is willing to accept, upon reasonable terms, a deceased person for burial regardless of whether that person chose, for religious or other reasons, not to be buried at such facility.

It is accordingly our conclusion that where a nonresident of a public cemetery district is not otherwise eligible for burial in a district cemetery, the fact that the nonresident's religious convictions preclude his utilizing the private cemeteries in his community does not within the meaning of section 8961.2 render such cemeteries not "available." Therefore, under the pertinent statutes, such subjective motivations are not the basis for an exception to the residency requirement.

Although this interpretation of the statute appears to be determinative of the question, it might be contended that the free exercise of religion as guaranteed in the First Amendment to the United States Constitution and article I, section 4 of the California Constitution, requires that an exception based upon religious belief be made to the residency requirements of a cemetery district.[6] While a dominant thrust of the decisions in this area of constitutional law has been to impose upon government the obligation to accommodate its otherwise neutral standards to one's sincerely held religious convictions (see *Thomas* v. *Review Bd. Ind. Empl. Sec. Div.* (1981) — U.S.—, —, 67 L. Ed. 2d 624, 633–634, 101 S. Ct. 1425, 1431–1432; Tribe, *American Constitutional Law* (1978), § 14–10, p. 852), there is, nonetheless, a significant limitation upon this obligation. in those cases in which the Supreme Court has declared that a failure of the state to grant benefits constitutes religious infringement, it has been determined that such infringement resulted from a governmentally compelled choice between foregoing vital benefits, such as unemployment insurance, or violating one's sincerely held religious precepts. In delineating the impact of such a compelled choice upon freedom of religion, the Supreme Court in *Sherbert* v. *Verner* (1963) 374 U.S. 398, stated:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." (*id*., 374 U.S. at p. 404.)

And as later observed in *Thomas* v. *Review Bd. Ind. Empl. Sec. Div.*, *supra*: "Here, as in Sherbert, the employee was put to a choice between fidelity to religious belief or cessation

[6]See *Citizens for Parental Rights* v. *San Mateo County Bd. of Education* (1975) 51 Cal. App. 3d 1, 15, where the court observed that "the free exercise clause has often been invoked by religious groups to gain exemption from laws of general applicability."

of work; the coercive impact on Thomas is indistinguishable from Sherbert. . . ." (*Id*., — U.S. —, —; 67 L. Ed. at p. 633; 101 S. Ct. at p. 1432.)

However in a situation where the element of coercion was lacking, the California Supreme Court in *Hildebrand* v. *Unemployment Ins. Appeals Bd.* (1977)19 Cal. 3d 765 approved a denial of unemployment benefits even though the claimant's loss of employment was a result of her refusal on religious grounds to work on Saturdays. (Previously she had voluntarily worked for her employer on Saturdays.) In that case the court pointed out:

> "Unlike the situation in *Sherbert*, the state in the matter before us has not forced plaintiff to choose between her religious principles and her financial needs, as a condition to receipt of unemployment benefits." (*Id*. at p. 770.)

See also 64 Ops. Cal. Atty. Gen. 346, 349–353 (1981) where this office recently discussed at some length the necessity of coercion or forced choice as requisite for a finding that there has been an impermissible burden on the free exercise of religion.

In the present situation this lack of the decisive element of coercion or compelled choice is even more clear. Unlike the case of unemployment benefits, the state does not, in any way relevant here, condition eligibility of nonresidents upon their performance of specified conduct. Furthermore, unlike the case of unemployment compensation, a public agency is not the only source of religiously suitable burial sites. The Oroville district's religiously consecrated cemetery merely happens to be the nearest one to the community in question here. Under no circumstance does the state's failure to institute a religious exception to a cemetery district's residency requirements force an otherwise ineligible resident into "abandoning one of the precepts of her religion in order to" secure the benefit of eligibility for burial in a district cemetery. (See *Sherbert* v. *Verner*, *supra*, 374 U.S. at p. 404.)

The court in *Johnson* v. *Huntington Beach Union High Sch. Dist.* (1977) 68 Cal. App. 3d 1 had before it an analogous situation when it upheld a public school district's refusal to allow the use of a classroom during the school day for religious meetings. There the court stated:

> "This is not a case where plaintiffs are denied access to all public forums for religious expression; they are merely being denied use of school property during the school day for religious purposes. This deprivation in no way infringes upon their religious rights when practiced outside the confines

> of the school. Plaintiffs are only being denied religious expression in a manner involving state participation. Each club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off campus outside of school hours. There is no infringement of plaintiffs' free exercise rights except to the limited extent made necessary by the establishment clause of the state and federal Constitutions." (*Id*. at p. 17.)

Thus in the situation being considered here, denying access to the district cemetery to all ineligible nonresidents regardless of their religious preferences does not constitute an infringement of their right to the free exercise of their religion since the particular religious obligations relating to burial can reasonably be honored at other locations. There is thus no constitutional basis for compelling a religious exception to the cemetery district residency requirements.

Therefore, in view of the fact that the pertinent statute does not permit an exception to a cemetery districts residency requirements based upon religious beliefs,[7] and the fact that the constitution does not require the incorporation of such an exception, we conclude that a public cemetery district is not authorized to bury a deceased nonresident, who is otherwise ineligible for burial in a district cemetery, solely because the precepts of the decedent's religion mandate that he not be buried in those private cemeteries otherwise available in the area of his residence.[8]

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[7]Even if the Legislature had provided an express statutory exception based upon religious requirements, such an express exception would raise the serious constitutional question of whether it fostered the establishment of religion in violation of the First Amendment of the U.S. Constitution. (See *Mandel* v. *Hodges* (1976) 54 Cal. App. 3d 596, 610–615.) Furthermore, such an exception would be constitutionally dubious in view of article I, section 4 of the California Constitution which guarantees the "[f]ree exercise and enjoyment of religion without discrimination or *preference. . . ."(Emphasis* added.) As was stated in *Mandel* v. *Hodges*, *supra*, at p. 617:

> "By its express terms, what it [article I, section 4] mandates is the perpetual guaranty of the '[f]ree exercise and enjoyment' of religion; what it prohibits is 'discrimination' against, 'or preference' in favor of. one religion as opposed to another." (See also *Fox* v. *City of Los Angeles* (1978) 22 Cal. 3d 792, 796–797; 64 Ops. Cal. Atty. Gen. 346, *supra*, at p. 353, fn. 10.)

A benefit such as burial rights granted to one and denied to another similarly situated, except for religious status, would appear to constitute such a prohibited religious preference.

> "[N]o State may 'exclude . . . members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." (Court's emphasis.) (*Sherbert* v. *Verner*, *supra*, 374 U.S. at p. 410.)

[8]In this opinion we are in no way suggesting that a public cemetery district may maintain a cemetery for the *exclusive* use of those of a particular religious faith. In fact in an earlier unpublished opinion of this office (N.S. 3947 (1941)) we expressly concluded that maintenance by a public cemetery district of a

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cemetery restricted to the use of members of a particular religious group would be a violation of the state constitutional provision prohibiting public aid to religion. (Art. XVI, § 5, formerly art. IV, § 30.) it would appear that this conclusion is presently viable See *California Teachers Assn.* v. *Riles* (1981) 29 Cal. 3d 794 (state cannot lend textbooks to students of religious schools); *Fox* v. *City of Los Angeles*, *supra*, 22 Cal. 3d 792 (city prohibited from displaying a large illuminated cross on city hall in honor of Christmas), *Johnson* v. *Huntington Beach Union High Sch. Dist.*, *supra*, 68 Cal. App. 3d 1 (school district prohibited from making a schoolroom availsble during school day for student religious meetings); *Frohliger* v. *Richardson* (1923) 63 Cal. App. 209 (state cannot appropriate funds to restore church building).