

MEMORANDUM

Legal Consideration in Developing an Eco-Cemetery in Alachua County, Florida

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*Lawyers are buried 24 feet underground rather than 6. Why?*¹

Introduction

This memorandum discusses legal considerations in developing an eco-cemetery in Alachua County and Gainesville.² A short bibliography of selected scientific references to burial practices is attached as appendix 1.

Questions Presented

- I. Whether an eco-cemetery presents licensing issues under the Chapter 497, Florida Statutes?
- II. Whether the “green burial” practices required in an eco-cemetery will conflict with applicable legal standards for cemeteries in Florida?
- III. Whether local land use regulations present any issues concerning the creation of an eco-cemetery?
 - A. Whether an eco-cemetery can be developed in Alachua County?
 - B. Whether an eco-cemetery can be developed in Gainesville?

¹ Because deep down, they're real nice people.

² Although Alachua County includes several other municipalities, these were not considered in this analysis.

- IV. Whether there are any advantages to developing a not-for-profit eco-cemetery under section 501(c)(13) of the Internal Revenue Code (as opposed to Section 501(c)(3))?

Short Answers

- I. Probably No. Although Florida has an extensive licensing procedure, an entity seeking to create an eco-cemetery should be able to obtain the relevant licenses to operate the eco-cemetery. However, providing multiple related services may require the entity to obtain additional licenses.
- II. Probably No. For the most part, the Florida Statutes do not conflict with green burial practices. Although several statutory provisions may present some challenges, the substance of the statute should not affect the general goal of developing an eco-cemetery.
- III. Probably No.
- a. The Alachua County Code does not create specific regulations for cemeteries. The only reference to cemeteries in the code states that “a cemetery may only be allowed by special use permit in all zoning districts.”
- b. The Gainesville Code of Ordinances addresses cemeteries only in the context of one specific cemetery. As long as the entity follows the designated procedure for development in the zone, it should be able to create an eco-cemetery in Gainesville.
- IV. Probably No. There does not appear to be any significant advantages to tax-exempt status under 501(c)(3) or 501(c)(13).

Introduction to Green Burial Standards

The Green Burial Council (“the Council”), a not-for-profit standard setting organization, has established two categories of eco-cemeteries, a “natural burial ground” and a “conservation burial ground.”³ A natural burial ground is a traditional cemetery that encourages ethical and sustainable burial practices, but does not necessarily include land conservation.⁴ A Conservation Burial Ground is “a cemetery that encourages sustainable and ethical practices and maximizes the potential of the

³ Green Burial Council Approved Standards and Practices for a Conservation Burial Ground, <http://www.greenburialcouncil.org/memorial.php> (2007).

⁴ Id.

burial process to facilitate ecological restoration and landscape-level conservation.”⁵ A Conservation Burial Ground must always involve an established conservation organization and requires adherence to specific burial criteria.⁶

A Conservation Burial Ground does not permit the use of toxic chemicals in the bodies of decedents.⁷ In other words, none of the bodies buried in the Conservation Burial Ground may be embalmed. In addition, the use of vaults is strictly prohibited and burial containers or shrouds must be biodegradable.⁸ This means that no cement, metal or plastic materials may be used in the burial process.⁹ Moreover, all monuments or burial markers must be “either living or ecologically functional and appropriate for their surroundings.”¹⁰ Traditional tombstones are not appropriate, but families may mark the resting place of their loved ones with natural objects such as trees, flowers or stones. The burial process in a Conservation Burial Ground should minimize impacts on the surrounding land and protect the diversity of the native species.¹¹

There are at least 6 operating Conservation Burial Grounds in the United States.¹² Some of these include: Glendale Memorial Nature Preserve in DeFuniak Springs, Florida; Ramsey Creek Preserve in Westminster, South Carolina; Cedar Brook Burial Ground in Limington, Maine.¹³ In addition, there are 4 more Conservation Burial Grounds in development in the United States.¹⁴ Moreover,

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Natural Burial in the U.S.A., <http://naturalburial.coop/USA/>.

¹³ Id.

¹⁴ Id.

approved providers in 8 states facilitate green burial within conventional facilities, and the Green Burial Council expects 25 more states to be included by the end of 2007.¹⁵

Discussion

This research involved three main issues. The first issue is whether the Chapter 497, Florida Statutes, which regulates cemeteries in Florida, presents any significant licensing concerns? The second issue is whether Florida law, both state and local, conflicts with the green burial practices associated with creating an eco-cemetery? The final issue is whether tax-exempt status under Section 501(c)(13) of the Internal Revenue Code represents a better option than Section 501(c)(3) of the Code?

I. The State of Florida may license an eco-cemetery.

The Department of Banking and Finance (“the Department”) regulates cemeteries through the Board of Funeral and Cemetery Services (“the Board”). In addition, the Chapter 497, Florida Statutes sets out a specific procedure for obtaining cemetery licenses.¹⁶ According to the Chapter 497, Florida Statutes, every person that operates a cemetery must first obtain a license under section 497.263.¹⁷ License requirements and procedures are divided into two stages. The first stage concerns the application procedures, and the second stage concerns review of the applicant.

Initially, all applicants must submit a completed application with a \$5,000 nonrefundable application fee.¹⁸ Cemetery applicants can obtain all relevant forms from the Department.¹⁹ In the application, the applicant must provide basic information about the organization. All applicants must

¹⁵ The Green Burial Council, <http://www.greenburialcouncil.com/faqs.php> (2007).

¹⁶ Fla. Stat. § 497.263 (2006).

¹⁷ Id.

¹⁸ Id.

¹⁹ Fla. Admin. Code Ann. r. 69k-1.001 (2007).

be a corporation, a partnership, or a limited liability company.²⁰ Any proposed cemetery must contain at least 30 contiguous acres, and the applicant is required to state the exact number of acres and the exact location of the proposed cemetery in the application.²¹ Within these 30 acres, at least 2 acres must be developed for burial space.²² In addition, a cemetery requires a paved road from a public road to the developed section.²³ The statute also requires all applicants to have a net worth of \$50,000.²⁴ Applicants must also include a financial structure description and a legal description for the proposed cemetery.²⁵

Following submission of all of this information, the applicant must “demonstrate by clear and convincing evidence that the applicant has the ability, experience, financial stability, and integrity to operate a cemetery, and that its principals are of good character.”²⁶ Having met all of these criteria, the applicant may move on to stage two of the process.²⁷

The second stage of the process requires the applicant to establish a care and maintenance trust fund with a minimum of \$50,000.²⁸ The money in the trust must be over and above the \$50,000 net worth requirement, and the trust fund must be certified by a trust company, a state or national bank holding trust powers, or a savings and loan association holding trust powers.²⁹ The Board further requires the applicant to demonstrate that it has designated a general manager of the cemetery with a

²⁰ Fla. Stat. Ann. § 497.263(1)(b) (2006).

²¹ Id. § 497.263(1)(g) (2006).

²² Id. § 497.263(3)(e) (2006).

²³ Id.

²⁴ Id. § 497.263(1)(h) (2006).

²⁵ Id. § 497.263(1)(i) (2006).

²⁶ Id. § 497.263(2)(p) (2006).

²⁷ Id. § 497.263(3).

²⁸ Id. § 497.263(3)(a) (2006).

²⁹ Id.

minimum of 3 years of cemetery management experience and the ability to operate the proposed cemetery.³⁰

In addition, the applicant must provide certification from a Florida lawyer or Florida title company that the applicant holds unencumbered fee simple ownership of all of the land in the proposed cemetery.³¹ A licensed Florida lawyer must also certify that the applicant has recorded appropriate notice in the public records.³² Moreover, the applicant must demonstrate to the Board that the local zoning authorities have approved the development plans for the proposed cemetery.³³

The applicant has 12 months to complete stage two of the licensing process. However, the Board may grant up to two extensions of this period.³⁴ Following completion of all of these requirements, the Board will issue a cemetery license.³⁵

Depending on the services that the ecocemetery plans to provide, the law may require additional licenses. For example, funeral directing and pre-need sales each require additional licenses.³⁶ Any funeral director that leads a service in the cemetery must have a state license.³⁷ However, the cemetery itself does not have to have a license to conduct grave side or memorial services.³⁸ In addition, any cemetery that supplies and sells pre-need merchandise and services must have a cemetery pre-need license and an individual license for the sales agent.³⁹ This requirement does not apply to the sale of merchandise or services on an “at need” basis.⁴⁰ This means that the cemetery

³⁰ Id. § 497.263(3)(d) (2006).

³¹ Id. § 497.263(3)(b) (2006).

³² Id. § 497.263(3)(f) (2006).

³³ Id. § 497.263(3)(c) (2006).

³⁴ Id. § 497.263(4) (2006).

³⁵ Id.

³⁶ Telephone Interview with Timothy Wheaton, Financial Control Analyst, Board of Funeral, Cemetery & Consumer Services, in Tallahassee, Fla. (Oct. 16, 2007).

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

may sell merchandise and services at the time of death without a pre-need license.⁴¹ Merchandise and services applies, but is not limited, to burial space, caskets, shrouds, or opening and closing services.⁴² The process for these additional licenses is very similar to the process described above.

II. Some aspects of an eco-cemetery with green burial practices may not be completely in accord with the requirements of the Florida Statutes.

As previously noted, Chapter 497, Florida Statutes requires that a cemetery develop a minimum of two acres of land with a paved road for burial purposes.⁴³ Given the material typically used for a paved road, this requirement is not necessarily in accordance with the nature or mission of a Conservation Burial Ground. As a result, an ecocemetery may have to make a concession in order to comply with this requirement. The public policy behind this requirement is that everyone should have access to the grave site of a loved one. Visitors should be able to reach a grave site without sustaining damage to their cars and elderly visitors often have special needs that are met by this requirement.⁴⁴ Given this public policy purpose, cemetery-provided transportation or the use of more environmentally-friendly materials (something other than asphalt) could meet these policy concerns.

Moreover, the Florida Statutes require a “licensee in charge of dead human remains” to affix an identification tag to “to the ankle or wrist of the deceased, and on the casket, alternative container, or cremation container.”⁴⁵ This section also provides that the Board may adopt rules regarding the specific materials that can be used on these identification tags. Accordingly, the Board requires that all identification tags be “plastic, non-corrosive metal, encased in plastic or weatherproof adhesive

⁴¹ Id.

⁴² Id.

⁴³ Fla. Stat. Ann. § 497.263(3)(e) (2006).

⁴⁴ Telephone Interview with Timothy Wheaton, Financial Control Analyst, Board of Funeral, Cemetery & Consumer Services, in Tallahassee, Fla. (Oct. 16, 2007).

⁴⁵ Fla. Stat. Ann. §497.171 (2006).

labels.”⁴⁶ Unless an eco-friendly weatherproof adhesive label exists, none of these persistent inorganic materials are necessarily good for the environment. However, there is no requirement for the size of the identification tag. As a result, it is possible to limit the negative impact of this requirement on the environment.

In addition, the Florida Statutes also require that cemeteries “ensure that the grounds, structures, and other improvements of a cemetery are well cared for and maintained in a proper and dignified condition.”⁴⁷ This requirement could be read to require the well-manicured lawn and organized burial rows found in traditional cemeteries. Such an analysis would directly conflict with the natural condition typically employed by a Conservation Burial Ground. However, the provision further stipulates that the Board has the authority to define different classes of cemeteries and to adopt care and maintenance rules accordingly.⁴⁸ It is fair to assume that those who choose to be buried in a Conservation Burial Ground are familiar with the objectives of the cemetery and feel that they will be laid to rest in a dignified fashion. Provided the Board is willing to acknowledge this position, this requirement should not pose an obstacle.

III. Local land use regulations should not conflict with the creation of an eco-cemetery.

A. The Alachua County Code should not conflict with the creation of an eco-cemetery with green burial practices.

Alachua County does not have specific regulations for the operation of a cemetery. As a result, green burial practices do not conflict with Alachua County regulations. However, Alachua

⁴⁶ Fla. Admin. Code Ann. r. 69k-6.009 (2007).

⁴⁷ Fla. Stat. Ann. § 497.262 (2006).

⁴⁸ Id.

County does regulate land development in the context of its comprehensive plan and zoning districts. Due to the lack of an exact location for an eco-cemetery in this analysis, a specific land use and zoning analysis is problematic. However, the Alachua County Code does designate the use classification for cemeteries in section 404.36. According to this section, cemeteries are allowed in all zoning districts by special use permit.⁴⁹ This means that the ecocemetery must comply with the requirements set out in Article XVIII of the Land Development Regulations (LDR).

Article XVIII regulates special use permits, which require approval by the Board of County Commissioners.⁵⁰ All applicants are required to participate in a pre-application conference with the Department of Growth Management.⁵¹ In addition, all applicants are also required to hold a neighborhood workshop prior to submitting an application.⁵² Neighborhood workshops are regulated under Article V of the LDR. Application requirements are set out in Article II of the LDR and are common to all development applications.⁵³

Prior to any review of an application, an applicant must provide notice to the applicant's neighbors.⁵⁴ The applicant will provide mailed notice, published notice, and posted notice in accordance with the procedure set out in Article IV of the LDR.⁵⁵ After the applicant provides the requisite notice, the Planning Commission will consider the application at a public hearing.⁵⁶ The criteria for consideration of all special use permits is delineated in § 402.114 of the LDR.⁵⁷

Following this hearing, the Planning Commission will make a recommendation to the Board of

⁴⁹ Alachua County Code § 404.36.

⁵⁰ Alachua County Code, Art. II, 404.06(b).

⁵¹ Alachua County Land Development Regulations § 402.18.

⁵² Id. § 402.19.

⁵³ Id. § 402.120.

⁵⁴ Id. § 402.121.

⁵⁵ Id.

⁵⁶ Id. § 402.122.

⁵⁷ Id.

County Commissioners.⁵⁸ The Planning Commission will either recommend approval, approval with conditions, or denial of the special use permit.⁵⁹

Following this recommendation, the Board of County Commissioners will hold its own public hearing to consider the proposed special use permit.⁶⁰ The Board of County Commissioners will also approve, approve with conditions, or deny the special use permit.⁶¹ If the Board of County Commissioners approves the application, the applicant may submit a development plan to the Development Review Committee (DRC) for preliminary and final approval.⁶² An applicant who is approved in this manner does not have to get separate preliminary development approval from the Board of County Commissioners.⁶³

The Board of County Commissioners uses the criteria for approval described in § 402.124 of the LDR.⁶⁴ During the review process, the Board of County Commissioners reserves the right to

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id. § 402.123.

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id. § 402.124. This provision provides:

Criteria for Approval

The Board of County Commissioners shall, as part of a decision to approve an application for a special use permit, make a finding that an application complies with both the general criteria and the review factors listed below:

- (a) the proposed use is consistent with the Comprehensive Plan and ULDC;
- (b) the proposed use is compatible with the existing land use pattern and future uses designated by the Comprehensive Plan;
- (c) the proposed use shall not adversely affect the health, safety, and welfare of the public; and
- (d) satisfactory provisions and arrangements have been made concerning the following matters, where applicable:
 1. ingress and egress to the property and proposed structures thereon with particular reference to automotive, bicycle, and pedestrian safety and convenience, traffic flow and control and access in case of fire or catastrophe;
 2. off-street parking and loading areas where required, with particular attention to item 1 above;
 3. the noise, glare or odor effects of the special exception on surrounding properties;

prescribe appropriate conditions and safeguards to protect the public health, safety and welfare.⁶⁵ If an eco-cemetery comports with the criteria described in the LDR, it should be able to obtain a special use permit. Specific green burial practices may give rise to questions concerning subsection 402.124(c), which provides latitude to consider the “health, safety and welfare of the public;” and subsection 402.124(d)(9), which addresses general compatibility with surrounding properties.⁶⁶

B. The Gainesville Code of Ordinances and Land Development Code do not conflict with the creation of an eco-cemetery with green burial practices.

The Gainesville Code of Ordinances sets out the requirements for burials in Chapter 7.⁶⁷ However, a cemetery as defined in section 7-1 is restricted to the Evergreen Cemetery.⁶⁸ The Gainesville Code of Ordinances reserves the specific regulation of non-municipal cemeteries to the State.⁶⁹ However, Gainesville does regulate land use development in the Land Development Code (LDC).

Under the LDC, cemeteries are permitted as of right in the Public Services and Operations Zoning District (PS).⁷⁰ This means that an ecocemetery may be created in this zone without rezoning or a special exception. However, even a use allowed by right must meet the code requirements and go through the appropriate level of review. All development proposals are required to go through

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4. refuse and service areas, with particular reference to location, screening and items 1 and 2 above;
 5. Utilities, with reference to location and availability;
 6. Screening and buffering with reference to type, dimensions and character;
 7. Signs, if any, and proposed exterior lighting with reference to glare, traffic safety and compatibility with surrounding properties;
 8. Required yards and other open space;
 9. General compatibility with surrounding properties; and
 10. Any special requirements set forth in this ULDC for the particular use involved.

⁶⁵ Id. § 402.125.

⁶⁶ Id.

⁶⁷ Gainesville Code of Ordinances § 7.

⁶⁸ Id. § 7-1.

⁶⁹ Telephone Interview with Pam Ganley, Cemetery Coordinator in Gainesville, Fla. (Oct. 22, 2007).

⁷⁰ Id.

review in accordance with Article VII of the LDC.⁷¹ Since, unlike Alachua County, there is no specific special use or exception for cemeteries, rezoning to the PS zoning district may be required.

The steps for the review process are specifically described in section 30-156 of the LDC.⁷² The first step in the process requires a pre-application conference.⁷³ During the conference, the applicant will meet with the planning staff and discuss the development review process, the ordinance requirements, and the actual application.⁷⁴ Next, the city manager will designate the level of review for the development plan according to section 30-159 of the LDC.⁷⁵ The levels of review include rapid, minor, intermediate and major. Depending on the level of review, the LDC may require public notice.⁷⁶ The next steps include an optional concept plan review followed by preliminary development plan review and final development plan review.⁷⁷ All of the criteria for each stage of review are set out in section 30 of the LDC. If the ecocemetery complies with all of these regulations, it should receive a final development order that is good for one year.

- V. There is one important difference between tax-exempt status under section 501(c)(3) and section 501(c)(13) of the Internal Revenue Code, but there are no apparent tax advantages.
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The Internal Revenue Service (IRS) provides for many different forms of tax-exempt status. The most commonly recognized classification is under section 501(c)(3). This section provides tax-exempt status for organizations with purposes that are “charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and

⁷¹ Id.

⁷² Id.

⁷³ Gainesville Code of Ordinances §30-156.

⁷⁴ Id.

⁷⁵ Id. § 30-157.

⁷⁶ Id. § 30-158.

⁷⁷ Id. § 30-156.

the preventing cruelty to children or animals.”⁷⁸ In contrast, tax-exempt status under section 501(c)(13) is only available for non-profit cemeteries.⁷⁹

Organizations classified under either status are exempt from federal income tax and generally all contributions are deductible.⁸⁰ The only difference lies in the general nature of the activity conducted by the organization. However, the nature of the activity does create issues. Although the ecocemetery operation will be used to conserve the adjacent land, cemetery operation may not fit into an existing entity’s –such as a land trust- stated purpose in its Articles of Incorporation. As a result, the IRS could revoke the 501(c)(3) status should the entity be construed as operating outside of the purposes for which it was incorporated.⁸¹ Accordingly, an attorney who specializes in tax-exempt organizations should appropriately research this matter.

Conclusion

An eco-cemetery can be developed in Alachua County. The actual location of the eco-cemetery site, and the disposal and related processes selected will dictate the ease with which this can be undertaken. The process for obtaining the appropriate licenses and gaining local approval is both time consuming and expensive. However, there is already one precedent for green burial in Florida, which suggests it is possible as a matter of state law.

⁷⁸ Internal Revenue Service, <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html>.

⁷⁹ Internal Revenue Service, <http://www.irs.gov/charities/article/0,,id=96184,00.html>.

⁸⁰ Telephone Interview with an Internal Revenue Service agent (Oct. 1, 2007).

⁸¹ Id.

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