THE ATTORNEY GENERAL
OF TEXAS

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October 22, 1990

Honorable Mark W. Stiles
Chairman
House County Affairs
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78768-2910

LO-90-78

Dear Representatives Stiles:

The question you submit grows out of a dispute between San Leanna, a type B general law municipality, and the owner and operator of a perpetual care cemetery that was in existence at the time the municipality was incorporated.

You relate that the controversy was precipitated by the owner of the cemetery purchasing a building to move onto the cemetery property to serve as an office. The municipality advised the owner of the cemetery that it would be necessary for him to obtain a variance from the zoning commission since the zoning ordinance requires on-site construction. The owner takes the position that the cemetery does not fall under the requirements of the ordinance since the cemetery was in existence prior to incorporation.

You ask whether the cemetery is subject to ordinances of the municipality since it was in existence prior to incorporation of the municipality.

San Leanna comes within the provisions of the General Zoning Act, section 211.003 of the Local Government Code (formerly article 1011a, V.T.C.S.). See 63 Tex. Jur. 2d Zoning § 14. Section 211.003 provides in pertinent part:

> (a) The governing body of a municipality may regulate:
>
> (1) the height, number of stories, and size of buildings and other structures;
>
> . . . .

> (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes. (Emphasis added.)

We believe the question of whether property in existence prior to incorporation of a municipality is subject to its ordinances is analogous to the authority of municipalities to govern annexed areas. In Attorney General Opinion V-626 (1948) it was stated:

> We have been unable to find any Texas cases specifically holding that when a city annexes a new area that all of the city's ordinances as well as its charter apply to and govern the new area. In fact, the question seems to be so elemental that the Texas cases assume such ordinances and charter provisions apply to the annexed areas without discussing the proposition at length. See City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.(2d) 695; City of Dallas v. Meserole, (Civ. App., writ ref'd W.O.M., 155 S.W.(2d) 1019; Lefler v. City of Dallas, (Civ. App.), 177 S.W. (2d) 231.

2 McQuillin Municipal Corporation, § 7.46 (3d. ed. 1979) states:

> When territory has been lawfully and finally annexed, the new area becomes, ipso facto, a part of the municipality, subject to municipal jurisdiction, and it may be governed as the original municipal territory was governed prior to change, subject, of course, to terms and provisions of the annexation, requiring variation in government.

We believe that the fact that the cemetery was in existence prior to charter of the municipality does not exempt it from ordinances unless there was some provision in the incorporation of San Leanna granting the cemetery a variance from the municipality's jurisdiction. To conclude that property (used for any purpose) that was in existence prior to incorporation is exempt from zoning ordinances would render incorporation nugatory.

You ask a number of questions relative to whether the municipality may prohibit the owner of the cemetery from

erecting various structures and whether the owner must comply with the building permit and occupancy requirement provisions of the ordinances.

This office is unable to determine the applicability of various provisions of the municipal ordinances to your questions. Each case wherein the validity of a zoning regulation is called into question must be decided on its own particular facts. Waxahachie v. Watkins, 275 S.W.2d 477 (Tex. 1955). As hereinafter noted, the determination of the validity of a zoning ordinance has been held by the Supreme Court of Texas to require consideration of numerous factors in each case.

We believe the following general rules relative to the validity of municipal ordinances may furnish some guidance in the resolution of your questions. The following statements were made by the court in Waxahachie v. Watkins, in construing then article 1011a V.T.C.S., (now § 211.003 of the Local Government Code):

> If reasonable minds may differ as to whether or not a particular zoning restriction has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the restriction must stand as a valid exercise of the city's police power. City of Corpus Christi v. Jones, Tex. Civ. App., 144 S.W.2d 388, error dism., correct judgt.. Otherwise expressed by the court in the case just cited, if the issue of validity is fairly debatable courts will not interfere.
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> . . . .
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> This query presents a question of law, not a question of fact, and in deciding it the court should have due regard 'to all the circumstances of the city, the object sought to be attained and the necessity existing for the ordinance.' And if there is an issuable fact as to whether the ordinance makes for the good of the community, the fact that it may be detrimental to some private interest is not material. Edge v. City of Bellaire, Tex. Civ. App., 200 S.W.2d 224, 227 error refused. (Emphasis added.)

We do not have before us all the circumstances of the city, the object sought to be attained and the necessity for the existing zoning ordinance. Further, we believe that the resolution of the issue of whether the ordinance in its application to your facts constitutes a clear abuse of discretion is a matter that may only be resolved by the courts.

Very truly yours

Tom G. Davis
Assistant Attorney General
Opinion Committee

APPROVED: Rick Gilpin, Chairman
Opinion Committee

TGD/RG/mc

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