IN THE

Supreme Court of Virginia

RECORD NO. 090906

KATHRYN SHILLING,

Appellant,

v.

BRIAN C. BAKER, et al.,

Appellees.

BRIEF OF APPELLEE ROCKINGHAM COUNTY

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Appellee Rockingham County, a political subdivision of Virginia (referred to herein as the County), appearing in this case as the Board of Zoning Appeals and the Zoning Administrator, by counsel, submits the following brief in support of reversing the Circuit Court's decision that a cemetery was not established in 1949 on the subject real estate in Rockingham County. There are a number of issues litigated between the Appellant (Ms. Shilling) and those Appellees other than the County upon which the County has no opinion. This brief deals only with those issues pertinent to the County and its administration of its Zoning Ordinance. (The County relies upon the Appellant's Brief and Transcript for identification of the subject real estate.)

STATEMENT OF THE CASE

For the County, this case began as a possible zoning violation when a report of a private cemetery was received in the office of the Zoning Administrator. Upon investigation, the Zoning Administrator found: that there was activity constituting a private (non-commercial) cemetery; that it was on real estate privately held; that the real estate was in an agricultural district; that, after the enacting of the County's

Zoning Ordinance in 1969, a special use permit would be needed to establish a cemetery and; that no special use permit for a private cemetery had ever been obtained for the subject parcel. Therefore, the Zoning Administrator concluded a zoning violation existed. Please see letter from Zoning Administrator, dated March 18, 2008, at Appellant's Appendix, page 247.

After informing the parties involved of her determination, the Zoning Administrator was presented with additional evidence that led her to conclude the private cemetery activity had actually commenced no later than 1949 or 1950, many years before the first enactment of the Zoning Ordinance, making the private cemetery a pre-existing non-conforming use. She notified interested parties of her reconsidered determination. Please see letter from Zoning Administrator, dated April 7, 2008, at Appellant's Appendix, page 249.

Mr. Brian C. Baker, the property seller / owner, and parties related to him, appealed the redetermination to the Board of Zoning Appeals.

The Board of Zoning Appeals (BZA) upheld the Zoning Administrator's determination that a cemetery had been established during, or shortly after, 1949; that it was a pre-existing non-

conforming use when the Zoning Ordinance came into effect; and, with the concurrence of the Zoning Administrator at the BZA hearing, based on evidence that first came to light at that hearing, clarified that the size of the pre-existing cemetery was within a 2 feet by 10 feet area circumscribed by a chain and stanchions enclosure. This area was a reduction from the 40 feet by 40 feet area circumscribed by a wrought iron fence, which was installed after the Zoning Ordinance was passed.

This decision of the BZA was appealed to the Circuit Court by both Ms. Shilling and Mr. Baker. Your Appellant, Ms. Shilling, wanted the 40 feet by 40 feet area recognized and Mr. Baker, along with the purchaser Mr. Kelly, did not want a cemetery at all. It is the County's understanding that the sale from Mr. Baker to Mr. Kelly is contingent upon Mr. Baker clearing the land of the adverse claim of a private cemetery.

QUESTION PRESENTED

The County would restate the question presented by the Appellee, that question which is relevant to the County's portion of this case, as follows: Whether a family who chose to dispose of a

loved ones' remains by conducting a funeral service, erecting a plague or headstone-like monument, and scattering cremation remains on the surface of the ground, rather than burying a casket or urn, failed as a matter of Virginia law to establish a private cemetery.

STATEMENT OF FACTS

The facts most significant to the County are summarized as follows: during or shortly after 1949 a significant number of Baker family members, including the then owners of the real estate, participated in a ceremony that they viewed as a funeral; they scattered cremation remains in a specifically selected location rather than burying a casket, in keeping with the wishes of the decedent and the preferences of the extended family (and at least partially as dictated by obstacles presented by the very rocky ground); they erected a plague that, for all practical purposes, functions as a headstone; and many family members, including Mr. Brian C. Baker, continued to refer to the designated area as the "family cemetery", or the "Baker cemetery", from 1949 to the present. (Please see the transcript of testimony given in a hearing to which the County was not party, found in the Appellant's Appendix, beginning at page 66. It is

worthy of note that few, if any, of the facts pertinent to the County's determination of establishment of a cemetery are in dispute among the other parties.) This cemetery, or cemetery-like, land use commenced before there was a zoning ordinance in Rockingham County.

The County does not view itself competent to dictate funeral practices to its families and residents. The Court is encouraged to note that, if in 1949 the Baker family had done everything identically to what it did, with the one exception that it buried a casket or an urn instead of scattering the cremation remains on the surface of the ground, this case would never have arisen. (Based on testimony in the transcript provided by the Appellant, referred to above, it would be very difficult to bury a casket in the rocky ground.)

DISCUSSION

The scattering of cremation remains on a hillside by itself would not establish a cemetery. The placing of a memorial plague by itself without the scattering (interment, if you will) of the remains would not establish a cemetery. But the holding of a funeral ceremony, the placing of a memorial plague that is altogether like a headstone on a

grave, the scattering of the cremation remains on the ground in a specifically selected area, and the continued treatment of the area as a family cemetery, including referring to it as such in so many words, is so similar to the more traditional burying of a body, that the County treats it the same as the more traditional burying.

The statutory discussion the Circuit Court relied upon regarding a definition of "cemetery" is found in Virginia Code Title 54.1. It must be noted that Title 54.1 deals with the oversight of regulated professions, and is not intended as a discussion of or legislation on land use issues. As such, it may provide helpful insight and guidance. But all those considerations that would be appropriate in other contexts must not be presumed to have been taken into account in its drafting.

The Circuit Court expands on the definition of "cemetery" found in Section 54.1-2310. Chapter 23.1 of Title 54.1, in which Section 54.1-2310 is found, specifically deals with the regulatory oversight of cemetery operators, perpetual care trust funds and preneed burial contracts. It states the word "cemetery":

> means any land or structure used or intended to be used for the interment of human remains. The

> sprinkling of ashes or their burial in a biodegradable container on church grounds or the placement in a columbarium on church property shall not constitute the creation of a cemetery.

To the extent this definition helps sort out the issues in the present case, it tells us that any land used *or intended to be used* for the "interment" of human remains is to be considered a cemetery. So far we know that it is not necessary to actually bury remains to establish a cemetery. All that is necessary is to intend to inter.

Continuing on, this definition then tells us that scattering ashes in a church yard does not make the churchyard a cemetery. It says nothing, at least directly, about scattering ashes on other private property.

Section 54.1-2310 also informs us that "interment" means:

> *All* forms of final disposal of human remains including, *but not limited to*, earth burial, mausoleum entombment and niche or columbarium inurnment. The sprinkling of ashes on church grounds shall not constitute interment. (Emphasis added.)

Interestingly, the Circuit Court found that "[t]hough the instant case does not deal with church grounds or church property, the inferred intent of the statute is to prohibit the creation of cemeteries in other locations in similar circumstances." Circuit Court Opinion Letter, dtd December 29, 2008, found in the Appellant's Appendix at page 393, 395.

The Circuit Court gives no basis or reasoning for this "inferred intent". In fact, this inference is difficult to draw. The overarching purpose of Chapter 23.1 of Title 54.1 is the regulation and oversight of those engaged in the business of cemetery operations, not the permitting or prohibiting of the creation of private, non-business, cemeteries.

A much more straightforward inference to draw would be that, should a church allow the sprinkling of ashes in its yard, that act alone would not bring the church under this statutory regime as a cemetery operator. There would have been an understandable legislative concern that some might confuse a public establishment such as a church as possibly coming under the requirements of a cemetery operator without this clarification. There would be no similar concern that some might misconstrue the statute to include

private land on which ashes are scattered as being a "cemetery company", thereby coming under the regulation of the Chapter, and so there was no need to exempt such from the regulation.

In other words, the County reads this definition to say: The sprinkling of ashes . . . on church grounds . . . shall not constitute the creation of a cemetery" *for purposes of regulation under this chapter.*

It is overreaching to read into that clarification that land on which cremation remains have been sprinkled is somehow disqualified as a cemetery, especially when the sprinkling is coupled with all that it was coupled with in the case at bar.

Additionally, the General Assembly, having demonstrated its ability to exclude churchyards sprinkled with ashes from this definition of cemeteries, must certainly be supposed to be able to exclude other places ashes are sprinkled if that is what it meant. It cannot reasonably be assumed that the General Assembly left out other property because it was not aware that ashes are sprinkled in other places.

The County respectfully submits the Circuit Court read too much into the Title 54.1 definition of "cemetery".

The Circuit Court refers to the County's definition of "cemetery" in deciding that there must be a burial in the ground of something in order for there to be a cemetery.

The County's definition, found in the County Code at Section 17-6 states:

> Cemetery. Land used for the burial of the dead, and dedicated for cemetery purposes, including columbariums and mausoleums when operated in conjunction and within the boundary of such cemetery.
>
> (The complete Rockingham County Code may be found by going to the County's website at www.rockinghamcountyva.gov, and clicking on County Code under Citizens on the homepage, or by going to http://www.municode.com/resources/gateway.asp?pid=12196&sid=46.)

There is no necessity to read the phrase "burial of the dead" to require the literal burying in the ground of a corpse or an urn, especially when the phrase is coupled with "and dedicated for cemetery purposes". Many cultures have chosen to "bury" their dead by means other than literal burial in the ground. (For example, the practice of "burial at sea" includes both weighting a body so its sinks beneath the waves and scattering ashes on the waves. Neither,

obviously, involves the digging of a hole in the ground.) The County's definition itself contains the license to expand on the concept of burial beyond the literal digging of a hole in the earth and placing a body therein when it states that the concept of "burial" shall include placing remains in structures on the surface of the earth.

And, probably most significantly, for a government to require literal burial raises constitutional issues of establishment of religion, or, if not establishment, then unacceptable discrimination against some religious practices. There is no public health or safety issue known to the County that would justify the prohibition of, or refusing to treat with equal dignity, the scattering of cremation remains on the surface of the earth as a manner of disposing of the remains. Therefore, the County construes its ordinance to avoid constitutional problems and include in the definition of cemetery the disposition of the remains as seems appropriate to the decedent and his survivors.

Additionally in this particular case, literal burial presents practical challenges, according to the testimony at trial.

This interpretation is consistent with the language of Section 54.1-2310 where it defines the word "interment". Again, the General Assembly gave that term an expansive, all inclusive meaning when it

stated that interment means "*all* forms of final disposal of human remains including, *but not limited to*, earth burial, ..." (Emphasis added.)

And, please note that the General Assembly felt it prudent to refer to "earth burial", implying that the word "burial" by itself might encompass other practices as well.

Furthermore, the Circuit Court ignored those provisions in the County Zoning Ordinance found, for example, in Section 17-23(x) (of the A-1 Prime Agricultural District provisions), that uses are permitted by special use permit that "in the opinion of the Zoning Administrator are similar to the foregoing uses, either permitted uses or special uses."

Under this provision, the County recognizes the use to which the Baker family put the subject real estate as being so like a cemetery, as to treat it like a cemetery. Should property owners come to the County after the passage of the Zoning Ordinance seeking to do what the Baker family started doing before the passage, the Zoning Administrator would process the request like a request for a cemetery, regardless of whether they intended to literally bury something in a hole in the ground.

A final aspect of this issue of the purported need to actually bury something to establish a cemetery is dealt with handily by the case decided by another circuit court in *Berryman v. Shiloh Baptist Church*, Ch No. 393-92, 1993 WL 946168 (Va. Cir. Ct. July 19, 1993). This case is adequately summarized in the Appellant's Brief, beginning at page 22 thereof, and so will not be elaborated on here. The County will only add to that discussion that it has long been the County's practice to state on special use permits for private cemeteries that the permit does not expire if the land is not so used within two years. This is contrary to the typical special use permit. The County has not wanted to place the family in the position of coming up with remains to inter by some deadline, if none were forthcoming in the natural course. Yet, even without remains, the County still considers the permitted land a cemetery. This is consistent with the holding in *Berryman*, the "used or intended to be used" provision in Section 54.1-2310, and good sense.

Finally, the County would note that the Circuit Court made it clear both during argumentation in open court and in its ruling that it was very focused on the burden private cemeteries place on private property under certain provisions of the State Code. This focus was

almost to the exclusion of giving due consideration to the facts and circumstances of this particular case. Though all of us can, and do, applaud the protection of flexibility and marketability for current private property owners, we must not ignore the actions, statements and intentions of previous property owners.

CONCLUSION

THEREFORE, Rockingham County asks that the Supreme Court affirm the finding of the Zoning Administrator, as upheld by the Board of Zoning Appeals, that a cemetery was established on the subject real estate prior to the passage of the County's Zoning Ordinance, and that the dimensions of the cemetery are described by the 10 feet by 2 feet area circumscribed by a chain and stanchions.

Respectfully submitted,

Rockingham County, a political subdivision of Virginia

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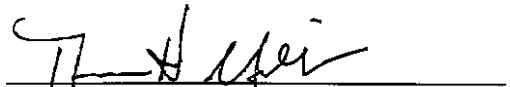
Certificate as to compliance with Rule 5:26(d)

Pursuant to Rule 5:26(d) of the Rules of the Virginia Supreme Court, I hereby certify that:

To counsels of record, Kevin Rose, Esquire, Botkin and Rose, 3210 Peoples Drive, Harrisonburg, Virginia 22801, krose@botkinrose.com, and to Michael J. Melkersen, Esquire, 9633 South Congress Street, New Market, Virginia 22844, mike@mlawpc.com, one copy of this pleading emailed to each on October 2, 2009, and three copies of this pleading mailed to each by regular U. S. Mail, postage prepaid on October 2, 2009.

To the Clerk of the Supreme Court of Virginia in his office in Richmond, Virginia, by hand delivery on October 2, 2009, fifteen bound copies of this pleading, and one copy of this pleading emailed on October 2, 2009 to scvbriefs@courts.state.va.us.



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