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March 25, 2020

Mr. Joseph Wilson, President  
The Ohio Cemetery Association, Inc.  
Franklin Hills Memory Gardens  
5802 Elder Road  
Canal Winchester, OH 43110

Re: Graveside Services and ODH Order, dated March 22,2020.

Dear Mr. Wilson:

I am writing to provide guidance on the legal issues recently raised by funeral directors or customers demanding graveside services notwithstanding the Social Distancing Requirements that are incorporated in the Ohio Department of Health's Stay at Home Order, dated May 22, 2020 (the "Order").

Before turning to such analysis, however, I must confirm my factual understandings. Please notify me such understandings are incorrect (or should be augmented, given this developing situation) so that I can confirm, enhance or modify my conclusions. Obviously, the information and analysis set forth herein is specific to the OCA (and its member's Ohio cemeteries only) and may not be utilized or relied upon by any other person or entity or construed or applied to any other jurisdiction. Further, as this letter relies on and interprets the Order, the opinions expressed herein shall require confirmation, withdrawal or revision if the Order is modified by the Ohio Department of Health or any other governmental entity asserting proper jurisdiction over the subject matter thereof. Finally, for the convenience of the cemetery operator, a summary of conclusions is presented before legal analysis is presented.

I. Facts.

- A. Some funeral directors or customers are taking the position that because funerals and cemeteries are categorized as "Essential Businesses and Operations" pursuant

to the Order, cemeteries are mandated allow graveside gatherings without any size limitations.

II. Issues Presented.

- A. Given the terms of the Order, are cemeteries required to permit graveside, or other gatherings associated with funerals or burials, without any size limitations?

III. Summary of Conclusions.

- A. No. cemeteries are not so compelled. The Order does not require cemeteries to permit such gatherings. To the contrary and in spite of cemeteries being designated as an Essential Businesses and Operations in the Order, it dictates that that should the cemetery choose to allow such gatherings, they **shall** be limited to ten or fewer persons and shall be subject to the Social Distancing Requirements set forth in the Order.

IV. Analysis

A. Stay at Home Order.

Initially, it should be recognized that Director Acton issued the Order pursuant to existing statutory authority (ORC Section 3701.13) and, as such, it is the prevailing law regarding all issues related to preventing the spread of COVID-19. As such, the significant parts of the Order relating to the Issues Presented herein shall be reproduced below (with underlining for emphasis) and discussed and analyzed as necessary. However, as will be detailed at the end of this Analysis, the Order should not be interpreted as somehow suspending or abrogating existing law, in the myriad of substantive areas that it touches upon, except as specifically set forth therein.

While the opening statement in the Order makes clear that the entirety of the following twenty-three pages are mandatory, the Order can best be understood by reference to the following summary which appears immediately above Dr. Acton's signature at the end of Order:

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including, the elderly and people with weakened immune systems and chronic medical conditions, I hereby ORDER effective at 11:59 p.m. on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate

Essential Businesses and Operations as set forth in this Order. This Order shall remain in full force and effect until 11:59 p.m. on April 6, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date. To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to the local health departments the authority to answer questions in writing and consistent with this Order.

Amy Acton, MD, MPH  
Director of Health  
March 22, 2020

Next, we should recognize that Section 12(y) of the Order designates cremation, burial, cemetery and related services as Essential Businesses and Operations as follows:

12. **Essential Businesses and Operations.** For the purposes of this Order, Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential and the following:

y. **Funeral services.** Funeral, mortuary, cremation, burial, cemetery, and related services.

While such designation means that cemetery employees are free to leave their residences to work at the cemetery, it does not mean that the cemetery may operate in any manner that it chooses without concern for contributing to the spread of COVID-19. The Order contains ample support for such proposition.

First, Section 16 contains the following statement of intent:

16. **Intent of this Order.** The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible. When people need to leave their places of residence, whether to perform Essential Activities, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times and as much as possible comply with Social Distancing Requirements. All provisions of this Order should be interpreted to effectuate this intent.

Second, Section 18(g) makes clear that it is not “business as usual” for any business (even Essential Businesses and Operations) as follows:

18 **COVID-19 Information and checklist for Businesses/Employers.** Businesses and employers are to take the following actions:

(g) Be prepared to change business practices if needed to maintain critical operations (e.g., identify alternate supplies, prioritize customers, or temporarily suspend some of your operations).

Third, Section 2 makes clear that Essential Businesses and Operations are not even required to remain open at all (let alone provide all aspects of their usual operations) and if they are open, they **shall** comply with Social Distancing Requirements. Section 2 provides, in part:

“All Essential Businesses and Operations are encouraged to remain open. Essential Businesses and Operations shall comply with Social Distancing Requirements as defined by this Order, including by maintaining six -foot social distancing for both employees and members of the public at all times, including, but not limited to, when any customers are standing in line.”

Fourth, Section 3 provides, in part:

“3. **Prohibited activities.** All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes permitted by this Order. Any gathering of more than ten people is prohibited unless exempted by this Order. This is in accordance with President Trump’s coronavirus guidelines issued March 16, 2020.

Finally, it is practically impossible to allow a gathering of ten or more persons for a graveside service while complying with the following Social Distancing Requirements (which are applicable to Essential Businesses and Operations):

15. **Social Distancing Requirements.** For the purposes of this Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

a. **Required measures.** Essential Businesses and Operations and businesses engaged in Minimum Basic Operations must take practice measures to ensure compliance with Social Distancing Requirements, including where possible:

i. **Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;

**ii. Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers;

**iii. Separate operating hours for vulnerable populations.** Implementing separate operating hours for elderly and vulnerable customers; and

**iv. Online and remote access.** Posting online whether a facility is open and how to best reach the facility and continue services by phone or remotely.

B. Other Sources of Law.

As previously stated, the Order does not modify the existing laws applicable to cemeteries that have nothing to do with COVID-19 and the scope of the Order. Most notably, the cemetery operator should recall that all types of cemeteries have rule making authority (see ORC Sections 1721.07, 517.06 and 759.11 with regard to cemetery companies and associations, township cemeteries and municipal cemeteries, respectively).

Further, Ohio Revised Code Section 1721.19 (A) provides:

(A) no person shall violate a bylaw, rule, or regulation adopted by the trustees, directors, or other officers of a cemetery company or association, or by a board of township trustees having charge of township cemeteries, with reference to the protection, good order, and preservation of cemeteries, and the trees, shrubbery, structures, and adornments therein.

Please let me know of any questions or concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read 'TCL', is written over a light blue horizontal line.

Timothy C. Long