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January 21, 2021

Memorandum

To: Ordinance and License Committee
From: Brian Running
Re: Revisions to Municipal Code 3.08(4), Regarding Prairie Home Cemetery Trust Funds

Prairie Home Cemetery maintains several trust funds into which proceeds from the sale of plots and other goods and services are deposited. The trust funds are to be used only for certain specified purposes, such as the perpetual maintenance of the cemetery and mausoleum. The permitted uses of the funds are described in a trust agreement with the bank holding the funds. Presently, the funds are at Associated Bank.

The Cemetery recently hired an investment advisor firm to manage the investment of the Cemetery's trust funds. That firm, Dana Investment Advisors, Inc., has a working relationship with Horicon Bank, and has recommended that the Cemetery deposit its trust funds with Horicon Bank. The Cemetery Commission has agreed, and the funds will be transferred to Horicon Bank.

As part of this process, a new trust agreement will be executed. This gives us an opportunity to start from a clean sheet. In reviewing the current agreement, our Finance Director, Bridget Souffrant, identified a potential issue – the trust agreement provides that only the income from the funds can be spent, and the principal can't be touched. That's fine while there is still new revenue coming into the funds, but Bridget pointed out that one day, when all of the available plots are sold and there's no new revenue coming in, we could be forced to use tax levy to pay for cemetery maintenance if we are not able to access the trust principal.

The reason our trust agreement does not allow principal to be spent is because of Municipal Code §3.08(4). The reason Mun. Code §3.08(4) does not allow principal to be accessed is because the Common Council in creating §3.08(4) years ago elected to follow the rules applicable to private cemeteries in Chapter 157 of the Wisconsin Statutes. Municipal cemeteries are not required to follow the rules applicable to private cemeteries, but they can, if they wish. Presumably, the Council felt that there was greater security for plot owners if the private rules were followed, because they are stricter. The prohibition on spending trust account principal is an example of the restrictions that apply to private cemeteries but not to municipal cemeteries.

Municipalities are generally more financially stable and responsible than private cemetery associations. In fact, if a private cemetery is allowed to go broke and is abandoned for five or more years, the municipality in which it's located has to take it over and run it. Municipalities have to be given more financial flexibility to take on those unexpected liabilities.

The proposed changes to §3.08(4) remove the prohibition on using principal of the Perpetual Care Trust Fund and the Mausoleum Care Trust Fund. Principal can be accessed, but only when the income is not sufficient to perform the required maintenance, and the principal can only be used for maintenance and care of the cemetery and mausoleum. It can't be accessed for any other purposes. Keeping those limitations insures that the trust funds will not be used for improper purposes and that the cemetery will continue to receive proper care.

These changes will help to insure that taxpayers will not end up paying to maintain the cemetery when they otherwise would not have to. Ultimately, at some point in the future, even the trust fund principal may be depleted, but these proposed changes will delay that happening, at worst.

We are waiting to execute a new trust agreement with Horicon Bank until after the Committee and Council have had a chance to act on this proposal.

Please review the attached redline ordinance. I will be available to answer questions at the meeting on Monday.

City of Waukesha, Wisconsin

Ordinance No. 2021 - _____

**An Ordinance Amending Section 3.08 of the Waukesha Municipal Code,
Regarding the Administration of Prairie Home Cemetery Trust Funds**

Whereas Municipal Code §3.08 presently requires its trust funds to be held in compliance with certain provisions of the Wisconsin Statutes that restrict access to the funds' principal; and

Whereas Wisconsin Statutes do not require those statutory provisions to apply to the trust funds of a municipal cemetery, but the Common Council had opted to apply them; and

Whereas the City's Finance Department has identified potential liquidity issues in the future after the cemetery has sold all of its available plots and products and there is no more principal being added to the trust funds, which might require revenue shortfalls to be made up by the City's general tax levy; and

Whereas the Finance Department has recommended that the prohibition on using trust fund principal be removed to prevent the cemetery from becoming an unnecessary burden on taxpayers in the future;

Now, therefore, the Common Council of the City of Waukesha do ordain as follows:

Section 1. Section 3.08 of the Waukesha Municipal Code is amended to read in its entirety as follows:

3.08 Prairie Home Cemetery Commission (Rep. & recr. #34-83)(Rep. & recr. #50-01)(Rep. & recr. #11-04)(Am. -16)

(1) Cemetery Commission.

- (a) Membership, Qualifications.** (Am. #2-06) The Cemetery Commission shall consist of seven members, who shall be appointed by the Mayor and shall have their appointments confirmed by the Common Council. Five shall be non-members of the Common Council, and two shall be members of the Common Council. Preference in appointment of one non-Common Council member shall be given to a person having significant experience operating a business having more than three employees. All members shall have demonstrated an interest in the good of the community.
- (b) Term.** Non-Common Council members shall serve terms of three years. Common Council members shall serve terms of one year. Terms shall commence on the third Tuesday of April, and the terms of non-Common Council members shall be staggered

so that no more than one term expires in any year. Members shall serve until their successors are appointed and their successors' terms commence. In the case of vacancies, appointments shall be for the remainder of the unexpired term.

- (c) **Conduct of Business.** Four members shall constitute a quorum. Meetings shall be conducted according to Robert's Rules of Order.
 - (d) **Responsibilities.** The Commission shall be responsible for setting policies for the management and operations of Prairie Home Cemetery, subject to Common Council approval of all policies and subject to the terms of this Section 3.08. Specifically, the Commission is responsible for, and shall set policies for:
 - (i) Ensuring that the Cemetery provides good service to its customers and the City, in accordance with the accepted and customary practices of the cemetery industry.
 - (ii) Preparation of a proposed annual budget, according to the requirements and deadlines determined by the City Administrator, to be included in the executive budget for consideration in the final adopted budget.
 - (iii) Ensuring that the Cemetery complies with its adopted budget.
 - (iv) Ensuring that the Cemetery is in compliance at all times with all applicable state, federal and local statutes, regulations, ordinances and codes, including those applicable to the management and investment of Cemetery funds.
 - (v) Management, investment, and accounting of all Cemetery funds.
 - (vi) Timely payment of all Cemetery debts and obligations.
 - (vii) Reporting all Cemetery business and financial activity to the Common Council and City Administrator.
 - (viii) Managing the sales of products and services by the Cemetery to maximize revenues.
 - (ix) Construction of all necessary improvements to the Cemetery, including roads, buildings and mausoleums.
 - (x) Necessary maintenance, repair and replacement of all Cemetery property.
 - (xi) Adequately staffing the Cemetery for the efficient performance of the Commission's responsibilities. All staff shall be City employees, and shall be subject to all City Human Resources policies.
 - (e) **Contract Authority.** The Commission is not a legal entity separate from the City and has no independent capacity to enter into contracts. The Commission shall comply with City Financial Policy F-6.0 with regard to all contracts for goods or services for Cemetery purposes.
- (2) **Cemetery Director.** The responsibility for implementing policies set by the Commission, and for managing the day-to-day operations of the Cemetery, shall be in a Cemetery

Director. The Cemetery Director shall be selected according to City Human Resources Policy B-2, and the Cemetery Director's compensation shall be determined according to Human Resources Policy F-2. The City Administrator shall conduct an annual performance review of the Cemetery Director.

(3) Organizational Level. The Commission is subordinate to the Common Council, and all policies set by the Commission pursuant to Section (1)(d) shall be subject to approval by the Common Council. The Cemetery Director is subordinate to the City Administrator.

(4) Finances.

(a) General. The Commission shall set policies for the management of the Cemetery's finances in compliance with Wis. Stat. ~~§157.19, §440.92, and §881.01 (2013-2014)~~, as applicable, or ~~their~~its successors. All Cemetery funds shall be the property of the City, maintained in segregated funds for the benefit of the Cemetery as described below.

(b) Allocation of Sales Revenues. Revenues derived from the sale of goods and services by the Cemetery shall be allocated as follows:

(i) The Commission shall establish a percentage of the total proceeds of sales of Cemetery lots, mausoleum spaces, and pre-need sales contracts, not less than the amounts required by Wis. Stats. §157.11(9g)(c), Wis. Stat. §157.12(3)(a), Wis. Stats. §440.92(3)(a)~~(2013-2014)~~, or successor statutes, and may establish a percentage of the revenues of all other sales of goods or services by the Cemetery, which shall be deposited into the Perpetual Care Trust Fund, Mausoleum Care Trust Fund, or Pre-Need Trust Fund maintained pursuant to Section (4)(c), below, as applicable. This allocation shall be made before any other allocations or deductions from gross revenues.

(ii) The Commission shall determine quarterly, in the Commission's sole discretion, whether the funds in the General Cemetery Account maintained pursuant to Section (4)(c)(i), below, are adequate for general Cemetery operations for the upcoming quarter, taking into account anticipated revenues and a reasonable contingency reserve, and shall determine whether a surplus exists. If a surplus exists, then the Commission may allocate amounts, determined in the Commission's sole discretion, to be deposited into the Cemetery Development Account maintained pursuant to Section (4)(c)(ii), below, and the Cemetery Reserve Account maintained pursuant to Section (4)(c)(vii).

(iii) The balance of revenues from sales of all Cemetery goods and services, and all funds allocated to the Cemetery by the City to make up Cemetery budget shortfalls, shall be deposited into the General Cemetery Account maintained pursuant to Section (4)(c)(i), below.

(c) Accounts. The following accounts shall be maintained by the City Treasurer for the deposit of Cemetery funds:

(i) General Cemetery Account. The General Cemetery Account shall be an interest-bearing, FDIC-insured account or accounts at a commercial bank. The General

Cemetery Account shall be used exclusively for the general operations of the Cemetery.

- (ii) **Cemetery Development Account.** Funds in the Cemetery Development Account may be invested for income as determined by the Commission. The Cemetery Development Account shall be used exclusively for capital improvements to the Cemetery.
- (iii) **Perpetual Care Trust Fund.** The Perpetual Care Trust Fund shall be ~~an irrevocable trust,~~ held in trust and administered according to the terms of a trust agreement approved by the Common Council, ~~and~~ the trustee of which shall be an institutional trustee affiliated with a commercial bank determined by the Commission and approved by the Common Council. Funds in the Perpetual Care Trust Fund shall be invested and administered according to the provisions of this Section 3.08, ~~Wis. Stats. §157.19,~~ Wis. Stats. §881.01, their respective successor ~~statutes,~~ and the mandatorily-applicable rules of the Wisconsin Cemetery Board. The income ~~only~~ of the Perpetual Care Trust Fund shall be used for the perpetual care and maintenance of the Cemetery lots and grounds, and if a surplus exists after maintenance of the lots and grounds, then for the perpetual care and maintenance of any other portion of the Cemetery. The principal of the Perpetual Care Trust Fund may ~~not~~ be withdrawn from the fund only when the income is insufficient to provide for the perpetual maintenance and care of the Cemetery lots and grounds, and then only for the perpetual maintenance and care of the Cemetery lots and grounds.
- (iv) **Mausoleum Care Trust Fund.** The Mausoleum Care Trust Fund shall be ~~an irrevocable trust,~~ held in trust and administered according to the terms of a trust agreement approved by the Common Council, ~~and~~ the trustee of which shall be an institutional trustee affiliated with a commercial bank determined by the Commission and approved by the Common Council. Funds in the Mausoleum Care Trust Fund shall be invested and administered according to the provisions of this Section 3.08, ~~Wis. Stats. §157.12(3),~~ Wis. Stats. §881.01, their respective successor ~~statutes,~~ and the mandatorily-applicable rules of the Wisconsin Cemetery Board. The income ~~only~~ of the Mausoleum Care Trust Fund shall be used for the perpetual care and maintenance of the Cemetery mausoleum, and if a surplus exists after maintenance of the mausoleum, then for the perpetual care and maintenance of any other portion of the Cemetery. The principal of the Mausoleum Care Trust Fund may ~~not~~ be withdrawn from the fund only when the income is insufficient to provide for the perpetual maintenance and care of the Cemetery mausoleum, and then only for the perpetual maintenance and care of the Cemetery mausoleum.
- (v) **Pre-Need Trust Fund.** The Pre-Need Trust Fund shall be ~~an irrevocable trust,~~ held in trust and administered according to the terms of a trust agreement approved by the Common Council, ~~and~~ the trustee of which shall be an institutional trustee affiliated with a commercial bank determined by the Commission and approved by the Common Council. Funds in the Pre-Need Trust Fund shall be invested and administered according to the provisions of this

Section 3.08, Wis. Stats. §440.92(3)(a) and (5), their respective successor ~~statutes~~, and the mandatorily-applicable rules of the Wisconsin Cemetery Board and Department of Safety and Professional Services. Funds in the Pre-Need Trust Fund shall be accounted for, and interest shall accrue, separately by pre-need contract; and funds in the Pre-Need Trust Fund shall be used only for the performance of the terms of pre-need sales contracts, except that income earned from the investment of proceeds of a pre-need sales contract may be used for general Cemetery purposes only after all of the Cemetery's obligations under the pre-need sales contract have been fulfilled.

- (vi) **Endowment Trust Fund.** The Endowment Trust Fund shall be ~~an irrevocable trust~~, held in trust and administered according to the terms of a trust agreement approved by the Common Council, ~~and~~ the trustee of which shall be an institutional trustee affiliated with a commercial bank determined by the Commission and approved by the Common Council. The purpose of the Endowment Trust Fund shall be to receive funds donated to the Cemetery for specific, ongoing purposes, as designated by the donors. Funds in the Endowment Trust Fund shall be invested according to the provisions of this Section 3.08, ~~Wis. Stats. §157.19~~, Wis. Stats. §881.01, their respective successor ~~statutes~~, and the applicable rules of the Wisconsin Cemetery Board. Funds in the Endowment Trust Fund shall be used only for the purposes designated by the donors.
- (vii) **Cemetery Reserve Account.** The Cemetery Reserve Account shall be an interest-bearing, FDIC-insured account or accounts at a commercial bank. The Cemetery Reserve Account shall be used as a contingency fund for emergency or unforeseen expenses, kept in amounts that are consistent with general prudent business practices in light of the Cemetery's overall budget, and in no case less than 5% of the total of the other accounts and trust funds maintained pursuant to this Section (4)(c). Funds may be expended from the Cemetery Reserve Account only with the prior approval of the Commission.
- (d) **Account and Fund Withdrawals.** All withdrawals and transfers from accounts and funds for their specified purposes shall be to the General Cemetery Account. All Cemetery expenses shall be paid from the General Cemetery Account, and shall not be paid from any other account or fund.
- (5) **Reporting to Common Council and City Administrator.** The Commission shall submit a written report of its activities to the Common Council at each Common Council meeting. The Commission shall present financial reports, including profit-and-loss statements, balance sheets, receivables and payables reports, bank and trustee statements, transfers among accounts and funds, and other reports showing significant financial activity as necessary, to the Common Council and the City Administrator, each calendar-year quarter. The Commission shall present such other reports to the Common Council and City Administrator as they may request.
- (6) **Investment of Funds.** The selection by the Commission of banks, institutional trustees, investment vehicles and investment advisors shall be subject to approval by the Finance Committee and Common Council.

- (7) **Deeds and Purchase Receipts.** The Cemetery Director shall deliver a deed and written receipt to the purchaser of any lot, crypt or niche, legally-identifying the lot, crypt or niche, showing the amount of the purchase, and showing the amount that will be deposited in the Perpetual Care Trust Fund or Mausoleum Care Trust Fund. The deed and receipt shall describe the lot, crypt or niche according to the Cemetery plat, and the Cemetery Director shall keep a duplicate copy in the Cemetery office.
- (8) **Sale of Certain Items Prohibited.** Prairie Home Cemetery, its Director, agents, and employees are prohibited from selling or otherwise providing headstones, urns and “outer burial containers,” as that term is defined in Wis. Stats. §157.061(11g), to the public. This prohibition shall not apply to the sale of items associated with the burial of pet remains. (Am. #30-08)
- (9) **Amendment to Conform with Statutes and Regulations.** If any term of this Section 3.08 should conflict with any applicable state statute or regulation, then this Section 3.08 shall be deemed amended to comply with such statutes or regulations.

Section 2. This Ordinance shall be effective immediately upon its publication.

Passed the _____ day of _____, 2021.

Shawn N. Reilly, Mayor

Attest: Gina L. Kozlik, City Clerk