



Board Determinations Regarding Grandfathered Combinations

The Cemetery Board made three recent determinations involving funeral entities that operate crematories. In each case, the operation of the crematory was grand-fathered by the Anti-Combination Law (Chapter 560 of the Laws of 1998). That legislation prohibits various combinations between cemeteries/crematories and funeral entities but has an exception for combinations that already existed. The exception states:

The provisions of this act shall not apply to the operation of any crematory or crematorium, or act of cremation performed by a funeral entity after the effective date of this act, if the funeral entity:

- a. operated such crematory or crematorium, or performed cremations prior to January 1, 1998; or
- b. filed an application with the cemetery board for the operation of a crematory or crematorium prior to January 1, 1998.

The term funeral entity is defined as:

a person, partnership, corporation, limited liability company or other form of business organization providing funeral home services, or owning, controlling, conducting or affiliated with a funeral home, any subsidiary thereof or any officer, director or stockholder having a ten per centum or greater proprietary, beneficial, equitable or credit interest in a funeral home.

The first issue brought before the board was whether the operator of a funeral home who is selling his funeral home business to another person could transfer his crematory operation to that person. The board determined that he could not. First, a not-for-profit does not have shareholders or any other "owner" who could sell the entity. Not-for-profits either get merged, consolidated or dissolved, they cannot be sold. Second, the grandfather provision of the Anti-Combination Law is personal to the person who was operating the crematory when the law was passed. The protection of that provision does not extend to a new operator.

The next issue brought before the board was whether the crematory of a grand-fathered combination could be moved to a new location. The board determined that it could not. The grandfather provision allows a funeral entity to continue to operate a crematory after the effective date of the legislation if the funeral entity "operated such crematory...prior to January 1, 1998". This provision only permits the funeral entity to continue to operate the same crematory it was operating before that date. Under Not-For-Profit Corporation Law (N-PCL) Article 15, there is no authority for moving a crematory operation to a new location. Approval to operate a crematory under N-PCL section 1505-a is approval to operate at a specific location. Any crematory operator - even a regular cemetery - that wishes to move its crematory would have to

apply to operate a new crematory at the new location. Since the grand-father provision only extends to the original crematory, it would not extend to a crematory operated at a new location.

The third issue brought before the board was whether the operator of a grand-fathered crematory could add a new retort or replace its existing retort. The crematory was operating a retort that was old and inefficient. The operator sought to add a new retort but keep the existing retort as a backup. The additional retort would fit in the existing crematory building. Previously, the Division of Cemeteries had taken the position that a grand-fathered combination could replace its retort as long as the footprint of the crematory building was not increased. This application was brought before the board because it involved not just replacing a retort but adding a retort and because the work qualified as a major renovation requiring board approval. The board once again determined that the grand-father provision only protects what the crematory operator had at the time the law was passed. Adding an additional retort and thereby increasing capacity would go beyond what the crematory operator had and therefore was not permitted. The operator then modified his application so that the new retort would replace the old retort. The board determined that this was permissible since the operator would not be expanding the crematory and would not be increasing its cremation capacity other than the incidental increased capacity that comes from having a more modern, efficient retort. The board also noted the environmental benefit that would come from allowing such crematories to modernize their equipment.

These determinations should be a guide to all grand-fathered funeral entity/crematory combinations.