

DIVISION OF CEMETERIES

STATE OF NEW YORK
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CEMETERY BOARD

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SECRETARY OF STATE
CHAIR

LETITIA JAMES
ATTORNEY GENERAL

DR. HOWARD A. ZUCKER
COMMISSIONER OF HEALTH

DRAFT

Cemetery Board Minutes February 9, 2021 Via WebEx

BOARD MEMBERS PRESENT:

Mark Pattison, Department of State, Chair
Jill Faber, Office of the New York Attorney General
Thomas Fuller, Department of Health

OTHER ATTENDEES:

John Fatato, Dep't of State
Andrew Hickey, Division of Cemeteries
Antonio Milillo, Dep't of State, Counsel
Lewis Polishook, Division of Cemeteries
Michael Seelman, Division of Cemeteries
Brendon Stanton, Division of Cemeteries
Robert Vanderbles, Dep't of State
Alicia Young, Division of Cemeteries
Vince Gimondo, Division of Cemeteries

GUESTS:

Brendan Boyle, NYSAC, Featherstonhaugh, Wiley & Clyne
David Fleming, NYSAC, FWC
Bruce Geiger, Bruce Geiger & Assocs. for Pinelawn Memorial Park
Richard Moylan, Green-Wood Cemetery
Joe Dispenza, Forest Lawn Cemetery
Eric Barna, Greenwood Cemetery
Adam Ginsberg, Cedar Grove Cemetery
Anthony Biolsi, Montefiore Cemetery
Ashton Matyl. Ostroff Associates

Opening Remarks

Mr. Pattison opened the meeting by wishing everyone a happy new year and expressing appreciation for their efforts in the previous year.

Mr. Pattison gave an overview of how the meeting would proceed via WebEx.

Mr. Milillo explained that the meeting is operating pursuant to Executive Order 202.1, which suspends the requirement to appear in person. The notice was posted in accordance with law and notice, agenda, and materials have been posted on the Division of Cemeteries website.

We take attendance; lobbyists must identify themselves and the entity they represent; speakers shall identify themselves.



Department
of State

21-02-A-07 Minutes of Previous Meeting

Motion was made, seconded, and unanimously adopted approving the minutes of the January 12, 2021 meeting with one correction (as to the date of the next meeting).

21-02-B-08 Legislation and Regulations

1. Pending Legislation

Mr. Milillo reported that:

Several bills that were one house are now two house:

1. A bill to remove the jurisdiction of the Comptroller and Tax Commissioner;
2. A bill that replaces the net appreciation statute by allowing access to a portion of principal.

A.969/ S.896: the Governor signed the chapter amendment to the merger bill on January 28, 2021.

A.975/ S.904: the Governor signed the chapter amendment for the cemetery disclosure form bill on January 28, 2021.

S.866/ A. 1920, relating to State veterans' cemetery requirements, passed the Senate and has advanced to third reading in the Assembly.

Several other bills have been reintroduced, including bills covering:

Sale of cemetery markers, flags, monuments that relate to veterans

Applicability of sales tax to cemeteries

The crime of cemetery desecration

Grandfathered standalone crematories that would allow the sale of equipment, expansion, and relocation.

Disposition of cremated remains in possession of a funeral home that have been unclaimed for 120 days or more.

An increase in the amount payable for social service burials.

Mr. Fuller asked whether a cemetery accepting unclaimed remains after 120 days would be able to charge for that service. Mr. Milillo stated that the bill did not explicitly address payment. Mr. Polishook added that scattering unclaimed remains at a cemetery would be hard to collect on from the family.

Ms. Faber asked whether the proposed changes to the anti-combination law would assume that the new entity would have to stay within the physical confines of the existing operation. Mr. Milillo stated that the bill would permit the crematory to be moved and that this is not dependent on a sale occurring.

2. Rules and Regulations

Mr. Milillo reported that the draft regulations on abandonment are making it past review by the Department of State.

Mr. Pattison noted that we hoped to consider proposed abandonment and multiple bid regulations at the Board's March meeting.

21-02-C-09 Division Report

Division Director Lewis Polishook reported that:

1. As of Friday, February 5, the volume of cremations seems to have come down a little. There are minor delays in New York City—crematories in New York City are scheduling out cremations approximately four days. There is also spare capacity in Long Island and the lower portion of the Mid-Hudson region. There was a slight uptick in cremations in Western New York.
2. Our annual report is due in March. Our annual mailing went out around the time of the previous meeting.
3. Now that the Legislature has passed the chapter amendment to the cemetery disclosure bill, the Division is working on a first draft of disclosures to share with counsel for review soon.

21-02-D-10 Vandalism, Abandonment and Monument Repair or Removal Fund Report

Assistant Director Alicia Young provided the vandalism report. So far in the 2020 calendar year the Division has collected \$54,163 in vandalism funds and \$27,260 in assessment collections. In the current fiscal year, we have collected \$128,858 in vandalism funds and \$72,010 in assessments.

In vandalism fund claims for the current fiscal year:

\$103,409 was paid on vouchers approved in the 2018-19 fiscal year.

\$304,447.28 was paid on applications approved in 2019-20

\$238,768.42 was paid on applications approved this fiscal year

\$438,199.33 have been processed but not paid on previously-approved applications.

\$453,312 remains committed but not paid on previous years' applications.

\$22,246.08 remains committed but not paid on this year's applications.

Approximately \$600,000 remains available for future applications, including approximately \$450,000 to be presented to the Board as part of this month's applications.

There are six applications in the pipeline for approval, totaling \$174,755.41

Today, there are seven hazardous monument applications and one abandonment application before the Board.

06-002 Cato Union Cemetery (Cayuga) for \$36,206.15

Mr. Seelman states that the cemetery seeks repair of 28 hazardous monuments, which we inspected. We recommend approval.

Motion made, seconded, and unanimously adopted approving the application in the amount of \$36,206.15, subject to availability of funds.

46-015 Greenridge Cemetery (Saratoga) for \$28,383.30

Mr. Breen reported that all 43 monuments subject to the application are in fact dangerous and recommended approval. Mr. Milillo observed that this application is unusual because the low bidder proposes to cap, rather than replace, foundations. Mr. Breen reached out to the cemetery concerning this issue. The higher bidder did

not respond to requests to re-bid the job using the same methodology as the lower bidder. The low bidder has successfully done work in the cemetery and the estimates are in line with previous estimates. Mr. Breen stated that this bidder has used this method in other cemeteries and we have confirmed that the repairs were properly performed. Mr. Seelman added that 20 of the monuments could safely be capped; 23 foundations will be replaced. In response to a question by Mr. Fuller, Mr. Breen explained some older monuments have openings filled with stone and lack a poured foundation. The existing stone will be secured with rebar and concrete poured over the top to create a level base.

Motion made, seconded and unanimously adopted approving the application in the amount of \$28,383.30, subject to availability of funds.

55-019 Trumbulls Corners Rural Cemetery (Tompkins) for \$27,494.32

Mr. Stanton stated that this is a small cemetery in Tompkins County. He noted that all monuments included in the application were dangerous and the cemetery published the required notice.

Motion made, seconded and unanimously adopted approving the application in the amount of \$27,494.32, subject to availability of funds.

33-036 New Forest Cemetery (Oneida) for \$52,579.95

Mr. Seelman states that the cemetery has identified 30 hazardous monuments. They are all rather large, on a terraced hillside. In 2018, they were approved for a previous hazardous monument application. Burdick Monument finished that job last year. The cemetery has a reorganized board and new staff. They watched the repairs done by Burdick and have themselves repaired monuments that have fallen. They have an approved foundation charge. They put in the low bid themselves. They also solicited three bids, all of which are higher than the cemetery's bid. Mr. Seelman believes the cemetery has the ability to perform the work.

Mr. Milillo stated that he is worried that where the cemetery itself is the low bidder, it could accelerate situations where the cemetery is the low bidder. Mr. Milillo asked whether we protect against the cemetery receiving the bids and then intentionally low bidding. Do we get the cemetery's bid first to ensure that the other bidders are given a fair chance.

Mr. Seelman had a discussion with the cemetery's board about this concern. In this instance, two of the monument dealers were well aware that the cemetery itself was bidding but does not know what the time frame of the bids was. The cemetery based its foundation charge on its approved charge. Mr. Seelman noted that Northeast Cemetery Services' bid was very similar to its bid in 2017; apparently, that company uses a formula to come up with a per-monument cost.

Mr. Pattison observed that we approve an amount, not a vendor, so this is a market process. If the monument dealers want to be competitive, they can adjust their bids.

Mr. Milillo stated that New Forest Cemetery bid because it wants the work, not to seek a lower price.

Mr. Pattison stated that this does not mean the bidding is not competitive.

Ms. Faber asked how common it is for cemeteries to do repairs in house.

Mr. Seelman said it is more common for contractors to do the work, rather than doing them in house.

Mr. Polishook added that some large cemeteries typically bid on their own jobs. Oakwood in Troy bids on the foundation work, not on setting the stones, and Forest Lawn bids on the whole job.

Mr. Milillo further stated that some cemeteries have an approved foundation charge and this is typically where we see cemeteries bid on jobs. Mr. Milillo asked whether we should limit cemeteries' bidding to foundation work because setting headstones is not a cemetery charge.

Mr. Polishook responded that this work is being done with State money, and it is a little anomalous to prohibit cemeteries from bidding and ensure that the work will cost the State more.

Mr. Milillo responded that cemeteries bidding on their own jobs might reduce competition. Practically every statute requiring competitive bids for state contracts has an anti-collusion provision. Mr. Milillo states that he does not believe there is collusion going on, but that depends on how you define collusion. If a cemetery receives bids and then submits its own lower bid, that would violate a lot of state laws where there are those kind of provisions. The cemetery should not make its bids where it knows what the other bids are.

Mr. Pattison stated that this is a policy question not necessarily relevant to this application and that the Division should consider this policy question further.

Ms. Faber agreed, but stated that a discussion would be good for the reasons Mr. Milillo stated. Inherent in asking that competitive bids are sought is that we think that it is a good thing that multiple bids are received and there is a process of selecting between those bids. If the cemetery always submits a slightly lower bid, that would defeat the purpose of bidding.

Mr. Seelman noted that the cemetery bid is dated December 23, 2020; the next highest bid is undated, the next highest bid is dated December 22, and the last one is dated December 29.

Mr. Polishook added that it is clear from this that the cemetery did not bid after receiving all three bids.

Mr. Milillo clarified that he did not recommend denying this application.

Motion was made, seconded and unanimously adopted approving the application in the amount of \$52,579.95, subject to availability of funds.

15027 Forest Lawn (Erie): Lakeview for \$55,070.50, St Mathews for \$53,292.50, and Forest Lawn Cemetery for \$66,335.00

Mr. Seelman reported that there are three separate applications from the Forest Lawn Group. Cindi Craig verified that all of the monuments appear to be hazardous. In all three cases, the cemetery has a bid from Western New York Cemetery Services and a bid from the cemetery itself. Mr. Seelman noted that an employee at Forest Lawn was formerly affiliated with Western New York Cemetery Services and his close relatives still own that company. Consequently, the Division requested that the cemetery buy an ad soliciting bids from monument dealers in the area and call additional monument dealers who have bid on other jobs in the area; the cemetery called three monument dealers, none of whom bid on the job.

Western New York is still the lowest bid, at \$944 per monument, which is low.

Mr. Pattison asked whether the issues are the same with all three applications.

Mr. Milillo agreed that the three applications should be treated together. Mr. Milillo asked that the Board table the application. This matter was almost presented to the Board last month. At that time, the cemetery had not requested bids from any companies other than Western New York, which is operated by the family of one of its employees, Mr. Wolcott. Where the cemetery and a company run by the cemetery's employee are the only two bidders, this is problematic, as it can lead to collusion and kickbacks. The matter was not presented to the Board last month so that more bids can be received. Instead of calling other bidders, the cemetery placed an ad and called other entities only on February 4, 2021, after the Division sent out the Board packet on February 2. After receiving the update from the Division on Friday, February 5, Mr. Milillo made some phone calls to monument dealers; there did not seem to be time to ask Division to follow up. A number of monument dealers

in the area said they don't look at ads. It looked like placing an ad was a method of obtaining bids that was destined to fail. The only real effort to solicit bids was the three phone calls on February 4. Mr. Milillo stated that he called those three bidders and that none of them do foundation work, which is a big part of the bidding. Mr. Milillo thinks there are other entities that are able to do foundation work that are able to provide a competitive bid. Because of snow, a delay to March will not delay the work. If we can get bids from a company that is not run by one of Buffalo City Cemetery's employees, the cemetery might get a reduction in the actual lowest bid. Mr. Milillo offered to share information with Division as to who might be interested in submitting a bid that would compete with those bids.

Mr. Polishook stated that the cemetery did exactly what we asked them to do. We asked them to advertise and that someone other than the employee whose relatives run the other monument company make calls to other monument dealers. The board can consider asking the cemetery to do even more, but it is not fair to fault the cemetery for doing exactly what it was asked to do.

Mr. Pattison asked the cemetery to respond. The cemetery was not on the call for a response.

Mr. Pattison asked whether the cemetery has complied with the law?

Mr. Milillo says that was an open question, and that he could not conclude that it had or had not complied with the law. The three entities that the cemetery contacted do not do foundation work. Based on the phone calls counsel made, there is at least one entity that is happy to bid on this project. There may be more. Mr. Milillo indicated that he is confident that there would be another bid by next month.

Mr. Polishook added that the cemetery's employee does not work for the bidding corporation. He formerly did but no longer does; his family runs the corporation. The Division also calculated that the bid it had submitted was consistent with: 1. The average cost of repairing monuments in Western New York; and 2. What this company charges. Mr. Seelman added that this calculation was based on 10 previous bids.

Ms. Faber asked about discussion by the cemetery's board. Did the board take into account the connection between the cemetery's employee and the corporation?

Mr. Polishook responded that the Division does not typically request minutes for such applications.

Mr. Seelman added that he is familiar with two of the three monument dealers the cemetery contacted and was unaware that these companies did not do foundation work.

Ms. Faber commented that the issue might be process more than substance. Whether or not the amount is appropriate, the point of getting other bids is to ensure a competitive process. If it seems that things were rushed and there was no opportunity to get bids from companies that do foundation work, we should allow more time.

Mr. Milillo added that the total amount sought is \$170,000, representing a significant amount for the fund. If the cemetery was spending its own money we would expect compliance with conflict of interest laws.

Mr. Fuller agreed that the cemetery did everything we asked for but that giving another month would be appropriate to get more information.

Mr. Pattison stated that he did not support the motion to table. The cemetery has done what we asked, they have done what is legal, and the price is relatively consistent with prices in the region.

Mr. Pattison moved to table the application.

Mr. Polishook added that there are two separate issues: 1. This is arguably a related party transaction. A company owned by the wife and children of a cemetery employee is the bidder. As such, it is reasonable to ask the board to demonstrate compliance with the related party provisions of the statute. 2. Do we know better

than they do which monument dealers to call? Do we have to specify which monument dealers they should call? Should we call monument dealers? We have been told by our Bureau of Fiscal Management not to talk to monument dealers because it could create contractual issues between us and the monument dealers, something we try to avoid.

Ms. Faber stated that no one was suggesting that we contact monument dealers or provide their contacts to the cemetery. Rather, this was a very condensed process and the Division suggested ways to get bids more quickly. Is it clear to folks in the cemetery world which companies do foundation work? Did the ad reach monument dealers? At its heart, the related party transaction concern requires tabling the application.

Mr. Polishook responded that this was not a "condensed process" and that the cemetery had almost a month but waited to make calls until after it had given contractors adequate time to respond to its ad.

Mr. Milillo asked why the calls were not made before the packet went to the Board. Mr. Polishook responded that there are two separate issues: to the extent the Division should have shared this with the Board sooner, the Division took responsibility for any delay. The cemetery made calls as soon as it knew that a reasonable time had passed from running the ad without obtaining any responsive inquiries.

Ms. Faber recommended that the application be tabled to give the cemetery time to demonstrate compliance with the related party transaction procedures.

Motion was made, seconded and adopted, with Mr. Pattison voting against, to table these applications pending demonstration of compliance with related party transaction provisions.

Grandview Cemetery/ Town of Whitestown (Oneida), abandonment for \$153,820.40

Mr. Seelman explained that the cemetery held an emergency lot owners meeting in 2016, which he and former Associate Accountant Joseph Ambrose attended. The meeting was well attended; the Town Supervisor and Town Attorney also attended. The superintendent and treasurer, who was basically doing everything at the cemetery, was stepping down. There was a long discussion about how the cemetery could continue without this individual. At the end of this meeting, the board of the cemetery concluded that the cemetery was abandoned and, thinking this was the proper procedure, voted to convey the cemetery to the Town.

The Town Supervisor indicated that the town was reluctant to accept conveyance of the cemetery but offered to assist in any way short of taking over the cemetery. Despite this offer, the trustees were unwilling to continue operating the cemetery.

The Town received \$94,000 from the cemetery. Initially, the Town thought this was PC, but we have since determined that it was PM.

Mr. Seelman met with the Town Supervisor, Highway Superintendent, and Parks Commissioner and made comments and suggestions and explained why we would not recommend payment for certain aspects of the application.

The Town seeks mowers, trimmers, blowers, and a chain saw, totaling \$18,078.48, and we recommend approval.

The Town wanted to add a paved road in the most recent section; this is currently a sod pathway. We explained that paving this pathway was not regarded as maintenance; another section of road was in good shape and we did not believe it required maintenance. The Town and Division agreed to the portions of road that needed repair and came up with repaving of two roads and two sections of other roads, totaling \$68,742.

The Town and Division identified retaining walls that needed replacement or repair. In addition, several concrete stairs need to be replaced or repaired. The apron at the entrance of the cemetery is concrete and is in poor shape.

There are also several dead trees, removal of which will cost approximately \$7,000.

Mr. Polishook added that there were not three individuals willing to continue to serve on the Board.

Mr. Milillo added that the records was sufficient to show that this cemetery was in fact abandoned. Mr. Milillo also noted that the application has the required certifications as to funds received and spent. Mr. Milillo asked whether the Town had agreed to the adjustments proposed by the Division; Mr. Seelman indicated that the Town had agreed to those changes.

Motion was made, seconded and unanimously adopted approving the application in the amount of \$153,820.40, subject to availability of funds.

Public Comment

Mr. Fleming spoke on behalf of the New York State Association of Cemeteries. He requested to see the revised version of the proposed abandonment regulations. Based on conversation before the Board today, he anticipates that NYSAC would oppose changes to the monument bidding regulations. Mr. Fleming indicated that he had received a number of messages during the meeting expressing deep concern about the use of terms such as collusion or other terms about how the bids were submitted and that this reflected quite badly in the industry. One of the cemeteries specifically followed what was asked of them at the previous meeting. Regarding process, Mr. Fleming commented that he is concerned that the process changes from meeting to meeting. Mr. Fleming stated that this has been an ongoing problem for a while. A number of misstatements were made about cemeteries today, most of which were corrected. These meetings are broadcasted and recorded. Making statements about cemeteries that reflect badly on them has an impact.

Motion made, seconded, and carried to adjourn the meeting at 11:54 a.m.

The next Board meeting is scheduled for February 26, 2021 at 10:30 AM, via Webex (the time was subsequently changed to 3:00 p.m.).