

DIVISION OF CEMETERIES

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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 October 13, 2020 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:

Andrew Hickey, Division of Cemeteries
Joshua Beams, Dep't of State
Antonio Milillo, Dep't of State, Counsel
Michael Seelman, Division of Cemeteries
Brendon Stanton, Division of Cemeteries
Robert Vanderbles, Dep't of State
Alicia Young, Division of Cemeteries
John Fatato, Dep't of State
Mercedes Padilla, Dep't of State

GUESTS:

David Fleming, NYSAC, Featherstonhaugh, Wiley & Clyne
Mike Lanotte, NYSFDA
Richard Moylan, Green-Wood
Bruce Geiger, Bruce Geiger & Assocs. for Pinelawn Memorial Park
Brendan Boyle, NYSAC, FWC
Margaret Hadsell, Vestal Park Cemetery
Yvette Buckner, Tusk Strategies
Sandy Gibson, Better Place Forests
Rev, Kirsten John Foy, Better Place Forests
Michelle Smith
Robert Hinkley

Joseph Dispenza, Forest Lawn Group
Hal Ehrhardt, Vestal Park
Nate Romagnola, White Haven MP
Justin Locke, Pinelawn MP
Jay Ivler, Mount Lebanon Cemetery
Nandi Chhabra, Better Place Forests
Jake Young, Better Place Forests
Tanya Marsh, McNeely Law
Bob Greenlee
Katrina Shindledecker

Opening Remarks

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 were posted on the Division of Cemeteries website.



**Department
of State**

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

20-09-A-62 Minutes of Previous Meeting

Motion was made, seconded, and unanimously adopted approving the amended minutes of the August 11, 2020 meeting as distributed.

Motion was made, seconded, and unanimously adopted approving the minutes of the September 8, 2020 meeting as distributed.

Mr. Milillo noted that he had not had an opportunity to review the minutes and recommended approval, subject to possible modification next month.

20-09-B-63 Legislation and Regulations

1. Pending Legislation

Mr. Milillo informed the board that: the enacting clause of A.6613 was stricken; S.5057A was recommitted and its enacting clause stricken; S.8873 now has a companion bill; and A.10929 was referred to corporations.

2. Rules and Regulations

Mr. Milillo reported that we had previously reported on the draft regulations concerning the steps the Division will take to prevent abandonment. The Board reviewed these and allowed us to share them with NYSAC for comment. We have drafts of procedures for abandonment to towns and to regulated cemeteries. We would like to share these procedures with interested parties and hope to have them for the Board next month.

The regulations for abandonment to regulated cemeteries address the issue of the ability of the cemetery accepting abandonment having the resources to manage it.

The regulations for abandonment to towns provide that the Division will make the determination that a cemetery is abandoned, subject to review by the Board. The current draft calls for the Board to review every such determination.

Mr. Milillo also suggested modifying existing section 200.2, applications for orders and determinations, setting forth those determinations may be heard by the Division in the first instance. This regulation is out-of-date; it does not allow the Division to determine fee applications in the first instance, even though the Board has delegated that authority to the Division. The Board indicated consensus in support of drafting a revision of this regulation.

20-09-C-64 Division Report

Mr. Polishook reported that the Division continues to be in touch with the Mortuary Affairs Task Force to try to ensure staying ahead of any possible second wave of COVID.

Mr. Polishook also stated that at a previous meeting he reported that selected surveys had indicated below-average numbers of burials at the downstate cemeteries the Division has surveyed. CDC data provided to the Division via the Department of Health indicates that the number of deaths downstate is not below average, so that cannot be the reason for the lower number of burials

Mr. Polishook also reported that the required crematory operator certification course took place last week.

Finally, Mr. Polishook reported that the Division is again presenting continuing education sessions to funeral directors, including updates as to executive orders and guidance on COVID.

Ms. Young reported on delegated duties for the third quarter of calendar year 2020:

We receive 37 rate applications and approved 54

We received no lot reclamation applications, society reclamations, or requests for approval of pre-1949 sales.

We received seven requests for approval of changes to rules and regulations and approved three.

20-10-D-65 Vandalism, Abandonment and Monument Repair or Removal Fund Report

Ms. Young provided the So far in the 2020 calendar year the Division has collected \$458,307 in vandalism funds. Assessment collections total \$261,456. In the current fiscal year collections are \$73,975 in vandalism collections and \$44,624 in assessment collections.

In terms of payments, we have paid \$141,212.90 on applications received in prior year applications with this year's funds.

We have paid \$85,042.18 on this fiscal year's applications with this fiscal year's funds.

\$635,166.46 remains unpaid on applications approved in previous years.

\$258,126.45 remains unpaid on applications approved this year.

After all that, approximately \$880,000 remains in this year's appropriation for new applications.

Three applications are before the board this month

Green Hill Cemetery (29-011) (Montgomery County) requesting \$28,360.68 for restoration of 72 monuments, which the Division confirmed are hazardous. The estimates allowed for capping some of the foundations, resulting in an average price of \$387, lower than usual.

Mr. Milillo noted that the cemetery had received only one bid. Leonard Breen explained that the cemetery had been unsuccessful in seeking a second bid from two additional monument dealers. These two declined to bid because they had been asked to bid in the past but did not get the job. Messrs. Breen and Milillo both commented that we are more frequently seeing only one bid. Mr. Milillo suggested that the regulations, which require two bids, be amended to allow for a single bid where the cemetery cannot get a second bid despite demonstrated effort to get a second bid and where it appears the bid amount is reasonable compared to prior approved applications in the region. Mr. Breen added that in this case the contractor's bid is comparable to bids that contractor has previously successfully submitted. The Board indicated consensus in support of drafting a revision of this regulation.

Motion was made, seconded, and unanimously adopted approving the application in the requested amount, subject to availability of funds.

Whispering Maples Memorial Gardens (Clinton County), Towns of Plattsburgh and Ellenburg, requesting \$3,800 and \$17,353 (respectively) for a new sign and lift (respectively), both previously approved by the Board. Mr. Polishook explained that these were the only items remaining unpaid from the original application, that with a change order for snow guards that increased total funds, leaving sufficient funds (\$27,326.70) to pay for the current requests for payment.

The Division confirmed that this work was not previously done but was completed before July 15, 2020.

The Division recommended that the Board either confirm that its previous approval includes these sums or approve a modification of the original application to the extent needed.

Mr. Milillo added that it was important to make clear that this is not a second application for funds, which is not permitted.

Motion made, seconded, and unanimously adopted to modify the Board's prior approval of the original application to adjust the approved sum for a new lift to \$17,353 to the Town of Ellenburg and to adjust the approved sum for a new sign to \$3,800 to the Town of Plattsburgh, subject to the availability of funds.

Vale Cemetery (No. 47-011) (Schenectady County). 38 monuments in total were vandalized. The police report shows only 30 vandalized monuments. The cemetery reports that eight more monuments were vandalized after the police wrote their report. Vale is a highly-trafficked cemetery that experiences vandalism yearly. Leonard Breen verified that all 38 monuments were toppled and the legal notice was in order.

Motion made, seconded, and unanimously adopted approving the application of Vale Cemetery for \$8,817.16, subject to the availability of funds.

20-10-E-66 Vestal Park Cemetery (04-040) – Columbarium

Vestal Park Cemetery, in Vestal, New York, has experienced an increase in cremation burials as compared to full-body burials. Only one regulated cemetery in Broome County has a columbarium (there is also a religious cemetery that has one). Vestal Park is well-funded, and we anticipate that the cemetery will successfully sell units. A columbarium also makes good use of its remaining land.

Mr. Fuller asked, and the Division confirmed, that this is the cemetery's first columbarium.

Mr. Milillo noted that 2019 was the cemetery's worst year in the last four in terms of burials. Senior Accountant Andrew Hickey responded that 2020 lot sales and burials are above average for the last four years. Mr. Hickey noted that 2017 was also a very high year, whereas 2019 was a very low year, which appears to have been an aberration.

Mr. Milillo also pointed out that the comment period does not expire until October 16, so approval should be conditioned on receipt of no negative comments.

Motion was made, seconded, and unanimously adopted approving the application subject to the cemetery not receiving negative comments prior to the end of the comment period.

20-10-F-67 Poughkeepsie Rural Cemetery (14-022) – Major Renovation – Retort Replacement

Poughkeepsie Rural Cemetery seeks to replace its oldest retort, mostly because it will not comply with new DEC regulations when they take effect in 4.5 years. Poughkeepsie Rural handled a large volume of cases from downstate at the height of the pandemic and wants to be prepared with a new retort. If the cemetery cannot replace its retort Poughkeepsie will have less cremation capacity.

Motion was made, seconded, and unanimously adopted approving the application.

20-10-G-68 Better Place Forests – Request for Determination

Better Place Forests is a for-profit Delaware corporation with a principal place of business in California. Its business model appears to be selling a memorial tree and specific place for final disposition of cremated remains. They market themselves as an alternative to cemeteries. In a filing with the California Secretary of State, they describe their business as the operation, marketing, and development of cemeteries.

Nevertheless, they seek something from the Board indicating that if they were to do in New York what they do elsewhere—selling a memorial tree and specific place for final disposition of cremated remains—they would not be a cemetery under New York law. The Division’s view is that as a matter of policy performing these actions would make Better Place Forests a cemetery. Better Place Forests cannot be a cemetery corporation because it is a for-profit corporation, not a not-for-profit cemetery corporation.

Mr. Polishook noted that the Division had recently received written comments from two ministers that seemed to reflect a misunderstanding of the Division’s position. The Division does not object to the concept of a memorial forest, but believes that such a forest, as described by Better Place, would have to be a cemetery corporation.

Mr. Polishook also noted that one of two letters from counsel from Better Place Forests to the Board was omitted from the Division’s submission to the Board.

Mr. Milillo stated that Better Place Forests is not seeking Board approval to operate as a cemetery corporation, but, rather, the negative of that. The Board’s position has always been that it does not provide advisory opinions but only addresses specific applications. But, in this case, Mr. Milillo suggested that Better Place Forests has gone as far as it can without buying land and engaging in operations that potentially violate the law. Thus, the question before the Board is whether Better Place Forests would have to organize as a cemetery corporation to do what it proposes to do. Better Place Forests states that it is engaged in scattering, which is permitted on private property. However, Mr. Milillo stated this is different from, for example, what New York City allows in its parks in terms of scattering with consent of the property owner. Mr. Milillo also asked that the Board consider legal issues further in executive session.

Sandy Gibson, founder and CEO of Better Place Forests addressed the Board. In early 2019, Better Place Forests approached the Board to see what if any of Better Place Forests’ operations would be limited in New York without it becoming a cemetery. Mr. Gibson stated that Better Place Forests works to create conservation memorial forests. Better Place Forests works with local groups for the purchase, endowment, and permanent preservation of a forest and sometimes spreading of ashes on the properties. Additionally, Better Place Forests creates a stewardship endowment to preserved forests. It is difficult to raise funds for forest conservation. Better Place Forests is a new model to provide an emotional connection to help raise funds. Better Place Forests enjoys support from legislators, New York conservation groups, and unions. Many New Yorkers want an affordable and beautiful option like Better Place Forests. Mr. Gibson described his personal connection to the need for affordable options for final disposition.

Nandi Chhabra for Better Place Forests stated that he seeks guidance as to what would be required to permit Better Place Forests to operate in New York without becoming a cemetery, as it has done in other states. Mr. Chhabra stated that the Division’s analysis does not respond to its request for clarification and does not actually establish that Better Place Forests would act as a cemetery. Mr. Chhabra stated that its 2019 filing with California was a clerical error by an outside vendor and has made a corrected filing that indicates its business as operating conservation forests. Mr. Chhabra also pointed out that its filings with California does not determine that Better Place Forests is a cemetery in New York, but, rather, what controls is the substance. No state in which Better Place Forests operates has determined that it is a cemetery and the California Cemetery and Funeral Bureau has in fact determined that it is not a cemetery.

Mr. Polishook asked Better Place Forests to share this determination with the Division and Mr. Chhabra agreed to do so.

Professor Tanya Marsh addressed the board and referred to her January 2, 2020 letter to the Board concerning the issue of whether Better Place Forests’ activities would make it a cemetery. Article 15 creates the Board and sets the limits of its authority. Professor Marsh stated that Article 15 does not precisely define what constitutes a cemetery, but rather states that a “cemetery corporation” is an entity that engages in “the disposal or burial of deceased human beings, by cremation or in a grave, mausoleum, vault, columbarium or other receptacle.” Better Place Forests does not meet this definition. It will not permit burials or disposal of deceased human beings. “Deceased human beings” is not defined by New York law. N-PCL section 1517

refers to handling of “deceased human beings” until cremation is complete. After that it mentions “cremains.” Cremains are defined. Professor Marsh opined that Cremains do not receive the protections afforded deceased human beings. Disposing of cremains is not disposing of deceased human remains. Additionally, cremains are not being placed in a receptacle. N-PCL section 1517(i) allows for disposal of cremated remains on private property. The Legislature chose not to regulate this activity. No state regulates such activity. The Legislature’s concern for the preservation of cemeteries do not apply to forests because they cannot fall into disrepair and need not be maintained. Also, cemeteries are for the mutual benefit of lot owners; conservation memorial forests do not have lot owners.

Yvette Buckner of Tusk Strategies, lobbyist for Better Place Forests, referred to letters of support Better Place Forests had received from unions and conservation groups and introduced the Rev. Kirsten John Foy who addressed the Board.

Rev. Foy President and CEO of the Ark of Justice, a national civil rights organization, addressed the Board. Rev. Foy took exception to what had been characterized as a misunderstanding. Rev. Foy stated that he was deeply troubled by the recommendation to reject this application. In doing so, the Division rejects the call from our community for multiple end of life options for the deceased and families to make end of live decisions more tranquil. The pandemic has disproportionately affected Black New Yorkers. Rev. Foy asked that the State allow those affected by this pandemic to find eternal peace via the means they choose. To reject this application would be to abandon its mandate. Rev. Foy also referenced the First Amendment right to free exercise including the right to choose the means of final repose. Rev. Foy criticized the Division for protecting outmoded industries. Conservation is a moral imperative and is the only way we can move forward as a society. This body’s mission is to establish stewardship of the exercise of religion as it pertains to the end of life. Funeral costs also place an undue burden on people of color, essential workers, and working families, who would welcome a cheaper alternative.

Michelle Smith, Executive Director of the Hudson Highlands Land Trust, also addressed the Board. The land trust dates form 1989, protecting and preserving the natural resources of the Hudson Highlands area 50 miles north of New York City. Funding for conservation has become a greater concern during the pandemic. She stated the Trust was delighted when Better Place Forests approached it about potential projects in the New York area. As the State is dealing with a budget crisis with potentially decreased State and municipal funding, Better Place Forests could provide very much needed funding for conservation that could also help resist development. Given New York’s view that conservation of natural forests is a high priority, she hopes that the State can find a way to permit this business model, which provides funding for conservation.

Mr. Polishook asked Professor Marsh about regulation of disposal of cremated remains and observed that Better Place Forests is licensed as a cremated remains disposer in at least one California county. Professor Marsh clarified that, while California law licenses cremated remains disposers (including Better Place Forests), it does not regulate the property where disposition occurs. The cremated remains disposer license in California concerns contracting with families and handling the remains. Mr. Chhabra states that the license is required only where the disposer handles the spreading for a fee without the family present—if the family is present no license is required even in California.

David Fleming from the New York State Association of Cemeteries addressed the Board. Mr. Fleming stated that the Association does not oppose the proposal as a cemetery operation but states that what is being proposed is in fact activity of a regulated cemetery, and regulated cemeteries already provide this service. Mr. Fleming stated that there are projects for natural cemeteries underway in New York. These services are regulated by the Board. Approving a for-profit entity providing this service essentially deregulates an entire portion of the cemetery industry. The Legislature has granted the Board broad police powers to regulate all aspects of disposal of human remains, including cremains.

Mr. Polishook added that the Division’s recommendation may not have been sufficiently clear as to one point. The Division is expressing no opinion on this particular method of final disposition. In fact, White Haven Memorial Park does something very similar to what Better Place is proposing. There are two issues. Our understanding is that the entity that will be doing this work will be an out-of-state for-profit corporation.

Second, it seems that, taking Better Place Forests' statements to their conclusion, the activity they propose to engage in is on their view completely unregulated. There is no principled reason we would object to this model if it were proposed by a not-for-profit cemetery corporation.

Mr. Chhabra asked for the Board to contact Better Place Forests when the Board emerges from executive session.

Public Comment

None

Motion made, seconded, and carried to go into executive session.

Motion made, seconded and carried to exit executive session.

After exiting executive session, Mr. Pattison indicated that no action had been taken. Regarding Better Place Forests, he stated the Board is not in a position to make any decision at this point. The Board appreciates Better Place Forests' patience and the passion brought to the discussion. He added that the state has several cemeteries offering similar services to what Better Place Forests offers. Mr. Pattison indicated that it is the sense of the Board that if Better Place Forests were constituted as a not-for-profit cemetery under Article 15, subject to review of the particular application, the Board would likely look favorably on such an application.

Motion made, seconded, and carried to adjourn the meeting.

The next Board meeting is scheduled for November 10, 2020 at 10:30 AM, via Webex.