

DIVISION OF CEMETERIES

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CEMETERY BOARD

ROSSANA ROSADO
SECRETARY OF STATE
CHAIR

LETITIA JAMES
ATTORNEY GENERAL

DR. HOWARD A. ZUCKER
COMMISSIONER OF HEALTH

**Cemetery Board Minutes
November 9, 2021
One Commerce Plaza
99 Washington Ave, Albany, NY 12231**

BOARD MEMBERS PRESENT:

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

OTHER ATTENDEES:

John Fatato, Department of State **[confirm]**
Vince Gimondo, Division of Cemeteries
Andrew Hickey, Division of Cemeteries
Lewis Polishook, Division of Cemeteries
Michael Seelman, Division of Cemeteries
Brendon Stanton, Division of Cemeteries
Joseph Ball, Department of State
Alicia Young, Division of Cemeteries
Kerry Forezzi, Division of Cemeteries

GUESTS:

Anthony Biolsi, New and Old Montefiore Cemeteries
Brendan Boyle, Featherstonhaugh, Wiley & Clyne, LLP, for New York State Ass'n of Cemeteries
Peter Colgrove, Locust Valley Cemetery
Mark Cuthbertson, Law Offices of Mark Cuthbertso, for Pinelawn Memorial Park
Joseph Dispenza, Forest Lawn Cemetery
Diane Fagiola, Locust Valley Cemetery
David F. Fleming, Featherstonhaugh, Wiley & Clyne, LLP, for NYS Ass'n of Cemeteries
Bruce W. Geiger, Bruce W. Geiger & Assocs., Inc., for Pinelawn Memorial Park
Annah Geiger, Bruce W. Geiger & Assocs., Inc.
Adam Ginsberg, Cedar Grove/ Mount Hebron Cemetery
Jay Ivler, Mount Lebanon Cemetery
Brandon Le, Hodgson Russ LLP, for Forest Lawn Cemetery
Justin Locke, Pinelawn Memorial Park
Ashton Matyi, Ostroff & Associates, for New York State Monument Builders Ass'n
Richard Moylan, Green-Wood Cemetery
Nate Romagnola, White Haven Memorial Park
William Simons, Locust Valley Cemetery

Some "other attendees" and "guests" attended solely via WebEx.

Opening Remarks



**Department
of State**

Mr. Pattison called the meeting to order.

Mr. Pattison explained that we are operating in accordance with the new statute, which allows participation in person or via videoconference, and that two board members were present in person, with Ms. Faber participating remotely.

Joseph Ball, acting as counsel to the Board, added that the meeting is being conducted under Chapter 417 of the laws of 2021.

Mr. Pattison stated that the meeting is being recorded and asked remote participants to mute their lines. Mr. Pattison stated that there would be an opportunity for public comment and asked that lobbyists and other speakers identify themselves. Those speaking should identify themselves. Finally, Mr. Pattison stated that the Board might go into executive session. If it does, it will keep the WebEx meeting open for when it exits executive session.

21-11-A-72 Minutes of Previous Meetings

Motion was made, seconded, and unanimously adopted approving the minutes of the Board's October 12, 2021 meeting, without change.

21-11-B-73 Legislation and Regulations

1. Legislation

Mr. Ball reported that a bill dealing with a grandfathered crematory passed and was signed into law.

2. Regulations

Mr. Polishook stated that notice of the proposed abandonment rule making was published in the September 29 State Register. There is a 60-day public comment period that expires on November 29, 2021, after which the Department will review any comments received. Mr. Polishook stated that we have just received comments from the New York State Association of Cemeteries.

21-11-C-74 Division Report

Mr. Polishook reported as follows:

1. Staffing: We have hired two new staff members, Associate Accountant Kerry Forezzi (who is present at today's meeting) and Administrative Assistant Elena Montenegro. We are completing interviews for two Senior Accountant positions.
2. Annual Report Season: the annual report season is approaching. We typically receive most annual reports in February and March. As we did last year, we will not send out paper copies of the annual report form. We prefer that cemeteries complete the form online, but if they have no access to the internet or a printer they can call our office and we will mail a copy. This year, we have received approximately 30% of annual reports online.
3. Niagara Falls Memorial Park: this cemetery seeks Board approval of a retort replacement. The cemetery has gone to court to seek approval of a PM Loan. We believe we, via the Office of the New York Attorney General, have worked out a schedule for us to complete an audit and present a recommendation to Supreme Court on December 16, 2021.
4. Cedar Grove Cemetery in Patchogue (Suffolk County): this cemetery is installing a historical marker for Austin Roe, who is buried there and was part of a spy ring for George Washington. On December 4, 2021, the last remains identified from the U.S.S. Oklahoma are being returned home to Patchogue for burial at this cemetery.

Assistant Director Alicia Young reported that we have received 1,340 annual reports, 508 of which were submitted online (38% of the total applications received).

21-11-D-75 Vandalism, Abandonment and Monument Repair or Removal Fund Report

Assistant Director Alicia Young provided the vandalism report.

Calendar year collections for the vandalism fund are \$569,218. Assessment collections are \$318,922. Fiscal year collections from April 1, 2021 are: Vandalism \$137,393; Assessment \$75,997.

Payments from the \$2 million vandalism fund appropriation are as follows:

We have made an initial payment of \$177,079.27, representing 11 initial payments of 25% of the total of each of those applications and one 75% final payment on applications approved this fiscal year and five payments from prior year's applications.

There remains \$108,254.84 in funds committed for applications approved in fiscal years 2018/19 and 2019/20. There is \$165,471.23 committed for applications approved in the 2020/21 fiscal year.

There are four applications in the pipeline for approval \$133,699.58; there are four applications to be presented today totaling \$83,935.67.

Maplewood Cemetery, No. 06-015 (Cayuga), \$11,505.50

Senior Investigator Michael Seelman reported that this cemetery has submitted an application for 15 hazardous monuments, and that he verified that they are in fact hazardous. The cemetery received two estimates, the lower of which plus the cost of the required legal notice was \$11,505.50 Mr. Seelman recommends approval.

Mr. Ball questioned whether the cemetery has determined that it is unable to locate the owners of the monument involved.

Mr. Seelman stated that the cemetery representative had not attempted to directly contact these lot owners and did not have records for these owners. Most of the monuments in these four applications date from the late 1800s. The newest monument to be repaired at Maplewood dates from 1918.

Mr. Polishook added that the most recent of these interments in these four applications dates from 1923. Unlike a recent interment or one where the cemetery has had recent contact with the lot owner, it would not make sense to make the cemetery attempt to contact the lot owners by other means.

Mr. Pattison stated that he believed the requirement to contact lot owners is statutory.

Mr. Ball stated that the statutory requirement is found in Not-for-Profit Corporation Law section 1510-a, which requires notice by regular mail unless the last known owner cannot be found. The statute is silent on what the cemetery has to do to try to find owners, and agrees that 100 year old address information would not be useful. Mr. Ball agreed that the situation would be different for newer monuments.

Mr. Polishook suggested that for next month the Division would come up with a specific proposal to address the circumstances under which the cemetery must give notice by mail.

Mr. Pattison indicated that he believes that cemeteries should go through some type of due diligence but that if counsel agreed that the application is legally sufficient he was prepared to approve this application.

Ms. Faber agreed that there should be some criteria for a process for giving notice.

Motion was made, seconded, and unanimously adopted approving the application in the amount of \$11,505.50, subject to the availability of funds.

West Genoa Cemetery, No. 06-038 (Cayuga), \$10,979.85

Mr. Seelman stated that this cemetery submitted an application for 10 monuments. Mr. Seelman visited the cemetery and determined that they are all hazardous. These monuments are quite a bit larger than the ones in the previous application [of Maplewood Cemetery]. Mr. Seelman recommends approval.

In response to a question from Mr. Pattison, Mr. Seelman stated that these are very old monuments and the cemetery had made no effort to reach lot owners other than via a legal notice.

Motion was made, seconded, and unanimously adopted approving the application in the amount of \$10,979.80, subject to the availability of funds.

Clearview Cemetery, No. 51-011 (Steuben), \$33,868.14

Investigator Brendon Stanton stated that this cemetery in the Town of Cohocton has submitted an application for repair of __ monuments. Mr. Stanton visited the cemetery and verified that all of the monuments are hazardous. Mr. Stanton stated that he had been unable to contact the cemetery to confirm but believes that the cemetery did not attempt to contact any lot owners; all of these are very old monuments.

Motion was made, seconded, and unanimously adopted approving the application in the amount of \$33,868.14, subject to the availability of funds.

Pleasant Valley Cemetery, No. 51-040 (Steuben), \$27,582.14

Mr. Stanton stated that this cemetery in the Town of Fluvana, Steuben County, has submitted an application for repair of 29 monuments. Mr. Stanton stated that this is the second application he has reviewed at this cemetery. Mr. Stanton visited the cemetery and verified that all of the monuments are hazardous. Similar to the other three, Mr. Stanton believes that the cemetery went straight to publishing a legal notice because of the age of these monuments and lack of records but has not yet contacted the cemetery.

Motion was made, seconded, and unanimously adopted approving the application in the amount of \$33,868.14, subject to the availability of funds.

21-11-E-76 28-009 Garland Cemetery - Columbarium

Mr. Stanton stated that this cemetery in the Town of Clarkson, Monroe County, seeks approval of a 48-niche columbarium unit, their first columbarium. Consistent with other cemeteries across the state, they have seen an increase in cremation burials. The cemetery's research and general trends suggest there is a demand for this product. The unit is pre-fabricated, coming from Alberta, Canada.

The cemetery board approved the columbarium. The appropriate signs have now been posted.

We recommend approval so long as the cemetery does not receive adverse comments by November 30, 2021.

Mr. Ball stated that the cemetery trustees approved one model at a full meeting of the board and subsequently decided to buy a different model without a meeting. The information seems that the change in model was not a

unanimous vote. Under the Not-for-Profit Corporation Law, the trustees can approve action without a meeting only with unanimous consent. Thus, the cemetery should either meet and approve or unanimously agree to the change.

Motion was made, seconded, and unanimously adopted approving the columbarium with the stipulations that: 1. The cemetery not proceed until after November 30; 2. The cemetery forwards to the Division any comments received; and 3. The cemetery's board approve the choice of columbarium at a full board meeting or by unanimous consent.

21-11-F-77 30-005 Locust Valley Cemetery – Land Swap and Major Alteration

Mr. Polishook stated that Locust Valley Cemetery owns property that it acquired around 1979 that a neighbor's driveway crosses, and that there is a 30-foot setback required by the village within which the cemetery cannot perform burials.

The cemetery wishes to swap a parcel of land it owns with a parcel of land owned by the neighbor.

In addition, after promising to rebuild the driveway, the cemetery instead proposes to pay the neighbor to relocate the driveway. As part of this relocation, part of the easement will be extinguished.

As a result of this, the cemetery will be able to develop 69 new burial spaces and six mausoleum spaces. The cemetery is low on inventory and this will provide it with graves that it will be able to sell immediately.

The land swap is an even exchange. Moving the driveway will improve relations with the cemetery's neighbor and free up graves for use. The land swap both provides new graves and mausoleum spaces and, because of moving the 30-foot setback, frees up existing mausoleum spaces. The cemetery will make money on this transaction.

The cemetery has provided only a single appraisal; the Division regards the value of the land being swapped as de minimis; the Board has in the past allowed valuation of inexpensive properties based only on one appraisal.

Mr. Polishook indicated that he believes the cemetery has all required local approvals but recommended that the Board condition approval on receipt of all required local permits. Mr. Polishook also asked that the Board direct the cemetery to deposit the value of the land transferred to the neighbor, \$18,200, to the cemetery's permanent maintenance fund without deciding whether this is required under the Not-for-Profit Corporation Law.

Peter Colgrove, Esq., counsel for the cemetery and a cemetery board member, explains that the cemetery has been working on this project for nine years. The cemetery has received approvals from the Village of Lattingtown zoning board and an amendment to the cemetery's use permit, approval from the Village planning board to a map change, approval from the Nassau County Planning Commission for reapportionment of the lots, approval from the Nassau County Legislature as required under the Not-for-Profit Corporation Law and believes this is the last approval the cemetery needs.

Mr. Colgrove expressed appreciation for assistance from Division staff and Department of State counsel.

Mr. Colgrove stated that the cemetery has about three acres of undeveloped land; the cemetery has bought two adjoining parcels that had houses on them. There is also some inventory in the areas near the land swap.

The cemetery's goals are to serve the wider community by providing graves, mausoleums, etc., preserve the cemetery (part of which was designed by Frederick Olmstead), and build up the cemetery's endowment to

provide for maintenance when the cemetery is sold out. Currently the PM Fund is about \$16 million, with \$5 million in general fund. This transaction adds 69 more graves, 38 of which are in the easement area which could be developed after the transaction plus 31 transactions in what will cease to be the 30' setback area. Buyers want mausoleums to be tucked into the hillside; the area to be acquired by swap will provide four more hillside mausoleums and the other two are in the setback and the Espositos would likely object to development absent the land swap. All in, this transaction will net for the cemetery about \$2 million.

Motion was made, seconded, and unanimously adopted approving the application of Locust Valley Cemetery for a land swap and major alteration, conditioned on receipt of all required local permits and deposit of the value of the land to be transferred, \$18,200, into the cemetery's permanent maintenance fund.

21-11-G-78 41-012 Mt Olivet – Notice of Proposed Penalty

Mr. Polishook reported that the Division had reviewed a series of transactions it has questions about and also found that the cemetery is delinquent in filing annual reports. The cemetery asked the Board to waive these penalties. The Division and Board agreed to postpone further discussion of the penalties while the cemetery retains a forensic auditor to review the transactions that were of concern to the Division. That report is complete but the Division has not yet seen it; it will provide the Board with more detail on this ongoing investigation in executive session.

The Division asks that the Board extend the cemetery's time to further respond or object to the notice of proposed penalty from November 30, 2021 to December 31, 2021, with the idea that we will have more information in time for our December Board meeting.

Motion was made, seconded, and unanimously adopted extending the time to respond to the notice of proposed penalties until December 31, 2021.

21-11-H-79 15-027 Forest Lawn & 15-040 Lancaster Cemetery – Merger

Mr. Polishook stated that Forest Lawn in Buffalo has previously merged with five other cemeteries in the greater Buffalo area: Lakeside, Williamsville, Gethsemane, St. Matthews, and Buffalo Crematory. About 2-3 years ago, Forest Lawn engaged in a rather aggressive program to identify other cemeteries that might benefit from merging. In 2019, the Board considered a merger between Forest Lawn and Chenango Valley Cemetery in Broome County, at which time our former counsel concluded that the cemetery law as written prohibited (among other things) mergers of cemeteries where the land was not contiguous.

In 2021, legislation was passed allowing such mergers under certain conditions.

Forest Lawn and five or six other cemeteries have now submitted applications for approval of mergers; we posed additional questions in response to those applications, and this is the first of those that we deem ready for Board review and approval. Of these cemeteries seeking merger approval, this one and Oakwood are similar to those with which Forest Lawn has previously merged. They are in the Buffalo suburbs. In this case, the cemetery appears to have a board that is not anxious to continue operating the cemetery and upside from more professional management and marketing. The Division has reviewed the factors required under Not-for-Profit Corporation Law section 1506-d and believes they are satisfied. Mr. Polishook called attention to one particular provision, which requires the plan of merger to include certain information. In this case, the document titled Plan of Merger does not include this information but, as a letter from Lancaster's board President indicates, Forest Lawn did present this information and make these representations to Lancaster as part of the proposed merger. Mr. Polishook also noted that Lancaster had provided notice by mailing to its lot owners, rather than seeking relief from this requirement because such a mailing would be unduly burdensome.

Mr. Ball had several comments. First, the statute clearly contemplates that there be a plan of merger. Here, the cemetery has two different documents, a plan of merger and an agreement of merger. Mr. Ball was not certain that between both documents they covered everything that should be covered. Mr. Ball noted that the documents should cover the membership, in particular, the number of members. Information about the relative size of the corporations might be one of the more important pieces of information. The plan of merger also has to address whether the plan of merger will require a change in the certificate of incorporation. Although the plan of merger says there will be no change, Forest Lawn's certificate of incorporation will in fact have to be amended because the cemetery will now be operating in the Town of Lancaster. Another requirement of the new section of Article 15 for cemetery corporations is that the notice to lot owners has to provide certain information about where to obtain the required information about the merger; the posting at Forest Lawn was made fewer than 60 days before the lot owners' meeting. Finally, Mr. Ball asked whether the cemeteries are asking for a recommendation of approval with the idea of going back to the boards and lot owners or whether they believe the necessary board and lot owner approvals have been made.

David Fleming, for Forest Lawn, Mr. Fleming drew a distinction between what must be provided to a court in an plan of merger pursuant to N-PCL section 905 and the information required to be provided to the lot owners as part of the plan of merger pursuant to N-PCL section 1506-d. This process started in April 2018. There have been 20 incidences of notices, publications, and interactions with the cemetery in the last three years. Notices were published in a newspaper designated by Erie County, mailed, and posted at cemeteries. There are other applicants; many of them are no longer willing to continue with this process much longer.

Mr. Polishook added one comment on the number of lot owners. Cemeteries do not have accurate lists of their members. Membership type not-for-profit corporations typically require their members to pay dues, so you can figure out who their members are. Because cemeteries do not require dues and membership is heritable, cemeteries at most have incomplete lists of who the original members are and who the successor members are. At most, hopefully, cemeteries have a list of the number of lots sold.

Mr. Pattison stated that he believes that future membership in the corporation is an important issue.

Mr. Ball stated that the requirement is not to identify the members by name but rather to identify the membership. Mr. Ball suggested that the plan of merger could state the number of lots in each cemetery and that each lot owner is entitled to one vote.

Ms. Faber stated that the statutory requirement is that the petition should make clear that the cemetery will comply with the statutory requirement and wanted clarification as to what information is required beyond the fact that the surviving lot owners will be members and entitled to vote.

Ms. Faber stated that she does not believe that the statute requires the number of lot owners at both cemeteries.

Mr. Fleming disputed that the statute requires more than the cemeteries have provided here as to members' rights.

Mr. Fuller asked whether the Board could act and address the issue of membership separately.

Mr. Polishook stated that the Division did not believe it was desirable to require another lot owner vote, but that it is extremely helpful to get greater clarity for future transactions. Ideally, everything required to be in a plan of merger ought to be in one document and voted on, and that it would be useful to provide information about number of lots in future votes.

Ms. Faber agreed that it would be useful to have more information in the plan of merger, but that this application includes what is required by statute.

Mr. Pattison stated that this conversation is very important for the cemetery community and acknowledged that in many cases cemetery lot owners are not engaged or aware of their rights.

Mr. Ball indicated that the cemeteries will need to seek court approval, and will have to represent what the Board recommended as to the merger.

Mr. Fleming agreed that the recommendation of approval would suffice.

Mr. Polishook asked whether the Attorney General could approve mergers without going to court; Ms. Faber was not sure.

Motion was made, seconded, and unanimously adopted recommending approval of the merger of Forest Lawn and Lancaster Rural Cemetery.

**21-11-I-80 33-063 Utica Cemetery (Forest Hill) – Crematory and PM Loan Recommendation
(amendment to May 12, 2021 approval)**

Mr. Polishook explained that a legal issue had arisen after the Board approved this new crematory and recommended approval of a PM loan to finance the crematory and associated renovations. The Board's approval was conditioned, among other things, on receiving Department of Environmental Conservation (DEC) approvals related to the retorts, but DEC will not approve the retorts until they are installed. The cemetery's application for Supreme Court approval of the requested permanent maintenance fund loan is to be heard next week.

Motion was made, seconded, and unanimously adopted adding this matter to the agenda.

Mr. Ball stated that the original approval was conditioned on obtaining a DEC permit, but that permit cannot be obtained until after the work is done and the PM Loan is taken. Mr. Ball suggested that the condition be modified to require only that the crematory obtain all required building permits.

Mr. Polishook proposed that the May 12, 2021 approval of the crematory and PM Loan to be modified to delete the condition requiring DEC approval.

Mr. Pattison rephrased the motion as follows: the Board's May 12, 2021 approval be modified to require only that Forest Hill obtain all necessary local permits; that motion was made, seconded, and unanimously adopted.

Public Comment

David Fleming, Featherstonhaugh, Wiley & Clyne, LLP, for the New York State Association of Cemeteries, thanked the Board for giving it the opportunity to comment on the proposed abandonment regulations. NYSAC is overall supportive of the regulations but has proposed some technical changes. Mr. Fleming noted he recently learned of a Capital Region town that was happy to learn of ways to try to prevent abandonment, as providing municipal assistance is preferable to abandonment

Motion made, seconded, and unanimously adopted to go into executive session.

Motion made, seconded, and unanimously adopted to exit executive session.

Motion was made, seconded and unanimously adopted adjourning the meeting.

The next Board meeting is scheduled for December 14, 2021 at 10:30 AM.