

# DIVISION OF CEMETERIES

STATE OF NEW YORK  
DEPARTMENT OF STATE  
ONE COMMERCE PLAZA  
99 WASHINGTON AVENUE  
ALBANY, NY 12231-0001  
TELEPHONE: (518) 474-6226  
FAX: (518) 473-0876  
WWW.DOS.NY.GOV

KATHY HOCHUL  
GOVERNOR

CEMETERY BOARD  
ROBERT J. RODRIGUEZ  
ACTING SECRETARY OF STATE  
CHAIR

LETITIA JAMES  
ATTORNEY GENERAL

MARY T. BASSETT, M.D., M.P.H.  
COMMISSIONER OF HEALTH

TO: NEW YORK STATE CEMETERY BOARD

FROM: LEWIS A. POLISHOOK, Director  
ROBERT VANDERBLES, Counsel

RE: PUBLIC COMMENTS: PROPOSED RULES  
CONCERNING CEMETERY ABANDONMENT

DATE: JANUARY 5, 2022

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In response to the Notice of Proposed Rule Making published on September 28, 2021, the New York State Department of State (the Department) has received two sets of comments, one from the New York State Association of Cemeteries (NYSAC) (dated November 8, 2021) and the Association of Towns of the State of New York (AOT) (dated November 23, 2021). This memorandum summarizes the Department's proposed responses to those comments. We have also attached a draft showing proposed linguistic changes to the proposed rules.

The Department does not believe that these changes constitute "a substantial revision" requiring a Notice of Revised Rule Making under New York State Administrative Procedures Act section 202(4-a).

## NYSAC COMMENTS

### Comment to Proposed 19 NYCRR § 202.2(3)

*Frequently, in times of threatened abandonment, there is no volunteer base or lot owners willing to or able to, assume management of the struggling cemetery. Therefore, to highlight and clarify this situation, the following additional language is proposed:*

***"(4) not having sufficient volunteers to hold board positions of president, secretary and treasurer."***

### Response

The Department has considered the comment and agrees that an inability to have sufficient volunteers to serve as officers or directors, among other factors, may put a cemetery at risk of abandonment. Section 202, as proposed, defines "abandoned cemetery." This term is already defined in Not-for-Profit Corporation Law section 1506-c, Town Law section 291, and County Law section 222. The Department proposed to modify this definition to refer to those statutes because they explicitly consider the existence of a corporate body in order to provide the clarity suggested by the comment.

### **Comment to Proposed 19 NYCRR § 202.3**

*The necessity of this regulatory proposal was made several years ago when then Governor Cuomo vetoed legislation to address cemetery abandonment after overwhelming support by both houses of the Legislature. Proactive actions are required to prevent abandonment. Therefore NYSAC proposes the following edit to this section:*

*“202.3 Steps to Avoid Abandonment The division may at any time determine that cemetery is at risk of abandonment and, together with the cemetery, **shall** take the following steps, as appropriate to avoid abandonment:...”*

### **Response**

The Department considered making the steps described in this section mandatory, as NYSAC proposes. Although the Department, together with a cemetery, will ordinarily follow these steps in seeking to prevent abandonment, there may be occasions where fulfilling each step may not be appropriate. For example, where the Department has just completed an audit and inspection of a cemetery before determining that the cemetery is at risk of abandonment, completing another audit may not be appropriate.

### **Comment to 19 NYCRR § 202.3(a)(2)**

*Each pending cemetery abandonment is different. To address the variables of abandonment and the urgency in some situations, it is proposed this section be rewritten as follows:*

*“The written report **or explanation** and **any** determination **as to why that** the cemetery is at risk of abandonment:”*

### **Response**

The Department agrees with this comment, and has rephrased this subparagraph to read: “An explanation of why the cemetery is at risk of abandonment.”

### **Comment to 19 NYCRR § 202.3(b)**

*NYSAC believes clarity is required related to mergers or consolidation. We offer the following amendments:*

*“Contact other **New York State regulated cemeteries** that **may** have the ability, **and** willingness **and experience** to merge or consolidate with, or assume the management and maintenance of the cemetery in danger of abandonment and provide them appropriate information.”*

### **Response**

The Department considered this comment and believes that the regulation is sufficiently clear as proposed as to the cemeteries that would be contacted concerning merger or consolidation. The Department is also concerned that addition of the phrase “and experience” might be read as limiting the assumption of the obligation to manage and maintain cemeteries to those that have previously done so.

**Comment to 19 NYCRR § 202.3(d)**

*NYSAC believes as part of the meeting preparation, a pre-meeting package should be compiled by the Division to include the latest financials, management structure, liabilities and active or threatened litigation, closed, open or pending investigations, prior or pending fines and a statement or analysis that led to abandonments (such as spending, sales inventory depletion, etc.). This material should be presented at or before the meeting.*

*NYSAC is not interested in creating additional materials but merely having the Division compile information that already exists into a packet that may be provided to interested parties for analyzing assessment of the true condition of the cemetery.*

**Response**

NYSAC proposes no specific language to implement this recommendation. The Department anticipates working with cemeteries at risk of abandonment to compile and share such information in advance of a reorganizational meeting but does not believe the regulations should impose a specific mandate on the Department to do this in all cases, for the reasons described in its response to the comment on 19 NYCRR section 202.3, above.

**Comment to 19 NYCRR § 202.3(e)**

*The language of this section includes language: “Prior to such meeting the cemetery shall:...” . The cemetery, in most instances, will be unable to comply for any number of reasons. The reality is that if this required meeting is being held and we are at this point in the review, the cemetery is most likely abandoned for all practical purposes other than for the formal finding.*

*The following substituted language is offered:*

*“Prior to such meeting the cemetery **may request division assistance in completing the following:**”*

**Response**

The Department proposes to replace “shall” with “should” to clarify that the steps set forth in 202.3 may be undertaken by the Department and cemetery as appropriate. The Department has made other minor technical changes to this subparagraph to clarify its terms.

**Comments to 19 NYCRR § 202.3(e)(2) and § 202(e)(3)**

*This section involves updating a list of lot owners and addresses. We know of almost no struggling small cemeteries that have this ability and most rely on postings and publications to notify members. This requirement is not achievable in most cases as many trustees do not have access to the software or technology necessary to appropriately accomplish this stated goal. It is recommended that this section either be deleted or be a function provided by the Division of Cemeteries should the cemetery be unable to accomplish this task.*

\* \* \*

*This section requires “additional notice”. That term is not defined in this proposal and cannot therefore be supported by NYSAC. The language should be struck.*

## **Response**

The Department proposes to replace “shall” with “should” to clarify that the steps set forth in 202.3 may be undertaken by the Department and cemetery as appropriate. Proposed 19 NYCRR sections 202.3(e)(2) and 202.3(e)(3) are designed to ensure that cemeteries at risk of abandonment try to identify as many lot owners who might be interested in helping save the cemetery from abandonment as is possible.

There are many ways cemeteries can make efforts to identify such individuals. The Department did not prescribe methods of notice in order to enable the Department and cemetery, working together, to identify the best ways to maximize attendance of lot owners within that community. The Department anticipates issuing a guidance document describing the best practices that cemeteries can take to try to reach lot owners and improve their membership lists.

## **Comment to 19 NYCRR § 205.3 (e)(5)**

*This section states that the cemetery must: “Demonstrate to the division that it has reviewed and understands the procedures for the conduct of the meeting and voting.” NYSAC does not know how such a demonstration would be completed or what would be the impact of the inability to comply. In general NYSAC views this section as aspirational and unrealistic. If this section is to be retained, it should read as follows:*

***“(5) The cemetery will work with the division to review and understand procedures for conducting the meeting and voting.”***

## **Response**

The Department agrees with this comment and has rephrased this subparagraph to state that the cemetery, before the special meeting, “should . . . review and understand procedures for the conduct of the meeting and voting.”

## **Comment to 19 NYCRR § 202.3(f)(2)**

*A formal report may or may not be available but statements or other documents may be readily available relating to the risk of abandonment. Therefore, it is suggested that this section be rewritten as follows:*

***“(2) Share the report any and all reports or reporting on the risk of abandonment and the division’s audit and inspection reports.”***

## **Response**

The Department agrees with this comment and has rephrased this subparagraph thus: “Explain the risk of abandonment and the division’s audit and inspection reports.”

## **Comment to 19 NYCRR § 202.3(f)(3)**

*NYSAC recommends this section be amended as follows to provide the full understanding of options available to prevent abandonment to a municipality.*

***“(3) Explain options and what can be done to avoid abandonment to the municipality including***

*merging with another regulated cemetery;”*

**Response**

The Department considered this comment and does not believe that the regulations should require it to explain the possibility of merger in all cases.

**Comment to 19 NYCRR § 202.4(e)**

*The importance of available state funds in a cemetery abandonment should not be understated. NYSAC believes this information should be highlighted in this process. It is suggested that this section be amended to read as follows:*

*‘(e) Any planned immediate repairs, maintenance or improvements to the property or facilities of the cemetery to be abandoned, the cost of same and source of funds and terms of payment including any expectation of any state cemetery abandonment funds for such work.’*

**Response**

The Department agrees with this suggested change.

**Comment to 19 NYCRR § 202.4(g)**

*NYSAC recommends the following clarifying language for this section.*

*“Whether the cemetery to be abandoned is affiliated with any religious denomination or tradition or if the majority of the persons whose bodies are interred in such cemetery are affiliated with any religious denomination or tradition, and whether the applicant follows or will follow the customs and practices of the same religious denominations or tradition **in specific sections or in all new cemetery development.**”*

**Response**

The language in the proposed regulation is identical to Not-for-Profit Corporation Law section 1506-c(a). The Department considered this comment and does not believe that the terms of the regulation should depart from the statutory language.

**Comment to 19 NYCRR § 202.5(8)**

*NYSAC believes this section should be amended as follows for clarification:*

*“(8) A statement that the town is not obligated to take title to the real property of the abandoned cemetery or reasons why the town may wish to take title.”*

**Response**

The Department considered this comment and does not believe that the regulations should require that the New York State Cemetery Board identify, in every determination concerning abandonment, why a town might wish to take title to land.

## **ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK COMMENTS**

*AOT is generally supportive of the proposed regulations' purpose of helping to avoid abandonment through the provision of assistance, and facilitation of mergers with other not-for-profit cemeteries. AOT is also supportive of early notification to municipal officials and the permissive, not mandatory, participation of municipal officials in efforts to help avoid abandonment. AOT comments that the proposed regulations could be improved if the timeframe the Department follows in the process of determining a cemetery is abandoned included "sufficient lead times to accommodate the nature of town operations and resources..." In absence of regulatory changes, AOT encourages development of protocols to ensure sufficient lead times and resources prior to issuing a determination of abandonment.*

### **Response**

The Department appreciates and thanks AOT for its support of the proposed regulations. The Department considered the comment suggesting a required timeframe that is sufficient to accommodate the nature of town operations and resources prior to issuing a determination of abandonment. The Department will endeavor to develop protocols and continue to involve municipal officials as early as possible to avoid abandonment. However, the Department does not agree that a mandatory, minimum amount of notice prior to issuing a determination of abandonment will always be feasible because a cemetery may operate in a distressed condition for years, or suddenly. Requiring a minimum does not comport with this reality and could even give the cemetery and the Department an incentive to begin this process earlier than necessary.

### **OTHER TECHNICAL CHANGES**

#### **19 NYCRR §§ 202.4(c)(1-3), 202.4(f)**

The original draft contained unnecessary requirements concerning cemetery funds and title to land in connection with a financial plan submitted by a cemetery corporation seeking New York State Cemetery Board approval to assume the obligation to manage and maintain an abandoned cemetery. Omitting these requirements will allow for greater flexibility to the extent permitted by Article 15 of the Not-for-Profit Corporations Law.