



STATE OF NEW YORK

DEPARTMENT OF STATE  
DIVISION OF CEMETERIES

Andrew M. Cuomo

GOVERNOR

Cesar A. Perales

ACTING SECRETARY OF STATE

CEMETERY BOARD

Cesar A. Perales  
ACTING SECRETARY OF STATE  
CHAIRMAN

Eric Schneiderman  
ATTORNEY GENERAL

Dr. Nirav R. Shah  
COMMISSIONER OF HEALTH

99 Washington Ave.  
Albany, NY 12231-0001  
(518) 474-6226

123 William Street  
New York, NY 10038  
(212) 417-5713

Richard D. Fishman  
DIRECTOR

Chester Butkiewicz  
ASSISTANT DIRECTOR

May 4, 2011

Hon. J. Michael Cindrich, Mayor  
Village Board of Trustees  
Village/Town of Mount Kisco  
104 Main Street  
Mount Kisco, New York 10549

Re: Proposed revision to section 110-59 of Chapter 110 of the Village Code;  
Definition of "Cemetery"

Dear Mayor Cindrich and Village Board of Trustees:

The New York State Cemetery Board (the "Cemetery Board") submits this letter upon the signature of its chairman in opposition to the proposed amendment of the Village of Mount Kisco Village Code which would add the following definition to section 110-59:

**CEMETERY:** Property used for the interring of the dead. This use shall not include facilities for cremation

As written, the proposed amendment would prohibit crematories in the village. Under the Village Code, cemeteries are permitted in the Preservation District (PD). On January 21, 2010 the New York State Cemetery Board approved Oakwood Cemetery's application to construct and operate a crematory on its property in Mount Kisco and thereafter Oakwood Cemetery applied for a building permit to construct a crematory as an accessory use of its cemetery operation. The Mount Kisco Building Inspector initially determined that a crematory is an accessory use incidental to the principal use as a cemetery. However, the Board of Trustees has proposed this amendment to prevent it and any other cemetery in the Village from constructing and operating a crematory. The Cemetery Board objects to the proposed zoning amendment as an unlawful attempt to prohibit cemeteries from operating crematories in conflict with state law which gives cemeteries, and only cemeteries the right to operate crematories.

**Background of the Division of Cemeteries and the Cemetery Board**

Cemeteries, which by statutory definition include crematories, occupy a unique position in New York law. They are required to be not-for-profit entities and are strictly regulated by the Division of Cemeteries and the Cemetery Board.

under Article 15 of the Not-for-Profit Corporation Law (NPCL). Section 1501 of the NPCL sets forth the state's Declaration of Policy regarding cemeteries:

The people of this state have a vital interest in the establishment, maintenance and preservation of public burial grounds and the proper operation of the corporations which own and manage the same. This article is determined an exercise of the police powers of this state to protect the well-being of our citizens, to promote the public welfare and to prevent cemeteries from falling into disrepair and dilapidation and becoming a burden upon the community, and in furtherance of the public policy of this state that cemeteries shall be conducted on a non-profit basis for the mutual benefit of plot owners therein.

NPCL section 1504 establishes the Cemetery Board which is comprised of the Secretary of State, the Attorney General and the Commissioner of Health. The Division of Cemeteries and the Cemetery Board oversee and regulate more than 1800 public cemeteries and 49 crematories. These cemeteries/crematories must file all their rules, regulations and prices with the Division. Every charge for work or services must be reviewed and approved by the Cemetery Board before they take effect. Every public cemetery and every crematory is inspected by Division staff, must file annual financial reports with the Division and is subject to periodic audit. All crematory employees are required to be certified to operate a crematory by taking and passing a course approved by the Division of Cemeteries.

It is the role of the Division to ensure that each cemetery is operated in a fiscally sound manner; that its trust funds are prudently managed and invested; and that it is taking all reasonable steps to ensure its longevity and ability to continue even after it has run out of space for graves. It bears repeating that it is the policy of the state to "prevent cemeteries from falling into disrepair and dilapidation and becoming a burden upon the community". Division accountants carefully monitor the health of each cemetery's permanent maintenance fund and recommend remedial steps if the fund appears to be inadequate for future needs. In addition, as set forth below, the Legislature has put the operation of crematories exclusively within the province of cemeteries. While some states allow funeral homes to operate crematories, the New York Legislature has decided to make this the exclusive right of cemeteries. The Legislature has determined that the operation of a crematory is part and parcel of the operation of a cemetery. The Mount Kisco proposal to redefine cemeteries to exclude crematories and thereby prohibit crematories is in conflict with the policy of the state.

#### **Objection to the proposed amendment as an unlawful restriction on cemeteries**

It is and has been the policy of the state that crematories are a natural part of the cemetery business. The operation of a crematory by a cemetery is a continuation of the land's use for cemetery purposes: the disposal of human remains. Writing for the Court of Appeals in Moore v. United State Cremation Co., 275 NY 105, 112 (1937), Chief Judge Crane stated: "The purpose of a cemetery is to dispose of the dead body; such also is the purpose of the crematory." The Court there was interpreting the phrase "cemetery purpose" as it appeared in various statutes. The Court construed the phrase "cemetery purpose" as referring not just to cemeteries but also to crematories. It held that the operation of a crematory is a cemetery purpose and it treated the crematory operation as the operation of a cemetery.

The Moore holding was relied on in an Attorney General opinion dealing with General Municipal Law section 148 which provides compensation for the cost of burying the remains of a soldier. 1966 N.Y. Op. Atty. Gen. No. 143. The opinion holds that the statute applies to the burial of cremated remains. The opinion states:

In Moore v. United States Cremation Co., 275 N. Y. 105 (1937), holding that the use of lands for cemetery purposes included use for a crematory for the reduction of dead bodies to ashes and a columbarium for the preservation of the ashes stated: "The cemetery referred to in section 78 (Member-

ship Corporations Law) means a place for the burial of the dead, not necessarily a grave in the ground or in a mausoleum or a vault, but in any other receptacle.'

Id.

The New York State Legislature codified the connection between cemeteries and crematories in a 1963 amendment of the laws affecting cemeteries. Chapter 359 of the Laws of 1963 changed the definitions of "cemetery corporation", and "cemetery" to include crematories. These definitions are currently found in NPCL sections 1502(a) and (d), respectively. The 1963 amendment added the following underlined language to those definitions (bracketed material indicates deletion):

The term "cemetery corporation" means any corporation formed under a general or special law for the disposal or burial of [the dead] deceased human beings, by cremation or in a grave, mausoleum, vault, columbarium or other receptacle but does not include a family cemetery corporation or a private cemetery corporation.

A public mausoleum, crematory or columbarium shall be included within the term "cemetery".

These changes ensured that all crematories in New York would be formed as and treated as cemeteries. In furtherance of that statutory change, the Department of State enacted regulations regarding the formation and operation of crematories. The State Legislature subsequently enacted Chapter 579 of Laws of 2006 entitled "AN ACT to amend the not-for-profit corporation law, in relation to the creation, operation and duties of crematories as cemetery corporations." As a result of this Act, crematories can only be built and operated by cemeteries.

NPCL section 1505-a sets forth the requirements for the establishment of a crematory. In order to obtain Cemetery Board approval to operate a crematory, a cemetery must provide:

A certified survey of the site and location where the crematory will be situated;

Plans and designs for the crematory building;

A business plan for the operation of the crematory with number of expected cremations per year, number of cremation units, capital costs, financing, number of employees, etc.; and

A description of the impact the proposed crematory would have on other crematories in the county and whether the crematory will have an adverse impact on the surrounding community.

When an application by a cemetery to build a crematory is submitted, the Division reviews it to determine whether it is complete, its field staff conduct an on-site inspection of the cemetery and its accountants review the financial aspects of the application. The Division then prepares a report to the Cemetery Board which accompanies the application. This oversight by the Division and the Cemetery Board ensures that cemeteries have the ability to construct and operate a crematory once it makes sense both for the cemetery and the community. The Cemetery Board will not approve a proposed crematory unless the cemetery can demonstrate that its future viability depends on its ability to build and operate a crematory; that current or near-term demand for cremations in the area are not met by current cremation capacity; that the cemetery has a well-thought-out

plan for constructing and operating a crematory; and that the location of the crematory and the plan of operation are devised to minimize any potential negative impacts on the community.

It is clear that the Legislature has determined that cemeteries have the right - subject to compliance with these requirements - to build and operate crematories. A blanket prohibition by any municipality is in conflict with and frustrates this statutory scheme.

When the state finds that there is a public need for a certain enterprise and enacts a comprehensive scheme for its approval and operation, a town may not adopt an ordinance or other regulation which would entirely prohibit the operation of such lawful enterprise. Concordia Collegiate Institute v. Miller, 301 N.Y. 189 (1950) and Cornell University v. Bagnardi, 107 A.D.2d 398 (3 Dept. ,1985) (applying the rule to schools); Jewish Consumptives' Relief Soc. v. Town of Woodbury, 230 A.D. 228 (2<sup>nd</sup> Dept. 1930) (applying the rule to tuberculosis hospitals). The Village of Mount Kisco proposes to prohibit all cemeteries in the municipality from ever operating a crematory, regardless of need in the community and regardless of the cemetery's need for its continued viability.

The issue of a cemetery's right to build and operate a crematory has been addressed by other states and was presented in Laurel Lawn Cemetery Ass'n v. Zoning Bd. of Adjustment of Tp. of Upper Deerfield, 545 A.2d 253 (N.J. Super. L., Cumberland Co. 1988). There, a cemetery that was operated as a nonconforming use sought a permit to construct a crematory as an "accessory or incidental use to a cemetery". Id. at 253. The town however viewed a crematory as a principal use "not incidental to the non-conforming cemetery use" and denied the permit. Id. In order to determine whether the operation of a crematory was an incidental use of a cemetery, the Court first noted that a number of state statutes - just like their New York counterparts - treat crematories as cemeteries and specifically authorize cemeteries to operate crematories. The Court noted that the practice of cremation:

appears to be gaining acceptance and more widespread use as an alternative to traditional interment. Since that is exactly what it is, an alternative to interment, then the Legislative bent toward equating cremation with a cemetery use seems logical, practical and utilitarian, not disruptive, noxious or alien to a cemetery.

Laurel Lawn Cemetery at 254-55. The Court reversed the Zoning Board denial of the building permit. Id.

Similarly, in states which permit funeral homes to operate crematories, courts have overturned or restricted local zoning laws which interfere with that statutory scheme. BMC Enterprises, Inc. v. City of Mt. Juliet, 273 S.W.3d 619 (Tenn. Ct. App., 2008), involved a city zoning ordinance that had been amended to allow crematories only in Industrial Special (IS) zones. The city had no such zones and the amendment effectively prohibited crematories within the city. A funeral home which had been in operation long before the zoning ordinance was amended applied to build and operate a crematory on its property. The Zoning Board denied the application because crematories were not permitted in the zone where the funeral home was located. The key issue before the court was "whether operation of a crematory is 'an actual continuance and expansion of the activities' of the Funeral Home's business." Id. at 625. The court looked at the Tennessee statutory definitions of "funeral establishment" and "funeral directing", both of which include the phrase, "or the disposition of dead human bodies". Id. Relying on this language, the court determined that it was the intention of the Tennessee

General Assembly to include crematories as part of a funeral business and that "funeral directing" includes the operation of a crematory. The court held:

Clearly, state lawmakers do not view funeral homes and crematories as separate industries, but, rather, as complementary services offered by the funeral industry.

BMC Enterprises at 626. See also, Conrad v. Babcock, 707 N.E.2d 44 (Ohio App. 11 Dist., 1997); Rabenold v. Zoning Hearing Bd. of Borough of Palmerton, 777 A.2d 1257 (Pa. Cmwlth., 2001).

In New York, the legislative intent is even more clear. The statutes that define "cemetery" and "cemetery corporation" don't just refer to "the disposition of dead human bodies" as they do in the Tennessee statutes, they refer specifically to cremation. Here, as in Tennessee, it is clear that crematories are not a separate industry from cemeteries but are part of the service provided by a cemetery.

Cemeteries are seeing a constantly increasing percentage of the population choosing cremation over burial. According to the records of the Department of State, Division of Cemeteries, the number of burials versus cremations has shifted dramatically in the last eight years:

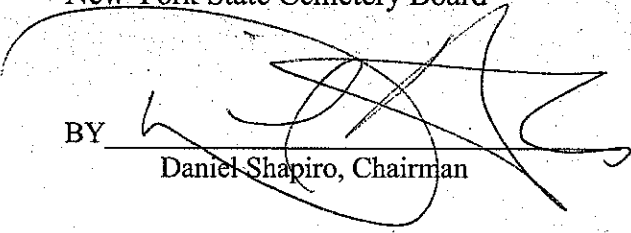
Year	Total burials/cremations	Cremations	Burials
2001	81,701	32,406	49,295
2009	94,992	42,753	52,239
Percentage Increase		31.92%	5.97%

If this trend continues, the number of cremations will soon exceed the number of burials. The future of cemeteries, their ability to continue in perpetuity, will in many cases depend on their right to build and operate crematories. The Village of Mount Kisco may not prohibit cemeteries within the municipality from building and operating crematories approved by the Cemetery Board.

Respectfully submitted,

New York State Cemetery Board

BY

  
Daniel Shapiro, Chairman

cc: Oakwood Cemetery