

ROLES AND RESPONSIBILITIES OF CEMETERY TRUSTEES

Municipal Trustees' Training Workshop
Thursday, June 8, 2023 2:00 – 3:00 p.m.

C. Christine (Fillmore) Johnston
Attorney, Drummond Woodsum and MacMahon
CJohnston@dwmlaw.com
(603) 792-7417

I. Board of Cemetery Trustees:

- Towns: Elected board of 3 cemetery trustees (RSA 298:6).
 - 3-year staggered terms
 - Town meeting may vote to increase to 5 trustees
 - Up to 2 alternates, recommended by board of trustees and appointed by Select Board to 1-year terms
 - Vacancies before end of a term are filled by appointment by Select Board for remainder of term
- Cities: cemetery trustees chosen and serve terms as provided by city ordinance
- Charter towns: trustees chosen as provided by town charter
- Board chooses its own chairperson and bookkeeper (who may be same person)
- Delegation to town manager: if a town operates under RSA 37 town manager, town meeting may vote by warrant article to delegate all cemetery trustee functions to town manager instead of having cemetery trustees. Takes effect 90 days after such vote.
- Delegation to Select Board: any traditional town meeting town may vote by warrant article to delegate all cemetery trustee functions to select board. Takes effect 90 days after such vote.
- Any delegation may be rescinded in same manner. New board of cemetery trustees is elected at following year's town meeting.
- Elected cemetery trustees are not employees and don't have a "boss"; however:
 - Trustees of trust funds have custody and investment of cemetery trusts
 - Charitable Trusts Division of AG's Office has supervisory authority over handling, expenditure and management of trusts
 - Governing body signs deeds for cemetery plots ("right to bury" deed)
 - Any violation of state law by cemetery trustee is legal "violation" under the NH criminal code, punishable by up to \$1,000 fine (RSA 651:2).

II. Powers and Duties:

- Adopt bylaws/regulations – rules of procedure, internal policies, establishment and maintenance of municipal cemeteries (RSA 298:7)
- Operate and maintain all public cemeteries (RSA 289:2).
- Prepare annual budget in preparation for municipal budget process:

- What will be required in ordinary municipal operating budget/appropriations?
- Separate budget request for planning/establishing new public cemetery, and/or for capital improvements or expansions of existing public cemeteries.
- Any proposed expenditures from capital reserve or trust funds for which cemetery trustees are not agents to expend must be included in proposed budget for municipal vote.
- Use appropriated funds for cemetery purposes:
 - Ordinary appropriations are part of general fund and are paid in the same manner as any other municipal expenditures
 - Trust funds are held by trustees of trust funds, income spent by cemetery trustees (bookkeeper issues vouchers for trustees of trust funds to pay) for cemetery purposes in accordance with the conditions of each particular trust.
 - NO commingling of trust money and ordinary appropriations
- Sexton: trustees appoint and supervise cemetery sexton, who manages work performed in the public cemeteries.
- Handle sale of cemetery lots, prepare deeds for governing body to sign.
- Records: Cemetery trustees must keep a record of every burial, including name, date of burial, and plot identification. RSA 289:5.
 - Private burial site records to be maintained by the owner of land containing such site, with copy to cemetery trustees for municipal records. Location may be annotated on municipal tax map.
 - Copy of records available upon request per RSA 91-A:4.

III. Municipal Cemeteries:

- Every town/city required to provide at least one public cemetery within its borders, or to contract for the use of one in a neighboring municipality. RSA 298:2.
- Cemetery trustees establish and enforce regulations for operation and use of public cemeteries. However, legislative body (city/town council or town meeting) may choose to establish or amend regulations which take precedence over trustee regulations.
- Can trustees impose mandatory cremation for municipal cemeteries?
 - While space-saving is understandable, it may violate the obligation under RSA 289:2 to provide at least one suitable cemetery for all municipal residents.
 - Cremation is not accepted by all religions – likely must provide at least one cemetery where traditional burial is available.
- Constraints on Location (RSA 289:3, D):
 - Not within 100 feet of any residence, school, store or other place of business without owner's consent
 - Not within 50 feet of any known source of water or the right of way of any State road.
 - Existing cemeteries closer than these limits may be expanded so long as the enlargement isn't any closer to these places than the existing area, and not within 50 feet of any State road.
 - Local zoning may be more restrictive than this and require larger buffers.

- Burials on private property: comply with local zoning, if any; if none, comply with location requirements for public cemeteries. RSA 289:3, II.
 - Location of any burial sites on private property must be recorded in the deed when such property is transferred to another person.
- New construction/excavation near burial site or cemetery (RSA 289:3, III):
 - Comply with local zoning setbacks
 - If no local zoning regulations regarding burial sites, must be at least 25 feet away from known burial site or boundary of established burial ground or cemetery.
 - Exception: where necessary for construction of an essential service as approved by governing body in concurrence with cemetery trustees (or, for State highway, DOT Commissioner in concurrence with cemetery trustees).
- Maintenance: towns and cities are legally required to raise and appropriate sufficient funds to provide for the suitable care and maintenance of municipal public cemeteries within their borders which are not otherwise provided for by some other funding source. RSA 289:4.
- Towns and cities are also permitted (but not required) to raise and appropriate money for care and maintenance of deserted burial grounds and those which have been declared abandoned. RSA 289:4.
- Abandoned burial spaces in public cemetery (RSA 289:18):
 - Plots unused and without monument/stone for 50 years, cemetery trustees may bring proceeding for termination and forfeiture of rights to the space.
 - Every purchase contract for burial space since 8/7/1994 has been required to include a notation that this procedure may be used in the future.
 - Trustees send notice to owner of the intent to terminate and forfeit owner's rights, served upon owner personally or sent certified mail with return receipt to owner's last known address.
 - If owner contacts cemetery management of intent to continue to use space, termination procedure is cancelled.
 - If owner chooses to return the space, they are paid the original purchase price, less any amount that was specified at the time for inclusion in a perpetual care fund.
 - If owner doesn't respond within 60 days, trustees advertise in local newspaper for information regarding present location of the owner. If new information about location is obtained, serve notice on owner again.
 - If no new information obtained, trustees may declare the original purchase contract void and may re-sell the space. If owner contacts trustees after resale has occurred, owner is reimbursed the amount originally paid (including any perpetual care amount).
- Discontinuance: any municipal cemetery may, for "public necessity," be discontinued and remains removed upon $\frac{3}{4}$ vote of town meeting/city council. RSA 289:15.
 - Governing body may have remains disinterred and reinterred in another cemetery at municipal expense, in the place designated by nearest surviving relatives (or, if none, cemetery trustees).
 - To be done "prudently" and with proper care and attention.

- Monuments, stones, etc. must be carefully removed and reinstalled at the new location. Any damage is assessed and paid to the injured party using same procedure under RSA 231:75-:78 for damages due to change in grade of public highway.

IV. **Abandoned Cemeteries:**

- Option for municipality to declare as “abandoned” any burial ground within its borders which has been neglected for 20 or more years. RSA 289:19.
- Procedure (RSA 289:20):
 - Advertise in at least one local newspaper. State intention to declare abandoned and take over management, identify the burial ground by name (if any) and location, names and dates of oldest stones (if possible), requesting any direct descendent to contact governing body/chief executive official of town or city.
 - 60-90 days after publication, notice is read at regular Select Board/City Council meeting.
 - Public hearing must be held on the matter
 - If descendants grant permission (or if there were no descendants located), governing body may declare it abandoned by majority vote.
- After declaration, the burial formally becomes a public cemetery under the management control of the cemetery trustees. RSA 289:21.
- Towns and cities may appropriate money to maintain deserted burial grounds and cemeteries which have been formally declared “abandoned.” RSA 289:4.

V. **Private Burial Grounds:**

- Generally, cemetery trustees are only responsible for municipal cemeteries, although there are exceptions.
- Any person/organization may petition governing body or cemetery trustees for permission to care for private burial ground (RSA 289:14-a):
 - Applies to burial ground which has not been maintained AND whose owner is unknown. (Doesn’t need to be declared “abandoned.”)
 - All work done at petitioner’s expense
 - Approval may include reasonable conditions (including permission of owner of surrounding property)
 - Petitioner must advertise in local newspaper to provide notice of the intent to perform work on the burial ground, notify persons with a property interest in such burial ground to bring any objections forward by a certain date.
 - Any marker, gate or other material removed for repair must be stored and kept safely in a manner determined by governing body or cemetery trustees. If it is at risk of “irreparable damage or loss,” it may be placed permanently in a safe facility and the fact of its removal or replacement made visible in the cemetery or in public records.

- No liability for municipality or its officials for acts or omissions of anyone under such an approval, and no liability for anyone allowing access across their private property for such work.
- Owner of land containing a private burial site/ground must follow same record keeping requirements as for municipal cemeteries! RSA 289:5 requires a record of every burial (date, name of decedent, lot where buried), with a copy supplied to the cemetery trustees for maintenance with other records. These records may be obtained by the public under RSA 91-A:4, and the location may be shown on the municipal tax map. Owner of land has no right to keep that information private.
- Burial on private property requires same burial permit and return of burial permit to municipal clerk as for burial in a municipal cemetery. RSA 290:5; RSA 290:6.
- Historic Burial Grounds and Cemeteries, RSA 289:14-b: established before January 1, 1950. Cemetery trustees may work with other organizations to provide information regarding location of such areas for inclusion in databases accessible to the public.
- Trustees may be called upon to consult with Select Board/Mayor when someone requests permission for temporary right of way over private land to access private burial ground for purposes of maintenance, repair or preservation.
 - Requires written permission from owner of land (and if the route recommended by owner is reasonable, that is the one that should be used)
 - Permit from Select Board/Mayor in consultation with trustees regarding location of route, timing, etc.
 - Person exercising right of entry must restore any disturbance they cause to private property.
- If a cemetery is under control of a private cemetery corporation and all lots have been sold, and if the municipality is already holding the maintenance trust funds, the corporation may deed the cemetery to the municipality if the municipality votes to accept it.
 - At this point, cemetery trustees have full management responsibility. However, municipality's financial obligation to such a cemetery is limited to the trust fund income unless municipality decides to appropriate any more. RSA 289:13.

VI. A Few Words on Cemetery Funds:

- Handling Older Trusts:
 - RSA 31:20 – Towns may take and hold in trust gifts, legacies and devises for the care of burial lots. May also receive and hold in trust funds as lots are sold for the care of individual lots. Such trusts obligate the municipality to spend the income only for the stated purpose (i.e., to maintain a particular cemetery or plot). *Boscawen v. Acting Attorney General*, 93 N.H. 444 (1945).
 - Any change to the way they are being held or used likely requires approval from the AG's Office Charitable Trusts Unit and may also require court approval. This includes combining multiple small trusts, spending principal instead of just income, using funds for other/different cemeteries, using for care of more than just one plot, etc.

- Why? Perpetual care funds and other special-purpose trust money is all considered “charitable trust money” which the AG’s Office has jurisdiction over
- To change the purpose, the trust must be formally amended (“cy pres” action), and only a court can approve this, with AG’s consent.
- TIP: begin by gathering and organizing ALL relevant documentation (trust documents, records of bequests, donations, etc.) that will establish who donated the money, when, how much, and exactly what the purpose was at that time.
- TIP: amendment to trusts will need to show that the original purpose has become impossible or impracticable, and amendments will only get approved if they are “as near as possible” to the original intent.
- DO NOT WAIT. This can take many months to accomplish, so plan ahead.
- Newer Trusts:
 - ONLY accept trusts with documentation:
 - donor, amount, date
 - what the purpose is
 - whether principal may be spent at any point
 - whether it must be individual fund or if it can be combined with other perpetual care funds
 - potential ways it can be amended in the future if purpose becomes impracticable or impossible
 - Include details on lot sales contracts about perpetual care funds
- RSA 289:2-a: Town meeting may vote by warrant article to decide whether funds from cemetery lot sales will be deposited into the general fund as ordinary “sale of town property” revenue, or if it will be deposited with trustees of trust funds for cemetery maintenance under RSA 31:19-a.
- Can use this process to set up an expendable trust fund to collect and spend all future income from the sale of cemetery plots for the maintenance of all municipal cemeteries (instead of just one lot). DRA has suggested language for this warrant article: “To see if the town will vote to establish a [title of fund] expendable trust fund pursuant to RSA 31:19-a and RSA 289:2-a, allowing all future proceeds received from the sale of cemetery lots in [municipality] cemeteries, and any interest gained thereon, for the maintenance of cemeteries; and further, to name [agents, such as selectmen] as agents to expend from this fund.”

VII. Green Burials

- Promote decomposition with minimal impact to the environment
 - Without embalming
 - Without permanent outside containers or modern caskets
 - Using biodegradable burial container with minimal use of nails, staples, glue or other fasteners, no latex or metallic products, only plant-based finishes.
 - Minimal gravesite maintenance, with some allowed to return to forested condition. Usually not mowed, raked, cleared or graded, but may be minimally maintained to prevent reforestation.

- May be allowed in any municipal cemetery
- Generally, there are 3 categories of cemeteries allowing green burials:
 - Hybrid – green burial permitted in specific section(s) of conventional cemetery
 - Natural cemetery – specifically for green burial
 - Conservation cemetery – burials on land conserved by a trust to support restoration, recreation and education
- As of February 2023, approximately 15 municipal cemeteries in NH permitting green burials (all hybrid)¹.
- Impediments in NH?
 - Limitations of winter burials (cannot hold non-embalmed remains for months before burial, not all municipalities have a vault to store them)
 - Not necessarily any less expensive than conventional burial
 - If burial has not occurred within 48 hr. after the funeral home receives the remains, it must be embalmed or kept below 40°F, or encased in a closed container. RSA 325:40-b.
 - High rate of cremations in NH (approx. 80%)
 - Not permitted in the largest cemetery in the state (Veterans' Cemetery)
- Regulations should very clearly explain the requirements for green burial, how graves will be dug, level of maintenance and who is responsible for it, and require a waiver.
- Reserve right to refuse permission in cases where cause of death is related to contagious or potentially hazardous virus or disease, and specify procedure for referral and review by NH DHHS, US CDC or NH Medical Examiner's Office.
- Natural burial sites tend to settle considerably over time, which leads to a variety of issues:
 - Excavation equipment may be impractical and/or may damage existing gravesites, so graves may need to be dug by hand. Who will be responsible for this?
 - Clarify in regulations required depth of grave, minimum of material to be placed on top, compacting requirements, extra mounded topsoil to accommodate settling.
 - Traditional gravestones may fall due to settling, so a single flat stone level with the ground may be a better option as a marker.
- Release form: Serves a variety of purposes:
 - Acknowledgment by decedent's next of kin or representative that all requirements for natural burial have been followed
 - Advises them of potential ramifications of natural burial
 - Releases municipality from any liability for those ramifications
 - Clarify who will dig the grave, lower remains, recover it
 - Release of liability for injury or damage suffered as a result of preparing grave, attending burial, lowering remains, replacing excavated materials
 - Potential settling of the ground
 - Disturbance by animals
 - Possible inability to remove and reinter remains in the future

¹ NH Magazine, February 15, 2023