

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of

FIREPLACE HISTORY CLUB, and
MARTIN VAN LITH, Chairman

Petitioners,

VERIFIED ANSWER WITH
OBJECTIONS IN POINT OF LAW

- against -

Index No. 09-28006

TOWN BOARD OF THE TOWN OF BROOKHAVEN

Respondents.
-----X

The Respondents, the Town Board of the Town of Brookhaven by its attorney, Robert Quinlan, Town Attorney, by Barbara M. Wiplush, Senior Assistant Town Attorney, answering the Verified Petition, hereby allege upon information and belief as follows:

1. The Respondents deny knowledge or information sufficient to form a belief as to the allegations contained within the paragraphs 1 and 2.
2. As to the allegations raised in paragraph 4, the Respondents respectfully refer the Court to New York State Town Law Section 291 for the complete text.
3. Upon information and belief as to the allegations contained in paragraph 5, the Respondents deny that the Barteau Cemetery, David Hawkins Cemetery, South Haven Presbyterian Church Cemetery, Carman Family Cemetery and Nathaniel Hawkins Cemetery are in the Town's Fireplace Historic District. Respondents further deny information or knowledge sufficient to form a belief as to the remaining allegations set forth in paragraph 5.

4. The Respondents deny knowledge or information sufficient to form a belief as to the allegations contained within the paragraph 6.
5. Upon information and belief, the Respondents deny and deny knowledge and information sufficient to form a belief as to the allegations in paragraph 7, but admit that the Petitioner met with representatives of the Town Parks Departments, and thereafter the Town Parks Department commenced mowing services.
6. The Respondents upon information and belief denies the allegations in paragraph 8, but admits that the Deputy Parks Commissioner advised the Petitioners that the Town Parks Department would begin to remove the grass and weed the required cemeteries.
7. The Respondents deny and deny knowledge and information sufficient to form a belief as to the allegations in paragraph 9, but admits that Petitioners submitted information consisting of a list and map to the Town Parks Department.
8. The Respondents deny the allegations contained in paragraph 10.

AS AND FOR A FIRST OBJECTION IN POINT OF LAW

THE RESPONDENTS HAS NO LEGAL OBLIGATION UNDER TOWN LAW SECTION 291
TO MAINTAIN PRIVATE CEMETERIES

It is established that a proceeding for mandamus can only be invoked where there is a clear legal right to the relief sought. (See, Maurer v. State Emergency Management Office, 13 A.D.3d 751, 786 N.Y.S.2d 620 (3rd Dept. 2003)) Burch v. Harper, 54 A.D.3d 854, 863 N.Y.S.2d 780 (2nd Dept. 2008); Petitioners have failed to establish their clear legal right to the requested relief.

THE CEMETERIES LISTED IN THE VERIFIED PETITION ARE NOT "PUBLIC"
CEMETERIES

The Respondents respectfully submit that they are cognizant of the sensitive nature of this proceeding and the respect to be given such matter. The Court stated in *Hunter v. Trustees of Sandy Hill*, 6 Hill 407 (1844), "[w]hen these graves shall have worn away; when they who now weep over them shall have found kindred resting places for themselves; when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a grave yard...". *Id.* However, under Town Law Section 291 the Town's legal obligation to remove the grass and weeds arises if the cemeteries are "public" cemeteries. Respectfully, the cemeteries listed in the Verified Petition are not "public" cemeteries, but rather are "private" cemeteries; and, therefore, the Town has no legal obligation to remove the grass and weeds.

The Rural Cemetery Act, (Laws of 1847, Chapter 133) authorized the incorporation of rural cemetery associations. (See, Rural Cemetery Act (Laws of 1847, annexed hereto as Exhibit A)). Pursuant to the Rural Cemetery Act, a number of persons, not less than seven, were authorized to form an association for the purpose of "procuring and holding lands to be used exclusively for a cemetery". *Id.* The certificate of association had to be filed in the county clerk's office in order for the association to be incorporated. {In this matter, there is no record of any certificates of association being filed in the Suffolk County Clerk's Office, (see, Exhibit B, Letter from Sharon Pullen, Archivist Suffolk County)}. Upon the certificate of association being duly filed in the county clerk's office, the Laws of 1847 authorized the incorporated

rural cemetery associations to purchase land, not to exceed 200 acres, to be used “exclusively for a cemetery...”, and after filing a map in the county clerk’s office, the incorporated association may have conveyed lots or plats on the map. (Exhibit A, Laws of 1847); (See, In the Matter of the Petition of the Deansville Cemetery Association to Acquire Title to Lands of Isaac C. Miller and Wife (21 Sickels 569, 66 N.Y. 569 (1876)).

It is the sale and purchase of such mapped lands or plots to the public that renders a cemetery “public”. (See, Conn v. Boylan, 224 N.Y.S.2d 823 (Sup. Ct. Suffolk Cnty. (1962)); (See, Opns. St. Comp. No. 63-456(1963); (See, Exhibit C copies of State Comptroller’s Opinions referred to in this Verified Answer).

Pursuant to Town Law Section 291 title will vest in the town where that cemetery “possessed a public character”. (See, Opns. St. Comp. No. 63-456 (1963)); (See, Opns. St. Comp. No. 4738 (1950)). It is the “public character” of the burial grounds that imposes upon a town the obligation to provide maintenance. (See, Opns. St. Comp. No. 63-456 (1963.)); (See, Opns. St. Comp. No. 60-382 (1960)). The provisions of Town Law Section 291 are not applicable to “private cemeteries”. (See, Opns. St. Comp. No. 60-616 (1960)); [Opns. St. Comp. No. 59-1121 (1960)].

THE CEMETERIES IDENTIFIED BY PETITIONERS ARE “PRIVATE” CEMETERIES.

Where the cemetery is a “private” one, the Town has no obligation to maintain that cemetery. (See, Opns. St. Comp. No. 60-616 (1963)); Opns. St. Comp. No. 46-443 (1959)); (See, Opns. St. Comp. 1406 (1946)). The New York State Cemeteries Name/Location Inventory, 1995-1997, as compiled by the Association of Municipal Historians of New York State (Exhibit D; pages 814-835), specifies the cemetery type for

each of the ten cemeteries identified in the Verified Petition, which is summarized below:

Azel Hawkins Private Graveyard: Type: Family;

Barteau Private Graveyard: Type: Family;

Corwin Private Graveyard: Type: Family

David Hawkins Private Graveyard: Type: Family

King David Hulse: Type: Other; Note: Private Graveyard

Miller Private Graveyard: Type: Family; Note: owned by (1939) George
Miller;

Nathaniel Hawkins: Type: Family; Note: Private Graveyard;

*Rose Private Graveyard: Type: Family;

Samuel Carman & Nathaniel Miller (identified as Carman Family
Cemetery on

GIS information): Type: Family; Note: Private Graveyards; and

So. Haven Presbyterian Church & Cem.: Type: Religious.

Additionally, based on the list of cemeteries provided by Petitioner, Martin Van Lith, the Town Division of Planning was able to identify the Suffolk County Tax Map Parcel Numbers and ownership. (See, Affidavit of Kim Kramer-Romero, Planning Aide).

*The Town of Brookhaven is the owner of the parcel identified by SCTM Number for the Rose Family Cemetery. The remaining cemeteries are “private” and not owned by the Town of Brookhaven.

Pursuant to the Laws of 1847, the incorporated cemetery association after paying for the purchase of lands and debts was required to allocate the proceeds of

future sales to be applied to preserving the cemetery. (Laws of 1847). If the incorporated association for a public cemetery was subsequently dissolved and there are no funds or endowment, then the cemetery could be considered abandoned, where then the town would be responsible for the maintenance. (See, Opns. St. Comp. No. 4738 (1950)). However, this obligation does not arise if the cemeteries are neglected "private" ones.

Although the Petitioners state that the above cemeteries, private burial grounds, are neglected, the provisions of Town Law Section 291 do not apply to the above identified "private" cemeteries. [See, Op. St. Comp. No. 59-1121 (1960)]; [See, Op St. Comp. No. 65-917 (1966)].

AS AND FOR A SECOND OBJECTION IN POINT OF LAW

PETITIONERS DO NOT HAVE STANDING TO MAINTAIN THIS PROCEEDING

The Petitioners do not have standing to maintain this proceeding. In order to satisfy the requisite for standing Petitioners must show that they have or will "suffer an injury" and that their interest is "within the zone of interest to be protected by the law at issue", (see *Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S.2d 428 (1st Dept. 1997) citing *Stanton Corp. v. Department of Labor*, 166 A.D.2d 331, 333, 561 N.Y.S.2d. 6 (1990)). Petitioners failed to satisfy this requirement. The "zone of interest" to be protected under Town Law Section 291 are "public" cemeteries; however, Petitioners' "interest" is that of "private" cemeteries, which are not within the "zone of interest of the law at issue." (See, *Coast Oil New York*, supra.).

WHEREFORE, it is respectfully requested that this Court deny the relief sought

and dismiss Petitioners' Verified Petition in its entirety and grant such other, further and different relief this Court deems just and proper.

ROBERT QUINLAN
BROOKHAVEN TOWN ATTORNEY
Attorney for Respondents

By: 

Barbara M. Wiplush
Senior Assistant Town Attorney
Town of Brookhaven Law Department
One Independence Hill
Farmingville, NY 11738
631(451-6500

TO: Regina Seltzer, Esq.
Attorneys for Petitioners
30 Brewster Lane
Bellport, NY 11713
(631)286-8849

VERIFICATION

Barbara M. Wiplush, attorney at law of the State of New York affirms the following:

I am an Assistant Town Attorney for the Town of Brookhaven and attorney for the Respondents herein.

I have read the foregoing Verified Answer and know the contents thereof. The same is true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is made by affiant and not by the Respondents is that the Respondents are a municipal corporation and affiant is a person acquainted with the facts.

The source of my information and the grounds of my belief as to all matters not stated upon my own knowledge are documents and writings furnished to me by officers, employees and agents of the defendant.

Affirmed: Farmingville, New York
January 13, 2010

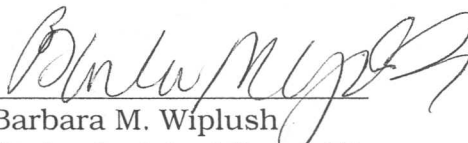

Barbara M. Wiplush
Senior Assistant Town Attorney

EXHIBIT A

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ing fund to liquidate and pay the said state loan; and to no other object or purpose whatever.

§ 6. The legislature may at any time hereafter, alter, modify or repeal this act. Right to repeal.

§ 7. This act shall take effect immediately on the passage thereof.

CHAP. 132.

AN ACT to authorize the inhabitants of Fishkill, to raise money by tax, to pay expenses of repairs done to roads and bridges in said town.

Passed April 21, 1847, "three-fifths being present."

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

§ 1. The inhabitants of the town of Fishkill, in the county of Dutchess, are hereby authorized by a vote at their annual town meeting, to raise by tax on said town, the sum of two thousand dollars, for the purpose of paying the debts already incurred by the commissioners of highways, and which has been applied to the repair and maintenance of roads and bridges in said town, to be levied and collected in addition to, and in the same manner, as other taxes are now authorized by law, to be levied and collected. Money to be raised by tax.

§ 2. This act shall take effect immediately.

CHAP. 133.

AN ACT authorizing the incorporation of rural cemetery associations.

Passed April 27, 1847.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

§ 1. Any number of persons residing in this state, not less than seven, who shall desire to form an association for the purpose of procuring and holding lands to be used exclusively for a cemetery, or place for the burial of the dead, may meet at such time and place as they or a majority of them may agree, and appoint a chairman and secretary by the vote of a majority of the persons present at the meeting; and proceed to form an association by determining on a corporate name, by which the association shall be called and known; Corporations how to be created.

Laws of
1847

by determining on the number of trustees to manage the concerns of the association, which number shall not be less than six, nor more than twelve; and thereupon may proceed to elect by ballot, the number of trustees so determined on; and the chairman and secretary shall immediately after such election, divide the trustees by lot, into three classes; those in the first class to hold their office one year, those in the second class two years, and those in the third class three years. But the trustees of each class, may be re-elected if they shall possess the qualification hereinafter mentioned. The meeting shall also determine on what day in each year, the future annual elections of trustees shall be held.

Certificate of
incorporation

§ 2. The chairman and secretary of the meeting, shall, within three days after such meeting, make a written certificate, and sign their names thereto, and acknowledge the same before an officer authorized to take the proof and acknowledgment of conveyances in the county where such meeting shall have been held; which certificate shall state the names of the associates who attended such meeting; the corporate name of the association, determined upon by the majority of the persons who met; the number of trustees fixed on, to manage the concerns of the association; the names of the trustees chosen at the meeting, and their classification, and the day fixed on for the annual election of trustees; which certificate it shall be the duty of the chairman and secretary of such meeting, to cause to be recorded in the clerk's office of the county in which the meeting was held; in a book to be appropriated to the recording of certificates of incorporation.

General
powers.

§ 3. Upon such certificate, duly acknowledged as aforesaid being recorded, the association mentioned therein, shall be deemed legally incorporated, and shall have and possess the general powers and privileges, and be subject to the liabilities and restrictions contained in the third title of the eighteenth chapter of part first of the Revised Statutes. The affairs and property of such associations, shall be managed by the trustees, who shall annually appoint from among their number, a president and a vice-president, and shall also appoint a secretary and a treasurer, who shall hold their places during the pleasure of the board of trustees; and the trustees may require the treasurer to give security for the faithful performance of the duties of his office.

Land may be
purchased for
cemeteries.

§ 4. Any association incorporated under this act, may take by purchase or devise, and hold, within the county in which the certificate of their incorporation is recorded, not exceeding two hundred acres of land; to be held and occupied exclusively for a cemetery for the burial of the dead. Such land or such parts thereof, as may from time to time be re-

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quired for that purpose, shall be surveyed and sub-divided into lots or plats of such size as the trustees may direct, with such avenues, paths, alleys and walks as the trustees deem proper; and a map or maps of such surveys, shall be filed in the clerk's office of the county in which the land shall be situated. And after filing such map, the trustees may sell and convey the lots or plats designated on such map, upon such terms as shall be agreed, and subject to such conditions and restrictions, to be inserted in or annexed to the conveyances, as the trustees shall prescribe. The conveyances to be executed under the common seal of the association, and signed by the president or vice-president, and the treasurer of the association. Any association incorporated under this act, may hold personal property to an amount not exceeding five thousand dollars, besides what may arise from the sale of lots or plats.

§ 5. The annual election for trustees, to supply the place of those whose term of office expires, shall be holden on the day mentioned in the certificate of incorporation, and at such hour and place as the trustees shall direct; at which election shall be chosen such number of trustees, as will supply the places of those whose term expires. The trustees chosen at any election subsequent to the first, shall hold their places for three years, and until others shall be chosen to succeed them. The election shall be by ballot, and every person of full age, who shall be proprietor of a lot or plat in the cemetery of the association, containing not less than four hundred square feet of land, or if there be more than one proprietor of any such lot or plat, then such one of the proprietors as the majority of joint-proprietors shall designate to represent such lot or plat, may either in person or by proxy, give one vote for each plat or lot, of the dimensions aforesaid; and the persons receiving a majority of all the votes given at such election, shall be trustees to succeed those whose term of office expires. But in all elections after the first, the trustees shall be chosen from among the proprietors of lots or plats. And the trustees shall have power to fill any vacancy in their number, occurring during the period for which they hold their office. Public notice of the annual elections shall be given in such manner as the by-laws of the corporation shall prescribe.

§ 6. The trustees at each annual election, shall make reports to the lot proprietors of their doings, and of the management and condition of the property and concerns of the association. If the annual election shall not be held on the day fixed in the certificate of incorporation, the trustees shall have power to appoint another day, not more than sixty days thereafter, and shall give public notice of the time and place,

at which time the election may be held with like effect as if holden on the day fixed on in the certificate. The office of the trustees chosen at such time, to expire at the same time as if they had been chosen at the day fixed by the certificate of incorporation.

Lots and
plats to be
indivisible.

§ 7. All lots or plats of ground designated on the maps filed as aforesaid, and numbered as separate lots by the incorporation, shall be indivisible, but may be held and owned in undivided shares. One-half at least of the proceeds of all sales of lots or plats shall be first appropriated to the payment of the purchase money of the lands acquired by the association, until the whole purchase money shall be paid, and the residue thereof to preserving, improving and embellishing the said cemetery grounds and the avenues, or roads leading thereto, and to defraying the incidental expenses of the cemetery establishment. And after the payment of the purchase money and the debts contracted therefor, and for surveying and laying out the land, the proceeds of all future sales shall be applied to the improvement, embellishment and preservation of such cemetery, and for incidental expenses and to no other purpose or object.

Penalty.

§ 8. Any person who shall wilfully destroy, mutilate, deface, injure or remove any tomb, monument, grave stone, building or other structure, placed in any cemetery of any association incorporated under this act, or any fence, railing or other work for the protection or ornament thereof, or of any tomb, monument, or grave stone, or other structures aforesaid, or of any plat or lot within such cemetery, or shall wilfully destroy, cut, break or injure any tree, shrub or plant, within the limits of such cemetery, shall be deemed guilty of a misdemeanor; and such offender shall also be liable in an action of trespass; to be brought in all such cases in the name of such association, to pay all such damages as shall have been occasioned by his unlawful act or acts. Such money when recovered shall be applied by the trustees to the reparation or restoration of the property so destroyed or injured.

Property
may be held
for improv-
ing ceme-
tery.

§ 9. Any association incorporated pursuant to this act, may take and hold any property, real or personal, bequeathed or given upon trust, to apply the income thereof under the direction of the trustees of such association, for the improvement or embellishment of such cemetery, or the erection or preservation of any buildings, structures, fences or walks, erected or to be erected upon the lands of such cemetery association, or upon the lots or plats of any of the proprietors; or for the repair, preservation, erection or renewal of any tomb, monument, grave stone, fence, railing, or other erection, in or around any cemetery lot, or plat; or for planting and cultivating trees, shrubs, flowers or plants, in or around

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any such lot or plat, or for improving or embellishing such cemetery, or any of the lots or plats in any other manner or form; consistent with the design and purposes of the association according to the terms of such grant, devise or bequest.

§ 10. The cemetery lands and property of any association, formed pursuant to this act, shall be exempt from all public taxes, rates, and assessments; and shall not be liable to be sold on execution, or be applied in payment of debts, due from any individual proprietors. But the proprietors of lots or plats in such cemeteries, their heirs, or devisees, may hold the same exempt therefrom so long as the same shall remain dedicated to the purpose of a cemetery, and during that time, no street, road, avenue, or thoroughfare shall be laid through such cemetery, or any part of the lands held by such association, for the purposes aforesaid; without the consent of the trustees of such association, except by special permission of the legislature of the state.

Cemetery and property not liable to be sold.

§ 11. Whenever the said land shall be laid off into lots or plats, and such lots or plats or any of them shall be transferred to individual holders, and after there shall have been an interment in a lot or plat so transferred, such lot or plat from the time of such first interment shall be forever thereafter inalienable, and shall upon the death of the holder or proprietor thereof descend to the heirs at law of such holder or proprietor, and to their heirs at law forever: Provided, nevertheless, that any one or more of such heirs at law may release to any other of the said heirs at law his, her or their interest in the same, on such conditions as shall be agreed on and specified in such release, a copy of which release shall be filed with the town clerk of the town or the register of the city within which the said cemetery shall be situated. And provided further, that the body of any deceased person shall not be interred in such lot or plat, unless it be the body of a person having at the time of such decease an interest in such lot or plat, or the relative of some person having such interest, or the wife of such person, or her relative, except by the consent of all persons having an interest in such lot or plat.

Transfers of lots and plats to individuals.

§ 12. The Legislature may at any time alter or repeal this act.

Right to repeal.

§ 13. This act shall effect immediately.

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EXHIBIT B



SUFFOLK COUNTY CLERK'S OFFICE

Sharon A. Pullen
Archivist
Office of the County Clerk
Historic Documents Library
310 Center Drive
Riverhead, NY 11901

Phone: 631-852-200 extn.700
Fax: 631-852-2004

Fax

To: Barbara Wiplush/Town of Brookhaven From: Sharon A. Pullen
Fax: 631-451-6505 Date: November 5, 2009
Phone: Pages: 1, including this cover
Re: Cemetery Associations

Dear Barbara,

I searched both the electronic and text indexes of Corporations and found no record of any of the cemeteries on the list you sent to me. Other cemetery associations from the same era are indexed.

It appears that the cemeteries on your list were not recorded as cemetery associations in the Office of the County Clerk.

Sincerely,

Sharon A. Pullen, C.A.
Archivist
Office of the County Clerk

EXHIBIT C

Opinion No. 63-456

TOWN LAW, §291: Town Law, §291 does not vest title to burial grounds in the town where there is no evidence that the burial ground in question ever possessed a public character and was used only for the interment of four members of the same family all of whom died prior to 1880.

Statement of Fact

Within a certain town, there is a one-half acre plot of ground containing four dead bodies, all members of the same family and all of whom were interred prior to 1880.

Inquiry

Has title to the plot in question vested in the town by virtue of Town Law, §291?

Statement of Law

Town Law, §291 provides in part as follows:

"The title to every lot or piece of land which shall have been used by the inhabitants of any town in this state as a cemetery or burial ground for the space of fourteen years shall be deemed to be vested in such town, and shall be subject in the same manner as other corporate property of towns, to the government and direction of town board. * * *"

This Department has expressed the view that the above statute does not vest title in or permit a town to assume the maintenance of a family burial ground (15 Op. State Compt. 205, 1959; 15 Op. State Compt. 477, 1960; 6 Op. State Compt. 248.)

In Conn v. Boylan, Misc. 2d _____, 224 N.Y.S. 2d 823, 1962, the Court first established that the burial grounds there in question were public in the sense that lots were held out for sale to the public as early as 1857, before holding that title to the burial ground vested in the town. The clear inference from the rationale of the Conn case is that Town Law, §291 vests title in the town only to cemeteries which have a public character, although the ownership thereof might remain in private individuals or association.

Opinion No. 63-456 - 2.

Conclusion

Town Law, §291 does not vest title to burial grounds in the town where there is no evidence that the burial ground in question ever possessed a public character and was used only for the interment of four members of the same family all of whom died prior to 1880.

July 2, 1963.

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

The officers and employees who executed the undertakings include: (1) the deputy county treasurer; (2) the deputy county clerk; (3) three employees in the county clerk's office; and (4) the clerk of the surrogate's court.

STATEMENT OF LAW

While the undertakings were undoubtedly a desirable measure of protection for the county treasurer, county clerk and surrogate (see County Law, § 141; Surrogate's Court Act, § 5; and *Hartwell v. Riley*, 1900, 47 App. Div. 164, 62 N. Y. S. 317), the county derives no benefit therefrom.

CONCLUSION

In our opinion, therefore, the expense involved in procuring these undertakings is not a county charge under provisions of the present County Law (cf. County Law of 1950, § 403). Payment of the expense would be, in effect, a use of county moneys, not for a county purpose, but for the sole benefit of the officials to whom the undertakings run (see 6 Op. State Compt. 166, 1950).

September 11, 1950.

Opinion No. 4738

TOWN LAW, SECTION 291.

Discussion re authority of town to provide care for certain cemeteries under cited section.

Concerning two old family burial plots, you state that the farms on which they are located are now owned by persons not interested in the old families and that the plots were not mentioned in the deeds conveying the farms. In our opinion such plots remain private in nature and, therefore, are not such as the town may lawfully care for under Town Law, § 291 (2 Op. State Compt. 353, 1946; see also *Hines v. State*, 1912, 126 Tenn. 1, 149 S. W. 1058, holding that where land has been appropriated for use as a private cemetery, title thereto cannot thereafter be transferred in any manner so as to affect the rights incident to the private cemetery).

You make reference to the portion of Town Law, § 291, which provides in substance that title to lands which shall have been used by the inhabitants of any town as a cemetery or burial ground for 14 years shall be deemed to be vested in the town. It is our belief that this provision relates to public rather than private burial grounds and, therefore, that it does not apply to these two old family burial plots.

With regard to the "small cemetery" you indicate that it was once owned by a cemetery association but that it has been abandoned. You do not state whether or not the association still exists. It is our opinion that if the association remains in existence, even

though not actively functioning, the town may not care for such cemetery (2 Op. State Compt. 353, 468, 1946). On the other hand, if the association has been dissolved pursuant to law, and assuming that there is no special fund or endowment for the care of the cemetery, we believe that it may properly be regarded as an abandoned cemetery for the care of which the town may provide under Town Law, § 291.

In a situation where a town may lawfully provide care for an abandoned cemetery, under Section 291, it may spend not to exceed \$300 in any one year for the removal of grass and weeds from such cemetery (note that in Nassau and Westchester counties this amount may be exceeded). Such amount may be raised by tax.

September 12, 1950.

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

Statement of Law: Town Law §175(3) provides that membership in a volunteer fire company shall not disqualify any such fire district commissioner. Thus, by statute, these positions are deemed compatible. A different situation is presented, however, with respect to the office of chief engineer and fire commissioner.

First, while nominations for these offices are made by members of the fire department of the fire district, Town Law §176(11-a) provides that the board of fire commissioners shall consider such nominations and make the final determination as to whether a certain nominee should be appointed. Thus, a fire commissioner, nominated to the office of fire chief, would find himself sitting as a member of the board which would act on his nomination. This is contrary to the rule that a public body may not appoint one of its own members to a position over which it has a power of appointment (*Macrum v. Hawkins*, 261 NY 193, 184 NE 817 (1933); *Wood v. Town of Whitehall*, 120 M 124, 197 NYS 789 (1923), aff'd 206 AD 786, 201 NYS 959; 7 Op St Compt 83 (1951)).

Second, Town Law §176(11) states that the fire commissioners may adopt regulations and enforce discipline with respect to members of all fire companies and fire departments. Thus, if a fire commissioner were appointed fire chief, questions of his behavior as fire chief might conceivably come before the board of fire commissioners, of which he is a member, to be determined. Since it is evident that one office is subordinate to and inconsistent with the other, the offices are incompatible and may not be held by the same person (*Peo ex rel Ryan v. Green*, 58 NY 295 (1874); *Peo v. Irwin*, 166 M 492, 2 NYS 2d 686 (1938); 11 Op St Compt 63 (1955); 5 Op St Compt 463 (1949)).

Conclusion: A fire commissioner may not serve as both commissioner and chief of a volunteer fire company at the same time.

May 13, 1960.

OPINION 60-382

Cemeteries—Town Responsibilities.—A town may not properly care for a private cemetery nor become liable for damages resulting from hazardous conditions therein (Town L §291).

Statement of Fact: There exists in a town an old cemetery which has been unattended for 15 years, but which is still used as a burial ground. There is evidence that the said cemetery had been, and probably still is, under the control of one Norfolk Highland Cemetery Incorporated, although the office of the Secretary of State has no record of such incorporated association.

Two individuals, known as trustees of the said association, are in

existence, and these individuals have control of active funds, now in the sum of \$175.

Inquiry: What is the status of an old cemetery in a town that has been unattended for 15 years, and is still used as a burial ground?

Statement of Law: Town Law §291 provides, in part, that title to a lot or piece of land which shall have been used by the inhabitants of any town as a cemetery or burial ground for the space of 14 years shall be deemed vested in such town, and shall be subject in the same manner as other corporate property of towns, to the government and direction of the town board. The town board may adopt regulations for the proper care of any such cemetery and burial ground, and for regulating the burial of the dead therein.

This section also directs that the town board must provide for removal of grass and weeds at least twice in each year from any cemetery or burial ground; by whomsoever owned, in that town where such control is not vested by other provisions of law in the town or in trustees or other corporate body.

In two previous opinions, this Department has stated that Town Law §291 applies to public rather than private burial grounds, and does not authorize a town to assume the burden of care and maintenance of a "neglected" private cemetery or burial plot (6 Op St Compt 248 (1950)).

Because there still remain certain individuals known as "trustees" of an alleged cemetery association, as well as active funds of such association, we must assume that such association was and undoubtedly still is in existence. This is a question of fact, however, which we are not in position to determine. If additional research of local records reveals that there is, in fact, a cemetery association, it would follow that the subject cemetery is a "neglected private cemetery" to which Town Law §291 has no application.

We invite your attention to the provisions of Membership Corporations Law §79-a, which authorizes conveyance by a cemetery corporation to a town of its cemetery lands. Again, whether said Norfolk Highland Cemetery Incorporated is a cemetery corporation established by some special act is a question of fact we cannot determine.

Conclusion: The status of the cemetery must depend upon its nature as a private or public cemetery as determined from available records.

July 1, 1960.

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

ordinances be published are customarily held inapplicable to compilations (see Antieau, Mun Corp Law, Vol 1, §4.16 and cases thereunder). Codification, however, is generally true legislation and is accompanied by repeal of all previous ordinances; and ordinances omitted or in conflict with the code will not thereafter be municipal law (*ibid*).

It is generally recognized, therefore, that a code is more than a published reassembly of related ordinances by a village clerk or other qualified person. A code involves enactment by the board of trustees of a modernized restatement of the law. Codification includes the assembly of all law presently in effect, a culling of the obsolete, a restatement of the germane and permanent law, a grouping of it in logical order, and submission to and enactment by the local legislative authority. An important characteristic of the process is the repeal of the old; equally so is enactment of the new. Through enactment, the code derives its conclusive and exclusive right to enforcement. Without it, it is but *prima facie* the law (Address given by William P. Leonard, Legislative Reference Librarian, New York State Library, to Training School for Fiscal Officers and Municipal Clerks of the Cities and Villages of the State of New York, September 18, 1958, Albany, New York; see Page 481 herein).

Accordingly, it is thought that a codification of village ordinances would necessarily involve, *per se*, the enactment of a village ordinance and not merely the adoption of a resolution.

The notice of the hearing required before the enactment of such ordinance must be published (Vil L §90), and the ordinance may not take effect prior to the publication thereof (§95).

Village Law §89(59) (promotion of public welfare) by implication permits the village board of trustees to enact a codification ordinance. No authority exists to codify such ordinances by adoption of a resolution.

(2) Village Law §89(28) authorizes the village to establish and expend from a publicity fund a certain amount of money for enumerated purposes and "for such other and additional purposes as may tend to promote the general commercial and industrial welfare of the village".

We do not believe that such provision of law authorizes the village to pay for the cost of printing booklets which would set forth the village ordinances as codified.

Conclusions: (1) The village may not codify its ordinances merely by adopting a resolution. Such codification may be accomplished only by enacting an ordinance.

(2) The village may not pay, from the publicity fund, for the costs of printing booklets which would set forth the village ordinances as codified.

February 5, 1960.

OPINION 59-1121

Neglected Cemeteries—Care by Town.—If a neglected cemetery in a town is not a private cemetery, the town board must provide certain care therefor (Town L §291(1)). If it is private in nature, the town may not render such care (State Const Art VIII §1).

Statement of Fact: There exists in a town an ancient cemetery in which interments have not been made within the memory of any living resident. The cemetery is not owned or controlled by trustees or any other corporate body. Finally, there is no evidence to indicate that the cemetery was ever used by the inhabitants of the town as a common cemetery.

Inquiry: Is the town mandated to care for such cemetery?

Statement of Law: Town Law §291(1) provides in reference to burial grounds, in part, as follows:

* * * The town board of any town must also provide for the removal of grass and weeds at least twice in each year from any cemetery or burial ground, by whomsoever owned, in such town, where such control is not vested by other provisions of law in the town or in trustees or other corporate body, and provide for the preservation, care and fencing of any such cemetery, * * *

The statute does not apply to private cemeteries, since the Constitution of the State of New York (Art VIII §1) provides, in part as follows:

No * * * town * * * shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking * * *.

Accordingly, the answer to this inquiry depends upon the nature of the cemetery. If it is, in fact, a private cemetery, the town may not undertake to care for it (6 Op St Compt 248 (1950); 2 Op St Compt 353, 468 (1946)).

This Department may not resolve the question of fact concerned. If the cemetery is, in fact, not a private cemetery, the town must render certain appropriate care therefor.

Conclusion: It is a question of fact as to whether the neglected cemetery is private in nature. If private, the town may not properly care for it. If, however, it is found to be not private in nature, the town must care for such neglected cemetery.

February 10, 1960.

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

OPINION 60-616

Cemetery Maintenance—Town Responsibility.—A town board must provide for the removal of grass and weeds from all cemeteries, other than private burial grounds, which are abandoned or not controlled by any existing board or body, and where there exists no special fund or endowment for such care. Whether or not a particular cemetery is of a private or public nature is a question of fact which can best be determined by available local records (Town L. §291(1)).

Inquiry: May a town clean up an abandoned cemetery in a village within the town?

Statement of Law: Town Law §291(1) provides, in reference to burial grounds, as follows:

* * * the town board of any town must also provide for the removal of grass and weeds from all cemeteries, other than private burial grounds, which are abandoned or not controlled by any existing board or body and for the care of which there exists no special fund or endowment * * *

This statute does not apply to private cemeteries. Moreover, if an association connected with a cemetery remains in existence even though not actively functioning, the town may not care for such cemetery (6 Op St Compt 248 (1950)).

The determination of whether a cemetery is "abandoned", within the terms of the statute, does not necessarily mean ownership relinquishment as a matter of established fact, but rather contemplates a condition of abandonment existing as a matter of commonly accepted fact (1952 Op Atty Gen 173). If it is determined that a cemetery is "abandoned" the fact that it is within a village in the town does not relieve the town of the responsibilities imposed on it by §291(1).

The amount which may be expended in any one year for the care of an abandoned cemetery is limited by the statute to \$500.

Conclusion: A town board must provide for the removal of grass and weeds from all cemeteries, other than private burial grounds, which are abandoned or not controlled by any existing board or body, and where there exists no special fund or endowment for such care. Whether or not a particular neglected cemetery is of private or public nature is a question of fact which can best be determined by available local records.

August 15, 1960.

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

Inquiry: May a notary public also serve as justice of the peace?

Statement of Law: There is no constitutional or statutory prohibition against the justice of the peace also being a notary public. The remaining question is whether the offices are "incompatible" within the common law meaning of that word.

In *Peo ex rel Ryan v. Greene* (58 NY 295 (1874)), a leading New York case, the Court of Appeals stated that incompatibility between two offices is an inconsistency in the functions of the two (e.g., judge and clerk of the same court or an officer who presents his personal accounts subject to audit to himself as the officer whose duty it is to audit such accounts). The offices must subordinate one another, and they must, per se, have the right to interfere one with the other before they are incompatible at common law.

We believe that there is nothing to prevent the justice of the peace, upon being appointed notary public, from discharging his duties as justice of the peace. It is our opinion, therefore, that the offices are not incompatible. An opinion of the Attorney General (1899 Op Atty Gen 267) held that the office of notary public is not incompatible with any other state office, unless the statute relating to the other office so declares. And another opinion of this Department (3 Op St Compt 405 (1947)) held that a town officer may be appointed a notary public.

Conclusion: The offices of justice of the peace and notary public are not incompatible.

August 9, 1960.

OPINION 60-621

Sewer Systems—Connection of Private Lines.—A city may conditionally authorize, by local law, the connection to the city sewer system of a sewer line constructed by a county (City HRL §11).

Inquiry: May a city contract with a county to dispose of sewage from a county-owned building located outside the city limits?

Statement of Law: We fail to find any provision of law which specifically authorizes a city to enter into such a contract. However, on the basis of an earlier opinion (3 Op St Compt 194 (1947)), we believe that the city could properly authorize the contract in question by a local law.

In one case dealing with such a situation (*Kelly v. Miller*, 78 M 584, 139 NYS 991 (1912)), the courts refused to prevent city officials from permitting such a connection, although no statute specifically authorized it, where there was no waste of city funds or property, where the city's system was more than adequate to handle the additional sewage, and where the permission was for a temporary connection.

Sale of surplus water and electricity by municipalities to persons outside their limits might be regarded as an analogous situation. Cir-

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BOORUM & PEASE "NOTES" ®

59-443

TOWN LAW § 291: A town may not assume control of a private burial plot no longer used or owned by the private family.

Inquiry

May a town assume control of a private burial plot no longer used or owned by the private family?

Statement of Law

Town Law § 291, which provides that title to lands which have been used by the inhabitants of a town as a cemetery or burial ground for fourteen years shall be deemed to be vested in the town, "relates to public rather than private burial grounds." (6 Op. State Compt. 248[1950]). Section 291 does not authorize a town to assume the burden of care and maintenance of a "neglected" private cemetery or burial plot.

There is a significant difference between "neglected", and "abandoned" cemeteries. To be considered "abandoned", a cemetery must have lost completely its identity as a burial ground. So long as bodies remain interred in its soil, and the graves remain discernible, however, a cemetery is not "abandoned", in the statutory sense, (1952 Op. Atty. Gen. 173).

Conclusion

A town may not assume control of a private burial plot no longer used or owned by the private family.

July 29, 1959

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

BOORUM & PEASE "NOTES" ®

TOWN LAW, §291(1): Discussion of what interest a town may have in an old cemetery.

January 11, 1966

65-917

Donald Tracy, Esq.
Town Attorney of Clarkstown
10 Maple Avenue
New City, New York 10956

Re: Town of Clarkstown

Dear Mr. Tracy:

This is in reply to an inquiry dated December 10, 1965, from the former town attorney. We have been informed of the following:

There exists in the Town of Clarkstown a cemetery in which the last interment was in 1905 and the first around 1782. Upon investigation it has been ascertained that the town of Clarkstown has maintained the cemetery for over twenty years. Recently an order was obtained by the alleged owner of the cemetery to remove the bodies. The Town of Clarkstown was not made a party to the proceedings.

Based on the above factual situation we were asked whether the town has acquired any proprietary interest in the cemetery in view of the provisions of section 291 of the Town Law.

Section 291(1) of the Town Law involves three classes of cemeteries. First, there are those cemeteries or burial grounds in which title thereto is by law vested in the town after such cemeteries have been used by the inhabitants of the town for at least fourteen years. The second class consists of those cemeteries which may be privately owned but where control thereof is not vested by other provisions of law in the town or in trustees or some other corporate body. As to this class, the town acquires no title to the land but is required to furnish specified maintenance. The third class consists of those cemeteries, other than private burial grounds, which are abandoned (neglected) or not controlled by any existing board or body and for the care of which there exists no special fund or endowment. Title to these cemeteries, like those in the second category, does not pass to the town, but the town is required to perform limited maintenance. Town Law, section 291, applies to public rather than private burial grounds (6 Op. State Compt. 248 (1950), 16 Op. State Compt. 194, (1960)).

Donald Tracy, Esq.

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65-917

Unless the cemetery in question falls within the first category, the town could not prevent the alleged property owner from removing the remains of those buried therein. The cemeteries in this category are actually those acquired by public user after fourteen years.

Land for a public cemetery may be acquired by purchase, dedication or condemnation. In regard to a dedication of land for a public cemetery, the court in Hunter v. Trustees of Sandy Hill, 1844, 6 Hill 407 stated:

"A dedication may be made without writing * * * as well as by deed. It is not necessary that the owner should part with the title which he has; for dedication has respect to the possession and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has."

At common law where land had been dedicated for public cemetery purposes, the right of the public in the cemetery was a mere easement. The title to the land was not in the public nor in the relatives of the persons buried therein. If the public abandoned the cemetery, it would lose the exclusive right to possession and enjoyment and the original owner or his heirs or assigns would reacquire the right of possession and enjoyment. (Hutchinson Land Co., Inc. v. Whitehead Brothers Co., 1926, 127 Misc. 558, 217 NYS 413, aff'd 218 App. Div. 682, 219 NYS 413).

It was to wipe out this reversionary interest that the Legislature provided for the vesting of title in the town after fourteen years.

Assuming that the cemetery in question is a public cemetery (see Conn v. Boylan, 1962, 224 NYS 2d 823) and has been used by the inhabitants of the town as such for at least fourteen years, then it is our opinion that pursuant to the provisions of section 290(1) of the Town Law, title to the cemetery is vested in the Town of Clarkstown. The town of course will have to show that the cemetery is not a private burial ground and that the public used it for at least fourteen years.

Donald Tracy, Esq.

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65-917

Although the last interment in the cemetery in question was in 1909, the law has long provided for acquisition of a public cemetery by public user after fourteen years. Section 291 of the Town Law is derived from Town Law of 1909, chap. 63, §332. Section 332 was derived from Town Law of 1890, chap. 569, §195. Section 195 contained the provision for vesting of title after fourteen years of public use. This fourteen year provision was also found in the Revised Statutes of 1827-1828 (Revised Statutes, 1827-1828, Part 1, Chapter XI, Title VII, §1). In fact, chapter 67 of the Laws of 1826 provided for the vesting in towns of title to lands which had been used for a long time as a public burial place.

However, as indicated above, if the town has not acquired title as aforesaid, the mere fact of yearly maintenance gives it no proprietary rights.

We trust that the above will be of assistance to you.

Very truly yours,

ARTHUR LEVITT
State Comptroller

By

Paul A. Hughes
Associate Counsel

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This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

The county treasurer, except where he receives a salary in lieu of fees, shall be entitled to receive for all services performed by him under this article two per centum of all moneys disbursed by him as provided herein.

County Law §201 provides in part as follows:

Notwithstanding the provisions of any general law other than this chapter or of any special law to the contrary, each board of supervisors shall fix the salary of all officers paid from county funds, except the members of the judiciary. Such salary shall be in lieu of all fees, percentages, emoluments or other form of compensation payable for services rendered in performance of the powers and duties of the office * * *

In an earlier opinion interpreting this section, this Department stated that it was the intention of the Legislature that, on and after January 1, 1951, the salary fixed by the board of supervisors for all county officers paid from county funds was to be in lieu of all fees and other compensation received by any such officer, which receipts should be long to the county (7 Op St Comp 64 (1951)).

However, County Law §2 provides that that law applies to all counties except one wholly contained within a city and except one operating under an alternative form of county government giving the board of supervisors general powers of local legislation.

It thus appears, in the first instance, that, in all counties not so excepted, the treasurers, being paid salaries in lieu of fees, are not entitled to the percentages authorized by Agriculture and Markets Law §123(1)(c).

Of the first class of excepted counties, we find those within the City of New York, which are not subject to review by this Department. Of the second class, there are presently four: Monroe, Nassau, Westchester, and Erie.

In each such instance, however, either by provisions of the county charter or by local law, the treasurer or equivalent officer is paid a fixed salary in lieu of all fees and other compensation. It follows, then, that the quoted provision of the Agriculture and Markets Law has no application in counties outside the City of New York.

Conclusion: A county treasurer outside the City of New York is not entitled to receive 2% of dog fund moneys disbursed by him, either to his personal use or to the use of the county.

February 29, 1960.

OPINION 59-1046

Neglected Cemeteries—Care by Town.—County Law §222(5-a), which authorizes counties to maintain abandoned cemeteries, does not prevent a town from maintaining such a cemetery (Town L §291).

Inquiry: In view of County Law §222(5-a), which authorizes counties to maintain abandoned cemeteries, is it now proper for a town to appropriate money for such a purpose?

Statement of Law: Town Law §291 requires towns to care for certain types of cemeteries within the town.

County Law §222(5-a) (added by L 1959 ch 398) provides in part as follows:

The board of supervisors of any county may, by the affirmative vote of two-thirds of the total membership of the board, provide for the perpetual care, upkeep and maintenance of any cemetery located within the county if such cemetery is abandoned or not controlled by an existing board or body and for the care of which there exists no special fund or endowment and the expense thereof may be appropriated from funds in the county treasury not otherwise appropriated. * * * (emphasis added)

It follows that, where a town has appropriated moneys and is caring for a cemetery, a county is not authorized to do so.

Conclusion: County Law §222(5-a) does not prohibit towns from maintaining abandoned or neglected cemeteries.

December 23, 1959.

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

EXHIBIT D

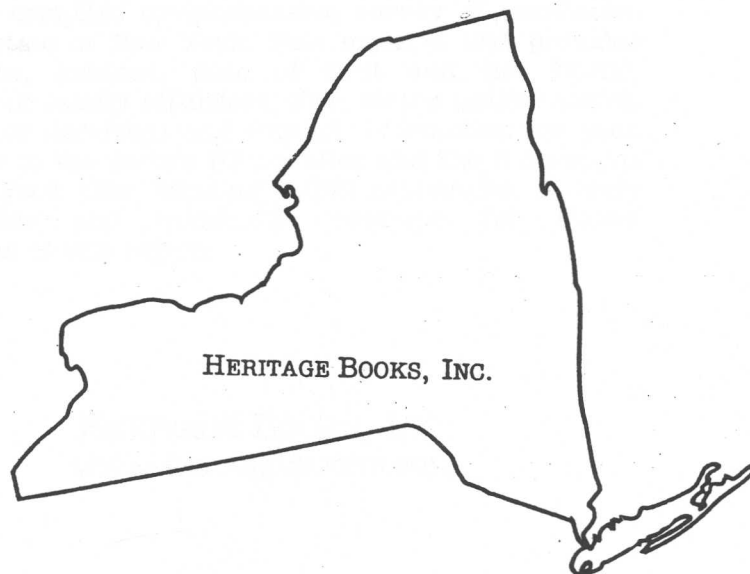
NEW YORK STATE

CEMETERIES NAME/LOCATION INVENTORY

1995-1997

Compiled by

The Association of
Municipal Historians
of New York State



Part I

EXHIBIT D
COPIED
SEPARATELY
(NOT IN THIS FILE)

STATE OF NEW YORK)

) SS.:

COUNTY OF SUFFOLK)

I, Gina Guccione, being sworn, depose and say:


On January 13, 2009, I served the within Verified Answer with Objections in Point of Law with supporting Affidavit of Kim Kramer-Romero and Carol A. Bissonette, by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name, via Federal Express:

Regina Seltzer, Esq.
30 Brewster Lane
Bellport, NY 11713

Gina Guccione
GINA GUCCIONE

Sworn to before me on
this 12th day of January, 2010.

this 12th day of January, 2010


Notary Public

DEBBIE L. MASTERSON
NOTARY PUBLIC, State of New York
No. 01MA4694984, Suffolk County
Term Expires February 28, 2015

Index No. Year RJ1 No. Hon.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Application of
FIREPLACE HISTORY CLUB,
and MARTIN VAN LITH, Chairman,
Petitioners,
For a Judgment Pursuant to
CPLR Article 78

Index No. 09-28006

-against-
TOWN BOARD OF THE TOWN OF BROOKHAVEN,

Respondents.

VERIFIED ANSWER WITH OBJECTIONS IN POINT OF LAW

Robert F. Quinlan, BROOKHAVEN TOWN ATTORNEY
BY: Barbara M. Wiplush
Attorney for Respondents.

Office and Post Office Address, Telephone
1 INDEPENDENCE HILL
FARMINGVILLE, NEW YORK 11738
(631) 451-6500

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To

Signature (Rule 130-1.1-a)

Print name beneath

Attorney(s) for

Barbara M. Wiplush, Senior Asst. Town Atty.

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Please take notice

☐ NOTICE OF ENTRY

that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order
settlement to the HON.
of the within named court, at
on

of which the within is a true copy will be presented for
one of the judges

at M

Dated,

Yours, etc.

Robert F. Quinlan

BROOKHAVEN TOWN ATTORNEY

BY:

To

Attorney for

Attorney(s) for

Office and Post Office Address
1 INDEPENDENCE HILL