

3. Respondents allegation that there is a material issue of fact as to whether the

historic cemeteries here are “public or private cemeteries” is totally without merit and belied by the actions of the Town Board.

4. As noted in our papers, Town officials have repeatedly acknowledged the Town’s obligations pursuant to Town Law Section 291 and have apologized for their failure to comply. There is no question that the Town Board of the Town of Brookhaven considers these historic cemeteries “public cemeteries”, as is obvious by the fact that they recently expended public funds to hire a consulting firm for historic assessment of the cemeteries at issue here. (Exhibit A). The Town Board could not have taken this action if the cemeteries were not acknowledged by the Town to be historic “public cemeteries”.

5. Petitioners position is actually reinforced by the case of *Conn v Boylan*, 224 NYS2d 823, cited by Respondents. In *Conn*, the dispute was between a church trustee who authorized removal of headstones from a cemetery that had been a church cemetery but had become a “public cemetery”. The Court concluded that the cemetery was a public cemetery and noted,

“it is the public policy of this state that cemeteries shall be kept in proper condition and appearance. ... It is more plainly pronounced in the authority granted to... provide for the perpetual care of any cemetery which is abandoned (and here the word should be construed to mean neglected) or not controlled by an existing board or body for the care of which there exists no special fund or endowment... Section 291 of the Town Law.

Town Law Section 291 has, in fact automatically vested the title to the cemetery in question in the Town of Brookhaven. That section even mandates the removal of grass and weeds at least three times in each year from any cemetery by whomsoever owned in any town”.

6. Respondents other allegation is equally without merit. As a special

proceeding, an Article 78 proceeding is governed by the general provisions of the CPLR pertaining to summary determinations which provision states that the court shall make a summary determination upon the pleadings to the extent that no triable issues of fact are raised. (CPLR 7804 (a)).

7. Vague conclusory or generalized allegations will not create a triable issue of fact. *Gagnon v Board of Education of Manhasset*, 119 AD2d 674, 500 NYS2d 801. Also no triable issue of fact exists where the material issues merely involve statutory construction, *Maliszewski v Regan*, 144 AD2d 170, 534 NYS2d 718, or where only questions of law are involved. *Guddemi v State Div. of Housing*. Indeed, a sole question of law can be determined by the court without a hearing. *Kane v Walsh* 48 NYS2d 367.

8. Moreover, the Town's position that there is a question of fact about whether these cemeteries are public cemeteries is undermined by its longstanding practice of maintaining the historic cemetery that is known as the Hulse Family Cemetery located on Fireplace Neck Road in Brookhaven. In all respects except one, the Hulse cemetery is like the other cemeteries at issue. The only difference is that it is highly visible from the road and it is located opposite the elementary school.

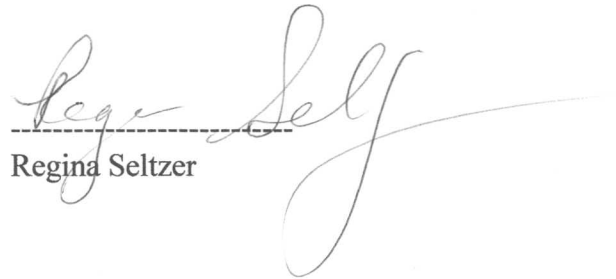
9. Respondents claim about the ownership of these cemeteries is irrelevant. They are abandoned and neglected and therefore, as the Town has acknowledged in the past, fall within the ambit of Town Law section 291.

10. This proceeding is not seeking to determine who owns the cemeteries or to provide a new designation or new characterization of these cemeteries, it is merely seeking to have the Town resume their previous care and maintenance of these cemeteries. (See Pet. Aff. 40-45)

11. Lastly, respondents have not met their burden of opposition to summary judgment. They have to do more than merely interpose generalized objections. They must specifically respond to the points raised in petitioners papers which demonstrated how all the cemeteries acquired a public nature and in reality, removed the issue of "public" or "private" cemeteries from this proceeding.

WHEREFORE, petitioners respectfully request that the motion for summary judgment be granted in its entirety.

Dated: Bellport, New York
March 6, 2010


Regina Seltzer