

Town Law §§ 291, 291(1), 291(4), 292, 296; Village Law § 15-1500; General Municipal Law §§ 72-h, 72-h(a), 72-h(b); Session Laws 2002 CH 669

Transfer of a town cemetery to a village requires specific legislative approval.

September 6, 2012

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Informal Opinion
No. 2012-9

Dear Mr. White:

You have requested an opinion relating to the Village's possible acquisition of a cemetery within the Village from the town within which the Village, and the cemetery, is located. You have advised that the Village wishes to obtain control over the cemetery so that the Village may restore and maintain it. Specifically, you have asked whether the transfer of the cemetery from the Town to the Village requires authorization, in the form of a special law, from the Legislature. As explained below, we are of the opinion that specific legislation is required before the cemetery can be transferred.

For the purpose of analysis, we assume that the Town currently holds title to the cemetery. Pursuant to Town Law § 291, the title to land used by the inhabitants of the Town as a cemetery or burial ground for at least 14 years vests in the Town. Town Law § 291(1). You have provided facts that suggest that the cemetery in question was used as a public burial ground for more than 14 years, and thus this assumption is well-founded.

A village can acquire property for a cemetery. Village Law § 15-1500. And a town board can transfer real property to a village for little or no consideration pursuant to section 72-h(a) of the General Municipal Law. But section 72-h does not authorize a town to transfer property that otherwise is made inalienable by state or local law. General Municipal Law § 72-h(b). We are of the opinion that a cemetery owned by a town is inalienable pursuant to state law and thus that the authority granted by section 72-h is unavailing to effect the proposed transfer.

We reach this conclusion in light of the statutory scheme the Legislature enacted relating to town powers and responsibilities with respect to cemeteries. First, state law specifically permits a town to transfer a cemetery to a not-for-profit cemetery corporation but does not expressly authorize a transfer from a town to any other type of entity. Town Law § 292. The express authority to convey a cemetery to one type of entity implies that transfers to other types of entities, including other municipalities, is not permitted. Statutes § 240, 1 McKinney's Cons. Laws of N.Y. at 411-12 (1971) (statutory construction principle of *expressio unius est exclusio alterius*). Second, state law establishes a procedure whereby a town can petition a court to have the interred remains removed from a cemetery and, upon their removal and interment in another cemetery, the town can "convey[] or otherwise dispose[] of [the now-former cemetery] in the same manner as other town lands." Town Law § 296. The authority to convey cemetery property like "other town lands" once it is no longer used as a cemetery indicates that that a transfer under ordinary procedures governing conveyance of town property is forbidden when remains are interred there.

We therefore recommend that you seek special authorizing legislation before proceeding with the transfer of the cemetery from the Town. Municipalities have sought and received legislative grants of authority to make such transfers. Town Law § 291(4) (transfer by town of Southampton to village of Sag Harbor); Act of Dec. 9, 2002, ch. 669 (transfer by town of Southampton to village of North Haven); *see also* 1972 Op. Att'y Gen. (Inf.) 202 (town of Southampton not authorized to convey title to cemetery lands to village without special act of Legislature).

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD
Assistant Solicitor General
in Charge of Opinions