



Guidance to Cemeteries Seeking to Appropriate a Percentage of Net Appreciation of their Permanent Maintenance Funds

Pursuant to N-PCL Section 1507(a)(2), as amended by L. 2014, c.509

I. Background

Not-For-Profit Corporation Law (N-PCL) section 1507(a)(2) has been amended by chapter 509 of the Laws of 2014 to permit a cemetery to:

appropriate for expenditure solely for the maintenance and preservation of the cemetery grounds a portion of the net appreciation, in the fair market value of the principal of the [permanent maintenance fund] trust, as is prudent under the standard established by article five-A of this chapter, the prudent management of institutional funds act.

Section 1507(a)(2) sets forth a procedure to be followed:

In the event that a cemetery corporation seeks to appropriate any percentage of its net appreciation in its permanent maintenance fund in accordance with this subparagraph, the cemetery corporation shall provide notice of such proposed appropriation by certified mail to the cemetery board not less than sixty days in advance of such proposed appropriation and shall disclose such appropriation as part of and in addition to their annual reporting requirements as defined in section fifteen hundred eight of this article, setting forth the amount of funds to be appropriated for such expenditure and its effect on the permanent maintenance fund. Such proposed appropriation shall become effective sixty days after receipt of such notice, unless the cemetery board within such sixty-day period notifies the cemetery corporation that the board objects to the proposed appropriation.

A cemetery seeking to appropriate a portion of net appreciation of the Permanent Maintenance Fund ("PM Fund") should complete the Division of Cemeteries' "Notice of Proposed Appropriation of a Percentage of Permanent Maintenance Fund Average Net Appreciation" ("PM Fund Notice") in accordance with these guidelines. A cemetery may not apply more than once a year.

II. The Application of NYPMIFA to N-PCL Section 1507(a)(2) Is Limited

The New York Prudent Management of Institutional Funds Act ("NYPMIFA") can be found at Not-For-Profit Corporation Law Article 5-A (sections 550 to 558). The only section applicable to a proposed appropriation of net appreciation of the PM Fund is paragraph (a) of section 553 ("Appropriation for expenditure or accumulation of endowment fund; rules of construction").

Although section 553(a) permits the expenditure of fund principal, N-PCL section 1507(a)(2) only permits expenditure of "net appreciation." This means that PM Fund initial principal value may not be expended; only a portion of net appreciation may be expended and only after applying the factors set forth in section 553(a).

III. Who May File a Notice of Proposed Appropriation

A cemetery that is in good standing with the Division of Cemeteries and the Cemetery Board and that can demonstrate net appreciation of its PM Fund under the guidelines set forth below may file a PM Fund Notice. To be in good standing with the Division and the Board a cemetery must be current on its filing of all required documents, records and information; must be current on all payments due for administration (section 1508(c)) and to the vandalism fund (section 1507(h)(2)); must not have a PM Fund deficit; must be current on repayment of any outstanding PM Fund loans; and must not be the subject of an unresolved board order and/or referral to the Attorney General. Any PM Fund Notice filed by any cemetery not in good standing will be objected to and disapproved.

IV. Acceptable Proposed Uses

The 2014 amendment to N-PCL section 1507(a)(2) permits an expenditure of net appreciation to be used "solely for the maintenance and preservation of the cemetery grounds." Net appreciation of PM Funds may not be used – directly or indirectly – for any other purpose. Any proposed appropriation that does not meet this requirement will be objected to and disapproved, and any appropriation that is approved but is subsequently determined to have violated this requirement will have to be repaid.

Guidance to Cemeteries Seeking to Appropriate a Percentage of Net Appreciation of their Permanent Maintenance Funds

V. Applying the Eight Factors in Section 553(a)

Section 553(a) requires that when an institution (a cemetery) contemplates making an expenditure of net appreciation of the PM Fund it must act in good faith, it must exercise the same care that an “ordinarily prudent person” would exercise and it must consider eight identified factors. Those factors are listed here with guidance on how they must be applied:

(1) the duration and preservation of the endowment fund;

The PM Fund must exist in perpetuity and must experience and retain growth substantially in excess of inflation so that income and net appreciation will be sufficient to maintain the cemetery now and in the future.

(2) the purposes of the institution and the endowment fund;

The institution exists for the disposal or burial of deceased human beings, by cremation or in a grave, mausoleum, vault, columbarium or other receptacle. The PM Fund exists to maintain and preserve the cemetery, including all lots, plots and parts thereof, to ensure that the institution continues in perpetuity, and to prevent the institution and its property and assets from falling into disrepair and dilapidation and becoming a burden upon the community. Income from the PM Fund in the form of interest and ordinary dividends shall be used solely for the maintenance and preservation of the cemetery grounds and all principal shall remain inviolate.

(3) general economic conditions;

Actual past and current economic conditions must be evaluated and future economic conditions must be anticipated conservatively and in a manner consistent with the standards of a prudent investor.

(4) the possible effect of inflation or deflation;

Actual past and current inflation must be evaluated and future inflation must be anticipated conservatively and in a manner consistent with the standards of a prudent investor.

(5) the expected total return from income and the appreciation of investments;

The PM Fund must experience and retain growth substantially in excess of inflation.

(6) other resources of the institution;

Net appreciation of the PM Fund is a resource of last resort. Institutions must maximize the use of general funds and income from the PM Fund before seeking to withdraw net appreciation.

(7) where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution; and

Alternatives to expenditure of net appreciation of the PM Fund must always be explored first. Net appreciation should not be used as a substitute for expenditure of general funds or PM Fund income, but rather should be used to fulfill needs that those other funds are inadequate to meet.

(8) the investment policy of the institution.

The institution must comply with the Prudent Investor Act, Estates, Powers and Trusts Law section 11-2.3, with regard to investment of the PM Fund and must act as a prudent investor when considering any expenditure of net appreciation.

VI. Calculating Average Net Appreciation

The calculation of average net appreciation should be performed on a calendar year basis if possible, however, applications with calculations performed on a fiscal year basis will be accepted from cemeteries that file their annual reports on a fiscal year basis. The Cemetery Board will accept a PM Fund Notice if it complies with the following standards for calculating average net appreciation:

1. Calculation of PM Fund Initial Value.
 - a. Start with the market value of the PM Fund as reported on the cemetery’s Annual Report filed with the Division for the year six years prior to the submission of the PM Fund Notice. (By starting with a market value from six years prior, the cemetery will have five years of market performance in its application). For a PM Fund Notice filed in 2015, the PM Fund market value will come from the 2009 Annual Report.

Guidance to Cemeteries Seeking to Appropriate a Percentage of Net Appreciation of their Permanent Maintenance Funds

- b. Add to the above market value of the PM Fund, the end of year balance of any PM Fund loans that were outstanding in that same year. The PM Fund market value plus the loan balance will give you the “Initial Value” from which total appreciation and average net appreciation will be calculated.
 2. Calculation of the Appreciated Value as of the end of the preceding year.
 - a. Start with the market value of the PM Fund as reported on the cemetery’s Annual Report filed with the Division for the year prior to the submission of the PM Fund Notice.
 - b. Add to the above market value of the PM Fund, the end of year balance of any PM Fund loans that were outstanding in that same year.
 - c. Next, subtract all deposits to the PM Fund required by N-PCL section 1507(a)(1) as well as other allocations to the PM Fund made in the preceding five years (the five-year period between the start date for the calculation in step one above and the end of the last reported year). These deposits would include allocations from lots sales, from interments, from installments sales (if the cemetery sells in installments) and any other allocations such as voluntary contributions.
 - d. These additions and subtractions will give you the “Appreciated Value” of your PM Fund as of your last annual report.
 3. Calculation of Average Net Appreciation.
 - a. Subtract the “Initial Value” calculated in step one above from the “Appreciated Value” calculated in step 2 above. This will be your “Total Appreciation”. This figure must be greater than zero, otherwise the cemetery will have no net appreciation and cannot seek an appropriation.
 - b. Divide the Total Appreciation calculated above by 5 (representing the five years of market performance). The result (quotient) will be your “Average Net Appreciation”.

VII. Determining what Portion of Net Appreciation is Prudent

A cemetery may not appropriate all of its PM Fund Net Appreciation. The amendment to N-PCL section 1507(a)(2) only permits a cemetery to appropriate a portion of the net appreciation as is prudent under NYPMIFA. An appropriation of 50% or less – if it meets the other standards set forth above - is presumptively prudent. Any PM Fund Notice that seeks to appropriate greater than 50% of net appreciation will be objected to and disapproved absent a demonstration of unusual and exigent circumstances, such as the uncompensated devastation many cemeteries experienced from severe storms in recent years.

VIII. Cemetery Board Discretion to Object

The proper completion of a PM Fund Notice does not guarantee that the Cemetery Board will not object to a proposed appropriation. The Cemetery Board retains its discretion to object to a proposed appropriation as permitted by the amendment of N-PCL section 1507(a)(2) by chapter 509 of the Laws of 2014.