

Opinion 95 - 10

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 The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

CEMETERIES -- Public Burial Grounds (duty of town to erect fences around certain cemeteries and burial grounds)

TOWN BOARD -- Powers and Duties (erection of fences around certain cemeteries and burial grounds)

TOWNS -- Powers and Duties (erection of fences around certain cemeteries and burial grounds); (to maintain cemetery)

WORDS AND PHRASES -- "Around" (meaning of for purposes of Town Law, §291)

TOWN LAW, §291: Town Law, §291 describes three classes of cemeteries and burial grounds. A town has a duty to erect a fence encircling a cemetery or burial ground in the first class described in Town Law, §291(1), that is, a cemetery or burial ground, title to which has vested in the town by virtue of its use by town residents for fourteen years. In the case of a cemetery in the second class described in section 291(1), a town is required to provide such fencing as is necessary to adequately preserve the cemetery, which may, in appropriate circumstances, include fencing only in front of the cemetery. A town may, in its discretion and subject to referendum requirements, construct a fence in front of or encircling a cemetery falling within the third class described in section 291(1).

This is in response to your request concerning the town board's responsibility under the provisions of section 291 of the Town Law with respect to a certain cemetery within the town. You indicate that the town is in the process of determining the status of the cemetery for purposes of section 291. You ask whether, if the cemetery is, in fact, subject to the provisions of section 291, the town must erect a fence entirely around the cemetery or may merely erect a fence in front of the cemetery.

Initially, we note that subdivision 1 of section 291 of the Town Law describes three classes of cemeteries and burial grounds:

- (1) cemeteries and burial grounds title to which has vested in the town by virtue of their use by the inhabitants of the town for a period of fourteen years;
- (2) cemeteries and burial grounds "by whomsoever owned," where control of the cemetery or burial ground is not vested in the town or in trustees or other corporate body;
- (3) 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.

Subdivision 1 also specifies the town board's duties in relation to each class of cemetery or burial ground. As to the first class, the town board is required to remove the grass and weeds from the cemetery or burial ground at least three times each year and to "erect and maintain suitable fences around such cemetery or burial ground." For cemeteries or burial grounds in the second class, the town

board is required to provide for the removal of grass and weeds twice each year and for the "preservation, care and fencing of any such cemetery." The town board need only provide for the removal of grass and weeds from cemeteries in the third class and no minimum number of times is prescribed (see 1973 Opns St Comp No. 73-1016, unreported; 23 Opns St Comp, 1967, p 630; 21 Opns St Comp, 1965, p 366).

Thus, a town has the duty to erect a fence "around" a cemetery if title to the cemetery has vested in the town by virtue of its use by town residents for fourteen years. The obligation to "erect and maintain suitable fences around" certain cemeteries and burial grounds was imposed in 1901 by chapter 386 of the Laws of 1901 which amended section 195 of the Town Law of 1890. An examination of the available legislative history of chapter 386 discloses no discussion of the intended meaning of the provision. No discussion of this provision appears in the legislative history of the various revisions of the Town Law and amendments to the statutes relating to abandoned cemeteries which have taken place since 1901. In addition, we have found no case law interpreting the requirement that fences be erected "around" certain cemeteries and burial grounds.

It is a general rule of statutory construction that, absent a showing of legislative intent to the contrary, "words of a statute will be interpreted in their ordinary acceptance and significance and the meaning commonly attributed to them" (Phaneuf v City of Plattsburgh, 84 Misc 2d 70, 74, 376 NYS2d 781, 785, affd 50 AD2d 614, 375 NYS2d 500, lv dismissed 38 NY2d 1004, 384 NYS2d 441; see also McKinney's Consolidated Laws of NY, Book 1, Statutes §94). Since section 291 does not define the word "around" and there is no evidence that the Legislature intended the word to have any meaning other than its common meaning, the word must be accorded its usual and ordinary meaning. Webster's Ninth New Collegiate Dictionary (1989) defines "around," when used as a preposition, to mean "on all sides of " or "so as to encircle or enclose." Similarly, a New York court, in construing the language of a boundary description, stated that when "[u]sed in connection with the continuation of a boundary line...it seems to us no possible construction can be given to the use of the word 'around' other than that it was intended to encircle or encompass the shore" (Mix v Tice, 164 Misc 261, 298 NYS 441). Therefore, it is our opinion that, in relation to a cemetery or burial ground within the first of the three classes described in section 291 of the Town Law, the town board would be required to erect a fence encircling the cemetery or burial ground.

As to a cemetery in the second class described in section 291(1), the statute provides only that the town board provide for the "preservation, care and fencing" of the cemetery. Since section 291 does not specify that the fencing must be "around" or encircling the cemetery, it is our opinion that the town is only required to provide such fencing as is necessary to adequately preserve the cemetery. Consequently, we believe that, in appropriate circumstances, the town board could determine that a fence be erected only in front of the cemetery.

With respect to a cemetery falling within the third class described in section 291 (1), the statute contains no requirement as to the erection of fences (6 Opns St Comp, 1950, p 312). Subdivision 3 of section 291, however, authorizes a town board, by resolution, to construct or maintain permanent improvements in any one or more of cemeteries described in section 291 whenever, in the judgement of the town board, it is necessary or advisable that such improvements be made. If the expenditure for such improvements is in excess of \$300 and it is to be paid by taxes levied in the fiscal year in which the expenditure is to be made, or paid from the proceeds of obligations, the town board resolution is subject to a permissive referendum in a town of the first class, or a mandatory referendum in a town of the second class. Since subdivision 3 does not specify the type of improvements, it is our opinion that the town board, in its discretion and subject to the referendum requirements, could determine to construct a fence in front of or encircling a

cemetery in the third class described in section 291(1).

Accordingly, a town is required to construct a fence encircling a cemetery in the first class described in section 291(1) of the Town Law. In the case of a cemetery in the second class described in section 291(1), a town is required to provide such fencing as is necessary to adequately preserve the cemetery, which may, in appropriate circumstances, include fencing only in front of the cemetery. A town may, in its discretion and subject to referendum requirements, construct a fence in front of or encircling a cemetery falling within the third class described in section 291(1). Whether the cemetery in question falls within class one, two or three as described in section 291(1) is question of fact to be determined, in the first instance, at the local level.⁽¹⁾

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1. We note that the Secretary of State administers a fund for the maintenance of certain abandoned cemeteries and municipalities are authorized to apply for fair and reasonable expenses required for the maintenance of those abandoned cemeteries (see Not-for-Profit Corporation Law, §1500[h]; 19 NYCRR 200.11). You may wish to contact that agency for further information in this regard.