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FILE NO.: S-363

CEMETERIES:
Interpretation of the Bonding
Requirement of the Cemetery Care Act

Honorable Michael J. Howlett
Auditor of Public Accounts
State of Illinois
Springfield, Illinois

Dear Auditor Howlett:

Your letter of recent date requested my advice on the proper interpretation of the fidelity bond requirements of Sections 64.9(c) and 64.18 of the Cemetery Care Act (Ill. Rev. Stat. 1969, Chap. 21, Pars. 64.1 to 64.24 inclusive). You pose the following question:

"Will you please advise as to whether or not Chapter 21, Paragraph 64.18, permits the Auditor to exempt the requirement for fidelity bonds found in Paragraph 64.9".

Your letter is accompanied by a depository agreement which a Cemetery Authority proposes to use in lieu of filing a fidelity bond.

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The Cemetery Care Act provides for the creation and the perpetual existence of care funds. The Act further provides for the licensing of private operated cemeteries. The constitutionality of this statute was upheld by the Illinois Supreme Court in Union Cemetery Ass'n. vs. Cooper, 414 Ill. 23. The opinion sets forth the background of this legislation.

"It appears that prior to the passage of the act here questioned a Cemetery Commission was created by action of the Sixty-fourth General Assembly of the State of Illinois. This commission studied the problems relative to the operation of cemeteries in this State, particularly those relating to advertising for perpetual care and the handling of care funds. As a result of its investigations the commission recommended to the Sixty-fifth General Assembly the passage of the Cemetery Care Act. The act shows upon its face that the principal evils sought to be remedied were those relating to possible frauds or mismanagement in the handling of care funds and those in connection with the advertising and sale of accommodations to which funds for care were to be devoted. It is not denied that the legislature, in the exercise of the police power, had the authority to remedy any evils it found to exist."
Union Cemetery Ass'n. vs. Cooper, 414 Ill. 23, at page 33.

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The Court concluded that the Act is constitutional and appropriately designed to fulfill its purposes. They also considered the bonding requirement of the statute and held that it was a reasonable exercise of legislative power.

The administration of the Cemetery Care Act is placed in the Auditor of Public Accounts. The provisions of the Act are well suited to both public regulation of care funds and protection of the funds. The Statute was intended to prevent a dilution of perpetual care funds through fraud or mismanagement of the Cemetery Authorities. In order to prevent loss from this cause, the Cemetery Care Act provided a system of fidelity bonds to protect the care funds from misconduct of persons having control or access to them. The goal of the bonding provisions of the statute is to guarantee protection and proper utilization of care funds.

The several sections which provide for bonding must be construed together for a proper interpretation of this

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requirement. Section 8 provides that existing cemeteries must supply a fidelity bond.

. . . . "Where no claim is made that a cemetery is a fraternal cemetery, municipal cemetery or religious cemetery or family burying ground, as the case may be, as defined in Section 2 of this Act, the registration statement shall be accompanied by a fidelity bond in the amount required by Section 9 of this Act."

Section 9(c) sets forth the size of the bond which the cemetery must supply.

"Applications for license shall also be accompanied by a fidelity bond issued by a bonding company or insurance company authorized to do business in this State, where such care funds exceed the sum of \$10,000. Such bond shall run to the Auditor and his successor for the benefit of the care funds held by such cemetery authority or by the trustee of the care funds of such cemetery authority. Such bonds shall be in an amount equal to one-tenth of such care funds. However, such bond shall not be in an amount less than

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\$1,000 nor in an amount more than \$100,000; provided that the first \$10,000 of such care funds shall not be considered in computing the amount of such bond. No application shall be accepted by the Auditor unless accompanied by such bond."

Section 17 provides for the filing of additional bonds.

"If the Auditor finds at any time that the bond is insecure or exhausted or otherwise doubtful, an additional bond in like amount to be approved by the Auditor shall be filed by the licensee within 30 days after written demand therefor upon the licensee by the Auditor."

Section 18 contains alternate methods for providing for the security of care funds and excusing the bonding requirement.

"The provisions of this Act as to the (a) registration, (b) application for license, (c) filing of a fidelity bond, (d) filing of an annual report, and (e) examination by the Auditor, apply to a cemetery authority owning, operating, controlling or managing a privately operated cemetery whether the care funds are held by such cemetery

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authority or by any trustee for the same. However, no bond need be filed with the Auditor as to care funds of such cemetery authority held as trustee by a bank or trust company authorized to do business in this State as a trust company in accordance with Section 2a of 'An Act to provide for and regulate the administration of trusts by trust companies,' approved June 15, 1887, as amended, or held by an investment company.

"Upon application by such cemetery authority to the Auditor, and upon a showing that all of the care funds of such cemetery authority are held by such bank or trust company as custodian or agent for such cemetery authority pursuant to an agreement in writing approved from time to time by the Auditor for the handling and management of all of the care funds of such cemetery authority, or are held by an investment company, the Auditor in writing may permit the licensee to operate without the filing of any bond as to such care funds except such fidelity bond as he may require for the protection of such cemetery authority against defaults by its employees engaged in the handling and collection of funds."

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Under this statutory scheme the Legislature evidences an intent to provide for the protection of the cemetery care funds. Fidelity bonds are the principal device to provide the security. However, the Legislature provides in Section 18 two alternate methods by which care funds can be safeguarded and the bond requirement of Section 9 excused: trusteeships and custodial agreements approved by the Auditor.

First; the care fund can be protected by placing them in a trust with an authorized bank acting as trustee. Misuse of the funds is prevented by provisions of the trust which provide for professional management of investments, prevent the principal of the trust from being distributed and provide for the payment of income for cemetery care. The trust company would be responsible for any breach of the trust agreement.

Second; an alternative to trust agreements is provided by the provision for custodial agreements approved by the Auditor. The Auditor is empowered to excuse the Cemetery Authority from the bond required by Section 9 when

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care funds are held by a bank or investment company under a custodial agreement approved by him. He may exercise this authority to approve depository or custodial agreements which provide the same type of protection as would a trust or the fidelity bond required by Section 9. The Auditor can require the inclusion of any provision necessary to insure that the care funds will be protected. He might require the inclusion of a provision providing for professional management of the care funds, prohibiting the payment of principal to the Cemetery Authority, requiring prior notice to the Auditor of any major alteration of the care fund corpus or requiring prior approval of any termination of the custodial agreement. The Auditor is given discretion to tailor the custodial agreements to provide whatever protection he determines is necessary for the care funds. The Courts will not interfere unless there has been an abuse of discretion. Gustafson vs. Wethersfield Township High School District 191, 319 Ill. 255.

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The depository agreement which accompanied your letter provides merely for the safekeeping of the securities held in a care fund. It does not provide any of the safeguards which fidelity bonds or a trust agreement would provide. The Cemetery Authority retains complete control over the investments to be made by the care fund. They may withdraw part or all of the funds held by the bank. The Cemetery Authority might terminate at any time the agreement and take possession of the care funds. As this agreement provides none of the protection of care funds which is the evident intent of the Cemetery Care Act, it should not be accepted as a substitute for the bonding requirement of Section 9.

If the Auditor determines to accept a custodial agreement in lieu of the bonding requirement, he is given further authority to supplement the protection provided by the custodial agreement with such fidelity bonds as are necessary to protect the care funds from default by employees of the cemetery authorities. The amount of this bond is to be

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fixed by the Auditor. Some factors which the Auditor might consider in fixing the size of a fidelity bond are the amount of money handled, opportunities for conversion or theft, the amount of care funds waiting to be deposited under the custodial agreement, the frequency of audits under the Cemetery Care Act and the possibility that the principal of the care fund could be converted by cemetery employees. After examining the situation with regard to a particular cemetery authority, the Auditor must fix the size of the fidelity bond. If he concludes that the custodial agreement approved by him provides complete protection for the care fund he may, in his discretion, determine that no additional bond will be required.

Therefore, it is my opinion that the Auditor has authority under Section 18 of the Cemetery Care Act to exempt the Cemetery Authority from the filing of the bond

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required by Section 9. However, the agreement submitted with your letter is not an agreement which could be accepted under the provisions of Section 18 as it fails to provide the type of protection of care funds intended by the statute.

Yours very truly,

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