

Analysis of April 16, 2007 draft amendments from Rep. Sak to the  
Cemetery Regulation Act

[These comments follow the draft by page and line number.]

Page 2, Lines 17-20.

Added to the statute is creation and definition of a new term, "Cemetery Entity". It is a corporation, an individual, or LLC that owns, manages or operates a cemetery. In light of Mikocem, this amendment is apparently intended to clarify the State's ability to oversee, and be able to grasp if need be, the underlying players for a cemetery. A question arises though of what about the owners, managers, or operators of the cemetery entity?

Pages 2-3, Lines 30-12.

These changes clarify the areas for which the Commissioner can promulgate rules. Expressly added are abilities:

1. To require "good moral character" and "financial security" of individuals with an "interest" in the cemetery or cemetery entity, as well as of anybody employed by the cemetery or cemetery entity;
2. To set requirements for perpetual care, pre-construction, merchandise, and development trusts;
3. To set requirements regarding the establishment, control, record-keeping and auditing of all trusts; and
4. To create standards for appearance and maintenance of a cemetery.

Of these items, the Commissioner has already asserted its power to include 2 and 3. Item 4 may be one of micromanaging. Item 1 raises questions regarding how onerous the procedure will be to become or remain registered as a cemetery. While the standard of "good moral character" is commonly used in Michigan, and has a statutory definition, the "financial security" of individuals, as contrasted with corporations or LLC's, is a standard that appears to be new to Michigan statutes and rules. The undefined nature of "interest", and the consideration of the attributes of any employee could prove to be problematic.

Pages 3 Lines 18 through Page 4 Line 27.

Imbue the Commissioner with clear investigative powers similar to those in areas such as sale of securities, franchising, and banking.

Subsection 1(C) at Page 4, Lines 3-9, are arguably in the wrong spot in the proposal, but nevertheless would give the Commissioner clear authority to takeover and dispose of "abandoned" cemeteries.

Page 4, Lines 28-30.

Deems a person who gives a false oath or affirmation to the Commissioner guilty of perjury. Assumedly, one would have to be convicted first, but unlike several other statutes, this makes no reference to conviction.

Page 4, Lines 31-36.

Authorizes the Commissioner to issue a "summary suspension order" of the cemetery's registration, "when it appears to the commissioner that a person or registrant has engaged or is about to engage in any act or practice constituting a violation of this act or a rule promulgated or order issued."

This would appear to be greater than the power given to agencies under the Administrative Procedures Act, MCL 24.292, which requires findings before suspension that public health, safety, or welfare require emergency action, and a prompt follow-up hearing.

Page 5, Line 8 through Page 7, Line 11.

This clearly states the powers of a receiver or conservator to operate, take possession of, and liquidate cemeteries and cemetery entities. It should be noted that this appears to give the receiver or conservator the ability (with court approval) to take possession of the assets of individuals who own, manage, or operate a cemetery (See comment on definition of "cemetery entity").

Page 7, Line 24 through Page 10, Line 12.

These sections deal with the Commissioner's relationship with other agencies, including a requirement that if it appears to the Commissioner that a crime has been committed, he must immediately report it to the Attorney General. They also set forth his ability to appoint deputy commissioners, delegate, enter contracts for consultants, and sue on behalf of the consumer under the Consumer Protection Act.

Page 11, Line 3 through Page 12, Line 9.

These sections are designed to give the Commissioner a better handle on changes of control, approved and unapproved. There are problems with confusing language as well as overbroad language, all of which arise out of the "cemetery entity" concept, and whether it is the intent of Rep. Sak to require dual registration of both cemetery, and cemetery entities.

Page 12, Line 33 through Page 13, Line 9.

Provides that in considering applications to establish cemeteries, the Commissioner may investigate even the children of a managerial employee.

Page 13, Line 26.

Limits a cemetery entity to owning only 1 cemetery. This section does not speak to how many it may manage or operate.

Page 14, Lines 10-25.

Moves duty to establish and maintain perpetual care fund from cemetery to cemetery entity, and rephrases current statutory language regarding use of PC from "only the earnings from the Funds shall be used for perpetual care" to "the income or proceeds from which shall be perpetually devoted for endowment care".

The PC fund will have to either be established in Michigan, or be with a financial institution approved by the Commissioner and having an office in Michigan. It is unclear what this actually means in current financial markets.

The presale deposit to a PC fund for a new cemetery entity is raised from \$25,000 to \$150,000. It is unclear whether this is only to apply when a new cemetery is established, or whether it would apply whenever a cemetery entity takes new control of a cemetery, since the obligation to establish the PC fund would rest with the cemetery entity, and not the cemetery.

Page 14, Line 39 through Page 15, Line 14.

This changes the PC funding waiver process. The floor funding level is increased from \$125,000 to \$750,000, with the waiver only being obtainable if the PC fund is funded at more than \$60,000 per acre of "developed" land, up from \$10,000 per acre. Eliminated is the statutory standard for granting of the waiver, i.e., a determination that "the income from the fund is sufficient to meet the then current cost of keeping the applicant's cemetery in good condition."

Page 17, Lines 1 through 28.

Restricts Trustees to persons, including owners and directors, approved of by the Commissioner. If the Trustee is not a bank or financial institution, then a surety bond securing the State has to be obtained in an amount equal to the trust accounts.

Page 18, Lines 31 and 32.

Places registration at risk of behavior of owners, directors, and members. Current law is only officers or general manager.

Page 19, Line 25.

Moves obligation on suspension or revocation from cemetery to cemetery entity to fulfill all of the then existing contractual obligations and agreements. This raises the question of whether the officers, directors, and other individuals who manage or operate the cemetery have individual liability.

Page 20, Lines 16 through 25.

Raises maximum fines for non trust fund violations to \$10,000 and 1 year.

Page 20, Lines 26 through 28.

Makes misuse of trust accounts a felony punishable by fine of up to \$50,000 and 10 years.

Non Cemetery Regulation Act proposals:

Change to the Revised Judicature Act would eliminate the requirement that a receiver have five years of experience in the cemetery industry.

Changes to the Cemetery Corporation Act, the Rural Cemetery Act, and the Business Corporation Act would allow an entity forming a cemetery to be incorporated under the Business Corporation Act.

Penal code changes would create a series of graduated offenses regarding trusts depending on amount involved. Penalties would range up to \$50,000 and 10 years.