

This document is identical to the version filed with the Supreme Court of the State of New York on January 25, 2010, except that a few typographical errors have been corrected, and pagination is slightly different. Page numbers are also provided. The Affidavits and Exhibits included with the January 25, 2010 filing are also not herein included, but are found as separate documents.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Application of
FIREPLACE HISTORY CLUB,
and MARTIN VAN LITH, Chairman,

NOTICE OF MOTION

For a Judgment Pursuant to
CPLR Article 78

Petitioners,

Index No. 09-28006

-against-

TOWN BOARD OF THE TOWN OF
BROOKHAVEN

Respondents.

PLEASE TAKE NOTICE, that upon the annexed affidavit of REGINA SELTZER, sworn to the 25th day of January , 2010 and the affidavit of Martin Van Lith, sworn to the 25th day of January 2010, and upon all papers and proceedings heretofore had herein, the undersigned will move this Court at the Courthouse located at 400 Carleton avenue, Central Islip, New York, on the 8th day of February 2010, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order pursuant to CPLR 3212 directing summary judgment in favor of petitioners and against respondents, on the grounds that Brookhaven Town violated its lawful Town duties as explicitly set forth in Cemeteries Town Law Section 291 and that respondents have raised no triable issue of fact and a summary determination is appropriate based on the pleadings, papers and admissions in accordance with the standards for granting summary judgment (CPLR 409(b)); and granting such other and further relief as the Court deems proper together with costs and disbursements.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2241(b), answering affidavits and any other papers in opposition to the above motion, if any, are required to

be served upon the undersigned at least two days prior to the return date of this motion.

Dated: Bellport, New York
January 25, 2010

REGINA SELTZER, ESQ.
Attorney for Petitioners
30 Brewster Lane
Bellport, New York 11713
(631) 286-8849

To:

Barbara M. Winplush
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Application of
FIREPLACE HISTORY CLUB,
and MARTIN VAN LITH, Chairman,

Affidavit

Petitioners,

For a Judgment Pursuant to
CPLR Article 78

Index No. 09-28006

-against-

Assig: Hon. M. Tanenbaum

TOWN BOARD OF THE TOWN OF
BROOKHAVEN

Respondents.

STATE OF NEW YORK)
) ss:
COUNTY OF SUFFOLK)

REGINA SELTZER, being duly sworn deposes and says:

1. I am an attorney at law duly admitted to practice in the courts of the State of New York and counsel to petitioners and am fully familiar with the facts and circumstances surrounding the underlying proceeding and the motion for summary judgment.
2. This affidavit is submitted in support of the petitioners motion for summary determination in this special proceeding pursuant to CPLR 409, for judgment directing that the Town of Brookhaven comply with Town Law Article 17- Cemeteries-Section 291 and remove the grass and weeds from the cemeteries listed herein by petitioners, dating back to Revolutionary times, (hereinafter referred to as “historic cemeteries“). (A copy of Town Law Article 17- Cemeteries-Section 291 is annexed hereto as Exhibit A).
3. Petitioner, Fireplace History Club (“History Club“), is a not for profit association that has adopted as its goal the patriotic work of implementing New York State Legislatures’ Town Law Article 17- Cemeteries. The History Club’s standing to maintain this proceeding is without question. Brookhaven Town officials have repeatedly relied on the Club for information relating

to these cemeteries. The Town has publicly praised the History Club for its invaluable work in educating the public on the importance of preserving and transmitting the cultural heritage and history of these cemeteries. The Town provided an \$11,000 grant to the History Club to continue its work. The Law enacted by the Legislature in reverent gratitude for the service of the men and women who fought and died to secure the blessings of liberty for future generations in the American Revolution, mandates that the Town has the obligation to identify, mark and care for these graves. To allege that the History Club, founded to implement the principles of Town Law section 291, has no standing, is to contend that no one has standing — an irrational, ludicrous claim.

4. To ensure that the cemeteries continue to provide a link to our past history and to our heritage, the History Club, in addition to doing physical work to identify, restore and maintain the cemeteries, has provided educational, historic tours for local school groups and history buffs. (Exhibit B).

5. In the past few years, the History Club has found their efforts to do their work greatly hampered and often impossible by reason of the failure of the Town of Brookhaven to remove the grass, brush and weeds from the cemeteries.

6. The problem was exacerbated, by the fact that the Town officials, while acknowledging their legal obligation to remove the grass and weeds, seemed unable to get the task accomplished. As late as June 3, 2009, Carol Bissonette, the Deputy Parks Commissioner, assured the History Club that the cemeteries would be mowed and the overgrown paths, that were impenetrable, would be opened to access, but despite her promises and those of other officials, the work was not done.

7. Only after it became obvious to the History Club that, if they do not obtain Court intervention, these monuments to the people who fought so valiantly for our freedom will be desecrated by neglect, did the History Club on July 16, 2009, commence this proceeding seeking an order directing the Town of Brookhaven to comply with Town Law section 291 and remove

the grass and weeds from the above referenced historic cemeteries.

8. New York State Town Law Section 291 in relevant part states:

“The title to every lot or piece of land which shall have been used by the inhabitants of any town in this state as a cemetery or burial ground for the space of fourteen years shall be deemed to be vested in such town, and shall be subject in the same manner as other corporate property of towns, to the government and direction of the town board.”...

“It shall be the duty of the Town Board to remove the grass and weeds from any such cemetery or burial ground in any such town at least three times in each year, and to erect and maintain suitable fences around such cemetery or burial ground.”

9. The Law, has been in existence for almost two hundred years and in all that time the Town of Brookhaven, until its January 13, 2010 Answering papers, has by deed and word consistently acknowledged its legal and moral obligation to maintain these historic cemeteries. Even during the Great Depression of the 1930's when the Town was in financial difficulties, it still fulfilled its legal obligations to maintain these cemeteries. (Exhibit C). So too, in 1964, the Town ensured that the work was done by retaining an independent contractor to maintain the very same cemeteries at issue here. (Exhibit D).

10. Consequently, Respondents' answer, denying knowledge or information as to allegations contained in paragraph 1,2 5, 6, 7 and their objections in point of law, are shameful, blatantly false fabrications, without any basis in fact, intended to mislead the Court.

11. The true facts set forth below demonstrate that that there is no triable issue of fact raised and that this court as a matter of law should direct judgment in favor of petitioners.

STATEMENT OF FACTS

12. Town Law Section 291 has a long history. The first full sentence in Section 291 derives from the first edition of the Revised Statutes of the State of New York. It is necessary to consider the origin of this sentence in order to understand the legislative history of Section 291.

13. The sentence as it appears in the revised statute passed in 1828 had the following wording (in 1828, this was the entire content of Section 291):

“The title to every lot which shall have been used by the inhabitants of any town of this State, as a cemetery or burying ground, for the space of fourteen years next and immediately before this title shall take effect, shall be deemed to be vested in such town, and shall be subject in the same manner as other corporate property of towns, to the government and direction of the electors in town meeting. (1 R. S. 1830, p. 360.)”

14. This wording first appears in the *Revised Statutes of the State of New-York: Passed during the Years One Thousand Eight Hundred and Twenty-Seven, and One Thousand Eight Hundred and Twenty-Eight: To Which Are Added, Certain Former Acts which Have Not Been Revised*. It can be found in Chapter XI. Of the Powers, Privileges, and Duties of Towns, Title VII. Local and Special Provisions, Section 1. Title to Burying Grounds, on p. 360.

15. The wording is nearly identical to that of today’s statute which reads as follows:

“The title to every lot or piece of land which shall have been used by the inhabitants of any town in this state as a cemetery or burial ground for the space of fourteen years shall be deemed to be vested in such town, and shall be subject in the same manner as other corporate property of towns, to the government and direction of the town board.”

16. The legislative history of the first provision in Section 291 conclusively shows that this law originated long before the Rural Cemetery Act of 1847; therefore the Town’s contention that “a public nature” of a cemetery depends on the “sale and purchase of . . . mapped lands or lots to the public” can not be correct. It can not be the case that this first provision of Section 291 was meant to apply only to a type of cemetery which had not yet come into existence; i. e. cemeteries authorized under the Rural Cemetery Act of 1847, or was meant to apply only to those cemeteries that possess “a public character” as a result of the sale and purchase of mapped land or plots to the public.

17. On April 17, 1901, an amendment was made to the law that immediately took effect.

CHAP. 386.

AN ACT to amend the town law, relative to the care of abandoned cemeteries.

BECAME A LAW, APRIL 17, 1901, WITH THE APPROVAL OF THE GOVERNOR,
PASSED BY A TWO-THIRDS VOTE.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one hundred and ninety-five of chapter five hundred and sixty-nine of the laws of eighteen hundred and ninety, entitled An act in relation to towns, constituting chapter twenty of the general laws, is hereby amended to read as follows:

SECTION 195. *Burial grounds, when to belong to town* The title to every lot or piece of land which shall have been used by the inhabitants of any town in this state as a cemetery or burial ground for the space of fourteen years shall be deemed to be vested in such town, and shall be subject, in the same manner as other corporate property of towns, to the government and direction of the electors in town meeting. In any town, for which trustees of burial grounds have not been chosen or provided in sections one hundred and ninety-three and one hundred and ninety-four of this chapter, the town board may adopt regulations for the proper care of any such cemetery and burial ground, and regulating the burial of the dead therein. If a cemetery or burial ground in any such town is not used for burial purposes it shall be the duty of the commissioner of highways of such town to remove the grass and weeds therefrom at least once in each year, and to erect and maintain suitable fences around such cemetery or burial ground at a cost not to exceed fifty dollars unless authorized by a majority vote of such town. The cost and expense of such commissioner in performing such duties shall be a town charge and shall be paid in the same manner as other town charges.

SECTION 2. This act shall take effect immediately.

18. The amendment is clearly entitled “An act to amend the town law, relative to the care of abandoned cemeteries.” It does not say abandoned public cemeteries, abandoned private cemeteries, or abandoned family cemeteries. It says abandoned cemeteries without qualification and makes no distinction.

19. The text of Section 195 does not itself use the word abandoned, and instead uses the phrase “a cemetery or burial ground . . . not used for burial purposes,” thus giving a working definition of what was to be considered an abandoned cemetery. An abandoned cemetery is a cemetery or burial ground that is no longer used for burial purposes.

20. It is significant that the act was amended at the urging of the Daughters of the American Revolution. In the DAR publication, *The American Monthly Magazine*, the Kanestio Valley Chapter recommended that other chapters ask

“that wherever there are old cemeteries, the care of which is not otherwise provided for, especially those in which rest patriot dead, whether of the American Revolution or of our subsequent history, the local chapter should call the attention of the town board to this enactment and ask for its effective execution. “

The American Monthly Magazine, Vol. 28, February 1906, No. 2, page 11

21. The law as it existed on April 17, 1901, covered two kinds of cemeteries,

1) those which had been town burying grounds and which were not owned by others, and for which title was vested in the town (cemeteries belonging to the town), and

2) cemeteries and burial grounds no longer used for burial purposes.

22. This section was further amended in 1909, 1917, and 1920, but it continued to cover only two categories of cemeteries. Between 1920 and 1960, a third category was added:

The new category provided the following :

the town board of any town must also provide for the removal of grass and weeds from 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

23. Section 291 as it currently exists applies to three kinds of cemeteries:

1) those which had been town burying grounds and which are not owned by others, and for which the town could assume title and control (cemeteries belonging to the town),

2) cemeteries by whomsoever owned that are not otherwise under the control of the town or controlled by trustees or other corporate body, and

3) all abandoned cemeteries, other than private burial grounds, that are not otherwise under the control of the town or controlled by trustees or other corporate body.

**A CEMETERY OR BURIAL GROUND THAT IS OWNED BY THE PUBLIC
IS NOT PRIVATE**

24. Private property is property that is not public property; that is, it is property that is not owned by a public governmental entity. A “private” cemetery or burial ground is a kind of

private property. In order to be a private burial ground or cemetery, the property must satisfy two conditions:

- 1) the property must be privately owned, and
- 2) that property must be used, or it must have been used, for interments of human bodies.

25. Five of the cemeteries on the Petitioners' list are acknowledged by Respondents to be owned by public governmental entities. By definition, property that is publicly owned can not be private.

26. The Respondents acknowledge that the Rose Family Cemetery is owned by the Town of Brookhaven. The Respondents also acknowledge that the Rose Family Cemetery is not private and that the town is obligated to fence, preserve, and care for it.

27. In Respondents' Exhibit A in the affidavit of Kim Kramer-Romer, the Respondents allege that the David Hawkins Cemetery and Nathaniel Hawkins cemeteries are owned by the United States government and that the South Haven Presbyterian Church Cemetery and the Carman Family Cemetery are owned by the County of Suffolk. As all four cemeteries are owned by public governmental entities, these four cemeteries, just as the Rose Family Cemetery, are not private cemeteries.

28. These four cemeteries then, according to Section 291, are cemeteries falling into Category 2: cemeteries *by whomsoever owned* that are neither owned nor under the control of the town. A family cemetery located on public land, for which title is not vested in the town, is one for which the town is required to remove the grass and weeds twice each year and for which the town is obligated to provide for the preservation, care and fencing, since such a cemetery falls in the category of a cemetery or burial ground by whomsoever owned. Therefore these are cemeteries which the Town is obligated to preserve, care for, and fence. (See Opinion of the State Comptroller (Opns. St. Comp. 60-616 (1960)) contained in Exhibit C of Respondents' Verified Answer confirming the above.)

CEMETERIES AND BURIAL GROUNDS, THE TITLES TO WHICH
HAVE BECOME VESTED IN THE PEOPLE OF THE STATE BY ESCHEAT,
ARE PUBLIC CEMETERIES

29. Of the remaining cemeteries for which the Town claims they have no obligation to provide care because they are “private” cemeteries, four have no known owners and fall within those land covered by Section 200 of Article 2 of the Abandoned Property Law of the State of New York.

30. Section 200 of Article 2 of the Abandoned Property Law of the State of New York states:

Escheated lands. All lands the title of which shall fail from a defect of heirs, shall revert, or escheat, to the people.

31. Pursuant to the Abandoned Property Law of the State of New York these cemeteries have escheated to the people. The Respondents have been unable to show that any living person holds title to these cemeteries. Thus the Hulse Cemetery, the Corwin Family Cemetery, the Azel Hawkins Cemetery, and the Barteau Cemetery have escheated to the people of the state and are, therefore, public cemeteries.

32. The Respondent can not claim that a burial ground is a private burial ground unless there exists a private owner who controls who may be buried in the private cemetery and regulates access to it. There have been no burials in any of the cemeteries on the Petitioners’ list for more than 70 years.

33. For many years (as early as 1950), individuals who are not private owners, have been entering these cemeteries. There have been many acts sufficiently open to put a diligent owner on notice, if one actually existed. There has been clearing of brush and vines, the up-righting of fallen stones and the repair of broken ones. Additionally, the cemeteries have been accessed by the Town of Brookhaven, and by teachers and pupils in the school district and used by the teachers to educate their students regarding the early settlers of the region and the lives of prominent citizens of the Town of Brookhaven, including Supervisors of the Town.

REMOVAL OF GRASS AND WEEDS FROM THE CEMETERIES BY THE TOWN
OVER AN EXTENDED PERIOD OF TIME CONSTITUTES
RECOGNITION OR ADOPTION OF THE BURIAL GROUNDS BY THE TOWN
AS PUBLIC HISTORIC CEMETERIES

34. Petitioners have already shown that a cemetery can acquire “a public character” by other means than “the sale and purchase of . . . mapped lands or plots to the public” as provided for in the Rural Cemetery Act of 1847. Exhibit C of Respondents’ Verified Answer states that “the law has long provided the acquisition” of a cemetery used by the public “**by public user.**” (See Opns. St. Comp. 65-917, (1965).)

35. In the case of privately owned cemeteries, the uninterrupted enjoyment of these cemeteries for very long periods of time has created a public easement by prescription.

36. The intent of the landowner and his consent or dissent to the public user of his land are immaterial, standing alone, to the question whether an easement right has been established by prescription.

37. The fact that an owner does not intend to abandon his land, and dissents to its user as an historic public cemetery, does not preclude the public from acquiring a public easement interest in it nevertheless, unless the owner does some positive act amounting to an interruption of the adverse user.

38. Also, the fact that the owner's acquiescence in the adverse user is due to a mistaken belief that such easement has been duly established by the public authorities, does not defeat the public's prescriptive easement right to it.

39. It is true that under the Real Property Law, such public use can not affect the title to the property, if any living private owner truly exists in which such title might be vested, but long enjoyment of these cemeteries by the public as historic cemetery sites raises the presumption of a grant of an easement. Such an easement by public user of a cemetery as a public historic cemetery site establishes “a public character” for it. It then becomes a *cemetery by whomsoever*

owned which the town is obligated to preserve, care for, and fence.

40. The Town itself must have concluded long ago that these cemeteries had acquired “a public character” through public user. The town recognized that these cemeteries are reservoirs of the history of the people of the town. That the family burying grounds which had been identified by the Town Historian in 1937 were determined *by the town itself* to be cultural treasures worth preserving is indicated by the following item that appeared in the Brookhaven hamlet column of the *Patchogue Advance* in September of that year:

“The annual cleaning of brush from the graveyards is being carried out by the state through the Town highway department. There are 12 of these family “Bury-grounds” in the community, including South Haven.”

Patchogue Advance, Sept 3, 1937, Brookhaven (hamlet), by Helen M. Ewing:

(The item confuses actions being carried out under New York State Town Law by the Town with action being carried out by the state itself, but it is clear that it is the Town highway department that is doing the work to help preserve the burial grounds.)

41. Note that this article, published in 1937, speaks of *the annual cleaning*. This care of the cemeteries by the Respondents was not a one-time event. There is also evidence that the cleaning and fencing of these cemeteries by the town *continued* for an extended period of time after 1937.

42. Ten years after the item above appeared in the *Patchogue Advance*, the *Minutes* of the governing body of the South Haven Church contain this entry:

Motion was made seconded and carried that the Church accept a new fence around the Cemetery [*sic*] at South Haven if funds are aviable [*sic*] from the Brookhaven Town.

South Haven Presbyterian Church Minutes, Meeting of the Session (governing body) of the South Haven Church, Monday evening, August 25th, 1947, at 8 p.m.

43. The care and maintenance of these cemeteries by Respondents is evidence of the Town's adoption of these burial grounds as historic cemeteries of a public nature.

44. On April 15, 1964, the Town of Brookhaven, under the authority of the Supervisor of the

Town, approved payment to Harvey P. Richardson Sr. of Bellport, New York, for “raking, trimming and hauling away debris from 23 abandoned Town of Brookhaven cemeteries,” work that was performed in March and April 1964. See Exhibit D.

45. The copy of the official Town of Brookhaven Purchase Order shown in Exhibit D clearly designates these cemeteries as “abandoned Town of Brookhaven cemeteries.” It is clear that the Town considered all the cemeteries named in the Purchase Order to be either *cemeteries that belong to the Town* or to be *cemeteries by whomsoever owned* for which the Town was obligated to provide care.

46. The Town had surely concluded that these cemeteries had become public cemeteries by escheat or that these cemeteries had taken on “a public nature” by public user, or, in any case, that any benefit to any private individual was *de minimus* compared to the public benefit of preserving the town’s historic cemeteries.

47. There has been no interruption in the use of these cemeteries by the public since the town ceased removing the weeds and grass from them. Public user of these historic cemeteries has continued to the present. There has been no lapse in the use of the cemeteries of a sufficient length of time (the statutory period required for the public easement to have been initially created) to have caused the easement to have been relinquished. Thus the “public nature” of the cemeteries has not been extinguished by the failure of Respondents to continue to care for them.

48. Even more recently, the Respondents themselves, by their own action, demonstrated that the Town considers seven of the cemeteries on the Petitioners list to be cemeteries of “a public character” and thus legally obligated to maintain and preserve these cemeteries.

49. On January 27, 2009, the Town Board of the Town of Brookhaven voted unanimously to fund preservation work in the following seven cemeteries. See Exhibit E.

1. South Haven Presbyterian Church graveyard
2. Carmans/Miller cemetery

3. David Hawkins cemetery
4. Nathaniel Hawkins cemetery
5. Barteau/Snow cemetery
6. Richard Corwin cemetery
7. Azel Hawkins cemetery

50. Examples of the continued use of these cemeteries by the public include historic tours during which these burial grounds are featured and the use of these historic cemeteries by the public schools. The use of the Miller Cemetery, in particular, by the South Country School District, shows that the public nature of that cemetery has never been extinguished, despite the fact that the town itself has, in more recent years, ceased caring for it. It should be noted that the Miller Cemetery contains the grave of Nathaniel Miller, Jr., (1815-1896), a Supervisor of the Town of Brookhaven. His obituary, published in the *Brooklyn Eagle*, noted



The name of Uncle Nat Miller is known to every Suffolk County resident. Mr. Miller became noted as supervisor of Brookhaven during the rebellion, and he has since been known as the war supervisor. . . . The deceased held the office of supervisor from 1862 to 1865. He conducted an economical administration with the result that Brookhaven was the only town in Suffolk county that paid its own war debts. He was thoroughly familiar with all the town records, and recently appeared before the Suffolk county supervisors in favor of repealing the dredge law relative to the South bay. He was a trustee of the Episcopal church, from which the funeral was held Christmas eve. . . .

Brooklyn Eagle, December 26, 1896

Nathaniel Miller, 1840

That the historic Miller Cemetery has a public nature is an unassailable fact. That it was cared for by the Town in 1964 is also a fact as shown by the Town's own Purchase Order to provide for that cemetery's care. That it has been enjoyed, and continues to be enjoyed, by the both the general public and by the public schools as a public historic cemetery is also a fact. The Miller Cemetery has, by public user over a period of decades of years, become a public historic cemetery. It is the Town's legal and moral duty to preserve, care for, and fence it.

51. It is respectfully submitted that this proceeding is significant because it has implications beyond the question of the Town's removal of grass and weeds. It is important for the cultural coherence of a community to preserve its history and heritage. The Town has a moral and legal obligation not to turn its back on the history of its communities and its people.

WHEREFORE, inasmuch as the Petitioners have shown by irrefutable evidence that all ten cemeteries are cemeteries of "a public nature" and Respondents have presented no triable issues of fact, a summary determination is appropriate to grant Petitioners' motion directing that Brookhaven Town remove the grass and weeds and preserve, care for, and fence these cemeteries and for other such further relief as the court deems proper together with costs and disbursements.

Regina Seltzer, Esq.

Sworn to before me this 25th day of January 2010

Notary