

**Opinion No. 60-232**

December 27, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Howard M. Rosenthal, Counsel State Banking Department Santa Fe, New Mexico

**QUESTION**

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Whether bonds or a trust fund in the sum of \$ 10,000 required under the Perpetual Care Cemetery Act must be perpetual in nature or permanently maintained.

CONCLUSION

Yes.

**OPINION**

{\*656} **ANALYSIS**

As set out in your letter of November 30, 1960, the relevant statute, § 67-25-5, N.M.S.A., 1953 Compilation, provides:

"In the case of any cemetery established after the passage of this act [67-25-1 to 67-25-10], which cemetery offers perpetual care or endowment care, an initial deposit of ten thousand dollars (\$ 10,000.00), or a surety bond in like amount, shall be made to the trust fund referred to in section 3 ([67-25-3] and additions thereto shall be made as required by section 4 [67-25-4], as lots or grave spaces are sold; Provided, however, that said initial deposit may be repaid to the person or persons making deposit out of trust funds derived under the provisions of section 4 [67-25-4], of this act."

From a reading of the statute it is planned that new cemeteries have two alternatives in the commencement of a perpetual care cemetery trust fund.

The first alternative deals with the cemetery depositing the sum of \$ 10,000 in a Trust Account, the income of which is to be applied to the cost of perpetual care.

From the fact that his initial deposit may be repaid out of the proceeds of grave space sales it is apparent that the purpose of the Legislature was to assure that at least the income from this sum of money would be available for this purpose.

The second alternative is to post a Bond assuring what must be construed as contributions to the same purpose. While the statutory language is ambiguous and

vague, it is plain that the Legislature proposed the use of a Surety Bond to accomplish the same purpose as the cash deposit. Therefore, it would appear to this office that the Bond shall run for such period of time as is required for the cemetery to accumulate the minimum \$ 10,000 trust fund and the bond shall provide that the cemetery shall expend such amount for perpetual care as would have been expended from the income of the Trust Fund if the \$ 10,000 cash deposits had been made.

In both of these alternatives it would appear that the Legislature sought to preclude the possibility of cemetery promoters representing that a cemetery was a perpetual care cemetery without insuring that at least the income from \$ 10,000 would be available for this purpose.

This office fails to see how a Surety Bond would serve this purpose unless the above provisions were included therein.

By: Mark C. Reno

Assistant Attorney General