

MANITOBA
THE PUBLIC UTILITIES BOARD ACT
THE CEMETERIES ACT

Board Order 52/05

April 12, 2005

Before: Graham F. J. Lane, C.A, Chairman
 S. Proven, P.H.Ec., Member
 M. Girouard, C.G.A., Member

**AN APPLICATION BY ROSEWOOD MEMORIAL GARDENS
LTD. TO PASS ACCOUNTS DEALING WITH THE PERPETUAL
CARE FUNDS FOR THE PERIOD FROM JANUARY 1, 1998 TO
DECEMBER 31, 2003**

1.0 Background

Amendments to the Cemeteries Act (“the Act”) resulted in The Public Utilities Board (“the Board”) having responsibility for “Passing Accounts” with respect to the handling of perpetual care funds. Previously, this was the responsibility of the Court of Queen’s Bench.

2.0 Application

Rosewood Memorial Gardens Ltd. (“Rosewood”) made an application (“the Application”) to the Board for the Passing of Accounts for the perpetual care fund of Rosewood Memorial Gardens (“the Cemetery”), in accordance with the Cemeteries Act C.C.M.C.C.30 (“the Act”) for the six-year period from January 1, 1998 to December 31, 2003.

In support of the Application, Rosewood filed the following information:

- Royal Bank Trust Company trust statements for the period January 1, 1998 to December 31, 2003;
- Price schedules for Rosewood Memorial Gardens for the period January 1, 1998 to December 31, 2003;
- Listing of perpetual care on regular lot sales for the period January 1, 1998 to December 31, 2003;
- Listing of perpetual care on existing lot contracts for the period January 1, 1998 to December 31, 2003;
- Listing of perpetual care on columbarium niche sales for the period January 1, 1998 to December 31, 2003;
- Perpetual Care Fund Statement for the period January 1, 1998 to December 31, 2003;
- Perpetual Care Fund Statement for the period from January 1, 2003 to December 31, 2003;

- Perpetual Care Trust Fund Report (Capital and Revenue) for the period January 1, 2003 to December 31, 2003;
- Statement of Perpetual Care Expenditures for the period January 1, 2003 to December 31, 2003;
- Sample of purchase contracts;
- Lot and Niche Inventory Report for 2003; and
- The Queen's Bench Order on Passing Accounts – August 4, 1998.

3.0 Amounts Transferred to the Perpetual Care Fund

For the period under review, Rosewood “allocated” \$70,177 of the proceeds it received from the sale of cemetery lots or niches/spaces in columbarium (collectively, “Spaces”) to the Perpetual Care Fund (“the Fund”) of the cemetery and columbarium. Although \$39,648 was required to be transferred to the Fund maintained by Royal Bank Trust Company pursuant to the Act, only \$19,500 was transferred to the Fund.

The difference between the amount “allocated” of \$70,177 and the amount actually transferred to the Fund of \$19,500, i.e. \$50,677, is equal to the capital gains realized in the Fund for the period. Rosewood’s practice has been to transfer to the Fund the monies received by it for the purpose of perpetual care, minus an amount equal to the capital gains realized in the Fund which had not yet been paid out to Rosewood.

By letter dated May 5, 2004, the Board advised Rosewood that the practice of depositing perpetual care monies to the Fund net of any realized capital gains should be discontinued immediately, and that all perpetual care monies received on the sale of spaces must be deposited to the Fund in accordance with the Act. The Board’s letter also stated that the question of whether realized capital gains should be paid out would be reviewed by the Board and with the industry, and that a policy direction may ensue.

In a letter to the Board from Rosewood dated December 23, 2004, Rosewood stated in part that the Board's letter of May 5, 2004 did not address previous transactions, nor should the view of the Board as set out in this letter be applied retroactively.

Rosewood's understanding is that it was authorized to use capital gains as income for purposes of perpetual care, and the practice of offsetting or netting the realized capital gains against transfers to the Fund was simply a convenience.

Rosewood also explained that with the decline in interest rates experienced in the 1990's, and changes to the Manitoba Trustee Act which permitted certain investments in common stocks as well as fixed income instruments, Rosewood, along with their investment advisors, adopted an investment strategy which included equity investments. The expectation was that dividends and capital gains would increase the total income of the Fund over what it would otherwise be if the Fund was to rely on interest income only.

4.0 Board Finding

The Board has reviewed its records and finds no evidence of any advice having been given to Rosewood in the past which approved the use or availability to Rosewood of capital gains realized in the Fund as income for current perpetual care purposes. The Board further notes that, to its knowledge, there are no other cemetery operators that withdraw or otherwise use capital gains realized in the Fund to fund current perpetual care expenses.

With respect to Rosewood's past practices, the Board notes that perpetual care expenses incurred over the period under review far exceeded the income generated by the Fund,

even after including the realized capital gains. The Board is satisfied therefore that the monies have been used for the intended purpose, and there is little practical merit in adjusting prior years' activity.

The Board reiterates however the direction set out in its letter of May 5, 2004 that, effective from that date, Rosewood is to discontinue the practice of depositing perpetual care monies to the Fund net of realized capital gains.

All perpetual care monies received on the sale of Spaces must be deposited to the trust fund in accordance with the Act. Further, although Rosewood is entitled to receive the income from the Fund (e.g. interest and dividends) for the purpose of perpetual care and until the Board orders otherwise, Rosewood is not entitled to receive or withdraw from the Fund any capital gains realized in the Fund or any amounts on account of any unrealized capital appreciation in the Fund, which capital amounts are to remain in the Fund to generate future income.

The Board's letter of May 5, 2004 stated that the capital gains issue will be reviewed with the industry, and a policy direction may ensue. The Board expects that review process to commence within the next few months.

Having reviewed the information provided by Rosewood for the period January 1, 1998 to December 31, 2003, the Board is satisfied that the perpetual care funds have been dealt with in a reasonable manner. The Board will therefore pass the accounts.

The Board is of the view that the passage of time between passing of accounts should not exceed three years. The Board will therefore order that Rosewood file an application with the Board for passing accounts for the period January 1, 2004 to December 31, 2006 no later than May 31, 2007.

