

**CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM**

DATE: April 9, 2012
TO: Alice E. Ingerson, Community Preservation Program Manager
FROM: Ouida C.M. Young, Associate City Solicitor
RE: Soldiers' Monument, Newton Cemetery

BACKGROUND

The Community Preservation Committee ("CPC") is considering an application to fund restoration of the historic Soldiers' Monument ("Monument"), located in the Newton Cemetery. The CPC has asked if the City owns the Monument and whether the Newton Cemetery is obligated to maintain the Monument.

RESPONSE

The 1873 *Annual Report* of the Town of Newton includes a report that on August 7, 1863, Newton Town Meeting voted to create a committee with the authority to erect a memorial to the soldiers who died in the Civil War. The narrative further reports that the Memorial was funded by donations from Newton inhabitants and erected on a lot owned by the Town in the Newton Cemetery. See Exh. A attached to this memorandum.

The *History of Newton 1630-1880* reports that on November 3, 1863, Town Meeting approved a motion as follows:

That a part of the Cemetery land owned by the town shall be so disposed of by the Selectmen as to secure for the Soldiers' Monument a lot properly graded, that may be selected by the committee on the erection of the Monument.¹

On February 12, 1864, the Town of Newton acquired the lot to be used for the Monument from the Newton Cemetery Corporation. The deed conveying the lot granted to the Town the right "...of burial, and of erecting tombs or cenotaphs in, and of ornamenting the same." The deed further provided that the Town of Newton's right to use the lot was "... subject, however, to such terms and

¹ See *History of Newton 1630-1880*, S.F. Smith, D.D., at page 601.

conditions, limitations, liabilities, and regulations as said Corporation may from time to time prescribe, and in accordance with the statutes which are, or may be, in such case made and provided (see Statute 1841, chapter 114, etc.).” See Exh. B attached hereto.

The City still holds title to the lot on which the Monument is located. As an appurtenance to that lot, the City also owns the Monument itself. However, ownership of the Monument does not fully answer the question of maintenance of the Monument or lot, given that the Monument is located in a private cemetery.

The City’s deed does not recite that the Newton Cemetery is required to provide any maintenance to either the lot or to the Monument. The only information on this point comes again from the above referenced 1873 *Annual Report*, which notes that the “Trustees of the Cemetery Corporation are to keep the grounds in good order and condition.”

Private cemetery corporations were first recognized in Massachusetts General Laws, St. 1841, sec. 1, which statute has remained essentially unchanged since that time to the present.² These private cemetery corporations, which include the Newton Cemetery, have no statutory obligation to maintain the cemetery grounds, or monuments installed by the owners of the burial lots. Rather, the owners of the lots have this obligation to the extent that such owners want to maintain the monuments.³

In order to provide continuing care for burial lots, Massachusetts law expressly permits private cemetery corporations to “... hold funds in trust and apply the income thereof to the improvement or embellishment of the cemetery or to the care, preservation or embellishment of any lot or its appurtenances.” G.L. c. 114, sec. 5. Typically, cemetery corporations acquire the funds to be held

² For a history of the development of cemeteries in Massachusetts, both public and private, see *Proprietors of Mr. Hope Cemetery v. City of Boston*, 158 Mass. 509, 513-518 (1893).

³ As succinctly stated by the Bellefontaine Cemetery in St. Louis, MO

Unless a cemetery has elected to become an “Endowed” or “Perpetual Care” cemetery, or makes commitments within its sales contracts, it has no obligation to take care of the grounds. In general, “Endowed” or “Perpetual Care” refers to basic care, such as keeping the grass mowed and roads cleared. It does not cover monument cleaning or repair, or grave landscaping. The pristine maintenance of the cemetery grounds, gardens, and buildings, in perpetuity, depends on the cemetery’s mission and its endowment.

You do not have any obligations, per se. However, because you own the marker or monument, if you wish to have it periodically cleaned or repaired, it will be at your expense. Some cemeteries offer “special” or “enhanced” care contracts, which may provide for regular cleaning or special landscaping. Bellefontaine offers these services and encourages families to plan for future care.

From Bellefontaine Cemetery website, St. Louis, Mo. www.bellefontainecemetery.org

in trust through perpetual care contracts offered to the purchasers of the burial lots.

In the case of the Newton Cemetery, Newton Planning Department staff has been advised that the Cemetery's rules and regulations provide perpetual care only for the maintenance of grass. This information also appears on the Newton Cemetery's website. More extensive perpetual care for permanent plantings can be purchased from the Cemetery.

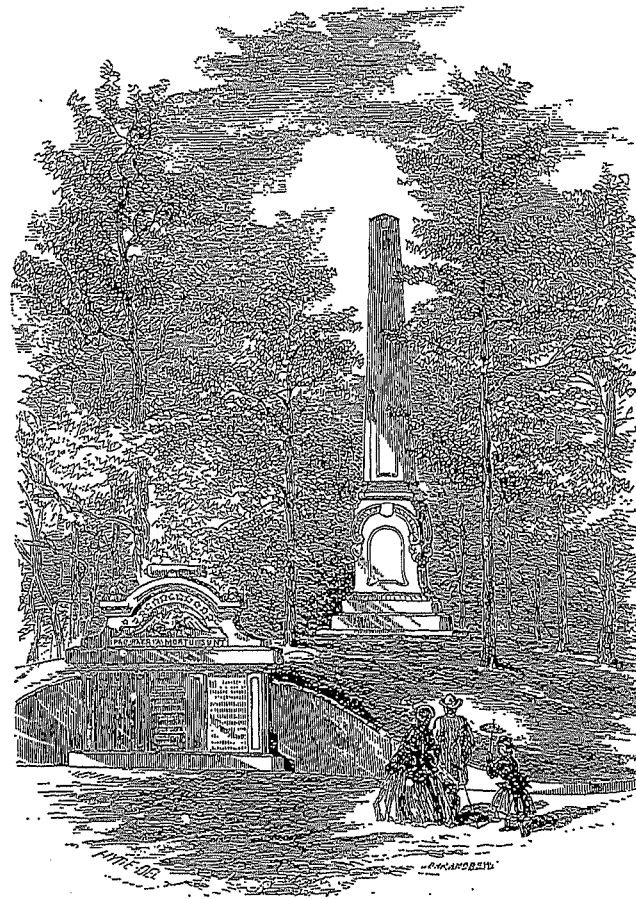
There is no evidence that the Town of Newton at any point purchased any more extensive perpetual care for the Monument than that offered as a matter of general maintenance from the Newton Cemetery. This level of care is consistent with the statement in the *Annual Report of 1873* which noted that the Cemetery Trustees would keep the "grounds in good order and condition."

CONCLUSION

The City owns both the Monument and the lot on which the Monument is located. Given that there is no evidence that the Town/City of Newton ever purchased any perpetual care of the Monument beyond that offered in the Cemetery's rules and regulations calling for general maintenance of a lot's grass, the Cemetery has no responsibility to provide maintenance or repair of the Monument itself. The City may choose to provide such maintenance if it wants to do so.

Cc: Brian Lever, Sr., Historic Preservation Planner

EXHIBIT A



SOLDIERS' MONUMENT

Erected July 23, 1864.

THE SOLDIERS' MONUMENT.

At a Town Meeting of the inhabitants of Newton, held on the 7th day of August, A.D. 1863, a committee was chosen with authority to erect a Monument to the soldiers of Newton who had fallen in the war of the Rebellion.

In order that all might share in this grateful tribute, a donation of one dollar was solicited from each inhabitant; and nearly twelve hundred dollars were received from this source. More than eleven hundred children of the public schools contributed each one dime; and the remainder necessary to construct the Monument, to grade and surround the lot with a suitable curb-stone, together with the erection of an appropriate entablature, has been cheerfully contributed by the generous friends of the soldiers in the Town.

The Monument itself, with the entablature, cost	\$3,975 50
The curb-stone and posts	1,245 00

The work has been completed at an expense of \$5,220 50

It stands in the cemetery, upon a lot of land given by the Town. The Trustees of the Cemetery Corporation are to keep the grounds in good order and condition. The Monument is an octagonal shaft of Quincy granite, resting upon a die and plinths of the same material, and is twenty-eight feet in height. Upon the front of the die are inscribed the words, "*In Memoriam Perpetuam.*" Near the Monument is the entablature, on which is carved the motto "*Pro patria mortui sunt,*" bearing the names of fifty-seven brave men of Newton, who offered up their lives in the cause of Freedom and the Union.

In the erection of this Monument, our patriotic citizens have gracefully performed a grateful public duty; and the work will stand as a perpetual honor to the brave heroes who have fallen, and to the noble spirit of our people.

EXHIBIT B

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Order of D. 36.

Lot for a Monument

For Newton Soldiers

who left their lives to save

American Freedom

Newton Cemetery Corporation

to

Town of Newton

February 1864

Know all Men by these Presents, That the NEWTON CEMETERY CORPORATION, in consideration of *twelve hundred twenty five* dollars and *100* to them paid by *the inhabitants* of *the town of Newton*,

the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said *Town of Newton*, the sole and exclusive right of burial, and of erecting tombs or cenotaphs in, and of ornamenting the same, upon such terms and conditions, and subject to such regulations as said Corporation shall prescribe, *one large* lot or subdivision situate on the Way called *Allen, Pine, and Walnut Avenues* in the Cemetery of said Corporation, in Newton, Mass, and numbered

on the Plan of said Cemetery, which Plan is in the possession of said Corporation for inspection by said grantees and *their* heirs and assigns, at all reasonable times; said lot containing ~~one hundred and~~

fourteen thousand three hundred and eighty eight square feet as per Plan of said Lot on the back of this deed.

TO HAVE AND TO HOLD the aforesaid Promises to the said *Town of Newton*, *its* heirs and assigns forever; subject, however, to such terms and conditions, limitations, liabilities, and regulations as said Corporation may from time to time prescribe, and in accordance with the statutes which are, or may be, in such case made and provided. [See Statute 1841, chapter 114, &c.]

IN TESTIMONY WHEREOF, the said NEWTON CEMETERY CORPORATION have caused these Presents to be signed by their President, and countersigned by their Treasurer, and authenticated by their common seal in duplicate, this *twelfth* day of *February* in the year of our Lord one thousand eight hundred and *twenty four*.

Executed and delivered }
in presence of }

C. Woodward Treasurer, *Harry B. Jewell* President.