



**WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION**

Form #7

Do not mark in this box  
Filing Date

**FILED**

**JUN 9 4 35 PM '93**

**OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE**

Effective Date

**NOTICE OF AN EMERGENCY RULE**

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY: W. Va. Code §§ 11-10-5, 5F-2-2(a)(11) and 5F-1-1(a)(1).

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 36

TITLE OF RULE BEING FILED AS AN EMERGENCY: Preneed Cemetery Companies

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

**THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:**

The Legislature when it enacted Committee Substitute for S.B. 407 authorized the establishment of preneed cemetery companies. There has been considerable discussion re the payment of different expenses, the amount of the annual registration fee and the involvement of trustees. This rule, by addressing these and other issues prevents substantial harm to the public interest.

Use additional sheets if necessary

*James H. Paige III*  
Signature  
James H. Paige III  
State Tax Commissioner



State of West Virginia  
Department of Tax and Revenue

GASTON CAPERTON  
GOVERNOR

TAX DIVISION  
P. O. Box 2389  
Charleston, WV 25328-2389

JAMES H. PAIGE III  
SECRETARY

CONSENT TO FILE RULE

July 9, 1993

FILED  
JUL 9 4 30 PM '93  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

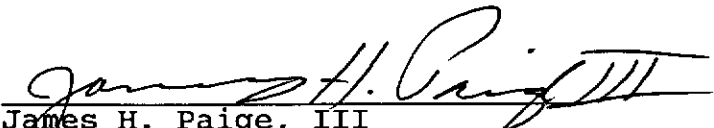
To Whom It May Concern:

Title of Rule:           Preneed Cemetery Companies  
Title Number:           110  
Series Number:          36

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Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 9th day of July, 1993.

  
James H. Paige, III  
Secretary, Tax and Revenue

STATEMENT OF CIRCUMSTANCES

The Legislature when it enacted Committee Substitute S.B. 407 authorized preneed cemetery companies. This rule provides appropriate regulation of such companies.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Preneed Cemetery Companies  
 Type of Rule: X Legislative      Interpretive      Procedural  
 Agency: State Tax Division Address State Capitol  
Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	0	0	0	0	0
Current Expense	0	0	0	0	0
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

2. Explanation of above estimates:

The expenses should not vary from those envisioned by the Legislature when it enacted Committee Substitute for S.B. 407.

3. Objectives of these rules:

Regulate Preneed Cemetery Companies.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no economic impact resulting from this rule.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

There may be an economic impact on the cemetery industry but there is not sufficient

information to calculate its extent.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact resulting from this rule.

Date: July 9, 1993

Signature of Agency Head or Authorized Representative

  
James H. Paige III  
State Tax Commissioner

DATE: July 9, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

EMERGENCY RULE TITLE: Preneed Cemetery Companies

1. Date of filing: July 9, 1993

2. Statutory authority for promulgating the emergency rule: W.Va. Code § 11-10-5, 5F-2-2(a)(11) and 5F-1-1(a)(1)

3. Date of filing of proposed legislative rule: July 9, 1993

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?  
The is a new rule.

5. Has the same or similar emergency rule previously been filed and expired?  
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.  
N/A

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

N/A

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

The Legislature when it enacted Committee Substitute for S.B. 407 authorized the establishment of preneed cemetery companies. There has been considerable discussion re the payment of different expenses, the amount of the annual registration fee and the involvement of trustees. This rule, by addressing these and other issues prevents substantial harm to the public interest.

FILED

WEST VIRGINIA LEGISLATION REGULATIONS

JUN 9 4 35 PM '93

DEPARTMENT OF TAX AND REVENUE

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

TITLE 110

SERIES 36

1993

PRENEED CEMETERY COMPANIES

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§110-36-1. General.

1.1 Scope. - These regulations clarify and implement state law as it relates to property, goods and services purchased by preneed cemetery companies and contracts for services to be rendered by such companies.

1.2 Authority. - W.Va. Code §§ 5F-2-2(a)(11) and 5F-1-1(a)(1).

1.3 Filing Date. -

1.4 Effective Date. -

§110-36-2. Definitions. - As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular and in the plural.

2.1 "Burial vault" means a protective container for a casket which is used to prevent a grave from sinking.

2.2 "Cemetery" means and includes all land and appurtenances including roadways, office buildings, outbuildings and other structures used or intended to be used for or in connection with the interment of human remains: Provided, That this definition shall have no effect on the determination of whether real

property is exempt from ad valorem property taxation pursuant to West Virginia Code § 11-3-9 and 110 C.S.R. 3. The sprinkling of ashes or their burial in a biodegradable container on church grounds or their placement in a columarium on church property does not constitute the creation of a cemetery.

2.3 "Cemetery company" or "seller" means any person, partnership, firm or corporation engaged in the business of operating a cemetery or selling property, goods or services used in connection with interring or disposing of the remains or commemorating the memory of a deceased human being, where delivery of the property or goods or performance of the service may be delayed later than 120 days after receipt of the initial payment on account of such sale. Such property, goods or services include, but are not limited to, burial vaults, mausoleum crypts, lawn crypts, memorials, marker bases and opening and closing and/or interment services, but do not include graves or incidental additions such as dates, scrolls or other supplementary matter representing not more than 10% of the total contract price.

2.4 "Commissioner" or "Tax Commissioner" means the Secretary of the West Virginia Department of Tax and Revenue or his delegate.

2.5 "Compliance agent" means a natural person who owns or is employed by a cemetery company to assure the compliance of the cemetery company with the provisions of West Virginia Code § 35-5B-1 et seq. and these regulations.

2.6 "Cost requirement" means the total cost to the seller of the property, goods or services subject to the deposit requirements of West Virginia Code § 35-5B-4 and these regulations and as required by that seller's total contracts.

2.7 "Delivery" means that the seller has transferred physical possession of the identified goods, has attached or installed such goods at the designated interment space or has actually furnished preneed cemetery company contract services. In the case of preneed goods which are identified with the name of the buyer or other contract beneficiary, "delivery" may also occur when:

2.7.1 The seller pays for and stores the goods at the cemetery where they are intended to be used; or

2.7.2 The seller has paid the supplier of such goods and the supplier has caused such merchandise to be manufactured and stored, has caused title to such merchandise to be transferred to the buyer or other contract beneficiary and has agreed to ship such merchandise upon his or her request.

2.8 "Grave" means a below-ground right of interment.

2.9 "Interment" means the disposition of human remains by earth burial, entombment or inurnment.

2.10 "Lawn crypt" means a burial receptacle, usually constructed of reinforced concrete, installed underground in a quantity of gravel or with tile underlay. Each crypt becomes an integral part of the given garden area and is considered real property.

2.11 "Marker base" means the visible part of the base or foundation upon which the memorial, marker or monument rests and is considered personal property.

2.12 "Mausoleum crypt" means a burial receptacle usually constructed of reinforced concrete and usually constructed or assembled above the ground and is considered real property.

2.13 "Memorials, markers or monuments" means the object used to identify the deceased including the base and is considered personal property.

2.14 "Opening and closing or interment service" means any service associated with the excavation and filling in of a grave in a manner which will not disturb or invade adjacent grave sites: Provided, That even if adjacent grave sites are unintentionally disturbed or invaded, the excavation and filling in of a grave shall fall within the meaning of this definition.

2.15 "Person" includes any state, and its political subdivisions or an agency of either, the State of West Virginia and its political subdivisions or an agency of either, and any individual, firm, partnership, joint venture, joint stock company, any public or private corporation, municipal corporation, cooperative, estate, trust, business trust, receiver, executor, administrator, any other fiduciary, any representative appointed by order of any court or otherwise acting on behalf of other, or any other group or combination acting as a unit.

2.16 "Preneed" means at any time other than either at the time of death or while death is imminent.

2.17 "Preneed cemetery company contract" or "contract" means a contract for the sale of real and personal property, goods or services used in connection with interring or disposing of the remains or commemorating the memory of a deceased human being, where delivery of the property or performance of the service may be delayed for more than 120 days after the receipt of initial payment on account of such sale. Such property, goods or services include, but are not limited to, burial vaults, mausoleum crypts, lawn crypts, memorials, marker bases and opening and closing and/or interment services, but do not include graves or incidental additions such as dates, scrolls or other supplementary matter representing not more than 10% of the total contract price.

2.18 "Seller's trust account" means the trust account established for the specific seller and into which is deposited the total specific funds from all of a specific seller's contracts, plus income on such funds allotted to that seller.

2.19 "Specific trust funds" means funds identified with a certain preneed cemetery company contract for personal property, goods or services.

2.20 "Trustee" means any natural person, partnership or corporation, including any bank, trust company, broker-dealer, foreign state chartered trust, savings and loan association or credit union which receives money in trust pursuant to any agreement or contract made pursuant to the provisions of West Virginia Code § 35-5B-1 et seq. and these regulations.

§110-36-3. Information filing; fees, compliance agent.

3.1 On or after July 1, 1993 and to the extent one of the exemptions in Section 4 of these regulations does not apply, no person, partnership, firm or corporation may engage in the business of operating a cemetery company in this state without having first paid to the Tax Commissioner an annual registration fee in the amount of \$400.00, and filing with the Tax Commissioner on the form specified certain information which shall include the names and addresses of all officers, owners and directors of the cemetery company and the name of the designated compliance agent. The cemetery company shall notify the Tax Commissioner of any changes in the information required to be filed within 90 days of the date on which the change occurs.

3.2 A new filing shall also be required if there is a change in the ownership of the cemetery company or if there is a change in the name of the compliance agent designated by the cemetery company. The cemetery company shall pay to the Tax Commissioner an additional fee of \$100.00 when reporting any such changes.

3.3 All fees collected under the authority of West Virginia Code § 35-5B-1 et seq. and these regulations shall be deposited in the "Cemetery Company Account" created in the State Treasury.

3.3.1 Amounts collected which are found from time to time to exceed funds needed may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature.

3.3.2 Funds in this account shall be expended upon appropriation of the Legislature by the Secretary of Tax and

Revenue in connection with the administration of West Virginia Code § 35-5B-1 et seq. and these regulations.

§110-36-4. Exemptions.

The provisions of West Virginia Code § 35-5B-1 et seq. and the regulations do not apply to:

4.1 Sales of property, goods and services subject to the provisions of West Virginia Code § 47-14-1 et seq.;

4.2 Sales of services by perpetual care cemeteries subject to the provisions of West Virginia Code § 35-5A-1 et seq.;

4.3 Sales of property, goods and services by cemeteries owned and operated by a county, municipal corporation, church or nonstock corporation not operated for profit if the cemetery:

4.3.1 Does not compensate any officer or director except for reimbursement of reasonable expenses incurred in the performance of official duties;

4.3.2 Does not sell or construct or directly or indirectly contract for the sale or construction of vaults or lawn or mausoleum crypts; and

4.3.3 Uses proceeds from the sale of all graves and entombment rights for the sole purpose of defraying the direct expenses of maintaining the cemetery;

4.4 Sales of property, goods and services by community cemeteries not operated for profit if the cemetery:

4.4.1 Does not compensate any officer, owner or director except for reimbursement of reasonable expenses incurred in the performance of official duties; and

4.4.2 Uses the proceeds from the sale of the graves for the sole purpose of defraying the direct expenses of maintaining its facilities; and

4.5 Sales of property, goods and services by family cemeteries wherein lots or spaces are neither offered for public sale nor sold to the public.

4.6 Any person which otherwise would be exempt from the provisions of West Virginia Code § 35-5B-1-et seq. and these regulations ceases to retain such exemption when selling preneed cemetery company contracts.

§110-36-5. Deposit in preneed trust required; who may serve as trustee.

5.1 Each cemetery company shall deposit into an interest bearing trust fund 40% of the receipts from the sale of property, goods or services purchased pursuant to a preneed cemetery company contract, including sales of opening and closing or interment services, when the anticipated delivery thereof will be delayed more than 120 days from the initial payment on said contract. However, should the proceeds from the sale be financed through a lending institution, it shall be considered a cash sale. Deposits are required to be made by the cemetery company within 30 days after the close of the month in which said receipts are paid to it.

5.1.1 When depositing sales receipts into the trust fund, the seller may combine the receipts from different contracts into one deposit: Provided, That the seller shall maintain appropriate records which specify the amounts deposited

relative to the identified contracts and that the trustee is provided with such information.

5.2 If payment is made on an installment or deferred payment basis, the seller shall have the option of initially depositing into the trust fund 40% of the amount of the principal, or in the alternative, depositing 40% of the principal of each payment within 30 days after the close of the month in which said payments are received.

5.3 The trustee of the trust fund shall be appointed by the person owning, operating, or developing a preneed cemetery company. If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, the trustee shall be approved by the Tax Commissioner. A trustee that is not a bank, savings and loan or other federally insured investment banking institution shall apply to the Tax Commissioner for approval. The Tax Commissioner shall approve the trustee when satisfied that:

5.3.1 The applicant employs and is directed by persons who are qualified by character, experience, and financial responsibility to care for and invest the funds of others; and

5.3.2 The applicant will perform its duties in a proper and legal manner and the trust funds and interest of the public generally will not be jeopardized.

5.4 If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, the trustee shall furnish a fidelity bond with the corporate surety thereon licensed to do business in this State, payable to the

trust established, in a sum equal to but not less than 100% of the value of the principal of the trust estate at the beginning of each calendar year, which bond shall be deposited with the Tax Commissioner.

5.3.4 If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, and if it appears that an officer, director or employee of the trustee is dishonest, incompetent or reckless in the management of a trust fund required by the provisions of West Virginia § 35-5B-1 et seq. and these regulations, the Tax Commissioner may bring an action in the circuit courts of this State to remove the trustee and to impound the property and business of the trustee as may be reasonably necessary to protect the trust funds.

**§110-36-6. Requirements for preneed cemetery company contracts.**

A preneed cemetery company contract shall:

6.1 Be written in clear understandable language and printed in easy-to-read type, size and style;

6.2 Identify the seller, the contract buyer and the person for whom the contract is purchased if other than the contract buyer;

6.3 Contain a complete description of the property, goods or services purchased;

6.4 Clearly disclose whether the price of the property, goods or services purchased is guaranteed;

6.5 Provide that if the particular property, goods and services specified in the contract are unavailable at the time of delivery, the seller shall be required to furnish property, goods

and services similar in size and style and at least equal in quality of material and workmanship and that the representative of the deceased has the right to reasonably choose the property, goods or services to be substituted; and

6.6 Be executed in duplicate and a signed copy given to the buyer.

§110-36-7. Identification of funds.

Any funds deposited in the seller's trust account shall be identified in the records of the trustee and the seller by the contract number and by the name of the buyer. The trustee may commingle the deposits in any preneed trust account for the purposes of the management thereof and the investment of funds therein.

§110-36-8. Corpus of trust account and income to remain in preneed trust account; exception.

The corpus of the seller's trust account shall remain intact until the property or goods are delivered or services performed as specified in all of the contracts which comprise such trust account: Provided, That the net income from the preneed trust account may be used to pay any appropriate trustee and auditor fees, commissions and costs. The net income from the preneed trust account, after payment of any appropriate trustee and auditor fees, commissions and costs, shall remain in the account and be reinvested and compounded. Any trustee fees, commissions and costs in excess of income shall be paid by the cemetery company and not from the trust. However, the trustee shall, as of the close of the cemetery company's fiscal year, upon the

written assurance to the trustee by a certified public accountant employed by the seller, return to the seller any income in the seller's account which, when added to the corpus of the trust account is in excess of the current cost requirements for all undelivered property, goods or services included in the seller's preneed cemetery company contracts including all outstanding preneed cemetery company contracts entered into prior to July 1, 1993. The seller's cost requirements shall be based upon wholesale cost to the seller and shall be certified in its records by a sworn affidavit by the compliance agent and determined by the seller as of the close of the cemetery company's fiscal year.

§110-36-9. Disbursement of trust funds upon performance of contract; mausoleum construction required.

9.1 Upon performance of the preneed cemetery company contract, the seller shall certify to the trustee by affidavit the amount of specific funds in the trust, identified with the contract performed, which the trustee shall pay to the seller. The seller may in its records itemize the property, goods or services and the consideration paid or to be paid therefore, to which the established deposit requirements apply. In such case the seller may, upon certification to the trustee of performance or delivery of such property, goods or services and of the amount of specific trust funds identified in its records with such items, request disbursement of that portion of the specific funds deposited pursuant to the contract, which the trustee shall pay to the seller.

9.1.1 When disbursing funds to the seller for payment on more than one preneed cemetery company contract, the trustee may combine all such payments into one payment: Provided, That the trustee maintains appropriate records which specify that portion of the total payment which is applied to the identified preneed cemetery company contract and such information is provided to the seller.

9.1.2 When disbursing funds received from the trustee, the seller may combine into one payment the amounts to be paid to a single payee: Provided, That the seller maintains appropriate records which specify that portion of the payment which is applied to the identified preneed cemetery company contract and such information is provided to the payee.

9.2 If the preneed contract provides for two or more persons, the seller may, at its option, designate in its records the consideration paid for each individual in the preneed cemetery company contract. In such case, upon performance of that portion of the contract identified with a particular individual, the seller may request, by certification in the manner described above, the disbursement of trust funds applicable to that portion of the contract, which the trustee shall pay to the seller.

9.3 Any cemetery company that sells space in an unconstructed mausoleum must commence construction within 7 years from the date of the first sale or when 80% of the spaces in the original mausoleum plan are sold, whichever occurs first.

9.3.1 Because the preneed cemetery company contract is purchased from the seller and not from the contractor

constructing the mausoleum, the cemetery company is the person that contracts with and pays the contractor for construction of the structure.

9.3.2 The cost of constructing a mausoleum shall be borne by the cemetery company: Provided, That if preneed cemetery company contracts are used to sell space in the mausoleum, the proceeds from such sales must be accounted for in the same manner as the proceeds from the sale of other contracts.

**§110-36-10. Seller required to keep records.**

Each seller of a preneed cemetery company contract shall record and keep detailed accounts of each and every contract and of all transactions regarding each preneed cemetery company contract. All such records shall be subject to examination by the Tax Commissioner.

**§110-36-11. Financial report and written assurance required.**

11.1 The cemetery company shall report the following information to the Tax Commissioner within 4 months following the close of the cemetery company's fiscal year:

11.1.1 The total amount of principal in the seller's trust account;

11.1.2 The securities in which the seller's trust account is invested;

11.1.3 The income received from the trust and the source of that income during the preceding fiscal year;

11.1.4 An affidavit executed by the compliance agent that all provisions of West Virginia Code § 35-5B-1 et seq. and

these regulations which are applicable to the seller and which relate to the seller's trust accounts have been complied with;

11.1.5 The total receipts required to be deposited in the seller's trust account;

11.1.6 All expenditures from the seller's trust account;  
and

11.1.7 If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, proof, in a manner determined by the Tax Commissioner, that the required fidelity bond has been secured and that it is in effect.

11.1.8 Appropriate documentation provided by the trustee may be utilized to support the foregoing information.

11.2 The cemetery company shall employ an independent certified public accountant who is to audit the account and provide assurance, which assurance shall be forwarded with the foregoing required report, that 40% of the cash receipts from the sale of preneed property, goods or services which is not anticipated to be delivered or performed within 120 days after receipt of the initial payment on account has been deposited in the account within 30 days after the close of the month in which such payments were received.

§110-36-12. Inclusion of property, goods and services to be delivered within one hundred twenty days.

The contract may include the sale of preneed property, goods or services to be delivered within 120 days after the receipt of the initial payment on account of such sale. Contracts may specify separately the total consideration paid or to be paid for

preneed property, goods or services not anticipated to be delivered or provided within 120 days after receipt of initial payment. If a contract does not specify the preneed property, goods or services not anticipated to be delivered or provided within the 120 day period, the seller shall deposit 40% of the total consideration for the entire contract.

**§110-36-13. Breach of contract by seller; trust to be single purpose trust.**

13.1 If, after a written request, the seller fails to perform its contractual duties, the purchaser, executor or administrator of the estate, or heirs, or assigns or duly authorized representative of the purchaser shall be entitled to maintain a proper legal or equitable action in any court of competent jurisdiction. No other purchaser need be made a party to or receive notice of any proceeding brought relating to the performance of any other contract.

13.2 The seller's trust shall be a single purpose trust. The trust funds shall not be available to any creditors as assets of the seller, nor may the seller encumber any portion of the trust funds.

**§110-36-14. Trustee may rely on certifications and affidavits.**

The trustee may rely upon all certifications and affidavits which have been made pursuant to the provisions of West Virginia Code § 35-5B-1 et seq. and these regulations and is not liable to any person for such reasonable reliance.

**§110-36-15. Transfer of trust funds to another trustee.**

15.1 The seller may, upon notification in writing to the trustee, and upon such other terms and conditions as the agreement between them may specify, transfer its account funds to another qualified trustee. The trustee may, upon notification in writing to the seller, and upon such other terms and conditions as the agreement between them may specify, transfer the trust funds to another qualified trustee.

15.2 Notwithstanding any terms or conditions of any agreement between the seller and the trustee to the contrary, if either the seller or the trustee transfers the seller's trust account to another qualified account, the trustee may not retain and the seller may not pay any portion of the trust funds as payment for any penalty or for any other reason related to such transfer.

**§110-36-16. Use of trustee's name in advertisements.**

No person subject to the provisions of West Virginia Code § 35-5B-1 et seq. or these regulations may use the name of the trustee in any advertisement or other public solicitation without written permission of the trustee.

**§110-36-17. Cemetery property maintained by cemetery company.**

With respect to cemetery property maintained by a cemetery company, the cemetery company is responsible for the performance of:

17.1 The care and maintenance of the cemetery property it owns; and

17.2 The opening and closing of all graves, crypts or niches for human remains in any cemetery property it owns.

**§110-36-18. Waiver of article void.**

Any provision of any contract which purports to waive any provision of West Virginia Code § 35-5B-1 et seq. or these regulations is void.

§110-36-19. Violation a misdemeanor.

19.1 Any person who violates any of the provisions of West Virginia Code § 35-5B-1 et seq. or these regulations is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than \$100 nor more than \$1,000 for each occurrence, or incarcerated in the county or regional jail for a term not to exceed one year, or both fined and incarcerated.

19.2 Any person who violates any of the provisions of West Virginia Code § 35-5B-1 et seq. or these regulations shall for a second offense be guilty of a felony and, upon conviction thereof, shall be fined not less than \$500 nor more than \$3,000, or incarcerated in the penitentiary not less than one nor more than three years, or, in the discretion of the court, be incarcerated in the county jail for a term not to exceed one year.