

**DEPARTMENT OF LAW
STATE OF COLORADO**

**ASSURANCE OF DISCONTINUANCE AND VOLUNTARY COMPLIANCE
IN THE MATTER OF TRINIDAD CATHOLIC CEMETERY ASSOCIATION**

This Assurance of Discontinuance and Voluntary Compliance (“Assurance”) is entered into between the State of Colorado, *ex rel.* Attorney General John W. Suthers, through the undersigned Assistant Attorney General (“State”) and the Trinidad Catholic Cemetery Association (“TCCA”). This Assurance is being agreed to by the parties in lieu of the Attorney General filing a complaint against TCCA for the conduct described below.

PARTIES

1. John W. Suthers is the duly elected Attorney General for the State of Colorado and has express jurisdiction to bring an action against a nonprofit corporation if it has continued to exceed or abuse the authority conferred upon it by law. *See* Colo. Rev. Stat. § 7-134-301(1)(b).

2. Respondent TCCA is a Colorado non-profit corporation incorporated on or about June 27, 1911, with a principal place of business at 2366 E. Main Street, Trinidad, CO 81082-0852.

ALLEGATIONS

3. TCCA is a non-profit, tax-exempt organization. Its primary purpose is the operation and preservation of the Trinidad Catholic Cemetery, one the largest cemeteries in Colorado.

4. To its credit, TCCA has accomplished the following projects over the past years: Constructed an office building, service shop concrete vault manufacturing plant, and 8 mausoleums and columbariums with over 900 crypts and niches; opened 9 new sections and installed 2 new sprinkler systems; installed 1 ¼ miles of 6 foot high perimeter fence, oiled and sealed all streets within the cemetery grounds; and built the Perpetual Care Fund from nothing to nearly \$750,000. All projects were paid for from operations, without financing and without use of any of the Perpetual Care Funds.

Nevertheless, for the past several years, TCCA has not complied in all respects with its own Articles of Incorporation and By-Laws, and has not been fully compliant with Colorado law.

5. The TCCA Articles of Incorporation and By-Laws state that there shall be seven directors on the TCCA Board. However, TCCA has not been operating with a seven-director board for approximately fourteen years. TCCA's directors over this period of time have included Nick DeBono, Fred Tavella, Frank Leone, Mike Festi, Leesa Givigliano, Marco Sebastiani, Albert Fouret, Willie Znidarsich, Mary Kos, and Father Hoorman.

6. The TCCA By-Laws are silent on the terms of each member of the board. Accordingly, by statute the term of each board director is one year. *See* Colo. Rev. Stat. § 7-128-105(1). Both current and former TCCA board directors have served as board directors for a number of years, and current board members Nick DeBono and Fred Tavella have served on the TCCA Board for over 40 years. Board directors may be elected for consecutive terms, but it appears from the board meeting minutes that exist that these elections never took place.

7. The TCCA By-Laws require that the President, Vice-President, Secretary and Treasurer hold their offices for a period of one year until their successors are elected and qualified. Despite this requirement, current president, Fred Tavella, has served as the TCCA board president since 1982. Mr. Tavella also serves as the Executive Director of TCCA.

8. The Secretary of the TCCA Board was responsible for keeping a full and complete record of all the proceedings of the meetings of the Board of Directors. *See* Article 4 Section 3 of the By-Laws. TCCA was required to keep minutes of all the meetings of the board. *See* Colo. Rev. Stat. § 7-136-101(1). TCCA's records do not include all of the board meeting minutes required by the By-Laws and the statute.

9. The failure to keep a complete set of minutes has led to a lack of transparency at TCCA.

10. The Attorney General also found that TCCA has not been making any deposits to its Perpetual Care Fund ("Fund") as required by Colo. Rev. Stat. § 12-12-109(2) for over two years. TCCA instead has used the monies that should have been deposited into the Fund for operating expenses. In light of the Attorney General's investigation, TCCA rectified the error by making a deposit of \$7,900 constituting all amounts due to the Fund. TCCA maintains that it was operating under a mistaken interpretation of the law.

11. Additionally, TCCA's tax preparer improperly reported the Fund balance on two 990 federal tax forms for the organization. TCCA's Board president failed to notice the error and signed and submitted the improperly prepared forms.

TCCA'S ASSURANCES

12. TCCA enters this Assurance as a compromise and settlement of the State's allegations herein. This Assurance shall not be considered an admission of violation for any purpose. TCCA assures the State that TCCA and its employees, contractors, agents, assigns and successors will comply with all applicable laws as now constituted or as may hereafter be amended in conducting business in the state of Colorado.

13. TCCA will undertake the following measures to ensure the appointment of a new, independent Board:

- a. Within 20 days of TCCA signing this Assurance, counsel for board directors Fred Tavella, Frank Leone, Michael Festi, and Leesa Givigliano and counsel for board member Nick DeBono will jointly provide to the Attorney General the names of two (2) individuals who will replace Fred Tavella and Nick DeBono on the TCCA Board.
- b. Within 30 days of TCCA signing this Assurance, counsel for board directors Fred Tavella, Frank Leone, Michael Festi, and Leesa Givigliano and counsel for board member Nick DeBono will each provide to the Attorney General a list of up to 4 potential candidates for new TCCA Board directors as well as an explanation of what relationship exists, if any, between the candidate and any directors of the existing Board. If counsel cannot agree on two individuals to replace Mr. Tavella and Mr. DeBono as required in Paragraph 13(a), the Attorney General and Senior Judge Kim Goldberger shall jointly select two individuals from this list to replace Mr. Tavella and Mr. DeBono on the Board.

- c. The TCCA Board shall hold a meeting within 45 days of this Assurance being signed that includes the two new board directors described in Paragraph 13(a).
- d. Fred Tavella, Nick DeBono and Leesa Givigliano shall resign as TCCA board directors at the meeting referenced in Paragraph 15(c). Because of their long tenure on the Board, Mr. Tavella and Mr. DeBono shall not serve as either Board members or officers in the future. The remaining board directors shall vote on three new directors to serve on the TCCA board, as provided by Article II, Section Two of the TCCA By-Laws, from the list provided to the Attorney General pursuant to Paragraph 15(b). In the event that the majority cannot agree on three new board directors, the Attorney General shall select enough directors from the list to fill any remaining vacancies on the board.
- e. No amendments shall be made to the TCCA By-Laws until the new TCCA Board has been formed.
- f. At its first regular Board meeting, the new TCCA Board shall vote on whether to amend the TCCA By-Laws to require that a Catholic priest serve on the TCCA Board.
- g. Unless the new TCCA Board amends the TCCA By-Laws to state otherwise, each board director will serve for a term of one (1) year, and their terms shall be governed by Colo. Rev. Stat. § 7-128-105. The terms of Board directors Frank Leone and Michael Festi shall expire on September 1, 2012. Mr. Leone and Mr. Festi may serve on the board after

their terms expire if selected by the remaining board members. The remaining board directors' terms shall expire one year from the date of the meeting described in Paragraph 13(c).

- h. TCCA shall use the Colorado Nonprofit Association's *Principles and Practices for Nonprofit Excellence in Colorado* as an operational guide as explained at <http://www.coloradononprofits.org/PandP/>.
- i. All TCCA board directors shall attend annual training offered by the Colorado Nonprofit Association on Better Boards: Beyond the Basics, or undergo similar annual training in their fiduciary duties and responsibilities.
- j. The new TCCA Board shall hire legal counsel to assist them at Board meetings for a period of 12 months after this Assurance is signed.

14. The TCCA Board shall regularly receive copies of relevant financial and business documents as they arrive and are prepared rather than waiting until the next scheduled Board meeting.

15. Within 120 days of this Assurance being signed, the TCCA Board shall adopt a procedure for periodically reviewing its required filings with governmental agencies in order to ensure that TCCA takes all necessary steps to file complete and accurate information, and shall provide a copy of said policy to the Attorney General.

16. Within 60 days of this Assurance being signed, the TCCA Board shall adopt a procedure to ensure compliance with Colo. Rev. Stat. § 12-12-109(2), and shall provide a copy of said procedure to the Attorney General.

17. For each TCCA purchase of any item or service costing above one thousand dollars (\$1000.00), the TCCA Board shall solicit bids from all known businesses that supply the item or service that are located in Las Animas and Huerfano Counties in Colorado, or Colfax County in New Mexico. The minutes of any meeting whereby the Board has voted to permit a conflicting interest transaction as described in Colo. Rev. Stat. § 7-128-501 shall be provided to the Attorney General for review for the next five years.

18. The TCCA Board shall set aside a period of at least thirty minutes at each board meeting to allow the public to make comments and to ask questions of the board.

19. The TCCA Board shall identify one employee, without the authority to sign checks, who shall reconcile TCCA's bank statements with its checks and debits on a monthly basis.

20. TCCA shall employ an independent auditor to perform annual audits, and shall supply the results of said audits to the Attorney General for the next three years.

ADDITIONAL TERMS

21. The obligations set forth in this Assurance are of a continuing legal nature.

22. The Attorney General shall be entitled to apply for and seek from a court of competent jurisdiction an order converting this Assurance into a permanent injunction against TCCA as if the parties had fully litigated all issues contained herein, upon a showing by the Attorney General of a violation by TCCAs of this Assurance. In such event, TCCA agrees to waive any and all defenses and counterclaims that they may have had to such an action, except as to claims or defenses related to the alleged violation of this Assurance or as to the need for injunctive relief.

23. The State acknowledges by its execution hereof that this Assurance constitutes a complete settlement and release of all claims on behalf of the State against TCCA with respect to all claims, causes of action, damages, fines, costs, and penalties which were asserted or could have been asserted with regard to the acts, practices or omissions alleged by the State in this Assurance. The State agrees that it shall not proceed with or institute any civil action or proceeding based upon the above-cited statutes against the TCCA, including, but not limited to an action seeking judicial dissolution of TCCA. Notwithstanding the foregoing, the State may institute an action or proceeding to enforce the terms and provisions of this Assurance or to take action based on future conduct by the TCCA. Nothing in this Assurance shall be construed to release claims held by any other governmental authority or unit.

24. This Assurance shall be a matter of public record.

25. The person who signs this Assurance in a representative capacity for TCCA warrants that he or she is duly authorized to do so. All TCCA Board Directors acknowledge that they have had had a full opportunity to review this Assurance and consult with legal counsel regarding the same.

26. This Assurance may be signed in one or more counterparts, each of which shall be deemed an original, but which together shall constitute the Assurance. Facsimile and electronic copies of this Assurance and the signatures hereto may be used with the same force and effect as an original.

27. TCCA, including any person or entity acting on TCCA's behalf or at the direction and control of TCCA, agrees to cooperate with all investigations and other

proceedings that the Attorney General may bring to enforce the terms of this assurance. Included within this cooperation agreement are the obligations to:

- A. Appear for hearings, depositions or provide testimony in any form, including affidavits. All such testimony shall be truthful;
- B. Produce documents, records, electronic records, or any other tangible things in response to a subpoena or other written request issued by the Attorney General; and
- C. Accept a subpoena from the Attorney General without the need for service of process.

28. Any notices, complaints, or other documents required or contemplated by this Assurance (including any request or subpoena) shall be sent to the following addresses.

To TCCA:

TCCA Board of Directors
2366 E. Main Street,
Trinidad, CO 81082-0852

To the Attorney General:

Alissa Gardenswartz
Assistant Attorney General
Consumer Protection Section
1525 Sherman Street, 7th Floor
Denver, CO 80203

29. The failure of any party to exercise any rights under this Assurance shall not be deemed a waiver of any right or any future rights.

30. If any part of this Assurance shall for any reason be found or held invalid or unenforceable by any court of competent jurisdiction, such invalidity or unenforceability shall not affect the remainder hereof, which shall survive and be construed as if such invalid or unenforceable part had not been contained herein.

31. In the event that any applicable law conflicts with any provision hereof, making it impossible for TCCA to comply both with the law and with the provisions of this Assurance, the provisions of the law shall govern.

32. This Assurance is binding and inures to the benefit of the parties hereto and their respective successors and assigns.

33. This Assurance may be amended solely by written agreement signed by the State and by TCCA.

34. There are no other representations, agreements or understandings between TCCA and the State that are not stated in writing herein.

DATED this 23 day of APRIL, 2012.

TRINIDAD CATHOLIC CEMETERY
ASSOCIATION

By: Fred Tavella

Fred Tavella, Jr. President
(Please print name and title)

TRINIDAD CATHOLIC CEMETERY
ASSOCIATION BOARD OF DIRECTORS

Fred Tavella
Fred Tavella, Jr.

Frank Leone
Frank Leone

Nick DeBono
Nick DeBono

Michael Festi
Michael Festi

Leesa Givigliano
Leesa Givigliano

DATED this 24th day of April, 2012.

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO

By: Alissa Hecht Gardenswartz SAAG for AG
Assistant Attorney General

* Atty Registration # 29753