August 30, 1994

OPINION NO. 94-053

The Honorable William R. Biddlestone
Athens County Prosecuting Attorney
Athens County Court House
Athens, Ohio 45701

Dear Prosecutor Biddlestone:

You have requested an opinion concerning the duty of a township to maintain various cemeteries located within the township and the use of township funds to maintain such cemeteries. As explained in your letter, a city located within a township passed a resolution transferring to the township the duty to maintain a cemetery that is located within, and owned by, the city. Subsequently, the township passed a tax levy outside the ten-mill limitation for the care and maintenance of cemeteries. Further, you have indicated that the city remains part of the township, and that the electors of the city, as part of the township, voted on the approval of the levy you describe. Based upon these circumstances, you ask:

1. Can the [township] trustees legally expend the proceeds of the levy on the care and maintenance of the cemeteries inside [a city and a village located in the township]?

2. Does the levy, a copy of the resolution and the ballot are attached, passed by the voters of [the township], require that the trustees maintain the cemeteries within the city [and the village located in the township]?

3. Does the ballot language require that the [township] trustees share the revenues from the levy with the city [and the village located in the township] in order for them to maintain their cemeteries?

4. Are the [township] trustees able to transfer to the city [and the village located in the township] a sum of money annually to allow the municipalities to care for and maintain their own cemeteries?

Township Levy Outside the Ten-mill Limitation for Cemetery Purposes

Your letter states that the levy about which you ask was submitted for voter approval by the board of township trustees as a levy outside the ten-mill limitation. Such a levy is provided for in R.C. 5705.19, which states in pertinent part:

> The *taxing authority of any subdivision* at any time and in any year, by vote of two-thirds of all the members of the taxing authority, may declare by resolution ... that the amount of taxes that may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision and that it is necessary to levy a tax in excess of that limitation for any of the following purposes:
> ....
> (T) For maintaining and operating cemeteries;
> ....
> The resolution shall be confined to the purpose or purposes described in *one division of this section*, for which the revenue derived therefrom *shall* be applied. The existence in any other division of this section of authority to levy a tax for any part or all of the same purpose or purposes does not preclude the use of such revenues for any part of the purpose or purposes of the division under which the resolution is adopted. (Emphasis added.)

For purposes of R.C. Chapter 5705, the term "subdivision" includes, among other things, townships and municipalities. R.C. 5705.01(A). The "taxing authority" of a township is the board of township trustees, and the taxing authority of a municipal corporation is the council or other legislative authority of the municipality. R.C. 5705.01(C). For purposes of R.C. Chapter 5705, therefore, townships and municipalities are separate subdivisions with separate taxing authorities, and nothing within R.C. 5705.19 permits a tax levy under that section to be submitted jointly by more than one taxing authority.

As in the situation you describe, it sometimes occurs that a municipality exists as part of a township, in which case persons who reside in the municipality are also residents of the township. The obligation for the payment of taxes by such persons to both political subdivisions in which they reside was addressed in 1988 Op. Att'y Gen. No. 88-036. That opinion considered the permissible uses of the proceeds of a tax levy for road purposes that was placed on the ballot by a board of township trustees and was voted on by the electors of the township, including the residents of a city within that township. Op. No. 88-036 discussed the levying of taxes in such a situation, stating as follows:

> [T]erritory forming a municipal corporation remains part of the township in which it is located unless steps are taken to alter the township boundaries .... Residents of the municipality are, thus, also residents of the township and have obligations to both the municipal corporation and the township. *See, e.g.*, Op. No. 85-033 at 2-118 ("[t]axpayers who reside in both the city and the township face extra tax burdens, since they must support the expenses of both the city and the township"); Op. No. 77-031 at 2-114 (inhabitants of a municipality within a township are "residents of

> both the municipality and the township with all of the benefits and obligations attendant thereto") .... Such residents are able to vote on both municipal and township issues. They are subject to both municipal and township tax levies. *See, e.g.,* 1959 Op. Att'y Gen. No. 888, p.584.
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> *When a municipal corporation exists within a township, the legislative authority of the municipal corporation and the board of township trustees are separate taxing authorities, and the proceeds of a tax levied by one of those taxing authorities accrues to the subdivision for which the taxing authority acts.* (Emphasis added; various citations omitted.)

Id. at 2-168 through 2-169.

Op. No. 88-036 then concluded in syllabus, paragraph one:

> When voters of a township have approved a tax levy for road purposes, the proceeds of that levy accrue to the *township*, and the township has no obligation to distribute a portion of the proceeds to a municipal corporation that constitutes part of the township. Rather, the township trustees may expend the levy proceeds in such manner as they choose for purposes that are authorized by the levy. (Emphasis added.)

Thus, although a person who resides in a municipality that is part of a township may have tax obligations to both subdivisions, the proceeds of a tax levied by one subdivision accrue only to that subdivision.

In the situation you describe, the tax levy was submitted by the board of township trustees to the voters of the township, of which a city and a village were part. Because the levy was submitted as a levy of the township, the proceeds of the levy accrue solely to the township, and the municipalities that are part of the township are not entitled to a portion of the proceeds of that levy merely because the residents of the municipalities are also residents of that township. The township trustees may, therefore, use the proceeds of the levy for any purposes authorized by the levy. *See generally* Ohio Const. art. XII, § 5 ("[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied").

Authority of Township Trustees to Expend Proceeds of Tax Levy

A board of township trustees, as a creature of statute, "can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them." *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875). In order to determine whether the township may use the proceeds of the tax levy you describe for the maintenance and care of public cemeteries within a city and a village in the township, it is, therefore, necessary to determine whether the board is authorized by statute to make such expenditure. Further, because the questions you ask concern the use of

township funds, it is necessary to bear in mind that, "[t]he authority to act in financial transactions must be clear and distinctly granted," and any doubt regarding the authority of a governmental entity to expend public funds must be resolved *against* the expenditure. *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 572 (1916).

Township Duties Concerning Public Cemeteries

Within R.C. Chapter 517 the General Assembly has granted townships certain authority with respect to the establishment and operation of cemeteries. The jurisdiction of a board of township trustees over public cemeteries generally is set forth in R.C. 517.10, which states:

> The title to, right of possession, and control of all public cemeteries located *outside any municipal corporation*, which have been set apart and dedicated as public cemeteries, and any grounds which have been used as such by the public, but not expressly dedicated as a cemetery, except such as are owned or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authorities of any municipal corporation, shall, severally be vested in the board of township trustees. (Emphasis added.)

Concerning the care of such cemeteries, R.C. 517.11 states in part: "The board of township trustees shall provide for the protection and preservation of cemeteries under its jurisdiction .... The board may levy a tax to meet any costs incurred for these purposes, not to exceed one-half mill in any one year, upon all the taxable property of the township." Additional duties with respect to public cemeteries are imposed upon boards of township trustees by R.C. 517.32, which states in pertinent part:

> Where the board of county commissioners has enclosed with a substantial fence ... all abandoned public cemeteries in the county, from which the remains of the dead have not been removed, the board of township trustees shall keep the fence in good repair, remove the undergrowth and weeds from such cemetery at least once a year, and pay the expense thereof from township funds.

See also R.C. 517.01 (township may acquire land for cemetery purposes); R.C. 517.14 (joint township cemeteries); R.C. 517.27 (requiring township, in certain instances, to accept conveyance of public cemetery that is located in township and that is not under the control of a municipal corporation).

Nothing in R.C. Chapter 517, however, authorizes a board of township trustees to maintain a cemetery that is owned by, and located within, a city or a village. Further, nothing within R.C. Chapter 759, which governs municipal and union cemeteries, authorizes a city to transfer to a township the duty of maintaining a city-owned cemetery. R.C. 759.19 does authorize the legislative authority of a village to transfer title to a cemetery owned by the village to the township in which the village is located "upon such terms as are agreed to between the village and the board [of township trustees]." It is only after a transfer of ownership from the village to the township under R.C.

759.19, however, that the township trustees have a duty under R.C. 517.11 to preserve and protect that cemetery.

In answer to your first question, therefore, because a township of which a city and village are part has no authority to maintain a cemetery owned by, and located within, a municipal corporation within the township, it may not use the proceeds of a tax levied upon the township under R.C. 5705.19(T) for the maintenance of such a cemetery.[1]

Disposition and Use of Tax Revenues

Your second question asks whether the resolution and ballot language of the tax levy you describe requires the township to maintain the public cemeteries within the municipalities located in the township. R.C. 5705.10, which governs the disposition and use of the proceeds of a special levy,[2] states in pertinent part: "All revenue derived from a special levy shall be credited to a special fund for the purpose for which the levy was made .... Money paid into any fund shall be used only for the purposes for which such fund is established."

As with any special levy approved by the electors of a subdivision, the contemplated uses of the proceeds of a levy can be no broader than the powers of the taxing authority of the subdivision levying the tax. Thus neither the language of the resolution nor the ballot language of the levy you describe can operate to confer upon the township trustees authority to use the proceeds of a tax levied under R.C. 5705.19(T) to maintain a cemetery owned by, and located within, a municipal corporation within the township. *See Trustees of New London Township v. Miner*.

Your third and fourth questions ask whether the township may "share the revenue" of the levy or transfer the proceeds of the levy to a city and a village located within the township for the

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[1] Although a township may not, as in the situation you describe, use the proceeds of a tax levied under R.C. 5705.19(T) to maintain a cemetery owned by, and located within, a municipality in the township, there are a number of mechanisms available to townships and municipalities to assure that public cemeteries are adequately maintained. In addition to the alternative provided in R.C. 759.19, R.C. 759.27 authorizes one or more municipalities and one or more townships to unite in the establishment and management of a union cemetery. *See* 1962 Op. Att'y Gen. No. 3170, p. 601, 605 (R.C. 759.27 permits an existing cemetery to be established as a union cemetery). Another alternative exists under R.C. 517.21, which permits a board of township trustees, in certain circumstances, to order an abandoned public or private cemetery to be discontinued and, at township expense, to provide for the removal and reinterment of all bodies and the removal and re-erection of all headstones and markers. Additionally, R.C. 517.28 and R.C. 517.29 establish a procedure by which a probate court may order that a cemetery under the control of municipal authorities be abandoned and removed.

[2] The term "special levy" refers to a levy for a specific purpose, as opposed to a general levy for current expenses. 1992 Op. Att'y Gen. No. 92-058, 2-239 n. 1.

maintenance of municipal cemeteries. Concerning the transfer of monies from a special fund of a subdivision, R.C. 5705.14 states:

> *No transfer shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise, except as follows*:
> ....
> (D) The unexpended balance in any special fund, other than an improvement fund, existing in accordance with division (D), (F), or (G) of [R.C. 5705.09 or R.C. 5705.12], may be transferred to the general fund or to the sinking fund or bond retirement fund after the termination of the activity, service, or other undertaking for which such special fund existed, but only after the payment of all obligations incurred and payable from such special fund. (Emphasis added.)

The transfer of funds authorized by R.C. 5705.14(D), however, extends only to transfers between funds within the same subdivision. *See* 1994 Op. Att'y Gen. No. 94-004. No other statute of which I am aware authorizes a township to share with, or transfer to, a municipality in the township the proceeds of a tax levied by the township under R.C. 5705.19(T). Absent such statutory authority, a township may not share with, or donate to, a municipality within the township the proceeds of a tax levied under R.C. 5705.19(T) for the maintenance of municipally owned cemeteries.

Conclusion

It is, therefore, my opinion, and you are hereby advised that, when the electors of a township that includes a city and a village approve a levy under R.C. 5705.19(T) for cemetery purposes, the proceeds of such levy accrue only to the township and may not be used to maintain a cemetery that is owned by, and located within, the city or village.

Respectfully,

LEE FISHER
Attorney General

August 30, 1994

The Honorable William R. Biddlestone
Athens County Prosecuting Attorney
Athens County Court House
Athens, Ohio 45701

SYLLABUS: 94-053

When the electors of a township that includes a city and a village approve a levy under R.C. 5705.19(T) for cemetery purposes, the proceeds of such levy accrue only to the township and may not be used to maintain a cemetery that is owned by, and located within, the city or village.