

November 19, 2014

The Honorable Gregg Marx  
Fairfield County Prosecuting Attorney  
239 West Main Street  
Suite 101  
Lancaster, Ohio 43130

SYLLABUS:

2014-041

Pursuant to R.C. Chapter 504, a board of trustees of a limited home rule township may adopt a resolution prohibiting the burial of human remains in private or family cemeteries within the unincorporated territory of the township, provided that the board of township trustees determines the resolution is in the interest of the public health, safety, morals, or general welfare of the public, and the resolution is reasonable and consistent with constitutional limitations.



# MIKE DEWINE

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November 19, 2014

OPINION NO. 2014-041

The Honorable Gregg Marx  
Fairfield County Prosecuting Attorney  
239 West Main Street  
Suite 101  
Lancaster, Ohio 43130

Dear Prosecutor Marx:

You have requested an opinion whether a township that has adopted a limited home rule government pursuant to R.C. Chapter 504 may prohibit the burial of human remains in private or family cemeteries located within the township's boundaries.<sup>1</sup> If a limited home rule township may not prohibit the burial of human remains in private or family cemeteries located within the township, you ask whether a limited home rule township may take other measures to limit or restrict the installation or use of private or family cemeteries within the township's boundaries. As you have noted, 2007 Op. Att'y Gen. No. 2007-005 (syllabus, paragraph 2) determined that a board of trustees of a statutory township "is without authority to prohibit the burial of human remains on private property within the unincorporated area of the township." That opinion did not, however, address the authority of a limited home rule township. 2007 Op. Att'y Gen. No. 2007-005, at 2-40 n.4.

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<sup>1</sup> You have indicated that for purposes of your request, you utilize the definition of "family cemetery" that is set forth in R.C. 4767.02(C). R.C. 4767.02(C) defines the term "family cemetery" as "a cemetery containing the human remains of persons, at least three-fourths of whom have a common ancestor or who are the spouse or adopted child of that common ancestor." As explained in 2007 Op. Att'y Gen. No. 2007-005 (syllabus, paragraph 1), the burial of a single deceased family member on privately owned, family property constitutes a "family cemetery" as defined in R.C. 4767.02(C).

You have not defined the term "private cemetery" for purposes of your request. A prior opinion of the Attorney General explained that the term "private cemetery" "does not [necessarily] mean one which is under private ownership for the sale of lots to the public, but [may refer to a cemetery] which is not only owned for the benefit of but also devoted to the burial of the members of a family, or relatives bound by family or similar personal ties, to the exclusion of the public." 1966 Op. Att'y Gen. No. 66-163, at 2-352. For purposes of this opinion, we use the term "private cemetery" in accordance with this definition.

In 1991, the General Assembly enacted R.C. Chapter 504, which authorizes a township to adopt a limited self-government form of township government. 1991-1992 Ohio Laws, Part II, 2902, 2905-17 (Sub. H.B. 77, eff. Sept. 17, 1991). Specifically, R.C. 504.01 authorizes a township to adopt a limited home rule government under which the township exercises limited powers of local self-government and limited police powers as authorized by R.C. Chapter 504. A limited home rule township contrasts with a statutory township, which is a township that has not adopted this limited home rule form of government. 2002 Op. Att’y Gen. No. 2002-032, at 2-210 n.2. “As a practical matter, R.C. Chapter 504 grants a limited home rule township authority to exercise a greater measure of authority, in a greater number of matters, than the authority granted to townships generally by the other provisions of R.C. Title 5.” *Id.*; *see also, e.g.*, R.C. 504.04. A township that has adopted this form of government is authorized, *inter alia*, to “[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws,” and to “[a]dopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws[.]” R.C. 504.04(A)(1)-(2); *see also* 2002 Op. Att’y Gen. No. 2002-032, at 2-212. These limited home rule powers shall be exercised pursuant to resolution. R.C. 504.04(A). Generally, a resolution adopted by a limited home rule township pursuant to R.C. Chapter 504 may not create a criminal offense or impose criminal penalties. R.C. 504.04(B)(1). Rather, resolutions adopted by a limited home rule township pursuant to R.C. Chapter 504 may be enforced by the imposition of civil fines.<sup>2</sup> R.C. 504.05; *see also* R.C. 504.06 (peace officers serving a limited home rule township may issue citations to persons violating resolutions adopted under R.C. Chapter 504); R.C. 504.08 (a limited home rule township may enforce resolutions adopted under R.C. Chapter 504 by filing for injunctive relief and filing for property liens under certain circumstances).

The home rule authority granted to townships by R.C. 504.04(A) to exercise all powers of local self-government and to adopt and enforce police, sanitary, and similar regulations that do not conflict with general laws mirrors the home rule authority granted to municipalities by Ohio Const. art. XVIII, § 3. *Compare* Ohio Const. art. XVIII, § 3 (“[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws”), *with* R.C. 504.04(A)(1)-(2) (a limited home rule township is authorized to “[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws ... [and to adopt] and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws”). That is, in enacting R.C. Chapter 504 and granting limited home rule authority to limited home rule townships, the General Assembly chose to enact language that closely reflects the language of Ohio Const. art. XVIII, § 3. *See Osnaburg Twp. Zoning Inspector v. Eslich Envtl., Inc.*, 5th Dist. No. 2008CA00026, 2008-Ohio-6671, 2008 WL 5257316, at ¶¶42-44 (Dec. 16, 2008) (recognizing that R.C. 504.04(A) mirrors Ohio Const. art. XVIII, § 3). It is, therefore, reasonable to conclude that the General

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<sup>2</sup> No fine imposed by a limited home rule township pursuant to R.C. 504.05 shall exceed one thousand dollars.

Assembly intended to grant to limited home rule townships home rule authority that is similar to the home rule authority of municipal corporations under Ohio Const. art. XVIII, § 3.

The General Assembly has, however, placed certain additional restrictions upon the exercise of home rule powers by a limited home rule township. For example, R.C. 504.04(A)(1) prohibits a limited home rule township from enacting taxes other than those authorized by general law. Additionally, a limited home rule township may not, except under limited circumstances, create a criminal offense or impose criminal penalties. R.C. 504.04(B)(1). R.C. 504.04(B) enumerates additional restrictions upon the exercise of home rule powers by a limited home rule township, including that a limited home rule township may not establish regulations affecting hunting, trapping, fishing, or the possession, use, or sale of firearms. Other than the specific limitations upon a limited home rule township's authority that are set forth in R.C. Chapter 504, the home rule powers granted to a township by R.C. Chapter 504 appear to correspond to the home rule powers of a municipality under Ohio Const. art. XVIII, § 3. When examining the confines of a limited home rule township's authority, it is, therefore, instructive to examine relevant case law discussing the home rule authority of Ohio municipalities.

Included among the home rule authority of both municipal corporations and limited home rule townships is the authority to adopt and enforce within their boundaries "local police, sanitary and other similar regulations" that do not conflict with general laws. Ohio Const. art. XVIII, § 3; R.C. 504.04(A)(2). This authority, collectively known as the "police power," authorizes enactment of regulations that "protect the public health, safety, or morals, or the general welfare of the public." *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St. 3d 553, 2008-Ohio-92, 880 N.E.2d 906, at ¶11. As explained by the Ohio Supreme Court:

Police [power] regulations, whether by ordinance or statute, will frequently interfere with the enjoyment and use of property and with the making of contracts. However, this court has consistently held that a police regulation having that effect may be valid unless it clearly appears that such regulation bears no real and substantial relation to the public health, safety, morals or general welfare of the public or is unreasonable or arbitrary.

*Vill. of W. Jefferson v. Robinson*, 1 Ohio St. 2d 113, 119-20, 205 N.E.2d 382 (1965); *see also Vill. of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 72, 458 N.E.2d 852 (1984). Thus, Ohio courts have interpreted municipalities' home rule authority under Ohio Const. art. XVIII, § 3 as including the authority to exercise police powers that have "a real and substantial relation to the public health, safety, morals or general welfare of the public[.]" *Benjamin v. City of Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854 (1957); *see also City of Toledo v. Tellings*, 114 Ohio St. 3d 278, 2007-Ohio-3724, 871 N.E.2d 1152, at ¶35 ("the state and the city of Toledo possess the constitutional authority to exercise police powers that are rationally related to a legitimate interest in public health, safety, morals, or general welfare"). Because the home rule authority granted to limited home rule townships by R.C. 504.04(A) mirrors the home rule authority granted to municipalities by Ohio Const. art. XVIII, § 3, it is reasonable to conclude that a limited home rule township is authorized to enact police

power regulations that are substantially related to a legitimate interest in public health, safety, morals, or general welfare.

As explained by the Ohio Supreme Court, “[t]he questions of whether an exercise of the police power is really and substantially related to the public health, safety, morals or general welfare of the public, and whether such exercise is unreasonable or arbitrary, are questions initially committed to the judgment and discretion of the legislative body[.]” *City of Portsmouth v. McGraw*, 21 Ohio St. 3d 117, 119-20, 488 N.E.2d 472 (1986). Accordingly, a board of trustees of a limited home rule township has discretion to determine whether a proposed resolution bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and is otherwise reasonable. Generally, courts will not invalidate the decisions of a legislative body in these matters unless such decisions appear to be clearly erroneous. *Id.* at 120; *Benjamin v. City of Columbus*, 167 Ohio St. at 110.

Accordingly, a board of trustees of a limited home rule township may enact a resolution prohibiting the burial of human remains in private or family cemeteries within the unincorporated territory of the township provided that the board of township trustees determines the resolution is in the interest of the public health, safety, morals, or general welfare of the public.<sup>3</sup> See *Vill. of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d at 72 (“the right of the individual to use and enjoy his private property is not unbridled but is subject to the legitimate exercise of the local police power”); 1993 Op. Att’y Gen. No. 93-005, at 2-29 (“[i]n general, a private person or religious society may use its land for such purposes as it chooses, including the burial of the dead, *subject to applicable state or local regulation*”) (emphasis added). Relevant factors that a board of township trustees may consider in determining whether to enact such a resolution include, among others, the conservation of safe, underground water resources and the preservation of property values within the township. See *Vill. of Hudson v. Albrecht, Inc.* (syllabus, paragraph 2) (“[t]he monetary interests of protecting real estate from impairment and destruction of value are includable under the general welfare aspect of the municipal police power and may therefore justify its reasonable exercise”); *Miller v. Horn*, Nos. 95-CA-113, -114, 1996 WL 354756, at \*5 (Clark County June 28, 1996) (considering potential contamination of drinking water in affirming trial court’s determination that backyard pet cemetery constituted a nuisance). A determination under R.C. 504.04(A) of whether a particular resolution bears a real and substantial relationship to the public health, safety, morals, or general welfare will depend upon the specific terms of the resolution, as well as the circumstances of its enactment. It has long been recognized, however, that regulation of the disposal of human remains serves sanitation and health purposes within the state’s police power. See *Hutchinson v. City of Lakewood*, 125 Ohio St.

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<sup>3</sup> Although R.C. 504.04(A) prohibits a limited home rule township from adopting a resolution under its police power that is in conflict with general laws, we are not aware of a general state law that would conflict with a township resolution prohibiting the burial of human remains in private or family cemeteries within the boundaries of the township. See generally *Vill. of Linndale v. State*, 85 Ohio St. 3d 52, 706 N.E.2d 1227 (1999) (describing the nature of the state’s “general laws” in relation to a municipality’s police power).

100, 103, 180 N.E. 643 (1932) (under a municipality's police power, it is authorized "to regulate the burial of the dead and similar functions having to do with the preservation of public health"); *Beth Hamedrosh Anshe Galicia Congregation v. Vill. of Brooklyn*, 44 Ohio Law Abs. 522, 65 N.E.2d 298 (Cuyahoga County 1945) (finding that a municipality's police power included the authority to prohibit the establishment of additional private cemeteries within the municipality, even if such prohibition was founded in reasons other than the public health); *Pierstorff v. Bd. of Embalmers & Funeral Dirs.*, 68 Ohio App. 453, 456, 41 N.E.2d 889 (Lucas County 1941) ("[n]ot only from the viewpoint of sanitation but from other considerations, there are few fields of business enterprise, profession or occupation into which the police power of the state may more appropriately extend its controlling and regulatory authority than that of the burial of the dead"); *Fraser v. Lee*, 8 Ohio App. 235, 239 (Cuyahoga County 1917) ("[t]he disposal of the dead, from motives of sanitation and health, is a state function").

We note that, generally speaking, legislative enactments apply prospectively. See Ohio Const. art. II, § 28; R.C. 1.48; *State ex rel. Coyne v. Cingle*, 8th Dist. No. 82279, 2003-Ohio-5383, 2003 WL 22309543, at ¶13; *Cleveland Heights Fire Fighters Ass'n v. City of Cleveland Heights*, No. 40881, 1980 WL 354747, at \*3 (Cuyahoga County May 8, 1980); 2013 Op. Att'y Gen. No. 2013-040. It is advisable that a township resolution prohibiting the burial of human remains in private or family cemeteries within the township be enacted to apply prospectively so as not to violate the constitutional rights of landowners. See *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953) (syllabus, paragraph 2) ("[t]he right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protections of [U.S. Const. amend. XIV and Ohio Const. art. I, § 16], providing that no person shall be deprived of life, liberty or *property* without due process of law"); *State v. Skilwies*, No. 17077, 1999 WL 6507, at \*3 (Montgomery County Jan. 8, 1999) ("[a]lthough a land-use regulation may be constitutional when applied to uses that arise after its enactment, the same regulation may be unconstitutional when applied retroactively to pre-existing uses"). Any resolution adopted by the board of trustees of a limited home rule township must, of course, conform to all constitutional limitations. See, e.g., U.S. Const. amend. V (no person shall "be deprived of life, liberty, or property, without due process of law"); U.S. Const. amend. XIV (no state shall "deprive any person of life, liberty, or property, without due process of law"); Ohio Const. art. I, § 16 (providing protections from deprivation of property without due process of law); see also *Ohio Edison Co. v. Power Siting Comm'n*, 56 Ohio St. 2d 212, 217-18, 383 N.E.2d 588 (1978) (citations omitted) ("[t]he [constitutional] provisions against impairment of contracts and taking of property without due process of law must bow to valid police power legislation designed to protect public health, safety and welfare, as long as the exercise of that police power 'bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary'").

Because we have determined that a board of trustees of a limited home rule township may, pursuant to R.C. 504.04(A), adopt a resolution prohibiting the burial of human remains in private or family cemeteries within the unincorporated territory of the township, we need not address your second question.

Based on the foregoing, it is my opinion, and you are hereby advised that pursuant to R.C. Chapter 504, a board of trustees of a limited home rule township may adopt a resolution prohibiting the burial of human remains in private or family cemeteries within the unincorporated territory of the township, provided that the board of township trustees determines the resolution is in the interest of the public health, safety, morals, or general welfare of the public, and the resolution is reasonable and consistent with constitutional limitations.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General