February 26, 1993

OPINION NO. 93-005

The Honorable P. Randall Knece
Pickaway County Prosecuting Attorney
P.O. Box 631
Circleville, Ohio 43113

Dear Prosecutor Knece:

You have requested an opinion concerning the legality and procedures involved with the establishment of a private cemetery on privately-owned land. Your request states that members of the Amish community in Pickaway County have inquired about the proper procedure for establishing, on land owned by them, a private burial ground to be used exclusively by members of their community. Your letter indicates that the burial ground would be located in a township that has no zoning regulations; it is assumed that the burial ground would not be located within a municipal corporation. For purposes of this opinion, it is understood that the Amish community constitutes a "religious society," as that term is commonly used. See, e.g., R.C. 517.10, 1721.03, 1721.21(G); State v. Fulton, 57 Ohio St. 3d 120, 566 N.E.2d 1195, cert. denied, 112 S.C. 98 (1991). Because of the general nature of your inquiry, this opinion contains a general overview of the applicable Ohio statutory scheme.

Statutes Providing for Regulation of Cemeteries and Related Activities

In 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. See, e.g., State ex rel. Stuart v. Meyer, 19 Ohio App. 436 (Lucas County 1925). The Ohio Revised Code contains a variety of statutes governing different types of cemeteries. A number of those statutes are clearly not applicable to the type of cemetery that you have described. See, e.g., R.C. 517.01-.20 (township cemeteries); R.C. 759.01-.26 (cemeteries of municipal corporations and cemeteries within municipal corporations); R.C. 759.27-.40 (union cemeteries); R.C.

1721.21 (requiring the establishment of a fifty thousand dollar endowment care fund by a person desiring to operate a cemetery that is organized or developed after July 1, 1970, but providing an exception for any cemetery that "is owned and operated entirely and exclusively by churches, religious societies, established fraternal organizations, municipalities, or other political subdivisions of the state, or a national cemetery").

Recently-enacted legislation requires a person, church, religious society, established fraternal organization, or political subdivision that owns, operates, or maintains a cemetery to register the cemetery with the Division of Real Estate in the Department of Commerce. R.C. 4767.02-.04; see Sub. H.B. 733, 119th Gen. A. (1992) (effective Oct. 28, 1992, with certain provisions effective on other dates). An exception to the registration requirement applies to a cemetery in which there have been no interments during the previous fifty calendar years and also to a "family cemetery," defined 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." R.C. 4767.02(C). An application for registration of a cemetery must be made by the owner or the person responsible for the operation and maintenance of the cemetery, who is required to submit the necessary documentation and appropriate fee. The certificate of registration must be displayed on the premises of the cemetery, and annual renewal is required. R.C. 4767.03-.04.

Various other statutes govern activities that may be related to the operation of a cemetery. For example, any individual who wishes to carry on the business or profession or discharge any of the duties of embalming or funeral directing must be licensed by the Board of Embalmers and Funeral Directors pursuant to R.C. Chapter 4717. See R.C. 4717.07, .12-.13. "Funeral directing" is defined to include "the disposition of dead human bodies" and "the provision or maintenance of a place for the preparation, the care, or disposition of dead human bodies." R.C. 4717.01(B). Funeral homes are governed by R.C. 4717.11 and 4717.17-.19. See also 7 Ohio Admin. Code Chapter 4717-1.

The Ohio Department of Health has general supervision of all matters relating to the preservation of the life and health of the people, and has express authority to make orders or

rules governing the receipt and conveyance of remains of deceased persons. R.C. 3701.13. The Public Health Council, which is part of the Department of Health, is authorized to adopt a sanitary code for application throughout the state. See R.C. 3701.02, .33-.34. No existing rules of those bodies govern the establishment of cemeteries.

The Director of Health is in charge of the statewide system of vital statistics that includes registration of births, deaths, and fetal deaths. R.C. 3705.02. The state is divided into registration districts, and each district has a local registrar of vital statistics whose responsibilities include keeping records of deaths and fetal deaths. R.C. 3705.04-.07. The funeral director or other person in charge of the final disposition of the remains of each death or fetal death is required to register the death with the local registrar of vital statistics. The funeral director or other person in charge must obtain the personal and statistical information needed for the death certificate, sign the statement of facts, and present the death certificate to the physician or coroner for certification of the cause of death. R.C. 3705.16.

The local registrar of vital statistics is also responsible for issuing burial permits. R.C. 3705.17. R.C. 3705.17 prohibits the person in charge of any premises in which interments or cremations are made from interring, cremating, or otherwise disposing of a body unless there is a burial permit. See also R.C. 3705.20 (fetal deaths). The person in charge is required to endorse upon the burial permit the date of disposal of the body and to retain the permit for at least five years. The person in charge is required to keep accurate records of all interments, cremations, or other disposal of dead bodies made in the premises under his charge, including the name of the deceased person, place of death, date of burial, cremation, or other disposal, and name and address of the funeral director. The records must be open at all times to public inspection. R.C. 3705.17. See generally 4 Ohio Admin. Code Chapter 3701-5.

Statutory provisions govern the disposition of the body of a person who has died of a communicable disease, when the Department of Health has declared that the disease requires immediate disposal for the protection of others. R.C. 3707.19. There are, however, no statutes governing the manner in which a burial must be performed in other circumstances.

R.C. Chapter 1721 provides for the establishment and operation of cemetery companies

or associations, which are companies or associations that are incorporated for cemetery purposes and have the rights and responsibilities specified in R.C. Chapter 1721. See, e.g., R.C. 1721.01-.02, .05-.06. It does not, however, appear that the establishment of a cemetery association would serve the purposes sought by the Amish community - particularly that of providing a cemetery for use exclusively by members of the community - since R.C. 1721.07 states that "any person not already the owner of a lot in the cemetery [of a cemetery company or association] may purchase any unsold lot in it, and have such lot conveyed to him by the company or association upon tender of the usual price asked by it for such lots."

Certain provisions of R.C. Chapter 1721 apply to entities other than cemetery companies or associations. Your letter references R.C. 1721.03, which prohibits an association incorporated for cemetery purposes, or a benevolent or religious society, from appropriating land or locating a cemetery within one hundred yards of a dwelling house, unless the owner of that house consents or the entire tract of land appropriated is a necessary addition to or enlargement of a cemetery already in use. Various exceptions are provided by R.C. 1721.03 and 1721.04. Unless one of the exceptions is applicable, the proximity limitations of R.C. 1721.03 will apply to a cemetery established by the Amish community.

An organization that considers establishing a cemetery should be aware that, pursuant to R.C. 5709.14, lands used exclusively as graveyards or burial grounds are generally exempt from taxation unless they are held for profit or for the purpose of speculating in the sale. Pursuant to R.C. 1721.10, lands appropriated and set apart as burial grounds and recorded and filed as such in the office of the county recorder are also generally exempt from sale on execution on a judgment, taxation, dower, and compulsory partition. Land appropriated and set apart as a private burial ground is, however, not so exempt if it exceeds fifty dollars in value. R.C. 1721.10. An association organized for the purpose of preserving and protecting bodies of deceased persons before burial may hold up to an acre of land, with suitable buildings and appliances, and such property will generally be exempt from execution, taxation, and appropriation for another public purpose. R.C. 1743.03.

Local Regulation of a Private Cemetery

Each local board of health is authorized to make such orders and regulations as are necessary for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances, and to take steps to abate or remove nuisances and to protect the public health and prevent disease. R.C. 3707.01, 3709.21-.22. A local board of health may, accordingly, adopt provisions that regulate the establishment and operation of cemeteries. A religious society that seeks to establish a private burial ground should, therefore, check with the local board of health for relevant regulations, and would also be well advised to consult with representatives of the board of health and other interested persons to seek to avoid any sort of nuisance situation. See generally, e.g., Henry v. Trustees, 48 Ohio St. 671, 674, 30 N.E. 1122, 1123 (1891) (a cemetery is not a nuisance per se, but it may be required to be kept an appropriate distance from a dwelling house to guard comfort and health and to protect property values; see R.C. 1721.03); see also R.C. Chapter 3767; R.C. 6111.04, .08.

It should further be noted that R.C. 517.21 permits a board of township trustees to order a private cemetery discontinued if the board is "of the opinion that the further use for burial purposes...will be detrimental to the public welfare or health," provided that a cemetery in the near vicinity is open for public use. R.C. 517.21. In such circumstances, the board is required to give notice that the bodies buried in the cemetery must be removed. If removal is not made by the friends or kindred of the dead, the board may provide for the removal and pay the expenses from the township treasury. R.C. 517.21.

Conclusion

This opinion provides an overview of various statutory provisions that relate to the establishment and operation of a private cemetery in an unincorporated area that has no zoning regulations. It is, however, not a definitive analysis of all provisions that may affect the establishment of a private cemetery. If you have specific questions concerning the interpretation or application of particular provisions, those matters could be addressed in a subsequent opinion.

It is therefore, my opinion, and you are hereby advised, as follows:

1. A religious society may not own, operate, or maintain a cemetery unless the cemetery is registered with the Division of Real Estate in the

Department of Commerce pursuant to R.C. 4767.02-.04; an exception to the registration requirement applies to a family cemetery or to a cemetery in which there have been no interments during the previous fifty calendar years.

2. A religious society seeking to establish a private cemetery in an unincorporated area that has no zoning regulations must comply with the requirements of R.C. 1721.03 and 1721.04 regarding proximity of a cemetery to dwellings and with any applicable regulations of the local board of health.

3. When a religious society establishes a private cemetery in an unincorporated area that has no zoning regulations, the cemetery must be operated and records retained in compliance with R.C. 3705.16-.17, which govern death certificates and burial permits.

Respectfully,

LEE FISHER
Attorney General

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SYLLABUS: 93-005

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