

OPINION NO. 87-042**Syllabus:**

The duty imposed upon a board of township trustees by R.C. 517.07 to "sell at a reasonable price such number of [cemetery] lots as public wants demand for burial purposes" is qualified by R.C. 517.06, which authorizes a board of township trustees to make and enforce rules for the allotment of cemetery lots. Pursuant to R.C. 517.06, the trustees may adopt rules that contain restrictions against conveying cemetery lots to persons who are not residents of the township, provided that such rules are reasonable and are in compliance with relevant statutory and constitutional provisions.

To: Charles L. Bartholomew, Wyandot County Prosecuting Attorney, Upper Sandusky, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, June 4, 1987

I have before me your request for an opinion concerning the duties and authority of township trustees with respect to maintaining cemeteries within the township and making lots available to the public. You have asked whether any provision of law authorizes a board of township trustees to refuse to sell cemetery lots to purchasers other than residents of the township and families that are in indigent circumstances, as provided for in R.C. 517.07.

R.C. 517.07 states, in part:

Upon application, the board of township trustees shall sell at a reasonable price such number of lots as public wants demand for burial purposes. Purchasers of lots, upon complying with the terms of sale, may receive deeds therefor which the board shall execute, and which shall be recorded by the township clerk in a book for that purpose, and the expense of recording shall be paid by the person receiving the deed. Upon the application of a head of a family living in the township, the board shall, without charge, make and deliver to such applicant a deed for a suitable lot for the burial of his family, if, in the opinion of the board and by reason of the circumstances of the family, such payment would be oppressive. (Emphasis added.)

R.C. 517.07 thus provides that a board of township trustees "shall sell...such number of lots as public wants demand for burial purposes." It also authorizes the board to provide a family burial lot without charge upon the application of the head of a family living in the township if, in the opinion of the board and by reason of circumstances of the family, payment for the lot would be oppressive.

Your letter of request specifically references R.C. 517.06, which authorizes the board of township trustees to adopt rules governing a township cemetery, as follows:

The board of township trustees shall have the cemetery laid out in lots, avenues, and paths, and shall number the lots and have a suitable plat thereof made, which plat shall be carefully kept by the township clerk. Such board shall make and enforce all needful rules and regulations for the division of such cemetery into lots, for the allotment thereof to families or individuals, for the care, supervision, and improvement thereof, and such board shall require the grass and weeds to be cut and destroyed at least twice each year.

Suitable provision shall be made in such cemetery for persons whose burial is at the expense of the township. (Emphasis added.)

You have asked whether the board of township trustees may adopt rules that would permit it to refuse to sell cemetery lots to persons who are not residents of the township. I note that the exception contained in R.C. 517.07 for the provision of a lot to an indigent family applies only to "a head of a family living in the township," and I find that this exception is

consistent with the rule that you have described, in that it applies only to township residents.

In conversations with my staff you have expressed the concern that the requirement that the board of township trustees sell "such number of lots as public wants demand," see R.C. 517.07, prevents the board of township trustees from making a determination that they shall convey cemetery lots to township residents only. I recognize the validity of this concern. The word "public" may, in some instances, be construed as applying to a limited group of people, rather than to the general public. See generally Black's Law Dictionary 1104 (5th ed. 1979) (defining "public" as follows: "In one sense, everybody, and accordingly the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people. In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few. Accordingly, it has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place; the people of the neighborhood"). The use of the word "public" in R.C. 517.07 appears, however, to contemplate the inclusion of all members of the general public who are interested in acquiring cemetery lots from the township, regardless of whether such persons are residents of the township.

The initial version of what is now R.C. 517.07 read as follows:

That it shall be lawful for the trustees of said township, for the purpose of grading, improving, and embellishing said "cemetery grounds," after proper notice having been given, to proceed to sell, in such manner, and at such time, and upon such terms as may be, in their judgment, deemed most advantageous, such number of lots as the public wants may demand; and all lots so sold, the purchasers thereof shall, upon complying with the terms of the sale, be entitled to receive a deed or deeds which the trustees aforesaid are hereby authorized and empowered to execute, and which shall be recorded in a book provided for that purpose by the clerk of said township--the expense of recording to be paid by the person receiving said deed; Provided, that no person not a resident of the township shall be allowed to become the purchaser of any lot or lots in said cemetery, nor shall any person being the owner or purchaser of any of the said lot or lots transfer his, her, or their title or claim to any person or persons not a resident of the township, without the written assent of the trustees of said township, or a majority of them. (Emphasis added.)

1857 Ohio Laws 187 (section 2). That version authorized the township trustees to sell "such number of lots as the public wants may demand" while expressly prohibiting any person who was not a resident of the township from purchasing a lot or becoming the transferee of a lot without the written assent of at least a majority of the township trustees.

Subsequent amendment of this provision eliminated the prohibition against sales or transfers to nonresidents. See 1873 Ohio Laws 136-37 (section 2). Concerning such amendment,

my predecessor stated, in 1931 Op. Att'y Gen. No. 3198, vol. I, p. 619 at 621:

It is to be noted that the only substantial change made in the latter enactment is that the proviso prohibiting the direct sale by the township trustees of township cemetery lots to non-residents and providing for the consent of the township trustees in the case of a transfer of a township cemetery lot from a resident to a non-resident was omitted. The effect of this omission was to allow non-residents the privilege of purchasing directly from the township trustees lots in a township cemetery. It does not follow that the change in the statute evidenced an intent on the part of the legislature to prohibit township trustees from enacting reasonable rules and regulations in regard to the transfer of such lots if they saw fit so to do.

Under [G.C.] Sections 3447 and 3448 [now R.C. 517.06 and 517.07]...the power of township trustees to make and enforce needful rules and regulations as to the division and allotment of cemetery lots was expressly set forth. (Emphasis added.)

It is clear that, when the initial version of R.C. 517.07 was enacted, the term "public" was qualified by statutory language so that the duty to satisfy public demands extended only to such persons as resided within the township. It appears, however, that the amendment that served to permit the purchase and ownership of cemetery lots by nonresidents served also to extend the scope of the word "public" to include all such persons as were interested in acquiring cemetery lots, whether or not they were residents of the township. I conclude, therefore, that the duty of a board of township trustees to sell such lots as public wants demand for burial purposes is not limited to demands that may be made by township residents, but extends also to nonresidents of the township. See generally R.C. 517.07 (recognizing that a nonresident may be owner of a township cemetery lot by providing for notice to a nonresident owner, in certain circumstances, that his interest in the lot will cease on the termination date set forth in the terms of sale or deed for the lot unless he contracts for renewal); 1959 Op. Att'y Gen. No. 643, p. 335.

This conclusion is consistent with the statutory requirement that a cemetery established by a cemetery company or association must be available to anyone seeking to purchase a lot therein. R.C. 1721.07 states, in part:

A cemetery company or association may adopt rules for disposing of and conveying burial lots; but any person not already the owner of a lot in the cemetery 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.

I note, however, that R.C. 517.07 is in pari materia with other provisions governing cemeteries and must be read together with those provisions. See 1930 Op. Att'y Gen. No. 2054, vol. II, p. 1041 (stating that G.C. 3447 and 3448, predecessors to R.C. 517.06 and 517.07, are in pari materia and must be construed together). See generally State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956). In particular, R.C. 517.06 expressly authorizes the board of

township trustees to "make and enforce all needful rules and regulations for the division of [the] cemetery into lots, for the allotment thereof to families or individuals, [and] for the care, supervision, and improvement thereof." The duty of the board of township trustees to sell cemetery lots to persons who are nonresidents of the township is, thus, qualified by the provision that the trustees may make and enforce rules relating to the allotment of cemetery lots. The authority to make such rules appears to include the authority to make rules that contain restrictions against conveying cemetery lots to persons who are not residents of the township, provided that such rules are reasonable and are in compliance with relevant statutory and constitutional provisions. See generally 1931 Op. No. 3198; 1930 Op. No. 2054.¹

It has been established that the standard for determining the validity of a rule adopted by the township trustees pursuant to R.C. 517.06 is whether the rule is reasonable. See, e.g., 1936 Op. Att'y Gen. No. 5447, vol. I, p. 530 (G.C. 3447, now R.C. 517.06, "specifically gives the township trustees authority to make needful rules and regulations, and...the only question is as to whether such rule, being conceded to come within the scope of said delegation of rule making power by the legislature, is a reasonable regulation"). Whether a particular rule restricting the sale of cemetery lots is reasonable will depend upon the circumstances and may be affected by such factors as the definition of "nonresident" that is adopted, the purposes that the rule serves, and the manner in which the rule is implemented. A determination of the validity of rules governing the conveyance of cemetery lots must, thus, be made on a case-by-case basis.

Existing statutory provisions do, however, support the conclusion that it is reasonable for township trustees to adopt rules that distinguish between residents and nonresidents of a township. The statutory scheme governing cemeteries indicates that the provision of cemetery lots by a political subdivision

¹ R.C. 517.07, as recently amended by Sub. S.B. 139, 116th Gen. A. (1986) (eff. July 24, 1986), sets forth specific requirements and limitations that may be included in the terms of sale or the deed for a lot in a township cemetery executed after the effective date of the amendment. Certain of the provisions are directed to notification of the names and addresses of owners and heirs and permit the board of township trustees to reenter a lot if notification requirements are not met. Other provisions authorize the board of township trustees to "limit the terms of sale or the deed for a cemetery lot by specifying that the owner, a member of the owner's family, or an owner's descendant must use the lot, or at least one burial place within the lot, within a specified time period." Notice must be provided prior to the termination date. If the owner does not contract for renewal, the board may establish reentry. R.C. 517.07 also authorizes the board to "repurchase any cemetery lot from its owner at any time at a price that is mutually agreed upon by the board and the owner." R.C. 517.07 provides that certain notices shall be mailed to resident or nonresident owners whose addresses are known. It does not distinguish between conveyances of cemetery lots to residents and conveyances of such lots to nonresidents.

is a function performed primarily for the benefit of residents of the subdivision. Township cemeteries may, pursuant to statute, be established and supported by taxes levied upon township lands. See R.C. 517.03 ("[t]o defray the expenses of the purchase or appropriation, and the enclosing, care, supervision, repair, and improving of lands for cemetery purposes, the board of township trustees may levy a tax sufficient for that purpose"); R.C. 517.08 ("the board of township trustees may build and maintain proper and secure fences around...cemeteries, to be paid for from the township funds"); R.C. 517.11; R.C. 517.13; R.C. 517.19; R.C. 517.32; R.C. 5705.19(T); 1976 Op. Att'y Gen. No. 76-050 (use of general revenue funds to purchase additional land for township cemetery). If a village located within a township has its own cemetery, property within the village is "exempt from taxes for the purchase or maintenance of cemeteries for the purchase of a funeral coach, or for the construction of a vault, under the superintendence of the board of township trustees, and for the use of the township exclusive of the village." R.C. 759.24. Provision is made for two or more townships to jointly take possession of, care for, and fund a "public cemetery, located on or near a township line, [that] is used by the people of two or more townships for burying purposes." R.C. 517.14. The implication is that each township is responsible for bearing the cost of providing cemetery facilities for its residents. See generally 1929 Op. Att'y Gen. No. 462, vol. I, p. 679. That concept is expressed more clearly in R.C. 759.29, which relates to a union cemetery established by the legislative authorities of two or more municipal corporations, or of one or more municipal corporations and the boards of township trustees of one or more townships. See R.C. 759.27. R.C. 759.29 states: "The title to the grounds of the [union] cemetery...shall vest in and be held by the municipal corporation making the appropriation, in trust for the use of its inhabitants and the inhabitants of the other municipal corporations or townships in common." (Emphasis added.) See also R.C. 759.30; R.C. 759.33; R.C. 759.38. These statutes support the conclusion that, in making allocations of cemetery lots, it is reasonable for a township to adopt provisions that distinguish between residents and nonresidents of the township.

1931 Op. No. 3198 concerned a situation in which a board of township trustees sold cemetery lots to both residents and nonresidents but charged a higher price to nonresidents. The trustees sought to enact rules governing the sale of lots by residents to nonresidents and the opinion concluded that such rules would be permissible, stating in the syllabus: "A board of township trustees may adopt reasonable rules and regulations for the purpose of protecting the trustees and residents of the township against speculative sales of cemetery lots to non-residents, and incorporate in deeds to the lots such rules and regulations as are pertinent." 1931 Op. No. 3198 used the fact that township cemeteries are acquired and maintained in part from the proceeds of township taxation as support for the conclusion that a restraint on alienation would be a reasonable requirement in a deed of sale of a township cemetery lot. See also 1930 Op. No. 2054; note 1, supra. As discussed above, current law permits township cemeteries to be funded by local taxes.

In light of the statutory scheme governing public cemeteries and the history of R.C. 517.07, I find that R.C. 517.07 permits township trustees to convey cemetery lots to nonresidents, but that it does not require that the trustees

make such conveyances if reasonable rules governing the allocation of lots restrict such conveyances. Accordingly, I conclude that the duty imposed upon a board of township trustees by R.C. 517.07 to sell "such number of lots as public wants demand for burial purposes" is qualified by the provisions of R.C. 517.06, and that the board may, pursuant to R.C. 517.06, make and enforce rules for the allotment of cemetery lots that restrict the sale of such lots to persons who are not residents of the township, if it finds such rules needful.

It is, however, clear that rules governing a township cemetery must comply with any statutory and constitutional provisions that may be applicable. For example, R.C. 4112.02 states, in part: "It shall be an unlawful discriminatory practice:...(H) For any person to:...(14) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold a burial lot from any person because of the race, color, sex, age, ancestry, handicap, or national origin of any prospective owner or user of such lot." See also, e.g., Terry v. Elmwood Cemetery, 307 F. Supp. 369, 377 (N.D. Ala. 1969) (under the 1866 Civil Rights Act, 42 U.S.C. §1982, a public cemetery is legally obligated to sell burial lots "to all United States citizens, on equal terms, without regard to race or color"). In addition, there may be instances in which distinctions between residents and nonresidents will be found to violate the equal protection guarantees of the United States and Ohio Constitutions or the right to travel. See, e.g., 1984 Op. Att'y Gen. No. 84-083 (discussing case law concerning residents and nonresidents and concluding that an arrangement to charge admission fees for nonresidents of a school district while providing free admission for residents will be constitutionally permissible if it bears a reasonable relationship to the achievement of a legitimate governmental purpose); 1984 Op. Att'y Gen. No. 84-048 (discussing case law concerning residents and nonresidents and concluding that an arrangement to charge nonresidents of a township for ambulance or emergency medical services but to provide such services without charge to residents of the township will satisfy the rational basis test for equal protection if it bears a reasonable relationship to the achievement of a legitimate governmental purpose).

In conclusion, it is my opinion, and you are hereby advised, that the duty imposed upon a board of township trustees by R.C. 517.07 to "sell at a reasonable price such number of [cemetery] lots as public wants demand for burial purposes" is qualified by R.C. 517.06, which authorizes a board of township trustees to make and enforce rules for the allotment of cemetery lots. Pursuant to R.C. 517.06, the trustees may adopt rules that contain restrictions against conveying cemetery lots to persons who are not residents of the township, provided that such rules are reasonable and are in compliance with relevant statutory and constitutional provisions.