

OPINION NO. 83-039

Syllabus:

A board of township trustees lacks authority to expend funds for the maintenance of a cemetery which is owned by a religious society.

To: Fred W. Crow, III, Meigs County Prosecuting Attorney, Pomeroy, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 22, 1983

I have before me your request for an opinion on the question whether a board of township trustees may expend funds for the maintenance of a cemetery owned by a religious society. You have explained that the cemetery appears to be open to the public, but that it is under the control of a religious society. You have further stated that a tax levy for the purpose of maintaining and operating cemeteries has been passed by the electorate of the township. See R.C. 5705.19(T).

It is firmly established in Ohio that a township is a creature of statute and, as such, possesses only the powers expressly conferred upon it by statute and those required, by necessary implication, to execute the duties imposed upon it by statute. See Hopple v. Trustees of Brown Township, 13 Ohio St. 311 (1862); 1974 Op. Att'y Gen. No. 74-083. Further, it is a general rule that public funds may be disbursed only by clear authority of law. See 1934 Op. Att'y Gen. No. 3694, vol. III, p. 1834. Thus, a township may expend funds for the maintenance of a cemetery owned by a religious society only if it has statutory authority, either express or implied, to do so. See 1931 Op. Att'y Gen. No. 3570, vol. II, p. 1158.

The authority of a township to make expenditures for purposes relating to cemeteries is derived primarily from the provisions of R.C. Chapter 517. R.C. 517.01 authorizes a board of township trustees to "accept a conveyance of, or purchase, and enclose, improve, and protect lands in one or more places within the township as it deems necessary and proper for cemetery purposes," or to appropriate lands for such purposes. See also R.C. 517.02 (authorizing board of township trustees to provide a public road to any township cemetery over which it has control). With respect to the funding of these activities, R.C. 517.03 states: "To 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." Use of the word "and" indicates that funds so derived are to be used for the maintenance and improvement of lands purchased or appropriated by the township for cemetery purposes, and not for maintenance of a cemetery which is owned and controlled by a body other than the township, such as a religious society. See generally Op. No. 74-083; 1969 Op. Att'y Gen. No. 69-101; 1934 Op. No. 3694.

R.C. 517.07 authorizes a board of township trustees to sell cemetery lots for burial purposes, and R.C. 517.08 provides for the expenditure of proceeds derived from such sales, as follows:

The proceeds arising from the sale of cemetery lots under section 517.07 of the Revised Code shall be used in improving and embellishing such grounds, except that upon unanimous consent of the board of township trustees, such proceeds may be used in the purchase or appropriation of additional land for cemetery purposes in accordance with sections 517.01 and 517.13 of the Revised Code; and the board of township trustees shall build and maintain proper and secure fences around all such cemeteries, to be paid for from the township funds.

The authority to expend proceeds from the sale of cemetery lots may not, however, be expanded beyond that granted by statute. See 1951 Op. Att'y Gen. No. 802, p. 558; 1934 Op. No. 3694 (township trustees may not spend money derived from the sale of cemetery lots for the purpose of advertising lots for sale). By its terms, R.C. 517.08 authorizes expenditures only for the acquisition, maintenance, or improvement of cemeteries under the ownership and control of the township. See R.C. 517.01, 517.13.

R.C. 517.11 requires a board of township trustees to "provide for the protection and preservation of cemeteries under its jurisdiction" and to enclose such cemeteries "with a substantial fence or hedge." It authorizes the board to levy a tax for the purposes of that section, including the re-erection of fallen tombstones. See generally Op. No. 69-101 (finding that R.C. 517.03 refers to

township cemeteries which are in current use and that R.C. 517.11 refers to cemeteries which are no longer in use but are under the control of the township trustees); 1954 Op. Att'y Gen. No. 4163, p. 423 (board of township trustees has a duty to maintain a cemetery over which it is given control by R.C. 517.10).

The extent of the jurisdiction of a board of township trustees over different types of cemeteries 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.)

It is, thus, expressly provided that a board of township trustees has the right to control public cemeteries which are not located within municipal corporations, with certain exceptions. Among the exceptions are cemeteries owned or under the care of a religious society. It is clear, therefore, that funds derived from a tax levied pursuant to R.C. 517.11 may not be used for the maintenance of a cemetery which is owned or under the care of a religious society.

R.C. 517.13 authorizes a township which owns a cemetery to add to the area of the cemetery by purchasing or appropriating additional grounds, and permits the board of township trustees to levy a tax for such purpose. R.C. 517.14 contains provisions governing the care of a cemetery used by the people of two or more townships and permits taxes to be levied for such purpose. See also R.C. 759.27-.48 (union cemeteries). In each of these cases, the taxes so levied may be used only for the purposes established by statute, which do not extend to the maintenance of a cemetery owned by a religious society.

R.C. 517.15 permits a board of township trustees to receive property in trust and expend the income for the care of particular burial lots "in any township cemetery over which such board has jurisdiction." See R.C. 517.16 (investment of cemetery fund); R.C. 517.17. See generally R.C. 9.20 (authorizing a township to receive property for its benefit or the benefit of any of those under its charge and hold and apply the property in accordance with the terms of the gift, devise, or bequest). There is no statutory authority for a board of township trustees to receive and expend gifts for the care of a cemetery owned by a religious society.

R.C. 517.19 provides that, when a township owns a burial place within the grounds of a cemetery association, the trustees may levy a tax for the purpose of erecting permanent buildings on the cemetery grounds. The authority granted by this provision is expressly limited to situations in which the township owns a particular burial place. It cannot be expanded beyond the language of the provision. See Op. No. 74-083.

From a review of the foregoing, it is clear that no statute expressly authorizes a board of township trustees to expend funds for the maintenance of a cemetery owned by a religious society. I am, similarly, unable to find that such authority may be implied as necessary to the statutory grants of power. Rather, I must conclude that a board of township trustees lacks authority to expend funds for the maintenance of a cemetery owned by a religious society. Accord, 1931 Op. No. 3570 (syllabus) ("[t]ownship trustees have no authority to grant temporary financial aid to church organizations for the care and maintenance of cemeteries belonging to such church organizations").

I note, however, that statutory provision has been made for a religious society which has the title or control of a public cemetery in a township to convey the grounds to the board of township trustees and its successors in office. R.C. 517.27. When such action is taken, the board shall, "[s]ubject to the rights of the original

grantor, his heirs or assigns, . . . accept and take possession of such grounds, and take care of, keep in repair, hold, treat, and manage them in all respects" as required by R.C. 517.01 to 517.32. R.C. 517.27; see 1973 Op. Att'y Gen. No. 73-049; 1966 Op. Att'y Gen. No. 66-163. See also R.C. 1715.04 (providing that a religious society may convey to the boards of township trustees of two or more townships and their successors in office, jointly, a public burying ground which is located on or near a township line and used by the people of two or more townships for burial purposes, and that such boards shall accept and maintain the burial grounds, shall bear equal shares of the expenses, and may levy taxes for such purposes). Further, if a religious society which has established or cared for a cemetery ceases to exist, the township has a duty of caring for and maintaining the cemetery under R.C. 517.10 and 517.11. See, e.g., 1954 Op. No. 4163.

Based upon the foregoing, it is my opinion, and you are hereby advised, that a board of township trustees lacks authority to expend funds for the maintenance of a cemetery which is owned by a religious society.