

1903

BOARD OF TOWNSHIP TRUSTEES—ACQUIRES ADDITIONAL
GROUNDS FOR CEMETERY PURPOSES—MUST ENCLOSE
SUCH GROUNDS WITH A FENCE OR HEDGE—§§517.13, .11 R.C.

SYLLABUS:

Where a board of township trustees acquires additional grounds for cemetery purposes pursuant to Section 517.13, Revised Code, such grounds become part of the township cemetery and the board is required under Section 517.11, Revised Code, to enclose such additional grounds with a fence or hedge regardless of the fact that such grounds are not immediately used for the burial of bodies.

Columbus, Ohio, December 15, 1960

Hon. Roy J. Gilliland, Prosecuting Attorney
Jackson County, Jackson, Ohio

Dear Sir:

I have your request for my opinion which reads:

“Your opinion upon the following fact situation is hereby respectfully requested.

“For many years, the Township Trustees of Washington Township, Jackson County, Ohio, have had jurisdiction and control over a certain local cemetery known as Byer Cemetery. A few years ago the Trustees, in anticipation of additional burials in the cemetery, acquired an additional 11 acres of land for cemetery purposes and constructed a roadway through the new acreage and also through the old cemetery.

“At the present time the entire area is now maintained by the Township Trustees but there are no burials made except in the old original portion of the cemetery most of which is enclosed by a substantial fence. Two sides of the newly acquired acreage, borders upon real estate owned by a citizen and inhabitant of the township who has made demands upon the Township Trustees to construct a fence around the entire portion of the cemetery land which borders his property.

“I am well aware of the general rule concerning line fences between adjoining property owners. It appears to be quite clear from the statutes that the Trustees have legal authority to procure additional land to be used for burial purposes and that they have legal authority to fence and inclose the newly acquired land. My request is for an opinion concerning the interpretation of Ohio Revised Code Section No. 517.11, as amended. This Section in part states ‘the Board shall enclose such cemeteries with a substantial fence or hedge, and shall keep it in good repair.’ In applying these words and Revised Code Section No. 517.11 to the situation above given, it is your opinion that the Board of Township Trustees has imposed upon it a mandatory duty to enclose the entire cemetery acreage with a substantial fence or hedge or is it the mandatory duty of the Board only to enclose, with a substantial fence or hedge, that portion of the cemetery which is at the present time, actually being used for burial purposes?”

The precise question, as I see it upon a careful reading of your inquiry, may be stated thus: Where a board of township trustees acquires addi-

tional grounds for cemetery purposes pursuant to Section 517.13, Revised Code, in anticipation of future needs, but no bodies have been buried in such additional grounds, is the board of township trustees required to enclose said new grounds with a fence or hedge, as provided in Section 517.11, Revised Code?

Section 517.11, Revised Code, provides:

“The board of township trustees shall provide for the protection and preservation of cemeteries under its jurisdiction, and shall prohibit interments therein when new grounds have been procured for township cemeteries or burial grounds. Where such old cemeteries are in or near village plats, and the public health is liable to be injured by further interments therein, the board shall institute suits to recover possession thereof, remove trespassers therefrom, and may recover damages for injuries thereto or any part thereof, or to any fence or hedge enclosing them, or to any tomb or monument therein.

“The board shall enclose such cemeteries with a substantial fence or hedge, and shall keep it in good repair. It may re-erect any fallen tombstones, regardless of the cause of the falling, in such cemeteries. The board shall levy a tax for such purpose, not to exceed one half mill in any one year, upon all the taxable property of the township.” (Emphasis added)

In the second paragraph of Section 517.13, Revised Code, in which authority is given to a board of township trustees to add to the area of a township cemetery either by purchase or appropriation, the following language is used:

“For such purpose the board may levy a tax, not to exceed one half of one mill, on the taxable property of the township, for a period not to exceed five years, which tax shall be collected as other taxes, and appropriated for the purchase or appropriation of such additional cemetery grounds which shall become a part of the township cemetery.” (Emphasis added)

Decisive as regards the question discussed appears to be the concluding clause of the quoted part of Section 517.13, *supra*. Whether or not additional grounds are actually used for the burial of bodies, is clearly immaterial in view of the categorical statement that such grounds “shall become part of the township cemetery.”

The requirement for the enclosure of township cemeteries with a substantial fence or hedge is spelled out in mandatory language. It is true,

of course, that the mandatory "shall" in a statute may sometimes be read as discretionary "may," but such statutory dilution would clearly be unwarranted in this situation in view of Section 517.12, Revised Code, which reads:

"No township trustee shall refuse or neglect to perform the duties required of him under Sections 517.06 and 517.11 of the Revised Code. Any fine for such refusal or neglect shall be recovered by action in the name of any taxpayer, resident of the township in which the cemetery is located, for each offense. Within ten days after such a fine is collected, it shall be paid to the township clerk, to be applied by the board of township trustees in repairing such cemetery."

Moreover, Section 517.99, Revised Code, provides for the punishment by a fine of not less than five nor more than twenty dollars for violation of Section 517.12, *supra*.

Answering your specific question, therefore, it is my opinion and you are advised that where a board of township trustees acquires additional grounds for cemetery purposes pursuant to Section 517.13, Revised Code, such grounds become part of the township cemetery and the board is required under Section 517.11, Revised Code, to enclose such additional grounds with a fence or hedge regardless of the fact that such grounds are not immediately used for the burial of bodies.

Respectfully,

MARK McELROY

Attorney General