

OPINION NO. 2007-005

Syllabus:

1. If a single deceased family member is buried on privately-owned, family property, such burial constitutes a "family cemetery," as defined in R.C. 4767.02(C), and is exempt as such from the registration requirements of R.C. 4767.02-.04.
2. A board of township trustees is without authority to prohibit the burial of human remains on private property within the unincorporated area of the township.
3. A local board of health has no authority to adopt a regulation that

prohibits the burial of a deceased family member on privately-owned property of a family member who lives in a township.

To: Thomas L. Sartini, Ashtabula County Prosecuting Attorney, Jefferson, Ohio

By: Marc Dann, Attorney General, March 30, 2007

You have submitted a request for an opinion concerning the authority of townships and local boards of health to adopt rules prohibiting the burial of human remains on private property. You specifically ask:

1. May an Ohio township or local board of health adopt rules or regulations which forbid the otherwise lawful burial of human remains on private property in unincorporated areas?
2. Would the lawful interment of a solitary, deceased family member on private, family-owned property transform that property into a "cemetery," as defined under Ohio law, thereby subjecting the property to the registration requirements of R.C. 4767.02-.04 or other provisions of the Revised Code which govern cemeteries?

Your opinion request indicates that several townships in Ashtabula County would like to be able to prevent property owners in the townships from using their property for the burial of human remains. You also question whether the lawful interment of a solitary, deceased family member on privately-owned family property transforms the property into a "cemetery" for purposes of R.C. 4767.02-.04.

Cemetery Registration Requirements

For ease of discussion, we will first address your second question, which asks whether the burial of a single deceased family member on private, family-owned property makes such property a "cemetery" for purposes of the registration requirements of R.C. 4767.02-.04.¹

To answer your question, let us begin with the cemetery registration requirement established by R.C. 4767.02(A), which states: "Except as otherwise provided in division (C) of this section, no person, church, religious society, established fraternal organization, or political subdivision of the state shall own, operate, or maintain a cemetery unless the cemetery is registered pursuant to section 4767.03 of the Revised Code." For purposes of R.C. 4767.02(A), the word "cemetery" means "any one or a combination of more than one of the following: (a) A *burial ground for earth interments*; (b) A mausoleum for crypt entombments; (c) A columbarium for the deposit of cremated remains; (d) A scattering ground for the spreading of cremated remains." R.C. 1721.21(A)(2) (made applicable to R.C. Chapter 4767 by R.C. 4767.01(A)) (emphasis added). Thus, except as provided in R.C.

¹ R.C. 4767.02-.04 concern the registration of cemeteries and also those who are employed or otherwise engaged by a cemetery to sell interment rights.

4767.02(C), R.C. 4767.02(A) prohibits, among other things, a person from owning, operating, or maintaining a cemetery unless the cemetery is registered with the Division of Real Estate in the Department of Commerce in accordance with R.C. 4767.03.

R.C. 4767.02(C), however, establishes the following exception: “Sections 4767.02 to 4767.04 of the Revised Code do not apply to or affect a *family cemetery* or a cemetery in which there have been no interments during the previous twenty-five calendar years.” (Emphasis added.) Thus, R.C. 4767.02(C) exempts, among others, family cemeteries from the registration requirements of R.C. 4767.02(A).

As used in R.C. 4767.02(C), the term “family cemetery” means “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) (emphasis added). Concerning the meaning of words in a statute, R.C. 1.43(A) declares that, “[t]he singular includes the plural, and the plural includes the singular.” Thus, although the definition of “family cemetery” in R.C. 4767.02(C) uses the plural “persons” in describing the remains buried therein, the use of that word does not require that such remains must be those of more than one person.

Let us now examine whether the burial of a single deceased family member on privately-owned, family property qualifies such property as a “cemetery” subject to registration under R.C. 4767.02(A), or whether such burial site qualifies as a “family cemetery” that is, pursuant to R.C. 4767.02(C), exempt from the registration requirements of R.C. 4767.02(A).

For purposes of R.C. 4767.02, the word “cemetery” includes “[a] burial ground for earth interments.” R.C. 1721.21(A)(2)(a). Under this broad definition, it appears that any ground in which human remains are buried constitutes a “cemetery” for purposes of R.C. 4767.02.²

If such a cemetery also falls within the definition of a “family cemetery,”

² Difficulty arises in attempting to define what portion of the property on which a family member is buried constitutes the “cemetery.” For example, as explained in *Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 735 (6th Cir. 1981), there are areas in Ohio where small, private family burial plots, often located on farms, are not uncommon. Unlike cemeteries generally, where burials occur in a defined area of property dedicated solely to the burial of human remains and related cemetery purposes, private property on which the remains of a deceased family member are buried is not used solely for the burial of human remains. We have found no instances in which a court has determined that a single such burial transforms the property on which it occurs into a cemetery. Thus, it appears that the general authority to regulate cemeteries does not encompass the authority to ban the burial of a deceased family member on privately-owned property. See generally *Village of Villa Park v. Wanderer’s Rest Cemetery Co.*, 316 Ill. 226, 228, 147 N.E. 104 (1925) (“[a] cemetery is a place or area of ground set apart for the burial of the dead. A cemetery is not created by the use of the tract of land for the burial of the dead, but

however, it is exempt under R.C. 4767.02(C) from the registration requirements of R.C. 4767.02(A). In a situation in which only one deceased family member is buried on a family member's property, we believe that such burial ground qualifies as a "family cemetery" for purposes of R.C. 4767.02, because there is only one person whose remains must be related to a "common ancestor." In such case, more than three-fourths, *i.e.*, one hundred percent, of the remains share a common ancestor. Thus, if a solitary deceased family member is buried on privately-owned, family property, such burial constitutes a "family cemetery," as defined in R.C. 4767.02(C), and is exempt as such from the registration requirements of R.C. 4767.02-.04.

Authority of Townships to Prohibit Burials on Private Property

Let us now turn to your first question, which asks whether a township or local board of health may adopt regulations that prohibit the otherwise lawful burial of human remains on private property in unincorporated areas of a county.³ In answering this question, we begin with the well-established principle that boards of

what creates the cemetery is the act of setting the ground apart for the burial of the dead, marking it and distinguishing it from the adjoining ground as a place of burial").

³ You have not explained the meaning of the term, "otherwise lawful burial of human remains." Because we have been given no specific facts concerning these burials, we limit our discussion to those situations in which the burial is not part of any otherwise criminal activity. *See, e.g.*, R.C. 2903.01(A) (stating, in part, "[n]o person shall purposely, and with prior calculation and design, cause the death of another"); R.C. 2921.22(C) ("[n]o person who discovers the body or acquires the first knowledge of the death of a person shall fail to report the death immediately to a physician whom the person knows to be treating the deceased for a condition from which death at such time would not be unexpected, or to a law enforcement officer, an ambulance service, an emergency squad, or the coroner in a political subdivision in which the body is discovered, the death is believed to have occurred, or knowledge concerning the death is obtained"); R.C. 2921.32 (stating, in pertinent part: "(A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime, ... shall do any of the following: ... (4) Destroy or conceal physical evidence of the crime or act... [; or] (6) Prevent or obstruct any person, by means of force, intimidation, or deception, from performing any act to aid in the discovery, apprehension, or prosecution of the other person"); R.C. 2927.01(B) (stating, "[n]o person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities").

Similarly, we will assume that the interment of the deceased family member will not be done as part of a funeral directing business as regulated by R.C. Chapter 4717. *See* R.C. 4717.13(A)(1) (prohibiting anyone from engaging in the business or profession of funeral directing without the appropriate license, certificate, or supervision). *See generally* R.C. 4717.01(C) ("[f]uneral directing," as that term is used in R.C. Chapter 4717, means "the business or profession of directing or

township trustees and other township offices are creatures of statute and have only those powers expressly provided by statute or as may be implied therefrom. *See In re Village of Holiday City*, 70 Ohio St. 3d 365, 369, 639 N.E.2d 42 (1994) (it is a “well-settled principle that township trustees can exercise only those powers granted by the General Assembly”); *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875) (“neither the township nor its trustees are invested with the general powers of a corporation; and hence the trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them”).⁴

Although R.C. Chapter 519 grants boards of township trustees certain authority to establish and operate township cemeteries and addresses certain matters related to abandoned cemeteries, nothing in R.C. Chapter 519 or elsewhere within the Ohio Revised Code expressly authorizes a board of township trustees to prohibit property owners within the township from burying human remains on their property. *Cf.* R.C. 759.05 (stating, “[t]he legislative authority of a municipal corporation may prohibit the interment of the dead within the municipal corporation limits, and, for the purpose of making such prohibition effective, may impose proper fines and penalties and cause any body, interred contrary thereto, to be taken up and buried without the limits of the municipal corporation” (emphasis added)). That the General Assembly has conferred upon municipal corporations, but not upon townships, the authority to prohibit burials within their boundaries, compels the conclusion that the General Assembly did not intend to confer such authority upon townships. *See generally State ex rel. Enos v. Stone*, 92 Ohio St. 63, 110 N.E. 627

supervising funerals for profit, the business or profession of preparing dead human bodies for burial by means other than embalming, the disposition of dead human bodies, the provision or maintenance of a place for the preparation, the care, or disposition of dead human bodies, the use in connection with a business of the term ‘funeral director,’ ‘undertaker,’ ‘mortician,’ or any other term from which can be implied the business of funeral directing, or the holding out to the public that one is a funeral director or a disposer of dead human bodies”); R.C. 4717.12 (exemptions from the application of R.C. Chapter 4717).

Finally, we will assume that other provisions of law related to death and burial have been complied with in the situations you describe. *See, e.g.,* R.C. 3705.16 (death certificate requirements); R.C. 3705.17 (burial permit requirements); R.C. 3707.19 (stating, in part, “[t]he body of a person who has died of a communicable disease declared by the department of health to require immediate disposal for the protection of others shall be buried or cremated within twenty-four hours after death”); R.C. 4717.13(B) (in part, prohibiting anyone from interring a dead human body without specified identifying information).

⁴ In accordance with R.C. 504.01, certain townships may establish themselves as limited home rule townships, with authority to exercise limited home rule authority, as prescribed by R.C. 504.04. You have not asked about the authority of limited home rule townships, and this opinion will not address such authority.

(1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). We conclude, therefore, that a board of township trustees is without authority to prohibit the burial of human remains on private property within the unincorporated area of the township.⁵

Board of Health of A General Health District

You also question whether local boards of health have authority to adopt regulations prohibiting the burial of human remains on private property. Because your question concerns the regulation of matters within a township, we assume that your use of the term “local” boards of health refers to boards of health of general health districts. *See generally* R.C. 3709.01 (stating, in part, “[t]he townships and villages in each county shall be combined into a health district and shall be known as a ‘general health district’”); R.C. 3709.02(A) (creation of board of health for

⁵ We are aware of one case, *Brown v. Painesville Twp. Bd. of Zoning Appeals*, 2005-Ohio-5608, 2005 Ohio App. Lexis 5062 (Lake County 2005), in which the owners of property within a township were denied a use variance to establish a family cemetery in an area of the township zoned for heavy industry. In affirming the trial court’s decision to uphold the board of zoning appeals’ denial of the variance, the *Brown* court noted the trial court’s finding that, according to the township’s zoning resolution, “* * * [p]rivate cemeteries cannot be operated in the township.” 2005-Ohio-5608, at ¶ 18. The *Brown* court did not, however, address whether the prohibition of private cemeteries within a township falls within the zoning powers of a board of township trustees. In addition, the situation you describe appears to contemplate a prohibition against the burial of human remains on private property anywhere within the township, rather than a ban against the use of property for the establishment of a cemetery. The *Brown* court’s decision does not, therefore, answer the question you pose.

The power of a township to regulate cemeteries was also addressed in 1993 Op. Att’y Gen. No. 93-005 at 2-31, which stated, in part:

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.

Again, however, 1993 Op. Att’y Gen. No. 93-005 addressed the authority of a township to regulate cemeteries, rather than simply to prohibit the burial of human remains on private property.

each general health district). For ease of discussion, we will refer to the board of health of a general health district as a local board of health.

To answer this portion of your question, we first note that the board of health of a general health district, as a creature of statute, possesses only those powers conferred by statute, either expressly or by necessary implication. *See D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536 (2002), at ¶ 38. The powers and duties of local boards of health are defined in various places throughout the Ohio Revised Code.⁶ Just as townships have no statutory authority to prohibit the burial of human remains within their jurisdictions, local boards of health also have not been granted authority to prohibit the burial of human remains within their jurisdictions.

Local boards of health, however, have been granted certain rule-making authority. For example, pursuant to R.C. 3709.21:

The board of health of a general health district may make such orders and *regulations* as are *necessary* for its own government, for the *public health*, the *prevention or restriction of disease*, and the *prevention, abatement, or suppression of nuisances*. Such board may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or watercourse without a permit therefor having been secured from the board under such terms as the board requires. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted,

⁶ *See, e.g.*, R.C. 307.153 (in part, authorizing contract with board of county commissioners “to exercise any power, perform any function, or render any service, in behalf of the county commissioners, which the board of county commissioners may exercise, perform, or render”); R.C. 955.26 (authority to declare rabies quarantine); R.C. 3313.73 (stating, in part, “[i]f the board of education of a city, exempted village, or local school district has not employed a school physician, the board of health shall conduct the health examination of all school children in the health district and shall report the findings of such examination and make such recommendations to the parents or guardians as are deemed necessary for the correction of such defects as need correction”); R.C. 3709.22 (duty to “study and record the prevalence of disease within its district and provide for the prompt diagnosis and control of communicable diseases”); authority to “provide for the medical and dental supervision of school children, for the free treatment of cases of venereal diseases, for the inspection of schools, public institutions, jails, workhouses, children’s homes, infirmaries, and county homes, and other charitable, benevolent, and correctional institutions ...dairies, stores, restaurants, hotels, and other places where food is manufactured, handled, stored, sold, or offered for sale, and for the medical inspection of persons employed therein; authority to inspect and abate “nuisances dangerous to public health or comfort”; authority to “take such steps as are necessary to protect the public health and to prevent disease”); R.C. 3714.08 (annual inspection of construction and demolition debris facility licensed by board of health).

recorded, and certified as are ordinances of municipal corporations and the record thereof shall be given in all courts the same effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in one newspaper published and of general circulation within the district. Publication shall be made once a week for two consecutive weeks and such orders and regulations shall take effect and be in force ten days from the date of the first publication. In cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, the board may declare such orders and regulations to be emergency measures, and such orders and regulations shall become effective immediately without such advertising, recording, and certifying. (Emphasis added.)⁷

In discussing the scope of the rule-making authority conferred upon local boards of health by R.C. 3709.21, the court in *D.A.B.E., Inc. v. Toledo-Lucas County*

⁷ Additional rule-making authority is conferred upon local boards of health by R.C. 3707.01, in part, as follows:

The board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction. It may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein, and prosecute such persons for neglect or refusal to obey such orders. Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board may regulate the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains.

The board may regulate the location, construction, and repair of yards, pens, and stables, and the use, emptying, and cleaning of such yards, pens, and stables and of water closets, privies, cesspools, sinks, plumbing, drains, or other places where offensive or dangerous substances or liquids are or may accumulate.

Although R.C. 3707.01 is a separate grant of rule-making authority, the courts commonly address the regulatory authority of local boards of health under this statute in conjunction with those powers described in R.C. 3709.21 or other statutes, rather than defining the scope of regulatory power conferred upon local boards of health solely by R.C. 3707.01. The courts tend to conclude that the general regulatory authority of such boards does not include the authority to address particular matters without a statute empowering the boards to regulate with respect to a particular matter. *See, e.g., Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957) (no authority to adopt regulation to license plumbers); *Bishop v. Nelson Ledges Quarry Park, Ltd.*, 2005-Ohio-2656, 2005 Ohio App. Lexis 2504 (Portage County 2005) (no authority to regulate public swimming areas).

Bd. of Health, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536 (2002), concluded in the syllabus:

1. The General Assembly has not indicated any intent through R.C. 3709.21, or otherwise, to vest local boards of health with unlimited authority to adopt regulations addressing *all public-health concerns*.
2. Administrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly.
3. *R.C. 3709.21 is a rules-enabling statute, not a provision granting substantive regulatory authority.* (Emphasis added.)⁸

The *D.A.B.E.* court cited numerous statutory powers granted to local boards of health to regulate with respect to specific matters,⁹ and found that:

At a minimum, enactment of the provisions cited above indicates

⁸ *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536 (2002), was decided prior to the enactment of R.C. Chapter 3794, as adopted by majority vote of the state electorate, effective December 7, 2006, which bans smoking in most public places.

⁹ By way of illustration, the *D.A.B.E.* court stated at ¶ 24:

R.C. 3714.12 provides that a board of health of a health district may issue orders in accordance with R.C. 3709.20 or 3709.21 to a license holder or other person to abate a violation of any section of R.C. Chapter 3714, the chapter governing construction and demolition debris, or any rule, adopted thereunder. R.C. 3709.085 allows the board of health of a city or general health district to enforce on behalf of the Environmental Protection Agency regulations for the disposal or treatment of sewage from semipublic disposal systems. R.C. 3709.22 requires boards of health of a city or general health district to promptly diagnose and control communicable diseases and gives the boards the power to inspect places where food is prepared and handled and to examine workers employed there. R.C. 3701.344 gives city or general health district boards of health the exclusive power to inspect private water systems and administer programs of a public-health council. R.C. 3730.03 requires local boards of health to regulate and approve businesses that provide tattooing and body-piercing services. R.C. 3707.01 delegates to boards of health of a city or general health district the authority to abate and remove all nuisances within its jurisdiction. R.C. 955.26 allows a city or general health district board of health to quarantine and vaccinate dogs for rabies.

See generally, e.g., Clark v. Greene County Combined Health Dist., 108 Ohio St. 3d 427, 2006-Ohio-1326, 844 N.E.2d 330 (2006) (finding that the authority conferred upon a local board of health by R.C. 3709.02 to protect the public health and to abate nuisances and the duty imposed upon such board by R.C. 3701.56 to enforce rules adopted by the Department of Health, when read in conjunction with

that the General Assembly did not intend through R.C. 3709.21 to vest local boards of health with plenary authority to adopt any regulations that they deem necessary for the public health. If petitioners correctly construe R.C. 3709.21 as authorizing such regulatory authority, then entire sections of R.C. Title 37, as well as other provisions, would be rendered superfluous.

96 Ohio St. 3d 250, at ¶ 25. Finding no express authority in a local board of health to regulate with respect to the matter of smoking in public places, the *D.A.B.E.* court concluded that local boards of health have no authority to prohibit smoking in public places. *See Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957) (syllabus) (“[a] board of health of a general health district has neither expressed nor implied power under Sections 3707.01, 3709.21 and 3709.36, Revised Code, to enact rules and regulations to provide for the licensing of plumbers in such general health district”).

Applying the *D.A.B.E.* court’s analysis to your question, it appears that, in light of the numerous statutory enactments that address or regulate the handling and burial of human remains, *see generally, e.g.*, note three, *supra*, none of which impose specific duties upon local boards of health, as well as the express grant of authority to the Department of Health in R.C. 3701.13 to make “special or standing orders or rules ... for governing the receipt and conveyance of remains of deceased persons,”¹⁰ the General Assembly did not intend that local boards of health have authority to adopt a regulation that prohibits the burial of a deceased family member on a family member’s privately-owned property.¹¹

In answer to your first question, we conclude, therefore, that a local board of

the Department’s rule prohibiting the installation or operation of household sewage disposal systems and requiring connection to any such accessible system, empowers such board to order a homeowner to connect to an accessible sewer line); *Johnson’s Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St. 3d 28, 567 N.E.2d 1018 (1991) (syllabus) (finding, in part, that R.C. 3709.20, R.C. 3709.22, R.C. 913.41, and R.C. 913.42, when read together, grant local boards of health authority to “prescribe some sanitary regulations for food establishments”).

¹⁰ To date, however, the Department of Health has not enacted any orders or regulations concerning the receipt and conveyance of remains of deceased persons.

¹¹ We recognize the possibility that the manner in which a specific burial is handled may present a particular danger to the public health. In such an instance, a local board of health may wish to proceed under its authority to prevent and abate specific nuisance situations. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-016 (syllabus, paragraphs 1 and 2) (“[t]he board of health of a general health district is not required to exhaust all administrative remedies under R.C. 3707.02 before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. The board of health of a general health district is authorized to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. As legal advisor of the board of health, a county prosecuting attorney shall advise the board that he may not initiate such an action on the board’s

health has no authority to adopt a regulation that prohibits the burial of a deceased family member on privately-owned property of a family member who lives in a township.

Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1. If a single deceased family member is buried on privately-owned, family property, such burial constitutes a "family cemetery," as defined in R.C. 4767.02(C), and is exempt as such from the registration requirements of R.C. 4767.02-.04.
2. A board of township trustees is without authority to prohibit the burial of human remains on private property within the unincorporated area of the township.
3. A local board of health has no authority to adopt a regulation that prohibits the burial of a deceased family member on privately-owned property of a family member who lives in a township.

behalf when he believes that the action is frivolous, obviously unfair, or not supported by the law or the facts"). *See also Henry v. Trustees of Perry Township*, 48 Ohio St. 671, 674, 30 N.E. 1122 (1891) (finding that, "[p]er se, a cemetery is not a nuisance," even though R.S. 1464 (now at R.C. 517.01) prohibited a township from locating a cemetery within two hundred (now one hundred) yards of a dwelling). *See generally Grundstein v. City of Ashland*, 25 Ohio N.P. (n.s.) 493, 1925 Ohio Misc. Lexis 1471 (C.P. Ashland County 1925) (syllabus, paragraph 1) ("[w]hether a specific act or thing constitutes a nuisance is largely dependent upon surrounding circumstances and is a matter for judicial determination"). *Cf.* note 5, *supra*.