

Note from the Attorney General's Office:

1962 Op. Att'y Gen. No. 62-3170 was overruled in part
on the basis of legislative amendment by
2018 Op. Att'y Gen. No. 2018-002.

3170

TOWNSHIP CEMETERY PROPERTY WITHIN A CITY ACCRUES TO THE CITY BUT PERSONAL PROPERTY OF THE OLD TOWNSHIP GOES TO THE NEW TOWNSHIP, WHEN A NEW TOWNSHIP IS FORMED OUT OF THE OLD—LEVY PROCEEDS DIVIDED BETWEEN CITY AND OLD TOWNSHIP—CITY AND TOWNSHIP MAY UNITE IN THE MANAGEMENT OF THE CEMETERY.

SYLLABUS:

1. When under Section 503.07, Revised Code, a new township is established out of the portion of a township comprising a city, the city, under Section 759.08, Revised Code, takes title to cemetery property owned by the original township but lying entirely within the borders of the city; and under Section 759.09, Revised Code, the cemetery is operated by the director of public service of the city. Personal property of the original township which property was not divided under Section 707.28, Revised Code, at the time the municipal corporation was incorporated, and remained the property of the township, remains the property of said original township when the new township is established.

2. In such a situation, where a special levy for the purpose of the township cemetery exists in the original township, the proceeds of such levy should be apportioned between the two townships under Section 503.03, Revised Code, the amount due the new township being allocated to the city under Section 703.22, Revised Code.

3. The city and the original township may, pursuant to Section 759.27 *et seq.*, Revised Code, unite in the management of the cemetery. (Opinion No. 817, Opinions of the Attorney General for 1951, page 606, approved and followed.)

Columbus, Ohio, July 27, 1962

Hon. Everett Fahrenholz, Prosecuting Attorney
Preble County, Eaton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The City of Eaton has filed a petition to detach from Washington Township, as provided in Ohio Revised Code Section 503.07. It is mandatory that the Commissioners grant the petition, and this action will likely occur about May 1, 1962.

“I will appreciate your early opinion upon the following resulting questions:

“Mound Hill Cemetery is located entirely within the corporate limits of the City of Eaton. Washington Township has title to all the real and personal property used by the cemetery. The Township has administered Mound Hill since its establishment.

“Upon detachment of the City, which of the subdivisions should administer the cemetery? Or is there provision for union operation of the cemetery? Which of the subdivisions owns the property? What should be the property division if it be determined that one of the subdivisions should control the cemetery?”

“There is a one-half ($\frac{1}{2}$) mill voted levy upon all property in Eaton City and Washington Township for cemetery purposes. After detachment, which subdivision is entitled to the proceeds of this levy?”

Section 503.07, Revised Code, to which you refer in your letter, reads as follows :

“When the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, may petition the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation. The board, on presentation of such petition, with the proceedings of the legislative authority authenticated, at a regular or adjourned session, shall upon the petition of a city change the boundaries of the township or erect such new township, and may upon the petition of a village change the boundaries of the township or erect such new township.”

Under Section 503.07, *supra*, the petition may ask that the township lines be changed to make them identical, in whole or in part, with the limits of the city, or may ask that a new township be erected comprising the area of the city. Since your letter of request refers to “detachment of the City,” I will assume for the purposes of this opinion that the petition asks for the erection of a new township out of the portion of Washington Township which is located within the limits of the city. Upon the creation of such new township, the jurisdiction of Washington Township over the area concerned must necessarily cease.

Statutory provision has been made for the ownership of public burial grounds located in municipal corporations and those located outside of

municipal corporations. In this regard, Section 759.08, Revised Code, reads :

“The title to and right of possession of public cemeteries and burial grounds *located within a municipal corporation* and set apart and dedicated as public cemeteries or burial grounds, and grounds used as such by the public but not dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, *are hereby vested in the municipal corporation in which such cemetery or burial grounds is located.*” (Emphasis added)

Also, Section 759.09, Revised Code, reads :

“The director of public service shall take possession and charge, and have the entire management, control, and regulation of public burial grounds and cemeteries located in or belonging to the city, subject to its ordinances. The director may direct the laying of such grounds out into lots, avenues, walks, and paths, or other subdivisions, which lots shall be numbered and the avenues named. A plat thereof shall be made so as to exhibit a fair and distinct outline of the grounds, and such plat shall be kept in the office of the auditor of the city for the use of the public.

“The director shall direct all the improvements and embellishments of such grounds and lots, protect and preserve them, and subject to the approval of the legislative authority of the city, appoint necessary superintendents, employees, and agents, and shall determine their term of office and the amount of their compensation.”

Also, Section 517.10, Revised Code, provides :

“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)

The syllabus of Opinion No. 1339, Opinions of the Attorney General for 1929, page 2010, reads as follows :

“Where a public cemetery operated by township trustees under the provisions of Section 3451, General Code, becomes located within the boundaries of a village, it becomes the property of said village through the terms of Section 4174, General Code,

even though the township trustees failed to give a deed to said property to the village before their terms expired.”

Section 3451, General Code, is now Section 517.10, Revised Code. Section 4174, General Code, was not codified into the Revised Code, because its provisions are included in the language of Section 759.08, *supra*. Said Section 4147 deals exclusively with graveyards and burial grounds being owned by the *villages* in which they are located.

In interpreting the provisions of Section 517.10, Revised Code, one of my predecessors, in Opinion No. 4163, Opinions of the Attorney General for 1954, page 423, held in the first paragraph of the syllabus :

“1. Under the provisions of Section 517.10, Revised Code, the title to, right of possession and control of all public cemeteries located outside any municipal corporation, 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, is vested in the board of township trustees of the township where such cemetery is located; and no instrument of conveyance is required to vest such title, title being automatically vested by virtue of such statute.”

Also see Opinion No. 2446, Opinions of the Attorney General for 1928, page 1929, and Opinion No. 1967, Opinions of the Attorney General for 1930, page 898.

The reasoning of the 1929 and 1954 opinions may be applied to the instant case, as similar statutory language is involved. Thus, under Section 759.08, *supra*, since the public cemetery in question is located within a municipal corporation, the title to and right of possession of such cemetery is vested in the municipal corporation.

I might note at this time that although a new township comprising the area of the city is to be formed, that township will not actually be in operation as a township. Under Section 703.22, Revised Code, where the limits of a municipal corporation become identical with those of a township, all township offices are abolished except those of justice of the peace and elected constables. (Which two offices have been abolished in recent years by other legislative action.)

To answer your first question, therefore, it is my opinion and you are advised that title to and right of possession of the cemetery in question is under Section 759.08, *supra*, in the city, and under Section 759.09.

supra, the cemetery should be operated by the director of public service of the city.

As to the question of union operation of the cemetery, Section 759.27, Revised Code, reads :

“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, when conveniently located for that purpose, may unite in the establishment and management of a cemetery, by the purchase or appropriation of land therefor not exceeding one hundred acres, to be paid for as provided by section 759.30 of the Revised Code.”

Such a cemetery is, pursuant to Section 759.31, Revised Code, managed jointly by the township and the municipal corporation.

I have assumed for purposes of this opinion that the cemetery in question was not established as a union cemetery under the above provisions of law; but the cemetery may be so established under Section 759.27, *supra*. I might add that this is true even though a cemetery presently exists. Opinion No. 817, Opinions of the Attorney General for 1951, page 606.

Coming to the question of the division of the property, one would assume that the proper time for such division was at the time that the municipal corporation was incorporated. On this point, Section 707.28, Revised Code (formerly Section 3544, General Code), reads as follows :

“When a village is created out of a portion of a township or portions of more than one township, a proper division of the real and personal property of such townships, and of the funds for township purposes which are in the treasury, or in the process of collection, of the townships from which the territory is taken, shall, upon application of the village to the probate court of the county in which the territory is situated, be determined and ordered transferred to such village or paid to the village treasurer. In determining the portion of such real and personal property and funds to which the village is entitled, the indebtedness of each township shall be taken into consideration. Ten days' notice of a hearing shall be given by the treasurer of the applicant to the township clerk of each township whose property and funds are sought to be divided. The findings and orders of the probate court under this section shall be final.”

As noted, the real property here in question goes to the city pursuant to Section 759.08, *supra*. Any personal property connected with the cem-

tery should have been divided at the time of incorporation, but this was evidently not done and it is now too late to proceed under Section 759.08, *supra*. There is no provision in Chapter 503., Revised Code, which permits, at the time of detachment, pursuant to Section 503.07, Revised Code, an apportionment of the personal property owned by the township from which the municipality is being detached. (It may be noted that Section 503.11, Revised Code, imposes upon the board of county commissioners a duty in connection with such property, however, said section is expressly limited to new townships established under Section 503.09, Revised Code, and, therefore, could not be applicable in the instant case.) Thus, in the absence of statutory authorization for a distribution of such property at this time, and based upon the presumption that such property should have been divided at the time of annexation or incorporation, I am of the opinion that the personal property used by the township at the cemetery in question remains the property of the township. In this regard, attention is called to Opinion No. 2686, Opinions of the Attorney General for 1958, page 542, which discusses this problem.

As to the disposition of the proceeds of the tax levy in question, it will be noted that the instant case involves the division or partition of a township (Washington Township) and the creation of a new township. Regarding such a situation, Section 503.03, Revised Code, provides :

“No township shall be laid off containing less than twenty-two square miles, or have its boundaries so changed as to reduce its territory below that quantity, unless it includes a municipal corporation, except as provided by sections 503.09 to 503.13, inclusive, of the Revised Code. *In case of division or partition of a township, the funds in the treasury thereof shall be apportioned to the townships to which portions thereof are attached, or to the new townships established, to the extent they are collected from such territory.*”
(Emphasis added)

The third and fourth paragraphs of the syllabus of Opinion No. 2686, *supra*, read as follows :

“3. A board of county commissioners proceeding according to Section 503.07, Revised Code, is required by Section 503.04, Revised Code, to give the necessary notice, to record the changed or altered boundaries of any township and the boundaries of any newly created township, and to name any such newly created township, in the manner set forth in the said Section 503.04, Revised Code.

“4. Section 503.03 and Section 503.02, Revised Code, imply a duty on the part of the board of county commissioners of ap-

portioning the funds in the treasury of a previously existing township where the boundaries of such township are changed or a new township is erected pursuant to Section 503.07, Revised Code.”

In the case of *Colley et al., v. The State, ex rel. The Village of Bay*, 74 Ohio St., 252, the Supreme Court had before it a question dealing with a statute which was analogous to Section 503.03, Revised Code (Section 1377, Revised Statutes). The court determined in the *Cooley* case, *supra*, that the word “funds” as used in said statute was not limited to monies in the treasury but included monies which thereafter would be placed in said treasury, and the court held in the syllabus of said case:

“In case of the division of a township and the establishment of a new township, the new township, under section 1377 R.S. is entitled not only to its portion of the money in the treasury of the original township, at the time the new township is established, but also to money thereafter in the treasury, to the extent the same is collected from the territory established into the new township.”

See also *In the Matter of Lemon Township Trustees*, 60 Ohio App., 1, for similar reasoning.

However, while under the procedure of Section 503.07, *supra*, a new township is established, the new township in the instant case will have limits identical with the municipal corporation and will not actually go into operation as a township. Section 703.22, Revised Code, to which I referred earlier, provides in this respect as follows:

“When the limits of a municipal corporation become identical with those of a township, all township offices shall be abolished, and *the duties thereof shall be performed by the corresponding officers of the municipal corporation*, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employees. Such justice and constables shall be elected at regular municipal elections. All property, moneys, credits, books, records, and documents of such township shall be delivered to the legislative authority of such municipal corporation. *All rights, interests, or claims in favor of or against the township may be enforced by or against such municipal corporation.*”
(Emphasis added)

Thus, upon the city being detached and a new township being formed, the board of county commissioners should apportion all the funds held by

Washington Township. This apportionment should, of course, include the funds received under the one-half mill levy in question and in accordance with the *Cooley* case, *supra*, such apportionment should apply not only to funds on hand but also to the funds which will be realized in the future as a result of such levy. The apportioned amount should be paid, in accordance with the formula determined, to the existing township and to the new township created by the action of the county commissioners under Section 503.07, Revised Code. However, since the boundaries of the municipal corporation, the City of Eaton, are identical with the boundaries of the new township, Section 703.22, Revised Code, comes into play which causes the property, monies, credit, etc., of the new township to be delivered to the legislative authority of the municipal corporation, the City of Eaton. Accordingly, the distribution due the new township under Section 503.03, *supra*, should be made to the City of Eaton on behalf of and as a result of the township in which it is located, and the city will have the right to use the funds in question for the purpose of operating the cemetery for which the funds were levied.

Since the cemetery will no longer be the responsibility of Washington Township, the funds apportioned to that township under the cemetery levy should be transferred to the general fund of Washington Township (See Section 5705.14, Revised Code.)

Concluding, it is my opinion and you are advised :

1. When under Section 503.07, Revised Code, a new township is established out of the portion of a township comprising a city, the city, under Section 759.08, Revised Code, takes title to cemetery property owned by the original township but lying entirely within the borders of the city, and under Section 759.09, Revised Code, the cemetery is operated by the director of public service of the city. Personal property of the original township which property was not divided under Section 707.28, Revised Code, at the time the municipal corporation was incorporated, and remained the property of the township, remains the property of said original township when the new township is established.

2. In such a situation, where a special levy for the purpose of the township cemetery exists in the original township, the proceeds of such levy should be apportioned between the two townships under Section 503.03, Revised Code, the amount due the new township being allocated to the city under Section 703.22, Revised Code.

3. The city and the original township may, pursuant to Section 759.27 *et seq.*, Revised Code, unite in the management of the cemetery. (Opinion No. 817, Opinions of the Attorney General for 1951, page 606, approved and followed.)

Respectfully,

MARK McELROY

Attorney General