

OPINION NO. 66-163

Syllabus:

1. Section 517.04, Revised Code, applies only to the establishment of a new cemetery and not to the transfer of an established cemetery, open to use by the public generally, by a private cemetery association to the board of township trustees.

2. The board of township trustees is required under the provisions of Section 517.27, Revised Code, to accept a transfer of a public cemetery from a private cemetery association, and Section 517.04, Revised Code, does not require the board of township trustees to submit the question of acceptance to the electors.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William B. Saxbe, Attorney General, October 3, 1966

I have before me your request for my opinion on the following questions:

"1. Is it necessary, prior to the acceptance

of a conveyance of a cemetery from a private cemetery association, that the question of the acceptance of such conveyance be placed on the ballot in accordance with Section 517.04?

2. Should the township electors reject the acceptance of the conveyance, does this rejection relieve the township trustees of the duty of accepting said conveyance?"

The pertinent code sections involved in your questions are Sections 517.04 and 517.27, Revised Code. Section 517.27 reads as follows:

"When a public cemetery in a township is not under the control of a municipal corporation, and the title or control thereof is vested in an association or the trustees thereof, or is vested in a religious society, whether incorporated or not, or in the trustees thereof, and such cemetery is used exclusively for cemetery purposes, such association, society, or the trustees thereof may convey such grounds to the board of township trustees and its successors in office. Subject to the rights of the original grantor, his heirs or assigns, the board shall 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 sections 517.01 to 517.32, inclusive of the Revised Code."
(Emphasis added)

The pertinent parts of Section 517.04, supra, are:

"Before a purchase or appropriation of land for cemetery purposes is made or a conveyance is accepted * * * the question of establishment of such cemetery * * * shall be submitted to the vote of the electors * * *"
(Emphasis added)

In your request you use the term "private cemetery association". The General Assembly has used the term "private" and "public" cemetery throughout Chapter 517 but it has failed to define the terms. The terms are distinguished as follows in 75 ALR 2d, 592, section 1.

"It has been repeatedly said that a cemetery, although privately owned, is properly classified as a 'public cemetery' as distinguished from a private one, where it consists of a great number of small burial plots or sites, sold and for sale to the public, * * * and there is no substantial difference in the use, between a burying ground owned and operated by a cemetery corporation with a statutory organization and one owned and operated by an individual, especially where the lands have been effectually dedicated to burial purposes only and so used for many years. * * * As indicated, a 'private cemetery' in the sense in which it is here

considered, does not mean one which is under private ownership for the sale of lots to the public, but one which is not only owned for the benefit of but also devoted to the burial of the members of a family, or relatives bound by family or similar personal ties, to the exclusion of the public."

Therefore, assuming that the private cemetery association referred to in your request sells lots to the public the provisions of Section 517.27, supra, would apply to such conveyance. I applied Section 517.27, supra, to a problem similar to yours in Opinion No. 65-146, Opinions of the Attorney General for 1965, page 329. I direct your attention to paragraph 2 of the syllabus which reads as follows:

"2. Where the title or control of such a mausoleum located in the township is vested in an association or the trustees thereof, the board of township trustees has a duty pursuant to Section 517.27, Revised Code, to accept a conveyance thereof and maintain and care for such mausoleum; * * *" (Emphasis added)

In Opinion No. 65-146, supra, I had held that a mausoleum was a public cemetery. Accordingly the opinion is applicable in the present case. During the course of the opinion I referred to Opinion No. 1125, Opinions of the Attorney General for 1957, page 519. I stated, in paragraph 1 of the syllabus of the 1957 opinion with respect to Section 517.27, supra, the following:

"1. A board of township trustees is required under the provisions of Section 517.27, Revised Code, to accept the transfer of a cemetery by the trustees of a church or religious society, and in such a case Section 1715.39, Revised Code, does not require such church or society to apply to the common pleas court for authority to transfer such cemetery to said township."

There is no doubt that a private cemetery association comes within the purview of both Sections 517.27 and 1715.39, supra.

In making the decisions set forth above, no consideration was given to Section 517.04, supra, as this section applies only when there is a question of establishing a cemetery. That is, Section 517.04, applies only when a new cemetery is being established and not when the township trustees are taking over an existing cemetery.

Therefore, since Section 517.04, supra, applies only to the establishment of a new cemetery and Section 517.27, supra, exclusively governs transfers by a private association or religious society, there is no statutory requirement to submit the question of acceptance to the electors. Since there is no statutory requirement to submit the question of acceptance to the electors there is no need to answer your second question.

In conclusion it is my opinion and you are hereby advised that:

1. Section 517.04, Revised Code, applies only to the estab-

lishment of a new cemetery and not to the transfer of an established cemetery, open to use by the public generally, by a private cemetery association to the board of township trustees.

2. The board of township trustees is required under the provisions of Section 517.27, Revised Code, to accept a transfer of a public cemetery from a private cemetery association, and Section 517.04, Revised Code, does not require the board of township trustees to submit the question of acceptance to the electors.