

OPINION NO. 939

Syllabus:

The Director of Highways may relocate a road on the state highway system through those lands of a cemetery association not containing graves in use as such if such lands, not containing graves in use as such, are contiguous to the boundaries of the cemetery association.

- - - - -

To: P.E. Masheter, Director of Department of Highways, Columbus, Ohio
By: William B. Saxbe, Attorney General, March 20, 1964

Your request for my opinion reads as follows:

"The Department of Highways is completing plans for the relocation of Olentangy River Road from Goodale Expressway in Columbus to State Route 161 near Worthington, Ohio. Part of this relocated highway will cross the lands of the Union Cemetery Association located west of the existing Olentangy River Road.

"The Union Cemetery Association is a non-profit corporation whose property, under the proposed plans, is needed for highway purposes. Proposed plans call for taking approximately 10 acres of land for right-of-way, bisecting the cemetery lands, leaving approximately 20 acres in the westerly residue and approximately 50 acres in the easterly residue.

"The area needed for the highway contains no graves in use as such, nor are there any graves in use as such in the westerly residue.

"Based on the above facts, your formal opinion is respectfully requested as to whether the Department of Highways has a right to appropriate this property of the Union Cemetery Association."

A determination of your question involves a construction of Section 1721.01, Revised Code, which provides in pertinent part as follows:

"Lands of cemetery associations within but contiguous to their boundaries not containing graves that are in use as such, shall be subject to appropriation for the purpose of widening or re-locating then existing public highways, streets, or alleys and other structures and improvements incident thereto; and for such purposes said lands shall be subject to the exercise of the right of eminent domain by the municipal corporation in which such lands are located, by the board of county commissioners of the county in which such lands are located,

or by the director of highways under the same conditions and in the same manner as any private property.
* * *

From an examination of the facts as presented in this request, the relocated highway goes through cemetery lands in which no graves are in use as such. Furthermore, it seems apparent that these lands involved in this highway acquisition are close to and bordering upon the boundaries of the cemetery.

Whether the word "contiguous," standing alone, as used in Section 1721.01, supra, means an actual touching or merely an approximate contact is not clear. Contiguous has been defined as "in close proximity; near, though not in contact; neighboring; adjoining; near in succession; in actual close contact; touching; bounded or traversed by." Black's Law Dictionary, Fourth Edition, 1951.

In construing a particular election law the Montgomery County Court of Common Pleas held: "'contiguous' means an actual contact; touching." Brubaker vs. Board of Elections; 71 Ohio Law Abs., 99. However, the Supreme Court of Ohio in Meissner vs. Toledo, 31 Ohio St., 387, in discussing the meaning of the words "contiguous and adjacent" as used in Section 539 of the municipal code, 69 Ohio Laws 59, (Section 727.01, Revised Code) relating to assessments for municipal improvements, said in the third branch of the syllabus:

"3. Such general description may embrace lots and lands near to, though not abutting upon or touching the improvement."

Moreover, the Supreme Court of Ohio in limiting the jurisdiction of the Public Utilities Commission of Ohio to regulate motor transportation companies by construing Section 4921.05, Revised Code, noted that certain operations are exempt where routes are between municipalities which are "immediately contiguous" to each other (having touching boundaries). Cleveland vs. P.U.C.O., 130 Ohio St., 503; Cleveland vs. P.U.C.O., 134 Ohio St., 216; Cleveland Rail Co. vs. P.U.C.O., 137 Ohio St., 302. In Section 4921.05, supra, the prerequisite for exemption requires that municipalities be "immediately contiguous," not merely "contiguous."

In the instant request, it would seem to make no difference what connotation is placed on the word "contiguous" as used in Section 1721.01, Revised Code, for the reason that the cemetery lands not containing graves in use as such are near, in close proximity, neighboring, in actual close contact, touching and adjacent to the boundary of the cemetery in question.

Also, it is important to note that the relocation of the highway in question will not require the removal of any graves in the cemetery association, which obviously is what Section 1721.01, supra, is intended to prevent. And it is equally clear that the cemetery association will be adequately reimbursed for the land taken by the department for the relocated highway and for any damages resulting thereby to any residue of this land. Section 1721.01, supra, further providing as follows:

"The cemetery associations may appeal from the determination of the municipal corporation, board of county commissioners, or director of high-

ways that the property sought to be taken is necessary for the public convenience and welfare. Such appeal shall be heard and determined in the same proceeding and in the same manner as the amount of compensation and damages for land taken under the right of eminent domain. * * *

(Emphasis added)

Of further import is Section 5501.11, Revised Code, which statute authorizes the Director of Highways, among other things, to relocate any road or highway on the state highway system. Whether a particular highway is or is not on the state highway system is a question of fact which I cannot answer from the information supplied me.

Therefore, it is my opinion and you are hereby advised that the Director of Highways may relocate a road on the state highway system through those lands of a cemetery association not containing graves in use as such if such lands, not containing graves in use as such, are contiguous to the boundaries of the cemetery association.