

submitted as a part of the files relating to the purchase of this property, I find that the same has been properly executed and that there is shown thereby a sufficient unencumbered balance in the appropriation account standing to the credit of the Department of Public Welfare to pay the purchase price of this property, which purchase price is the sum of nine thousand dollars. Although this encumbrance record has been signed by the Director of Finance and thus complies with the provisions of section 2288-2, General Code, the same has not been signed by the Superintendent of Public Works and Director of said Department, who, under the provisions of section 154-40, General Code, is the only officer in the state government who is authorized to purchase real property required by the state government or any department thereof. It follows, therefore, that before the voucher is issued by your department covering the purchase price of this property, the signature of the Superintendent of Public Works and Director of said Department to this contract encumbrance record should be secured. And, of course, no warrant should be issued for the purchase price of this property until the Superintendent of Public Works and Director of said Department has evidenced the purchase of this property by him by signing said contract encumbrance record. In this connection, it is noted that under date of May 15, 1934, the Controlling Board approved the purchase of the lands here under investigation and released from the appropriation account the money necessary to pay the purchase price of the property.

I am herewith returning to you for your further appropriate action the files above referred to, to wit, the abstract of title, warranty deed, contract encumbrance record No. 1, Controlling Board certificate and the deed executed by Thomas B. Bennington in and by which Bonnie E. Rust obtained title to this property.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

3694.

CEMETERY—OPERATED BY TOWNSHIP TRUSTEES UNDER SECTION 3441 ET SEQ. PROCEEDS FROM SALE OF LOTS MAY BE EXPENDED HOW.

SYLLABUS:

A board of township trustees, operating a cemetery or cemeteries under Sections 3441 et seq., General Code, is unauthorized to expend money, arising from the sale of lots or by a tax levy, for the purpose of advertising lots for sale, or, payment of a commission to a person making sales of such lots, or employing persons to make sales of such cemetery lots.

COLUMBUS, OHIO, December 28, 1934.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent request for my opinion reads as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

QUESTION: May a board of township trustees, operating a cemetery or cemeteries under the provisions of Section 3441 et seq., General Code, legally expend moneys arising from the sale of lots, or moneys arising from a tax levied, for the purpose of advertising lots for sale; or for the purpose of payment of a commission to a person making sales of such lots, or for the purpose of employing persons to make sales of such cemetery lots?"

The disposal of the dead, from motives of sanitation and health, is a state function. (*Fraser vs. Lec*, 8 O. App. 235.) For that reason the regulation and supervision of cemeteries is within the power of the state. The legislature has made specific provision for the establishment and maintenance of cemeteries by townships and has enacted other requirements to guide and control the township trustees in the operation of such cemeteries.

Section 3441, General Code, contains a direct grant of authority to the township trustees in these words:

"Township trustees may * * * purchase, and enclose, improve and protect such lands in one or more places within the township as they deem necessary and proper for cemetery purposes."

Section 3444, General Code, contains authority for levying a tax to defray the expenses of acquiring such land and for the necessary care and improvement of such cemeteries. It reads:

"To defray the expenses of such purchase or appropriation, inclosing and improving of such lands, the trustees may levy for one or more years a tax sufficient for that purpose, not to exceed two thousand dollars in any one year, and each year thereafter such sum as may be necessary for the needful care, supervision, repair, and improvement of such cemeteries."

Section 3445, General Code, requires the submission to a vote of the electors of the township of the question of such purchase or appropriation before the same may be made.

Section 3448, General Code, provides in part that:

"Upon application the township trustees shall sell at a reasonable price such number of lots as the public wants demand for burial purposes. * * *"

Then follows this provision in Section 3449, General Code:

"The proceeds arising from the sale of lots shall be used in improving and embellishing such grounds."

Briefly stated, your question concerns the authority of township trustees to expend funds for the purpose of advertising lots for sale, or for the payment of a commission to a person making sales of such lots, or for the employment of a person to make sales of such cemetery lots; when the payment of all such expenses will be made from funds obtained from the levy of a tax under

Section 3444, General Code, or from the sale of lots under Section 3448, General Code.

In the enactment of Sections 3441 et seq., supra, the legislature, in effect, delegated its authority to a subordinate administrative body. That being so, it is pertinent to consider fundamental principles governing the exercise of powers by public officials, especially when such powers authorize the expenditure of public funds. As a general rule, public officers have only such powers as are expressly delegated to them by statute, and such as are necessarily implied from those so delegated. *Guckenberger vs. Dexter* 60 O. S. 353. *Ireton vs. State* 81 O. S. 562. These powers must be exercised in the mode prescribed by statute. *State vs. Glidden* 31 O. S. 309; *Tiffin vs. Shawan* 43 O. S. 178.

It is also well settled that where the statute prescribes the mode by which power conferred upon a public officer or board shall be exercised, the mode specified is also the measure of power granted. *Frisbil Co. vs. East Cleveland* 98 O. S. 266. In *State ex rel. Smith vs. Mahany*, 97 O. S. 272, it was held that public funds may be disbursed only by clear authority of law.

That the principles of law stated above apply to a board of township trustees is apparent. See *Board of Education vs. Ladd*, 26 O. S. 210. *Trustees vs. Miner*, 26 O. S. 452 and *Brattleboro Savings Bank vs. Trustees* 13 O. F. D. 321, 98 Fed. 524.

In the expenditure of funds derived from the levying of a tax under section 3444, General Code, and from the sale of lots under Section 3448, General Code, township trustees are acting under a special power and must therefore conform strictly to the conditions under which such power is given. The policy applicable to the financial management of cemeteries has been well stated in 7 Ohio Jurisprudence, page 45 as follows:

“The statutes contain numerous provisions as to the sources from which cemeteries may derive income, as to the purpose for which such income can be used, and as to by whom and in what way it shall be kept, invested or disbursed. As has already been said the law does not contemplate that cemeteries shall be operated for profit by either public or private corporations.”

The language used in Section 3449, General Code, is imperative, saying in effect that the proceeds from the sale of lots “shall be used for the purposes last mentioned.” This section literally requires the trustees to expend those proceeds for improvement and embellishment only and would have the effect of impressing such proceeds with a special and limited use. A similar question was presented to a former Attorney General. His opinion thereon is found in Opinions of the Attorney General, 1920, Vol. I, p. 89. There the question was whether proceeds arising from the sale of lots could be used by the township trustees to purchase additional land for the cemetery. The then Attorney General traced the history of Section 3449, General Code, from the enactment of a law March 4, 1853 (51 O. L. 495), to its present form. He concluded that the provision, “that the proceeds arising from the sale of lots * * * shall be used for the purpose of improving and embellishing said grounds” was mandatory and that such proceeds could be used for no other purpose. Answering specifically the question asked the then Attorney General said:

“From a consideration of the terms of this section, its purpose and

history brings this department to the conclusion that the proceeds raised from such sale are impressed with the limited and special use named in section 3449 * * *. The word 'improving' used in section 3449, cannot be construed to include the purchase of additional land, but is limited to 'said grounds' mentioned in the section, and not to other additional grounds."

I concur in the reasoning employed in the 1920 opinion supra, and consequently am of the opinion that by virtue of Section 3449, General Code, the legislature has limited the purposes for which the township trustees may expend the proceeds from the sale of cemetery lots to the sole purpose of "improving and embellishing said grounds;" and that the advertising of lots for sale or the payment of a commission for the sale of said lots or the employment of persons to sell such lots, do not come within the meaning of the statutory provision "improving and embellishing said grounds."

This conclusion is further supported by the provisions of Section 3448, General Code, that "upon application the township trustees shall sell at a reasonable price such number of lots as the public wants demand for burial purposes." Additional support for this conclusion is found in Section 3449, General Code, where after it is stated that the proceeds for the sale of such lots shall be used in improving and embellishing such grounds, there is this provision: "and township trustees shall build and maintain proper and secure fences around all such cemeteries, *to be paid* for from the township funds."

The reasoning supporting the conclusion that the proceeds from the sale of lots may be expended only pursuant to the provisions of Section 3449, General Code, is applicable in determining the purposes for which the proceeds of a tax levy authorized by Section 3444, General Code, may be used. As previously stated, Section 3444, General Code authorizes the township trustees to levy a tax for the purpose of defraying the expense of purchasing, inclosing and improving land for a cemetery, "and each year thereafter such sum as may be necessary for the needful care, supervision, repair, and improvement of such cemeteries." If the proceeds of the sale of lots may not legally be expended for the purpose of advertising lots for sale, paying a commission for the sale of such lots or paying for the employment of persons to make such sales, it is inconceivable that the proceeds of a tax levy under Section 3444, General Code, could be used for such purpose. Bearing in mind that provisions of Section 3441 et seq. it can hardly be claimed that the legislature authorized the expenditure of the proceeds of a tax levy for the purpose of promoting the sale of cemetery lots. As previously stated herein, public funds may be disbursed only by clear authority of law and specifically answering your inquiry, I am of the opinion that township trustees are not authorized to expend funds procured from a tax levy under Section 3444, General Code, or the proceeds from the sale of lots under Section 3449, General Code, for the purpose of advertising cemetery lots for sale, or paying a commission to a person selling such lots, or employing persons to sell such cemetery lots.

Respectfully,

JOHN W. BRICKER,
Attorney General,