

OPINION NO. 856

Syllabus:

The legislative authority of a village and the board of township trustees may not lease union cemetery lands for oil and/or gas exploration unless the conditions of Sections 759.04, 759.07, and 759.47, Revised Code, are met.

To: Thomas E. Ray, Morrow County Pros. Atty., Mt. Gilead, Ohio
By: William B. Saxbe, Attorney General, February 10, 1964

Your request for my opinion reads in substance as follows:

- "1. May the legislative authority of a Village and the Board of Township Trustees lease Union Cemetery lands for oil and/or gas exploration and development,

where said cemetery lands are not used presently for burial purposes, but said lands are suitable for burial purposes, and an equal quantity of land cannot be purchased contiguous to the cemetery land to be leased, nor is the cemetery indebted.

- "2. If the answer to question one is 'no', may the legislative authority and the Board of Trustees lease said cemetery land as a non-development oil and/or gas lease, whereby the surface of said land will not be disturbed, but will be communitized with adjoining lands or slant drilling from adjoining property will be used to develop the cemetery lands for oil and/or gas purposes.
- "3. If the answer to questions 1 and 2 is yes, and oil and gas is discovered, how is the lease rental payment and income from sale of oil and/or gas used.

"This office is particularly concerned as to whether a lease for oil and gas purposes constitutes a sale of the real estate, thereby bringing this matter within the provisions of Revised Code 759.01 to 759.48."

The establishment of a union cemetery is provided for by Section 759.27, Revised Code. That section provides:

"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."

Section 759.29, Revised Code, provides:

"The title to the grounds of the cemetery provided for in section 759.27 of the Revised Code, whether by purchase or otherwise, shall vest in and be held by the municipal corporation making the appropriation, in trust for the use of its inhabitants and the inhabitants of the other municipal corporations or townships in common. Provision shall be made for the interment in such cemetery of all persons buried at the expense of the municipal corporation or township."

Thus, even though the cemetery is created by the union of two political bodies, nevertheless title to the grounds is vested

only in the municipal corporation as defined under Section 759.28, Revised Code.

As I recently pointed out in Opinion No. 720, Opinions of the Attorney General for 1963, issued December 10, 1963:

"While it (an oil and gas lease) is ordinarily denominated a 'lease', subsequent discussion shows that it has many incidents that are not common to leases generally; in fact, oil and gas leases are in a class by themselves and must be so treated."

I then pointed out that whether a lease in its exact sense is denominated a sale of real estate in place or as a sale of a chattel when the mineral reaches the surface, nevertheless the result is the same for the ultimate incident of it, is the sale of the mineral which constitutes a part of the real estate. Miller v. Vandergrift, 12 C.C. (N.C.) 475, (1910). Hollister v. Vandergrift, 12 C.C. (N.S.) 586, (1910). The court in the Hollister case, supra, in construing the effect of an oil and gas lease declared that such leases "* * * are to be regarded as sales of the substances of oil under the surface of the earth * * *"

Under the circumstances you recite I find no authority in the officers having control of a union cemetery to execute a gas and oil lease of the cemetery grounds. Such a lease as shown, supra, contemplates a sale of part of the real estate. While a sale of union cemetery lands may be executed pursuant to statute when certain conditions are met, I find nothing in the facts you have stipulated to bring your situation within the purview of these statutes. Section 759.04, Revised Code, (by reference in Section 759.31, Revised Code) applies to the sale of union cemetery lands. This section describes the conditions under which the cemetery grounds may be sold. It provides:

"The legislative authority of a municipal

corporation may sell any portion of the cemetery grounds owned by it and not used for the burial of the dead, which grounds are unsuitable for burial purposes, and may purchase with the proceeds thereof other suitable lands lying contiguous thereto. No such sale shall be made until the legislative authority has contracted for an equal or greater quantity of land suitable for burial purposes. For the purpose of paying any indebtedness arising out of the purchase or improvement of such cemetery, the director of public service in cities, or the board of cemetery trustees in villages, with the consent of the legislative authority, may sell or mortgage such portion of the real estate belonging to the cemetery as has not been used for burial purposes, or as may not, in its opinion, be needed for such purposes, and the money arising from the sale or mortgage thereof shall be applied by it to the payment of the indebtedness, and for no other purpose. Upon such sale, if there is a surplus after the payment of the indebtedness, such surplus money shall be used by the director or the board in the improvement of the cemetery grounds, and for no other purpose."

You will note that the conditions of the statute are not met by the facts you have stipulated. See also Section 759.07, Revised Code, which provides for the sale of cemetery lands situated within a municipality only when the bodies therein interred have been removed. From the foregoing it is evident, as Section 759.29, Revised Code, declares, that the cemetery lands are held in trust for the inhabitants of the municipal corporations or townships in common. This trust may not be deviated from unless express provisions of the applicable statutes so provide. Additional policy considerations are clearly seen in Section 759.43, Revised Code, which provides that "the rights and titles of lot owners * * * shall not be questioned." The officials of a union cemetery therefore hold the cemetery lands in trust perpetually.

However, what has been said above does not apply to the sale of an old cemetery approach. Section 759.47, Revised Code, authorizes the sale of an old approach when such

approach is unnecessary for cemetery purposes.

Therefore, it is my opinion and you are accordingly advised that the legislative authority of a village and the board of township trustees may not lease union cemetery lands for oil and/or gas exploration unless the conditions of Sections 759.04, 759.07, and 759.47, Revised Code, are met.