

OPINION NO. 90-066**Syllabus:**

1. The boards of township trustees and the legislative authorities of municipal corporations that have established a cemetery under authority of R.C. 759.27 may not promulgate rules pursuant to R.C. 759.35 whereby the property interest of an unknown owner of an unused cemetery lot is terminated.
2. The board of trustees of a cemetery organized under the authority of R.C. 759.27 may establish requirements for notification by the original grantee of a cemetery lot of the names and addresses of persons to whom the grantee's property would pass by intestate succession and may establish a requirement that a person who acquires ownership by some method other than the original grant notify the board of trustees of such cemetery of his name and address. However, the board of trustees of such cemetery may not establish a regulation which conditions the ownership of a cemetery lot on compliance with these or any other requirements and may not insert into the deed a provision granting it the right of reentry upon a lot in the event that certain conditions do not occur.

To: Anthony L. Gretick, Williams County Prosecuting Attorney, Bryan, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 7, 1990

I have before me your request for my opinion concerning the authority of a board of trustees of a municipal and township cemetery with respect to cemetery lots which remain unused. Your specific questions are:¹

1. May the boards of township trustees and the legislative authorities of municipal corporations that have united to establish a cemetery pursuant to R.C. 759.27 promulgate rules under the authority of R.C. 759.35 whereby they may regain title to cemetery lots which remain unused for a long period of time and for which owners cannot be located?
2. May the board of trustees of a cemetery organized under the authority of R.C. 759.27 establish the same requirements regarding notification of ownership and usage of cemetery lots that a board of township trustees is permitted to include in the terms of sale and the deed for a cemetery lot pursuant to R.C. 517.07?

R.C. 759.27 permits 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, if conveniently located, to unite for the purpose of establishing and managing a cemetery by purchasing or appropriating land therefor not exceeding one hundred acres. The title to such lands shall 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." R.C. 759.29. The cemetery shall be under the control and management of the board of township trustees and the legislative authorities of the municipal corporations. R.C. 759.31. R.C. 759.35 provides the boards of township trustees and the legislative authorities of the municipal corporations with authority to call, at any time, a joint meeting of such legislative authorities and boards on reasonable notice, for the purpose of making or amending joint rules and regulations

¹ With your concurrence, I have reworded your questions for ease of discussion.

for the government of the cemetery, and making such orders as are found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise. R.C. 759.35. A board of cemetery trustees (hereinafter "cemetery board") may be elected by the members of the boards of township trustees and the legislative authorities of the municipal corporations pursuant to R.C. 759.36, and such cemetery board "shall have all the powers and perform all the duties exercised and performed by the director of public service of a municipal corporation under sections 759.09 to 759.14 of the Revised Code."² R.C. 759.36.

As creatures of statute, a board of township trustees and the legislative authority of a municipal corporation have only the powers they are expressly granted by statute and the powers which are necessarily implied by such express grant. *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 142 N.E.2d 655 (1957); *Verberg v. Board of Education*, 135 Ohio St. 246, 20 N.E.2d 368 (1939). The statutes which govern municipal and township cemeteries, R.C. 759.27-.44, contain no provisions which expressly grant authority to regain unused cemetery lots. R.C. 759.35, however, permits the boards of township trustees of townships and the legislative authorities of municipal corporations which have established a cemetery pursuant to R.C. 759.27 to make rules and regulations "for the government of the cemetery...." In order to understand the authority of the boards of township trustees and the legislative authorities of municipal corporations with respect to unused cemetery lots, I must first examine the nature of such lots.

Title to the property which comprises a municipal and township cemetery is held in trust by the municipal corporation which makes the appropriation, by purchase or otherwise, for the use of its inhabitants and the inhabitants of the other municipal corporations or townships. R.C. 759.29. Thus, the purchaser of a cemetery lot does not acquire title in fee simple to the lot but acquires some lesser interest. In 1972 Op. Att'y Gen. No. 72-031, my predecessor determined that the sale of a cemetery lot confers upon the purchaser an easement for the purposes of burial. An easement is an interest in real property (see, e.g., *Norwood v. Forest Converting Co.*, 16 Ohio App. 3d 411, 476 N.E.2d 695 (Hamilton County 1984)) which is generally defined as a right to use the land of another for a specified purpose. *Ross v. Franko*, 139 Ohio St. 395, 40 N.E.2d 664 (1942). Thus, although the purchaser of a cemetery lot does not obtain legal title to the lot, he obtains a property interest which entitles him to use the lot for burial. See 1933 Op. Att'y Gen. No. 2087, vol. III, p. 1996.

Your first question asks whether title to unused cemetery lots may be regained through the operation of a rule promulgated pursuant to R.C. 759.35. However, since title to the cemetery lot never passes to the purchaser, the question becomes whether the easement in a cemetery lot may be terminated by a rule promulgated pursuant to R.C. 759.35.

When an easement is terminated, the owner of the fee simple title holds the same free from easement. *Corwin v. Cowan*, 12 Ohio St. 629 (1861). An easement may be extinguished in a number of ways. However, since your facts indicate that the owner of the cemetery lot is unknown and therefore unable to consent to an extinguishment of the easement, I shall limit my analysis to extinguishment by abandonment, adverse possession, and appropriation, none of which requires the consent of the owner of the easement.³

² R.C. 759.09-.14 set forth the powers and duties of the director of public service with respect to cemeteries for municipal corporations.

³ An easement may be terminated by the express written release of the owner of the easement to the owner of the servient estate. *Junction Railroad Co. v. Ruggles*, 7 Ohio St. 1 (1857). Other methods by which an easement may be terminated but which are clearly inapplicable to the question at hand are: extinguishment on the happening of a stated event (where the easement was granted subject to such condition), see, e.g., *Gustafson v. Urasales*, 3 Ohio App. 136, 20 Ohio C.C. (n.s.) 275 (Butler

Abandonment of an easement may cause its termination. An abandonment must be proved by evidence of an intention to abandon as well as evidence of acts by which the intention is put into effect; possession must be relinquished with an intention to terminate the easement. *West Park Shopping Center v. Masheter*, 6 Ohio St. 2d 142, 216 N.E.2d 761 (1966). However, in Op. No. 72-031 it was determined that the theory of abandonment could not be applied to an easement in a cemetery lot because the elements could not be proved.

Its elements are nonuser plus clear evidence of intention to abandon. Nonuser could not be established, because a lot may not be needed for a great many years, and of course it is not used until needed. Intention to abandon could not be clearly inferred, since there is always the possibility that someone in a family which has moved away may wish his body returned for burial.

Id. at 2-121 and 2-122. Since the theory of abandonment is virtually impossible to apply to an easement in a cemetery lot, it follows that a rule pursuant to R.C. 759.35 could not effectively employ the theory of abandonment to extinguish such an easement.

An easement also may be extinguished by adverse possession. *Szaraz v. Consolidated R.R. Corp.*, 10 Ohio App. 3d 89, 460 N.E.2d 1133 (Summit County 1983). Adverse possession is, generally, the acquisition of real property by possession which is open, notorious, adverse, continuous, and hostile for a period of twenty-one years or more. *Board of Education v. Nichol*, 70 Ohio App. 467, 46 N.E.2d 872 (Belmont County 1942). In order to extinguish an easement, the possession must be adverse to the enjoyment of the easement by the owner thereof. *Szaraz v. Consolidated R.R. Corp.* Clearly, possession cannot be accomplished by rule. Thus, the theory of adverse possession cannot be implemented by rule to extinguish an easement.

Finally, I consider the possibility of appropriation as a means of extinguishing the owner's right to use the cemetery lot for burial. Without offering an opinion as to authority of the boards of township trustees and the legislative authorities of municipal corporations to appropriate individual cemetery lots which have been sold and remain unused, I find that such appropriation may not be accomplished by rule pursuant to R.C. 759.35. The legislature has provided in R.C. Chapter 163 a comprehensive and mandatory scheme for the appropriation of real property. R.C. 163.02(A) holds that "[e]xcept as provided in divisions (B), (C), and (D) of this section,⁴ all appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code." (Footnote added.)

I conclude, therefore, that the board of township trustees and the legislative authorities of municipal corporations that have established a cemetery under authority of R.C. 759.27 may not promulgate rules pursuant to R.C. 759.35 whereby the property interest of the unknown owner of an unused cemetery lot is terminated.

Your second question asks whether the cemetery board of a cemetery organized under the authority of R.C. 759.27 may establish the same requirements regarding notification of ownership and usage of cemetery lots that the board of township trustees are permitted to include in the terms of sale and the deed for a cemetery lot pursuant to R.C. 517.07.

County 1914); completion of the purpose for which the easement was granted, *McCombs v. Stewart*, 40 Ohio St. 647 (1884); merger of the right to the easement and the servient tenement, *see, e.g., Rex v. Hartman*, 16 Ohio L. Abs. 573 (App. Medina County 1934); and, in some circumstances, by foreclosure of mortgage or trust deed on the servient estate, *see, e.g. Christ Protestant Episcopal Church v. Mack*, 93 N.Y. 488 (1883).

⁴ Divisions (B), (C) and (D) of R.C. 163.02 concern appropriations by the director of transportation, a conservancy district, and a sanitary district, respectively.

R.C. Chapter 517 governs cemeteries established by boards of township trustees. R.C. 517.07, which sets forth the procedures for the sale of cemetery lots, permits the board of township trustees to require the grantee (purchaser) of a cemetery lot to provide a list of names and addresses of persons to whom the grantee's property would pass by intestate succession and to notify the board of changes in the names or addresses of such persons. The board is also permitted to require any person who receives a lot by some means other than the original conveyance to give written notice of his name and address within one year of receiving such interest and to give notice of subsequent changes in his name or address. The statute provides that the terms of sale and any deed for lots executed in compliance with these requirements

shall state that the board of township trustees shall have right of reentry to the cemetery lot if the notification requirements are not met. At least ninety days before establishing reentry, the board shall send a notice by certified mail to the last known owner at his last known address to inform him that his interest in the lot will cease unless the notification requirements are met. If the owner's address is unknown and cannot reasonably be obtained, it is sufficient to publish the notice once in a newspaper of general circulation in the county. In order to establish reentry, the board shall pass a resolution stating that the conditions of the sale or of the deed have not been fulfilled, and that the board reclaims its interest in the lot.

R.C. 517.07 further provides that the board "may limit the terms of sale or the deed for a cemetery lot by specifying that the owner, a member of the owner's family, or an owner's decedent must use the lot, or at least one burial place within the lot, within a specified time period." Such terms of sale or deed must state that the board shall have right of reentry to the lot at the end of the specified period if the lot is not used or renewed for an extended period. *Id.* The provisions of R.C. 517.07 have two apparent purposes: to provide information regarding the ownership of the cemetery lot if ownership passes from the original grantee and to provide for possible termination of the owner's interest in the lot if the lot is not used in the manner and time specified in the statute.

The provisions of R.C. 517.07 which require the original grantee and subsequent grantees to provide information concerning ownership or the possibility of ownership through intestate succession do not affect the property interest of the owner of a cemetery lot. As discussed above, the purchase of a cemetery lot conveys an easement for purposes of burial. Such an easement is generally understood to be of a permanent or perpetual nature. *See, e.g., Persinger v. Persinger*, 54 Ohio L. Abs. 295, 298, 86 N.E.2d 335, 337 (C.P. Fayette County 1949) ("[a] burial lot is generally regarded as property in which title may descend to heirs"). The provisions of R.C. 517.07 which provide for termination of the owner's interest, however, change the nature of the property interest. The nature and extent of an easement is determined by the words used in the deed. *Lowe v. Redgate*, 42 Ohio St. 329 (1884). R.C. 517.07 permits the board of township trustees, by inserting particular requirements into the deed, to create an easement on condition. Such an easement is subject to extinguishment if the conditions stated in the deed are not met, and the board of township trustees may thus reclaim its interest in a cemetery lot which is not used in accordance with the stated conditions.

Against this background, I note that the cemetery board is a creature of statute, and therefore its authority is limited to the powers and duties expressly granted by statute and those powers and duties necessarily implied by such express grant. *Yorkavitz v. Board of Township Trustees; Verberg v. Board of Education*. R.C. 759.11 gives the cemetery board, through R.C. 759.36, the authority to "make bylaws and regulations, not inconsistent with the ordinances of the city and the constitution and laws of this state, for the management and protection of the burial grounds and cemeteries under [its] control...." Because knowledge of the names and addresses of the lot owners assists the cemetery board in the management and protection of the cemetery, a regulation requiring a person who acquires ownership of a cemetery lot by some method other than the original grant to notify the cemetery board of his name and address is within the implied authority of the cemetery board to manage and protect the cemetery. Thus, I find that such a

regulation, not inconsistent with the ordinances of the city and the constitution and laws of the state, may be established by the cemetery board. Failure to comply with such regulations, however, does not result in extinguishment of an easement.

Pursuant to R.C. 759.36 and R.C. 759.14, the cemetery board "shall sell lots, receive payment therefor, direct the improvements, and make the expenditures under such rules and orders as [it] prescribes...." R.C. 759.14. Thus, the cemetery board may prescribe rules and regulations for the sale of lots. I find that requirements regarding notification by the original grantee of the possible successors to ownership of the lot fall within the ambit of the cemetery board's authority to prescribe rules for the sale of lots.⁵ The authority to make a rule regarding the sale of a cemetery lot, however, does not necessarily imply the authority to make substantive changes in the deed of sale that effectively create an easement on condition. Since neither the express nor implied authority of the cemetery board pursuant to R.C. 759.36 and R.C. 759.09-.14 includes the power to create an easement on condition, I conclude that the cemetery board may not establish regulations which place conditions on the continued ownership of a cemetery lot and provide the cemetery board a right of reentry upon the lot in the event that the conditions do not occur.

Moreover, if authority exists to place conditions on an easement in a municipal and township cemetery lot, such authority lies with the boards of township trustees and the legislative authorities of the municipal corporations pursuant to R.C. 759.31 and R.C. 759.03. R.C. 759.31 provides that the authority of the boards of township trustees and the legislative authorities of the municipal corporations is "the same as where the cemetery is the exclusive property of a single municipal corporation." The legislative authority of a single municipal corporation owning a cemetery includes the power to "define the *tenure and conditions* on which lots therein shall be held...." (Emphasis added.) R.C. 759.03. Thus, the authority to determine the tenure and conditions on which a lot in a municipal and township cemetery shall be held rests with the boards of township trustees and legislative authorities of the municipal corporations. Therefore, it is within the authority of the boards of trustees and the legislative authorities of municipal corporations to establish the nature of the easement which is conveyed in the sale of a lot in a municipal and township cemetery.⁶

In summary, I find that the cemetery board, in the exercise of its authority pursuant to R.C. 759.36 and R.C. 759.09-.14, may establish regulations requiring the original grantee of a cemetery lot to provide the names and addresses of persons to whom the grantee's property would pass by intestate succession. The cemetery board may also establish a regulation which requires any subsequent grantee to give written notice of his name and address to the board within one year of receiving a cemetery lot and to give notice of subsequent changes in his name or address. However, the cemetery board may not condition the ownership of a cemetery lot on compliance with these or any other requirements since the power to define the tenure and conditions on which a cemetery lot is held rests with the boards of township trustees and the legislative authorities of the municipal corporations that have united to establish such cemetery. The cemetery board may not, therefore, establish a regulation permitting it the right of reentry upon a cemetery lot in the event that certain conditions do not occur.

⁵ In 1931 Op. Att'y Gen. No. 3198, vol. I, p. 619, it was found that a statute which expressly granted to township trustees the authority to sell cemetery lots in the manner and on the terms which they determined advantageous also gave them the authority to place certain restrictions on the alienation of such lots and to place such restrictions in the deeds therefor. I note, however, that the nature of the easement was not changed thereby.

⁶ The authority to establish conditions on which a cemetery lot is held must be exercised prior to the sale of the lot since the nature and the extent of an easement is determined by the words used in the deed. *Lowe v. Redgate*, 42 Ohio St. 329 (1884).

It is, therefore, my opinion and you are hereby advised:

1. The boards of township trustees and the legislative authorities of municipal corporations that have established a cemetery under authority of R.C. 759.27 may not promulgate rules pursuant to R.C. 759.35 whereby the property interest of an unknown owner of an unused cemetery lot is terminated.
2. The board of trustees of a cemetery organized under the authority of R.C. 759.27 may establish requirements for notification by the original grantee of a cemetery lot of the names and addresses of persons to whom the grantee's property would pass by intestate succession and may establish a requirement that a person who acquires ownership by some method other than the original grant notify the board of trustees of such cemetery of his name and address. However, the board of trustees of such cemetery may not establish a regulation which conditions the ownership of a cemetery lot on compliance with these or any other requirements and may not insert into the deed a provision granting it the right of reentry upon a lot in the event that certain conditions do not occur.