

**OPINION NO. 90-046****Syllabus:**

A board of cemetery trustees of a municipal and township cemetery that is established pursuant to R.C. 759.27 is not authorized to enter into an agreement with a private business enterprise whereby such enterprise is permitted to display monuments and literature at the cemetery in consideration for which the enterprise agrees to pay the cemetery a commission on all completed monument sales.

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**To: Dean Holman, Medina County Prosecuting Attorney, Medina, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, July 13, 1990**

You have requested my opinion on a matter pertaining to the authority of a board of cemetery trustees of a municipal and township cemetery. Your letter reads as follows:

The City of Wadsworth and Wadsworth Township Trustees share the "Union Cemetery" in Medina County. The Board of Trustees for the cemetery is composed of at least a city official, a township trustee and private citizen. A private enterprise which sells cemetery monuments has approached the board regarding the display of their monuments and literature at the cemetery for the sale of monuments. Any sales would result in a sales commission to the cemetery.

With regard to the foregoing, you have asked whether the board of cemetery trustees may enter into an agreement with the private business enterprise whereby it will be permitted to display its monuments and literature at the cemetery, in consideration for which the enterprise will pay the cemetery a commission on all completed monument sales.

Provisions addressed to the establishment and management of a cemetery by a municipal corporation and a township appear in R.C. Chapter 759 (cemeteries) at R.C. 759.27-.44. R.C. 759.27 states, in pertinent part, that, "[t]he legislative authorities...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." The land therefor, not exceeding one hundred acres, is to be acquired by purchase or appropriation, and is to be paid for in the manner provided by R.C. 759.30. *Id.* See R.C. 759.28 (appropriation of land by municipal corporation for the cemetery purposes specified in R.C. 759.27); R.C. 759.29 (title to the cemetery grounds 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 township); R.C. 759.30 (the expense of the purchase, or of the proceedings in case of appropriation, or both, for land for cemetery purposes under R.C. 759.27 shall be borne by the municipal corporations and townships in proportion to the property of each on the tax duplicate). R.C. 759.31 further provides that a cemetery owned in common as provided in R.C. 759.27 "shall be under the control and management of the board of township trustees and the legislative authorities of the municipal corporations, and their authority over it and duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single municipal corporation." See R.C. 759.01-.07 (provisions applicable to municipal cemeteries generally); R.C. 759.08-.18 (city cemeteries); R.C. 759.19-.26 (village cemeteries).

As I noted recently in 1989 Op. Att'y Gen. No. 89-058, there are two methods set forth in R.C. Chapter 759 by which a municipal and township cemetery may be managed and operated. Pursuant to R.C. 759.35, the legislative authority of the municipal corporation and the board of township trustees may elect to control and manage such cemetery directly through joint meetings of those two bodies. Alternatively, they may delegate such responsibility to a separately-elected board of cemetery trustees pursuant to the terms of R.C. 759.36. R.C. 759.36 thus reads, in pertinent part, as follows:

At any joint meeting provided for by section 759.35 of the Revised Code, or at the joint meeting provided for by section 759.34 of the Revised Code,<sup>1</sup> by a majority vote of all present counting members of the legislative authorities of municipal corporations and of boards of township trustees, the meeting may elect a board of cemetery trustees consisting of three members, of which one or more must be a member of each of the separate boards of township trustees and legislative authorities which comprise the union cemetery association represented by the joint meeting. (Footnote added.)

Thus, as a creature of statute, a board of cemetery trustees of a municipal and township cemetery may exercise only those powers and responsibilities expressly conferred upon it by the General Assembly, or that are necessarily implied by those powers and responsibilities as are expressly granted it. See generally *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 142 N.E.2d 655 (1957); *Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875). Any authority on the part of a board of cemetery trustees to enter into an agreement such as that described in your letter, therefore, must be either expressly granted by one or more of the statutory provisions that comprise R.C. Chapter 759, or necessarily implied somewhere within those provisions.

The specific duties and powers of a board of cemetery trustees of a municipal and township cemetery are set forth in R.C. 759.36. R.C. 759.36 reads, in pertinent part, as follows:

The board of cemetery trustees so elected shall have the custody of the funds derived from the tax levy provided by section 759.34 of the Revised Code, and the political subdivision shall pay the funds to the board of cemetery trustees upon its application for them. The board of cemetery trustees also shall have the custody of the funds derived from any tax levied by the union cemetery district under Chapter 5705. of the Revised Code. The board of cemetery trustees 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. The board of cemetery trustees may create a permanent endowment fund for the express purpose of keeping the cemetery clean and in good order and may:

- (A) Add to the price regularly charged for lots a sum for that purpose;
- (B) Receive gifts for that purpose;
- (C) Enter into separate agreements with the purchasers of lots by which an agreed part of the purchase price shall constitute a permanent fund;
- (D) Receive individual gifts for the fund, the income thereof to be used for the upkeep and care of lots.

When any such funds are received or created, they shall be a permanent fund for such use and the income therefrom shall be used only for such purpose, and the principal sum shall be kept and invested

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<sup>1</sup> R.C. 759.34 requires the legislative authority of the municipal corporation and the board of township trustees to meet each May "for the purpose of determining the rate of tax to be levied upon the taxable property of the municipal corporation and the township for [cemetery] purposes."

under the same terms fixed by law for the investment of the funds of a minor by his guardian.

R.C. 759.36 also provides for the specific terms to be served by the individual members of a board of cemetery trustees; the filling of vacancies that occur on such board; the designation of one of the board members as the board's clerk-treasurer; and the removal of board members. Under R.C. 759.36, therefore, a board of cemetery trustees is directed to retain custody of the funds derived from the tax levied pursuant to R.C. 759.34, as well as the funds derived from any tax levied by a union cemetery district under R.C. Chapter 5705. *See* R.C. 759.341 (creation of a union cemetery district for the purpose of levying taxes within the territory of the district for the establishment, operation, and maintenance of the cemetery); Op. No. 89-058 at 2-245 n. 1. R.C. 759.36 also permits a board of cemetery trustees to create a permanent endowment fund for the purpose of keeping the municipal and township cemetery clean and in good order, which shall be comprised of moneys raised from the sources specified in R.C. 759.36(A)-(D).

In addition to the responsibility thereby conferred upon a board of cemetery trustees with respect to the custody of cemetery funds, R.C. 759.36 further provides that a board of cemetery trustees shall have all the powers and perform all the duties exercised and performed by the director of public service of a municipal corporation under R.C. 759.09-.14. R.C. 759.09-.14 address the particular powers and duties conferred upon a director of public service with respect to the control and management of cemeteries and burial grounds located in or belonging to a city. R.C. 759.09 thus states that the director of public service "shall take possession and charge, and have the entire management, control, and regulation of public burial grounds and cemeteries located in or belonging to the city, subject to its ordinances." R.C. 759.11 also grants the director of public service the authority to make bylaws and regulations for the management and protection of the burial grounds and cemeteries under his control, and for the burial of the dead therein. R.C. 759.12 states that in such bylaws and regulations the director of public service "shall declare the amount of money he will accept by agreement, gift, devise, bequest, or otherwise and hold as a permanent fund of the cemetery," to be used for the perpetual care of the cemetery lots designated. R.C. 759.14 further addresses the receipt and management of moneys by the director of public service in connection with the operation of the cemetery:

The director of public service shall have entire charge and control of receipts from the sale of cemetery lots, and of laying off and embellishing the grounds. He may receive donations by bequest, devise, deed of gift, or otherwise, or money or other property, the principal or interest of which is to be used for the enlargement, improvement, embellishment, or care of the cemetery grounds generally, or for any particular parts or lots therein, as the donor directs, or as the director determines if no such direction is given. The director shall sell lots, receive payment therefor, direct the improvements, and make the expenditures under such rules and orders as he prescribes, and shall invest, manage, and control property received by donations and surplus funds in his hands from any source.

*See also* R.C. 759.10 (whenever necessary the director of public service shall institute suits in the name of the city to recover damages for injuries to city cemetery property); R.C. 759.13 (the director of public service shall determine the size and price of cemetery lots, and the terms of payment therefor).

Having reviewed the foregoing provisions of R.C. Chapter 759, I conclude that a board of cemetery trustees of a municipal and township cemetery may not enter into an agreement with a private business enterprise whereby the private enterprise is permitted to display monuments and literature at the cemetery, in consideration for which the enterprise agrees to pay the cemetery a commission on all completed monument sales. First, it is evident that an express grant of such authority on the part of a board of cemetery trustees does not appear in either R.C. 759.36 or the provisions of R.C. 759.09-.14. I also discern nothing in any of those statutory provisions to indicate that such authority is granted by implication. In that regard I am of the opinion that the foregoing statutes, by their express terms,

confer upon a board of cemetery trustees very specific duties and powers that are limited in their character and scope to matters directly related to the operation, management, and maintenance of the cemetery. I perceive no necessary connection, however, between the transaction described in your letter and the board's exercise of the specific duties and responsibilities bestowed upon it by the provisions of R.C. Chapter 759 set forth above. *Cf., e.g., State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105, 113 (1981) (a particular power may be implied on the part of a public agency where such power reasonably relates to the proper exercise of an express power by such agency). Accordingly, I conclude that there is no basis for inferring from those provisions authority on the part of a board of cemetery trustees to enter into an agreement with a private business enterprise whereby such enterprise is permitted to display monuments and literature at the cemetery in consideration for which the enterprise agrees to pay the cemetery a commission on all completed monument sales.

It is, therefore, my opinion, and you are advised that a board of cemetery trustees of a municipal and township cemetery that is established pursuant to R.C. 759.27 is not authorized to enter into an agreement with a private business enterprise whereby such enterprise is permitted to display monuments and literature at the cemetery in consideration for which the enterprise agrees to pay the cemetery a commission on all completed monument sales.