

OPINION NO. 74-083

Syllabus:

A board of township trustees has implied power under R.C. 517.03 to construct a permanent building upon cemetery grounds when necessary for the care, supervision and improvement of the cemetery. Unencumbered general funds and federal revenue sharing funds may be used for the construction of such a building.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: William J. Brown, Attorney General, October 2, 1974

I have your request for my opinion which reads as follows:

"Recently, this office was requested to furnish an opinion as to whether the Township Trustees could construct a building to be located on the grounds of the Township Cemetery for the sum of \$16,000.00 utilizing part of unencumbered funds in the General Fund and in part General Revenue Sharing Funds. A review of Chapter 517 of the Ohio Revised Code does not provide for this authority but reviewing Section 517.19 of the Revised Code specifically provides that the Township Trustees may levy a tax not exceeding five mills for the purpose of erecting permanent buildings upon cemetery grounds. Therefore, the question is raised is this the only manner in which Township Trustees can secure necessary funds to construct permanent buildings for cemetery purposes."

Boards of township trustees are created by statute, and such a board may exercise only those powers which are specifically delegated to it by statute, or are necessarily implied from those expressly given. State, ex rel. Schramm v. Ayers, 158 Ohio St. 30 (1952), Opinion No. 74-053, Opinions of the Attorney General for 1974, Opinion No. 73-102, Opinions of the Attorney General for 1973, Opinion No. 232, Opinions of the Attorney General for 1959.

Under the Revised Code townships have specific authority to acquire lands for cemetery purposes, and to enclose, improve and protect such lands. R.C. 517.01. In pertinent part that Section provides:

"The board of township trustees may accept a conveyance of, or purchase, and enclose, improve, and protect lands in one or more places within the township as it deems necessary and proper for cemetery purposes. If suitable lands cannot be procured by contract on reasonable terms, such board may appropriate lands therefor, not to exceed ten acres, by proceedings in accordance with sections 719.01 to 719.21, inclusive, of the Revised Code." (Emphasis added.)

Specific authority is granted to levy a tax to pay for the supervision and improvement of a township cemetery under R.C. 517.03 which reads as follows:

"To defray the expenses of the purchase or appropriation, and the enclosing, care, supervision, repair, and improving of lands for cemetery purposes, the board of township trustees may levy a tax sufficient for that purpose." (Emphasis added.)

Until very recently the amount of this levy was limited to \$2000 a year; but that limit was removed by HB No. 204, effective, November 21, 1973.

Under R.C. 517.08 specific authority is granted to use the proceeds of sales of cemetery lots to improve and embellish the grounds. That Section reads as follows:

"The proceeds arising from the sale of cemetery lots under section 517.07 of the Revised Code shall be used in improving and embellishing such grounds, except that upon unanimous consent of the board of township trustees, such proceeds may be used in the purchase or appropriation of additional land for cemetery purposes in accordance with sections 517.01 and 517.13 of the Revised Code; and the board of township trustees shall build and maintain proper and secure fences around all such cemeteries, to be paid for from the township funds."

In the particular instance of a township having a burial place within the grounds of an incorporated non-profit cemetery association (R.C. 1721.01), the board of township trustees has specific authority to levy a tax in order to erect permanent buildings on the grounds. R.C. 517.19 provides in part as follows:

"Where the township owns a burial place within the grounds of a cemetery association, the board of township trustees may levy a tax, not exceeding five mills on the dollar of the tax duplicate of the township, for the purpose of erecting permanent buildings upon such cemetery grounds.

"Such tax, when it has been assessed and collected, shall be paid to the officers of such cemetery association, and shall be applied by them to the erection of such permanent buildings as in their judgment are requisite for the accommodation of the patrons of the cemetery.

* * * * *

In Opinion No. 3441, Opinions of the Attorney General for 1931, page 996, the then Attorney General relied upon Sections of the General Code, which have now become R.C. 517.03 and 517.19, when holding that a board of township trustees has authority to construct a building, within the grounds of a township cemetery, to be used as tool house, shelter house and offices. The Attorney General said, at p. 997:

"In view of the provisions of these sections, I have little difficulty in concluding that township trustees are authorized to acquire or construct a building such as you describe in your communication."

That Opinion dealt with a union cemetery, formed by a township and a municipal corporation. R.C. 759.27. I doubt, therefore, that my predecessor was justified in relying on G.C. 3461 (now R.C. 517.19), since, as we have just seen, that Section is made specifically applicable only where a township has a burial place within the grounds of an incorporated non-profit cemetery association. However, I do agree that, since R.C. 517.01, 517.03 and 517.08 specifically authorize a board of township trustees to supervise and improve cemetery grounds, we may properly imply the authority to construct such buildings as are necessary for those purposes. See Opinion No. 991, Opin-

ions of the Attorney General for 1964, and Opinion No. 791, Opinions of the Attorney General for 1929, in which my predecessors found an implied power to employ either a sexton or an independent contractor to care for a township cemetery.

You ask what funds can be used by the Board of Township Trustees to construct the building. For the reason already given I do not think the Trustees may, as your letter suggests, resort to a five mill levy under R.C. 517.19. The specific situation covered by that Section is not present in your case.

The Trustees could, of course, use the proceeds of sales of cemetery lots, since R.C. 517.08 specifically provides that such proceeds shall be used to improve and embellish the cemetery grounds. See Opinion No. 949, Opinions of the Attorney General for 1920; Opinion No. 3694, Opinions of the Attorney General for 1934; Opinion No. 802, Opinions of the Attorney General for 1951; Opinion Nos. 71-038 and 71-062, Opinions of the Attorney General for 1971. I assume, however, that there is not enough in that special fund to cover the cost of the building.

I turn then to your question as to use of unencumbered monies in the township's general fund. A board of township trustees is, like any other taxing unit, restricted by the "ten-mill limitation" in the aggregate annual amount of taxes which it may levy upon taxable property without submitting the question to the electorate. R.C. 5705.02. Within that limitation, the board is authorized to make a general levy for current expenses of the township. R.C. 5705.03 and 5705.04(B). All revenue from that general levy is paid into the township's general fund under R.C. 5705.10 which provides in part:

"All revenue derived from the general levy for current expense within the ten-mill limitation, * * * shall be paid into the general fund.

* * * * *

The purpose for the general levy for current expenses is spelled out in R.C. 5705.05 which provides in part:

"The purpose and intent of the general levy for current expenses is to provide one general operating fund derived from taxation from which any expenditures for current expenses of any kind may be made, and the taxing authority of a subdivision may include in such levy the amounts required for carrying into effect any of the general or special powers granted by law to such subdivision, including the acquisition or construction of permanent improvements and the payment of judgments, but excluding the construction * * * of roads and bridges * * * and the payment of debt charges. The power to include in the general levy for current expenses additional amounts for purposes for which a special tax is authorized shall not affect the right or obligation to levy such special tax. * * *

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"(G) * * * This section does not require the inclusion within the general levy of amounts for

any purpose for which a special levy is authorized by section 5705.06 of the Revised Code."
(Emphasis added.)

The Section referred to in the last sentence of the above quotation, R.C. 5705.06, enumerates a number of special levies which are authorized to be made within the ten-mill limitation, but it ends with the following paragraph:

"Except for the special levies authorized in this section any authority granted by the Revised Code to levy a special tax within the ten-mill limitation for a current expense shall be construed as authority to provide for such expense by the general levy for current expenses."

I conclude from the foregoing that the object of the general levy for current expenses is to provide one general operating fund which the township may use for any current expenses, including the construction of permanent improvements, even though the board of township trustees could, if they so desired, have levied a special tax for that purpose. One of my predecessors has said that the purposes of the general fund are at least as broad as those of the general levy. Opinion No. 6183, Opinions of the Attorney General for 1956, at p. 21.

Under R.C. 517.03 a township is authorized to levy a tax sufficient to defray the expense of caring for, supervising and improving the township cemetery. It will be recalled that the amount of such levy was formerly \$2000 a year, but that this limit has recently been removed. The levy must, of course, be within the ten-mill limitation. Opinion No. 69-101, Opinions of the Attorney General for 1969. While this tax might be raised by a special levy, I find nothing in the pertinent Sections of the Revised Code to require that that be done. It can, therefore, be included in the general levy for current expenses, and I assume that this is what the Board of Township Trustees has done in your case since you make no reference to a special levy or a special fund. Under these circumstances my conclusion is that unencumbered monies in the Township's general fund can be used to construct the proposed building in the cemetery grounds.

Your request letter states that you wish to use General Revenue Sharing funds as well as unencumbered general fund monies to construct the permanent building. The State and Local Fiscal Assistance Act of 1972 requires that local governments spend revenue sharing funds "only in accordance with the laws and procedures applicable to the expenditure of its own revenues." 31 U.S.C. 1243a(4), (Supp. II 1972), Opinion No. 73-058, Opinions of the Attorney General for 1973, Opinion No. 73-102, Opinions of the Attorney General for 1973. Since the township trustees have implied power under R.C. 517.03 to construct a building needed to carry out their duties under that section, this requirement is satisfied.

However, the Act also requires that the funds be used only for priority expenditures. 31 U.S.C. 1222(a) (Supp. II 1972). That provision reads as follows:

"(a) In general--Funds received by units of local government under this subchapter may be used only for priority expenditures. For purposes of

this chapter, the term 'priority expenditures' means only--

(1) Ordinary and necessary maintenance and operating expenses for--

(A) public safety (including law enforcement, fire protection, and building code enforcement),

(B) environmental protection (including sewage disposal, sanitation, and pollution abatement),

(C) public transportation (including transit systems and streets and roads),

(D) health,

(E) recreation,

(F) libraries,

(G) social services for the poor or aged, and

(H) financial administration; and

(2) ordinary and necessary capital expenditures authorized by law."

I conclude that this requirement has also been satisfied since the erection of a necessary building on the cemetery grounds is an "ordinary and necessary capital expenditure authorized by law."

In specific answer to your question, it is my opinion and you are so advised that a board of township trustees has implied power under R.C. 517.03 to construct a permanent building upon cemetery grounds when necessary for the care, supervision and improvement of the cemetery. Unencumbered general funds and federal revenue sharing funds may be used for the construction of such a building.