

OPINION NO. 71-038**Syllabus:**

1. In establishing a township cemetery, a board of township trustees is not required to comply with a provision of the township zoning resolution that limits new cemeteries to a minimum of twenty acres.

2. In acquiring a parcel of land for the establishment of a new township cemetery to relocate one that must be vacated, the township trustees may act (a) under Sections 517.04 and 517.08, Revised Code, without submission of the question of establishment to the voters, if otherwise unobligated funds are available from the sale of cemetery lots or from the sale of the vacated cemetery or from both sources together, or (b) under Sections 517.01 and 517.04, Revised Code, by submission of the question of the establishment to the voters if tax monies are required to effect the acquisition.

To: Henry E. Shaw, Jr., Delaware County Pros. Atty., Delaware, Ohio
By: William J. Brown, Attorney General, July 26, 1971

I am in receipt of your request for my opinion which is as follows:

"Pursuant to proceedings by the United States Army Corps of Engineers, presently engaged in the construction of the Alum Creek Dam in Delaware County, the existing Berlin Township Cemetery has been appropriated for use by the Corps of Engineers. The Berlin Township Cemetery is presently in use and is appropriately maintained by the Board of Township Trustees of Berlin Township. Berlin Township, some years ago, enacted a Zoning Ordinance which, among other provisions relating to cemeteries, provides that newly created cemeteries shall be established on lands containing not less than twenty (20) acres. Land for relocation of the cemetery is available in Berlin Township and my questions therefore are as follows:

(1) Must the Berlin Township Trustees follow the provisions of their Zoning Code and treat this re-location of the existing cemetery as a creation of a new cemetery and therefore acquire not less than twenty (20) acres?

"(2) In any event, is the Board of Township Trustees in their acquisition of other lands for re-location of the cemetery, governed by Section 517.04 of the Ohio Revised Code requiring the question of establishment of the cemetery to be submitted to the electorate of the Township?"

Although the two questions you pose arise from the same facts, they must be dealt with separately.

The first question involves the relationship of township zoning, pursuant to Chapter 519, Revised Code, and township cemeteries, as regulated by Chapter 517, Revised Code.

It appears from your statement that the zoning plan adopted in the township requires new cemeteries to be established on a parcel of not less than twenty acres. Such zoning plan may be adopted or amended only after completion of many procedures designed to prevent imprudent or unpopular rules for uses of land in the township. Adoption must be preceded by approval of a county or regional planning commission (Section 519.07, Revised Code); public hearings (Sections 519.06 and 519.08, Revised Code); and approval of the electors (Section 519.11, Revised Code). Amendments or supplements may be adopted only after notice to those affected, public hearings, approval by the county or regional planning commission and opportunity for referendum (Section 519.12, Revised Code). Such elaborate safeguards must be accorded the greatest possible weight and zoning plan growing from the statutory procedures, accordingly, can be overridden by a board of township trustees only in situations where other statutory mandates may require it.

The provisions of the statutes respecting township cemeteries, therefore, must be considered in some detail. Chapter 517, *supra*, provides for and regulates such cemeteries with substantial care. Section 517.01, Revised Code, authorizes the board of township trustees to acquire lands "as it deems necessary and proper for cemetery purposes" and, if not otherwise obtainable, the land for such purpose may be appropriated, so long as no more than ten acres are so appropriated. This is as follows:

"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 163.01 to 163.22, inclusive, of the Revised Code.

"No lands shall be so appropriated within one hundred yards of a dwelling house, or other building."

An original acquisition for cemetery purposes must be approved by

the electorate, pursuant to Section 517.04, Revised Code, as follows:

"Before a purchase or appropriation of land for cemetery purposes is made or a conveyance is accepted, except where funds may be available for such purchase or appropriation of land for cemetery purposes under section 517.08 of the Revised Code, the question of the establishment of such cemetery, on the order of the board of township trustees or the written application of any six electors of the township, shall be submitted to a vote of the electors of such township at a regular annual election. Such order or application shall specify as nearly as possible the proposed location of the cemetery, and the estimated cost thereof, including enclosing and improving it."

Additional cemetery land, however, may be obtained by use of funds derived from the sale of cemetery lots, as provided in Section 517.08, Revised Code (referred to in Section 517.04, supra), 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."

Land for expansion of an existing cemetery may be acquired pursuant to Section 517.13, Revised Code, as follows:

"In any township in which there is a cemetery owned or partly owned by such township, if in the opinion of the board of township trustees, it is desirable to add to the area of such cemetery by the purchase of additional grounds, and if suitable lands cannot be procured by contract on reasonable terms, the board may appropriate lands therefor, not exceeding five acres, as provided by section 517.01 of the Revised Code. The restrictions of the second paragraph of such section do not apply if any person erects a dwelling house or other building within one hundred yards of an established cemetery, and such additional lands shall be considered a part of the original cemetery even though separated therefrom by a road or highway.

"For such purpose the board may expend funds as provided in section 517.08 of the Revised Code, or the board may levy a tax, not to exceed one half of one mill, on the taxable property of the township,

for a period not to exceed five years, which tax shall be collected as other taxes, and appropriated for the purchase or appropriation of such additional cemetery grounds which shall become part of the township cemetery."

It is apparent from the foregoing that the provision of cemetery space for public use is deemed to be a necessary and important duty of township trustees, a duty ostensibly equal to their duties respecting township zoning. Where zoning provisions and other statutory purposes can be read together, without necessary inconsistency, both must be given effect. Stary v. Brooklyn, 162 Ohio St. 120 (1954) (upholding an ordinance limiting the period of individual occupancy in a trailer court licensed under state statute); Billman v. McPherson, 72 Ohio L. Abs. 232 (1955) (appeal dismissed 164 Ohio St. 296 (1955)) (upholding a zoning resolution barring trailer parks licensed under state statute). Where the two are unavoidably inconsistent, however, the statutory direction must prevail. Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349 (1957) (upholding a state policy to encourage aviation as against a zoning resolution barring airports from the township; see, also, Lyndhurst v. Compota, 112 Ohio App. 483 (1960)).

In the matter presented to me there appears to be no way to reconcile the township zoning resolution and the provisions respecting cemeteries. The former attempts to forbid a cemetery of less than twenty acres and the latter limits appropriation of land for township cemetery purposes to a maximum of ten acres (Section 517.01, supra). In short, the zoning resolution could prevent the establishment of a new township cemetery where appropriation of land therefor may be required, in spite even of a favorable vote thereon by the township electorate, a result that would border on the ridiculous.

I must therefore conclude that township trustees, in establishing a township cemetery, are not bound by a township zoning resolution limiting cemeteries in the township to a minimum of twenty acres. In so concluding, however, I venture no opinion on other provisions of a zoning resolution that might have some effect on township cemeteries.

Your second question deals with problems connected with the development of a new cemetery to replace the one being taken by the Corps of Engineers, as to whether or not such development is the establishment of a cemetery and, if so, whether or not the electorate of the township must give prior approval.

In a practical sense a new cemetery in this situation would be a relocation of the old one. Statutory provision has been made for cemetery abandonment and removal of bodies (Section 517.21, Revised Code); for the expansion of an existing cemetery into adjoining land (Section 517.13, supra); and for the acquisition of additional land for cemetery purposes (Section 517.08, supra), but express provision appears to be lacking to cover relocation of an

existing and operative cemetery. Any action therefore must proceed under the applicable statutory provisions cited above, in effect, under Section 517.01, supra, as an establishment of a cemetery or under Section 517.08, supra, as additional land, not constituting an expansion.

Section 517.08, supra, authorizes the establishment of a new cemetery with the funds derived from sales of cemetery lots in an existing cemetery. This is made clear in Section 517.04, supra, which exempts cemetery establishment from the prerequisite voter approval where money therefor is available from the sale of lots. (Acquisition of "additional land" under Section 517.08, supra, must be differentiated from acquisition of land for expansion under Section 517.13, supra, because it is clear from the language of the latter that the expansion must be on adjoining land.)

It appears, thus, that voter approval must be obtained for establishment of a cemetery if tax monies are required for the land acquisition (see Section 517.05, Revised Code, directing the levy of taxes for acquisition where the voters approve establishment), but voter approval is not required when sale of cemetery lots yields funds adequate for the purchase.

You have not informed me of the financial resources of the township trustees for the acquisition of the needed cemetery land nor of the origin of such funds as might be available. Accordingly, I cannot advise you further respecting the prerequisites of establishing a relocated cemetery. Within the general context of the statutes, however, I would see no objection to use of the funds realized from the appropriation proceedings, as though such funds emanated from the sale of lots, subject, of course, to other obligations that may be required to be paid from such proceeds.

In specific answer to your questions, it is my opinion and you are so advised that:

1. In establishing a township cemetery, a board of township trustees is not required to comply with a provision of the township zoning resolution that limits new cemeteries to a minimum of twenty acres.

2. In acquiring a parcel of land for the establishment of a new township cemetery to relocate one that must be vacated, the township trustees must act (a) under Sections 517.04 and 517.08, Revised Code, without submission of the question of establishment to the voters, if otherwise unobligated funds are available from the sale of cemetery lots or from the sale of the vacated cemetery or from both sources together, or (b) under Sections 517.01 and 517.04, Revised Code, by submission of the question of the establishment to the voters if tax monies are required to effect the acquisition.