

OPINION NO. 2009-006**Syllabus:**

2009-006

1. A board of township trustees may not reclaim its interest in sold but unused cemetery lots under a theory that the burial easement has been extinguished by abandonment on the basis of nonuse alone, and it is highly unlikely that the board will be able to establish intent to abandon a sold but unused cemetery lot. (1972 Op. Att’y Gen. No. 72-031, modified.)
2. R.C. 517.07 does not allow any retroactive application to deeds executed on or before July 24, 1986.
3. Existing Ohio law provides no clear and direct legal means by which a township may reclaim and resell cemetery lots that were sold on or before July 24, 1986, and remain unused.

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Richard Cordray, Ohio Attorney General, February 2, 2009

We have received your request for an opinion concerning the ability of a board of township trustees to reacquire and resell gravesites that were sold many years ago, that have not been used, and whose owners cannot be located. Your request refers to 1972 Op. Att’y Gen. No. 72-031, which addressed this question, and to subsequent amendments to R.C. 517.07. You have asked the following questions:

1. Has Opinion No. 72-031 been supplanted or does it remain a valid interpretation, especially regarding the theory of abandonment?
2. Does the current version of R.C. 517.07 allow for any retroactive application to deeds executed several decades ago, such as the one provided by way of example [dated March 10, 1923]?
3. What legal recourse exists for township trustees under the circumstances outlined [in your request letter]?

For the reasons set forth in this opinion, we conclude:

1. A board of township trustees may not reclaim its interest in sold but unused cemetery lots under a theory that the burial easement has

been extinguished by abandonment on the basis of nonuse alone, and it is highly unlikely that the board will be able to establish intent to abandon a sold but unused cemetery lot. (1972 Op. Att’y Gen. No. 72-031, modified.)

2. R.C. 517.07 does not allow any retroactive application to deeds executed on or before July 24, 1986.
3. Existing Ohio law provides no clear and direct legal means by which a township may reclaim and resell cemetery lots that were sold on or before July 24, 1986, and remain unused.

Background Information

R.C. 517.07 authorizes a board of township trustees to sell lots in township cemeteries.¹ As explained in your request letter, that provision was amended in 1986 to permit the “terms of sale” and “any deed for lots” executed after July 24, 1986, to include various provisions that enable the township to stay in contact with persons who may acquire an interest in a cemetery lot, and to reenter and resell the lot in certain circumstances. See 1985-1986 Ohio Laws, Part I, 370 (Am. Sub. S.B. 139, eff. July 24, 1986).

As amended in 1986 and modified slightly in subsequent legislation, R.C.

¹ It is clear under R.C. 517.07 that a cemetery lot may include more than one burial place. The statute authorizes the delivery, without charge, of a deed “for a suitable lot for the burial of the applicant’s family,” if payment would be oppressive. R.C. 517.07. It also permits the terms of sale or deed to specify that “the owner, a member of the owner’s family, or an owner’s descendant must use the lot, or at least one burial place within the lot, within a specified time period.” R.C. 517.07; see also, e.g., *Lanham v. Franklin Township*, Clermont App. Nos. CA2002-07-052, CA2002-08-068, 2003-Ohio-2222, 2003 Ohio App. LEXIS 2080, at ¶3 (a “full lot” was capable of holding eight graves); *Metzger v. Dayton Mem’l Park & Cemetery*, No. CA 9882, 1987 Ohio App. LEXIS 5689 (Montgomery County Jan. 29, 1987).

Your questions ask about a situation in which a cemetery lot contains several gravesites and all the gravesites remain unused. 1972 Op. Att’y Gen. No. 72-031 was based upon a situation in which one or two bodies were buried in a lot that contained several gravesites. In neither instance is it suggested that the burial easement be extinguished in a burial site in which a body has been buried. With respect to gravesites in which no bodies have been buried, essentially the same analysis regarding extinguishment of the burial easement applies whether an entire cemetery lot or only part of a cemetery lot remains unused. Cf. note 7, *infra* (certain issues may be raised by an attempt to resell part of a family plot). For purposes of this opinion, we use the term “gravesite” to refer to a “burial place” as that term is used in R.C. 517.07—that is, a portion of a cemetery that holds or is designed to hold a single grave. We use the term “unused” in connection with a cemetery lot to refer to whichever gravesites within a cemetery lot have not been used for burial purposes.

517.07 now provides that the terms of sale and deeds for township cemetery lots may require the grantee to provide notification of the names and addresses of persons to whom the grantee's property would pass by intestate succession, may require those who acquire an interest in a cemetery lot to keep the township informed of their names and addresses, and may grant the board of township trustees the right of reentry to the cemetery lot if the notification requirements are not met. The board may limit the terms of sale or deed by specifying that at least one burial place in the cemetery lot must be used within a specified time period (at least twenty and no more than fifty years), with a right of renewal provided at no cost, and that the board has a right of reentry if the lot is not used within the time period or renewed for an extended period. To establish reentry, the board must pass a resolution stating that the conditions of the sale or deed have not been fulfilled and that the board reclaims its interest in the cemetery lot. The board must compensate owners of unused lots who do not renew by paying eighty percent of the purchase price, and may repurchase any cemetery lot from its owner at any time at a price agreed upon by the board and the owner. R.C. 517.07. The 1986 amendments to R.C. 517.07 thus authorize the board of township trustees to create an easement that is subject to extinguishment if the conditions stated in the deed are not met, and in this way to reclaim its interest in a cemetery lot that is not used in accordance with the stated conditions. *See* 1990 Op. Att'y Gen. No. 90-066, at 2-279.²

Prior to the 1986 amendments to R.C. 517.07, the Attorney General was asked whether a township could take legal action to reacquire and resell cemetery lots that had been sold but had not been used and whose owners were not known or could not be contacted. The Attorney General concluded, in 1972 Op. Att'y Gen. No. 72-031, that a board of township trustees could not appropriate, or otherwise regain title to, unused cemetery lots sold under R.C. 517.07.

You have described the situation at issue in your county as follows:

The problem that exists with one of the township cemeteries in Erie County, and we suspect this may be a statewide problem, is that in years past, and prior to 1986, cemetery lots with multiple gravesites (family plots), were sold under deeds that would not have had the language permitting re-entry under the most recent version(s) of R.C. 517.07. In Opinion No. 72-031, then Attorney General Brown opined that: "A board

² As discussed more fully later in this opinion, an interest in a cemetery lot is considered an easement under Ohio law, rather than a fee simple ownership. Thus, a township that grants a burial interest in a cemetery lot is granting an easement for burial purposes and is not forfeiting its title to the lot. Therefore, to regain a grantee's interest in a cemetery lot, a board of township trustees must extinguish the easement. *See* 1990 Op. Att'y Gen. No. 90-066, at 2-277; 1959 Op. Att'y Gen. No. 643, p. 335, at 336 (in speaking of a sale and deed, R.C. 517.07 does not authorize an outright deed of conveyance in fee simple, but only an instrument that will evidence the right to use the lot for burial purposes). For purposes of this opinion, we refer to the process of extinguishing an easement for burial purposes as reclaiming the cemetery lot.

of trustees may not appropriate, or otherwise regain title to, unused cemetery lots sold under authority of Section 517.07.” In that Opinion, the Attorney General would not recognize the theory of abandonment as it pertains to gravesites. Thus, it appears for deeds executed before 1986, especially ones executed 50-100 years ago, township trustees are without any means of re-entry where no action is taken with respect to those gravesites for decades and families do not interact with Cemetery Boards. It may be after decades family members forget that such sites exist or have no interest in using them.

We are enclosing a deed to a family lot dated March 10, 1923. No one has ever used these gravesites and the trustees would like to re-sell the sites if no one is going to use them. The trustees do not know who or where the lineal descendants of the initial grantee reside. The deed does state that the conveyance is “subject to the Cemetery Laws of the State”

We understand your practical concerns and regret that Ohio law does not currently provide a clear and direct remedy for the problem you have described.

Township Trustees’ Authority over Cemeteries

It is firmly established under Ohio law that boards of township trustees have only the powers and privileges granted by the General Assembly and those that exist by necessary implication. *In re Petition for Incorporation of the Village of Holiday City*, 70 Ohio St. 3d 365, 369, 639 N.E.2d 42 (1994); *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875); 2003 Op. Att’y Gen. No. 2003-034, at 2-283; 1951 Op. Att’y Gen. No. 802, p. 558 (syllabus, paragraph 2).³ As described in 1972 Op. Att’y Gen. No. 72-031, a board of township trustees is empowered by R.C. 517.07 to sell lots in township cemeteries to the public. *See also* 1999 Op. Att’y Gen. No. 99-047, at 2-296 to 2-297.

The owner of a cemetery lot possesses only an easement for burial purposes, rather than an absolute title to real property. *See In re Estate of Joiner*, No. 92-L-170, 1993 Ohio App. LEXIS 3344, at *8-9 (Lake County June 30, 1993) (“the grantee of a burial lot takes an easement; to wit, rights of burial, ornamentation, and erection of a monument, rather than an absolute title”); *Persinger v. Persinger*, 39 Ohio Op. 315, 316, 86 N.E.2d 335 (C.P. Fayette County 1949); 1990 Op. Att’y Gen. No. 90-066, at 2-277; 1972 Op. Att’y Gen. No. 72-031, at 2-120 (“[a] deed to a cemetery lot does not convey fee simple ownership, but only an easement for purposes of burial”); 1949 Op. Att’y Gen. No. 925, p. 559, at 560; note 2, *supra*.

³ *See also State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 33, 106 N.E.2d 630 (1952) (“the question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred on them by law”). You have not asked specifically about townships that have adopted a limited home rule government under R.C. Chapter 504 and this opinion does not address those townships. *See, e.g., R.C. 504.04*; 2007 Op. Att’y Gen. No. 2007-036, at 2-373 n.10; 2005 Op. Att’y Gen. No. 2005-042, at 2-436 n.1.

Under Ohio law, if a decedent's will does not specifically provide who is to receive the decedent's interest in a cemetery lot, that interest does not pass under the general residuary clause but, instead, descends to heirs through intestate succession. See *In re Estate of Joiner*, 1993 Ohio App. LEXIS 3344, at *11 (under Ohio common law, a cemetery lot does not pass under a general residuary clause in a will but descends to heirs as intestate property); *Persinger v. Persinger*, 39 Ohio Op. at 316; 1972 Op. Att'y Gen. No. 72-031, at 2-121 to 2-122. When the interest in a cemetery lot passes to heirs in this manner, it may be difficult to identify and locate the heirs.

Once a body is buried in a gravesite, the body is entitled to remain there unless the land ceases to be used as a cemetery or removal is authorized under R.C. 517.23-.24 by a court or by persons with authority over the cemetery. See 1972 Op. Att'y Gen. No. 72-013, at 2-120 to 2-121; see also *In re Disinterment of Frobose*, 163 Ohio App. 3d 739, 2005-Ohio-5025, 840 N.E.2d 249 (Wood County); *Fraser v. Lee*, 8 Ohio App. 235 (Cuyahoga County 1917); C. Allen Shaffer, Comment, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 Cap. U. L. Rev. 479, 486 (2003) (in discussion of the development of the American view of the permanence of a gravesite, quoting *King v. Frame*, 216 N.W. 630, 633 (Iowa 1927), as follows: "a due respect for the memory of the dead and for the feelings of the living friends and relatives requires that when a body is once interred it shall so remain unless extreme necessity demands its disinterment").

A board of township trustees may discontinue use of an abandoned cemetery or of a cemetery whose further use for burial purposes is believed to be detrimental to the public welfare or health, as provided in R.C. 517.21. See also 1999 Op. Att'y Gen. No. 99-047. After giving notice to family, friends, or next of kin, the board of township trustees may provide for the bodies to be removed and reinterred elsewhere and may then sell the property for other uses. R.C. 517.21-.22; see also R.C. 517.11; 1999 Op. Att'y Gen. No. 99-047. These provisions do not authorize the trustees to reclaim and resell unused cemetery lots in a cemetery that continues to be used as a cemetery.

Analysis Set Forth in 1972 Op. Att'y Gen. No. 72-031

In 1972 Op. Att'y Gen. No. 72-031, the Attorney General considered how a burial easement in a cemetery lot might be terminated. The opinion stated that "[a]n easement is 'property' within the meaning of the constitutional prohibition against the taking of property without just compensation, and any extinguishment of such property right must, of course, be strictly in accord with statutory requirements." 1972 Op. Att'y Gen. No. 72-013, at 2-121. We concur in this statement.

The opinion then considered whether a burial easement could be terminated by appropriation under the power of eminent domain and concluded that it could not, stating that an appropriation of property rights must be accomplished in accordance with R.C. Chapter 163 and finding that the board of township trustees "does not have the power to appropriate such individual grave sites." 1972 Op. Att'y Gen. No. 72-031, at 2-121. The opinion noted that, by statute, the board of township

trustees' appropriation authority with respect to cemeteries extends only to land for a new cemetery, *see* R.C. 517.01, or to land used to enlarge an existing cemetery, *see* R.C. 517.13. It noted the presumption against the delegation of the power of eminent domain and found no basis for an implication that the power of eminent domain could be used to acquire sold but unused gravesites. 1972 Op. Att'y Gen. No. 72-031, at 2-121; *see Pontiac Improvement Co. v. Bd. of Comm'rs*, 104 Ohio St. 447, 454-58, 135 N.E. 635 (1922); *Miami Coal Co. v. Wigton*, 19 Ohio St. 560 (1869); 1985 Op. Att'y Gen. No. 85-032.

We concur in the appropriation analysis set forth in the 1972 opinion and conclude that a board of township trustees has no authority under existing statutes to use the power of eminent domain to appropriate sold but unused cemetery lots. A township "has no powers to appropriate any property except as explicitly granted by the legislature." *Bd. of Township Trustees v. Lambrix*, 60 Ohio App. 2d 295, 298-99, 396 N.E.2d 1056 (Summit County 1978). With regard to cemeteries, the appropriation authority of a township extends to new land or land used to enlarge an existing cemetery, but does not encompass gravesites that have been sold and remain unused. *See* R.C. 517.01 (if suitable lands for a cemetery cannot be procured by contract on reasonable terms, the board of township trustees may appropriate not more than ten acres under R.C. 163.01-.22); R.C. 517.08 (proceeds from the sale of cemetery lots under R.C. 517.07 may, upon unanimous consent of the board of township trustees, "be used in the purchase or appropriation of additional land for cemetery purposes in accordance with [R.C. 517.01 and 517.13]"); R.C. 517.13 (the board of township trustees, acting under R.C. 163.01-.22, may appropriate lands "for the expansion of an existing cemetery" in certain circumstances).

The 1972 opinion next considered whether a burial easement, like other types of easements, could be extinguished by abandonment and concluded that it could not, stating:

I have . . . found no authority which applies such a rule to a cemetery lot easement. The elements of the theory are stated in West Park Shopping Center v. Masheter, 6 Ohio St. 2d 142, 144 (1966), as follows:

" 'An abandonment is proved by evidence of an intention to abandon as well as of acts by which the intention is put into effect; there must be a relinquishment of possession with an intent to terminate the easement.' "

See also Schenck v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 11 Ohio App. 164 (1911); Wheaton v. Fernenbaugh, 8 Ohio App. 182 (1917). While these Opinions recognize the theory of extinguishment of an easement by abandonment, they do so only in dictum. It has actually been applied in Ohio law rarely, if at all.

Because of the special characteristics of a cemetery lot easement, I am reluctant to analogize it to other types of easement. Hence, the mere

fact that a theory of extinguishment applies to, e.g., a footpath or railway easement, does not mean that it also applies to an easement for burial purposes. In addition, it is difficult to see how the theory could be applied. 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. It must also be remembered that title to the easement remains in the heirs. I conclude, therefore, that an easement for burial purposes cannot be extinguished by abandonment.

1972 Op. Att’y Gen. No. 72-031, at 2-121 to 2-122. The 1972 opinion thus concluded that a board of township trustees cannot use a claim of abandonment to regain its interest in cemetery lots that have been sold but remain unused.

Analysis Set Forth in 1990 Op. Att’y Gen. No. 90-066

Issues concerning the reclaiming and reselling of unused cemetery lots were subsequently addressed in 1990 Op. Att’y Gen. No. 90-066, which concerned a union cemetery created under R.C. 759.27 by a combination of municipal corporations and townships. That opinion considered, *inter alia*, whether the boards of township trustees and legislative authorities of municipal corporations, acting under R.C. 759.35, could promulgate rules under which they could regain their interests in unused cemetery lots and concluded that they could not. In reaching this conclusion, the 1990 opinion quoted from the discussion of abandonment set forth in 1972 Op. Att’y Gen. No. 72-31 and stated: “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.” 1990 Op. Att’y Gen. No. 90-066, at 2-278.

1990 Op. Att’y Gen. No. 90-066 thus modified the analysis of the 1972 opinion slightly. The 1990 opinion did not adopt the 1972 finding that an easement for burial purposes cannot be extinguished by abandonment, but concluded, instead, that it is “virtually impossible” to apply the theory of abandonment to a burial easement in a cemetery lot. *See Merriam-Webster’s Collegiate Dictionary* 1397 (2005) (“virtually” means “almost entirely” or “for all practical purposes”).

This minor change in wording reflects the practical difficulty of establishing the intent to abandon a burial easement in a cemetery lot, but recognizes the possibility that, because the determination as to whether an easement has been abandoned is a question of fact, there may be circumstances in which it is possible to establish the intent to abandon a burial easement.

Current Analysis of Abandonment

The elements of the theory of abandonment continue to be as they were described in the 1972 and 1990 opinions. For example, *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d 57, 72, 740 N.E.2d 328

(Hocking County 2000), states that, to demonstrate the abandonment of an easement, it is necessary to establish both nonuse of the easement and an intent to abandon the easement. Further, the intent to abandon an easement must be demonstrated by unequivocal and decisive acts that are inconsistent with the continued use and enjoyment of the easement. Thus, the determination of whether an easement has been abandoned is a question of fact. *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d at 72; *see also Bauerbach v. LWR Enterprises, Inc.*, 169 Ohio App. 3d 20, 2006-Ohio-4991, 861 N.E.2d 864, at ¶18-20 (Washington County 2006); *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, Lake App. No. 2003-L-192, 2005-Ohio-3398, 2005 Ohio App. LEXIS 3146, at ¶56; *Snyder v. Monroe Township Trustees*, 110 Ohio App. 3d 443, 457-58, 674 N.E.2d 741 (Miami County 1996).

Consistent with the findings in 1972 Op. Att’y Gen. No. 72-031 and 1990 Op. Att’y Gen. No. 90-066, our research has disclosed no Ohio authority establishing that an easement for burial purposes may be extinguished by abandonment. *See generally* 1999 Op. Att’y Gen. No. 99-047.

Certain authorities from other jurisdictions assert that the owner of a cemetery lot may forfeit the lot through abandonment; however, these assertions are generally supported by citations to statutes that expressly authorize the return of property rights to the public body in certain circumstances (as in the current version of R.C. 517.07) or to cases involving the abandonment of an entire cemetery, rather than the abandonment of particular gravesites within an existing cemetery. *See* 14 Am Jur. 2d *Cemeteries* § 31 (2000) (stating that purchase of a lot in a public cemetery grants the purchaser a right of burial, commonly designated an easement, which “can be extinguished only by abandonment,” and citing in support *Boyd v. Brabham*, 414 So. 2d 931 (Ala. 1982), *appeal after remand*, 442 So. 2d 86 (Ala. 1983), which considered whether a family cemetery had been abandoned so that the land could be used for a non-cemetery purpose); 2-18 *Powell on Real Property* § 18.02 (2008) n.66 (even as the interest of a cemetery lot owner in an unused lot is terminated when the cemetery is abandoned, “[a]n individual may also lose rights to the lots through abandonment of the lot,” citing statutes that set forth criteria for establishing abandonment); *see also* Jennifer L. Romeo, Annotation, *Loss of Private Easement by Nonuse*, 62 A.L.R. 5th 219, 227, 416-17, 473 (1998) (indexing only one cemetery case, *Walker v. Georgia Power Co.*, 339 S.E.2d 728 (Ga. App. 1986), which concerns a power company that condemned and relocated a family cemetery in accordance with state statutes and with the acquiescence of the appellant heir).

In 1987, the Arkansas Attorney General considered the issue of reclaiming cemetery lots on a theory of abandonment and suggested that a city seeking to reclaim unused cemetery lots might be able to pursue a theory of abandonment if, in a particular case, the facts were sufficient to establish intent to abandon. The Arkansas Attorney General’s opinion states, in part:

The above-cited authority [general statement of cemetery law] indicates that the interest in the lots is still vested in the original owner or, if he is dead, in his heirs or lineal descendants, unless he voluntarily

relinquished possession of the lots. It may be argued, however, that the owner did voluntarily relinquish his interest in the lots by abandonment. To show abandonment, it must be proven that the owner meant to relinquish all claim to the lots with the intention of never again asserting such a claim. See *Hyde v. Hyde*, 240 Ark. 463, 400 S.W.2d 288 (1966). Mere non-use, without more, does not constitute abandonment. The facts provided in the present situation are insufficient to form a conclusive opinion on the abandonment issue. If the facts taken as a whole do, however, sufficiently indicate voluntary relinquishment, the interest in the lots will revert to the city as the grantor for the lots. See 14 Am. Jur. 2d *Cemeteries* § 24. It should also be noted in this regard that the doctrine of abandonment allowing abandoned property to become appropriated by the first taker does not apply to cemeteries. *Phinney v. Gardner*, 121 Me. 44, 115 A. 523 (1921). The interest will therefore revert to the city upon a showing of abandonment, and the city may then resell the lots.

1987 Arkansas Op. Att’y Gen. No. 87-267, at 2-3. Like 1972 Op. Att’y Gen. No. 72-031 and 1990 Op. Att’y Gen. No. 90-066, this Arkansas opinion states that non-use in itself is not sufficient to establish abandonment. It also asserts, however, that a public body wishing to reclaim a cemetery lot in a particular instance may seek a determination as to whether the facts support a claim of abandonment and may reclaim the lot if a sufficient showing is made.

On the basis of the authorities discussed above, we conclude that nonuse of a cemetery lot is not sufficient to establish abandonment of the lot, and that it is highly unlikely that it will be possible to establish intent to abandon a cemetery lot. However, because the question whether an easement has been abandoned is one of fact, we cannot discount the possibility that, in particular circumstances, there may be facts sufficient to support a finding that a cemetery lot easement has been abandoned. If such facts can be established, it may be possible for a township to reclaim cemetery lots that have been sold and remain unused. See generally *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, 2005-Ohio-3398, at ¶56 (“[a]n intention to abandon is a material question, and it may be proved by an innumerable variety of acts. It is a question of fact to be ascertained from the circumstances of the case, and, in effect, no one case can be authority for another” (citations omitted)); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d at 72.

Therefore, we modify 1972 Op. Att’y Gen. No. 72-031 on the basis of 1990 Op. Att’y Gen. No. 90-066 and conclude that a board of township trustees may not reclaim its interest in sold but unused cemetery lots under a theory that the burial easement has been extinguished by abandonment on the basis of nonuse alone, and it is highly unlikely that the board will be able to establish intent to abandon a sold but unused cemetery lot.

The 1972 opinion found no other theory on which the interests in unused gravesites could be reacquired by the township and concluded that the reentry and

resale could not occur. Our research, similarly, has disclosed no theory of legal action directly authorizing a township to reclaim and resell cemetery lots in the circumstances you have described.⁴

Retroactive Application of R.C. 517.07

Your second question asks whether the current version of R.C. 517.07 allows for any retroactive application to deeds executed several decades ago, such as the one provided by way of example, which was executed in 1923. This question must be answered in the negative.

By its terms, R.C. 517.07 permits provisions governing the reentry and reselling of cemetery lots to be included in “[t]he terms of sale and any deed for lots executed after July 24, 1986.” This was the effective date of the legislation that enacted the reentry provisions. *See* 1985-1986 Ohio Laws, Part I, 370 (Am. Sub. S.B. 139, eff. July 24, 1986) (as initially enacted, the language authorizing a board of township trustees to place conditions on the conveyance of cemetery lots stated: “The terms of sale and any deed for lots executed after the effective date of this amendment may include the following requirements”). The language of the legislation is prospective, authorizing the board of township trustees to include certain terms and conditions in deeds executed after July 24, 1986, and describing actions

⁴ Even though our research has disclosed no Ohio authority establishing that an easement for burial purposes may be extinguished by abandonment, we are unable to predict what action a court might take in a particular case. Accordingly, it may be possible, in particular circumstances, for a township to seek a judicial remedy if it finds, under provisions of contract or property law, an argument in support of its authority to reclaim sold but unused cemetery lots. *See* 1999 Op. Att’y Gen. No. 99-047, at 2-297 (general principles of basic contract and property law apply to governmental entities except as otherwise provided). *See generally, e.g., Harvest Land Co-op, Inc. v. Sandlin*, Butler App. No. CA2005-08-360, 2006-Ohio-4207, 2006 Ohio App. LEXIS 4140 (action to quiet title to an easement, asserting abandonment), *appeal after remand*, Butler App. No. CA2007-07-161, 2008-Ohio-5417, 2008 Ohio App. LEXIS 4542 (appeal of declaratory judgment extinguishing an easement due to abandonment, reversed and remanded); *Gannon v. Klockenga*, Summit App. No. 22946, 2006-Ohio-2972, 2006 Ohio App. LEXIS 2867 (action to quiet title and declare rights under easement, including claims of expiration, laches, and abandonment); *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, Lake App. No. 2003-L-192, 2005-Ohio-3398, 2005 Ohio App. LEXIS 3146 (declaratory judgment action to determine easement rights, including issues of extinguishment by estoppel, laches, or abandonment); 1990 Op. Att’y Gen. No. 90-066, at 2-278 (an easement may be extinguished by adverse possession, which generally encompasses possession that is open, notorious, continuous, hostile and adverse to the enjoyment of the easement by the owner for a period of twenty-one years or more); 1-15 *Ohio Real Property Law and Practice* § 15.06 (2007) (duration and extinguishment of easements); 36 Ohio Jur. 3d *Easements and Licenses* §§ 69-79 (2002) (termination or extinguishment of easements); notes 7 and 8, *infra*.

the grantee or later recipient “shall” take, provisions the deed “shall” contain, and actions the board of township trustees “shall” take with regard to those deeds.

The provisions of R.C. 517.07 operate by allowing a township to grant limited rights to the purchaser of a cemetery lot and to place conditions upon the ownership of the lot. There is no basis in the terms of R.C. 517.07 for applying any of the notification or reentry terms or conditions to a deed executed on or before July 24, 1986. *See State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, 861 N.E.2d 1167 (syllabus, paragraph 1) (“[a] statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred”); R.C. 1.48 (“[a] statute is presumed to be prospective in its operation unless expressly made retrospective”); *see also* Ohio Const. art. II, § 28 (“[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts”).

The deed attached to your letter provides the grantee with a burial easement in a lot of ground, “subject to the Cemetery Laws of the State, and to the rules and regulations prescribed by the Trustees of said Township with reference to the said Cemetery.” The grant was unrestricted when made, and the board of township trustees is not empowered to unilaterally and retroactively impose conditions upon the easement, either by rule or under R.C. 517.07. *See* 1990 Op. Att’y Gen. No. 90-066 (boards of township trustees and legislative authorities of municipal corporations in charge of a union cemetery under R.C. 759.27 cannot use their rulemaking authority under R.C. 759.35 to promulgate rules under which the property interest of an unknown owner of an unused cemetery lot is terminated or a right of reentry is acquired);⁵ *see also* 1999 Op. Att’y Gen. No. 99-047, at 2-297 to 2-298. *See generally Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d at 75-76 (Grey, J., concurring) (although no one would grant so broad an easement today, “[t]he courts and the parties . . . are bound to follow the terms of the ease-

⁵ Boards of township trustees are authorized to adopt rules and regulations with respect to township cemeteries, provided that the rules and regulations are reasonable and in compliance with relevant statutory and constitutional provisions. *See* R.C. 517.06 (the board of township trustees “shall make and enforce all needful rules and regulations for the division of the cemetery into lots, for the allotment of lots to families or individuals, and for the care, supervision, and improvement of the lots”); 1987 Op. Att’y Gen. No. 87-042, at 2-276 to 2-277 (under R.C. 517.06, which authorizes the board of township trustees to make rules governing a township cemetery, the rules must be reasonable and in compliance with relevant statutory and constitutional provisions); 1949 Op. Att’y Gen. No. 925, p. 559, at 561 (whether the board of township trustees may grant a purchaser of cemetery lots the privilege of erecting a monument that is located on a path between his lots depends on whether the board of trustees has reserved this right in its rules and regulations). *See generally Kuhn v. German Township Bd. of Trustees*, No. 11733, 1990 Ohio App. LEXIS 607, at *7 (Montgomery County Feb. 21, 1990) (duty of township trustees under R.C. 517.11 to protect and preserve cemeteries is a general public duty that “necessarily involves broad discretion”).

ment as originally granted” in 1916). As stated in 1990 Op. Att’y Gen. No. 90-066, at 2-280 n.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.” *See also* 1949 Op. Att’y Gen. No. 925, p. 559, at 560 (“[t]he purchaser’s title to a [cemetery] lot being an easement, its extent may be restricted by the express terms of the instrument creating it”).⁶

We conclude, therefore, that R.C. 517.07 does not allow any retroactive application to deeds executed on or before July 24, 1986.

Recourse for Township Trustees

Your third question asks what legal recourse exists for township trustees facing a situation in which cemetery lots are going unused. Our research reveals no existing Ohio law under which a township may reclaim and resell cemetery lots that were sold on or before July 24, 1986, and remain unused.

Two competing interests are at play in this situation. On one hand, the township is interested in having all gravesites in its cemetery used, and in reselling unused cemetery lots if owners of record will not be using them. On the other hand, the owners of record and their heirs have acquired legal rights to their cemetery lots, and there is a need to recognize and respect these rights. *See generally In re Estate of Joiner; Persinger v. Persinger.*

As discussed above, our research has disclosed no theory of legal action directly authorizing a township to reclaim cemetery lots in the circumstances you have described, although on the basis of specific facts it may be possible to seek some sort of judicial remedy in particular circumstances. *See* note 4, *supra*.

As a practical matter, it might be argued that a township could take reasonable action to try to locate owners of sold but unused cemetery lots and, if the township is convinced that no persons remain who are interested in using the lots, simply proceed to resell the lots and accept the consequences. Although this procedure

⁶ Other provisions pertaining to cemeteries appear in R.C. Chapter 4767. *See, e.g.,* R.C. 4767.02-.03 (governing cemetery registration and requiring every person, church, religious society, established fraternal organization, or political subdivision of the state that owns, operates, or maintains a cemetery (except a family cemetery or a cemetery in which there have been no interments in the previous twenty-five years) to register the cemetery with the Division of Real Estate and Professional Licensing in the Department of Commerce, created under R.C. 121.08(H)); R.C. 4767.05-.08 (establishing the Ohio Cemetery Dispute Resolution Commission, which receives, reviews, investigates, and conducts hearings on complaints about cemetery practices or procedures; assists in resolving complaints through informal techniques of mediation, conciliation, and persuasion; and makes referrals to prosecuting attorneys or the Ohio Attorney General); *see also* 2007 Op. Att’y Gen. No. 2007-005.

could make previously unused lots available, it might raise concerns about propriety and charges of lack of respect for an individual's rights to a cemetery lot.⁷

Further, if cemetery lots are resold and used without a definitive resolution of the rights of a previous owner, the township could be subject to a number of legal consequences. For example, a township might be required to pay financial damages to a previous owner or to remove and reinter a body buried in a previous owner's lot. *See, e.g., Lanham v. Franklin Township*, Clermont App. Nos. CA2002-07-052, CA2002-08-068, 2003-Ohio-2222, 2003 Ohio App. LEXIS 2080, at ¶29 (in a situation in which the vault of a nonfamily member encroached upon a family cemetery lot in a township cemetery, stating that the owners of the family cemetery lot had a remedy in the form of a breach of contract action against the township, in which action the owners could have requested, *inter alia*, specific performance of the contract, including that the deceased be interred outside the family's burial lot);⁸ *Cobb v. Mantua Township Bd. of Trustees*, Portage App. No. 2003-P-0112, 2004-Ohio-5325, 2004 Ohio App. LEXIS 4806, at ¶33 (political subdivisions, including townships, are granted immunity from certain tort claims under R.C. Chapter 2744,

⁷ Some courts have recognized an interest in not having strangers buried in a family plot, even if this means that some gravesites remain unused. In *Ebenezer Baptist Church, Inc. v. White*, 513 So. 2d 1011 (Ala. 1987), it was found that, by establishing boundaries and providing maintenance of family cemetery plots, certain families acquired easements by prescription that prevented the church from reselling unused burial places located within a family plot, even in the absence of a deed. *See also Corp. of the Roslyn Presbyterian Church & Congregation v. Perlman*, 193 Misc. 2d 60, 64, 747 N.Y.S.2d 304 (Sup. Ct. Nassau County 2002) (quoting *Matter of Turkish*, 48 Misc. 2d 600, 600, 265 N.Y.S.2d 888 (Sur. Ct. Kings County 1965): "Survivors of close blood should not be denied the solace of burial together, or that those already interred should have strangers buried in their family plot").

⁸ In the *Lanham* case, summary judgment was granted against the family cemetery lot owners on claims for damages on grounds of intentional infliction of emotional distress, obstruction of justice, civil conspiracy, trespass, nonfeasance, negligence, violation of 42 U.S.C. § 1983, and criminal vandalism under R.C. 2909.05(C). *Lanham v. Franklin Township*, 2003-Ohio-2222, at ¶6-7. The case was remanded for consideration of a taxpayer derivative action, which was not successful. *See Lanham v. Franklin Township*, Clermont App. No. CA2003-07-057, 2004-Ohio-2071, 2004 Ohio App. LEXIS 1790 (affirming dismissal of taxpayer derivative action). *See generally Corp. of the Roslyn Presbyterian Church & Congregation v. Perlman*, 747 N.Y.S.2d at 305-08 (in a situation in which a religious corporation mistakenly sold to a widow for the burial of her husband a gravesite included in a lot deeded to a family in 1873, the court (under a New York State statute) granted an order authorizing the disinterment of the husband; the family claiming ownership had entered into a perpetual care agreement for its lot in 1940 and reconfirmed it in 1969, and the most recent burial by the family was in 1968); *Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc.*, 42 Md. App. 186, 399 A.2d 936 (1979).

but are subject to actions for breach of contract); 1999 Op. Att’y Gen. No. 99-047, at 2-297 to 2-298 (when a governmental entity is a party to a valid deed or contract, it is ordinarily bound by the terms of the instrument either to comply with it or to be liable for damages; a township that prohibits future interments in a cemetery operated under R.C. Chapter 517 may be required to provide compensation to persons who have property interests in lots in the cemetery).

Although existing Ohio law provides no clear and direct legal means by which a township may reclaim and resell cemetery lots that were sold on or before July 24, 1986, and remain unused, this matter might be addressed by appropriate legislation. For example, townships might be given authority, after a specified period of time, to appropriate sold but unused cemetery lots under the power of eminent domain, with the understanding that, if the previous owner should subsequently claim the cemetery lot, the township would be responsible for paying any compensation that might be due. *See, e.g.*, Ohio Const. art. I, § 19 (“[p]rivate property shall forever be held inviolate, but subservient to the public welfare”); R.C. Chapter 163; R.C. 517.01, .08, .13; *Bd. of Township Trustees v. Lambrix*, 60 Ohio App. 2d at 295 (the right to appropriate property under the power of eminent domain is a right of sovereignty, and a township has the powers of appropriation that are explicitly granted by the legislature); 1972 Op. Att’y Gen. No. 72-031. The General Assembly is empowered to take cognizance of the consequences of existing law and, within constitutional limits, to change the law to achieve the desired results. *See, e.g.*, *State ex rel. Nimberger v. Bushnell*, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus, paragraph 4); Ohio Const. art. II, § 1; R.C. 1.47.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. A board of township trustees may not reclaim its interest in sold but unused cemetery lots under a theory that the burial easement has been extinguished by abandonment on the basis of nonuse alone, and it is highly unlikely that the board will be able to establish intent to abandon a sold but unused cemetery lot. (1972 Op. Att’y Gen. No. 72-031, modified.)
2. R.C. 517.07 does not allow any retroactive application to deeds executed on or before July 24, 1986.
3. Existing Ohio law provides no clear and direct legal means by which a township may reclaim and resell cemetery lots that were sold on or before July 24, 1986, and remain unused.