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TOWNSHIP FUNDS—CEMETERY, MUNICIPAL—NO AUTHORITY TO EXPEND TOWNSHIP FUNDS IN MAINTAINING MUNICIPAL CEMETERY—TOWNSHIP MAY ACCEPT CONVEYANCE OF SUCH CEMETERY—§759.19 R.C.

SYLLABUS:

1. A township may not legally expend its funds for the care and maintenance of a cemetery belonging to a village located within the township.
2. The township trustees are without authority to pay over to a village located within the limits of the township funds to enable the village to operate a cemetery belonging to it.
3. The trustees of a township have authority under Section 759.19, Revised Code, to accept from a village conveyance of a cemetery located within such township and belonging to such village, and may upon such conveyance and acceptance, care for and maintain such cemetery as a township cemetery.

Columbus, Ohio, March 19, 1959

Hon. Joseph B. Yanity, Jr., Prosecuting Attorney
Athens County, Athens, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“As legal adviser to the Trustees of Trimble Township, Athens County, Ohio, I seek your opinion on the questions presented at the conclusion of the facts which follow:

“Trimble Township, Athens County, Ohio, has within its geographical confines three municipalities, the villages of Jacksonsville, Trimble and Glouster. Glouster is the largest of the three villages and those residing in said municipality comprise a majority of the population of Trimble Township. The Township Trustees by proper resolution and for the stated purpose of ‘maintenance and upkeep of the cemeteries *within* Trimble Township’ submitted the question to the voters of Trimble Township on November 5, 1957, with the 1.5 mills for each dollar of valuation levy being approved.

“It is reliably estimated by the Athens County Auditor that the taxes paid on real estate within Glouster Village results in the sum of approximately \$3,000.00 annually for the cemetery levy.

“Glouster Village owns, manages and maintains through Glouster Village Cemetery Trustees a municipal cemetery, wholly owned and under the control of Glouster Village, but located approximately one-half mile from the corporation line in Trimble Township.

“Recently, Glouster Village has approached the Trimble Township Trustees and have requested assistance in maintaining Glouster Village Cemetery basing their request on the approximately \$3,000.00 taxes paid on the levy by residents of Glouster Village.

“The specific questions on which an opinion is requested follows:

“1. Can the Trimble Township Trustees legally expend the proceeds of the levy on the care and maintenance of Glouster Village Cemetery and other municipal cemeteries in Trimble Township?

“2. If so, can the Trimble Township Trustees give Glouster Village Cemetery a sum of money annually and let Glouster Vil-

lage Cemetery Trustees care for and maintain their own cemetery or must they care for and maintain the cemetery themselves?

“3. If the answer to one above is no, could the Township Trustees accept a deed for said Gloucester Village Cemetery and other municipal cemeteries, and then care for and maintain the same?

“4. If the answers to one and three above are no, is there any procedure whereby Gloucester Village could now be exempted from the levy?”

The statutes relating to municipally owned cemeteries are found in Chapter 759. of the Revised Code. It may be remarked at the outset that practically all of these statutes were enacted many years before the adoption in 1912 of Article XVIII of the Constitution, commonly known as the “Home Rule Amendment.” Undoubtedly under the broad powers of home rule granted by Section 3 of Article XVIII, municipalities could exercise practically all of the powers granted by the chapter mentioned. However, certain sections therein contained may be useful in reaching a solution of the problems which you present.

As to the authority of trustees of a township in which a village is located to expend township funds for the care and maintenance of a cemetery owned by the village, we must turn to the statutes regulating the powers of townships in this matter. These are found in Chapter 517., Revised Code. There is no question as to the right of township trustees to raise moneys by taxation for the purchase and improvement and care of township cemeteries. See Section 517.03, Revised Code. A township may also, under the provisions of Section 517.15, Revised Code, receive by gift, bequest or otherwise any money, securities or other property, in trust as a permanent fund, to be held and invested, the income therefrom being used for the care of a cemetery owned by it.

There is no provision in the law authorizing township trustees to expend township funds for the care of a cemetery owned by a city or village located within its limits; and bearing in mind that a public body such as a township, created by the General Assembly has only such powers as have been granted to it by statute, and such implied powers as are essential to carrying into effect the powers granted, it is evident that your first question must be answered in the negative.

For want of such power, it is manifest your second question as to the right of the township to give the village a sum of money annually

which the village may use for the care of its cemetery, must also be answered in the negative.

The third question which you present is as to the right of the township trustees to accept a deed from the village for its cemetery and then care for and maintain the same. This question would appear to involve the power of the village to make the conveyance, and also the power of the township to accept it. I see no difficulty in reaching an affirmative answer to the first part of this question, because Section 3, Article XVIII of the Constitution, adopted in 1912, gives a municipality the right to "exercise *all* powers of local self government." Many years before home rule, the legislature had provided in Section 721.01, *et seq.*, Revised Code, for the circumstances under which and the process by which a municipality might dispose of its property. This involved a declaration that it was no longer needed for municipal purposes and there was the requirement of advertisement for bids and sale to the highest bidder. In the case of *Hugger vs. Ironton*, 83 Ohio Appeals, 21, decided in 1947, the court held that a municipality, under the home rule provision of the Constitution, was free to dispose of its property according to its own judgment and for such consideration as it deemed advantageous. Appeal in this case was dismissed by the Supreme Court. See also Opinion No. 5558, Opinion of Attorney General for 1942, p. 745; Opinion No. 1478, Opinions of Attorney General for 1950, p. 85.

Coming then to the authority of the township to accept a conveyance of the village owned cemetery, I call your attention to Section 759.19, Revised Code, reading as follows:

"In all cases in which the legislative authority of a village which has title to a cemetery fails to take proper care thereof, and the township in which the village is located desires to control such cemetery, the village may, by ordinance, transfer any real property acquired for cemetery purpose to the board of township trustees, upon such terms as are agreed to between the village and the board.

"The board may receive and accept transfer, and receive and accept from any other source or acquire in any other manner, any real property for the purpose of such cemetery, and may use and apply it for such purpose and enter into any contract relating thereto. After such transfer has been completed the board shall regulate the cemetery as provided in sections 517.01 to 517.32, inclusive of the Revised Code."

We do not need to depend upon the first paragraph of this section, for it is certainly not essential that the municipality which has a cemetery should fail to take proper care of the same in order to give the township the right to accept a conveyance of it, as the second paragraph makes it very clear that the township trustees may accept a transfer from any source, if the trustees deem it proper, and after receiving such transfer, may care for the cemetery as a township cemetery in the manner provided by the pertinent statutes.

It is accordingly my opinion and you are advised :

1. A township may not legally expend its funds for the care and maintenance of a cemetery belonging to a village located within the township.

2. The township trustees are without authority to pay over to a village located within the limits of the township funds to enable the village to operate a cemetery belonging to it.

3. The trustees of a township have authority under Section 759.19, Revised Code, to accept from a village conveyance of a cemetery located within such township and belonging to such village, and may upon such conveyance and acceptance, care for and maintain such cemetery as a township cemetery.

Respectfully,

MARK MCELROY

Attorney General