

OPINION NO. 2003-034**Syllabus:**

1. A board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 may not sell and convey that cemetery with human remains interred therein to a church.
2. A board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 may not lease that cemetery with human remains interred therein to a church for church purposes.

To: Richard D. Welch, Morgan County Prosecuting Attorney, McConnellsville, Ohio
By: Jim Petro, Attorney General, November 10, 2003

You have requested an opinion concerning the sale or lease of real property that is used as a cemetery from a township to a church.¹ You have asked the following questions:

¹Unless otherwise excepted by R.C. 4767.02(C), a township that owns, operates, or maintains a cemetery must register the cemetery in accordance with R.C. Chapter 4767. R.C. 4767.02(A); *see* R.C. 4767.03. Under R.C. 4767.02(C), exceptions exist for family cemeteries

1. May a Board of Township Trustees convey real property it owns to a church that desires to use the property for cemetery and other church related purposes?
2. If the answer to question number 1 is in the affirmative, may the Trustees convey the land to the church by private sale or must it do so by public sale or competitive bid?
3. If the Trustees are not authorized to sell the land, may it enter into a lease with the church for the use of the real property, including allowing the church to take over the care, maintenance and repair of the cemetery if the church so desires? If so, must the Trustees engage in competitive bidding in order to lease the real property and what is the maximum permissible term of the lease?

Historical Background

The real property in question consists of two parcels of land that were conveyed on or around April 7, 1982, by a duly organized church to the Windsor Township Trustees for cemetery purposes.² The conveyance was made from the church to the board of township trustees pursuant to R.C. 517.27,³ which authorizes the transfer of a public cemetery⁴ to a board of township trustees.⁵ You have explained that human remains are still interred in the

and for cemeteries in which there have been no interments during the previous twenty-five calendar years. *See also* 1993 Op. Att’y Gen. No. 93-005 (syllabus, paragraph one).

²You have stated that the church conveying the two parcels of land to the board of township trustees retained no rights in the parcels. In addition, because the conveyance was made in accordance with the provisions of R.C. 517.27, which authorizes the conveyance of a public cemetery from a church to a board of township trustees, *see* note five, *infra*, it is our understanding that there was no intent by the church to create a charitable trust. *See generally* R.C. 109.23(A) (defining a “charitable trust” as “any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, religious or educational purpose”); *Brown v. Concerned Citizens for Sickel Cell Anemia, Inc.*, 56 Ohio St. 2d 85, 90, 382 N.E.2d 1155 (1978) (the definition of “charitable trust” set forth in R.C. 109.23(A) is the generally accepted definition of an express trust).

³Other statutes in the Revised Code authorize a township to acquire a cemetery or land for cemetery purposes. *See, e.g.*, R.C. 517.01; R.C. 517.03-.05; R.C. 517.08; R.C. 517.10; R.C. 517.13; R.C. 759.19; R.C. 759.27; R.C. 759.40-.41; R.C. 1715.04. “However, a township has no statutory duty to provide a cemetery.” 1999 Op. Att’y Gen. No. 99-047 at 2-295 n.2.

⁴A public cemetery is one that sells burial lots to the public. *See* 1966 Op. Att’y Gen. No. 66-163 at 2-351 and 2-352; *see also* R.C. 517.07 (“[u]pon application, the board of township trustees shall sell at a reasonable price such number of lots as public wants demand for burial purposes”); R.C. 1721.07 (“[a] cemetery company or association may adopt rules for disposing of and conveying burial lots; but any person not already the owner of a lot in the cemetery may purchase any unsold lot in it, and have such lot conveyed to him by the company or association upon tender of the usual price asked by it for such lots”).

⁵R.C. 517.27, provides, in part:

cemetery and that the cemetery is under the care and control of the board of township trustees.⁶

Recently, another duly organized church has approached the township trustees about purchasing the cemetery for cemetery purposes and other church related purposes. If such sale is not permissible, the church has requested the township trustees to lease the use of the cemetery grounds to the church for church purposes. The terms of the lease may require the church to take care of, keep in repair, and maintain the grounds of the cemetery for the township trustees. In the case of either a sale or lease of the cemetery to the church, human remains interred in the cemetery will not be removed and relocated.

Authority of Township Trustees to Sell and Convey a Public Cemetery with Human Remains Interred Therein

We will first consider whether a board of township trustees may sell and convey to a church a public cemetery with human remains interred therein.⁷ Boards of township trustees are creatures of statute and have only such authority as is expressly provided by statute or as may exist by necessary implication. *See 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); *Hopple v. Trustees of Brown Township*, 13 Ohio St. 311, 324-25 (1862); 1983 Op. Att’y Gen. No. 83-039 at 2-147. Accordingly, a board of township trustees may sell and convey to a church a public cemetery with human remains interred therein only if there is express or implied statutory authority for the board to do so.

Various statutes authorize a board of township trustees to sell and convey real property the township owns. *See, e.g.*, R.C. 503.01; R.C. 505.10; R.C. 505.102; R.C. 505.104;

When a *public cemetery* in a township is not under the control of a municipal corporation, and the title or control thereof is vested in an association or the trustees thereof, or is vested in a religious society, whether incorporated or not, or in the trustees thereof, and *such cemetery is used exclusively for cemetery purposes*, such association, society, or the trustees thereof may convey such grounds to the board of township trustees and its successors in office. (Emphasis added.)

Thus, in certain instances, a church may convey a public cemetery that is used exclusively for cemetery purposes to a board of township trustees. 1957 Op. Att’y Gen. No. 1125, p. 519; *see also* 1966 Op. Att’y Gen. No. 66-163 (syllabus, paragraph two). *See generally* 1999 Op. Att’y Gen. No. 99-047 at 2-295 (pursuant to R.C. 517.10, “if a church ceases to function, its cemetery becomes the property of the township without action on the part of either party”).

⁶You have informed us that the possession of, and title to, the grounds of the cemetery is not vested in, or shared with, a municipal corporation, *see* R.C. 759.08; R.C. 759.27; R.C. 759.29; R.C. 759.40; *see also* R.C. 759.31, or another township, *see* R.C. 517.14; *see also* R.C. 1715.04. In addition, you have stated that the township has not appointed a board of directors to take charge of the cemetery, *see* R.C. 517.20, and that the board of county commissioners is not required to care for and preserve a portion of the cemetery that is set apart for the burial of veterans, *see* R.C. 5901.37. Thus, the possession, care, and control of the cemetery is vested solely in the board of township trustees. *See* R.C. 517.10; *see also* R.C. 517.27.

⁷The township in question has not adopted the limited home rule form of township government under R.C. Chapter 504, and this opinion does not address the powers of townships acting under this chapter.

R.C. 517.22. Among these statutes, R.C. 505.10 and R.C. 517.22 are relevant to the authority of a township to sell and convey a public cemetery to a church.

R.C. 505.10 sets forth general provisions authorizing the sale of real property by a board of township trustees when the board determines that the property is not needed for public use, obsolete, or unfit for the use for which it was acquired. R.C. 505.10 provides, in part, that, “[w]hen the township has property ... which the board, by resolution, finds it does not need for public use, is obsolete, or is unfit for the use for which it was acquired, the board may sell and convey that property or otherwise dispose of it in accordance with this section.” The plain language of R.C. 505.10 thus authorizes a board of township trustees to sell and convey to a grantee any real property owned by the township, including a cemetery acquired by the board pursuant to R.C. 517.27. *See generally* 1961 Op. Att’y Gen. No. 2395, p. 381 (syllabus) (“[a] board of township trustees under the provisions of [R.C. 505.10] has the right to sell real estate belonging to the township, at public auction, without approval of the voters when by resolution it finds that it does not need the same”); 1958 Op. Att’y Gen. No. 2341, p. 422, at 424 (pursuant to R.C. 505.10, a board of township trustees “may sell *any properties* which it declares by resolution it does not need”).

Provisions for the sale and conveyance of public cemeteries by boards of township trustees are set forth in R.C. 517.22. This statute provides as follows:

The board of township trustees or the trustees or directors of a cemetery association, after notice has first been given in two newspapers of general circulation in the county, may dispose of, at public sale, and convey any cemetery under their control that they have determined to discontinue as burial grounds, but possession of the cemetery shall not be given to a grantee until after the remains buried in that cemetery, together with stones and monuments, have been removed as provided by [R.C. 517.21].

Pursuant to this statute, when a public cemetery under the control of a board of township trustees is no longer to be used as burial grounds, the board may sell and convey the cemetery to a grantee.

A review of R.C. 505.10 and R.C. 517.22 discloses that both of these statutes authorize a board of township trustees to sell and convey to a grantee a public cemetery that is titled to the board. These statutes conflict, however, insofar as R.C. 517.22 requires the removal of human remains interred in a cemetery before the township may convey the cemetery to a grantee, while R.C. 505.10 imposes no such requirement. Moreover, the conflict between the two statutes is irreconcilable and the statutes can not be construed to give effect to both because both apply when a board of township trustees has determined that a cemetery is not to be used or maintained by the township for burial purposes. *Compare* R.C. 505.10 (authorizing the sale of township real property when it is not needed for public use, obsolete, or unfit for the use for which it was acquired) *with* R.C. 517.22 (authorizing the sale of a public cemetery when the cemetery is no longer to be used as burial grounds).

It is a codified rule of statutory construction that, if a conflict between a general and special provision is irreconcilable, “the special ... provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.” R.C. 1.51. *See generally State ex rel. Ehmman v. Schneider*, 78 Ohio App. 27, 31, 67 N.E.2d 117 (Hamilton County 1946) (“[f]or purposes of interpretation of legislative enactments, enactments have long been classified as either general or special, and given different effect upon other enactments dependent as they are

found to fall in one class or the other”). When comparing R.C. 505.10 and R.C. 517.22, it is apparent that R.C. 505.10 is a general provision while R.C. 517.22 is a special provision. *See generally* 1989 Op. Att’y Gen. No. 89-103 at 2-500 n.7 (modified in part, on other grounds, by 1990 Op. Att’y Gen. No. 90-022) (“[t]he determination as to whether a statute is general or special in character must be made in light of the statute with which it is to be compared”). R.C. 505.10 concerns *all* township real property, whereas R.C. 517.22 is limited to real property used by the township for cemeteries. Accordingly, R.C. 517.22 prevails over R.C. 505.10 unless R.C. 505.10 was adopted after R.C. 517.22 and the manifest intent is that R.C. 505.10 prevail. *See* R.C. 1.51.

The general provisions of R.C. 505.10 concerning the sale and conveyance of township real property were enacted after R.C. 517.22. *Compare* 1876 Ohio Laws 33 (eff. Mar. 15, 1876) (enacting language that subsequently became R.C. 517.22) *with* 1880 Ohio Laws 42 (H.B. 26, eff. Mar. 9, 1880) (enacting language in R.S. 1481 (now R.C. 505.10) authorizing the sale of township real property). Nevertheless, there is no intent discernible in R.C. 505.10 or elsewhere that it prevail over R.C. 517.22. Rather, it appears that the General Assembly intended for R.C. 517.22 to prevail as an exception to R.C. 505.10.

R.C. 517.22 is part of a comprehensive scheme enacted by the General Assembly to provide for the establishment, operation, management, and use of public cemeteries by boards of township trustees. *See* R.C. Chapter 517. As stated in 1953 Op. Att’y Gen. No. 2978, p. 374, at 376, “[f]rom the earliest days in the history of Ohio, there have been statutory enactments providing in one way or another for cemeteries, and authority has been conferred upon townships, cities and villages, as well as upon private associations or corporations to establish and maintain such cemeteries.” Accordingly, pursuant to R.C. Chapter 517, a board of township trustees is given certain powers and duties with respect to public cemeteries under its jurisdiction. The board of township trustees has general authority to “provide for the protection and preservation” of such cemeteries and to provide for their care and maintenance. R.C. 517.11; *accord* R.C. 517.27; *see* R.C. 517.10; 1954 Op. Att’y Gen. No. 4163, p. 423. The board “shall prohibit interments therein when new grounds have been procured for township cemeteries or burial grounds.” R.C. 517.11. In addition, when old cemeteries are in or near village plats and further interments may injure the public health, the board “shall institute suits to recover possession thereof, remove trespassers therefrom, and may recover damages for injuries thereto or any part thereof, or to any fence or hedge enclosing them, or to any tomb or monument therein.” *Id.* The board may levy a tax for cemetery expenses, *id.*; *see also* R.C. 517.03; R.C. 517.19, and sell burial lots in cemeteries under its control, R.C. 517.07. The board of township trustees also has authority to order that a cemetery be discontinued and the human remains be removed and reinterred elsewhere, if a public or private cemetery is abandoned or the trustees are of the opinion that further use for burial purposes will be detrimental to the public welfare or health and a cemetery in the near vicinity is open for public use. R.C. 517.21.

The enactment of such detailed provisions to govern the establishment, operation, management, and use of public cemeteries indicates that the General Assembly’s intent was to give a board of township trustees certain specific powers and duties with respect to public cemeteries under its jurisdiction. *See generally* 1947 Op. Att’y Gen. No. 2386, p. 561 (syllabus) (“[t]he authority of township trustees with respect to ... cemeteries and burial grounds is prescribed and limited by statute, and in acquiring land by deed of gift or otherwise for such purposes the statutory conditions, limitations and restrictions relating thereto must be observed”). In light of these specific provisions, it follows that there is no manifest legislative

intent that R.C. 505.10 prevail over R.C. 517.22 with respect to the sale and conveyance of a public cemetery by a board of township trustees.

Also, if the General Assembly intended for R.C. 505.10 to control the sale and conveyance of public cemeteries by townships, R.C. 517.22 would be repealed by implication by the enactment of R.C. 505.10. It is a long-standing rule, however, that it will be assumed that the General Assembly has knowledge of prior legislation when it enacts subsequent legislation, and that had it intended to repeal prior legislation, it would have expressly repealed the prior legislation. *See Humphrys v. The Winous Co.*, 165 Ohio St. 45, 133 N.E.2d 780 (1956) (syllabus, paragraph one); *State v. Ferguson*, 96 Ohio App. 297, 300, 121 N.E.2d 684 (Franklin County 1954), *appeal dismissed*, 161 Ohio St. 563, 120 N.E.2d 306 (1954). Accordingly, R.C. 517.22 prevails as an exception to R.C. 505.10 and applies to the sale and conveyance of a public cemetery by a board of township trustees.

Pursuant to R.C. 517.22, a board of township trustees may sell and convey a public cemetery under its control to a grantee when the human remains interred therein have been removed as provided by R.C. 517.21. If the human remains interred in a public cemetery have not been removed from the grounds of the cemetery, R.C. 517.22 does not authorize a board of township trustees to sell and convey the cemetery to a grantee. *See* 1935 Op. Att'y Gen. No. 4198, vol. I, p. 487 (syllabus, paragraph one) (“[w]here authority is extended by statute to public officers or boards to sell and dispose of public property, and the statute fixes the manner of consummating the sale, the terms of the authorization must be strictly complied with”). *See generally Schaeffer v. Unknown Heirs and Next of Kin of Fletcher*, 86 Ohio L. Abs. 425, 427, 175 N.E.2d 776 (C.P. Cuyahoga County 1961) (“[t]he Legislature has determined that the sale of cemetery areas without a removal and re-interment of bodies is against the public policy of the State of Ohio”). *See generally also* R.C. 759.42 (a union cemetery may transfer to an incorporated cemetery association a cemetery with human remains interred therein). Therefore, a board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 may not sell and convey that cemetery with human remains interred therein to a church. *Cf.* 1965 Op. Att'y Gen. No. 65-229 (syllabus) (“[t]here is no authority in law for a board of township trustees to transfer the lands, lots and improvements of an existing township cemetery to an incorporated cemetery association”); 1917 Op. Att'y Gen. No. 513, vol. II, p. 1463 (syllabus, paragraph one) (“[t]ownship trustees are not authorized by [G.C. 4199 (now R.C. 759.42)] to transfer a cemetery under their control to an incorporated cemetery association”).

Your second question asks about the method by which a board of township trustees may sell a public cemetery. Because we have determined that a board of township trustees does not have authority to sell and convey to a church a public cemetery with human remains interred therein, it is unnecessary for us to answer your second question.

Authority of Township Trustees to Lease a Public Cemetery with Human Remains Interred Therein

Your final question asks whether a board of township trustees may lease to a church a public cemetery with human remains interred therein.⁸ R.C. 505.11(A) provides that

⁸This opinion does not consider the authority of the board of township trustees to enter into a contract with a church whereby the township pays the church to take care of, keep in repair, and maintain the public cemetery in question. *See generally* 1964 Op. Att'y Gen. No. 991 (syllabus) (“[a] board of township trustees may contract with an independent contrac-

“[w]henever the provisions of [R.C. 505.11(B)]⁹ do not apply, and when, in its opinion, the township would be benefited, the board of township trustees may lease township real property to any person upon terms agreed upon by the board and the lessee.”¹⁰ This statute thus appears to authorize a board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 to lease that cemetery with human remains interred therein to a church.

A review of R.C. 517.27, however, discloses that a board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 is not permitted to lease that cemetery with human remains interred therein to a church. R.C. 517.27 states, in part, “[s]ubject to the rights of the original grantor, his heirs or assigns, the board shall accept and take possession of [a public cemetery], and take care of, keep in repair, hold, treat, and manage them in all respects *as required by [R.C. 517.01-.32].*” (Emphasis added.) *See also* R.C. 517.06; R.C. 517.08; R.C. 517.10; R.C. 517.11; R.C. 517.32. Accordingly, the authority of a board of township trustees to manage a public cemetery acquired by the board pursuant to R.C. 517.27 is limited to that which is set forth in R.C. 517.01-.32. *See generally* 1947 Op. Att’y Gen. No. 2386, p. 561 (syllabus) (the authority of a board of township trustees to manage public cemeteries is prescribed and limited by statute).

As explained previously, R.C. 517.01-.32 vest a board of township trustees with the care, control, and management of public cemeteries under the board’s control. Nothing in R.C. 517.01-.32 authorizes a board to lease to a church for church purposes a public cemetery under the control of the board. To the contrary, the various provisions of R.C. 517.01-.32 indicate that a township’s public cemeteries are to be used solely for cemetery purposes. *See, e.g.,* R.C. 517.01 (“[t]he 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”); R.C. 517.06 (a board of township trustees “shall make and enforce all needful rules and regulations for the division of [a] cemetery into lots, [and] for the allotment thereof to families or individuals”); R.C. 517.07 (a board of township trustees may execute deeds for the sale of burial lots in public cemeteries under its jurisdiction); R.C. 517.12 (“[t]he board of township trustees may make rules specifying the times when cemeteries under its control shall be closed to the public”). Because R.C. 517.01-.32 require a board of township trustees to use a public cemetery for cemetery purposes only, R.C. 517.27 evidences a legislative intent to prohibit a board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 from leasing that cemetery with human remains interred therein to a church for church purposes.

tor, when reasonably necessary, to maintain and care for a township cemetery under its jurisdiction”).

⁹The provisions of R.C. 505.11(B) pertain to the leasing of mineral rights and are not relevant to your question.

¹⁰The language of R.C. 505.11(A) conferring authority upon a township to lease its real property was enacted in 1983-1984 Ohio Laws, Part I, 407, 408 (Am. S.B. 148, eff. June 13, 1984). Prior to that time, a board of township trustees had implied authority to lease real property owned by the township when the board determined that such lease was in the public’s best interest and that the property was not needed for public uses. 1980 Op. Att’y Gen. No. 80-028 (syllabus, paragraph one).

Thus, there is an irreconcilable conflict between R.C. 505.11(A) and R.C. 517.27 insofar as R.C. 505.11(A) permits the lease of a township's public cemetery, while R.C. 517.27 prohibits the lease of that cemetery. As stated above, if a conflict between a general and special provision is irreconcilable, "the special ... provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." R.C. 1.51.

R.C. 505.11(A) is a general provision because it concerns all township real property. On the other hand, R.C. 517.27 is a special provision because it is limited to real property acquired by the township as a public cemetery. Accordingly, R.C. 517.27 prevails as an exception to R.C. 505.11(A) unless R.C. 505.11(A) was adopted after R.C. 517.27 and the manifest intent is that R.C. 505.11(A) prevail. *See* R.C. 1.51.

Although the general provision of R.C. 505.11(A) authorizing the leasing of township real property was enacted after R.C. 517.27, there is no intent discernible in R.C. 505.11 that it prevail over R.C. 517.27. *Compare* 1898 Ohio Laws 153 (H.B. 557, eff. Apr. 21, 1898) (enacting language that subsequently became R.C. 517.27) *with* 1983-1984 Ohio Laws, Part I, 407, 408 (Am. S.B. 148, eff. June 13, 1984) (enacting language in R.C. 505.11 authorizing the lease of township real property). Moreover, as explained previously, the enactment of detailed provisions in R.C. 517.01-.32 to govern the establishment, operation, management, and use of public cemeteries by a board of township trustees indicates that the legislative intent was to limit the use of public cemetery land to cemetery purposes. *See generally Bd. of Comm'rs of Mahoning County v. Young*, 59 F. 96 (6th Cir. 1893) (syllabus, paragraph three) ("[w]here land has been conveyed to a village for use as a public burying ground, the village council, in their character as trustees, cannot abandon the use, and thereby defeat the beneficial interest of the public").

Because there is no manifest legislative intent that R.C. 505.11(A) prevail over R.C. 517.27, it follows that R.C. 517.27 prevails as an exception to R.C. 505.11(A), and prohibits a board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 from leasing that cemetery with human remains interred therein to a church. Therefore, a board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 may not lease that cemetery with human remains interred therein to a church for church purposes. Because we have concluded that a board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 does not have authority to lease that cemetery with human remains interred therein, it is not necessary to address the other aspects of your final question.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 may not sell and convey that cemetery with human remains interred therein to a church.
2. A board of township trustees that acquired possession of a public cemetery pursuant to R.C. 517.27 may not lease that cemetery with human remains interred therein to a church for church purposes.