

OPINION NO. 89-002**Syllabus:**

1. A county auditor lacks authority to certify into the county treasury pet cemetery endowment care funds required by R.C. 961.04.
2. A county auditor may certify only public moneys into the county treasury.
3. The county prosecuting attorney, by authority of R.C. 309.08, may inquire into the commission of a violation of R.C. 961.04 and may prosecute a complaint alleging the violation of R.C. 961.04.

To: John A. Pfefferle, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 23, 1989

I have before me your request for my opinion concerning the power of a county to receive and hold pet cemetery endowment care funds. As determined by conversations between a member of my staff and your office, I have rephrased your question as follows:

1. Does a county auditor have the authority to certify into the county treasury pet cemetery endowment care funds required by R.C. 961.04 as "any amount received by a subdivision in trust" pursuant to R.C. 5705.09(H)?
2. Does a county prosecuting attorney have a legal duty to enforce R.C. 961.04?

You have indicated that a pet cemetery operator has remitted twelve thousand dollars to be deposited in the Erie County treasury to establish a pet cemetery endowment fund. The Erie County auditor has refused to certify the remittance into the county treasury. The concern evident in your request is whether a county auditor may certify money into the county treasury where the money is not characterized as "public moneys."

The requirement of an endowment care fund for the maintenance of each pet cemetery is set forth in R.C. 961.04, which states:

(A) Any person desiring to operate any pet cemetery which is organized or developed on or after the effective date of this section shall, before selling or offering to sell any burial right in such pet cemetery, establish an endowment care fund, as required by division (B) of this section, and place a deposit in the fund of at least twelve thousand dollars in cash, or in bonds of the United States, this state, or any county or municipal corporation of this state.

Whenever any such person has placed another twelve thousand dollars in the endowment care fund from the maintenance fee portion of the proceeds received from the sale of burial rights, in addition to the deposit required in this division, such person may withdraw the deposit of twelve thousand dollars from the fund.

(B) *No person shall operate or continue to operate any pet cemetery in this state without establishing and maintaining an endowment care fund segregated from other assets in accordance with this section.*

(C) Any person operating any pet cemetery after the effective date of this section shall place into the endowment care fund required by division (B) of this section a maintenance fee of not less than fifty dollars, which shall be charged as part of the purchase price for the sale of any burial right. This fee shall be placed in the endowment care fund no later than thirty days following the month in which the entire gross sales proceeds from the sale of the burial right are received.

(D) *The moneys of an endowment care fund shall be held and invested in the manner in which trust funds are permitted to be held and invested pursuant to sections 2109.37 and 2109.371 of the Revised Code.*

The income from the endowment care fund shall be used only for the maintenance, supervision, improvement, and preservation of the grounds, lots, markers, memorials, buildings, equipment, statuary, and other real and personal property of the pet cemetery and for the payment of real property taxes. Annual reports of all the assets and investments of the endowment care fund shall be prepared and maintained, and shall be available for inspection at reasonable times to any owner of a burial right in the pet cemetery. (Emphasis added.)

By the express terms of R.C. 961.04, the endowment care fund is a separate fund consisting of maintenance fees collected as a portion of the purchase price of pet cemetery burial rights and the initial twelve thousand dollar deposit of the pet cemetery operator required to establish the fund. It is held and invested like other trust funds. The language of R.C. 961.04 is silent as to who is to manage the endowment care fund.

To determine whether a county auditor has the authority to certify the fund in question into the county treasury it is first necessary to examine the general duties of the office of county auditor. The county auditor is the fiscal officer of the county. *State ex rel. Morgenthaler v. Crites*, 48 Ohio St. 142, 26 N.E. 1052 (1891). *See also* R.C. 5705.01(O). Control of payments into the county treasury is vested in the county auditor since no payment of money, except moneys collected on the tax duplicate, may be credited unless the county auditor first certifies the money into the county treasury. R.C. 319.13; R.C. 321.12; *State v. Newton*, 26 Ohio St. 265, 274 (1875) ("without [the county auditor's] knowledge and consent, except in a few designated instances in which the auditor of state acts, no public money can legally get into or out of the county treasury"). The Ohio Supreme Court has delineated the extent of the auditor's limited powers by stating that the county auditor, being a creature of statute, "can exercise only such powers as are expressly delegated by statute, together with such implied powers as are necessary to carry into effect the powers expressly delegated." *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 89, 197 N.E. 112, 115 (1935). *See also State ex rel. Hoel v. Goubeaux*, 110 Ohio St. 287, 288, 144 N.E. 251, 252 (1924) ("the creation of county officers is a legislative act; conferring power upon them is also a legislative act. They have no power as officers save and except such as are clearly conferred by statute."); *State ex rel. Alexander v. Oviatt*, 4 Ohio N.P. (n.s.) 481, 488 (C.P. Summit County 1906), *aff'd sub nom. State ex rel. Alexander v. Summit County Commissioners*, 17 Ohio Dec. 451 (Summit Cir. 1906) ("the officers of the county in the administration of their political duties, are guided solely by legislative provisions. This is particularly true as to the collection, custody and disbursement of the public funds").

Inasmuch as the county auditor's powers are limited to those statutorily granted or necessarily implied from statute, it is apparent from R.C. Chapter 319 that a county auditor's powers are restricted to public moneys. *See, e.g.*, R.C. 319.11 (auditor shall prepare financial report of the county); R.C. 319.13 (auditor shall certify all moneys into the county treasury); R.C. 319.14 (auditor shall keep an accurate current account of all moneys paid into or out of the county treasury); R.C. 319.16 (auditor shall issue warrants for all moneys payable from the county treasury). If a pet cemetery endowment care fund cannot properly be characterized as "public moneys" but rather as private funds, specific statutory authorization

would be required for a county auditor to certify such funds into the county treasury.

The county auditor's restricted authority to certify only public moneys into the county treasury follows from the county treasurer's duty pursuant to R.C. 9.38 and 9.39 to accept the deposit of all "public moneys" and "all moneys received under color of office." R.C. 9.38 states in relevant part:

As used in this section and section 9.39 of the Revised Code, "color of office," "public office," and "public official" have the same meaning as in section 117.01 of the Revised Code.

A state officer, employee or agent shall pay to the treasurer of state all public moneys received by them as required by rule of the treasurer of state adopted pursuant to section 113.09 of the Revised Code. A public official other than a state officer, employee, or agent shall deposit all public moneys received by him with the treasurer of the public office.... (Emphasis added.)

R.C. 9.39 states:

All public officials are liable for all public money received or collected by them or by their subordinates under color of office. All money received or collected by a public official under color of office and not otherwise paid out according to law shall be paid into the treasury of the public office with which he is connected to the credit of a trust fund and shall be retained there until claimed by its lawful owner. If not claimed within a period of five years, the money shall revert to the general fund of the public office.

For the purpose of R.C. 9.38 and R.C. 9.39, the definition of "public money" contained in R.C. 117.01(C) reflects the common meaning of the term. 1987 Op. Att'y Gen. No. 87-027. R.C. 117.01 states in relevant part:

As used in this chapter:

(A) "Color of office" means actually, purportedly, or allegedly done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority.

...
(C) "Public money" means any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.

(D) "Public office" means any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

(E) "Public official" means any officer, employee, or duly authorized representative or agent of a public office.

When R.C. 9.38, R.C. 9.39 and R.C. 117.01 are read and construed together, it is apparent that "public moneys" includes moneys received by a public official under color of office. A county auditor would, thus, have a duty to certify into the county treasury any funds received pursuant to express statutory authority or authority necessarily implied from statutory authority. Lacking such express or implied authority a county auditor is without the power to certify into the county treasury funds which are not public moneys but are, instead, private funds.

R.C. Chapter 961 does not establish any governmental entity; instead, it regulates the conduct of a private enterprise. Also, no state officer or public official is named in connection with any duties under R.C. Chapter 961. A person operating a pet cemetery is thus not a state or public official required by R.C. Chapter 961 to pay or deposit pet cemetery endowment care funds to the Treasurer of State or treasurer of a public office such as a county treasurer. Application of the rule of statutory construction of *in pari materia*, construing separate portions of a statutory provision together and harmoniously to give full effect, *see State v. Berry*, 25 Ohio St. 2d 225, 267 N.E.2d 775 (1971), reveals that the intent of R.C. 961.04 is to require the pet cemetery operator to establish and maintain an

endowment care fund. The operator, as part of his duty to maintain the fund, is to hold and invest the fund in the manner other non-governmental trust funds are administered under R.C. 2109.37 and R.C. 2109.371.

While R.C. Chapter 961 does not expressly confer upon the county auditor the power to accept pet cemetery endowment care funds, the county auditor "shall establish the following funds:...A trust fund for any amount received by a subdivision in trust." R.C. 5705.09(H). The first question in your opinion request contemplates that R.C. 5705.09(H) is an authorization for the county auditor to accept pet cemetery endowment care funds. R.C. Chapter 961, however, does not designate a pet cemetery endowment care fund as a trust fund. Moreover, even if a pet cemetery endowment care fund were a trust fund, it appears that R.C. 5705.09 would not be applicable. The funds received in trust under 5705.09(H) are funds owned by a subdivision "in a right and capacity for its own benefit..." 1950 Op. Att'y Gen. No. 2326, p. 646, at 664. Pet cemetery endowment care funds under R.C. 961.04, however, are not funds owned by a subdivision in a right and capacity for its own benefit. Such endowment funds are for the benefit of the owners of a burial right in the pet cemetery.

Inasmuch as pet cemetery endowment care funds do not qualify as trust funds under R.C. 5705.09(H), a determination must be made whether they are "custodial funds" for which a duty exists to deposit into the county treasury. Custodial funds are expressly recognized in Ohio law. See, e.g., R.C. 113.05(B); 1985 Op. Att'y Gen. No. 85-085; 1984 Op. Att'y Gen. No. 84-085; 1982 Op. Att'y Gen. No. 82-082; 1974 Op. Att'y Gen. No. 74-102. Custodial funds held by county treasurers are authorized by clear implication by the definition of "public moneys" contained in R.C. 135.31(E) which states: "Public moneys" means all moneys in the treasury of a county or *moneys coming lawfully into the possession or custody of the treasurer.*" (R.C. 135.31(F) defines "treasurer" as the county treasurer). See also Op. No. 84-085.

The central factor in determining whether pet cemetery endowment care funds are "custodial funds" is whether they have come *lawfully* into the custody of the treasurer. Applying, again, the principle of *in pari materia* in reading the various statutes governing public moneys, "lawfully" in R.C. 135.31(F) may be equated to "under color of law" as defined in R.C. 117.01. Since R.C. 117.01 requires authority under law, the term "lawfully" used in R.C. 135.31(F) infers the necessity of statutory authorization without which a county auditor may not certify a fund into the county treasury as a "custodial fund" under R.C. 135.31(F). Since there is no statutory authority to treat a pet cemetery endowment fund as a custodial fund, I conclude it is not a custodial fund.

No express statutory power is granted to a county auditor to certify pet cemetery endowment care funds. No power to certify non-governmental trust funds is implied from R.C. 5705.09. Pet cemetery endowment care funds are not custodial funds under R.C. 135.3(F). Therefore, no power to accept pet cemetery endowment care funds is possessed by a county auditor.

Your request for my opinion made evident your concern about the responsibility for supervising the management of pet cemetery endowment care funds. Your major concern focused on the duties of county officers. R.C. Chapter 961 does not impose any supervisory duty upon the county auditor or prosecuting attorney. Criminal penalties are, however, imposed upon any person who operates a pet cemetery without establishing an endowment care fund in accordance with R.C. 961.04. R.C. 961.99 (maximum fine is five thousand dollars, maximum imprisonment is one year). The prosecuting attorney is charged by R.C. 309.08 with prosecuting crimes committed:

The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code, and such other suits, matters, and controversies as he is required

to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals....

Since failure to establish or maintain a pet cemetery endowment care fund is a crime, a county prosecutor has the power to prosecute criminal violations of R.C. 961.04 of which he is aware. There is no statutory provision placing a burden of supervision of the administration of pet cemetery endowment care funds upon the prosecuting attorney. Upon being made aware of the probable commission of a violation of R.C. 961.04, the prosecuting attorney may inquire into the commission of the crime and may prosecute.

It is, therefore, my opinion and you are hereby advised that:

1. A county auditor has no authority to certify into the county treasury pet cemetery endowment care funds required by R.C. 961.04.
2. A county auditor may certify only public moneys into the county treasury.
3. The county prosecuting attorney, by authority of R.C. 309.08, may inquire into the commission of a violation of R.C. 961.04 and may prosecute a complaint alleging the violation of R.C. 961.04.