

## OPINION NO. 67-012

**Syllabus:**

A municipality may regulate the distance a burial must be made from a dwelling house pursuant to Section 759.05, Revised Code, even though Section 1721.03, Revised Code, prevents the municipality from regulating the proximity to a dwelling house for the appropriation of land for cemetery purposes other than burial.

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**To:** John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio  
**By:** William B. Saxbe, Attorney General, January 25, 1967

I have before me your request for my opinion wherein you pose the following question:

"In the Village of Mayfield is burial forbidden within one hundred yards of a dwelling house as provided in the ordinance, or only within one hundred feet of a dwelling house, as is provided by the statute Section 1721.03, Revised Code if interpreted to apply to burials?"

The ordinance referred to in your request is Ordinance No. 163 of the Village of Mayfield entitled "An Ordinance Regulating the Location of Cemeteries within the Village" which provides in part as follows:

"Sec. 1. Land shall not be appropriated or a cemetery located by an association incorporated for cemetery purposes or by benevolent or religious societies within One Hundred Yards of a dwelling house, unless the owner thereof gives his consent in writing.

"Sec. 2. No person operating or responsible for the operation of a cemetery, and no person employed by any cemetery shall permit,

cause or allow any burial to be made within a cemetery located within the Village of Mayfield within One Hundred Yards of a dwelling house, unless the owner thereof gives his consent in writing.

"Sec. 3. Any person operating a cemetery or responsible for the operation of a cemetery or any person employed by a cemetery who violates this ordinance, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$200.00."

Section 1721.03, supra, which is entitled "Proximity to Dwellings" provides as follows:

"Land shall not be appropriated, nor shall a cemetery be located, by an association incorporated for cemetery purposes or by a benevolent or religious society, within one hundred yards of a dwelling house, unless the owner of such dwelling house gives his consent, or unless the entire tract appropriated is a necessary addition to or enlargement of a cemetery already in use. The limits shall not be less than one hundred yards when it is sought to appropriate for cemetery purposes property adjoining a cemetery already in use, when such dwelling house was erected subsequent to the laying out and establishing of such cemetery. When a cemetery lies within or adjoins a Municipal Corporation, the association or corporation owning such cemetery, without such consent, may appropriate property within one hundred feet, or the width of a street or alley, of any dwelling house.

"The addition of any land across a street or public road is an enlargement of an existing cemetery for the purposes of this section."

The initial question which presents itself is whether there exists a conflict between state and municipal law. Article XVIII, Section 3, Ohio Constitution states:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws."

It appears to be obvious that Ordinance No. 163, supra, conflicts with Section 1721.03, supra, as prohibited by Arti-

cle XVIII, Section 3, supra. It might be argued that Ordinance No. 163 does not conflict with, but merely augments Section 1721.03, supra, by affording the citizens of Mayfield additional restriction upon a cemetery association. An analogous situation was presented in Schneiderman v. Sesanstein, 121 Ohio St. 80, where a municipal ordinance had been created imposing a speed limit less than that imposed by state statute. The Court there employed the following reasoning:

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"In determining whether the provisions of the ordinance in question conflict with the general law covering the same subject, a proper test may be applied by the inquiry: Does the ordinance prohibit an act which the statute permits, or permit an act which the statute prohibits? Village of Struthers v. Sokol, supra.

"When the law of the state provides that a rate of speed greater than a rate therein specified shall be unlawful, it is equivalent to stating that driving at a less rate of speed shall not be a violation of law; and therefore an ordinance of a municipality which attempts to make unlawful a rate of speed which the state by general law has stamped as lawful would be in conflict therewith.

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Thus applying the rationale of Schneiderman v. Sesanstein, supra, it would appear that Sec. 1 of Ordinance No. 163 and Section 1721.03, Revised Code, are in direct conflict, leaving unanswered the question of whether the burial provision of the ordinance is effective. In your request you noted that "it may be argued that, if the association may appropriate and locate the cemetery within one hundred feet of a dwelling house, it may bury within that distance, as it may use its entire property for all cemetery purposes." This argument might have merit were it not for Section 759.05, Revised Code, which states:

"The legislative authority of a municipal corporation may prohibit the interment of the dead within the municipal corporation limits, and, for the purpose of making such prohibition effective, may impose proper fines and penalties and cause any body, interred contrary thereto, to be taken up and buried without the limits of the municipal corporation."

The above provision combined with the language of Sec-

tion 759.01, Revised Code, which permits a municipality to "regulate public and private cemeteries and crematories", would seem to make the substance of Section 2 of the municipal ordinance valid. It certainly seems that the sections are independently operative and thus severable, which would give Section 2 continued effect. Piqua v. Zimmerlin, 35 Ohio St. 507 (1880).

Therefore, it is my opinion and you are advised that a municipality may regulate the distance a burial must be made from a dwelling house pursuant to Section 759.05, Revised Code, even though Section 1721.03, Revised Code, prevents the municipality from regulating the proximity to a dwelling house for the appropriation of land for cemetery purposes other than burial.