

August 30, 1994

OPINION NO. 94-049

The Honorable Jeffrey M. Welbaum
Miami County Prosecuting Attorney
201 W. Main Street
Safety Building
Troy, Ohio 45373

Dear Prosecutor Welbaum:

You have requested an opinion regarding the ownership and maintenance of a public cemetery located in a village. According to your letter,

In 1886, the Village of New Lebanon (now known as Potsdam), Ohio, in Miami County was incorporated. The name of the village was later changed to Potsdam, which is its current name.

Prior to the village's incorporation, a cemetery was established. The cemetery, known then as Georgetown Cemetery, was a private cemetery. Individual parcels for grave sites were conveyed to persons by private parties. Further, for at least a portion of the area in question, a board of directors of a cemetery association maintained title and control.

The original Village of New Lebanon's petition for incorporation indicates that the cemetery was located within the municipal (village) corporate boundaries.

In 1904, by deeds from private parties, an addition to Georgetown Cemetery, was purchased and conveyed to the Union Township Trustees for cemetery purposes.

The township trustees, from that time to the present, have controlled, maintained, and cared for the cemetery addition conveyed to them in 1904. Since 1904, the township trustees, in fact, have exclusively controlled and maintained the entire cemetery including the cemetery existing in the village at the time of its incorporation and the addition thereto conveyed to the township trustees. The facts and circumstances as to how the township trustee[s] assumed full control and care of the entire cemetery is not determinable either from deed records or township records. Likewise, the time period of control and maintenance by the township is not precisely determinable, but it has been substantial. The entire cemetery has been considered a public cemetery for this same period. The entire cemetery is now known as Potsdam Cemetery.

In light of this background, you ask:

Where a township obtains land by deed from private parties for cemetery purposes in an incorporated village, and thereafter controls, cares for, and maintains the premises, is the township or the incorporated village, currently vested with title of, control over, and the maintenance responsibility for the cemetery which is maintained as a public cemetery?

The Title to, Right of Possession, and Responsibility for the Maintenance and Care of a Public Cemetery Located in a Village Is Vested in the Village in Which the Cemetery Is Located

R.C. 759.08 provides for the ownership of public cemeteries and burial grounds located in municipal corporations:

The title to and right of possession of public cemeteries and burial grounds located within a municipal corporation¹ and set apart and dedicated as public cemeteries or burial grounds, and grounds used as such by the public but not dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, are hereby vested in the municipal corporation in which such cemetery or burial ground is located. (Footnote added.)

R.C. 759.08 thus unequivocally states that the title to and right of possession of a public cemetery located within a village vests with the village in which the cemetery is located.

1991 Op. Att'y Gen. No. 91-062, which addressed the issue whether a township or village is responsible for the maintenance of township cemeteries that are located, through various annexations, within a village, examined the language of R.C. 759.08 and concluded as follows:

Pursuant to R.C. 759.08, when a cemetery to which a township holds title under R.C. 517.10 becomes located in a village by annexation, title to the cemetery and the concomitant duty of care and maintenance vests in the village, regardless of whether a deed to the cemetery is given to the village by the board of township trustees.

Op. No. 91-062 (syllabus, paragraph one); *accord* 1963 Op. Att'y Gen. No. 26, p. 116; 1962 Op. Att'y Gen. No. 3170, p. 601; 1929 Op. Att'y Gen. No. 1339, vol. III, p. 2010. Op. No. 91-062 reasoned that,

by operation of law, title to the cemeteries you have described is now vested in the village.

¹ The term "municipal corporation" includes villages. *See* Ohio Const. art. XVIII, §1; R.C. 703.01.

The transfer of title is not dependent on either the formal execution of a deed or the willingness of the village to accept the property. 1963 Op. No. 26 at p. 118; 1929 Op. Att'y Gen. No. 1339, vol. III, p. 2010. Accordingly, upon annexation, responsibility for the maintenance of the cemeteries described in your request shifted to the legislative authority of the village or to the village board of cemetery trustees, pursuant to the provisions of R.C. 759.19-.26, and there is no necessity for the board of township trustees to "give" the cemeteries to the village. The trustees have authority, however, to take cognizance of the statutory change of title by formal transfer of a deed, *see, e.g., King v. City of Shelby*, 40 Ohio App. 195, 197, 178 N.E. 22, 23 (Richland County 1931).

Op. No. 91-062 at 2-297. Accordingly, a public cemetery located inside a village is the property of the village, since the title and right of possession to that cemetery is vested in the village by R.C. 759.08. Op. No. 91-062; 1963 Op. No. 26; 1962 Op. No. 3170; 1929 Op. No. 1339. Furthermore, the village is responsible for the maintenance and care of that cemetery, regardless of whether a deed to the cemetery is given to the village by the board of township trustees. Op. No. 91-062.

A Village Is Authorized to Transfer Title to a Public Cemetery to a Township in Which the Village is Located

The only exception to R.C. 759.08 appears in R.C. 759.19. That section authorizes the legislative authority of a village to transfer title to a public cemetery to the township in which the village is located upon such terms as are agreed to between the village and the board of township trustees.² *See* Op. No. 91-062. After the transfer of ownership from the village to the township under R.C. 759.19, the township has a duty under R.C. 517.11³ to preserve and protect that public cemetery. R.C. 759.19. Therefore, pursuant to R.C. 759.08, the title to, right of possession, and

² R.C. 759.19 reads 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.

³ R.C. 517.11 provides, in part, that "[t]he board of township trustees shall provide for the protection and preservation of cemeteries under its jurisdiction, and shall prohibit interments therein when new grounds have been procured for township cemeteries or burial grounds."

responsibility for the maintenance and care of a public cemetery that is located in a village is vested in the village, unless the village has transferred title to that cemetery to the township in which the village is located under R.C. 759.19.

**The Title to, Right of Possession, and Responsibility for the Maintenance and Care of
Potsdam Cemetery is Vested in the Village of Potsdam**

With respect to your specific inquiry, you have stated that Potsdam Cemetery, a public cemetery, is located in the Village of Potsdam and deeded, in part, to Union Township.⁴ In addition, Union Township currently controls and maintains Potsdam Cemetery. You state further that insofar as a portion of Potsdam Cemetery is deeded to Union Township and the township controls and maintains the cemetery, the village argues that the title to, right of possession, and responsibility for the maintenance and care of Potsdam Cemetery is vested in Union Township.

As noted above, unless a village has transferred title to a public cemetery to the township in which the village is located under R.C. 759.19, a public cemetery located inside a village is the property of the village since the title and right of possession to that cemetery is vested in the village by R.C. 759.08. According to information provided, the title to Potsdam Cemetery was not transferred to Union Township pursuant to R.C. 759.19. Thus, the fact that a portion of Potsdam Cemetery is deeded to Union Township, or that Union Township has assumed the care and maintenance of Potsdam Cemetery, is not determinative on the issue of whether Union Township or the Village of Potsdam is vested with title and right of possession to Potsdam Cemetery. Rather, the controlling factor is the location of the public cemetery. *See* 1962 Op. No. 3170 at p. 604 ("[t]hus, under Section 759.08, *supra*, since the public cemetery in question is located within a municipal corporation, the title to and right of possession of such cemetery is vested in the municipal corporation"). *Compare* R.C. 759.08 (the title to and right of possession of a public cemetery located within a municipal corporation is vested in the municipal corporation) *with* R.C. 517.10 (the title to, right of possession, and control of a public cemetery located outside any municipal corporation is vested in the township in which the cemetery is located). Since Potsdam Cemetery is located in the Village of Potsdam, the title to, right of possession, and responsibility for the maintenance and care of Potsdam Cemetery is, pursuant to R.C. 759.08, vested in the Village of Potsdam.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 759.08, the title to, right of possession, and responsibility for the maintenance and care of a public

⁴ According to information provided, "[d]eed records indicate only a portion of the total area of the current cemetery was purchased by the Township Trustees in 1904. The current cemetery is approximately three acres, the amount purchased by the Township Trustees in 1904 was 1.45 acres." It thus appears from the information provided that only a portion of Potsdam Cemetery is deeded to Union Township.

The Honorable Jeffrey M. Welbaum

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cemetery that is located in a village is vested in the village, unless the village has transferred title to that cemetery to the township in which the village is located under R.C. 759.19.

Respectfully,

LEE FISHER
Attorney General

August 30, 1994

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Miami County Prosecuting Attorney
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Safety Building
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SYLLABUS:

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Pursuant to R.C. 759.08, the title to, right of possession, and responsibility for the maintenance and care of a public cemetery that is located in a village is vested in the village, unless the village has transferred title to that cemetery to the township in which the village is located under R.C. 759.19.