

**OPINION NO. 99-047****Syllabus:**

1. The board of trustees of a township that has obtained title to a cemetery pursuant to R.C. 517.10 may prohibit future interments in the cemetery if, in the reasonable exercise of its discretion, the board determines that such a prohibition is necessary for the regulation, protection, and preservation of the cemetery. Factors that might support such a determination include findings that future interments are not possible for physical reasons or that such interments would endanger the public health or offend public sensibilities.
2. A township that prohibits future interments in a township cemetery operated pursuant to R.C. Chapter 517 may be required to provide compensation to persons who have private property interests in cemetery lots.
3. The operation of a township cemetery is a governmental function pursuant to R.C. Chapter 2744, and a township is immune from tort liability as provided in R.C. 2744.02. Further immunity is granted under R.C. 2744.03 for discretionary determinations regarding planning or use of township property.

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**To: David L. Landefeld, Fairfield County Prosecuting Attorney, Lancaster, Ohio**  
**By: Betty D. Montgomery, Attorney General, September 1, 1999**

We have received your request for an opinion regarding Hopewell Cemetery in Madison Township, Fairfield County, Ohio. You have raised the following questions:

1. Can a township, which pursuant to R.C. 517.10 has obtained title to grounds which have been used as a public cemetery, prohibit future interments in the cemetery?
2. If the township can prohibit future interments, what conditions would be necessary for the township to do this?
3. What liability would the township have to individuals claiming to own a burial lot within said cemetery?

We are informed that Hopewell Cemetery was at one time a church-operated cemetery. The church now no longer functions. We are also informed that the cemetery has had a somewhat checkered history, and that at some point in the past an individual caretaker removed all the headstones in an apparent effort to resod the cemetery and failed to place them in the right order again.

In addition, we are told that there are no records as to who is buried in the cemetery or where they are buried. Consequently, if an individual were to request a burial in the cemetery, the township would have no way of ensuring that the plot chosen for burial was the one originally purchased or even that it was not occupied with an unknown, unrecorded burial.

You have indicated to us that, “[a]s you can see, this matter has become complicated by the fact that individuals seeking burial there are doing so because some of their family members are already buried there. A denial of a burial permit raises emotions to an unacceptable level.”

In a recent telephone conversation with your representative, we were informed that the confusion with the gravestones happened perhaps forty years ago, before the township had control of the cemetery. Further, any cemetery records that had existed were destroyed in a fire. It is not known whether any persons claim the right to burial plots in the cemetery or what the nature of their claims might be.

In order to answer your questions, let us look first at the statutes governing a cemetery of the sort in question.<sup>1</sup> Pursuant to R.C. 517.10, the board of township trustees has “[t]he title to, right of possession, and control of all public cemeteries located outside any municipal corporation,” except cemeteries that are owned or under the care of a municipal corporation, a religious or benevolent society, or an incorporated company or association. R.C. 517.10. Thus, if a church ceases to function, its cemetery becomes the property of the township without action on the part of either party. *Id.*; see 1954 Op. Att’y Gen. No. 4163, p. 423.<sup>2</sup>

The board of township trustees is given certain powers and duties with respect to cemeteries under its jurisdiction.<sup>3</sup> 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; see 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.” *Id.* 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. The board of township trustees also has authority to order that a cemetery be discontinued and the remains be removed and reinterred, 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.

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<sup>1</sup> In general, cemeteries must be registered in accordance with R.C. Chapter 4767. R.C. 4767.02; see also R.C. 4767.03. Exceptions exist for family cemeteries and for cemeteries in which there have been no interments during the previous twenty-five calendar years. R.C. 4767.02(C); see also 1993 Op. Att’y Gen. No. 93-005.

<sup>2</sup> There are other means by which townships may acquire cemeteries, including accepting a conveyance of cemetery land or making a purchase or appropriation. See R.C. 517.01; R.C. 517.04-.05; R.C. 517.08; R.C. 517.13; R.C. 517.27. However, a township has no statutory duty to provide a cemetery.

<sup>3</sup> The board of township trustees may appoint three directors to take charge of any cemetery in the township over which the board has control. R.C. 517.20. Those directors are governed by the provisions of R.C. Chapter 517. If such directors are appointed, the analysis governing the powers of the board of township trustees is applicable also to such directors. See, e.g., 1961 Op. Att’y Gen. No. 2482, p. 540.

The law requires that the board of township trustees have a township cemetery laid out in lots, avenues, and paths, and that the board number the lots and keep a plat. R.C. 517.06. The board is also directed to "make and enforce all needful rules and regulations for the division of such cemetery into lots, for the allotment thereof to families or individuals, for the care, supervision, and improvement thereof," and to have the grass and weeds cut. *Id.* The rules may govern such matters as the conveyance of cemetery lots to nonresidents, *see* 1987 Op. Att'y Gen. No. 87-042, the digging of graves, *see* 1929 Op. Att'y Gen. No. 791, vol. II, p. 1210, and the payment for services, *see* 1936 Op. Att'y Gen. No. 5447, vol. I, p. 530.

Statutory provisions authorize the board of township trustees to sell or otherwise deliver deeds to cemetery lots for burial purposes. R.C. 517.07; *see* 1987 Op. Att'y Gen. No. 87-042; 1972 Op. Att'y Gen. No. 72-031 (deed to cemetery lot conveys easement for purposes of burial); 1961 Op. Att'y Gen. No. 2256, p. 283. The statute provides terms that may be included in such deeds, including terms limiting the time within which the lot may be used. R.C. 517.07. The board is authorized to "repurchase any cemetery lot from its owner at any time at a price that is mutually agreed upon by the board and the owner." *Id.*

Let us next consider whether, and under what conditions, a township may prohibit interments in a former church cemetery that it now controls pursuant to R.C. 517.10. The general authority of the board of trustees to control, protect, and preserve a cemetery, and to regulate its division into lots, permits the board to exercise reasonable discretion in making decisions concerning the operation and maintenance of the cemetery. *See, e.g.*, 1936 Op. Att'y Gen. No. 5447, vol. I, p. 530. It is evident that to regulate, protect, and preserve a cemetery, it may be necessary at some point to prohibit future interments in the cemetery. Further, at some time it may be physically impossible to make additional lots available. Thus, the authority of a board of township trustees to prohibit future interments in a public cemetery is inherent in the board's authority to protect and preserve the cemetery and to regulate the platting of the cemetery and the allotment of lots.

The conditions under which future interments may be prohibited are left to the determination of the board of trustees, in the reasonable exercise of its discretion. In exercising its discretion, the board should consider all relevant facts, including the amount and type of space available and the effect of additional interments on public health and public sensibilities. *See generally* R.C. 2927.01 (defining offenses relating to abuse of a corpse in terms of treatment that would outrage reasonable family or community sensibilities). The factors that you have presented—that there are no records as to who is buried in the cemetery or where they are buried and that any effort to commence an excavation for burial may uncover another grave—would support a determination to close the cemetery to future burials. Whether those factors are sufficient is a matter that must be determined by the board of township trustees, in the reasonable exercise of its discretion in light of all relevant facts.

You have expressed concern that a township might not be able to prohibit future interments in an existing cemetery unless it has procured grounds for a new cemetery. This concern is based on the language of R.C. 517.11 stating that the board of township trustees "shall prohibit interments therein when new grounds have been procured for township cemeteries or burial grounds." Your suggestion is that a township might not be able to prohibit future interments if it has not procured new cemetery land. It does not appear, however, that this conclusion necessarily follows from the language of the statute. The language in question describes circumstances in which future interments must be prohibited, but it does not prevent a township from prohibiting future interments in other circumstances—as, for example, when it is physically impossible to provide for future interments because no space remains. Thus, we do not find it reasonable to read R.C. 517.11 to require

a township to provide additional cemetery space before it prohibits the use of existing space, especially since there is no statutory requirement that a township provide a cemetery. *See* note 2, *supra*.

We conclude, therefore, that the board of trustees of a township that has obtained title to a cemetery pursuant to R.C. 517.10 may prohibit future interments in the cemetery if, in the reasonable exercise of its discretion, the board determines that such a prohibition is necessary for the regulation, protection, and preservation of the cemetery. Factors that might support such a determination include findings that future interments are not possible for physical reasons or that such interments would endanger the public health or offend public sensibilities.

In a telephone conversation, your representative asked whether it might be possible to close the cemetery to future burials except in the event that someone can establish a preexisting right to burial and a capacity to identify the location of the plot, with the further condition that the person assume any costs or damages that may occur in connection with the burial. Action of that sort would be permissible if the board of township trustees, in the reasonable exercise of its discretion, finds it an appropriate means of managing the cemetery.

You have also asked what liability the township would have to individuals claiming to own burial lots in the cemetery. Your representative has indicated that the township trustees would like to take steps to eliminate any possible liability from closing the cemetery. Questions concerning liability in particular circumstances cannot be determined by means of opinions of the Attorney General. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-028; *see also King v. City of Shelby*, 40 Ohio App. 195, 178 N.E. 22 (Richland County 1931). It is possible, however, to discuss general principles regarding liability that may be applicable in the circumstances you have described.

A board of township trustees is subject to the provisions of R.C. Chapter 517 governing cemeteries. Thus, the township is obligated to comply with statutory provisions governing the allotment and sale of cemetery lots and the management of cemetery property. *See, e.g.*, R.C. 517.06-.07; R.C. 517.10. Existing statutes authorize a township to include in the terms of sale and deeds for cemetery lots provisions permitting the township to regain unused cemetery lots by following specified procedures. R.C. 517.07. When those provisions have been employed, the statutory procedures must be followed and compensation paid as provided therein. *Id.*; *see also* 1990 Op. Att'y Gen. No. 90-066.

In your situation, however, it appears that interests in cemetery lots may have been granted without any rights of reentry on the part of the township. In that case, attention should be given to general provisions of basic contract and property law, which apply to governmental entities except as otherwise provided. *See* R.C. 503.01; R.C. 2743.02; *State ex rel. Cope v. Cooper*, 122 Ohio St. 321, 171 N.E. 399 (1930); 1997 Op. Att'y Gen. No. 97-036; 1989 Op. Att'y Gen. No. 89-033; 1972 Op. Att'y Gen. No. 72-031. If a governmental entity is a party to a valid deed or contract, it is ordinarily bound by the terms of the instrument either to comply with it or to be liable for damages. *See generally* 1990 Op. Att'y Gen. No. 90-066 (syllabus, paragraph 1) (municipality and township operating a union cemetery may not, by rule, terminate property interest of an unknown owner of an unused cemetery lot). If actions of the township result in the taking of private property, due process of law must be provided and appropriate compensation must be paid. *See* U.S. Const. amends. V and XIV; Ohio Const. art. I, §§ 16 and 19; 1994 Op. Att'y Gen. No. 94-040, at 2-207 to 2-208; 1972 Op. Att'y Gen. No. 72-031. Therefore, a township that prohibits future interments in a township

cemetery operated pursuant to R.C. Chapter 517 may be required to provide compensation to persons who have private property interests in cemetery lots.

With respect to potential tort liability, it should be noted that townships are included as political subdivisions for purposes of R.C. Chapter 2744, and that "[t]he design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery" is defined as a "governmental function" for purposes of that chapter. R.C. 2744.01(C)(2)(s) and (F). Pursuant to R.C. 2744.02(A)(1), a township is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission in connection with a governmental function except in the circumstances set forth in R.C. 2744.02(B). Those circumstances include negligence in operating motor vehicles on public roads, negligence in keeping public roads in repair or in removing obstructions from public roads, and negligence in or on the grounds of and due to physical defects in or on the grounds of buildings used for governmental functions. R.C. 2744.02. It does not appear that any of these circumstances is likely to be involved in the instant case. Hence, it appears unlikely that a township would be liable for damages under R.C. 2744.02 in the circumstances with which you are concerned.

Even if there might be liability under R.C. 2744.02, however, certain defenses or immunities are granted under R.C. 2744.03 for situations involving the exercise of discretion. A political subdivision is immune if the employee's action or failure to act "was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee." R.C. 2744.03(A)(3). Additionally, the political subdivision is immune from liability for injury resulting from "the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(5). A decision to close a cemetery to further burials appears to be a decision that requires the exercise of a high degree of judgment or discretion of the sort that comes within the immunities established by R.C. 2744.03(A)(3) and R.C. 2744.03(A)(5). *See, e.g., McVey v. City of Cincinnati*, 109 Ohio App. 3d 159, 671 N.E.2d 1288 (Hamilton County 1995), *discretionary appeal not allowed*, 76 Ohio St. 3d 1409, 666 N.E.2d 568 (1996). Therefore, a good faith decision to close a township cemetery to further burials does not appear to come within the actions for which liability may be imposed under R.C. 2744.02-.03. *See, e.g., Opial v. City of Rossford*, 116 Ohio App. 3d 588, 688 N.E.2d 1073 (Wood County 1996). *See generally Scott v. Spearman*, 115 Ohio App. 3d 52, 684 N.E.2d 708 (Licking County 1996), *appeal dismissed*, 79 Ohio St. 3d 1215, 681 N.E. 2d 437 (1997).

In conclusion, it may be stated generally that the operation of a township cemetery is a governmental function pursuant to R.C. Chapter 2744, and a township is immune from tort liability as provided in R.C. 2744.02. Further immunity is granted under R.C. 2744.03 for discretionary determinations regarding planning or use of township property.

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. The board of trustees of a township that has obtained title to a cemetery pursuant to R.C. 517.10 may prohibit future interments in the cemetery if, in the reasonable exercise of its discretion, the board determines that such a prohibition is necessary for the regulation, protection, and preservation of the cemetery. Factors that might support such a determination include findings that future interments are

not possible for physical reasons or that such interments would endanger the public health or offend public sensibilities.

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