

August 19, 2019

The Honorable Scott A. Haselman
Fulton County Prosecuting Attorney
152 S. Fulton Street, Suite 240
Wauseon, Ohio 43567

SYLLABUS:

2019-030

1. Under R.C. 517.11, a board of township trustees may, by majority vote, purchase a columbarium for any cemetery under the jurisdiction of the township. (1969 Op. Att’y Gen. No. 69-101, overruled, on the basis of legislative amendment.)
2. Under R.C. 505.262, a board of township trustees may contract for the construction of a columbarium for a cemetery under the jurisdiction of the township, but only by the unanimous vote of the board.



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OPINION NO. 2019-030

The Honorable Scott A. Haselman
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Wauseon, Ohio 43567

Dear Prosecutor Haselman:

You have requested an opinion regarding the authority of a board of township trustees to purchase or construct a columbarium in a township cemetery that is currently in use.¹ You ask whether the board may proceed with such purchase or construction by a majority vote of the board's membership, rather than by a unanimous vote. Your question arises in the context of three statutes, each of which could be interpreted as providing a board of township trustees varying degrees of authority in the purchase or construction of a columbarium, and establishing the level of support required from the membership of the board of township trustees. In evaluating the authority of the board in this situation, you ask us to reconsider language in a previous opinion, 1969 Op. Att'y Gen. No. 69-101.

Statutory Scheme: R.C. 517.08; R.C. 517.11; and R.C. 505.262

Three statutes provide boards of township trustees with varying degrees of authority to purchase, construct, maintain, or improve columbaria. The first statute, R.C. 517.08, authorizes a board of trustees to use proceeds from the sale of cemetery lots to maintain or to improve entombments, including columbaria, and provides as follows:

The proceeds arising from the sale of cemetery lots under section 517.07 of the Revised Code shall be used in maintaining, improving, beautifying, and embellishing such grounds, *and for maintaining and improving entombments,*

¹ A columbarium is "a vault with niches for urns containing the ashes of cremated bodies." *Webster's New World College Dictionary* 296 (5th ed. 2014); *see also* R.C. 1721.21(A)(1)(c), (A)(6).

including mausoleums, columbariums, and other interment rights[.] (Emphasis added.)

The second statute, R.C. 517.11, authorizes a board of township trustees to purchase, maintain, and improve columbaria, and levy taxes to cover the costs of such purchase, maintenance, or improvement. The statute provides as follows:

The 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. Where such old cemeteries are in or near village plats, and the public health is liable to be injured by further interments therein, 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.

The board may enclose cemeteries *under its jurisdiction* with a substantial fence or hedge, and shall keep any such fence or hedge in good repair. It may re-erect any fallen tombstones, regardless of the cause of the falling, in such cemeteries. *The board, as it considers necessary, may purchase, maintain, and improve entombments, including mausoleums, columbariums, and other interment rights.* The board may levy a tax to meet any costs incurred for these purposes, not to exceed one-half mill in any one year, upon all the taxable property of the township. (Emphasis added.)

Finally, R.C. 505.262 is a general statute that provides a board of township trustees the authority to contract for the construction of buildings, by unanimous vote of the board. It provides, in part, as follows:

(A) Notwithstanding division (D) of section 505.37 of the Revised Code or any other statute of this state, the board of township trustees of any township, *by unanimous vote*, may adopt a resolution allowing the township to contract for the purchase of equipment, buildings, and sites, *or for the construction of buildings*, for any lawful township purpose.

R.C. 505.262(A) (emphasis added). Of the three statutes above, you ask which, if any, may be used as authority for a board of township trustees to purchase or construct, by majority vote, a columbarium for a township cemetery currently in use.

1969 Op. Att’y Gen. No. 69-101

Your question first requires us to examine the application of the second statute above, R.C. 517.11. In 1969 Op. Att’y Gen. No. 69-101, the Attorney General concluded that R.C. 517.11 “*refers to cemeteries which are no longer being used.*” 1969 Op. Att’y Gen. No. 69-101,

at 2-207 (emphasis added). Under the current version of R.C. 517.11, a township has authority to purchase a columbarium. If R.C. 517.11 were limited to cemeteries no longer in use, as the 1969 opinion advises, then a board of township trustees would have the authority to purchase a columbarium for a cemetery *no longer* in use, but the board would lack the authority to purchase a columbarium for a cemetery *still* in use. This questionable result was not likely the intent of the General Assembly. See *State ex rel. Brecksville Educ. Ass'n, OE/NEA v. State Emp. Relations Bd.*, 74 Ohio St. 3d 665, 671, 660 N.E.2d 1199 (1996) (“[i]n construing the statutes of this state, we must presume that just and reasonable results are intended by the General Assembly”).

In fact, the General Assembly amended R.C. 517.11 to avoid this very result. Sub. H.B. 413, 131st Gen. A., at 23 (eff. Sept. 28, 2016). The legislature deleted the word “such” in the first sentence of the second paragraph of R.C. 517.11, quoted in full above, which referred to “old cemeteries” in the first paragraph. At the time the 1969 opinion was issued, R.C. 517.11 provided that a board of township trustees may enclose “such [old] cemeteries with a substantial fence or hedge.” *Id.* Now, R.C. 517.11 provides that a board of township trustees may enclose “cemeteries under its jurisdiction with a substantial fence or hedge,” clarifying that the statute applies to *all* cemeteries under a township’s jurisdiction, whether the cemeteries are currently in use or not. *Id.* In light of this legislative enactment, we find it necessary to overrule 1969 Op. Att’y Gen. No. 69-101 to the extent the opinion stands for the proposition that R.C. 517.11 applies only to cemeteries no longer in use. Consequently, we conclude that R.C. 517.11 applies to all cemeteries under the jurisdiction of a township.

Authority of Board of Township Trustees to Purchase or Construct Columbaria by Majority Vote

A board of township trustees, as a creature of statute, may act only in accordance with authority expressly or implicitly granted by law. 2017 Op. Att’y Gen. No. 2017-007, at 2-53. The first statute above, R.C. 517.08, authorizes a board of township trustees to use proceeds from the sale of cemetery lots to *maintain* and to *improve* columbaria. “Maintain” is defined as “to keep in a certain condition or position, esp. of efficiency, good repair, etc.; preserve.” *Webster’s New World College Dictionary* 880 (5th ed. 2014). “Improve” is defined as “to raise to a better quality or condition; make better.” *Id.* at 732. Consequently, both words refer to actions done to something already in existence or under the care of a board of township trustees. The statute does not authorize the purchase or construction of columbaria, even though the two other statutes detailed above contain the terms “purchase” and “construct.” The General Assembly is presumed to have intended different results when it uses certain language in one statute and entirely different language in another statute. See *Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927); *Lake Shore Elec. Ry. Co. v. P.U.C.O.*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926). Therefore, because R.C. 517.08 limits the authority of a board of township trustees to using cemetery lot proceeds to improve or maintain columbaria, a board cannot act under authority of R.C. 517.08 to purchase or construct columbaria.

The second statute, R.C. 517.11, authorizes a board of township trustees to “purchase” columbaria. The General Assembly, in 2016, in addition to clarifying that R.C. 517.11 applies to all cemeteries under the jurisdiction of a township, also enacted express authority for boards of township trustees to purchase columbaria, by adding an additional sentence to the second paragraph of the statute: “The board, as it considers necessary, may purchase, maintain, and improve entombments, including mausoleums, columbariums, and other interment rights.” Sub. H.B. 413, 131st Gen. A., at 23 (eff. Sept. 28, 2016). R.C. 517.11 does not require a board of township trustees to act by unanimous vote when purchasing a columbarium for use in a cemetery under the jurisdiction of the township. *See State ex rel. Saxon v. Keinzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) (“[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur”); 2007 Op. Att’y Gen. No. 2007-002, at 2-20 n.10; 1929 Op. Att’y Gen. No. 892, Vol. II, p. 1390, at 1391 (“a majority of the board of township trustees may transact such business as does not expressly require unanimous vote”). Therefore, under R.C. 517.11, a board of township trustees may decide to purchase a columbarium, by majority vote, for use in any cemetery under the jurisdiction of the township.

By contrast, the third statute, R.C. 505.262, *does* require a board of township trustees to act by unanimous vote when contracting for the construction of buildings. As set forth above, that statute authorizes a board of township trustees, by unanimous vote, “*to contract* for the purchase of equipment, buildings, and sites, or *for the construction of buildings*, for any lawful township purpose.” R.C. 505.262(A) (emphasis added). Therefore, under R.C. 505.262, when contracting for the construction of a columbarium, a board of township trustees must act by unanimous vote. In this context, however, the bare “unanimous vote” requirement in R.C. 505.262 means the absence of dissent, rather than an affirmative favorable vote from all members of the board of township trustees. *See* 1985 Op. Att’y Gen. No. 85-010, at 2-38. Consequently, if a member of the three-member board of township trustees is absent or is recused from voting, for example, the other two members of the board may vote to contract for the construction of a columbarium, so long as those two members are in agreement.

With respect to “purchasing,” R.C. 505.262 conflicts with the more specific R.C. 517.11. As noted above, R.C. 517.11 authorizes a board of township trustees to purchase a columbarium by majority vote. R.C. 505.262 can reasonably be interpreted, however, as requiring a unanimous vote when a board of township trustees contracts to purchase a columbarium. As such, the two statutes conflict. Under the Revised Code, the rule in reconciling conflicting statutes is as follows:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local 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. Here, the amendments to R.C. 517.11 are special provisions that apply to entombments, such as mausoleums and columbaria, and were enacted later than the general provisions of R.C. 505.262 which apply to all township buildings. There is no indication that the General Assembly intended the general R.C. 505.262 to prevail over the more specific R.C. 517.11 with respect to purchasing columbaria. Therefore, we conclude that, with respect to the purchase of columbaria, R.C. 517.11 provides the controlling authority, and a board of township trustees may purchase a columbarium by majority, rather than unanimous, assent.

With respect to a board of township trustees contracting for the “construction” of columbaria, however, R.C. 505.262 controls. “When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need . . . to apply the rules of statutory interpretation.” *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 553, 721 N.E.2d 1057 (2000). The General Assembly made the policy decision to differentiate between procedural requirements that apply to a board of township trustee’s decision to *purchase* a columbarium and the decision to contract for the *construction* of a columbarium. The General Assembly has not authorized a board of township trustees to “construct” a columbarium by majority vote, as that term does not appear in R.C. 517.11. We cannot say that this distinction is an unreasonable one, and, consequently, we interpret the law as it is written. Therefore, we conclude that a board of trustees may purchase a columbarium for any cemetery under its jurisdiction by majority vote pursuant to R.C. 517.11, but the board must act by unanimous vote when contracting for the construction of a columbarium under R.C. 505.262.

Conclusions

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

1. Under R.C. 517.11, a board of township trustees may, by majority vote, purchase a columbarium for any cemetery under the jurisdiction of the township. (1969 Op. Att’y Gen. No. 69-101, overruled, on the basis of legislative amendment.)
2. Under R.C. 505.262, a board of township trustees may contract for the construction of a columbarium for a cemetery under the jurisdiction of the township, but only by the unanimous vote of the board.

Respectfully,



DAVE YOST
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