

Opinion No. 52-5596

September 23, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: State Highway Commission State Capitol Santa Fe, New Mexico

{*308} Chapter 226 of the Laws of 1939 granted to the town of Silver City, subject to restrictions and limitations set forth in the Chapter, Block 239 of the original townsite of Silver City for public park purposes. It required the governor and the secretary of state to execute a proper conveyance of the property, provided the town should "first acquire in the name of the State of New Mexico a tract of land satisfactory to the State Highway Commission for the purpose of erecting and maintaining thereon the buildings and improvements now situated upon said Block 239 of the original townsite of Silver City, owned by the State Highway Commission, and provided further that the town of Silver City shall bear all costs of moving and reerecting such buildings and improvements upon the new site, or such portion of such costs as will be agreed upon between the town of Silver City and the State Highway Commission." The law also provided that title would revert to the state if the town failed to keep and maintain the plot as a public park. It repealed Chapter 153 of the Session Laws of 1937, a similar act which had apparently contained a misdescription but which was an outright grant, and did not include the above-quoted provisos.

You have asked for an opinion of this office as to the State Highway Commission's authority to proceed under Chapter 226 of the Laws of 1939 where one of the buildings located on said tract is so constructed of concrete, steel and glass that its removal would be impractical. You have suggested that if Chapter 226 cannot be complied with, perhaps the authority to dispose of the building to the town of Silver City rests in the State Purchasing Agent.

Although there is some doubt as to whether real estate purchased or sold by the state departments, offices, commissions and institutions must be handled by the State Purchasing Agent (Sec. 6-708 NMSA, 1941 (Supplement), it is not felt that the law creating that office and defining the duties of the Purchasing Agent (Chapter 124, Laws of 1943) is so inconsistent with Chapter 226 Laws of 1939 as to prevent the Commission from proceeding under the earlier statute. However, it would seem that in the letting of contracts for the re-erection or the removal of the buildings on the new site, if the Commission is to participate, such contracts should go through the State Purchasing Agent.

It cannot be assumed that the legislature intended that a cement {*309} building which could not be removed without its destruction must nevertheless be destroyed and its materials hauled to the new location. A reasonable construction of the above quoted proviso would be that if it was cheaper to rebuild a new building and the city and the Highway Commission would agree on the costs thereof, in lieu of moving and re-

erecting the old one, that such could be done under the law. A reasonable compliance with the law would not require a useless or impractical performance, and it would seem that after a tract of land satisfactory to the Highway Commission had been obtained and the costs of removing and re-erecting those buildings which can be removed practically was assured together with the costs of constructing a building similar to the one necessarily left on Block 239 that the governor and the secretary of state could then execute the conveyance.

Some reflection, however, should be given the practical aspects of the matter. Chapter 153 of the Laws of 1937 was an outright grant to the city, and, as such, provided for a reverter to the state should the plot be used other than as a public park. Chapter 226 of the 1939 Laws, however, is not an outright grant, but an exchange providing for the payment of costs, yet the same reverter clause was placed in this law so that though the city must now in effect purchase the property, it is restrained from using it for other than park purposes. Although a museum has been considered as proper use for park purposes (63 A.L.R. 484, 18 A.L.R. 1256), Sec. 14-3106 NMSA, 1941 prohibits the use of a tax levy unless title to the park has been conveyed **absolutely** to the town or city where the same is located.

The constitutionality of a donation to any person, association, public or private corporation could well be questioned, under Article IX, Sec. 14 of the Constitution of New Mexico, as could any appropriation for charitable, educational or benevolent purposes under Article IV, Sec. 31. Any interests of the Pioneers Foundation, Inc., of Silver City in the matter might be limited by these provisions. *Harrington v. Atteberry*, 21 N.M. 50, *White v. Board of Education of Silver City*, 42 N.M. 94.

On the other hand, as long as Chapter 226 remains on the books, title to this property in the state or the Highway Department is questionable, since the law provides that subject to the restrictions and limitations, the real estate "is hereby granted to the town of Silver City." Certainly the property could not be sold to another purchaser without the repeal of this law, and there is some doubt as to whether additional improvements or maintenance other than that required by ordinary wear and tear could legally be made upon this property by the use of road funds under the Constitution and laws of New Mexico, or under the Federal Aid Roads Act.

Since the legislature will soon convene, it might be well for the city and the Highway Commission to delay proceeding under this statute and agree upon exactly what can be done, and what is practical for each, and to present to the coming legislature a bill repealing Chapter 226 and authorizing the transfer pursuant to conditions agreeable and practicable. In the preparation of such a law, the constitutional limitations above-mentioned might well be considered. It should be noted that Article IX, Sec. 14, prohibits donations to public, as well as private, corporations, and a municipality itself is within the definition of a public corporation. (Black's Law Dictionary, Page 439).