

Opinion No. 67-127

October 31, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Robert L. Clay Capitol Buildings Improvement Commission State Capitol Santa Fe, New Mexico

QUESTION

FACTS

The Capitol Custodian Commission, and under it, the office of capitol custodian was created by Laws 1935, ch. 135. This act, as amended by subsequent legislatures, appears as Sections 6-1-9 through 6-1-17,, New Mexico Statutes Annotated, 1953 Compilation. For the purposes of this opinion, Sections 6-1-11 through 6-1-13, supra, creating the capitol custodian with certain powers and duties, are material. These sections state:

6-1-11. MAINTENANCE OF CAPITOL GROUNDS AND BUILDINGS -- EMPLOYEES -- RULES AND REGULATIONS. -- The capitol custodian, under the direction and supervision of the capitol custodian commission shall have the custody and control of the state capitol grounds and buildings and premises. It is the duty of the capitol custodian to provide for the preservation, repair, care, cleaning, heating and lighting of the buildings and the improvements, and to provide for the care and beautifying of the grounds and premises. The custodian shall employ the necessary employees and provide and enforce the rules and regulations for the conduct of such employees. He shall make all rules and regulations for the conduct of all persons in and about the buildings and grounds necessary and proper for the safety, care and preservation of the same.

6-1-12. BUILDINGS UNDER THE CARE, CUSTODY AND CONTROL OF THE CAPITOL CUSTODIAN. -- All buildings now or hereafter constructed or remodeled under the authority of chapter 53 [6-2-1 to 6-2-4, 6-2-6 to 6-2-12] of the Session Laws of 1945, and all buildings, except the Supreme Court building, owned or occupied by the state of New Mexico or agencies or departments thereof within a radius of two [2] blocks of the capitol grounds, shall be under the care, custody and control of the capitol custodian, to the same extent and in the same manner now provided by law.

6-1-13. GOVERNOR'S MANSION AND GROUNDS. -- The capitol custodian in addition to his other duties, shall have full charge and custody of the building known as the "Governor's Mansion," and the grounds surrounding and belonging to the same, and said governor's mansion and grounds shall be considered a part of said capitol building and grounds.

The Capitol Buildings Improvement Commission hereinafter referred to as CBIC, was created by Laws 1945, ch. 53. The act creating the CBIC which was amended by subsequent legislatures is compiled as Sections 6-2-1 through 6-2-12, New Mexico Statutes Annotated, 1953 Compilation. In 1963, the CBIC was given additional powers, including the power to raise additional money by issuing bonds, under the State Capitol Expansion Act, compiled as Sections 6-2-14 through 6-2-22, New Mexico Statutes Annotated, 1953 Compilation. By Laws 1965, chapters 246 and 49, compiled as Sections 6-2-22.1 through 6-2-24, New Mexico Statutes Annotated, 1953 Compilation, the CBIC was given further powers, again including the power to raise money by issuing additional bonds. Of these statutes Sections 6-2-1, 6-2-2, 6-2-5, 6-2-7, 6-2-10, 6-2-11, 6-2-16, 6-2-22, 6-2-22.1 and 6-2-23, supra, are deemed material to this opinion. These sections provide:

6-2-1. PURPOSE. -- That for the purpose of providing suitable and adequate quarters for the various legislative and executive departments of the state of New Mexico, and relieving the present congestion and lack of suitable and adequate quarters and offices in the present capitol building, and for the purpose of making the architectural design of said capitol building appropriate to New Mexico, the alteration, reconstruction and redesigning of said capitol building, the erection of new and additional buildings, including an executive mansion.

6-2-2. USE OF FUNDS FOR DESIGNING, ALTERATION, AND RECONSTRUCTION OF CAPITOL BUILDINGS, AND IMPROVEMENT OF GROUNDS. -- All unexpended balances remaining on hand as transferred and as appropriated by Laws 1945, chapter 53, section 2, as amended by section 1, chapter 18, Laws of 1951 (relating to the Capitol Improvement Program), or otherwise accumulated in the state capitol building fund, or the state building fund, together with the proceeds of bond issues already authorized, and funds which may be appropriated by the legislature, may be used by the capitol building improvement commission for the design, alteration, reconstruction, furnishing and redesigning of the capitol buildings, the erection and furnishing of new buildings, including a governor's residence, and the improvement of their grounds. Provided, however, that the amounts to be expended hereunder shall not exceed the appropriations to be made hereafter by the legislature, together with the unexpended balances on hand and proceeds from bond issues heretofore authorized.

6-2-5. EMPLOYMENT OF ARCHITECT AND STAFF -- LETTING OF CONTRACTS. -- The commission may employ necessary staff assistance including the retaining of a consulting architect to act as adviser to the commission. The commission is authorized to let contracts for the improvement, alteration and reconstruction of present capitol buildings and for the erection of additional buildings and for improvement of capitol grounds. The letting of all such contracts shall be based upon sealed competitive bids. The commission, or the state purchasing agent at the commission's request, shall advertise for bidders by publication in two [2] consecutive issues in any Santa Fe or Albuquerque, New Mexico, newspaper. Publication must be not less than twenty [20] days before the day of letting. The commission may let the work in one entire contract or to different contractors for portions thereof. The commission is authorized to reject

any or all bids and to call for new bids. The commission may require any contractor to give security in an amount to be fixed by the commission to secure the performance of any contract.

6-2-7. ADDITIONAL POWERS OF COMMISSION. -- The commission shall have full power and authority to do any and all acts necessary and proper in and about the acquisition of additional lands. The commission shall also have full power and authority to do any and all acts necessary and proper for the alteration, reconstruction and redesigning of the present capitol buildings and the erection of new and additional buildings, including an executive mansion, at Santa Fe, and selection and adoption of plans therefor, and the arrangement and architectural style thereof. No alteration to any building constructed, improved or acquired under authority of the capitol buildings improvement commission shall be made without the specific prior approval of the commission. The commission shall have power to negotiate and receive loans and grants from the United States government and to transfer such amounts to the state capitol expansion fund.

6-2-10. FURNISHING OF BUILDING -- FILING BY ARCHITECT OF PLANS AND SPECIFICATIONS. -- The said commission shall have full power and authority, in its discretion, to purchase, subject to the approval of the state purchasing agent, all necessary furniture and equipment necessary and requisite for the furnishing and equipping of the capitol building, as reconstructed and altered, and any new building, but it is hereby authorized and directed to use as much of the furniture and fixtures now in use, as may be suitable and is further authorized to sell any and all such furniture which may not be suitable, and the proceeds from such sale shall be added to the fund, provided by section 2 [6-2-2], and used in the purchase of new furniture and equipment, and may barter or trade furniture and equipment as aforesaid for suitable furniture and fixtures. When such work is completed the architect employed by said commission shall file with the secretary of the commission complete copies of all plans and specifications.

6-2-11. PROVIDING QUARTERS FOR OFFICES TEMPORARILY VACATED BY ALTERATION OR RECONSTRUCTION -- RENTAL PAYMENTS. -- The commission shall provide any bureau or office, compelled to vacate its quarters in the capitol building while the work contemplated hereby is in progress, with suitable quarters, and shall pay the rental thereof out of the fund referred to in section 2 [6-2-2] thereof. Provided that such rental shall be paid only in cases where said bureau or offices have no funds available for such purposes.

6-2-16. IMPROVEMENT OF CAPITOL BUILDINGS AND GROUNDS -- ADDITIONAL LAND AND BUILDINGS. -- Upon approval by the capitol buildings improvement Commission of the plan presented by the state planning office, as provided in section 4-20-6 New Mexico Statutes Annotated, 1953 Compilation, the commission is authorized to enter into contracts for the improvement, alteration and reconstruction of the present capitol buildings and grounds, for the acquisition of land for additional buildings, and for the design and construction of additional buildings, to the extent of the funds available in the state capitol expansion fund.

6-2-22. ISSUANCE AND SALE OF SEVERANCE TAX BONDS. -- When the capitol buildings improvement commission, by resolution duly passed, certifies to the state board of finance (1) that the requirements and provisions of the State Capitol Expansion Act [6-2-14 to 6-2-22] have been compiled with and (2) that just cause and need exists, the state board of finance shall issue and sell severance tax bonds in compliance with sections 72-18-29 through 72-18-51 New Mexico Statutes Annotated, 1953 Compilation, in an amount not exceeding the aggregate sum of six million dollars (\$ 6,000,000) to carry out the provisions of the State Capitol Expansion Act.

6-2-22.1 ACQUISITION AND IMPROVEMENT OF LAND -- ADDITIONAL BUILDING DESIGN AND CONSTRUCTION -- SEVERANCE TAX BONDS -- ISSUANCE AND SALE. -- The state board of finance may issue and sell severance tax bonds in compliance with sections 72-18-29 through 72-18-51, New Mexico Statutes Annotated, 1953 Compilation in an amount not exceeding the aggregate sum of three million dollars (\$ 3,000,000) to carry out the land acquisition, land improvement, land alteration, and additional building design and construction provisions of the State Capitol Expansion Act, being sections 6-2-14 through 6-2-22, New Mexico Statutes Annotated, 1953 Compilation (P.S.) (being Laws 1963, chapter 290) when the capitol buildings improvement commission certifies that need exists for the issuance of such bonds for such purposes.

Provided that not less than two hundred thousand dollars (200,000) shall be reserved for the sole purpose of purchasing the location in Santa Fe known as the Fort Marcy site. Provided, further, that not more than two hundred seventy-five thousand dollars (\$ 275,000) may be expended to purchase the Fort Marcy site.

6-2-23. EQUIPPING, REMODELING AND FURNISHING CAPITOL FACILITIES -- SEVERANCE TAX BONDS -- ISSUANCE AND SALE. -- The state board of finance may issue and sell severance tax bonds in compliance with sections 72-18-29 through 72-18-51, New Mexico Statutes Annotated, 1953 Compilation in an amount not exceeding the aggregate sum of two million dollars (\$ 2,000,000) to carry out the provisions of the State Capitol Expansion Act, being sections 6-2-14 through 6-2-22, New Mexico Statutes Annotated, 1953 Compilation (P.S.) (being Laws 1963, chapter 290) and to equip, remodel and furnish capitol facilities, including the executive mansion, when the capitol buildings improvement commission certifies that need exists for the issuance of such bonds for such purposes.

Under the above statutes, the capitol custodian and the CBIC have certain powers and duties with respect to the capitol complex of buildings and the Governor's Mansion. These structures sometimes need complete replacement of certain components such as water pipes of a septic tank drain field. Also, there is need for periodic care to the buildings such as painting or cleaning septic tanks.

QUESTIONS

1. Between the CBIC and the capitol custodian who has the power or duty to provide and pay for periodic care to the capitol complex or Governor's Mansion?

2. Between the CBIC and the capitol custodian who has the power or duty to provide and pay for the replacement of complete components such as a water pipe system or a sewage drain field in the buildings of the capitol complex or the Governor's Mansion?

CONCLUSIONS

1. See analysis.

2. See analysis.

OPINION

{*200} ANALYSIS

Under Section 6-1-11, supra, the capitol custodian is given "custody and control of the state capitol grounds and buildings and premises." The same section makes it the duty of the capitol custodian "to provide for the preservation, repair, care, cleaning, heating and lighting of the buildings and the improvements, and to provide for the care and beautifying of the grounds and premises." Sections 6-1-12 and 6-1-13, extends these duties to certain other capitol buildings and to the Governor's Mansion.

We note that the statutes give the capitol custodian custody and control over certain things, to wit: buildings and grounds, 6-1-11, supra. We also note that the specified duties of the capitol custodian regarding preservation, repair, care, etc., are directed to 'buildings and improvements.' 6-1-11, supra. Therefore, the capitol custodian's powers and duties are seen to be directed toward **specific units**. These units are **buildings**, and improvements made to the buildings and also the grounds surrounding the buildings.

This means that the capitol custodian has the duty to do more than effect repairs and maintenance only upon the systems which are in a building. We are of the opinion that the duty of preservation, repair, care, etc., must be directed to the building as a whole.

From this we conclude that any one of the capitol buildings as well as the Governor's Mansion may be looked upon as a unit. If any part of that unit requires preservation, repair, care, etc., it is the duty of the capitol custodian to provide these services.

Before we can determine whether the capitol custodian does or does not have the duty to replace worn out components of a building or provide continuing, periodic care to the buildings we must provide definitions for the duties placed upon the capitol custodian. The words of Section 6-1-11, supra, giving the capitol custodian the duty to provide for preservation, repair, care, etc. have been defined in many decisions. The following list of definitions is illustrative.

PRESERVATION

"Preservation" has been held to be a keeping safe from harm, avoiding injury, destruction or decay. This term always presupposes a real or existing danger. **State ex rel. Pollack v. Becker**, 289 Mo. 660, 233 S.W. 641, 649. It is not creation, but the saving of that which already exists, and implies the continuance of what previously existed. **McKeon v. Central Stamping Co.**, C.C.A.N.J., 264 F. 385, 387.

REPAIR

"Repair" carries with it the idea of restoration after decay, injury, or partial destruction . . ." **American Bonding Co. v. City of Ottumwa**, 137 F. 572, 579, 70 C.C.A. 270, quoting **Goodyear Show Machinery Co. v. Jackson**, 112 F. 146, 150, 50 C.C.A. 159, 163, 55 L.R.A. 692. "Repair" connotes a restoration to a sound or good state after decay, injury, dilapidation, or partial destruction, as to repair a house, a wall or a ship, **City of Covington v. Bullock**, 126 Ky. 236, 103 S.W. 276, 277.

CARE

"Care" in relation to objects has been said to be maintenance, **Stafford v. Stovall**, 109 Okl. 234, 235 P. 238, 239, or management, **Seaman v. State**, 106 Ohio St. 177, 140 N.E. 108, 111.

We are of the opinion that the further duties of the capitol custodian (cleaning, heating and lighting of the buildings, etc.) are not such as require further definition.

We must now determine how {*201} these statutory duties of the capitol custodian apply to the problems presented. Firstly, we consider the problem of periodic care to the capitol buildings and the Governor's Mansion.

We have seen that the term "preservation" implies saving and continuing the existence of a thing. Also, the term "care" as applied to things is synonymous with maintenance. Finally, the capitol custodian has the duty to "repair."

We are of the opinion that the words "preservation," "repair," and "care," as defined above, clearly give the capitol custodian the duty to provide periodic maintenance to the buildings.

We now turn to whether the the capitol custodian has the duty to replace complete systems within the buildings as such may become necessary. Again, we return to the statutes to determine what the legislature intended in this regard. In doing so we turn to the cases applying the definition of the term "repair." In **Contas v. City of Bradford**, 206 Pa. 291, 55A. 989, 990, the court held that putting a new front, roof and ceiling on an existing building was not "reconstruction" but was "repairs." In **City of Covington v. Bullock**, supra, it was held that resurfacing a badly worn asphalt street by removing the old asphalt and covering the existing base with new asphalt was "repair" and not

"reconstruction." In **American Bonding Co. v. City of Ottumwa**, supra, the court, quoting from **Wilson v. Simpson, et al.**, 9 109, 13 L. Ed. 66, said:

". . . Repairing partial injuries; whether they occur from accident or wear and tear, is only refitting a machine for use. And it is no more than that though it shall be a replacement of an essential part of a combination." At page 595.

When we deal with replacing a component of a building such as water pipes this is the case. The building is the "machine" which has lost a "part" through wear and tear. When we replace the part we have repaired the machine. In the same manner when a system of water pipes is replaced the building (which is the prime unit with which we are concerned) is merely refitted to perform its intended function. This would lead us to conclude that the legislature intended the capitol custodian to perform this service by including the term "repair" within the duties of the capitol custodian.

We are further convinced that the legislature intended the capitol custodian perform these types of rather extensive repairs by noting the language of the General Appropriations Act for the thirty-fourth and thirty-fifth fiscal years appropriating money to the Capitol Custodian Commission as follows:

Capitol Custodian Commission

(1) For new roof and repairs to fire walls on Capitol Annex ____ \$ 6,500.00

To be made available at such time that the project has been completed and the work accepted by the State Board of finance. Laws 1945, Ch. 139.

Therefore from the definition of the terms "preservation." "repair" and "care" placed on them by many courts concerned with problems similar to those presented here we are of the opinion that the legislature intended to give the capitol custodian the duty to provide for both periodic care to and replacement of worn out systems in the buildings from time to time.

In 1935 the office of capitol custodian was created by the legislature by Laws 1935, Ch. 135 and in 1945 the legislature created the CBIC, Laws 1945 Cr. 53. The laws creating the powers and duties of both the capitol custodian and the CBIC have been amended by subsequent legislatures. The last {*202} amendment affecting either was made by Laws 1965, Ch. 246, extending the powers of the CBIC. We must therefore determine whether any of the statutory duties of the capitol custodian have been repealed by implication by the creation of the CBIC.

Therefore, we turn to the statutory duties and powers of the CBIC. As to existing capitol buildings the CBIC is given powers for "alteration," "reconstruction," "furnishing," "designing" and "redesigning" thereof, Sections 6-2-1, 6-2-2, 6-2-5, 6-2-7 and 6-2-10. The CBIC also has the power to contract for "improvement" of existing capitol buildings,

Section 6-2-16. Finally, the CBIC may "equip," "remodel" and "furnish" capitol facilities, including the executive mansion, 6-2-23, supra.

Bond issues have also been issued by the State Board of Finance in order to finance certain projects of the CBIC. The objects and purposes of the bonds are identical with the statutory powers of the CBIC. Therefore, this opinion does not discuss those powers listed in the bond issues.

To determine just what powers the CBIC has in relation to existing buildings we must again define the statutory terms. Certain terms, such as "designing," "furnishing," "equip," "redesigning," and "furnish," should need no definition since they clearly do not apply to the problem at hand.

ALTERATION

"Alteration" as applied to buildings is a change or substitution in a substantial particular of one part of a building for building different in that particular; a change or changes in the superficial limits of an existing structure; an installation that becomes an integral part of the building and changes its structural quality; a substantial change therein; a varying or changing the form or nature of such building without destroying its identity. **Payne v. City of Grosse Pointe**, 279 Mich. 254, 271 N.W. 826, 827.

RECONSTRUCTION

"Reconstruct" means to construct again; to rebuild; to form again or renew. **Contas v. City of Bradford**, supra. **Farraher v. Keshuk**, 111 La. 310, 313, 82 N.W. 773. A building is properly said to be reconstructed when it is rebuilt or restored to its original condition after having been wholly or partially demolished. **Vincent v. Frelick**, 50 La. Ann. 378, 235, 373, 375, 69 Am. St. Rep. 436.

IMPROVEMENT

In real estate law "improvement" means valuable additions made to property or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. **Spencer v. Tobey**, 22 Barb., N.Y., 269; **Allen v. McKay**, 120 Cal. 332, 52 P. 828.

REMODEL

To "remodel" means to cause a change in a building to make it practically equivalent to a new one; to model anew; to fashion afresh, **Board of Commissioners of Guadalupe County v. State**, 43 N.M. 409, 94 P.2d 515.

This completes the list of all duties and powers of the capitol custodian and CBIC which possibly could be applicable to the problem of replacement of components in or periodic

care to the capitol complex buildings and the Governor's Mansion. Now we must determine whether any of the CBIC powers supersede the duty of the capitol custodian to provide for periodic care to and replacement of components in those buildings.

The Supreme Court of New Mexico has held that repeals by implication occur only when there is a positive repugnancy between provisions of old and new statutes {203} so they cannot be reconciled and made to stand together. **Alvarez v. Board of Trustees of La Union Townsite**, 62 N.M. 319, 309 P.2d 989. Are the powers of the capitol custodian and CBIC with regard to the problems raised herein in positive conflict? We are of the opinion that they are not.

Neither the replacement of components such as water or steam pipes in the buildings nor the periodic care needed by the buildings can be classified as "alteration." The function and character of the building will in no manner be changed by such services. For the same reason, such services are not classifiable as "improvements" or "remodeling."

We are also of the opinion that such services do not constitute "reconstructing." This is because the term "reconstructing" demands more than the replacement of one part or component, **Contas v. City of Bradford**, supra, **City of Covington v. Bullock**, supra; **American Bonding Co. v. City of Ottumwa**, supra.

Therefore, we conclude that the capitol custodian was, in 1935, given certain statutory duties which include giving periodic care to and replacing worn out systems in the Governor's Mansion and the buildings in the capitol complex. We also conclude that none of these duties were replaced or superseded by creation of the CBIC or by amendments to the CBIC statutes.

We must conclude that the agency ultimately responsible for payment for these services is the one charged with the duty of performing them. The CBIC has neither the power nor duty to perform the kinds of services which are the subject of this opinion, and is, accordingly, not responsible for paying for them. However, the office of capitol custodian does have the duty of performing these services and therefore is the party ultimately responsible for payment.

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