

## **Opinion No. 67-60**

April 12, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. Thomas F. McKenna Member Capitol Building Improvement Commission  
Legislative-Executive Building Santa Fe, New Mexico

### **QUESTION**

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1. In view of the passage of House Bill 141, containing an emergency clause, what authority does the Capitol Buildings Improvement Commission have in connection with past, present and future agreements or contracts concerning the Legislative-Executive Building, the Central Heating Plant, and the surrounding grounds?
2. Can the functions relating to past, preset or future contracts or agreements concerning these buildings and grounds be delegated to the Capitol Buildings Improvement Commission?

#### **CONCLUSIONS**

1. See analysis.
2. See analysis.

### **OPINION**

#### **{\*85} ANALYSIS**

Under authority of the State Capitol Expansion Act, Sections 6-2-14 through 6-2-22, N.M.S.A., as amended, the Capitol Buildings {\*86} Improvement Commission contracted for the building of a new Legislative-Executive Building and an adjoining central heating plant. The Commission also entered into various other contracts which are related to this building. The Capitol Buildings Improvement Commission had the power to assign all space in the now completed Legislative-Executive Building, to charge the agencies occupying space rental rates commensurate with amounts charged for like facilities in the area, to grant concessions in the Legislative-Executive Building and to authorize any alteration to this building. The First Session of the Twenty-Eighth Legislature enacted House Bill Number 141 which transferred the exclusive control, care, custody and maintenance of the Legislative-Executive Building, the adjacent utilities plant and the surrounding grounds from the Capitol Buildings Improvement Commission and the Capitol Custodian Commission to the Legislative Council, a legislative joint committee. The director of the Legislative Council Service, an agency of

the legislature, was given the power to carry out those functions previously performed by the Capitol Buildings Improvement Commission and the Capitol Custodian affecting the Legislative-Executive Building, the adjoining central heating plant and the surrounding grounds.

The legislature may consolidate; **Bailey v. State Board of Public Affairs**, 153 P.2d 235 (Okla. 1945), or abolish, **Kirchner v. Kansas Turnpike Authority**, 336 F.2d 222 (10th Cir., 1964) state agencies, without necessarily affecting their contracts. This principle is applicable to this state. See for example **State Office Building Commission v. Trujillo**, 46 N.M. 29, 52, 120 P.2d 434 (1942); **State v. New Mexico State Authority**, 76 N.M. 1, 26, 27, 411 P.2d 984 (1966); and **Silver City Consol. School District No. 1 v. Board of Regents**, 75 N.M. 106, 401 P.2d 95 (1965). The **Trujillo** and **New Mexico State Authority** decisions both recognize that the state is one party for the purposes of contracting. The **Silver City Consolidated School District** case is worth discussing in greater detail. New Mexico Western College at one time operated and maintained the Silver City High School, its furnishings, and surrounding lands. In 1960 the legislature refused to appropriate further funds for the continued operation of the school. A 1937 act required a state educational institution to immediately transfer and convey high school buildings to the local school district when it abandoned or ceased to conduct the high school. New Mexico Western College refused to convey the school, and a suit was brought to compel conveyance. The last argument made by the College was that the high school building and its surrounding land was private property protected by Article II, Section 20 of the New Mexico Constitution which prohibits the taking of private property for public use without the payment of just compensation. The New Mexico Supreme Court disagreed with that contention, holding that:

"The body corporate (New Mexico Western College) was created by the legislature as the most convenient means of operating the educational institution, its property and affairs, and, although declared by statute to be a body corporate, it is not separate from or independent of the state, and even in the vesting of title in it of public lands and buildings, **they nevertheless remain the property of the state.**

...

In this jurisdiction, public property held and used in a proprietary, as distinguished from a governmental, capacity may not be taken for another public use without payment of just compensation. *State ex rel. State Highway Comm. v. City of Albuquerque*, 67 N.M. 393, 355 P.2d 925. However, the legislature may exercise control over property acquired by an agency of the state for the performance of a strictly public {\*87} duty, devolved upon it by law, to the extent of requiring the state agency or governmental subdivision to transfer such property to another agency of the government to be devoted to a strictly public purpose without receiving compensation therefor." (Emphasis added).

The Supreme Court of New Mexico ordered that New Mexico Western College transfer the property to the Silver City Consolidated School District. Thus it is seen that although property is acquired and subsequently controlled and maintained by one agency of the state, the legislature may at any time transfer the property to another agency. The land is owned by the state and not by any agency of the state.

In the present situation the legislature did not transfer the buildings and property to another agency of the state, it merely took control, care, custody and maintenance of the buildings and grounds from two agencies of the state, and then delegated these powers to another agency of the legislature, the Legislative Council Service. Obviously, the Capitol Buildings Improvement Commission may no longer enter into contracts or in any other way spend money on future contracts related to those buildings. The real issue here, however, is whether the Capitol Buildings Improvement Commission still has control over contracts already entered into.

It is recognized that agencies of a state may be abolished or consolidated. This, however, does not necessarily render them incapable of contracting beyond their existence, since the contract is with the state and not its agency. **Kirchner v. Kansas Turnpike Authority**, supra at 230. We therefore believe that agreements or contracts entered into in the past by the Capitol Buildings Improvement Commission in connection with buildings covered by House Bill No. 141 are binding on the Legislative Council and must be enforced by the Legislative Council Service. See Section 22-23-1, N.M.S.A., 1953 Compilation.

We note that the legislature did not transfer any money from the Capitol Buildings Improvement Commission to the Legislative Council to complete the contracts entered into by the Capitol Buildings Improvement Commission. The only reasonable conclusion that we can reach is that the legislature intended that the Capitol Buildings Improvement Commission would still be charged with the ministerial duty of paying those amounts due and owing to those who have contracted with the state upon certification by the Legislative Council. This ministerial duty exists for only those contracts previously entered into by the Capitol Buildings Improvement Commission for the state. The duty to insure the adequate performance of these contracts and the duty to certify that payment thereon is due and owing must now be performed by the Director of the Legislative Council Service under the direction of the Legislative Council.

Your second question asks if the Legislative Council Service can delegate any of its functions or powers enumerated in House Bill Number 141, or implied therefrom, to the Capitol Buildings Improvement Commission. The duty of performing discretionary acts under a contract cannot be delegated from one agency to another. **Charles Scribner's Sons v. Marrs**, 262 S.W. 722, 728 (Tex. 1924); 81 C.J.S. Section 113, p. 1087. It is the legislature that delegates powers and duties and not the agencies of the legislature. We therefore must conclude that discretionary functions related to past, present or future contracts or agreements concerning the buildings transferred to the Legislative Council under House Bill Number 141 may not be delegated to the Capitol Buildings Improvement Commission.

By: Gary O'Dowd

Assistant Attorney General