

MEMORANDUM OF LAW

DATE: April 28, 1993

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Application of Smoking Ordinance to St. Mary
Magdalene Church

You have asked our office to review a letter you received from Jack Murray and Paul Boland, President and Manager, respectively, of the St. Mary Magdalene Bingo Association, and to advise you accordingly.

As you know, the City has a contractual arrangement with the County Health Department to enforce the City's smoking ordinance. Evidently, in response to citizen complaints, the County Health Department has informed St. Mary Magdalene Church ("Church") that it is a violation of the smoking ordinance for the Church to allow members of the public to smoke during the bingo games which are conducted one night a week in the Church's auditorium.

San Diego Municipal Code ("SDMC") sections 45.0103 and 45.0104 preclude the designation of smoking areas, and thus preclude smoking altogether, inside of public assembly rooms, meeting rooms or auditoriums. Mr. Murray and Mr. Boland take exception to the Health Department's characterization of the Church's "bingo hall" as falling within the category of structures where smoking is not allowed and they ask you to evaluate the Health Department's position.

In our opinion, the Health Department has correctly interpreted and applied the smoking ordinance. We find no support in the documentation provided to us for the Church's contention that the "bingo hall" does not fall within the category of structures listed in the ordinance where smoking is not allowed. In fact, if you look at the attachment to the letter from Mr. Murray and Mr. Boland, which consists of a one page plan illustrating the location of proposed designated smoking areas, you will see that the building is classified as an "auditorium," with the main room labeled as an "assembly" room and the proposed designated smoking areas labeled as "meeting rooms." Perhaps, anticipating that you might agree with the

Health Department's application of the ordinance, Mr. Murray and Mr. Boland ask you, in the alternative, to grant the Church an administrative exemption to the smoking ordinance under powers vested with you under SDMC section 45.0107.

SDMC section 45.0107 specifically sets forth the criteria for consideration of an exemption as follows:

1. Whether the applicant has demonstrated an adequate understanding of the requirements of this Article, such that it is clear that the application is not based on a misunderstanding of the minimum requirements of compliance.
2. The extent of efforts the business has made toward compliance with the requirements of this Article.
3. The physical structure of the area for which the exemption is sought.
4. The number of employees in or near the area for which the exemption is sought.
5. The nature and frequency of contact that the applicant's business has with the public.
6. Whether physical disabilities of employees would render compliance with the requirements of this Article unreasonably difficult.

SDMC section 45.0107 further states: "The burden of proof shall be upon the applicant to show by substantial evidence that such unique or unusual circumstances exist, in respect to the foregoing considerations, that there is a necessary and compelling reason to grant an exemption." However, the Church's request fails to establish, or even articulate, the existence of a "necessary or compelling reason" to grant the exemption. Moreover, the only evidence offered in support of the request for exemption is the apparent financial ability and willingness of the Church to extensively modify the auditorium to create segregated areas for smokers. This is not evidence of "unique or unusual circumstances," or evidence which fits within the criteria which justifies an exemption or modification of the policies codified by the City Council in the ordinance.

Therefore, we are concerned that if you grant an exemption under

these facts, you could be exceeding the administrative discretion vested with you by the Council.

In summary, it is our opinion that the Health Department has correctly interpreted and applied the smoking ordinance in this situation. The issue of whether to grant an exemption is one for you alone to decide in the exercise of your administrative discretion. However, since you have asked for our opinion on the matter, it is our view that under the facts as presented to you, the Church has failed to meet its burden of producing substantial evidence to justify the granting of an exemption.

Please contact us if you have any questions.

JOHN W. WITT, City Attorney

By

Richard A. Duvernay

Deputy City Attorney

RAD:mrh:502(x043.2)

cc John M. Kaheny

ML-93-48

TOP

TOP