

The City Attorney
City of San Diego
MEMORANDUM
236-6220

DATE: July 13, 1988

TO: Councilmember Judy McCarty
FROM: City Attorney
SUBJECT: Exemption of Hot Tub Businesses from Bathhouse Ordinance

We have been requested by memo dated May 16, 1988 to review the possibility of exempting facilities such as "The Tubs of San Diego" from the recently adopted bathhouse ordinance. Please excuse the delay. We contacted the attorney for the facility and were awaiting word from his firm to assist in our research. I informed your office of this fact, but before we heard from the attorney we received your second request dated June 24, 1988 and are proceeding at this time.

We have discussed this question with officials of the San Diego County Health Department since this is basically a Public Health Ordinance. That department is opposed to the exemption of such places as "The Tubs of San Diego." The Health Department's position is that the primary purpose of the bathhouse ordinance is an attempt to halt the spread of AIDS by restricting high risk sexual activity in commercial establishments other than lodging establishments, hospitals and the like. According to the latest information high risk sexual activity includes anal and vaginal intercourse. See attached memo from Dr. Ramras, of San Diego County Health Department. Therefore, if such facilities as "The Tubs" were excluded, the purpose for which the ordinance was enacted would be negated.

Although Mr. Friedman emphasized, in his letter to you dated May 2, 1988, the differences between his establishment and those that allow more casual contact between patrons, the fact remains that the activity by which the AIDS virus is transmitted can occur as easily in his establishment as in any other bathhouse type facility. Mr. Friedman refers in his letter to you to San Francisco and Nevada ordinances. I spoke with counsel for both cities. San Francisco has adopted such an exemption and counsel sees no problem with it, however all the bathhouses there have closed voluntarily so it is presently a moot point. The District Attorney in Nevada who worked on the 1985 ordinance was opposed to allowing the exemption but was directed to include it by the County Commissioner. The District Attorney emphasized that at

the time the ordinance was written evidence that AIDS could be transmitted through heterosexual contact was not available. In addition, I contacted two other cities, Los Angeles and New York, that have adopted bathhouse ordinances. County Counsel for Los Angeles informs me that the bathhouse ordinance there does not exempt this type of facility, and there has not been a request for such an exemption. Counsel's feeling however is that he sees a difference between the anonymous sexual contact prevalent in typical bathhouses and the one-on-one associations common to private spa facilities. Counsel for the State of New York Health Department who worked on a regulation which successfully closed bathhouses there stated that there was not an exemption in the regulation. He also stated that when that regulation was written in 1985, there was not evidence of heterosexual contact transmitting AIDS. His opinion is that the nature of the facility would not be relevant and that he would not exempt such a facility were the question to arise today. We have been unable to find case law where courts have addressed this particular question. As you can see, there is a difference of opinion between legal counsel in different cities. Therefore, there is no specific legal precedent on which to rely. If Council wishes to exempt these establishments from the ordinance such decision could be defended by use of the argument that the nature of activities is quite different in each. That is, the casual anonymous sex practiced in the bathhouses is quite different than the one-on-one encounters possible in private spa facilities. Additional arguments that could be used are mentioned in Mr. Friedman's letter to you. If Council does not wish to exclude such establishments, that decision could be defended on the public health grounds mentioned above.

Please let me know if I can be of further assistance to you.

JOHN W. WITT, City Attorney

By

Mary Kay Jackson

Deputy City Attorney

MKJ:mrh:500
Attachment
MS-88-8