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January 27, 1998

The Honorable Dick Frank
San Luis Obispo County Assessor
Deputy County Assessor
County Government Center, Room 100
San Luis Obispo, CA 94279-0001

Attn: Ms. Lee Anne Meinhold

**Re: Fundraising activities on property receiving a church
parking area exemption**

Dear Ms. Meinhold:

This is in response to your correspondence of October 10, 1997, to Colleen Dottarar of the Board's exemption staff, in which you request our opinion as to whether the fundraising activities held at the leased parking area of the Church in the City of Cambria, San Luis Obispo County, disqualify the property from the church parking area exemption under Section 206.1 of the Revenue and Taxation Code.¹ As will be discussed below, you are correct that the church's fundraising barbecues disqualify the portion of the parking area used for this activity from exemption under Section 206.1. Additionally, as requested, staff will respond to several questions pertaining to the church parking area exemption (Cal. Const. Article XIII, Section 4, subdivision (d) and Rev. & Tax. Code Sec. 206.1) that have been triggered by the church's commercial fundraising activity.

RELEVANT FACTS

You have indicated that property leased by the church for parking purposes was granted the church parking area exemption (Section 206.1) for fiscal 1997-98. (APN. .). However, most of the parking area is used to sell barbecue dinners for which \$6.00 a person is charged. A large barbecue pit is set up to cook the food, and tables are provided for customers. The church also offers take-out orders and delivery service to homes and businesses. The fundraising barbecues which were held twice monthly and on holidays during the summer, apparently became a monthly event during the fall and were discontinued during winter months.

¹ All section references hereinafter are to the Revenue and Taxation Code unless otherwise indicated.

The church has advertised the barbecues on signs near the freeway and in the local weekly newspaper:

Sunday Morning Services and Children's Sunday School are held at 10:30 a.m. and 6:30 p.m.... Chicken and Tri-tip barbecue is offered the first and third Saturdays of the month and holiday weekends from 11 a.m. to 6 p.m. (rain cancels). Dinner is \$6.00. Home or business delivery is also available. To place takeout orders, or for other church information, call

I. LAW AND ANALYSIS

Article XIII, Section 4, subdivision (d) provides that the Legislature may exempt from property taxation "real property not used for commercial purposes that is reasonably and necessarily required for parking vehicles of persons worshipping on land exempt by Section 3(f)." Thus, this constitutional provision, in authorizing the Legislature to exempt property that is reasonably and necessarily required" for parking by those engaging in religious worship, does not preclude other uses of such property, so long as those uses are not for commercial purposes; does not require church ownership of the property; and does not state that the property cannot be used to generate income or a profit. Pursuant to its authority granted by Article XIII, Section 4, subdivision (d), the Legislature recently repealed the former Section 206.1 and enacted the new Section 206.1, effective September 30, 1996, to expand the statutory church parking area exemption to property **not owned** by the church, provided all of the following requirements are met:

(b)(3) The real property is **not at other times used for commercial purposes.**

(b)(4)(A) The congregation of the church, religious denomination, or sect is no greater than 500 members.

(B) The church, denomination, or sect is engaged in a lease of real property to be used **exclusively for qualifying parking purposes.**

(C) Under the terms of the lease, the church, denomination, or sect is responsible for paying the property taxes levied.

(D) The real property is used **exclusively for the parking of automobiles by persons described in subdivision (a).**

(E) The fee owner and the county agree that the fee owner shall pay the total amount of taxes that would be levied on the real property for the current fiscal year and the first two subsequent fiscal years in the absence of a grant of exemption pursuant to this paragraph for the current fiscal year, if the real property is used for any purpose other than the parking of

automobiles by persons described in subparagraph (D) during either of those two subsequent fiscal years.
(emphasis added)

A. EXCLUSIVE USE

Thus, the exclusive use requirement which had been deleted from Section 206.1 for church-owned parking property in 1975², was reenacted in the 1996 amendment to apply to parking property not owned by the church (Subd. (b)(4)(B) and subd. (b)(4)(D) of Section 206.1). We know from California case law interpreting "used exclusively" as it applies to claimants for other "exclusive use" exemptions, that the judiciary has not construed the term, "used exclusively" literally to mean only or solely for the stated purpose(s), to the exclusion of all other use. The State Supreme Court, following a rule of strict, but reasonable construction,³ has construed "exclusively used" in Section 214, subd. (a) to include any property "incidental to and reasonably necessary for the accomplishment of the exempt purpose," which in that case involving exemption of hospital property included property used for a nursing school, nurses' dormitories, housing for essential hospital personnel, and a tennis court for employees (Cedars at 735, 741). Similarly, courts of appeal have construed "exclusively used" to mean that the property is used primarily for exempt (religious, hospital, scientific, or charitable) purposes; therefore, incidental uses are not precluded; (*Peninsula Covenant Church v. County of San Mateo* (1979) 94 Cal. App. 3d 382, 393; *Honeywell Information Systems, Inc. v. County of Sonoma* (1974) 44 Cal. App.3d 23, 25) however, such incidental use must be directly connected with, essential to, and in furtherance of the primary use. (*Honeywell* at p. 28).

Thus, if the property has been used primarily for exempt purposes, the term, "exclusively" does not preclude activity, "which while not charitable in the traditional sense, is merely incidental to the charitable purpose and not in competition with commercial enterprise." (*Greek Theatre Assn. v. County of Los Angeles* (1978) 76 Cal. App.3d 768, 776), holding that a bar within a theater for the convenience of theatergoers "is used exclusively for a purpose incidental to the charitable function." In contrast, the YMCA's restaurant, tailor and barber shop were not viewed as non-disqualifying incidental uses, but were held to be "largely commercial in character and properly classified as business ventures (*YMCA v. County of Los Angeles* (1950) 35 Cal. 2d 760). Furthermore, the Courts have held that organization's integrated activities as a whole must be examined in determining the tax status of the property for the welfare exemption. (Cedars at 734-736, YMCA at 767)

Thus, the requirement in section 206.1 of "exclusive use" for parking for church members attending religious services or activities probably would not be construed by the courts to mean that could be the only or sole use of the property, nor that it precludes incidental uses that are directly connected with and in furtherance of the primary church parking use. Presumably, the judiciary would follow the precedent set by Section 214 and other "exclusive

² The legislature amended Section 206.1 in 1975 (Ch. 128 of AB 817) to allow church owned parking property to be used by the general public without loss of exemption, if a profit was not realized. Assemblyman Knox introduced the bill to allow a church parking lot in Richmond to be used by BART passengers for "park and ride" purposes for no fee or a minimum fee to merely cover maintenance costs.

³ *Cedars of Lebanon v. County of Los Angeles* (1950) 35 Cal.2d 729, 734.

use" court cases as to the meaning of "exclusive use" if and when asked to interpret the term for purposes of the church parking area exemption in Section 206.1. The application of this precedent to the current facts of the _____ Church will be discussed under Section II in our responses to your questions.

B. COMMERCIAL PURPOSES

Additionally, the restriction that the real property is not to be used at other times for "commercial purposes" is imposed on all property used for church parking for which the exemption is claimed, whether leased or owned. (Section 206.1, subd. (b)(3) and Article XIII, Section 4, subd. (d) of the California Constitution). Express language stating the requirement that the property not be used for "commercial purposes" has been in Section 206.1 since initially enacted and derives from the California Constitution, Section 4, subdivision (d) of Article XIII, formerly Section 1 1/2 of former Article XIII, amended in 1956 to expressly exempt from taxation church property used for parking. The term, "commercial purposes" is not defined in the Constitution, and the Legislature has merely stated what it does not constitute. Section 206.1, subd. (b)(3) provides that "commercial purposes" does not include the use of the property for the parking of vehicles or bicycles, the revenue of which does not exceed the ordinary and necessary costs of maintaining the real property. The plain and ordinary meaning of "commercial purpose" is to engage in profit making or a business activity, however, it is also the generic term for the activities of buying and selling. (Black's Law Dictionary, 5th Ed., p. 245) The term is stated in Section 206.1 in the plural which clearly indicates that the Legislature intended to bar the use of church parking area property for any and all commercial purposes, not solely commercial parking purposes in which the church uses the property for a profit-making parking business or in which the church leases the property to a parking firm for purposes of operating a commercial parking business. If property of a tax-exempt institution competes in the common business with the property of other owners, it must bear the tax as much as theirs bears. (Honeywell at p. 30).

II. RESPONSES TO QUESTIONS

1. Are fundraising events such as the barbecues described above covered under the church exemption.

I am assuming that you mean the church parking area exemption in Section 206.1 since the facts indicate that the leased parking area, not the church building and real property on which it is located, is being used for the barbecues; therefore, does Section 206.1 permit the church to use its leased parking property to sell the barbecue dinners to the general public under the stated facts. As discussed above, Section 206.1 requires property leased by a church for parking to be used exclusively for parking for persons attending religious services or activities. Absent judicial guidance on how the term, exclusive use should be interpreted in Section 206.1, it is relevant to consider judicial precedent on what constitutes "used exclusively" for purposes of other "exclusive use" exemptions. "It is well established that "used exclusively" does not preclude incidental uses, provided they are directly connected with and in furtherance of the exempt, religious, hospital, scientific, or charitable purpose" (*Cedars* at p. 739) and not in competition with commercial enterprise (*Greek Theatre* at p. 776).

In this case, the primary, exempt use of the church leased parking area property is for church parking, with a concurrent non-qualifying use of selling barbecue dinners. The sale of these dinners to the general public would not appear to fall within the construction of "exclusive use" that permits an incidental use that is connected with and in furtherance of the primary exempt use of the property. It is apparent that the dinner sales are not incidental to or related to the property's primary use of parking for persons attending religious services or activities, but rather a totally separate and independent use of the property to generate revenue. Delivery service and advertising of sales are elements of commercial enterprises. Accordingly, the portion of the parking area used to conduct the barbecue dinner sales would not be eligible for exemption pursuant to Section 206.1 for this reason. It would also not be eligible for exemption because of its use for commercial purposes. See discussion under question 2 on commercial purposes.

2. Would using the property to sell barbecue dinners be considered within the meaning of commercial purposes. What would commercial purposes include and not include.

As discussed above, section 206.1 requires that the property not be used at other times for "commercial purposes." The term, stated in the plural, would indicate that the Legislature intended to include any and all any commercial purposes. The facts involving the church's barbecue dinner sales clearly indicate a commercial or business purpose:

1. the sales were scheduled on a regular basis for a period of several months
2. a fixed price was charged per dinner
3. delivery service was available
4. sales were advertised in the local newspaper and on signs near the freeway.

Thus, the church's use of its parking area for the commercial purpose of selling barbecue dinners disqualifies the property from the church parking area exemption. Section 206.1, subd. (b)(3) bars the use of property for commercial purposes. See also *Honeywell* at p.30.

Commercial purposes would include using the property for any business activity for purposes of generating a profit, such as a commercial parking business, renting the property to a visiting carnival or circus, or leasing the property to a business for purposes of demonstrating and selling a product or services to the public, i.e., a car dealer to show and sell cars.

Would the barbecues be covered under the church parking area exemption if the church required a fixed donation amount rather than a fee? If the church requested an optional donation rather than a fee?

Staff has been of the opinion that if a donation box is available at an organization's event, with the amount requested for the activity being optional rather than mandatory, then amounts received can be considered "donations." It is irrelevant that the amount requested for the

activity is fixed if participants are allowed to contribute any amount or to make no donation and still participate in the activity. However, under the stated facts, the church's commercial use of the church parking area serves to disqualify the portion of the property so used from exemption under Section 206.1, regardless of whether the church requires a donation rather than a fixed price for the dinners.

3. Would it make a difference if the fundraising barbecues occurred only once a month or only three times a year?

If judicial precedent of Section 214 were followed as to what constitutes exclusive use for purposes of Section 206.1, the use of the church parking property for a fundraising activity that occurred only a few times a year could be viewed as an incidental activity, particularly in light of the court holding that the organization's integrated activities as a whole must be examined in determining the tax status of the property for the welfare exemption. (Cedars at 734-736, YMCA at 767) Therefore, it might make a difference if such fundraising use were occasional. The courts have not construed what constitutes occasional use of the property for fundraising. for purposes of Section 214, subd.(a)(3)(A) and subd. (a)(3)(B), and minds certainly differ as to what frequency of use would be occasional. In my view, a few times a year clearly would be occasional, however, weekly or monthly would not be occasional. However, as indicated above, Section 206.1 precludes use of church parking areas for commercial purposes, and the section does not contain any exceptions for "occasional" commercial purposes/uses, as does Section 214 for occasional fundraising. Thus, it would seem that any commercial use would result in loss of the church parking area exemption.

4. If the church owned the property, and claimed a religious exemption, would the activities described above be eligible?

The religious exemption in Section 207 is available for property owned and operated by a church and used exclusively for religious worship and various school purposes. The exemption is granted pursuant to Section 4(b) of Article XIII of the Constitution. The courts have not addressed the issue of whether a church's use of the property for other than religious worship and religious school purposes would fail the exclusive use test, thereby disqualifying property from exemption under Section 207. The discussions under section A. on exclusive use on pages 3 and 4 and the discussions under questions 1 and 3 are incorporated by reference here. As discussed therein, if the courts followed judicial precedent of other "exclusive use" exemptions to determine what constitutes exclusive use for purposes of the religious exemption in Section 207, the property used for the barbecue dinner sales under the facts of this case would not meet the exclusive use test. This activity is a use of the property that is not incidental or related to the primary purposes of religious worship or the specified school purposes, rather an independent use of the property to generate revenue which disqualifies the property from exemption under Section 207. And again, there would be the matter of the barbecue dinner sales being a commercial use, which also is not use for religious worship and religious school purposes.

If the religious aspect of the welfare exemption were claimed pursuant to Section 214, the church's barbecue dinner sales under the facts of this case would disqualify the portion of the property so used from exemption. As discussed previously, and that discussion is incorporated by

reference here, the regularly scheduled dinner sales would fail the exclusive use test in subd. (a) of Section 214. Additionally, the regularly scheduled dinners are beyond the scope of occasional fundraising pursuant to the provisions of Section 214 (subs. (a)(3)(A) and (a)(3)(B)) that permit the property to be used for fundraisers that are held only on an irregular and intermittent basis. Please reference discussion under question 5. And again, there would be the matter of commercial use.

5. Would any occasional, intermittent fundraising activity be eligible under the church exemption? What would be your definition of occasional and intermittent?

The church exemption in Section 206 references the Constitutional provision, Section 3(f) of Article XIII which exempts buildings, land on which they are situated and equipment used **exclusively for religious worship**. Thus, the property is to be used exclusively for religious worship and not for fundraising or other purposes. The courts have not addressed the issue of whether occasional fundraising would fail the test of using the property exclusively for worship purposes, thereby disqualifying the property from the church exemption under Section 206, or whether occasional fundraising would be viewed by the courts as a qualifying incidental use. However, prior to the enactment of Section 215.2, Welfare Exemption - Bingo, use of church property for monetary bingo games made such property ineligible for the church exemption and the welfare exemption. Section 215.2 pertains only to the latter.

You have inquired about the terms, "occasional" and "intermittent" which are not found in the church exemption, but in the welfare exemption in Section 214. However, the courts have not addressed the separate fundraising provisions of Section 214 that state that an exempt organization's occasional use of the property for fundraising incidental to its primary [exempt] activities will not disqualify the property from the welfare exemption (subs. (a)(1)(A) and (a)(1)(B)). Lacking judicial guidance on what constitutes occasional and intermittent, we would rely on the language of the statute which indicates that occasional use means use that is not regular or ongoing. Intermittent is similarly defined as stopping for intervals then commencing, not-continuous. In my view, a regularly scheduled fundraising activity such as the barbecue dinner sales, which were occurring twice monthly during the summer would not constitute occasional use, neither would monthly sales of the dinners.

6. Please clarify the meaning of subd. (e) of Section 206.1, as it relates to subd. (c) of the section.

The Legislature apparently was concerned about the possibility of abuse of the "leased" part of the new church parking area exemption by a property owner with a valuable commercial lot improperly obtaining the exemption, thereby evading property taxes. This provision was intended to discourage property owners from improperly qualifying for exemption on a short term basis. Subdivision (e) imposes a condition that the fee owner of the property and the county have to agree that the fee owner will pay property taxes that would have been levied on the property if the property is used for purposes other than church parking. The provision presupposes that the property is exempt during the first year for which exemption is granted, followed by use of the property for other than church parking in either the second or third year; if so, the exemption is lost for all three years. For example, if property is used exclusively for

church parking and gets the exemption in 1997 and 1998, but the property is used for other than church parking in 1999, the property owner is penalized by having to pay property taxes for all three years, despite the leased property having been used for the exempt purpose for two years. Non-qualifying use of the property is the test: "if the real property is used for any purposes other than that specified in subparagraph (d) during either of those two subsequent fiscal years." Thus, the property owner's use and/or the church's use of the property for other than church parking could result in the applicability of subdivision (e).

Subdivision (c) states that if the church is not responsible for paying the property taxes on the property leased for purposes of church parking, then the property can not be exempted under Section 206.1. Thus, subdivision (e) is independent from and not relevant to the applicability of subdivision (c) since each addresses a different issue.

I hope this letter has been responsive to your concerns. The views expressed in this letter are advisory only; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,



Mary Ann Alonzo

MAA:jd

property/precednt/genexemp/1998/98001.maa

cc: Mr. Dick Johnson, MIC: 63
Mr. Rudy Bischof, MIC:64
Ms. Colleen Dottarar, MIC: 64
Ms. Jennifer Willis, MIC:70

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