

## **Opinion No. 87-21**

May 21, 1987

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Alicia Mason, Assistant Attorney General

**TO:** David Phillips, Acting Associate Director for History Museum of New Mexico, Office of Cultural Affairs, Santa Fe, New Mexico 87504

### **QUESTIONS**

1. Does the existing state law on smoking impose controls on Indians who sell jewelry on the portal of the Palace of the Governors?
2. If not, can administrative controls be imposed?

### **CONCLUSIONS**

1. No.
2. Yes, if such controls are reasonably related to the success of the portal program.

### **ANALYSIS**

The existing state law on smoking is found in the "Clean Indoor Air Act," § 24-16-1 through § 24-16-9, N.M.S.A. 1978 (Repl. Pamp. 1986) (hereinafter "the Act"). The Act declares smoking in enclosed places to be a health hazard and seeks to regulate smoking in public places to protect public health from the hazard. § 24-16-2, *supra*. The Act proscribes smoking in a public place "except in smoking-permitted areas." § 24-16-4, *supra*. "Public place" as used in the Act means "any enclosed indoor areas in a building owned or leased by the state or any of its political subdivisions." § 24-16-3(D), *supra*. Consequently, by definition, the Act's proscription does not apply to the portal of the Palace of the Governors, because it is not an enclosed indoor area.

According to § 24-16-2, the legislature did not intend to preempt the field of public smoking regulation by passage of the Act. The Museum of New Mexico Board of Regents may regulate smoking on museum property on rationale other than concern for public health. The Board of Regents by law holds title to all property for museum use. § 18-3-3(D), N.M.S.A. 1978 (Repl. Pamp. 1980). The Board must acquire, preserve, and exhibit fine art, folk art, and crafts of historical, archaeological, and ethnological interest, and may adopt the necessary rules, regulations, and policy directives necessary to implement its statutory powers and duties. *Id.* at § 18-3-3(E). Consequently, the Board of Regents regulates and sets policy for the portal program. Policy Manual for the Museum of New Mexico (July 1, 1984).

The Portal program has been part of the Museum since the legislature established the Museum in 1909. *Livingston v. Ewing*, 601 F.2d 1110, 1116 (10th Cir. 1979), cert. denied, 444 U.S. 870 (1979). "In the interest of stimulating the native crafts and encouraging the educational consequences, the Board of the Museum was carrying out an education policy to develop and preserve the traditions of New Mexico." *Id.* at 1112. The portal program has been characterized as a living exhibit, because it allows the general public to meet the Indians and to gain information as to the character and quality of the Indians' work. *Id.* at 1116.

There may be a number of policy motives for which the Board of Regents may regulate smoking on the portal. See *Op. Att'y Gen. No. 5336* (N.Y. 1978) (upheld validity of smoking ban on school property). We need not decide whether any of specific reasons or any particular regulation on smoking would be valid or lawful. The Board of Regents may, however, regulate smoking on the portal if such regulation is reasonably related to the success of the portal program.

**ATTORNEY GENERAL**

HAL STRATTON Attorney General