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ORIGINAL
FILED

FEB 18 2011

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 SAFEWAY INC., a Delaware Corporation,

15 Plaintiff,

CV11

CASE NO.

0761

ME

16 v.

17 COMPLAINT FOR DECLARATORY
18 AND INJUNCTIVE RELIEF

19 CITY AND COUNTY OF SAN FRANCISCO;
20 THE BOARD OF SUPERVISORS FOR THE
21 CITY AND COUNTY OF SAN FRANCISCO;
22 and EDWIN M. LEE in his official capacity as
23 Mayor of the City and County of San Francisco,

24 Defendants.

25 COMES NOW Plaintiff SAFEWAY INC. ("Safeway") which complains and alleges as
26 follows:

27 **THE PARTIES**

- 28
1. Plaintiff Safeway is a Delaware corporation with its principal place of business in Pleasanton, California.
 2. Defendant City and County of San Francisco is a municipal corporation duly organized under the laws of the State of California and is a defendant in its official capacity.

1 pursuant to the California Business and Professions Code, as required by the California
2 Department of Consumer Affairs, California Board of Pharmacy.

3 10. Safeway fills prescriptions in its pharmacies. Safeway sells the filled prescriptions
4 to its customers over the counter in the pharmacies only.

5 11. The California Department of Consumer Affairs, California Board of Pharmacy,
6 regulates the operations of Safeway's pharmacies.

7 12. Safeway isolates the pharmacies in its stores from the rest of the store by side
8 walls, back walls, front counters, and locked doors. Safeway does not allow members of the
9 public access to the insides of the pharmacies.

10 13. The licensed pharmacies at Safeway's stores in San Francisco are separate, and
11 distinguishable, from the retail floor space for groceries and other products, including tobacco
12 products.

13 14. At all times relevant to this Complaint, Safeway pharmacies did not sell tobacco
14 products.

15 15. At all times relevant to this Complaint, Safeway operated retail grocery stores in
16 other parts of the buildings housing its pharmacies. These retail stores sold general grocery
17 products, such as beverages, cooking utensils, food, household supplies, and non-prescription
18 health and beauty products.

19 16. At all times relevant to this Complaint prior to November 7, 2010, Safeway
20 displayed and stored tobacco products in these other parts of its stores that were separate and
21 distinguishable from the pharmacies.

22 17. Employees in these other parts of the grocery stores handled and sold tobacco
23 products, including charging for purchases of these products.

24 18. Tobacco products sold in the Safeway stores in San Francisco were sold only
25 through the stores' Customer Service booths, and were only available to customers through staff
26 who were not involved in pharmacy operations.

27 19. Safeway competes with other retail outlets in San Francisco that do not contain
28 pharmacies, but which also offer, to a varying extent, products similar to those available in

1 plaintiff's non-pharmacy operations. These other retail outlets include General Grocery Stores,
2 Big Box stores, convenience stores, corner markets, and liquor stores.

3 REGULATION OF TOBACCO PRODUCTS

4 20. Federal law regulates the advertising and promotion of cigarettes and preempts
5 State and local laws purporting to regulate advertising or promotion of cigarettes.

6 21. California state law provides for licensing of retailers to sell tobacco products
7 pursuant to a "statewide program to license manufacturers, importers, distributors, wholesalers,
8 and retailers of cigarettes and tobacco products." (Cal. Bus. & Prof. Code §22970.2).

9 22. California state law prohibits sales procedures that would allow access to tobacco
10 products by minors, such as self-service access.

11 23. Stores in San Francisco that sell tobacco products must also obtain a license to sell
12 tobacco products issued by the City and County of San Francisco.

13 ENACTMENT OF SAN FRANCISCO ORDINANCE NO. 194-08

14 24. On August 5, 2008, the San Francisco Board of Supervisors enacted an ordinance
15 (San Francisco Ordinance No. 194-08, amending San Francisco Health Code § 1009.53 and
16 adding § 1009.60 and Article 19J to the Health Code) entitled "**Ordinance amending the San**
17 **Francisco Health Code by amending Section 1009.53 and adding Section 1009.60 and Article**
18 **19J, to prohibit pharmacies from selling tobacco products**" ["the Original Ordinance"]. A true
19 and correct copy of the Original Ordinance is attached to this Complaint as Exhibit A.

20 25. The Original Ordinance was signed into law by San Francisco's then Mayor Gavin
21 Newsom on August 7, 2008.

22 26. Section 1009.92 of the Original Ordinance directs that "[n]o person shall sell
23 tobacco products *in a pharmacy*, except as provided in Section 1009.93." (Emphasis added.)

24 27. The Original Ordinance contains a definition of "pharmacy" that is similar to
25 definition of a pharmacy in the California Business and Professions Code.

26 28. Section 1009.91(e) of the Original Ordinance defines a "pharmacy" as "a retail
27 establishment in which the profession of pharmacy by a pharmacist licensed by the State of
28 California . . . is practiced and where prescriptions are offered for sale."

1 29. Section 4037 of the California Business and Professions Code defines a
2 “pharmacy” as “an area, place, or premises licensed by the board [State Board of Pharmacy] in
3 which the profession of pharmacy is practiced and where prescriptions are compounded.”

4 30. What is in issue in this case is whether the City may lawfully expand the definition
5 of “pharmacy” to include as a “pharmacy” the whole other area of the building which operates as
6 traditional retail grocery store, and then ban sales of tobacco products in the retail grocery store on
7 the ground that it is a “pharmacy.”

8 31. Under the Original Ordinance (and as later amended), the San Francisco Director of
9 Health is required to issue a permit to sell tobacco products to an applicant who has not violated
10 any laws, unless the applicant is a retail store that contains a pharmacy.

11 32. Section 1009.93 of the Original Ordinance contained an exemption for two types of
12 retail stores that also had pharmacies. It provided that “The prohibition against tobacco sales at
13 pharmacies * * * *shall not apply to (a) General Grocery Stores. (b) Big Box Stores.*” (Emphasis
14 added).

15 33. The Original Ordinance referred to the San Francisco Planning Code for the
16 definition of a “General Grocery Store.” The Planning Code, as then and now in effect, defines a
17 “General Grocery Store” as an individual retail food establishment that “(A) Offers a diverse
18 variety of unrelated, non-complementary food and non-food commodities, such as beverages,
19 dairy, dry goods, fresh produce and other perishable items, frozen foods, household products and
20 paper goods; (B) May provide beer, wine, and/or liquor sales for consumption off the premises
21 with a California Alcoholic Beverage Control Board License ***; (C) Prepares minor amounts or
22 no food on-site for immediate consumption; (D) Markets the majority of its products at retail
23 prices.” (Section 790.102(a))

24 34. The Original Ordinance defined a “Big Box Store” as “a single retail establishment
25 occupying an area in excess of 100,000 gross square feet.” (Section 1009.91 (a))

26 35. In enacting the Original Ordinance, the Board of Supervisors heard evidence from
27 the City that the reasons for banning the sale of tobacco products in retail stores that contained
28 pharmacies applied with little or no force to General Grocery Stores and Big Box Stores that also

1 contained pharmacies.

2 36. The Original Ordinance further provided “No permit shall issue *** if the applicant
3 is a pharmacy prohibited from selling tobacco products * * *.” (Section 1009.53 (c))

4 37. The Original Ordinance became effective on October 1, 2008.

5 38. There were two lawsuits filed prior to the effective date of the Original Ordinance
6 challenging the constitutionality and validity of the Ordinance.

7 **THE PHILLIP MORRIS LITIGATION**

8 39. In September 2008, Phillip Morris USA, a cigarette manufacturer, sought a
9 temporary restraining order in the United States District Court for the Northern District of
10 California to prevent the Ordinance from going into effect on October 1, 2008 (Action No. C 08-
11 04482-CW). The application for a TRO was denied.

12 40. Phillip Morris based its Complaint on First Amendment grounds as well as on
13 Federal preemption of laws regulating the advertising and promotion of cigarettes.

14 41. By an Order dated December 5, 2008, the United States District Court denied
15 Phillip Morris’s application for a preliminary injunction. A true and correct copy of that Order is
16 attached hereto as Exhibit B.

17 42. By a Memorandum Decision and Order dated September 9, 2009, the United States
18 Court of Appeals for the Ninth Circuit affirmed the decision of the District Court. A true and
19 correct copy of the Ninth Circuit’s Memorandum decision is attached hereto as Exhibit C.

20 43. The issues raised by Safeway in this action were not addressed by the Courts in the
21 *Phillip Morris* action.

22 **THE WALGREENS LITIGATION**

23 44. Also in September 2008, Walgreen Co. (“Walgreens”), a retail chain that sells
24 prescription and non-prescription drugs and also general merchandise, filed a lawsuit in the San
25 Francisco Superior Court against the City and County of San Francisco, the Board of Supervisors,
26 and the Mayor (“the Walgreens action”) for declaratory and injunctive relief to bar the
27 enforcement of the Original Ordinance (Action No. 479-533).

28 45. Walgreens complained that the Original Ordinance denied it equal protection in

1 violation of the Federal and California Constitutions. Walgreens contended that it was arbitrary
2 and capricious to exempt General Grocery Stores and Big Box Stores that had pharmacies from
3 the ban against selling tobacco products, when the ban was applied against Walgreens and other
4 pharmacies that also sold general merchandise including tobacco products.

5 46. On December 19, 2008, the San Francisco Superior Court sustained a demurrer to
6 the Walgreens complaint without leave to amend.

7 47. On June 8, 2010, the California Court of Appeal, First Appellate District, Division
8 3, reversed the judgment of the Superior Court. The Court of Appeal held that the granting of an
9 exemption to General Grocery Stores and Big Box Stores, but not to Walgreens, was a denial of
10 Walgreens' rights to equal protection under the Federal and California Constitutions. A true and
11 correct copy of the California Court of Appeal's decision is attached hereto as Exhibit D.

12 48. The issues raised by Safeway in this action were not addressed by the Court in the
13 *Walgreens* action.

14 **THE ORDINANCE IS AMENDED**

15 49. Safeway's pharmacies are "pharmacies" as defined in the California Business and
16 Professions Code Section 4037, as set forth in paragraph 29 above.

17 50. Safeway's grocery stores are "General Grocery Stores" as defined in the San
18 Francisco Planning Code.

19 51. In September 2010, after remand of the *Walgreens* case to the Superior Court, the
20 Board of Supervisors repealed the exception in § 1009.93 of the Health Code that provided that
21 "[t]he prohibition against tobacco sales shall not apply to: (a) "General Grocery Stores. (b) Big
22 Box Stores." A true and correct copy of the amended Ordinance, known as Ordinance No. 245-10
23 ("Amended Ordinance"), is attached hereto as Exhibit E.

24 52. In amending the Original Ordinance, the Board recited that it was formally
25 amending the Ordinance to forestall further litigation over the "severance issue" and to remove
26 any cloud over ongoing enforcement of the Ordinance (Amended Ordinance Section 1009.98,
27 Section 2).

28 53. In the Amended Ordinance, the Board also eliminated that portion of the definition

1 of “pharmacy” which provided that “[f]or purposes of this Article [19J], ‘pharmacy’ includes retail
2 stores commonly known as drugstores.” (Amended Ordinance, Section 1009.91(c)).

3 54. The Board left intact the balance of the definition of “pharmacy” to mean “a retail
4 establishment in which the profession of pharmacy by a pharmacist licensed by the State of
5 California in accordance with the business and Professions Code is practiced and where
6 prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to
7 prescription pharmaceuticals.” (Amended Ordinance, Section 1009.91(c)).

8 55. However, the Board did not create an exemption for pharmacies that did not sell
9 tobacco products. Instead, the Board, in a form of legislative gerrymandering, treated the entire
10 retail grocery store in which a pharmacy was located as a “pharmacy.” In doing so, it went
11 beyond the definition of a pharmacy in the Business and Professions Code and into an area where
12 it was not authorized to act.

13 56. In the Amended Ordinance, as in the Original Ordinance, the Board stated in a
14 section entitled “Preemption” that the Board “does not intend to regulate or affect the rights or
15 authority of the State to do those things that are required, directed, or expressly authorized by
16 Federal or State law. Further, in adopting this Article, the Board of Supervisors does not intend to
17 prohibit that which is prohibited by Federal or State law.” (Amended Ordinance, Section 1009.96;
18 Original Ordinance, Section 1009.97).

19 57. Section 1009.92 of the Amended Ordinance continues the prohibition of the
20 Ordinance that “[n]o person shall sell tobacco products in a pharmacy.”

21 58. Because of the position now taken by the City that wherever “pharmacies” are
22 within a General Grocery Store, the General Grocery Store will not be issued a license to sell
23 tobacco products unless the General Grocery Store gives up its lawful pharmacy business, and
24 because of the revocation of the exemption for General Grocery Stores found in the Original
25 Ordinance, Safeway has ceased sales of any tobacco products in its retail grocery stores in San
26 Francisco that have pharmacies pending the outcome of this litigation.

27 59. The Amended Ordinance, like the Original Ordinance, continues to provide
28 penalties for non-compliance (Original Ordinance, Section 1009.41; Amended Ordinance, Section

1 1009.93). It specifies that “[a]dministrative penalties shall be assessed and collected by the
2 Director [of Public Health] in accordance with San Francisco Administrative Code Chapter 100 *
3 * *.” (Original Ordinance, Section 1009.94; Amended Ordinance, Section 1009.93).

4 60. In enforcing the Amended Ordinance the City has continued to take the position
5 that the term “pharmacy” includes all areas of a retail grocery store that sell tobacco products and
6 other common goods, even if the pharmacy does not sell tobacco products.

7 61. On October 10, 2010, Mayor Newsom signed the amendments to the Ordinance
8 into law.

9 **THE EFFECT OF THE AMENDMENTS TO THE ORDINANCE**

10 62. As a result of the Amended Ordinance, the permits issued to 10 Safeway stores in
11 San Francisco to sell tobacco products were revoked effective November 7, 2010, because the
12 stores also operated lawful pharmacies.

13 63. Under the Amended Ordinance, however, other retailers in San Francisco,
14 including Safeway’s competitors, remained eligible for a license to sell lawful tobacco products.
15 Only stores that also have pharmacies are banned from selling lawful tobacco products.

16 64. When the Original Ordinance was enacted, a rationale stated by the Board for
17 banning the sale of tobacco products in pharmacies was that “[t]hrough the sale of tobacco
18 products, pharmacies convey tacit approval of the purchase and use of tobacco products. This
19 approval sends a mixed message to consumers who generally patronize pharmacies for health care
20 services.” (Original Ordinance, Finding 7).

21 65. This rationale applies with equal force to retail stores without pharmacies that are
22 still eligible to obtain a permit to sell tobacco products. Such retail stores also sell numerous non-
23 prescription drugs and products appealing to the customers’ interests in health or recovering from
24 illness, such as cough medicines, nasal decongestants, throat lozenges, vitamins, and other
25 products addressing personal health and well being.

26 66. The Ordinance as amended differentiates arbitrarily and capriciously between
27 similarly situated retailers solely on the ground that some have, and some do not have, somewhere
28 on their premises, a lawful pharmacy.

1 67. The Ordinance, as amended, arbitrarily and capriciously expands the definition of
2 “pharmacy” to include portions of the retail stores that are not pharmacies licensed by the State of
3 California or within a commonly understood definition of “pharmacy.”

4 68. Banning the sale of tobacco-related products in General Grocery Stores (like the 10
5 Safeway stores in San Francisco) that also operate separate pharmacy departments has damaged
6 Safeway’s business. The damage to Safeway’s business will continue as long as the Ordinance as
7 amended remains in effect and is subject to enforcement.

8 **FIRST CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

9 69. Safeway refers to and incorporates herein by reference as though fully set forth
10 paragraphs 1 through 68, inclusive, of this Complaint.

11 70. The San Francisco Health Code, as amended by the Ordinance, prohibits sales of
12 tobacco products “in” a pharmacy.

13 71. Safeway did not sell tobacco products in its pharmacies in its retail grocery stores
14 in San Francisco.

15 72. The City has revoked the permits issued to Safeway to sell tobacco products in
16 other areas of its retail premises, separate from the pharmacies.

17 73. Safeway requests an order declaring that the sales of tobacco products in the other
18 areas are not sales in a pharmacy, that Safeway is entitled to a permit to sell tobacco products in
19 these other areas, and enjoining the City from enforcing the Health Code, as amended by the
20 Ordinance, against Safeway as to sales of tobacco products in these other areas of its stores.

21 **SECOND CAUSE OF ACTION-UNCONSTITUTIONAL CONDITIONS IN VIOLATION**
22 **OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS**

23 74. Safeway refers to and incorporates herein by reference as though fully set forth
24 paragraphs 1 through 72, inclusive of this Complaint.

25 75. In California, it is lawful to operate a pharmacy in which the profession of
26 pharmacy by a licensed pharmacist is practiced.

27 76. Safeway has a constitutionally protected interest under both the United States
28 Constitution and the California Constitution in its pharmacy businesses.

1 77. It is also lawful to operate a licensed retail grocery business in California.

2 78. Safeway has a constitutionally protected interest in its retail grocery business and in
3 being able to sell lawful products, including lawful tobacco products, in that business, as do its
4 competitors.

5 79. The Ordinance, as amended, imposes a condition on the issuance of a permit to sell
6 tobacco products, i.e., that the applicant must give up its right to operate one lawful business, a
7 pharmacy licensed by the State, in order to be permitted to conduct another lawful business, a
8 retail grocery store that sells lawful tobacco products among many other products.

9 80. The Ordinance thus imposes an unconstitutional condition on the exercise of
10 constitutionally protected rights.

11 81. The Ordinance unlawfully denies Safeway access to permits to sell tobacco
12 products in the City and County of San Francisco unless Safeway discontinues its pharmacy
13 businesses in violation of the 14th Amendment to the United States Constitution and Article I, § 7
14 of the California Constitution.

15 82. Safeway requests an order declaring the San Francisco Health Code, as amended by
16 the Ordinance, unconstitutional as an unconstitutional condition on the issuance of a permit to sell
17 tobacco products, enjoining the City and County of San Francisco from enforcing the Health
18 Code, as amended by the Ordinance on that basis, and ordering the City and County of San
19 Francisco to issue permits to Safeway allowing it to sell tobacco products in its retail grocery
20 stores in San Francisco that also have pharmacies.

21 **THIRD CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF –**
22 **DENIAL OF EQUAL PROTECTION UNDER THE UNITED STATES AND**
23 **CALIFORNIA CONSTITUTIONS**

24 83. Safeway realleges and incorporates by reference as though fully set forth herein
25 paragraphs 1 through 81 inclusive of this Complaint.

26 84. The San Francisco Health Code, as amended by the Ordinance, treats similarly-
27 situated retail businesses differently, and unfairly. The Ordinance discriminates between and
28 among General Grocery Stores, Big Box Stores, and other retail outlets in San Francisco based

1 solely on whether or not there is a licensed pharmacy somewhere on their premises.

2 85. For example, the Director of Public Health is required to issue a permit to sell
3 tobacco products to a grocery store identical in all respects to a Safeway store, except for the lack
4 of a pharmacy somewhere on its premises, while the Director is prohibited from issuing the same
5 permit to a Safeway store with a separate pharmacy department located on its premises even
6 though the tobacco products are not sold “in” the pharmacy or anywhere near the pharmacy, and
7 even though they are not sold by a pharmacist or other pharmacy employee.

8 86. The attempt by the Health Code, as amended by the Ordinance, to distinguish
9 between retail grocery stores without licensed pharmacies and those with licensed pharmacies
10 does not in any principled way justify the unequal and prejudicial treatment afforded to retail
11 grocery stores with pharmacies somewhere on their premises.

12 87. Safeway requests an order declaring the San Francisco Health Code, as amended by
13 the Ordinance, unconstitutional as a denial of equal protection, enjoining the City and County of
14 San Francisco from enforcing the Health Code, as amended by the Ordinance on that basis, and
15 ordering the City and County of San Francisco to issue Safeway permits to sell tobacco products
16 in its retail stores that also have pharmacies.

17 **FOURTH CAUSE OF ACTION – DENIAL OF DUE PROCESS IN VIOLATION**
18 **OF THE FEDERAL AND CALIFORNIA CONSTITUTIONS**

19 88. Safeway realleges and incorporates herein by reference as though fully set forth
20 herein paragraphs 1 through 86, inclusive, of this Complaint.

21 89. The San Francisco Health Code, as amended by the Ordinance, defines “pharmacy”
22 to include the non-pharmacy areas of Safeway’s retail stores.

23 90. The classification of these other parts of Safeway’s stores as pharmacies is arbitrary
24 and capricious. It does not comport with what actually occurs, or is sold, in these other parts of
25 the stores.

26 91. The arbitrary and capricious classification of these other parts of retail grocery
27 stores as “pharmacies” is a denial of Safeway’s due process rights under the 14th Amendment to
28 the United States Constitution and Article I, § 7 of the California Constitution.

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1. A declaration that the Ordinance as amended does not apply to sales of tobacco products outside of a licensed pharmacy by Safeway stores with a licensed pharmacy, is an unconstitutional condition on the issuance of a permit to sell tobacco products and on Safeway's other Federal and State Constitutional rights, violates Safeway's equal protection and due process rights under the 14th Amendment to the United States Constitution and Article I, § 7 of the California Constitution, and is preempted by State law;
2. Permanently enjoining defendants and each of them from enforcing the San Francisco Health Code as amended by Ordinance 245-10 as to Safeway, and from refusing to issue to Safeway permits to sell tobacco products in retail grocery stores in the City and County of San Francisco that also contain pharmacies;
3. For an award of attorneys' fees (42 U.S.C. § 1988);
4. For Safeway's costs of suit; and
5. For such other and further relief as the Court may deem proper and just.

DATED: February 18, 2011

DILLINGHAM & MURPHY, LLP
THOMAS J. KLITGAARD
WILLIAM F. MURPHY
JOHN N. DAHLBERG
BARBARA L. HARRIS CHIANG
ANGEL R. SEVILLA

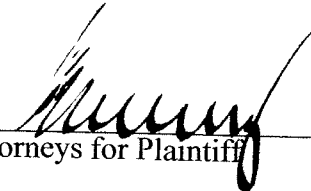
By: 
Attorneys for Plaintiff

EXHIBIT A



City and County of San Francisco Master Report

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 080594	File Type: Ordinance	Status: Passed
Enacted: 194-08	Effective:	
Version: 1	Reference:	In Control: Mayor
File Name: Prohibiting pharmacies from selling tobacco products	Introduced: 4/29/2008	
Requester:	Cost:	Date Passed: 8/7/2008
Comment: No Fiscal Impact. No Economic Impact	Title: Ordinance amending the San Francisco Health Code by amending Section 1009.53 and adding Section 1009.60 and Article 19J, to prohibit pharmacies from selling tobacco products.	
Indexes:	Sponsors: Mayor, Peskin, McGoldrick	

History of Legislative File		080594		Sponsors: Mayor, Peskin, McGoldrick		
Ver	Acting Body	Date	Action	Sent To	Due Date	Pass/Fail
1	President	4/29/2008	ASSIGNED UNDER 30 DAY RULE	City Operations and Neighborhood Services Committee	5/29/2008	
<i>(Referred to the Small Business Commission for comment and recommendation.)</i>						
1	Small Business Commission	6/11/2008	RESPONSE RECEIVED			
<i>The Small Business Commission unanimously supports proposed ordinance, with recommendations to the Mayor.</i>						
1	City Operations and Neighborhood Services Committee	7/17/2008	REFERRED WITHOUT RECOMMENDATION			Passed
<i>Heard in Committee. Speakers: Dr. Mitchell Katz, Department of Public Health; Cheryl Adams, Deputy City Attorney; Michael Sharpe, UFCW Local 648; Brajah Norris, Small Business Commission; Dr. Steven Fugaro, SF Medical Society; Edward Al-Ghani, UFCW Local 648; Jean Lopez, Walgreens; Christian Pradia, UFCW Local 648; Rob Black, SF Chamber of Commerce; Lisa Kroon, UCSF School of Pharmacy; James Ray, American Cancer Society; Bob Gordon, Tobacco Free Coalition; Ralph Morals, American Lung Association; Ted Guggenheim, Tobacco Free Coalition; Dave Devencenzi, Walgreens; Brian Katcher, Department of Public Health; Peter Kellison, California Retailers Association; Rodney Templeton; Female Speaker, Walgreens; Female Speaker, Walgreens.</i>						
1	Board of Supervisors	7/29/2008	PASSED ON FIRST READING			
1	Board of Supervisors	8/5/2008	FINALLY PASSED			Passed
1	Mayor	8/7/2008	APPROVED			Passed

Master Report Continued (101056)

1	Board of Supervisors	09/21/2010 PASSED ON FIRST READING	Passed
1	Board of Supervisors	09/28/2010 FINALLY PASSED	
1	Mayor	10/05/2010 RETURNED UNSIGNED	Passed

File No. 080594

Committee Item No. 7
Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS AGENDA PACKET CONTENTS LIST

Committee CITY OPERATIONS AND
NEIGHBORHOOD SERVICES

Date 7/17/08

Board of Supervisors Meeting

Date _____

Cmte Board

- | | | |
|-------------------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Motion |
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| <input type="checkbox"/> | <input type="checkbox"/> | Budget Analyst Report |
| <input type="checkbox"/> | <input type="checkbox"/> | Legislative Analyst Report |
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Completed by: Gail Johnson
Completed by: _____

Date 7/14/08
Date _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

1 [Prohibiting Pharmacies From Selling Tobacco Products.]
2

3 **Ordinance amending the San Francisco Health Code by amending Section 1009.53 and**
4 **adding Section 1009.60 and Article 19J, to prohibit pharmacies from selling tobacco**
5 **products.**

6 Note: Additions are single-underline italics Times New Roman;
7 deletions are ~~strikethrough italics Times New Roman~~.
8 Board amendment additions are double underlined.
9 Board amendment deletions are ~~strikethrough normal~~.

10 Be it ordained by the People of the City and County of San Francisco:

11 Section 1. Findings.

12 The Board of Supervisors hereby finds and declares as follows:

13 1. Tobacco is the leading cause of preventable death in the United States and the
14 leading risk factor contributing to the burden of disease in the world's high-income countries;

15 2. In addition to its health impact, tobacco related death and disease has an
16 economic impact. In 1999, the economic costs of smoking in California were estimated to be
17 \$475 per resident or \$3,331 per smoker, for a total of nearly \$15.8 billion in smoking-related
18 costs (1999 dollars). Those same costs in 2008 dollars would be \$614 per resident or \$4,310
19 per smoker for a total of nearly \$20.4 billion dollars;

20 3. Twenty-three percent of San Franciscans have been diagnosed with high blood
21 pressure. The National Heart Lung and Blood Institute's guidelines for the use of prescription
22 drugs in the treatment of high blood pressure call for smoking cessation;

23 4. Twenty percent of San Franciscans have been diagnosed with high cholesterol.
24 The National Heart Lung and Blood Institute's guidelines for the use of prescription drugs in
25 the treatment of high cholesterol call for smoking cessation;

1 5. The American Diabetes Association's standards of medical care in diabetes call
2 for smoking cessation as well as prescription drug therapy;

3 6. Thirteen percent of San Franciscans have asthma. The National Heart Lung
4 and Blood Institute's guidelines for the use of prescription drugs in the treatment of asthma
5 call for avoidance of tobacco smoke;

6 7. Through the sale of tobacco products, pharmacies convey tacit approval of the
7 purchase and use of tobacco products. This approval sends a mixed message to consumers
8 who generally patronize pharmacies for health care services;

9 8. In 1970, The American Pharmaceutical Association stated that mass display of
10 cigarettes in pharmacies is in direct contradiction to the role of a pharmacy as a public health
11 facility;

12 9. The Tobacco Education and Research Oversight Committee for California, as
13 well as the American Pharmacists Association, the California Pharmacists Association, and
14 the California Medical Association have called for the adoption of state and local prohibitions
15 of tobacco sales in drugstores and pharmacies;

16 10. A majority (78%) of independently owned pharmacies in California have become
17 tobacco free; however, tobacco products are still sold by 94% of chain drugstores;

18 11. Of the independently owned pharmacies that are tobacco-free, 88% report they
19 have experienced either no loss or an increase in business since removing tobacco from their
20 shelves;

21 12. An overwhelming percentage of California consumers (96.8%) indicate that they
22 would continue to patronize their pharmacy or drugstore as often or more often if it stopped
23 selling tobacco products;

1 13. A large majority (72.3%) of California consumers are opposed to the sale of
2 tobacco products in drugstores and nearly one-half of California smokers (49.7%) disagree or
3 strongly disagree that tobacco products should be sold through drugstores;

4 14. Only 13.2% of chain drugstore pharmacists are in favor of the sale of tobacco
5 products in drugstores;

6 15. In a 2003-2004 national survey of pharmacy students, nearly three-quarters
7 (71%) of those surveyed were against tobacco sales in pharmacies. These findings were
8 aligned with the 2003 resolution of the American Association of Colleges of Pharmacy that
9 encourages pharmacy schools to use only training sites that do not sell tobacco products;

10 16. Pharmacies and drugstores are among the most accessible and trusted sources
11 of health information among the public;

12 17. Clinicians can have a significant effect on smokers' probability of quitting
13 smoking;

14 18. Most health care institutions have adopted policies that have banned tobacco
15 sales and created smoke-free environments. In spite of numerous resolutions and
16 recommendations by state and national pharmacy organizations calling for pharmacies to stop
17 selling tobacco, some community pharmacies in the United States continue to sell tobacco
18 products.

19 19. A study of 100 randomly selected San Francisco pharmacies found that in 2003,
20 61% of pharmacies sold cigarettes, significantly less compared to 89% of pharmacies in 1976.
21 Most of this decrease was among independently owned pharmacies.

22 20. In a 2003 study of San Francisco pharmacies' merchandising of cigarettes, 84%
23 of pharmacies selling cigarettes displayed tobacco advertising.
24
25

1 21. Prescription drug sales for chain drugstores represent a significantly higher
2 percentage of total sales than for grocery stores and big box stores that contain pharmacies.
3 According to the 2007 Rite Aide Annual Report, prescription drugs sales represented 63.7%
4 of total sales in fiscal 2007. Walgreen's 2007 Annual Report documented prescription sales as
5 approximately 65% of net sales that year. Pharmacy sales at Safeway have been estimated
6 at 7.5% of annual volume. Costco's prescription sales generated 1.5% of total revenue in
7 2002.

8 Section 2. The San Francisco Health Code is hereby amended by amending Section
9 1009.53 and adding Section 1009.60 and Article 19J, to read as follows:

10 **SEC. 1009.53. APPLICATION PROCEDURE: INSPECTION OF PREMISES;**
11 **ISSUANCE AND DISPLAY OF PERMIT.**

12 (a) Application. An application for a tobacco sales permit shall be submitted in the
13 name of the person(s) proposing to engage in the sale of tobacco products and shall be
14 signed by each person or an authorized agent thereof. The application shall be accompanied
15 by the appropriate fees as described in section 35 of the San Francisco Business and Tax
16 Regulations Code. A separate application is required for each location where tobacco sales
17 are to be conducted. All applications shall be submitted on a form supplied by the Department
18 and shall contain the following information:

- 19 1. The name, address, and telephone number of the applicant;
- 20 2. The establishment name, address, and telephone number for each location for
21 which a tobacco sales permit is sought;
- 22 3. Such other information as the Director deems appropriate, including the applicant's
23 type of business, and whether the applicant has previously been issued a permit under this
24 Article that is, or was at any time, suspended or revoked.

1 (b) Inspection by Director. Upon receipt of a completed application and fees, the
2 Director may inspect the location at which tobacco sales are to be permitted. The Director
3 may also ask the applicant to provide additional information that is reasonably related to the
4 determination whether a permit may issue.

5 (c) Issuance of Permit. If the Director is satisfied that the applicant has met the
6 requirements of this Article and that issuance of the permit will not violate any law, the
7 Department shall issue the permit. No permit shall issue if the Director finds that the applicant
8 is in violation of San Francisco Health Code section 1009.1 (regulating cigarette vending
9 machines), ~~or~~ San Francisco Police Code section 4600.3 (regulating the self-service
10 merchandising of tobacco products), or if the applicant is a pharmacy prohibited from selling
11 tobacco products under Article 19J. No permit shall issue if the application is incomplete or
12 inaccurate.

13 (d) Display of Permit. Each permittee shall display the permit prominently at each
14 location where tobacco sales occur. No permit that has been suspended shall be displayed
15 during the period of suspension. A permit that has been revoked is void and may not be
16 displayed.

17
18 **SEC. 1009.60. CONDUCT VIOLATING TOBACCO CONTROL LAWS**

19 (a) Upon a decision by the Director that the permittee or the permittee's agent or employee has
20 engaged in any conduct that violates local, state, or federal law applicable to tobacco products or
21 tobacco sales, the Director may suspend a tobacco sales permit as set forth in section 1009.66, impose
22 administrative penalties as set forth in section 1009.67, or both suspend the permit and impose
23 administrative penalties.

1 **(b) The Director shall commence enforcement of this section by serving either a notice of**
2 **correction under section 1009.68 of this Article or a notice of initial determination under section**
3 **1009.69 of this Article.**

4
5 **ARTICLE 19J: PROHIBITING PHARMACIES FROM SELLING TOBACCO PRODUCTS**

6 **SEC. 1009.91. DEFINITIONS.**

7 **(a) "Big Box Store" shall mean a single retail establishment occupying an area in excess of**
8 **100,000 gross square feet.**

9 **(b) "Director" shall mean the Director of the Department of Public Health or his or her**
10 **designee.**

11 **(c) "General Grocery Store" shall have the same meaning as set forth in Planning Code**
12 **Section 790.102(a) or any successor provisions.**

13 **(d) "Person" shall mean any individual person, firm, partnership, association, corporation,**
14 **company, organization, or legal entity of any kind.**

15 **(e) "Pharmacy" shall mean a retail establishment in which the profession of pharmacy by a**
16 **pharmacist licensed by the State of California in accordance with the Business and Professions Code is**
17 **practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods**
18 **in addition to prescription pharmaceuticals. For purposes of this Article, "pharmacy" includes retail**
19 **stores commonly known as drugstores.**

20 **(f) "Tobacco Product" shall mean any substance containing tobacco leaf, including but not**
21 **limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco, and dipping tobacco.**

22
23 **Sec. 1009.92. PROHIBITION AGAINST TOBACCO PRODUCT SALES AT**
24 **PHARMACIES.**

1 No person shall sell tobacco products in a pharmacy, except as provided in Sec. 1009.93.
2

3 **Sec. 1009.93. EXCEPTIONS.**

4 The prohibition against tobacco sales at pharmacies in Section 1009.92 shall not apply to:

5 (a) General Grocery Stores.

6 (b) Big Box Stores.
7

8 **Sec. 1009.94. PENALTIES AND ENFORCEMENT.**

9 Administrative penalties shall be assessed and collected by the Director in accordance with San
10 Francisco Administrative Code Chapter 100, a copy of which is on file in Board of Supervisors File No.
11 _____ and which is hereby incorporated by reference.
12

13 **SEC. 1009.95. EXPIRATION OF PERMIT TO SELL TOBACCO.**

14 Any permit to sell tobacco issued to a pharmacy pursuant to Article 19H shall expire on
15 September 30, 2008, and shall not be renewed if sales of tobacco by that pharmacy are prohibited
16 under this Article.
17

18 **SEC. 1009.96. AUTHORITY TO ADOPT RULES AND REGULATIONS.**

19 The Director may issue and amend rules, regulations, standards, guidelines, or conditions to
20 implement and enforce this Article.
21

22 **SEC. 1009.97. PREEMPTION.**

23 In adopting this Article, the Board of Supervisors does not intend to regulate or affect the rights
24 or authority of the State to do those things that are required, directed, or expressly authorized by
25

1 federal or state law. Further, in adopting this Article, the Board of Supervisors does not intend to
2 prohibit that which is prohibited by federal or state law.
3

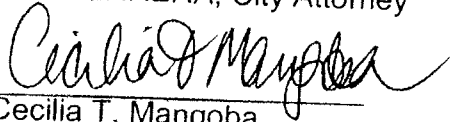
4 **SEC. 1009.98. CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL**
5 **WELFARE.**

6 In undertaking the adoption and enforcement of this Article, the City and County is assuming an
7 undertaking only to promote the general welfare. The City does not intend to impose the type of
8 obligation that would allow a person to sue for money damages for an injury that the person claims to
9 suffer as a result of a City officer or employee taking or failing to take an action with respect to any
10 matter covered by this Article.
11

12 **SEC. 1009.99. SEVERABILITY.**

13 If any of the provisions of this Article or the application thereof to any person or circumstance
14 is held invalid, the remainder of this Article, including the application of such part or provisions to
15 persons or circumstances other than those to which it is held invalid, shall not be affected thereby and
16 shall continue in full force and effect. To this end, the provisions of this Article are severable.
17

18 APPROVED AS TO FORM:
19 DENNIS J. HERRERA, City Attorney

20 By: 
21 Cecilia T. Mangoba
22 Deputy City Attorney
23
24
25

Mayor Newsom
BOARD OF SUPERVISORS



City and County of San Francisco

Tails

Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 080594

Date Passed:

Ordinance amending the San Francisco Health Code by amending Section 1009.53 and adding Section 1009.60 and Article 19J, to prohibit pharmacies from selling tobacco products.

July 29, 2008 Board of Supervisors — PASSED ON FIRST READING

Ayes: 8 - Alioto-Pier, Ammiano, Daly, Maxwell, McGoldrick, Mirkarimi, Peskin,
Sandoval

Noes: 3 - Chu, Dufty, Elsbernd

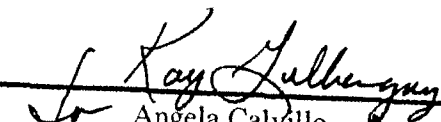
August 5, 2008 Board of Supervisors — FINALLY PASSED

Ayes: 8 - Alioto-Pier, Ammiano, Daly, Maxwell, McGoldrick, Mirkarimi, Peskin,
Sandoval

Noes: 3 - Chu, Dufty, Elsbernd

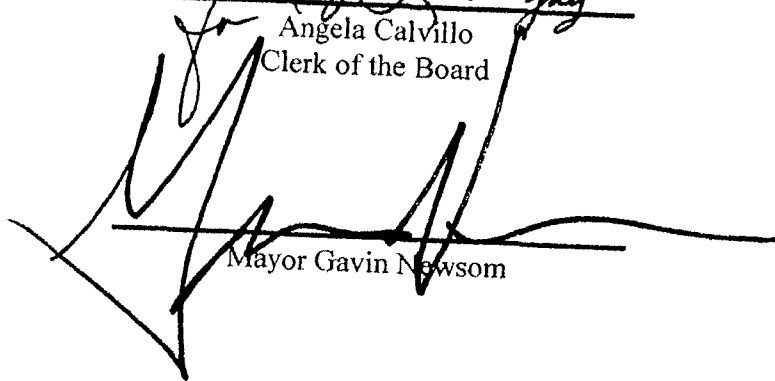
File No. 080594

I hereby certify that the foregoing Ordinance
was **FINALLY PASSED** on August 5, 2008
by the Board of Supervisors of the City and
County of San Francisco.



Angela Calvillo
Clerk of the Board

8.7.08
Date Approved



Mayor Gavin Newsom

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PHILIP MORRIS USA,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Defendants.

No. C 08-04482 CW

ORDER DENYING
PRELIMINARY
INJUNCTION

Plaintiff moves for a preliminary injunction enjoining Defendants from enforcing City Ordinance No. 194-08 (Ordinance). Defendants oppose the motion. The motion was heard on November 6, 2008. Having considered all of the papers filed by the parties and oral argument on the motion, the Court DENIES Plaintiff's motion for a preliminary injunction.

BACKGROUND

Plaintiff Phillip Morris USA is a Virginia corporation that manufactures cigarettes that are marketed and sold in San Francisco. Defendants are City and County of San Francisco, Board of Supervisors of the City and County of San Francisco and Gavin Newsom, Mayor of the City and County of San Francisco. On August 5, 2008, the Board of Supervisors passed and, on August 7, 2008,

1 the Mayor signed and approved Ordinance 194-08. The Ordinance
2 prohibits the sale of tobacco products in stores containing
3 pharmacies except for general grocery stores and "big box" stores.

4 In the Ordinance, the Board made several findings describing
5 the need for the law. The Board found, "Through the sale of
6 tobacco products, pharmacies convey tacit approval of the purchase
7 and use of tobacco products. This approval sends a mixed message
8 to consumers who generally patronize pharmacies for health care
9 services." San Francisco Ordinance No. 194-08 § 1(7). The Board
10 also cited a 2003 study that found that eighty-four percent of San
11 Francisco pharmacies selling cigarettes displayed tobacco
12 advertising. Id.

13 On September 24, 2008, Plaintiff sought an emergency temporary
14 restraining order to prevent the ordinance from going into effect
15 as scheduled on October 1, 2008. The Court denied the application.
16 The Court ordered Defendants to show cause why a preliminary
17 injunction should not issue. The law went into effect on October
18 1, 2008.

19 LEGAL STANDARD

20 To obtain a preliminary injunction, the moving party must
21 establish either: (1) a combination of probable success on the
22 merits and the possibility of irreparable harm, or (2) that serious
23 questions regarding the merits exist and the balance of hardships
24 tips sharply in the moving party's favor. Rodeo Collection, Ltd.
25 v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987).

26 The test is a "'continuum in which the required showing of
27 harm varies inversely with the required showing of
28 meritoriousness.'" Id. (quoting San Diego Comm. Against

1 Registration & the Draft v. Governing Bd. of Grossmont Union High
2 Sch. Dist., 790 F.2d 1471, 1473 n.3 (9th Cir. 1986)). The moving
3 party ordinarily must show "a significant threat of irreparable
4 injury," although there is "a sliding scale in which the required
5 degree of irreparable harm increases as the probability of success
6 decreases," United States v. Odessa Union Warehouse Co-op, 833 F.2d
7 172, 174, 175 (9th Cir. 1987), and vice versa. To overcome a weak
8 showing of merit, a plaintiff seeking a preliminary injunction must
9 make a very strong showing that the balance of hardships is in its
10 favor. Rodeo Collection, 812 F.2d at 1217.

11 DISCUSSION

12 I. Probability of Success on the Merits

13 Philip Morris argues that there is a sufficient likelihood
14 that it will succeed on the merits of its First Amendment and
15 federal preemption claims to support the grant of a preliminary
16 injunction.

17 A. First Amendment

18 Philip Morris argues that the Ordinance unconstitutionally
19 restricts its "protected interest in communicating information
20 about its products." See Lorillard Tobacco Co. v. Reilly, 533 U.S.
21 525, 571 (2001). Philip Morris asserts that removing products from
22 pharmacies suppresses its speech because the product itself is a
23 form of advertisement. Philip Morris also argues that the
24 Ordinance has the practical effect of removing all point of sale
25 advertising because stores affected by the Ordinance participated
26 in Philip Morris's "Retail Leaders" program, which provides
27 retailers with advertising and promotional materials. Once the
28 Ordinance went into effect, Philip Morris terminated the Retail

1 Leaders agreements with all affected stores. Paoli Supplemental
2 Dec. ¶ 4.

3 Nothing in the Ordinance restricts Philip Morris's ability to
4 advertise its products in pharmacies. Rather, the Ordinance
5 states, "No person shall sell tobacco products in a pharmacy except
6 [in grocery stores or big box stores]." As Defendants point out,
7 the ordinance would not prevent Philip Morris from continuing to
8 pay Walgreens and Rite Aid to display actual Philip Morris products
9 in prominent parts of the store. Therefore, the Ordinance
10 prohibits conduct, tobacco sales, not speech about tobacco.

11 The Supreme Court has "extended First Amendment protection
12 only to conduct that is inherently expressive." Rumsfeld v. Forum
13 for Academic and Institutional Rights, Inc., 547 U.S. 47, 66 (2006)
14 (FAIR) (explaining that in Texas v. Johnson, 491 U.S. 397, 406
15 (1989), the Court "held that burning the American flag was
16 sufficiently expressive to warrant First Amendment protection.").
17 However, the Court has "rejected the view that conduct can be
18 labeled speech whenever the person engaging in the conduct intends
19 thereby to express an idea." Id. at 65-66 (internal quotation and
20 citation omitted).

21 To determine whether particular conduct possesses sufficient
22 communicative elements to bring the First Amendment into play, the
23 Supreme Court asks whether "'[a]n intent to convey a particularized
24 message was present, and [whether] the likelihood was great that
25 the message would be understood by those who viewed it.'" Texas v.
26 Johnson, 491 U.S. at 404 (quoting Spence v. Washington, 418 U.S.
27 405, 410-411 (1974)). To give some examples, the Supreme Court has
28

1 recognized the expressive nature of students' wearing
2 of black armbands to protest American military
3 involvement in Vietnam, Tinker v. Des Moines
4 Independent Community School Dist., 393 U.S. 503, 505
5 (1969); of a sit-in by blacks in a "whites only" area
6 to protest segregation, Brown v. Louisiana, 383 U.S.
7 131, 141-142 (1966); of the wearing of American
8 military uniforms in a dramatic presentation
9 criticizing American involvement in Vietnam, Schacht v.
10 United States, 398 U.S. 58 (1970); and of picketing
11 about a wide variety of causes, see, e.g., Food
12 Employees v. Logan Valley Plaza, Inc., 391 U.S. 308,
13 313-314 (1968); United States v. Grace, 461 U.S. 171,
14 176 (1983).

15 Here, there is nothing inherently expressive about selling tobacco
16 products in pharmacies that would warrant First Amendment
17 protection. Rather, the expression implicated is the speech
18 accompanying the Ordinance, not the conduct prohibited. See FAIR,
19 547 U.S. at 66. For instance, the Ordinance states one purpose of
20 the law is to counter the "mixed message" that might arise from
21 selling tobacco in stores that are known for selling health care
22 products. The term "mixed message" here is used colloquially to
23 mean that allowing the continued sale of tobacco products alongside
24 health care products in pharmacies might create confusion among
25 consumers. The fact that Philip Morris relies so heavily on this
26 explanatory colloquialism in the Ordinance "is strong evidence that
27 the conduct at issue here is not so inherently expressive that it
28 warrants protection under" the First Amendment. Id.

29 Phillip Morris also asserts that the Ordinance is
30 unconstitutional because it was passed based on an "improper
31 censorial motive," namely Defendants' "antipathy to the advertising
32 that accompanies the offering of tobacco for sale." Application
33 for TRO at 11 and 9. The Court disagrees. As noted above, the
34 Ordinance regulates tobacco sales, not advertising. The record

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CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiff's motion for a preliminary injunction (Docket No. 6).

IT IS SO ORDERED.

Dated: 12/5/08



CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California

EXHIBIT C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 09 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PHILIP MORRIS USA, INC.,

Plaintiff - Appellant,

v.

**CITY AND COUNTY OF SAN
FRANCISCO; et al.,**

Defendants - Appellees.

No. 08-17649

D.C. No. 4:08-cv-04482-CW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted August 12, 2009
San Francisco, California

Before: **KOZINSKI**, Chief Judge, **HUG** and **REINHARDT**, Circuit Judges.

Plaintiff's advertising is protected expressive activity. E.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508–12 (1996) (plurality opinion). Selling cigarettes isn't, because it doesn't involve conduct with a "significant expressive

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

element.” Arcara v. Cloud Books, Inc., 478 U.S. 697, 701–02, 706 (1986); cf. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550 (2001). It doesn’t even have “an expressive component.” Talk of the Town v. Dep’t of Fin. & Bus. Servs., 343 F.3d 1063, 1069 (9th Cir. 2003).

San Francisco Ordinance 194–08 limits where cigarettes may be sold; it doesn’t prevent plaintiff from advertising. Even assuming it incidentally restricts plaintiff’s advertising in a way that wouldn’t be permissible as a direct regulation of advertising, that’s not enough. “[E]very civil and criminal [regulation] imposes some conceivable burden on First Amendment protected activities.” Arcara, 478 U.S. at 706.

Neither does the ordinance have “the inevitable effect of singling out those engaged in expressive activity.” Id. at 704, 707. Of the three groups “singled out” by the ordinance—pharmacies, smokers and cigarette companies—only the cigarette companies are even arguably engaged in expressive activity.

And even if the ordinance did have the inevitable effect of singling out expressive activity, “a differential burden . . . is insufficient by itself to raise First Amendment concerns.” Leathers v. Medlock, 499 U.S. 439, 452 (1991). The burden must be “directed at, or present[] the danger of suppressing, particular ideas.” Id. at 453. No such danger is present here. The censorial motive plaintiff

attributes to defendants is always present when the government restricts sales of a product. That can't be sufficient. Cf. 44 Liquormart, 517 U.S. at 508–12; Lorillard, 533 U.S. at 550.

AFFIRMED.

EXHIBIT D

Filed 6/8/10

CERTIFIED FOR PARTIAL PUBLICATION*
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

WALGREEN CO.

Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN
FRANCISCO et al.,

Defendants and Respondents.

A123891

(San Francisco County
Super. Ct. No. 479553)

In this appeal we consider a challenge to an ordinance enacted by the City and County of San Francisco (the City) banning the sale of tobacco products in certain retail establishments that contain a pharmacy. The ordinance is premised on the notion that a retail store conveys tacit approval of tobacco use when it sells prescription drugs as well as tobacco products. Appellant Walgreen Co. (Walgreens) contends the ordinance violates the equal protection clauses of the federal and state constitutions, arguing there is no rational basis for prohibiting its stores with pharmacies from selling tobacco products while allowing such sales at “general grocery” stores and “big box” stores that contain pharmacies. Walgreens also claims the ordinance must be invalidated because the City’s Office of Economic Analysis (OEA) abused its discretion by failing to prepare a report on the economic impact of the legislation, a purported violation of voter-enacted Proposition I.

* Pursuant to California Rules of Court, rules 8.1105(a) and 8.1110, this opinion is certified for publication with the exception of part III.

We conclude the OEA's failure to prepare an economic impact report does not permit an interested party such as Walgreens to invalidate a duly enacted ordinance. The cause of action premised on failure to comply with Proposition I therefore fails as a matter of law. However, we agree with Walgreens that its complaint adequately states a cause of action alleging an equal protection violation. The issue is a close one only because the deferential rational basis test guides our equal protection analysis. Nevertheless, even under that deferential standard, the challenged distinction among stores containing licensed pharmacies is not fairly related to the object of the prohibition on sales of tobacco products. There is no rational basis to believe the supposed implied message conveyed by selling tobacco products at a Walgreens that has a licensed pharmacy in the back of the store is different in any meaningful way from the implied message conveyed by selling such products at a supermarket or big box store that contains a licensed pharmacy. Accordingly, we reverse in part the judgment of the trial court sustaining the City's demurrer without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

The legislation challenged in this appeal, City Ordinance No. 194-08 (hereafter the ordinance), amended the San Francisco Health Code to provide that "No person shall sell tobacco products¹ in a pharmacy, except as provided in [San Francisco Health Code] Sec. 1009.93." (S.F. Health Code, § 1009.92.) The term "pharmacy" is defined in the ordinance to refer to the entire retail establishment that includes the portion normally referred to as a pharmacy, giving rise to some confusion in terminology.² To avoid

¹ "Tobacco Product" is defined as "any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco, and dipping tobacco." (S.F. Health Code, § 1009.91, subd. (f).)

² "Pharmacy" is defined as "a retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals. For purposes of this Article, 'pharmacy' includes retail stores commonly known as drugstores." (S.F. Health Code, § 1009.91, subd. (e).)

confusion and be consistent with the language of the ordinance, we shall refer to the section of a retail establishment in which a licensed pharmacist prepares and sells prescription pharmaceuticals as a “licensed pharmacy,” in contrast to the entire store containing a licensed pharmacy, which the ordinance labels a “pharmacy.” The prohibition on sales of tobacco products is not limited to the licensed pharmacy portion of a store but instead applies to the establishment as a whole.

In addition to traditional independent pharmacies, which sell little more than prescription drugs, over-the-counter medications, and personal care items, the term “pharmacy” encompasses chain stores, supermarkets, and big box stores that sell a variety of products such as food, beverages, paper goods, and miscellaneous items in addition to prescription drugs. However, although a “general grocery store”³ or a “big box store”⁴ that contains a licensed pharmacy qualifies as a “pharmacy” under the ordinance, the ordinance specifically excludes these establishments from the prohibition on sales of tobacco products. (S.F. Health Code, § 1009.93.) As a result, the ordinance prohibits a Walgreens that contains a licensed pharmacy from selling tobacco products but imposes no such limitation on a Safeway supermarket or a Costco big box store that contains a licensed pharmacy.

The legislative findings associated with the ordinance cite the adverse health effects associated with tobacco use. The principal finding upon which the ordinance is

³ “General Grocery Store” is defined to have “the same meaning as set forth in [San Francisco] Planning Code Section 790.102(a) or any successor provisions.” (S.F. Health Code, § 1009.91, subd. (c).) Section 790.102, subdivision (a)(1) of the San Francisco Planning Code, in turn, defines “General Grocery Store” as “[a]n individual retail food establishment that: [¶] (A) Offers a diverse variety of unrelated, non-complementary food and non-food commodities, such as beverages, dairy, dry goods, fresh produce and other perishable items, frozen foods, household products, and paper goods; [¶] (B) May provide beer, wine, and/or liquor sales for consumption off the premises . . . ; (C) Prepares minor amounts or no food on-site for immediate consumption; and [¶] (D) Markets the majority of its merchandise at retail prices.”

⁴ “Big Box Store” is defined as “a single retail establishment occupying an area in excess of 100,000 gross square feet.” (S.F. Health Code, § 1009.91, subd. (a).)

premised states: "Through the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize pharmacies for health care services." As further support for the ordinance, the City's Board of Supervisors (Board of Supervisors or Board) also found that "[p]harmacies and drugstores are among the most accessible and trusted sources of health information among the public," and that "[c]linicians can have a significant effect on smokers' probability of quitting smoking."

As reflected in the legislative findings, various medical and pharmaceutical organizations advocate prohibiting sales of tobacco products in pharmacies. Among the organizations supporting such a prohibition are the Tobacco Education and Research Oversight Committee for California, the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association. As far back as 1970 the American Pharmaceutical Association declared that "mass display of cigarettes in pharmacies is in direct contradiction to the role of a pharmacy as a public health facility."

As support for distinguishing between chain drugstores,⁵ on the one hand, and general grocery stores and big box stores on the other hand, the ordinance contains a finding that prescription drug sales comprise a much larger part of the business of chain drugstores, as follows: "Prescription drug sales for chain drugstores represent a significantly higher percentage of total sales than for grocery stores and big box stores that contain pharmacies. According to the 2007 Rite Aid Annual Report, prescription drug sales represented 63.7% of total sales in fiscal 2007. Walgreen's 2007 Annual Report documented prescription sales as approximately 65% of net sales that year.

⁵ Neither the ordinance nor the legislative findings define the terms "drugstore" or "chain drugstore." Nevertheless, based on the text of the legislative findings, the City classifies chain stores such as Walgreens and Rite Aid as "chain drugstores," whereas Safeway and Costco are not considered "chain drugstores," even though they are chains and may contain a licensed pharmacy.

Pharmacy sales at Safeway have been estimated at 7.5% of annual volume. Costco's prescription sales generated 1.5% of total revenue in 2002."

During public hearings on the ordinance, one of its main proponents, Dr. Mitchell Katz, the City's Director of Public Health, addressed why the legislation was directed at only certain stores containing licensed pharmacies. Dr. Katz explained: "Well, you know, shouldn't you include all stores [containing licensed pharmacies]. If you're going to do this, you know, let's be fair, look at all stores. But I ask you, in your own experience, if we stop people going into a Walgreens, going into a Rite-Aid, going into one of these independent pharmacies and said, What kind of store are you going into? [T]hey would say, Pharmacy. If you stop someone going into a supermarket, and [say], What kind of store are you going into? [E]ven a supermarket that has a drugstore, they'd say, I'm going into a supermarket. And that's the social perceptibility difference. . . . You can see as a total of sales that Walgreens, Rite-Aid, and the two chain stores, [pharmacy sales are] their major line of work, and to me that makes a big difference in terms of how those establishments are viewed by vulnerable adolescents."

When asked during a Board of Supervisors meeting why the legislation did not cover all stores containing a pharmacy, Dr. Katz responded as follows: "What I was trying to do in our work in fashioning the legislation was focusing on the group where I thought the case was strongest. We all go to supermarkets. We all go to warehouse stores. They get a cross section of people. We teach our children that supermarkets, wholesale stores, they're places you go to buy everything. When it comes [to] ~~pharmacies, I feel that our children, our teenagers get a different message. . . . What~~ we're trying to say is these places market themselves as health-promoting businesses. They're not Walgreens General Store. They're not Rite Aid. They're Walgreens pharmacy. They're Rite Aid pharmacy. The ['P]harmacy America [T]rusts' and so it sends a very different message. Certainly in the future if we have success and I believe we would, just like San Francisco was the leader and then broaden[ed] the legislation . . .

around second hand smoke. . . . [W]e focus on that group we thought was most compelling.”

On September 8, 2008, Walgreens filed a complaint seeking to invalidate the ordinance. Walgreens also moved for a preliminary injunction to prevent the ordinance from taking effect. The trial court denied the application for a preliminary injunction on September 30, 2008. The ordinance took effect the following day. Walgreens thereafter filed a first amended complaint (hereafter the complaint).

The complaint contains three causes of action. The first and second causes of action allege violations of the equal protections clauses of the United States and California Constitutions, respectively. Walgreens alleges the ordinance “prohibits some retail establishments with [licensed] pharmacies from selling tobacco products, but arbitrarily exempts from this prohibition other retail establishments with [licensed] pharmacies, namely, general grocery stores and big box stores,” in violation of constitutional equal protection guarantees. The third cause of action alleges a violation of Proposition I, which the voters approved in November 2004. Proposition I directed the City to create an Office of Economic Analysis (referred to herein as OEA), which is obligated to provide an economic impact report to the City’s Board of Supervisors with respect to any proposed legislation that might have a material impact on the City. (S.F. Admin. Code, § 10.32.) Walgreens contends the failure of the OEA to prepare an economic impact report regarding the Ordinance renders the Ordinance invalid.

Walgreens alleges in the complaint that it operates licensed pharmacies in 52 of its ~~54 full-service stores in the City. The two Walgreens stores that do not operate~~ pharmacies are exempt from the prohibition on selling tobacco. Walgreens contends that licensed pharmacies could also be found in the City at one Costco big box store, one pharmacy operated by Longs Drugs, two Lucky supermarket stores, ten Safeway stores,

and six Rite-Aid stores.⁶ Walgreens asserts that its stores containing licensed pharmacies are similar in all relevant respects to the 12 grocery stores and one big box store that are specifically exempt from the ordinance. Among other things, at both Walgreens and the exempt grocery stores, the licensed pharmacy is located in the back of the store, whereas tobacco products were sold in the front of a Walgreens store prior to the effective date of the ordinance. Tobacco products were not sold by pharmacists at Walgreens but instead were “clerk served,” meaning that a customer would have to request to purchase a tobacco product from a clerk or checkout attendant. According to Walgreens, both stores subject to the ordinance and those exempt from it typically advertise themselves as health-promoting and have signage on the outside of the store advertising the pharmacy within. Walgreens alleges that, like stores exempt from the ordinance that do not devote a significant percentage of their floor space to their pharmacies, it devotes only 9 percent of the total “front area” of its stores to the pharmacy. Walgreens also asserts that 90 percent of the transactions at Walgreens’s stores in the City do not involve an item from the licensed pharmacy and, in contrast to legislative findings indicating that 65 percent of Walgreens’s net sales were attributable to prescription items, non-pharmacy sales

⁶ The complaint neglects to mention independent pharmacies covered by the ordinance. Dr. Katz testified that there were 16 independent pharmacies in the City at the time the ordinance was enacted. Only four of those independent pharmacies were still selling tobacco products at the time the ordinance was enacted. In its briefing to this court, Walgreens states that it purchased the six Rite-Aid pharmacies located in the City following enactment of the ordinance, leaving it with 58 stores covered by the ordinance. Walgreens asserts it has “58 of the approximately 63 pharmacy establishments covered by the Ordinance.” Walgreens’s estimate of the total number of pharmacies covered by the ordinance is derived by adding Walgreens’s 58 stores to the one operated by Longs Drugs and the four independent pharmacies that were selling tobacco products at the time the ordinance was enacted. Walgreens’s tally omits the 12 independent pharmacies that had voluntarily chosen not to sell tobacco products even before the ordinance was enacted. Regardless of how one calculates the number of pharmacies subject to the ban on sales of tobacco products, the fact remains that, following its purchase of Rite-Aid drugstores in the City, Walgreens operates over three-quarters of the pharmacies covered by the ordinance (58 out of approximately 75), including all but one of the chain drugstores prohibited from selling tobacco products.

accounted for slightly less than half (46.7 percent) of Walgreens's sales at its stores in the City during a one-year period ending in July 2008.

In a demurrer to the complaint, the City contended the ordinance passes constitutional muster because the exclusion of general grocery stores and big box stores from the ban on sales of tobacco products is rationally related to a legitimate governmental interest. The City also claimed the ordinance is not invalid under Proposition I, reasoning that, while the law imposes an obligation upon the OEA to prepare and submit an analysis to the Board of Supervisors, the Board does not require an OEA analysis before enacting legislation. According to the City, the proper remedy for the failure to comply with Proposition I is a writ of mandate directing the OEA to prepare an economic impact report.

The trial court sustained the City's demurrer without leave to amend. Walgreens timely appealed following entry of judgment in the City's favor.

DISCUSSION

I. STANDARD OF REVIEW

"On review of an order sustaining a demurrer without leave to amend, our standard of review is de novo, 'i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' [Citation.]" (*Santa Teresa Citizen Action Group v. State Energy Resources Conservation & Development Com.* (2003) 105 Cal.App.4th 1441, 1445.) " "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]" (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.)

II. EQUAL PROTECTION

Walgreens contends the challenged ordinance violates the equal protection clauses of the federal and state constitutions, asserting that the disparate treatment of different types of stores containing pharmacies is not rationally related to a legitimate legislative end. For the reasons that follow, we agree that Walgreens's complaint adequately states an equal protection violation.

A. *Applicable Legal Principles*

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The California Constitution likewise prohibits the denial of equal protection.⁷ (Cal. Const., art. I, § 7, subd. (a).) " "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' [Citations.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 531.) A corporation is considered a "person" entitled to the constitutional guarantee of equal protection. (*National General Corp. v. Dutch Inns of America, Inc.* (1971) 15 Cal.App.3d 490, 495, fn. 3.)

" "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly*

⁷ In addressing Walgreens's constitutional claims, we consider decisions of the United States Supreme Court and other federal courts as persuasive authority because the equal protection provision of the California Constitution is " 'substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution.' " (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571.) While it is true the equal protection provisions of the California Constitution are " 'possessed of an independent vitality' " and in a given case may demand an analysis different from that applicable under the Fourteenth Amendment of the United States Constitution (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764), the California Supreme Court has rejected the notion that the rational basis test is more rigorous under California law than under federal law. (See, e.g., *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481 [adhering to federal rational relationship test in face of claim it did not adequately express the state constitutional guarantee].)

situated groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similar situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) “If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citation.]” (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

The City concedes that, for purposes of the challenged ordinance, all retail establishments containing licensed pharmacies are similarly situated. This concession is not dispositive of Walgreens’s equal protection challenge but merely constitutes an acknowledgement that Walgreens has met its threshold burden to show that the different types of stores containing licensed pharmacies are “ ‘sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.’ [Citation.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*)). The next step in the analysis is to determine the appropriate level of scrutiny to apply.

“In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*Hofsheier, supra*, 37 Cal.4th at p. 1200.) Because the challenged ordinance does not involve a suspect classification or interfere with the exercise of a fundamental right, the parties agree that the deferential “rational relationship” or “rational basis” test governs our consideration of Walgreens’s equal protection claim.

Rational basis review “ ‘is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a “discrimination” or

differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and “requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.” [Citation.]” (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641.) “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. [Citations.]” (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315.)

“[T]hose attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it,’ [citation].” (*FCC v. Beach Communications, Inc.*, *supra*, 508 U.S. at p. 315.) “ ‘Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it.*’ [Citation.]” (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 641.) “But this is not an impossible task. The rationale must be ‘plausible’ [citation] and the factual basis for that rationale must be *reasonably* conceivable [citation]. And ‘even in the ordinary equal protection case calling for the most deferential of standards, [courts must ascertain] the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause.’ [Citation.]” (*Hofsheier*, *supra*, 37 Cal.4th at p. 1201.)

“[A]lthough it is irrelevant whether the perceived reason for the challenged ~~distinction actually motivated the Legislature, equal protection ‘does require that a~~ purpose may conceivably or “may reasonably have been the purpose and policy” of the relevant governmental decisionmaker’ [citation] and that ‘the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.’ [Citation.]” (*Hofsheier*, *supra*, 37 Cal.4th at p. 1201.) Thus, “we must undertake ‘ ‘ ‘*a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals’ ’ ’ [citation] by inquiring whether ‘ ‘ ‘the

statutory classifications are rationally related to the ‘realistically conceivable legislative purpose[s]’ [citation]” . . . and . . . by declining to “invent[] fictitious purposes that could not have been within the contemplation of the Legislature” [Citation.]” (*Ibid.*) Statutory distinctions resting on “speculative possibility” do not satisfy the requirements of equal protection. (See *id.* at p. 1204.)

B. *Asserted Rational Grounds for Exempting General Grocery Stores and Big Box Stores from Ban on Sales of Tobacco Products*

We now turn to the question of whether there is a rational basis for exempting general grocery stores and big box stores that contain licensed pharmacies from the ban on sales of tobacco products applicable to all other retail establishments containing licensed pharmacies. We do not question the premise that the presence of a licensed pharmacy within any retail establishment provides a rational justification for prohibiting that store from selling tobacco products, but that is not the question before us. What must be decided here is whether the legitimate objectives of discouraging smoking and avoiding the suggestion that a health care purveyor approves of cigarette smoking provides a rational justification for prohibiting retail establishments such as Walgreens—which contains a licensed pharmacy in the rear of the store—from selling tobacco products, while permitting a competing retail establishment such as Safeway or Costco—which sells many of the same products and also has a licensed pharmacy on premises—to sell the very same tobacco products.

The City defends the distinction drawn in the ordinance by asserting that the Board of Supervisors “rationally could have concluded that the sale of cigarettes by drug stores like Walgreens sends the wrong message about cigarettes *more strongly* than does the sale of cigarettes by big box stores or grocery stores, even if those stores too have pharmacies in them.” (Italics added.) What the City seems to mean is that customers, particularly “impressionable young people,” are more likely to perceive a tacit message that smoking is not harmful when tobacco products are sold in a store the public

associates with the sale of health-related products, and a “drugstore” such as Walgreens carries such an association more so than does a supermarket such as Safeway.

The City’s premise contradicts the allegation in Walgreens’s complaint that “the implied message, if any, conveyed by the sale of tobacco products at a Walgreens [is not] different from the implied message, if any, conveyed by the sale of tobacco products at the exempted stores with [licensed] pharmacies.” We must accept Walgreens’s allegation as true in this appeal from an order sustaining a demurrer. (See *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.) More importantly, allegations in the complaint concerning the similarities between Walgreens and general grocery stores support the contention there is no difference in any implied message that might be conveyed by selling tobacco products in the two types of stores. These allegations appear to be beyond dispute, with the City conceding that similarities exist. Thus, for example, at both Walgreens and the exempt general grocery stores, the licensed pharmacy is located in the back of the store, whereas tobacco products were sold in the front of Walgreens stores prior to the effective date of the ordinance and had to be requested from a clerk. Stores subject to the ordinance and grocery stores exempt from it typically advertise themselves as health-promoting and have signage on the outside of the store advertising the licensed pharmacy within. Indeed, Safeway advertised itself as promoting “Healthy Living.” Like stores exempt from the ordinance that do not devote a significant percentage of their floor space to their licensed pharmacies, Walgreens devotes less than 10 percent of the total “front area” of its stores to the licensed pharmacy. In addition, 90 percent of the transactions at Walgreens’s stores in the City do not involve a purchase from the licensed pharmacy.

Furthermore, as Walgreens points out in its complaint, the majority of its stores in San Francisco meet the primary criteria for the ordinance’s definition of “general grocery store,”⁸ which the ordinance exempts from the ban on sales of tobacco products.

⁸ See footnote 3 *ante*.

Walgreens alleges that the majority of its stores meet the four criteria defining a general grocery store because they “(A) exceed 5,000 gross square feet; (B) offer a diverse variety of unrelated, non-complementary food and non-food commodities, such as beverages, dairy, dry goods, fresh produce and other perishable items, frozen foods, household products, and paper goods; (C) prepare no food on-site for immediate consumption; and (D) market all of their merchandise at retail prices.” Walgreens purportedly does not come within the definition of “general grocery store” only because of the peculiar distinction that it is not a “retail food establishment” but instead is a retail store that sells food. The distinction apparently turns upon whether the establishment primarily sells foodstuffs.⁹

The increasingly blurred distinction between Walgreens and general grocery stores is much like the growing similarities over time between hotels and motels, which the appellate court addressed in *Gawzner Corp. v. Minier* (1975) 46 Cal.App.3d 777. There, the court held that a statute regulating the content of outdoor rate advertising by motels but not hotels violated equal protection and could not be enforced. (*Id.* at p. 791.) The proffered justification for the distinction was that hotels do not seek the business of the motoring public and therefore have no need to display rate signs to appeal to passing motorists. (*Id.* at p. 790.) The court rejected this reasoning as “patently untrue in California in the year 1975.” (*Ibid.*) According to the court, “Just as motels have expanded their services to compete with hotels, hotels have added parking facilities to compete with motels.” (*Ibid.*) The court concluded that although a hotel is obviously different from a motel in terms of size, diversity of services, and facilities, they both “rely

⁹ The City offers no explanation of the product mix that would be necessary for a store to be considered a “retail food establishment,” a troubling ambiguity as hybrid forms of retail stores offering food items continue to appear in the marketplace. At oral argument, counsel for Walgreens explained it would not be in a position to claim it is a “general grocery store” and that it would have been futile to pursue such a status, asserting the City takes the view a “retail food establishment” primarily sells food items. Counsel for the City did not dispute this assessment.

to a large degree upon the motoring public for business.” (*Id.* at p. 791.) Thus, “[w]ith respect to the avowed purpose of [the statute], hotels and motels are similarly situated.” (*Ibid.*)

Likewise, based on an objective comparison of the stores, a Walgreens store and a general grocery store are similarly situated with respect to the purpose of the ordinance. There is no reason to believe the implied message conveyed by a Walgreens that sells tobacco products is any different from the implied message conveyed by a supermarket or big box store that sells such items. To survive an equal protection challenge, the rationality of the legislative distinction “must be ‘plausible’ [citation] and the factual basis for that rationale must be *reasonably* conceivable [citation].” (*Hofsheier, supra*, 37 Cal.4th at p. 1201.) Here, there is no reasonably conceivable factual basis for finding that the purported implied message approving tobacco use is “stronger” at a Walgreens than it is at a supermarket containing a licensed pharmacy.

Walgreens attacks not only the exemption for general grocery stores and big box stores but also claims the very premise of the legislation is questionable. According to Walgreens, “It is simply not credible that ‘pharmacies convey tacit approval of the purchase and use of tobacco products’ . . . given the decades of anti-smoking media campaigns and warnings that would counteract any such implied message.” The premise underlying the prohibition on sales of tobacco products in pharmacies may not be universally accepted. Nonetheless, the government unquestionably has a legitimate interest in discouraging tobacco use. Here, the City made a determination that ~~prohibiting sales of tobacco products in pharmacies furthers that legitimate interest, a~~ determination supported by numerous professional medical and pharmaceutical organizations. While that assessment may be subject to debate—and indeed was debated by members of the City’s Board of Supervisors—it does not violate any constitutional principle.

Although it is generally not the court's role to examine the legitimacy of the legislative purpose underlying legislation,¹⁰ we must necessarily consider a law's purpose more carefully when it provides the justification for treating similarly situated persons differently. In other words, a law based upon a questionable premise may violate no constitutional proscription if applied uniformly to all similarly situated persons. But a law that discriminates among similarly situated persons based upon that same questionable or speculative premise may well lack a rational basis to support the unequal treatment. In this case, the City has relied upon a premise that is itself subject to debate to support narrow distinctions the generic premise simply does not support. With the image of a small, traditional independent pharmacy in mind—one that primarily sells pharmaceutical prescriptions, over-the-counter medications, personal care items, and little more—the justification for precluding customers from obtaining the impression that the licensed pharmacist endorses the use of tobacco products can be readily understood. There is an unmistakable difference, however, between the traditional independent pharmacy selling predominantly pharmaceuticals and contemporary chain stores that sell a far greater variety of merchandise, including foodstuffs as well as prescription drugs. The premise underlying the ordinance—that pharmacies selling tobacco products convey tacit approval of tobacco use—has a questionable application to stores such as Walgreens, and it certainly does not support the narrow distinction in the ordinance between stores such as Walgreens and general grocery stores. As discussed above, the distinction turns largely on whether the store primarily sells food items, a difference that has little bearing on the “strength” of any implied message that may be conveyed by selling tobacco products in a store that contains a licensed pharmacy.

¹⁰ The day is past when the courts “strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations.]” (*Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 488.)

The analysis in *Hays v. Wood* (1979) 25 Cal.3d 772 is particularly apt. There, our Supreme Court held equal protection was denied by a provision of the Political Reform Act of 1974 requiring public officials who are also attorneys or brokers to disclose the names of clients paying them \$1,000 or more in fees a year, while officials practicing any other professions were required to disclose only clients paying them \$10,000 or more in annual fees. (*Id.* at pp. 778-779.) The court could find no rational basis for creating different financial disclosure levels “for lawyers and brokers on the one hand and, on the other hand . . . members of other professions” or others “whose relative profit margin is comparable to theirs.” (*Id.* at pp. 789-790.) The Attorney General advanced four conceivable bases for the distinction, each of which was rejected by the court. As relevant here, the Attorney General urged that the “classification here in question finds a rational basis on the ground of strengthening public confidence in the political process.” (*Id.* at p. 794.) The argument, as the court understood it, “rest[ed] upon the rather curious assertion that the public, seeing an attorney advocate a position in his role as public official, ‘may believe, more so than for persons in other professions,’ that he is really promoting the interests of a private client.” (*Ibid.*) “[T]o disabuse the public of this pernicious and misguided notion,” the court was advised that “more stringent disclosure requirements have been placed upon the attorney.” (*Id.* at pp. 794-795.) The court rejected the contention, reasoning that although a concern about the appearance of impropriety involving public officials may support public disclosure laws *in general*, this concern does not justify “significantly different standards of disclosure for members of different professions.” (*Id.* at p. 795.)

Like the distinction among professionals in *Hays v. Wood*, the distinction among pharmacies here rests upon the supposed strength of a perception. That perception may justify the prohibition against sales of tobacco products by pharmacies *in general*, but it does not justify treating stores such as Walgreens differently from general grocery stores and big box stores. The City’s claim that the implied message, or perception, is somehow

stronger at a Walgreens than it is as a general grocery store or big box store is purely speculative.

The City urges that the factual basis for a statutory distinction may not be “subject to courtroom factfinding” and may rest on “rational speculation.” (*FCC v. Beach Communications, Inc.*, *supra*, 508 U.S. at p. 315.) While true, the distinction must at least be based on “reasonably conceivable facts.” (*Hofsheier*, *supra*, 37 Cal.4th at p. 1204.) The only explanation the City advances as to why it is plausible to assume that, despite their similarities, stores such as Walgreens are more likely than a supermarket such as Safeway or a big box store such as Costco to convey the tacit message that smoking is not harmful is that a greater percentage of Walgreens’s sales revenue is derived from prescription drugs than is true of Safeway or Costco.¹¹

But why do these revenue percentages indicate that customers receive a different message concerning the safety of tobacco products sold at a store such as Walgreens than the message received by customers of Safeway or Costco? A customer normally would not be aware of the percentage of pharmacy sales at the different types of stores. The City agrees that the percentage of a store’s revenue attributable to pharmacy sales does not *cause* a customer to perceive the various types of stores differently. It claims, however, that the comparison of revenues attributable to pharmacy sales reflects the fact that stores such as Walgreens are *in fact* different from grocery and big box stores. That undoubtedly is true, but it begs the question: why do the different sales percentages indicate that purchasers at the different establishments receive different messages concerning the safety of tobacco products they sell? The public may more closely identify a Walgreens with a licensed pharmacy than a Safeway with a licensed pharmacy,

¹¹ By Walgreens’s estimates, pharmacy sales comprise slightly over half of the sales revenue at its San Francisco stores. According to the recitals in the City’s ordinance, pharmacy sales at Safeway are estimated to be “7.5% of annual volume” and prescription sales generated “1.5% of total revenue in 2002” at Costco.

since most Walgreens contain a pharmacy¹² and that is not true of most grocery stores and likely is not true of what have come to be known as supermarkets or big box stores. But the fact that the public considers it more likely to find a licensed pharmacy in a Walgreens than in a supermarket, or is more likely to purchase prescription drugs at a Walgreens than a supermarket, does not rationally explain why in those stores that contain a licensed pharmacy, the implied approval of smoking is greater in one than the other.

It is true, as the City argues, that courts do not force policymakers to tackle an entire problem at one time. “Past decisions . . . establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative.” (*Warden v. State Bar, supra*, 21 Cal.4th at pp. 644-645.) It is also the case, however, that “the legislative body, when it chooses to address a particular area of concern in less than comprehensive fashion by merely ‘striking the evil where it is felt most’ [citation] may not do so wholly at its whim.” (*Hays v. Wood, supra*, 25 Cal.3d at p. 790.) Further, even when a classification is considered an incremental or partial step in addressing a problem, the differentiation must still be based on “some plausible reason, based on reasonably conceivable facts.” (*Hofsheier, supra*, 37 Cal.4th at p. 1204.) As explained above, the challenged classification does not satisfy this standard. There is no plausible reason to believe that members of the public place any greater reliance on implicit advice regarding the healthfulness of tobacco products conveyed by counter clerks, the corporate structure, or the product mix of a Walgreens than of a Safeway or Costco. We conclude the strength of the purported implied message conveyed by a pharmacy that sell tobacco products

¹² The complaint alleges that two Walgreens stores in San Francisco do not contain a licensed pharmacy.

does not justify the ordinance's distinction among general grocery stores, big box stores, and all other stores containing a licensed pharmacy.

Other reasons offered by the City to justify the classification among pharmacies are no more persuasive. According to the City, one could rationally conclude that a ban on sales of tobacco products in stores such as Walgreens and Rite-Aid would serve the purpose of limiting the exposure of sick people to cigarettes. The City reasons that customers of Walgreens and Rite-Aid are more likely to be sick than customers of general grocery stores and big box stores. The contention lacks merit. Sick people who go to a licensed pharmacy at a Safeway or Costco are just as likely to be exposed to tobacco products as those who went to a Walgreens. Moreover, there is no reason to believe supermarkets and big box stores have fewer sick customers than Walgreens. People who are sick still need to buy food and will be exposed to tobacco products at the supermarket when they do their grocery shopping, regardless of whether they also patronize the store for pharmacy services. Further, even if it were true that a larger percentage of Walgreens's customers are sick, it is likely the case that there will be just as many sick customers at supermarkets and big box stores, which common experience suggests have larger numbers of customers overall. Thus, there is no rational relationship between the distinction among pharmacies in the ordinance and the objective of limiting the exposure of sick people to tobacco products.

In its trial court briefs and again at oral argument in this court, the City contended the Board of Supervisors could have rationally excluded big box stores and grocery stores from the ordinance for economic reasons. Citing an article from the San Francisco Chronicle, the title of which suggests that supermarkets are an "endangered species" in San Francisco, the City urges it is rational to favor supermarkets over stores such as Walgreens in order to discourage them from leaving the City. This proffered rationale is insufficient to support the differential treatment afforded to grocery stores, big box stores, and all other pharmacies. Among other things, the article on which the City relies postdates the enactment of the ordinance and is not contained in the record on appeal. In

any event, the article's contents are not a proper subject of judicial notice and therefore may not be considered by this court on review of a ruling sustaining a demurrer. (See *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126 [on review of demurrer court considers only complaint and matters subject to judicial notice]; *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1191-1192 [court may take judicial notice of document's existence but not truth of its contents].) Furthermore, the rationale for favoring supermarkets is questionable, at best. There is nothing in the record to suggest the City has a policy of favoring supermarkets over stores such as Walgreens, and none of the ordinance's findings mention an economic basis for the exemptions afforded to general grocery stores. Moreover, given that big box stores as well as general grocery stores enjoy the exemption from the ban on sales of tobacco products, it seems unlikely the exemption could have been motivated by a desire to encourage supermarkets to remain in San Francisco. In short, the economic rationale for the exemption falls into that category of " ' "fictitious purposes that could not have been within the contemplation of the Legislature" ' [Citation.]" (*Hofsheier*, *supra*, 37 Cal.4th at p. 1201; *Warden v. State Bar*, *supra*, 21 Cal.4th at p. 649.)

For the reasons set forth above, Walgreens's complaint adequately states causes of action for a violation of the equal protections provisions of the United States and California constitutions. The order sustaining the City's demurrers to the first and second causes of action therefore must be reversed. Walgreens goes one step further and asks this court to direct entry of judgment in its favor on the equal protection causes of action. ~~It claims the relevant facts are "largely undisputed" and that this court could decide the~~ matter in its favor as a matter of law. (See, e.g., *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 786 [reversing order sustaining demurrer and directing entry of judgment for plaintiff].) We decline to do so. As far as this court is aware, the City has not yet answered the complaint or had the opportunity to assert and litigate any

affirmative defenses it may wish to raise. It is therefore premature to enter judgment in favor of Walgreens.¹³

Should Walgreens ultimately prevail on its equal protection causes of action, the court will be required to determine whether the appropriate remedy is to preclude enforcement of the entire ordinance or to invalidate only the exceptions contained in San Francisco Health Code section 1009.93. (See *Hofsheier, supra*, 37 Cal.4th at pp. 1207-1208; *Coalition Advocating Legal Housing Options v. City of Santa Monica* (2001) 88 Cal.App.4th 451, 464.) This question should be considered in the first instance in the trial court. We express no opinion at this point concerning the appropriate form of relief.

III. PROPOSITION I

In November 2004, San Francisco voters passed Proposition I,¹⁴ which required the City to create the OEA—the Office of Economic Analysis—to “identify and report on all legislation introduced at the Board of Supervisors that might have a material economic

¹³ Our disposition should not be interpreted to suggest we have reached our decision solely because we must accept as true the allegations in Walgreens’s complaint. We agree with Walgreens that the relevant facts appear to be largely beyond dispute. To the extent disputed facts have been brought to our attention, such as the litigants’ competing estimates of proportionate revenue attributable to prescription drug sales at Walgreens and other pharmacies, the differences are legally irrelevant, particularly in light of the principle that a legislative choice is not subject to judicial fact-finding. (*FCC v. Beach Communications, Inc., supra*, 508 U.S. at p. 315.)

As a consequence of our decision, the parties do not start with a clean slate upon remand. The principles of law necessary to this court’s decision become law of the case and must be adhered to both in the court below and upon any subsequent appeal. (*Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 213.) “[I]t has long been held that sufficiency of the pleadings is an issue subject to foreclosure by law of the case. [Citation.]” (*People v. Shuey* (1975) 13 Cal.3d 835, 843, abrogated on other grounds as recognized in *People v. Bennett* (1998) 17 Cal.4th 373, 389-390, fn. 5.) This appeal therefore precludes any further litigation in this court or the trial court on whether Walgreens’s complaint states valid claims for a violation of the equal protection clauses of the federal and state constitutions.

¹⁴ Proposition I is codified at sections 10.31 to 10.33 of the San Francisco Administrative Code.

impact on the City, as determined by the [OEA].” (S.F. Admin. Code, § 10.32.) The OEA is required to “analyze the likely impacts of the legislation on business attraction and retention, job creation, tax and fee revenues to the City, and other matters relating to the overall economic health of the City.” (*Ibid.*) Proposition I provides that the OEA “shall submit its analysis to the Board of Supervisors within 30 days of receiving the subject legislation from the Clerk of the Board, unless the President of the Board grants an extension for legislation of unusual scope or complexity.” (*Ibid.*) As required by Proposition I, the OEA’s “analysis shall be submitted to the Board of Supervisors prior to the legislation being heard in committee.” (*Ibid.*)

In this case, the OEA had originally indicated it would issue an economic report on the ordinance challenged in this appeal but reversed itself seven days before the first legislative committee hearing. In a letter to the Board of Supervisors reflecting the decision not to submit a report, the OEA’s chief economist wrote: “During the course of research on the . . . ordinance, the Office of Economic Analysis has determined that the ordinance, if implemented, would not have a material impact on the City’s economy. Therefore, our office will not be submitting a report on this item.”

Walgreens contends the OEA abused its discretion in determining that no report was needed.¹⁵ It asserts the OEA “wholly failed to consider the Ordinance’s impact on business attraction and retention, job creation, or the total loss of tax and fee revenues to the City, despite the fact that Walgreens alone would lose nearly 9% of its non-pharmacy sales by reason of the Ordinance.” The appropriate remedy for the OEA’s abuse of discretion, according to Walgreens, is invalidation of the ordinance.

Because the City has challenged the adequacy of Walgreens’s complaint on demurrer, we must accept as true Walgreens’s allegation the OEA abused its discretion by failing to prepare an economic impact report. (See *Zelig v. County of Los Angeles*,

¹⁵ It is notable that Walgreens alleges the OEA, but not the Board, abused its discretion. In fact, there is no allegation the Board abused its discretion or failed to do anything required to enact legislation.

supra, 27 Cal.4th at p. 1126.) The question remains whether invalidation of an ordinance is an available remedy for the OEA's failure to prepare an economic impact report required by Proposition I. The trial court concluded the proper remedy was not invalidation of an ordinance but rather a writ of mandate directing the OEA to prepare a report. As we explain, we agree with the trial court and the City that the OEA's failure to prepare a report required by Proposition I does not permit an interested party to seek invalidation of a duly enacted ordinance.

As an initial matter, although we are required to accept as true Walgreens's allegation that the OEA abused its discretion by failing to submit an economic impact report, some clarification is necessary with respect to the OEA's mandate under Proposition I. The OEA is not required to submit reports for proposed legislation that might have *any* economic impact, such as might be experienced by individual residents or businesses. Instead, it is required to submit reports only for legislation that, in the OEA's judgment, could have a *material* economic impact on the City *as a whole*. (S.F. Admin. Code, § 10.32.) Accordingly, in a case in which the OEA acts within its discretion by concluding that proposed legislation will not have a material economic impact on the City, it is entirely proper for the OEA to decline to submit an economic impact report to the Board of Supervisors. From the point of view of the Board of Supervisors, the OEA has complied with its mandate under Proposition I when, based upon its determination that proposed legislation would not have a material economic impact on the City, it advises the Board that no report is required.

As support for its claim that invalidation is a proper remedy for a violation of Proposition I, Walgreens cites the "general rule [that] an ordinance . . . is invalid if the mandatory prerequisites to its enactment are not *substantially* observed. [Citations.]" (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 931 (*Cooper*)). Walgreens's argument rests upon the premise that submission of an economic impact report to the Board of Supervisors is a "mandatory prerequisite" to enactment of

legislation that might have a material economic impact upon the City. We turn to the language of Proposition I to assess Walgreens's claim.

“The general principles that govern interpretation of a statute enacted by [a legislative body] apply also to an initiative measure enacted by the voters. [Citation.] Thus, our primary task here is to ascertain the intent of the electorate [citation] so as to effectuate that intent [citation]. [¶] We look first to the words of the initiative measure, as they generally provide the most reliable indicator of the voters' intent. [Citations.] Usually, there is no need to construe a provision's words when they are clear and unambiguous and thus not reasonably susceptible of more than one meaning. [Citations.] . . . [¶] A literal construction of an enactment, however, will not control when such a construction would frustrate the manifest purpose of the enactment as a whole. [Citations.] ‘The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.’ [Citation.] In determining the purpose of an initiative measure, we consider the analysis and arguments contained in the official election materials submitted to the voters. [Citations.]” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 978-979.)

The plain text of Proposition I does not make submission of an economic impact report a mandatory prerequisite to further action by the Board of Supervisors. Instead, Proposition I imposes an obligation *upon the OEA* to conduct an analysis and, if appropriate, prepare and submit a report by a certain time. (S.F. Admin. Code, § 10.32.) It provides the OEA must submit an analysis—in a case in which it is determined that proposed legislation “might have a material economic impact on the City”—within 30 days after receiving the legislation and before the legislation is heard in committee. (*Ibid.*) Nothing in the plain language of Proposition I indicates the Board lacks authority to consider or enact legislation in the absence of an economic impact report.

This conclusion becomes even more compelling when one reads Proposition I in its entirety. An uncodified section of Proposition I specifies that “[t]he voters urge the Board of Supervisors, upon the adoption of this measure, to adopt all necessary rules and

procedures for its full implementation, including, but not limited to, a Rule of Order providing that the Board shall not consider or hold hearings on any proposed legislation until it has received the Office of Economic Analysis's report on the impact of legislation, if any, on the San Francisco economy, and that the Board may waive this requirement by a two-thirds vote if it finds that the public interest requires the immediate consideration of the measure." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. I, § 2, p. 136.) This language makes clear that Proposition I does not *compel* the Board to refrain from considering legislation until or unless it receives an OEA economic impact report. Rather, it merely *urges* the Board to adopt a rule providing that it will not consider or hold hearings on proposed legislation until it receives an OEA report or notification that no OEA report is necessary. Proposition I then goes on to empower the Board to waive that very rule.

Walgreens contends the "voters' exhortation to the Board that it adopt a rule of order that would prevent a hearing from being held in the absence of a report says nothing about the legal effect of proceeding without the required report." It claims the voters recognized as a matter of "comity" that the Board should adopt its own rules of order. The fact remains, however, that such a rule of order would be superfluous if Proposition I required receipt of an economic impact report as a prerequisite to consideration or enactment of proposed legislation. Walgreens does not adequately explain why voters would have urged the Board to adopt a rule it was already obliged to follow, nor does it address how the Board could unilaterally waive a prohibition on ~~considering legislation before receipt of an economic impact report if such receipt were a~~ mandatory prerequisite to enactment of legislation.

Our power to invalidate legislation is constrained by the "separation of powers doctrine, the fundamental doctrine which recognizes that in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation." (*Cooper, supra*, 13 Cal.3d at p. 915.) Although we may invalidate legislation if the "mandatory prerequisites to its enactment are not

substantially observed” (*id.* at p. 931.), “[i]t is only where statutory requirements are accorded ‘mandatory’ rather than ‘directory’ effect that failure to comply with a particular procedural step will result in invalidating the governmental action to which the procedural requirement relates. [Citations.]” (*Downtown Palo Alto Com. for Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 394.) “And unless a contrary intent is *manifestly expressed*, such requirements will be deemed directory rather than mandatory. [Citation.]” (*Ibid.*, italics added.) Thus, before we may invalidate legislation based upon a lack of compliance with a statutory requirement, we must satisfy ourselves that the requirement is clearly expressed as a mandatory prerequisite to the legislative body’s authority to act. “There is no simple, mechanical test for determining whether a provision should be given ‘directory’ or ‘mandatory’ effect; as is all cases of statutory interpretation, the court must ascertain the legislative intent. [Citation.]” (*Id.* at p. 395.)

Proposition I lacks any manifest and clear expression of an intent to impose a mandatory requirement upon the Board of Supervisors to receive and read an economic impact report before considering or enacting legislation. To be sure, Proposition I contains mandatory language, but it is directed at the OEA, not the Board of Supervisors. Nothing in Proposition I directs that the Board of Supervisors itself “shall” fulfill any particular statutory requirement before considering or enacting legislation.

Walgreens urges that we consider the legislative history of Proposition I, contending that arguments contained in the ballot pamphlet make clear that the Board of Supervisors was “not supposed to consider legislation without the benefit of the economic impact report.” In general, we only consider legislative history as a interpretive guide when the language of a statute or ordinance is ambiguous. (See *People v. Arias* (2008) 45 Cal.4th 169, 177.) As explained above, for purposes of this analysis, Proposition I is not ambiguous. Furthermore, even if there were an ambiguity as to the Board’s authority to enact legislation without the benefit of an economic impact report, any such ambiguity in the language of Proposition I would necessarily mean there is no “manifestly expressed” mandatory prerequisite to the Board’s authority to enact

legislation.¹⁶ (See *Downtown Palo Alto Com. for Fair Assessment v. City Council*, *supra*, 180 Cal.App.3d at p. 394 [statutory requirements are directory rather than mandatory unless contrary intent is manifestly expressed].)

Walgreens's own arguments undercut its contention that the failure of the OEA to submit an economic impact report is a statutory violation of such magnitude as to justify wholesale invalidation of a duly enacted ordinance. On the one hand, Walgreens stresses that submission of an economic impact report is an absolute prerequisite to consideration by the Board of Supervisors of legislation that might have a material economic impact on the City. On the other hand, elsewhere in its briefing Walgreens minimizes the significance of the requirement imposed upon the OEA, ostensibly to show that Proposition I does not run afoul of the City's charter. For example, Walgreens claims Proposition I "simply requires that the Board of Supervisors receive (*and not even read*) an economic analysis prior to legislation being heard." (Italics added.) Walgreens also asserts that any burden on the Board resulting from Proposition I is *de minimis* because, "[a]fter all, after receiving the OEA's report, the Board of Supervisors is free to *utterly*

¹⁶ Contrary to Walgreens's characterization of the ballot pamphlet materials, the legislative history of Proposition I does not suggest the Board of Supervisors lacks authority to act on legislation without first receiving an economic impact report. The one-sentence summary of the initiative measure merely asked voters whether the City "shall . . . hire economists to study proposed legislation and report on the likely impact on the local economy, and . . . the City [shall] develop a long-term Economic Development Plan[.]" (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) summary description of Prop. I, p. 131.) Further, nothing in the digest of the initiative measure or the controller's statement indicated the Board of Supervisors would be powerless to enact legislation in the absence of an economic impact report. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) digest of Prop. I, p. 131; *ibid.*, controller's statement on Prop. I.) In the proponent's argument in favor of the initiative measure, although voters were informed that "Supervisors and San Franciscans will know the full impact of each law before it is adopted," the statement can be read simply to reflect that citizens and members of the Board of Supervisors would benefit from more complete information about proposed legislation. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) proponent's argument in favor of Prop. I, p. 132) The proponent's argument does not indicate the Board of Supervisors may take no action on legislation unless and until it receives an economic impact report.

disregard it.” (Italics added.) If, as Walgreens seems to concede, Proposition I is satisfied if an economic impact report is submitted to the Board of Supervisors but never considered or even read, then compliance with its mandate can hardly be characterized as an absolute prerequisite to legislative action. Walgreens’s arguments effectively admit that Proposition I imposes no mandatory requirement upon the Board of Supervisors, except for the mere receipt of something they are free to disregard.

Walgreens relies on *Cooper, supra*, 13 Cal.3d 898, and *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626 (*Walker*), to support its argument that invalidation of the ordinance is a proper remedy for the failure to comply with Proposition I. Those cases do not aid Walgreens. In *Cooper, supra*, 13 Cal.3d at pp. 923-924, where the city charter required a health service board to adopt a new medical care plan for city employees before the plan could be considered by the city’s board of supervisors, the Supreme Court invalidated the portion of an ordinance establishing a city-financed dental plan that was not first adopted by the health service board. The court reasoned the city’s board of supervisors lacked authority to enact the ordinance because the city charter delegated such authority to the health service board in the first instance to develop new medical care plans. (*Id.* at p. 923.) Walgreens claims that *Cooper* establishes it does not matter who is responsible for a failure to observe a mandatory prerequisite. It equates the health service board in *Cooper* to the OEA here.

Cooper is inapposite. There, the portion of the ordinance establishing a dental plan was invalid because the board of supervisors had no authority to act unless the ~~health service board first approved the plan. The health service board’s approval was not~~ merely advisory but constituted a prerequisite to further action. Here, the OEA’s obligation vis-à-vis the Board of Supervisors is advisory only. Proposition I imposes an obligation upon the OEA but does not deprive the Board of authority to act on legislation in the event the OEA fails to comply with its duty to either submit an informational report to the Board or inform the Board that no such report is necessary.

In *Walker, supra*, 55 Cal.2d 626, also relied upon by Walgreens, the court held that an ordinance reenacting the existing wage scale for civil servants violated the Los Angeles County charter's requirement that the board of supervisors enact a salary or wage at least equal to the prevailing salary or wage in private industry for the same type of work. The court invalidated the wage ordinance because the board declined to first adopt a survey specifying private industry prevailing wages. The court ruled that although the charter did "not expressly provide that [the board] shall first make a finding on the prevailing wage question or hold hearings in aid thereof before passing an ordinance fixing compensation for civil service employees, the clear implication is that such a determination must be made in some fashion either before or at the time of adoption of the salary ordinance." (*Id.* at p. 635.) Walgreens cites *Walker* for the proposition that a mandatory prerequisite to enactment of legislation need not be express but may be implied. The wage survey was an implied requirement in *Walker* because the county board of supervisors necessarily had to know prevailing private industry wages before it could enact a public employee wage scale that was tied to such private industry wages. Although the information contained in an OEA report might well be useful in considering whether to adopt proposed legislation, it is not required in order to provide factual support for specific provisions of an ordinance, as was the case in *Walker*. Thus, unlike in *Walker*, in which the county charter impliedly required the board of supervisors to adopt a wage survey to support the specific wages contained in a wage ordinance, Proposition I does not expressly or impliedly require anything of the Board of Supervisors.

Walgreens's position that an ordinance may be invalidated for failure of the OEA to submit a report to the Board of Supervisors is problematic for yet another reason. Consider the fact in this case that the City received a letter from the OEA stating that no report was required under Proposition I in light of its determination the ordinance would have no material economic impact on the City. Under Proposition I, the OEA satisfied its obligation by analyzing the proposed legislation, determining it would have no material

economic impact on the City, and informing the Board of its conclusion. It was only in hindsight, after the ordinance was enacted, that Walgreens claimed in this lawsuit that the OEA abused its discretion in failing to prepare and submit an economic impact report to the Board. As a practical matter, Walgreens's construction of Proposition I would require the Board of Supervisors to second-guess the OEA's assessment of ordinances' economic impacts out of a concern that an abuse of discretion by the OEA might render an ordinance invalid. This consequence is untenable.

Proposition I established the OEA to provide the Board with meaningful economic analyses concerning proposed legislation that, in the OEA's assessment, might have a material impact on the City's economy. The Board needs to be able to rely on the OEA's assessment without concern that interested parties might decline to participate during the legislative process and only after its enactment seek to invalidate an ordinance on the ground the OEA's assessment of the ordinance's economic impact was somehow deficient. We find no support in the language of Proposition I or its legislative history to suggest the voters intended to create a mechanism whereby the office charged with assessing the economic impact of proposed legislation could, through intransigence or incompetence, cause an ordinance duly enacted by the Board of Supervisors to be held invalid.

Accordingly, we conclude an ordinance may not be held invalid merely because the OEA fails to submit an economic impact report to the Board of Supervisors even in a case in which the ordinance might have a material economic impact on the City. The appropriate remedy for an abuse of discretion by the OEA is a writ of mandate directing it to prepare the required economic impact report. (See Code Civ. Proc., § 1085; *Munroe v. Los Angeles County Civil Service Com.* (2009) 173 Cal.App.4th 1295, 1300 [although mandate does not lie to control an agency's discretion, it may be used to correct abuses of discretion].)

Walgreens contends a mandate action would have been "impracticable" here because OEA determined only seven days before the initial committee hearing that no

report was necessary. It argues seven days is insufficient to obtain relief from the court. Walgreens also asserts that invalidation is the only effective means of enforcing Proposition I in light of statistics purporting to show that, since 2006, only 24 economic impact reports were prepared out of roughly 960 enacted ordinances in the City. Walgreens claims “[i]t is highly doubtful that the Board of Supervisors’ actions over the past three years have had a potentially material economic impact in only 2.5% of cases.” Walgreens is apparently of the view that only the threat of having countless ordinances invalidated will cause the OEA to fulfill its statutory obligation to prepare the required reports.

With regard to the claim of impracticability, it is incorrect to say Walgreens had only seven days to seek mandate relief. Walgreens could have petitioned for a writ of mandate at any time up until the ordinance was passed, giving it four weeks to seek relief. Further, it could have sought a stay of further action on the ordinance pending a determination of its writ petition. It was not required to litigate its claim to conclusion within seven days, as it suggests.

In any event, the supposed difficulty in seeking writ relief to compel the OEA to comply with its duty does not render invalidation of the ordinance a proper remedy. Likewise, Walgreens’s claim that invalidation is the only viable means to enforce Proposition I does not justify a remedy that is otherwise legally unavailable to it. We have determined as a matter of law that invalidation of an ordinance is not an available remedy for a claim that the OEA failed to prepare an economic impact report required by Proposition I. ~~As explained above, separation of powers principles limit our power to~~ invalidate duly enacted legislation absent some overriding constitutional, statutory, or charter proscription justifying invalidation. (*Cooper, supra*, 13 Cal.3d at p. 915.) Even if we agreed with Walgreens that the threat of invalidating an ordinance would be a more

effective means of ensuring compliance with Proposition I, the mere fact the remedy might be effective does not empower a court to grant it.¹⁷

DISPOSITION

The judgment is reversed insofar as it sustained the demurrers to the first and second causes of action. On remand, the trial court is directed to enter a new order (1) overruling the demurrers to the first and second causes of action alleging equal protection violations, and (2) sustaining without leave to amend the demurrer to the third cause of action alleging a violation of Proposition I. Each party shall bear its own costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.

¹⁷ We deny Walgreens's motion for judicial notice of City documents purporting to show the number of ordinances enacted by the City as well as the number of completed economic impact reports submitted by OEA. The matters that are the subject of Walgreens's judicial notice request are legally irrelevant. (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6 [judicial notice cannot be taken of a matter that is legally irrelevant].) The total number of economic impact reports prepared by the OEA since 2006 has no bearing on whether the OEA abused its discretion in this instance. Furthermore, as explained above, even if the numbers were to suggest that the threat of invalidating an ordinance might encourage compliance with Proposition I, that remedy is unavailable as a matter of law.

Court: Superior Court for the City and County of San Francisco

Judge: Hon. Peter J. Busch

Gibson, Dunn & Crutcher LLP, Daniel M. Kolkey, Brett H. Oberst and Rebecca Justice Lazarus, for Plaintiff and Appellant

Dennis Herrera, City Attorney, Wayne Snodgrass and Vince Chhabria, Deputy City Attorneys, for Defendants and Respondents

Francisco J. Silva and Long X. Do for California Medical Association and San Francisco Medical Society as Amicus on behalf of Defendants and Respondents

EXHIBIT E

File No. 101056

Committee Item No. 1

Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Land Use and Economic Development Date September 13, 2010

Board of Supervisors Meeting

Date September 21, 2010

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Completed by: Alisa Somera

Date September 10, 2010

Completed by: Alisa Somera

Date September 21, 2010

An asterisked item represents the cover sheet to a document that exceeds 25 pages.
The complete document can be found in the file.



City and County of San Francisco Master Report

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 101056 **File Type:** Ordinance **Status:** Passed
Enacted: 245-10
Version: 1 **In Control:** Land Use and Economic Development Committee **Effective:**
File Name: Banning the Sale of Tobacco Products in Pharmacies **Date Introduced:** 08/03/2010
Requester: **Cost:** **Final Action:** 10/05/2010
Comment:

Title: Ordinance amending the San Francisco Health Code by amending Sections 1009.91 and 1009.92, by repealing Section 1009.93, and by re-numbering Sections 1009.94, 1009.95, 1009.96, 1009.97, 1009.98, and 1009.99, as Sections 1009.93, 1009.94, 1009.95, 1009.96, 1009.97, and 1009.98, respectively, all to eliminate the exemptions for general grocery stores and big box stores from the general ban on the sale of tobacco products in pharmacies.

Indexes:

History of Legislative File 101056

Sponsors: Mar; Dufty and Maxwell

Ver	Acting Body	Date	Action	Sent To	Due Date	Result
1	President	08/03/2010	ASSIGNED UNDER 30 DAY RULE	Land Use and Economic Development Committee		
1	Clerk of the Board	08/27/2010	REFERRED TO DEPARTMENT			
1	Land Use and Economic Development Committee	09/13/2010	RECOMMENDED			Passed
1	Small Business Commission	09/17/2010	RESPONSE RECEIVED			

Referred to the Small Business Commission for comment and recommendation. Referred to the Department of Public Health for informational purposes.

Heard in Committee. Speakers: Dr. Mitch Katz, Director of Public Health; Lisa Kroon, UCSF School of Pharmacy; Tonya Williams, SF Tobacco Free Coalition; Ernestine Weiss; Terry Mock, American Heart Association; David Jesson, American Cancer Society; Nick Shoman, Charlies Drug Store; Fred Mayer, Pharmacists Planning Service, Inc.; Bob Gordon; Regina Dick-Endrizzi, Office of Small Business; Kaye Griffin; Benjamin Tosi.

Supervisor Maxwell requested to be added as a co-sponsor. On September 13, 2010 the Small Business Commission heard and recommended approval with modifications.

LEGISLATIVE DIGEST

[Banning the Sale of Tobacco Products in Pharmacies]

Ordinance amending the San Francisco Health Code by amending Sections 1009.91 and 1009.92, by repealing Section 1009.93, and by re-numbering Section 1009.94, 1009.95, 1009.96, 1009.97, 1009.98, and 1009.99, as Sections 1009.93, 1009.94, 1009.95, 1009.96, 1009.97, and 1009.98, respectively, all to eliminate the exemptions for General Grocery Stores and Big Box Stores from the general ban on the sale of tobacco products in pharmacies.

Existing Law

The Health Code currently bans the sale of tobacco products in pharmacies, but contains exemptions for general grocery stores and "big box" stores with pharmacies.

Amendments to Current Law

The proposal would amend the Health Code to delete the exemptions for general grocery stores and "big box" stores with pharmacies, thereby extending the ban on the sale of tobacco products to all pharmacies.

Background Information

In *Walgreen Co. v. City and County of San Francisco, et al.*, the Court of Appeal found that it was unreasonable to apply the ban to pharmacies in general, but not to supermarkets and "big box" stores that contain pharmacies. This amendment has been proposed to head off further litigation over the proper remedy in the *Walgreen* case and remove any cloud over ongoing enforcement of the Article.

1 [Banning the Sale of Tobacco Products in Pharmacies]

2
3 Ordinance amending the San Francisco Health Code by amending Sections 1009.91
4 and 1009.92, by repealing Section 1009.93, and by re-numbering Sections 1009.94,
5 1009.95, 1009.96, 1009.97, 1009.98, and 1009.99, as Sections 1009.93, 1009.94, 1009.95,
6 1009.96, 1009.97, and 1009.98, respectively, all to eliminate the exemptions for general
7 grocery stores and big box stores from the general ban on the sale of tobacco
8 products in pharmacies.

9 NOTE: Additions are single-underline italics Times New Roman;
10 deletions are ~~strike-through italics Times New Roman~~.
11 Board amendment additions are double-underlined;
Board amendment deletions are ~~strikethrough normal~~.

12 Be it ordained by the People of the City and County of San Francisco:

13
14 Section 1. The San Francisco Health Code is hereby amended by amending
15 Sections 1009.91 and 1009.92, by repealing Section 1009.93, and by re-numbering Section
16 1009.94, 1009.95, 1009.96, 1009.97, 1009.98, and 1009.99, as Sections 1009.93, 1009.94,
17 1009.95, 1009.96, 1009.97, and 1009.98, respectively, to read as follows:

18
19 **SEC. 1009.91. DEFINITIONS.**

20 ~~(a) "Big Box Store" shall mean a single retail establishment occupying an area in excess of~~
21 ~~100,000 gross square feet.~~

22 ~~(a) (b)~~ "Director" shall mean the Director of the Department of Public Health or his or
23 her designee.

24 ~~(e) "General Grocery Store" shall have the same meaning as set forth in Planning Code~~
25 ~~Section 790.102(a) or any successor provisions.~~

Supervisors Mar, Duffy, Maxwell
BOARD OF SUPERVISORS

1 **(b) (d)** "Person" shall mean any individual person, firm, partnership, association,
2 corporation, company, organization, or legal entity of any kind.

3 **(c) (e)** "Pharmacy" shall mean a retail establishment in which the profession of
4 pharmacy by a pharmacist licensed by the State of California in accordance with the Business
5 and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy
6 may also offer other retail goods in addition to prescription pharmaceuticals. *For purposes of*
7 *this Article, "pharmacy" includes retail stores commonly known as drugstores.*

8 **(d) (f)** "Tobacco Product" shall mean any substance containing tobacco leaf including
9 but not limited to cigarettes, cigars, pipe, tobacco, snuff chewing tobacco, and dipping
10 tobacco.

11
12 **SEC. 1009.92. PROHIBITION AGAINST TOBACCO PRODUCT SALES AT PHARMACIES.**

13 No person shall sell tobacco products in a pharmacy, *except as provided in*
14 *Section 1009.93.*

15
16 **~~SEC. 1009.93. EXCEPTIONS.~~**

17 *The prohibition against tobacco sales at pharmacies in Section 1009.92 shall not apply to:*

18 **~~(a) General Grocery Stores.~~**

19 **~~(b) Big-Box Stores.~~**

20
21 **SEC. ~~1009.93~~ 1009.94. PENALTIES AND ENFORCEMENT.**

22 Administrative penalties shall be assessed and collected by the Director in accordance
23 with San Francisco Administrative Code Chapter 100, a copy of which is on file in Board of
24 Supervisors File No. 080594 and which is hereby incorporated by reference.

1 **SEC. 1009.94 ~~1009.95~~. EXPIRATION OF PERMIT TO SELL TOBACCO.**

2 Any permit to sell tobacco issued to a pharmacy pursuant to Article 19H shall expire on
3 September 30, 2008, and shall not be renewed if sales of tobacco by that pharmacy are
4 prohibited under this Article.

6 **SEC. 1009.95 ~~1009.96~~. AUTHORITY TO ADOPT RULES AND REGULATIONS.**

7 The Director may issue and amend rules, regulations, standards, guidelines, or
8 conditions to implement and enforce this Article.

10 **SEC. 1009.96 ~~1009.97~~. PREEMPTION.**

11 In adopting this Article, the Board of Supervisors does not intend to regulate or affect
12 the rights or authority of the State to do those things that are required, directed, or expressly
13 authorized by Federal or State law. Further, in adopting this Article, the Board of Supervisors
14 does not intend to prohibit that which is prohibited by Federal or State law.

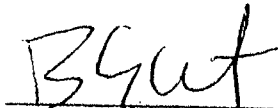
16 **SEC. 1009.97 ~~1009.98~~. CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL
17 WELFARE.**

18 In undertaking the adoption and enforcement of this Article, the City and County is
19 assuming an undertaking only to promote the general welfare. The City does not intend to
20 impose the type of obligation that would allow a person to sue for money damages for an
21 injury that the person claims to suffer as a result of a City officer or employee taking or failing
22 to take an action with respect to any matter covered by this Article.

24 / / /
25 / / /

1 Section 3. Any permit to sell tobacco issued pursuant to Article 19H to a General
2 Grocery Store or Big Box Store with a pharmacy under the exceptions contained in former
3 Section 1009.93 shall expire by operation of law on the effective date of this ordinance, and
4 the Director of the Department of Public Health shall refund a pro rate portion of any permit
5 renewal fees paid by the former permitholder for the current year.
6

7 APPROVED AS TO FORM:
8 DENNIS J. HERRERA, City Attorney

9
10 By: 
11 THOMAS J. OWEN *by Sam DeWentha*
12 Deputy City Attorney
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1 **SEC. ~~1009.98~~ 1009.99. SEVERABILITY.**

2 If any of the provisions of this Article or the application thereof to any person or
3 circumstance is held invalid, the remainder of this Article, including the application of such part
4 or provisions to persons or circumstances other than those to which it is held invalid, shall not
5 be affected thereby and shall continue in full force and effect. To this end, the provisions of
6 this Article are severable.

7
8 Section 2. The Board of Supervisors is adopting this legislation in response to the
9 Court of Appeal's decision in *Walgreen Co. v. City and County of San Francisco, et al.* (Court
10 of Appeal of the State of California, First Appellate District, Division Three, Case No.
11 A123891). While the severability clause contained in the Article already requires severance of
12 the exemptions for General Grocery Stores and Big Box Stores that the Court of Appeal found
13 lacked a sufficient rational basis, the Board is formally repealing those exemptions by this
14 ordinance in order to forestall further litigation over the severance issue and remove any cloud
15 over ongoing enforcement of the Article.

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