

File No. 101056

Committee Item No. 1

Board Item No. 20

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.

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1 [Banning the Sale of Tobacco Products in Pharmacies]

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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;
12 Board amendment deletions are ~~strikethrough normal~~.

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

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

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.

5
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.

9
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.

15
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.

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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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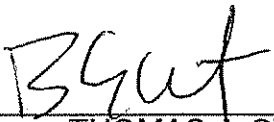
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Supervisors Mar, Duffy
BOARD OF SUPERVISORS

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

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10 By: 
11 THOMAS J. OWEN *by Bush DeWent*
12 Deputy City Attorney
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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.