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MEMORANDUM OF LAW

DATE: April 10, 2015

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Regulating Advertising of Tobacco Products and Electronic Cigarettes in the City of San Diego

INTRODUCTION

Last year, the San Diego City Council (Council) passed two ordinances relating to electronic cigarettes. San Diego Ordinance O-20408 (Oct. 2, 2014) prohibits the use of electronic cigarettes in the same locations where smoking of cigarettes and other tobacco products is prohibited. And San Diego Ordinance O-20409 (Oct. 2, 2014) regulates the sale of electronic cigarettes, electronic cigarette paraphernalia, and vaping juice in the same manner that sales of tobacco products are regulated. When these two ordinances were being considered, the Council expressed its desire to regulate the advertising of electronic cigarettes in the same way that tobacco advertisements are regulated.

The City's ordinances restricting the sale, advertising and promotion of tobacco products are codified in sections 58.0301 through 58.0312 of the San Diego Municipal Code (Municipal Code). This statutory scheme was adopted in 1998. Since then, a United States Supreme Court (Supreme Court) case was decided and federal regulations were enacted bringing into question the constitutionality of some of San Diego's advertising restrictions on tobacco products.

QUESTION PRESENTED

Are San Diego's advertising restrictions on tobacco products contained in Chapter 5, Article 8, Division 3 of the Municipal Code still valid such that they may be amended to apply to electronic cigarettes?

SHORT ANSWER

Probably not. In 2001, the Supreme Court invalidated portions of a Massachusetts law restricting the promotion and advertising of tobacco products finding that the state statutes were preempted by federal law and violated the First Amendment. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The Massachusetts tobacco advertising restrictions that were struck down in *Lorillard* are very similar to San Diego's tobacco advertising regulations. Therefore, before the City's Municipal Code may be amended to regulate electronic cigarette advertising, some existing provisions for tobacco advertising must be repealed, and others must be amended to comply with federal regulations and constitutional requirements.

ANALYSIS

I. SAN DIEGO'S TOBACCO ADVERTISING REGULATIONS

In 1998, the City of San Diego adopted a statutory scheme to restrict the advertising and promotion of tobacco products to minors (Ordinance O-18597, adopted on October 20, 1998). Sections 58.0303 through 58.0306 of the Municipal Code regulate tobacco advertising displays. Section 58.0303, Advertising Restrictions, prohibits the advertising and promotion of tobacco products in publicly visible locations. Section 58.0304 contains exceptions to the advertising restrictions set forth in section 58.0303. Section 58.0305 restricts the placement of tobacco products and advertisements inside retail establishments. And section 58.0306 authorizes exceptions to the restrictions in section 58.0305.

Outdoor tobacco advertising displays are permitted if they "contain a generic description of tobacco products in black and white without logos or graphics." SDMC § 58.0304(d). Outdoor displays are also permitted on tobacco product delivery trucks. SDMC§ 58.0304(b). Other outdoor tobacco advertising displays are prohibited unless they are (1) in certain industrial or commercial zones; and (2) "more than 1000 feet from the premises of any school, playground, recreation center or facility, child care center, arcade, or library;" and (3) "more than 1000 feet from the boundary of any zone that is not a designated commercial or industrial zone." SDMC § 58.0304(a)(1)-(a)(3). Additionally, tobacco advertising displays are prohibited when "[p]osted on the inside or outside of the windows or doors of the business such that the advertising or promotion is visible to the public from outside the establishment." SDMC § 58.0305(b)(3).

Indoor tobacco advertising displays are permitted without regulation for "commercial establishments where access to the premises by persons under eighteen years of age is prohibited by law." SDMC § 58.0306(a). Similarly, indoor tobacco advertising displays are permitted without regulation for establishments located more than "1000 feet of the premises of any school, playground, recreation center or facility, child care center, arcade, or library." SDMC § 58.0305. For all other establishments, indoor tobacco advertising displays are prohibited (1) below four feet from the floor; or (2) within two feet of candy, snack, or non-alcoholic beverage displays. SDMC § 58.0305.

II. FEDERAL PREEMPTION

When there is a conflict between federal law and state law, federal law prevails under the doctrine of federal preemption. The Supremacy Clause of the U.S. Constitution holds that some matters are of such a national concern, as opposed to a local concern, that a state may not pass a law inconsistent with the federal law.

In the Federal Cigarette Labeling and Advertising Act (FCLAA), Congress passed a comprehensive federal scheme governing the advertising and promotion of cigarettes. *Lorillard*, 533 U.S. at 541. The FCLAA preemption provision prohibited states or local jurisdictions from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes. *Id.* at 542. In enacting the federal law, Congress was concerned with health warnings about the hazards of cigarette smoking. Congress also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising and, to this end, electronic media advertising of cigarettes was banned. *Id.* at 548.

In *Lorillard*, Massachusetts regulations on outdoor and point of sale cigarette advertising were deemed to be preempted by the FCLAA.

The Massachusetts regulations prohibited:

> Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

The regulations also prohibited:

> Point of sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.

Lorillard, 533 U.S. at 534-35.

The stated purpose of Massachusetts' regulations was, in part, to address the incidence of tobacco use by minors and to prevent access to tobacco products by minors. The Court in *Lorillard* recognized the state's attempt to address underage cigarette smoking, but found the concern about youth exposure intertwined with concerns about cigarette smoking and health. *Id.* at 548.

In finding that the FCLAA preempted Massachusetts' regulations targeting cigarette advertising, the Court said that states remained free to enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette use and sales. *Id.* at 550. And the Court found that "[r]estrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption provision. Such restrictions are not 'based on smoking and health.'" *Id.* at 552.

Like Massachusetts, the City of San Diego also regulates outdoor and point of sale cigarette advertising. With few exceptions, Section 58.0303 of the Municipal Code prohibits advertising or promotion of tobacco products on any advertising display sign in a publicly visible location. Similarly, Municipal Code section 58.0305 prohibits tobacco products displays and advertising signs within two feet of candy, snack, or non-alcoholic beverage displays inside stores that are located within 1,000 feet of any school, playground, recreation center or facility, child care center, arcade, or library.

The stated purpose of San Diego's regulations is to discourage illegal sales and furnishing of tobacco products to minors by restricting advertising that encourages and induces minors to buy or steal and use cigarettes and other tobacco products. (Ordinance O-18597, adopted on October 20, 1998).

The preemption analysis under *Lorillard* involved the FCLAA which restricted advertising and promotion of cigarettes. The current federal standard is found in a more recent amendment, the Family Smoking Prevention and Tobacco Control Act, adopted in 2009. The Family Smoking Prevention and Tobacco Control Act requires a number of restrictions on cigarette *and* smokeless tobacco product advertising and other marketing, and authorizes the Federal Drug Administration (FDA) to impose additional restrictions on the advertising, promotion, and other marketing of tobacco products to promote public health.

Under the Family Smoking Prevention and Tobacco Control Act, states and local jurisdictions may restrict the time, place, and manner of tobacco advertising, but not the content. Thus, section 58.0304(d) of the Municipal Code, which is one of the few exceptions to San Diego's advertising restrictions and allows signs containing generic descriptions of tobacco products in black and white without logos or graphics, is preempted because it attempts to regulate the content of advertising.

Similar restrictions on logos or graphics in other jurisdictions have been found to be content-based and preempted. The Second Circuit held that New York City's "tombstone" provision was preempted content regulation. New York's ordinance prohibited outdoor tobacco advertising within 1,000 feet of certain areas frequented by children but permitted "a single, black-and-white, text-only 'tombstone' sign stating, 'Tobacco Products Sold Here,' within ten feet of an entrance to a retailer.*Greater New York Metro, Food Council, Inc. v. Giuliani,* 195 F.3d 100, 103 (2d Cir. 1999). The ordinance also prohibited colors, nontextual images, and non-conforming messages. *Id.* At 107. The Second Circuit concluded that "the tombstone provision thus creates obligations directly pertaining to the nature and content of advertising information. This risks the sort of 'diverse, nonuniform, and confusing' advertising standards

that Congress expressly sought to avoid. Congress could not have intended to let municipalities promulgate their own unique regulations governing the content and format of cigarette advertising information. See *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 76 (1st Cir.1997) (noting that 'a quintessential state requirement 'with respect to advertising and promotion' would be a law mandating changes or additions to the content of cigarette advertisements') (alteration omitted)." *Id.*

The Seventh Circuit reached a similar conclusion when it considered an ordinance that restricted tobacco advertisement to certain areas, but permitted "advertising, without any location consideration, that is limited to a generic, as opposed to brand-specific, mention of a tobacco product." *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 640 (7th Cir. 1999) (abrogated on other grounds by *Lorillard*). That provision of the ordinance was preempted by the FCLAA because it "purports to regulate the content of some advertising without regard to any land-use consideration." *Id.*

When the Ninth Circuit considered this preemption issue, it acknowledged the content versus location distinction made by the Second and Seventh Circuits but held that the FCLAA preempted both. At issue was an ordinance that generally banned advertisement but contained a tombstone exception permitting tobacco retailers to "post price and availabilityinformation outside their businesses so long as the advertisements are in plain black type on a white field without adornment, color, opinion, artwork, or logos." *Lindsey v. Tacoma-Pierce Cnty. Health Dep't*, 195 F.3d 1065, 1067 (9th Cir. 1999). Reaching the same conclusion that the U.S. Supreme Court later reached in *Lorillard*, the court held that "content regulations are indistinguishable from location regulations under the language and purpose of the FCLAA" and therefore they both were preempted. *Id.* at 1073.

While section 58.0304(d) is the only provision that is preempted by federal law, the balance of the San Diego's advertising and promotion regulations are still subject to the constraints of the First Amendment, which protects certain commercial speech.

III. FIRST AMENDMENT – COMMERCIAL SPEECH

The Supreme Court defines commercial speech as speech that does "no more than propose a commercial transaction." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 (1973)). The Court has developed a framework for analyzing regulation of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions. *Lorillard*, 533 U.S. at 554 (citing *Board of Trustees of State University of NY v. Fox*, 492 U.S. 469, 477 (1989)).

Commercial speech is analyzed under a four-part test to determine whether a regulation violates the First Amendment. *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980). The test, referred to as the *Central Hudson* test, asks whether (1) the proscribed expression is protected by the First Amendment, (2) the asserted governmental interest is substantial, (3) the regulation directly advances the governmental interest asserted, and

(4) the regulation is not more extensive than is necessary to serve that interest. *Lorillard, 533 U.S.* at 554 (citing *Central Hudson*, 447 U.S. at 566).

A. Is The Speech Protected By The First Amendment?

For commercial speech to receive constitutional protection, it must concern lawful activity and not be misleading. *Lorillard*, 533 U.S. at 554. The Supreme Court summarized the general principles underlying the protection of commercial speech thusly:

> The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Edenfield v. Fane, 507 U.S. 761 (1993).

In *Lorillard*, the first prong was not at issue. The state assumed that the speech was entitled to First Amendment protection *Id.* at 555. For purposes of analyzing San Diego's advertising restrictions, smoking cigarettes and using tobacco products are lawful, at least as to adults. Thus, a court would likely find that advertisements for tobacco products and cigarettes are protected speech, so long as the advertisements are truthful and non-deceptive.

B. Does The Government Have A Substantial Interest?

In *Lorillard*, the tobacco industry conceded that the state had an important interest in preventing tobacco use by minors. *Id.* And the Supreme Court even recognized that, "The State's interest in preventing underage tobacco use is substantial, and even compelling." *Id.* at 564. Here, it is likely that a court would find that the City has a substantial interest in preventing and discouraging tobacco use by minors based on the Supreme Court's observations in *Lorillard*.

C. Does The Regulation Directly Advance The Governmental Interest Asserted?

Under the *Central Hudson* test, this prong considers the relationship between the harm that underlies the state's interest and the means identified by the state to advance that interest. The speech restriction must directly and materially advance the asserted government interest. The burden is not satisfied by mere speculation or conjecture; rather the government must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Id.* (citing *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 188 (1993)).

The state is not required to provide empirical data supported by background information. *Lorillard*, 533 U.S. at 555. It is sufficient to cite studies and anecdotes pertaining to different locales altogether, or even to justify restrictions based upon history, consensus, and "simple common sense." *Id.* at 555 (citing *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 628 (1995)).

In *Lorillard*, the state cited numerous studies advancing the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect. *Lorillard*, 533 U.S. at 557. The state provided evidence gathered by the FDA that the period prior to adulthood is when an overwhelming majority of Americans first decide to use tobacco products, and that advertising plays a crucial role in that decision. *Id.* at 557-58. Other information relied upon by the state included FDA studies of tobacco advertising and trends in the use of various tobacco products. *Id.* at 558.

In evaluating this prong of the test, the Court was unable to conclude that the state's decision to regulate advertising of tobacco products to combat the use of those products by minors was based on mere speculation and conjecture. *Id.* at 561. Therefore, the Court determined that the state justified its outdoor advertising regulations, satisfying the third prong of the *Hudson* test. *Id.*

The City of San Diego could similarly point to studies and statistics showing the link of advertising to tobacco use, and the trends of minors using tobacco products. For example, the Centers for Disease Control and Prevention (CDC) reports that tobacco use is the leading preventable cause of disease and death in the United States, and nearly all tobacco use begins during youth and young adulthood. Among U.S. youths, cigarette smoking has declined in recent years; however, the use of electronic cigarettes has increased, and nearly half of tobacco users use two or more tobacco products.[1] Likewise, the U.S. Surgeon General reports that sufficient evidence shows a causal relationship between advertising and promotion efforts of tobacco companies and the initiation and progression of tobacco use among young people.[2]

Thus, like Massachusetts, the City could probably satisfy the third prong of the *Central Hudson* test and show that tobacco advertising regulations directly advance the City's substantial interest in preventing and discouraging tobacco use by minors.

D. Is There A Reasonable Fit Between The Means And Ends Of The Regulatory Scheme?

The final step of the *Central Hudson* analysis is whether the speech restriction is not more extensive than necessary to serve the interests that support it. *Id.* at 555 (quoting *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 188 (1993)). The standard is not the least restrictive means; rather case law requires a reasonable "fit between the

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[1] Morbidity and Mortality Weekly Report of the Centers for Disease Control and Prevention (CDC), November 14, 2014.

[2] Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General, Executive Summary, 2012, U.S. Department of Health and Human Services.

legislature's ends and the means chosen to accomplish those ends . . . a means narrowly tailored to achieve the desired objective." *Lorillard*, 533 U.S. at 556 (citing *Florida Bar v. Went for It, Inc.,* 515 U.S. 618, 632 (1995) (quoting *Board of Trustees of State University of NY v. Fox,* 492 U.S. 469, 480 (1989)).

In this regard, the Court found that Massachusetts did not meet the standard and failed to "carefully calculate the costs and benefits associated with the burden on speech imposed" by the regulations. *Lorillard*, 533 U.S. at 561 (citing *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417 (1993)). The flaws in the restrictions are discussed more particularly below.

1. Advertising prohibited within 1,000 feet of schools or playgrounds

The Massachusetts outdoor advertising regulations prohibited advertising within a 1,000 foot radius of a school or playground. *Lorillard*, 533 U.S. at 556. The prohibition on outdoor advertising within 1,000 feet of schools or playgrounds resulted in prohibiting advertising in a substantial portion of the major metropolitan areas of Massachusetts.[3] *Id.* at 562. The substantial geographic reach of the advertising prohibitions was compounded by the prohibition on advertising inside a store that is visible to the outside, and the restriction on advertisements of any size, from billboards to small signs. *Id.* at 562-63.

The state has an interest in preventing underage tobacco use. However, use of tobacco products by adults is legal, and tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have an interest in receiving truthful information about those products. *Id.* at 564. Thus, restrictions on speech must be narrowly tailored, and leave ample alternative channels for communication. *Id.* at 529.

The Massachusetts regulations failed to narrowly tailor the restrictions on speech, and the 1,000 foot radius restriction failed to account for different locales, and whether the area was rural, suburban or urban. *Id.* at 563. The uniformly broad sweep of the geographical limitation showed a lack of tailoring. *Id* . In addition, the ban on all signs of any size seemed ill suited to target advertising to youth; to the extent that studies have identified particular advertising and promotions that attract youth, tailoring would involve targeting those specific practices, while still allowing others. *Id.*

Like Massachusetts, San Diego's advertising restrictions apply to outside advertisements and advertisements posted on the inside or outside of windows or doors of businesses that are visible from the outside. Like Massachusetts, San Diego also prohibits advertising within 1,000 feet of schools or playgrounds; however, San Diego's regulations go even further. Municipal Code section 58.0304(a)(2) prohibits tobacco advertisements within 1,000 feet from any school, playground, recreation center or facility, child care center, arcade, or library. And San Diego's geographic reach is compounded in that the 1,000 foot restriction in Municipal Code

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[3] According to the petitioners, the advertising restrictions together with general zoning limitations prevented advertising in between 87 percent to 91 percent of some metropolitan areas. *Lorillard*, 533 U.S. at 562.

section 58.0304(a)(2) is on top of a restriction that limits advertisements to certain industrial or commercial zones which are also more than 1,000 feet from the boundary of any zone that is not a designated commercial or industrial zone.

Based on the Court's finding in *Lorillard*, a court would likely find that San Diego's advertising restrictions are similarly not sufficiently narrow. The backup materials in support of San Diego's ordinance did not contain any evidence of studies or data to justify the geographical restrictions. Even though schools and playgrounds are places where children congregate, the Court found that Massachusetts did not further analyze different locales (urban, rural, suburban). The City would likely have to provide that kind of analysis to defend a challenge to its geographical restrictions.

2. Advertising prohibited within five feet from the floor

Massachusetts regulations also restricted indoor point of sale advertisement, prohibiting them lower than five feet from the floor of any retail establishment within a 1,000 foot radius of any school or playground. *Lorillard*, 533 U.S. at 566. This regulation failed on the third and fourth prongs of the *Central Hudson* test. *Id.* at 567.

The blanket height restriction did not constitute a reasonable fit with the goal of preventing minors from using tobacco products or curbing demand. Not all children are less than five feet tall, and those who are may just look up and see the advertisements. *Id.* at 566. A regulation cannot be sustained if it "provides only ineffective or remote support for the government's purpose." *Id.* at 566 (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Central Hudson*, 447 U.S. at 564)). Likewise, a regulation cannot be sustained if there is "little chance" that the restriction will advance the state's goal. *Id.* at 576 (citing *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 193 (1993)).

Like Massachusetts, San Diego has a restriction limiting the height at which tobacco advertisements may be placed inside stores and businesses. Municipal Code section 58.0305(b)(1) prohibits advertisements from being placed below four feet from the floor, if the store or business is within 1,000 feet of a school, playground, recreation center or facility, child care center, arcade, or library.

While four feet is less restrictive than five feet, the same Constitutional principles apply. A court would likely find that San Diego's height limitation does not satisfy the third and fourth prongs of the *Central Hudson* test, in violation of the First Amendment. Again, the backup materials in support of San Diego's ordinance did not contain any evidence of studies or data to justify the height restriction to support the idea that the height restriction was effective in advancing the City's goals.

IV. SUMMARY OF PROPOSED AMENDMENTS TO THE SAN DIEGO MUNICIPAL CODE REGULATING ADVERTISING AND PROMOTION OF TOBACCO PRODUCTS AND ELECTRONIC CIGARETTES

Currently, there are no federal regulations governing the advertising or promotion of electronic cigarettes. However, to comply with First Amendment protections for commercial speech, any advertising restrictions on electronic cigarettes must still satisfy the four-prong *Central Hudson* test.

Thus, taking into account federal limitations on advertising of tobacco products and the Supreme Court's decision in *Lorillard*, the following amendments are proposed to the Municipal Code to regulate the sale, advertising, and promotion of tobacco products and electronic cigarettes.

Here is a summary of the proposed substantive changes:

Section 58.0301, Definitions: Some terms are stricken, as they are used in sections that should be repealed to comply with First Amendment principles. Some new terms relating to electronic cigarettes have been added.

Section 58.0302, Measure of Distance: This provision will be unnecessary and should be repealed since the 1,000 foot buffer zone is overly restrictive and should also be repealed.

Section 58.0303, Advertising Restrictions: Subdivision (a) prohibits tobacco advertising displays in publicly visible locations, except when expressly authorized by an exception in section 58.0304. Subdivision (b) authorizes advertising of tobacco products located inside commercial establishments, so long as there is compliance with the exceptions in section 58.0305. A court would likely find the exceptions contained in 58.0304 and 58.0305 to be overly restrictive and unable to satisfy the *Central Hudson* test. Without the exceptions, the restrictions in section 58.0303 have no application, and should be repealed.

Section 58.0304, Exceptions to Advertising Restrictions: The exception in subdivisions (a)(1) through (a)(3) allow advertising display signs located in certain industrial or commercial zones that are also more than 1,000 feet from any school, playground, recreation center or facility, child care center, arcade, or library, and more than 1,000 feet from the boundary of a zone that is not a designated commercial or industrial zone. This exception is overly restrictive so as to make it unconstitutional under the *Central Hudson* test, and should be repealed. The exceptions in sections 58.0304(b) and (c) relating to commercial vehicles used for transporting tobacco products and public service announcements, respectively, are no longer necessary if the advertising restrictions in section 58.0303 are repealed. And the exception in section 58.0304(d) which allows advertising signs containing a generic description of tobacco products in black and white without logos or graphics is preempted by federal law because it regulates the content of tobacco product signs, and should be repealed. Finally, section 58.0304(e) is not an exception, but rather applies the advertising restriction in section 58.0303(a) to public facilities within the City's jurisdiction, unless there's a contract with a private party giving the private party control

over advertising rights on the facility premises. This subdivision is unnecessary and should be repealed, if the advertising restrictions in section 58.0303 are repealed.

Section 58.0305, Location of Tobacco Products and Advertising Inside Retail Establishments: The proposed ordinance strikes the 1,000 foot restriction in subdivisions (a) and (b) because it fails to satisfy the *Central Hudson* test. Thus, as amended subdivision (a) makes it unlawful to place displays of tobacco products within two feet of candy, snacks or non-alcoholic beverage displays. And subdivision (b) makes it unlawful to place advertising signs for tobacco products within two feet of candy, snacks or non-alcoholic beverage displays. The additional restriction that prohibited advertising four feet from the floor has also been stricken from subdivision (b), as a similar restriction was found to be unconstitutional in *Lorillard*.

Section 58.0306, Exceptions to Location of Tobacco Products and Advertising Inside Retail Establishments: Subdivision (c) of section 58.0306 should be repealed. This provision is preempted by federal law because it regulates the content ofpublic service announcements relating to tobacco products.

As amended, the balance of provisions in Chapter 5, Article 8, Division 3 of the Municipal Code regulate the sale, advertising, and promotion of tobacco products and electronic cigarettes, as they relate to minors, and comport with constitutional principles.

CONCLUSION

Much like the Massachusetts regulations found to be unconstitutional in *Lorillard*, it is likely a court would find San Diego's tobacco advertising restrictions overly burdensome on commercial speech. Therefore, the proposed ordinance amends the tobacco advertising restrictions contained in Chapter 5, Article 8, Division 3 of the Municipal Code to bring them into compliance with federal law and First Amendment commercial speech principles. As amended, the same advertising and promotion restrictions on tobacco products will now also apply to electronic cigarettes, electronic cigarette paraphernalia, and vaping juice.

The City is not left without options in preventing and discouraging use of tobacco products and electronic cigarettes by minors, however. First, the City may impose time, place and manner restrictions on advertising and promotion of tobacco products and electronic cigarettes, but may not restrict the content. Second, restrictions on the location and size of advertisements for tobacco products and electronic cigarettes must be treated the same as advertisements for other products. Finally, the City may regulate the use and sales of tobacco products and electronic cigarettes, and may employ zoning measures to do so.

If the City wishes to retain advertising-free buffer zones for tobacco products and electronic cigarettes, studies will have to be undertaken and information will have to be gathered to support the need for such restrictions.

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By */s/ Linda L. Peter*
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