Memorandum

City of Westfield, Massachusetts
Office of the City Solicitor

TO: **City Council**

FROM: **Shanna R. Reed, First Assistant City Solicitor**

DATE: **December 22, 2021**

SUBJECT: **Motion regarding mask mandate**

At the December 16, 2021 City Council meeting, the Council voted to request an opinion from the law department. This department contacted the City Clerk for the specifics of the request and received the following: "That the Law Department determine if the order from the Board of Health on the mask mandate complies with Massachusetts General Laws and is it a fatal flaw in the order if the emergency is not included and if written incorrectly, have the order either corrected or rescinded and corrected". In addition to requesting an excerpt from the minutes of the meeting, this office did review portions of the City Council video to clarify the scope of the request.

Please also know that this office has received emails from individual councilors with additional questions beyond what was voted on by the Council and said emails copied the Mayor.[1] Although these questions are beyond the scope of the motion on which the Council voted, the answers to these questions can be discerned by the case law cited in this memorandum. To that end, I have attached two Supreme Judicial Court cases and one Appeals Court case which are on point to the discussion.

Certain Boards and Commissions within the City of Westfield, including but not limited to the Westfield Board of Health, have independent, statutory authority to issue Orders, regulations, and the like. A legal opinion requested by the City Council regarding the decisions of another autonomous body is problematic as it is outside of the jurisdiction of the Council.[2] However, it appears prudent to clarify the specific authority of the Board of Health as it relates to the issuance of the recent order.

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[1] This seems to be a misunderstanding of Charter section 26 which allows council to request specific information on any municipal matter within the Council's jurisdiction from the Mayor. As will be further detailed in this memorandum, this particular matter is not within Council's jurisdiction.

[2] This would suggest that Council could then call into question the decisions of the Conservation Commission, Planning Board, Zoning Board of Appeals, etc. Each of the aforementioned boards and commissions, among others, have independent statutory authority to issue decisions and orders.

Massachusetts General Laws, Chapter 111, §31 (hereinafter the "statute") gives the local Boards of Health the authority to make reasonable health regulations. "Since the enactment of G.L. c.111, s.31, (courts) have repeatedly observed that this statute has granted boards of health plenary power to issue reasonable, general health regulations."[3] The authority of the Board is broad and has been historically recognized by the courts as both extensive, independent, and given extreme deference. The local Board of Health, being conferred this authority under the statute, is not required under any law, charter, or ordinance to have their decision reviewed and/or approved by the local executive or legislative branch. The remedy for "parties who believe that a board's regulation has exceeded proper boundaries may seek judicial review of the regulation, pursuant to an action for declaratory relief."[4]

Accordingly, the regulations of the local board of health are afforded great deference by the Courts. "Our standard of review for health regulations is settled law in that they 'have a strong presumption of validity', stand 'on the same footing as would a statute', and a reviewing court 'must make all rational presumptions in favor of [their] validity."[5] With all presumptions made in favor of the reasonableness of Board of Health regulations, those challenging said regulations must prove that the regulation "cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it."[6] Furthermore, a party cannot meet that burden by arguing the record does not affirmatively show facts that support the regulation.[7]

The question posed in the motion asks whether the Westfield Board of Health Order instituting a mask mandate complies with Massachusetts General Law given that the word "emergency" is not included. As stated earlier, the statute states in the first sentence that "Board of Health may make reasonable health regulations".[8] It does not require that there be a declared state of emergency, nor does it require that the Board of Health use the word emergency in it's Order. In Chapter 321 of the Acts of 2020 *An Act Providing for Agricultural Commission Input on Municipal Board of Health Regulations*, a copy of which is attached hereto, there was an amendment to the statute that added a section discussing the determination that an emergency exists as it relates to specific regulations that impact agricultural commissions. This amendment, however, did not amend the general authority of the local boards of health to issue reasonable regulations without a determination of emergency.

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[3] Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433, Mass, 217, 222 (2001) citing Independence Park, Inc. V. Board of Health of Barnstable, 403 Mass. 477, 480 (1988).
[4] Id at 226.
[5] American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Athol Board of Health of Athol & another, 446 Mass. 310, 317 (2006) citing Tri- Nel Management, Inc. v. Board of Health of Barnstable, supra, and Padden v. West Boylston, 64 Mass. App. Ct. 120, 124-125 (2005).
[6] Druzik v. Board of Health of Haverhill, 324 Mass. 129, 138 (1949),
[7] Padden v. West Boylston, 64 Mass. App. Ct. 120 (2005).
[8] MGL c.111, s.31.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Board of Health of Yarmouth, Mass., June 20, 2003

433 Mass. 217
Supreme Judicial Court of Massachusetts, Barnstable.

TRI–NEL MANAGEMENT, INC.,[1] & others,[2]
v.
BOARD OF **HEALTH** OF BARNSTABLE & another.[3]

Argued Nov. 7, 2000.
Decided Jan. 19, 2001.

Synopsis
Various business owners and operators sought preliminary injunction to enjoin enforcement of town regulation imposing absolute ban on smoking in all food service establishments, lounges, and bars. The Superior Court Department, Barnstable County, Gary A. Nickerson, J., denied request for a preliminary injunction, and plaintiffs filed application for direct appellate review. The Supreme Judicial Court, Cowin, J., held that: (1) regulation did not exceed **authority** granted under statute authorizing local **boards** of **health** to make reasonable **health** regulations and was reasonable; (2) State statute establishing minimum statewide restrictions on smoking in restaurants did not preempt town from enacting regulation; (3) regulation did not violate provision of town's charter requiring all legislative powers of the town to be exercised by a town council; and (4) allegation that smoking ban would interfere with existing customer relationships and cause a loss of business income was insufficient to establish irreparable harm required for injunction.

Affirmed.

West Headnotes (21)

[1] **Injunction** ⇐ Grounds in general; multiple factors

To succeed in an action for a preliminary injunction, a plaintiff must show: (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.

59 Cases that cite this headnote

[2] **Injunction** ⇐ Injunctions against government entities in general

When a party seeks to enjoin governmental action, the court also considers whether the relief sought will adversely affect the public.

31 Cases that cite this headnote

[3] **Appeal and Error** ⇐ Preliminary injunction; temporary restraining order

In reviewing an order on a preliminary injunction, the Supreme Judicial Court must determine whether the judge abused his discretion.

4 Cases that cite this headnote

[4] **Appeal and Error** ⇐ Province of, and deference to, factfinding judge in general

Where no testimony was taken in the Superior Court hearing, there is no credibility or factual issue on which the Supreme Judicial Court would defer to the judge.

[5] **Administrative Law and Procedure** ⇐ Questions of fact and findings; evidence

Absent a contrary statutory direction, a court reviewing a regulation is not concerned with whether there was substantial evidence in a record before the administrative agency, but rather whether, based solely on the record made in court, the adoption of the agency regulation was illegal, arbitrary, or capricious.

board considerable latitude, requiring a sharp conflict between the regulation and the statute before invalidating the regulation.

1 Cases that cite this headnote

[14] **Health** ⇐ State and local regulations

Sharp conflict between a local **health** regulation and a state statute appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local regulation.

2 Cases that cite this headnote

[15] **Constitutional Law** ⇐ Municipalities and municipal employees and officials

Health ⇐ Validity

Legislature's delegation of regulatory **authority** to local **board** of **health** did not violate provision of state constitution requiring governmental separation of powers; there was a long-standing tradition of municipal regulation of local **health** matters, Legislature provided appropriate guidance for the implementation of regulations by requiring that they address the "**health**" of the community and that they be "reasonable," and these limitations on content and reasonableness sufficiently demarcated the boundaries of regulatory discretion so that the statute provided safeguards to control abuses of discretion. M.G.L.A. Const. Pt. 1, Art. 30; M.G.L.A. c. 111, § 31.

1 Cases that cite this headnote

[16] **Constitutional Law** ⇐ Delegation of Powers

Doctrine of separation of powers encompasses the general principle that the Legislature cannot delegate the power to make laws.

[17] **Constitutional Law** ⇐ Delegation in general

Whether a particular delegation of power is proper is a question of degree.

[18] **Constitutional Law** ⇐ Delegation of Powers

Constitutional Law ⇐ To State and Local **Authorities**

In reviewing a claim of improper delegation of legislative power, the Supreme Judicial Court considers: (1) whether the Legislature delegated the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) whether the act provides adequate direction for implementation, either in the form of statutory standards or, if the local **authority** is to develop the standards, sufficient guidance to enable it to do so; and (3) whether the act provides safeguards such that abuses of discretion can be controlled.

[19] **Towns** ⇐ Town **board** in general

Town **board** of **health's** adopting regulation imposing absolute ban on smoking in all food service establishments, lounges, and bars did not violate provision of town's charter requiring all legislative powers of town to be exercised by town council; town council, much like the Legislature, delegated regulatory **authority** to the **board** to preserve and protect the town's public **health**.

[20] **Injunction** ⇐ Food and beverages; restaurants

Business owners' allegation that smoking ban would interfere with existing customer relationships and cause a loss of business income was insufficient to establish irreparable harm required to enjoin enforcement of town regulation that imposed smoking ban; only evidence on this issue consisted of two statistical studies that smoking restrictions in restaurants and bars had little to no effect on restaurant revenues, and scientific support linking environmental tobacco smoke (ETS) to adverse **health** effects supported determination that issuance of injunction would not serve the public interest.

(1988). In reviewing an order on a preliminary injunction, we must determine whether the judge abused his discretion. Because no testimony was taken in the Superior Court hearing there is no credibility or factual issue on which we would defer to the judge. *Packaging Indus. Group, Inc. v. Cheney, supra* at 615–616, 405 N.E.2d 106.

[5] We note initially that "in the absence of a contrary statutory direction, a court reviewing a regulation is not concerned with *220 whether there was substantial evidence in a record before the agency, but rather ... whether, based solely on the record *made in court,* the adoption of the agency regulation was illegal, arbitrary, or capricious" (emphasis supplied). *Massachusetts State Pharmaceutical Ass'n v. Rate Setting Comm'n,* 387 Mass. 122, 126, 438 N.E.2d 1072 (1982). Accordingly, it is the record of the preliminary injunction proceeding with which we are concerned.

[6] The plaintiffs present several arguments supporting their claim of a likelihood of success on the merits. They contend that the **board's** regulation exceeds the **authority** granted by G.L. c. 111, § 31. We disagree. General Laws c. 111, § 31, authorizes local **boards** of **health** to "make reasonable **health** regulations." G.L. c. 111, § 31. We have previously recognized that the "statutory language itself is the principle source of insight into the legislative purpose." *Hoffman v. Howmedica, Inc.,* 373 Mass. 32, 37, 364 N.E.2d 1215 (1977). Through the plain language of G.L. c. 111, § 31, the Legislature has delegated **boards** of **health** the power to adopt reasonable **health** regulations.

[7] [8] [9] [10] The plaintiffs next argue that the **board's** regulation is not reasonable because the amount of ETS exposure at restaurants and bars would not be sufficient to cause adverse **health** effects in general. In deciding whether a **health** regulation adopted under G.L. c. 111, § 31, is reasonable, this court accords the regulation the same deference granted to a legislative enactment. *Druzik v. **Board** of **Health** of Haverhill,* 324 Mass. 129, 138, 85 N.E.2d 232 (1949). **Health** regulations have a strong presumption of validity, and, when assessing a regulation's "reasonableness," all rational presumptions are made in favor of the validity of the regulation. *Id.* A court may invalidate the regulation only when there is no rational relation between the regulation and its stated public **health** purpose. *Id.* at 138–139, 85 N.E.2d 232. *Hamel v. **Board** of **Health** of Edgartown,* 40 Mass.App.Ct. 420, 423, 664 N.E.2d 1199 (1996).[6]

Reviewing the record in this case, we note that the plaintiffs did not offer any evidence in support of their contention that the ill effects of ETS exposure will not result from only limited contact. By contrast, the **board** has placed in the record four reports interpreting and summarizing scientific studies that identify ETS exposure as a cause of numerous negative **health** *221 effects.[7] Further, given **42 the subject matter, the **board's** expertise and experience in this area is given great deference by our courts. *Massachusetts Inst. of Tech. v. Department of Pub. Utils.,* 425 Mass. 856, 867–868, 684 N.E.2d 585 (1997). Given the absence of any evidence from the plaintiffs, the scientific studies on the ill effects of ETS exposure generally and the **board's** expertise in this subject matter, we conclude that the **board's** regulation is within the standard of reasonableness. *Druzik v. **Board** of **Health** of Haverhill, supra* at 138, 85 N.E.2d 232.

The plaintiffs also maintain that G.L. c. 111, § 31, limits the **authority** of **boards** of **health** to adopt regulations to specific subject matters enumerated in other sections of G.L. c. 111. For this proposition, the plaintiffs cite our decision in *Commonwealth v. Drew,* 208 Mass. 493, 94 N.E. 682 (1911). The *Drew* opinion, however, was issued in 1911, approximately nine years before *222 the enactment of G.L. c. 111, § 31, and interpreted a different statute, Rev. L. c. 75, § 65 (1902), which gave more limited power to **boards** of **health**. Compare *Commonwealth v. Drew, supra* at 495, 94 N.E. 682 (analyzing Rev. L. c. 75, § 65 [1902]) with St.1920, c. 591, § 17, enacting predecessor to G.L. c. 111, § 31, as amended by St.1937, c. 285.[8] Section 31 was "passed as legislation of broad and general scope ... which is 'not subject to the limitations of earlier rule making powers of **boards** of **health**.' " ***Board** of **Health** of Woburn v. Sousa,* 338 Mass. 547, 551–552, 156 N.E.2d 52 (1959), quoting *Brielman v. Commissioner of Pub. **Health** of Pittsfield,* 301 Mass. 407, 409, 17 N.E.2d 187 (1938). We have said that, when the Legislature enacted G.L. c. 111, § 31, it created "a comprehensive, separate, additional source of **authority** for **health** regulations." ***Board** of **Health** of Woburn v. Sousa, supra* at 550, 156 N.E.2d 52. Since the enactment of G.L. c. 111, § 31, we have repeatedly observed that this statute has granted **boards** of **health** plenary power to issue reasonable, general **health** regulations. *Independence Park, Inc. v. **Board** of **Health** of Barnstable,* 403 Mass. 477, 480, 530 N.E.2d 1235 (1988); *United Reis Homes, Inc. v. Planning Bd. of Natick,* 359 Mass. 621, 623, 270 N.E.2d 402 (1971). Moreover, we have previously recognized the ill effects of tobacco use, particularly when it involves minors, as a legitimate municipal **health** concern

[15] [16] [17] [18] The plaintiffs' next contention is that the Legislature's delegation of regulatory **authority** to local **boards** of **health** in G.L. c. 111, § 31, violates art. 30 of the Massachusetts Declaration of Rights, which provides for governmental separation of powers. "The doctrine of separation of powers encompasses the general principle that the Legislature cannot delegate the power to make laws." *Construction Indus. of Mass. v. Commissioner of Labor & Indus.*, 406 Mass. 162, 171, 546 N.E.2d 367 (1989). Whether a particular delegation of power is proper is "a question of degree." *Id.* See *Opinion of the Justices*, 328 Mass. 674, 676, 105 N.E.2d 565 (1952) ("principle that legislative power cannot be delegated is not ... applied in all instances with absolute literal inflexibility"). In reviewing a claim of improper delegation of legislative power, we consider: "(1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or, if the [local **authority**] is to develop the standards, sufficient guidance to enable [it] to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?" *Construction Indus. of Mass. v. Commissioner of Labor & Indus., supra,* quoting *Chelmsford* ****45** *Trailer Park, Inc. v. Chelmsford,* 393 Mass. 186, 190, 469 N.E.2d 1259 (1984).

The **board's** regulation satisfies these standards. First, the Legislature has made the policy decision that public **health** matters affecting local communities may be the subject of reasonable municipal regulations. G.L. c. 111, § 31. The appropriateness of this delegation is rooted in the legal history of this ***226** Commonwealth. See *Baker v. Boston,* 29 Mass. 184, 12 Pick. 184, 192–193 (1831) (noting validity of power held by municipalities to preserve "public **health**"); *Brodbine v. Revere,* 182 Mass. 598, 601, 66 N.E. 607 (1903) (noting validity of legislation delegating regulatory **authority** on public **health** matters to local **boards** of **health** "has long been recognized"). Further, with specific regard to ETS regulation, the Legislature has already made the determination that smoking should be prohibited or regulated in certain public locations, including restaurants, see G.L. c. 270, § 22, and has explicitly left municipalities, and their **boards** of **health**, the power to implement stricter regulations on smoking in public places. See St.1987, c. 759, § 5.

Second, in view of the long-standing tradition of municipal regulation of local **health** matters, the Legislature has provided appropriate guidance for the implementation of regulations by requiring that they address the "**health**" of the community and that they be "reasonable." *Chelmsford Trailer Park, Inc. v. Chelmsford, supra* at 190, 469 N.E.2d 1259 ("Legislature may delegate to a **board** ... the details of a policy adopted by the Legislature"); *Bay State Harness Horse Racing & Breeding Ass'n v. State Racing Comm'n,* 342 Mass. 694, 699, 175 N.E.2d 244 (1961) (although statute furnished "few specific standards," delegation valid where general standards of "public interest, convenience, and necessity" could be implied); *Burnham v. **Board** of Appeals of Gloucester,* 333 Mass. 114, 118, 128 N.E.2d 772 (1955), and cases cited (degree of certainty with which standards for exercise of discretion are set up depends on subject matter and circumstances). In regard to the third consideration, these limitations on content and reasonableness sufficiently demarcate the boundaries of regulatory discretion so that the act provides safeguards to control abuses of discretion. Parties who believe that a **board's** regulation has exceeded proper boundaries may seek judicial review of the regulation, pursuant to an action for declaratory relief. G.L. c. 231A.[11]

[19] Finally, the plaintiffs assert that the **board's** regulation violates the town's charter. Section 1–3 of the charter, entitled "Division of Powers," declares "[a]ll legislative powers of the town shall be exercised by a town council." The charter further provides, ***227** however: "*Except as otherwise provided by law or by the charter,* all powers of the town shall be vested in the town council which shall provide for their exercise and for the performance of all duties and obligation [*sic*] imposed on the town by law" (emphasis added). Charter of the Town of Barnstable § 2–3. In 1991, the Barnstable town council adopted an administrative code, which the charter defines as "a written description of the administrative organization of town offices, departments and multiple member bodies. The administrative code shall state the ... general powers and duties of each town office department and multiple member body." § 9–4(a). The code provides that "regulatory" standing committees have "legal **authority** to promulgate rules and regulations, decide individual cases and enact policy." Barnstable Administrative Code § 1.09(b). Section 16 of the code establishes the **board** as a standing committee, defining the **board** as "an advisory and regulatory committee of the Town." Barnstable ****46** Administrative Code §§ 16.01–16.02.[12] Accordingly, the town council, much like the Legislature, has delegated regulatory **authority** to the **board** to preserve and protect the town's public **health**.[13] For the foregoing reasons, we conclude that the Superior Court judge properly ruled that the

or exacerbation of asthma. The plaintiffs did not present any evidence contradicting the chairwoman's affidavit or these reports. Although the plaintiffs focus their arguments on the ETS exposure of restaurant patrons, three of the reports submitted by the **board** also identify employees as individuals at risk for adverse **health** effects. A 1994 EPA report notes a scientific study which found that workplace ETS exposure created a "slightly higher risk" of developing cancer than residential exposures.

8 The current version of Rev. L. c. 75, § 65 (1902), which is substantially similar to its predecessor, is found at G.L. c. 111, § 122. General Laws c. 111, § 122 provides: "The **board** of **health** shall examine into all nuisances, sources of filth and causes of sickness within its town, or on **board** of vessels within the harbor of such town, which may, in its opinion, be injurious to the public **health**, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public **health** and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town or into or from any vessel. Whoever violates any such regulation shall forfeit not more than one thousand dollars ."

9 Article 89, § 6, of the Amendments to the Massachusetts Constitution, the Home Rule Amendment, provides in pertinent part: "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight...."

10 The plaintiffs argue that St.1987, c. 759, § 4, which authorizes the Department of Public **Health** to promulgate rules and regulations necessary to implement the provisions of G.L. c. 270, § 22, preempts local regulation. Section 4 provides: "The department of public **health** shall promulgate such rules and regulations as may be necessary to implement the provisions of this act. Said rules and regulations shall include the provision that copies of any complaints under section twenty-two of chapter two hundred and seventy of the General Laws shall be filed with said department." There is no indication in this statutory language that the Legislature intended to confer exclusive regulatory jurisdiction on the Department of Public **Health**. Further, § 4 was passed in conjunction with § 5. "Sections of the same chapter are to be interpreted ... so as to constitute an harmonious and consistent body of laws." *Johnson v. Johnson,* 425 Mass. 693, 696, 682 N.E.2d 865 (1997), quoting *Gosselin v. Gosselin,* 1 Mass.App.Ct. 146, 148, 294 N.E.2d 555 (1973). When read together, § 4 authorizes the Department of Public **Health** to promulgate rules and regulations to fulfil the Legislature's intended prohibitions on smoking, while § 5 expressly permits local communities to regulate or prohibit smoking altogether beyond the statutorily imposed minimum standards.

11 Section 2 of G.L. c. 231A provides that the declaratory judgment procedure "may be used to secure determinations of right[s] ... under ... a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination."

12 The full text states: "The **Board** of **Health** seeks to preserve and maintain the Town's public **health** standards and protect its environmental resources by educational means and by strict enforcement of various regulations, ordinances, State **Health** Codes, General Laws, in particular MGL Chapter 111, and Federal law. The **Board** carries out duties and responsibilities assigned by either state or local legislation, as these primarily concern public **health** standards and protection of environmental resources. The **Board** establishes policies and programs for implementation by the **Health** department. The **Board** of **Health** is an advisory and regulatory committee of the Town." Barnstable Administrative Code § 16.02.

13 Even without this creation of municipal **authority**, the **board** has been given the necessary **authority** by the Legislature as discussed above.

14 The study analyzed the "taxable meals receipts data collected by the Massachusetts Department of Revenue ... for the period January 1992 through December 1995." The study compared the receipts data collected from twenty-nine municipalities that adopted "highly restrictive" smoking policies to receipts data collected from twenty-nine municipalities that did not adopt such policies. The study defines a "highly restrictive" smoking policy as "any city ordinance, town by-law, or local **board** of **health** regulation that completely restricts smoking in restaurants or confines smoking to separate, enclosed, and separately ventilated sections of restaurants."

15 The preliminary results also showed that the communities that had adopted smoking restrictions in restaurants had a combined increase in restaurant receipts.

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64 Mass.App.Ct. 120
Appeals Court of Massachusetts,
Worcester.

Carolyn PADDEN & others[1]

v.

WEST BOYLSTON & others[2]

No. 04–P–987.

Argued Nov. 5, 2004.

Decided July 26, 2005.

Synopsis

Background: Residents brought action against town to challenge mandatory sewer connection regulation, seeking a preliminary injunction and trial on the merits. After jury-waived trial, the Superior Court, Worcester County, John S. McCann, J., entered judgment for residents, essentially enjoining town from enforcing regulation. After filing notice of appeal, town filed motions to alter or amend the judgment and to stay the judgment pending appeal, which were denied, and town filed "amended notice of appeal."

Holdings: The Appeals Court, Lenk, J., held that:

[1] "amended notice of appeal" was a proper new notice of appeal, and

[2] regulation was rationally related to public health and thus was valid.

Vacated.

West Headnotes (12)

[1] **Appeal and Error** ⇐ Time for filing

Town's "amended notice of appeal," filed after original notice of appeal and subsequent post-judgment motions to alter or amend judgment and to stay judgment, was a new notice of appeal which satisfied rule prohibiting premature appeals, where notice clearly and expressly referenced the final judgments from which appeal was being taken, and notice was filed subsequent to the filing and denial of the post-judgment motions. Rules App.Proc., Rule 4, 43C M.G.L.A.

3 Cases that cite this headnote

[2] **Health** ⇐ Scope of judicial review of agency decision

A party challenging a board of health regulation must prove that it is illegal, arbitrary, or capricious, and must establish the absence of any conceivable grounds upon which the regulation may be upheld; party cannot meet that burden by arguing that the record does not affirmatively show facts that support the regulation.

1 Cases that cite this headnote

[3] **Administrative Law and Procedure** ⇐ Consistency with statute, statutory scheme, or legislative intent

Administrative Law and Procedure ⇐ Presumptions and burden of proof

The court must apply all rational presumptions in favor of the validity of an administrative regulation and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.

[4] **Administrative Law and Procedure** ⇐ Questions of fact and findings; evidence

In reviewing an administrative regulation, the court is not concerned whether there was substantial evidence in a record before the agency, but rather whether, based solely on the record made in court, the adoption of the agency regulation was illegal, arbitrary, or capricious.

Boylston board of health (board of health). The plaintiffs sought declaratory and injunctive relief on a preliminary and permanent basis. Their request for preliminary injunctive relief was consolidated with a jury-waived trial on the merits; the trial judge declared the regulation invalid and, in essence, permanently enjoined the town from enforcing the regulation. The town now appeals, claiming that the judge erred in declaring the regulation invalid because it is rationally related to the protection of public health and safety. We agree and vacate the judgment.

Background. The town is located on the western side of the Wachusett Reservoir, which supplies water to the greater Boston area through the Massachusetts Water Resource Authority (MWRA) and is managed and maintained by the Metropolitan District Commission (MDC).[3]

In the early 1990's, the MDC conducted and commissioned several studies of the watershed area, revealing significant water quality problems in the brook tributary to the reservoir. The studies recommended the development of a sewer system that would service certain areas of West Boylston generating wastewater that was not adequately serviced by septic systems. Additional studies of the watershed and of groundwater pollution were conducted through the late 1990's and into 2002, assessing whether property in certain areas of the town could be brought into compliance with Title 5 septic system regulations[4] or would require connection to the sewer system.

At town meetings in October, 1995; May, 1997; and October, 1997, town residents voted to borrow money, assess betterments, establish a mechanism for collecting unpaid sewer fees, establish a board of sewer commissioners, and offer low interest ***122** loans for the upgrade of septic systems and sewer connections. By 2001, however, the nascent sewer system was encountering considerable financial difficulty.

Although the town's sewer system had initially been intended for use in areas ****930** where Title 5 compliance could not be achieved, the town, in May of 2002, sought to cast a wider net by adopting a by-law, pursuant to G.L. c. 40, § 21, requiring the owners of abutting properties generating wastewater to connect to the public sewer. Town residents, however, voted not to adopt the by-law at the May 20, 2002, annual town meeting. Two weeks later, the board of selectmen met to discuss the situation and, at that June 1, 2002, meeting, decided to meet with the board of health and draft for it a mandatory sewer connection regulation. Several such meetings thereafter took place.

A public hearing on the proposed board of health regulation took place on August 28, 2002, in which town residents voiced their concerns. Nonetheless, the board of health adopted the mandatory sewer connection regulation on September 25, 2002, to take effect on January 2, 2003.[5]

The plaintiff homeowners then brought this action seeking declaratory and injunctive relief. More specifically, they sought (1) an order that the town and the board of health cease enforcing the mandatory sewer connection regulation; (2) a declaration that the board of health had adopted the regulation based on impermissible criteria and without authority; (3) an order enjoining the town's selectmen from unlawfully interfering with the board of health in the future; and (4) a preliminary injunction enjoining enforcement of the regulation during the course of the litigation. Since the parties appeared to be in agreement on the essential facts, the judge ordered the trial of the action on the merits to be advanced and consolidated with the hearing ***123** of the application for preliminary injunctive relief pursuant to the provisions of Mass.R.Civ.P. 65(b)(2), 365 Mass. 833 (1974). After a jury-waived trial, the judge concluded that the challenged mandatory sewer connection regulation was unrelated to public health and safety; he accordingly declared it invalid and, in essence, permanently enjoined the board of health from enforcing it.

The town filed a notice of appeal on November 26, 2003. On December 18, 2003, it filed a motion to alter or amend, pursuant to Mass.R.Civ.P. 59(e), 365 Mass. 828 (1974), and a motion to stay the judgment pending appeal, pursuant to Mass.R.Civ.P. 62(c), 365 Mass. 830 (1974). Both motions were denied on March 8, 2004. On April 8, 2004, an "amended notice of appeal" was entered on the docket stating that the town was amending "the Notice of Appeals to the Appeals Court from the judgment of [the Superior Court] dated October 31, 2003 ... to also include appeal of [the Superior Court's] March 8, 2004, denial of defendant's Motion to Alter or Amend and Motion for Stay Pending Appeal."

[1] *Compliance with Mass.R.A.P. 4(a).* The plaintiffs contend that this appeal should be dismissed for failure to comply with Mass.R.A.P. 4(a),[6] asserting that the ****931** April 8, 2004, amended notice of appeal was a nullity, as the underlying November 26, 2003, notice of appeal was extinguished when the town filed its December 18, 2003,

[8] [9] [10] The board of health adopted the present regulation under the authority of G.L. c. 83, §§ 3[8] and 11,[9] and **933 G.L. c. 111, §§ 31,[10] 122,[11] and 127.[12] Chapter 111, § 31, alone "confers plenary power [upon local boards of health] to promulgate health regulations *127 reasonable ones that are general in application." *Hamel v. Board of Health of Edgartown*, 40 Mass.App.Ct. 420, 423, 664 N.E.2d 1199 (1996). "Health regulations have a strong presumption of validity.... A court may invalidate the regulation only when there is no rational relation between [it] and its stated public health purpose." *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, supra* at 220, 741 N.E.2d 37.

The stated health purpose of the challenged regulation is "the protection of the public health, safety, welfare and environment and for the further purpose of ensuring the protection of the Wachusett Reservoir, a public water supply." To prevail in their challenge, the plaintiffs must prove that the sewer regulation lacks any nexus with public health and safety. They contend in this regard that Title 5 compliant septic systems, such as the ones servicing their property, pose no danger to the public health or safety. Even if they were to have established that presently compliant systems pose no such danger, however, the regulation will not be invalidated if there is a "conceivable ground" upon which the board could rationally have concluded that Title 5 compliant systems may nonetheless represent a danger to public health and safety.

In his affidavit, Robert Barrell, chairman of the board of health, stated that "[a]ccording to John Scannell and Patricia Austin of the MDC, who met with the board of health on April 9, 2003, even an on-site septic system that passes a Title 5 inspection can contribute pollution to the groundwater due to a hidden failure when the soil below the system stops providing appropriate treatment for septage." We note that Title 5 requires that septic systems be evaluated only in connection with the transfer of a property serviced by such a system. See 310 Code Mass. Regs. § 15.301(1) (1995).[13] Further, Joseph M. **934 McGinn, director of the division of watershed management of the MDC, *128 stated in a letter to the board of health that "[t]he second major reason for compelling the earliest connection of other properties to the sewer is to reverse as quickly as possible the continuing degradation and pollution of the ground and surface waters of the Wachusett Reservoir watershed by inadequate septic systems...." Given this, the board of health could plausibly have adopted the challenged mandatory sewer connection regulation based on the logic that, over time, a once compliant system could become a noncompliant, failing system, that the failure might well remain undetected for some period of time, and that the undetected failing system would, until detected and brought back into compliance, contribute to pollution. This constitutes a "conceivable ground" upon which the board of health could properly have based its adoption of the mandatory sewer connection regulation.

[11] Relying on *Home Builders Assn. of Cape Cod, Inc. v. Cape Cod Commn.*, 441 Mass. 724, 808 N.E.2d 315 (2004), and *Hamel v. Board of Health of Edgartown, supra*, the plaintiffs contend that the MDC studies did not provide the board of health with sufficient scientific basis upon which to base the mandatory sewer regulation. To be sure, the two cases upon which the plaintiffs rely do draw more precise connections between the scientific studies conducted and the challenged regulations than are present here.[14] Such level of precision is not, however, the prerequisite for promulgation of a regulation that the plaintiffs *129 appear to suggest. A board of health is permitted to take preventative action in order to preserve the public health and safety; it is not required to "wait until the danger materializes" before taking action. *Borden, Inc. v. Commissioner of Pub. Health*, 388 Mass. at 727 n. 19, 448 N.E.2d 367. Nor is it incumbent upon a board of health before taking such action to demand **935 unqualified scientific proof as to its efficiency. *Ibid.* ("Some doubts [about] whether [a particular type of insulation] properly installed in houses will cause the symptoms characteristic of exposure to formaldehyde will not stay the commissioner's hand"). Lack of such level of scientific proof does not prevent regulatory action. See *Commonwealth v. Leis*, 355 Mass. 189, 195, 243 N.E.2d 898 (1969). Moreover, as previously discussed, the board of health was required only to have a "conceivable basis" for its action; this it had. The plaintiffs had the burden of showing the absence of a rational relationship between the regulation and public health and safety; this they did not do. Their reliance on *Home Builders* and *Hamel* is unavailing.

The plaintiffs also contend that the subjective motivations of the members of the board of health should be taken into account in determining whether the reasons that the board of health supplied for adopting the mandatory sewer connection regulation were only a pretext. They argue that the real reason for the regulation is the financial difficulties that the town faced in connection with the new sewer system and not genuine public health concerns. Be this as it may, because we have concluded that a nexus between the regulation and public health existed, we need not consider the motives of the board of health. See *130 *Massachusetts Fedn. of Teachers*

9 General Laws c. 83, § 11, states, "The board of health of a town may require the owner or occupant of any building upon land abutting on a public or private way, in which there is a common sewer, to connect the same therewith by a sufficient drain, and such owner or occupant who fails to comply with such order shall be punished by a fine of not more than two hundred dollars."

10 General Laws c. 111, § 31, states, in part, "Boards of health may make reasonable health regulations.... No regulation or amendment thereto which relates to the minimum requirements for subsurface disposal of sanitary sewage as provided by the [S]tate environmental code shall be adopted until such time as the board of health shall hold a public hearing thereon.... Prior to the adoption of any regulation or amendment which exceeds the minimum requirements for subsurface disposal of sanitary sewage as provided by the [S]tate environmental code, a board of health shall state at said public hearing the local conditions which exist or reasons for exceeding such minimum requirements."

11 General Laws c. 111, § 122, states, in part, "The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town ... which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto ..."

12 General Laws c. 111, § 127, states, in part, "The board of health of a city or town may make and enforce regulations for the public health and safety relative to house drainage and connection with common sewers, if such a sewer abuts the estate to be drained."

13 Title 310 Code Mass. Regs. § 15.301(1) (1995) states, "Except as provided in 310 [Code Mass. Regs §]15.301(2), 15.301(3), and 15.301(4), a system shall be inspected at or within two years prior to the time of transfer of title to the facility served by the system. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time. If weather conditions preclude inspection at the time of transfer, the inspection may be completed as soon as weather permits, but in no even later than six months after the transfer, provided that the seller notifies the buyer in writing of the requirements of 310 [Code Mass. Regs. §§] 15.300 through 15.305. A copy of the inspection report shall be submitted to the buyer or other person acquiring title to the facility served by the system."

14 The scientific studies proffered to the board of health in support of the challenged regulation focused on areas of the town in which Title 5 compliance could not be achieved based on soil conditions and other factors, rather than upon presently or previously Title 5 compliant systems. Hence, the studies did not draw the precise connection between the proposed regulation and such compliant systems that might well have been preferable. Nonetheless, there was evidence in studies before the board of health that supported the adoption of a mandatory sewer connection regulation based on public health and safety concerns. In the MDC's "Watershed Protection Plan Update" of July 31, 1998, referenced in the July 1, 2002, letter to the board of health from John Westerling, the town's superintendent of services and drains, the assessment was that "[o]n-site wastewater disposal systems continue to represent a potential source of pathogens and other pollutants of concern to the water supply.... [T]hese pollutants may eventually appear as surface water pollution in the tributaries throughout the watershed system and/or migrate via groundwater pathways." In addition, a different study referenced in the same letter to the board of health, "Environmental Quality Assessment Report, Reservoir District, 2002," concluded that "pollutants from failing septic systems ... have been ... caus[ing] severe impacts to the macroinvertebrate community.... It is expected that sewers will significantly improve water quality in the near future once installation and connections are completed." The plaintiffs' critique of such studies does not, in any event, further their cause, as they cannot prevail simply by arguing that the record does not affirmatively show facts that support the regulation. See *Massachusetts Fedn. of Teachers v. Board of Educ.*, 436 Mass. at 772, 767 N.E.2d 549.

15 The one case that the plaintiffs cite in this regard, *Marr v. Back Bay Architectural Commn.*, 23 Mass.App.Ct. 679, 684, 505 N.E.2d 534 (1987), pertains only to the denial of an individual zoning application and not to a regulation of general application. It is not on point.

16 It is also unnecessary for us to consider the plaintiffs' assertion that the regulation is improper because it did not provide for a variance mechanism. We express no opinion on this issue because the issue was not raised in the Superior Court proceedings and is not properly before us. See *Sahli v. Bull HN Information Sys., Inc.*, 437 Mass. 696, 707 n. 20, 774 N.E.2d 1085 (2002).

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446 Mass. 310
Supreme Judicial Court of Massachusetts,
Worcester.

AMERICAN LITHUANIAN NATURALIZATION CLUB, ATHOL, MASS., INC., & others[1]

v.

BOARD OF **HEALTH** OF ATHOL & another.[2]

Argued Nov. 9, 2005.

Decided March 22, 2006.

Synopsis

Background: Membership associations filed declaratory judgment action seeking determination that town **board** of **health** exceeded its **authority** in promulgating regulation prohibiting smoking in the enclosed areas of associations' premises. The Superior Court Department, Worcester County, John S. McCann, J., determined that **board** had exceeded its **authority** and permanently enjoined **board** from enforcing regulation.

Holdings: On grant of **board's** application for direct appellate review, the Supreme Judicial Court, Marshall, C.J., held that:

[1] **board** had **authority** to promulgate local antismoking regulation;

[2] **board's authority** to promulgate local regulation was not preempted by statewide antismoking legislation;

[3] regulation was neither vague nor overbroad;

[4] regulation was not an unreasonable, substantial, or serious interference with the right of privacy of the associations and their members;

[5] regulation did not infringe associations' or their members' right to free assembly under the First Amendment;

[6] regulation did not infringe any rights associations or their members had under the freedom of religion clause of the Federal or State Constitution;

[7] issue of whether regulation constituted a deprivation of property without adequate compensation would be remanded; and

[8] there was no basis for recovery against town under Civil Rights Act.

Vacated and remanded.

West Headnotes (18)

[1] **Environmental Law** ⇐ Indoor air; tobacco

Town **board** of **health** had **authority** to promulgate regulation prohibiting smoking in the enclosed areas of associations' premises, under statute providing **boards** of **health** with plenary power to promulgate reasonable **health** regulations that were general in application; even if smoking members of associations chose to disregard the overwhelming evidence of the serious **health** consequences of smoking, **board** rationally could have been concerned about the exposure of nonsmokers to a "known human carcinogen," and general public had access to premises from time to time and nonsmoking members and their guests had access all of the time. M.G.L.A. c. 111, § 31.

1 Cases that cite this headnote

[2] **Health** ⇐ Validity

Local **health** regulations have a strong presumption of validity, and stand on the same footing as would a statute.

1 Cases that cite this headnote

[3] **Health** ⇐ Scope of judicial review of agency decision

Town **health** regulation prohibiting smoking in the enclosed areas of membership associations' premises did not infringe associations' or their members' right to free assembly under the First Amendment; although some members threatened that they would no longer socialize at clubs if smoking was not permitted, there was no showing that enforcement of regulation would infringe members' right to maintain relationships with each other or to engage in First Amendment activities. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[12] **Constitutional Law** ⇐ Right of Assembly

Constitutional Law ⇐ Right to Petition for Redress of Grievances

Constitutional Law ⇐ Freedom of Association

The freedom of association encompasses the right to enter into and maintain certain intimate human relationships, and a right to associate for the purpose of engaging in those activities protected by the First Amendment, including speech, assembly, petition for the redress of grievances, and the exercise of religion. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[13] **Constitutional Law** ⇐ Free Exercise of Religion

Constitutional Law ⇐ Freedom to believe

The free exercise clause of the United States Constitution protects the freedom to believe and freedom to act and its counterpart in the Massachusetts Declaration of Rights protects both religious beliefs and religious practices. U.S.C.A. Const.Amend. 1; M.G.L.A. Const. Pt. 1, Art. 2.

[14] **Constitutional Law** ⇐ Particular Issues and Applications

Environmental Law ⇐ Indoor air; tobacco

Town **health** regulation prohibiting smoking in the enclosed areas of membership associations' premises did not infringe any rights associations or their members had under the freedom of religion clause of the Federal or State Constitution; there was no claim that "smoking" was any aspect of any "belief" of association members or that smoking was related to any religious practices taking place on associations' premises. U.S.C.A. Const.Amend. 1; M.G.L.A. Const. Pt. 1, Art. 2.

2 Cases that cite this headnote

[15] **Constitutional Law** ⇐ Smoking and tobacco regulation

Environmental Law ⇐ Hearing and determination; statement of reasons

Neither statute permitting **boards** of **health** to make reasonable **health** regulations nor principles of due process required a hearing or findings to support exercise of town **board** of **health's** rule making **authority** in promulgating regulation prohibiting smoking in the enclosed areas of membership associations' premises. U.S.C.A. Const.Amend. 14; M.G.L.A. c. 111, § 31.

1 Cases that cite this headnote

[16] **Eminent Domain** ⇐ Appeal and error

Supreme Judicial Court could not resolve whether town **health** regulation prohibiting smoking in the enclosed areas of membership associations' premises constituted a deprivation of property without adequate compensation on the record before it and, thus, issue would be remanded to the Superior Court for further proceedings.

[17] **Civil Rights** ⇐ Particular cases and contexts

Even if Civil Rights Act applied to municipalities, absent showing that town **health** regulation prohibiting smoking in the enclosed areas of membership associations' premises interfered with, or attempted to interfere with, any of constitutional rights of associations or their members, there was no basis for recovery against town under Act. M.G.L.A. c. 12, § 11I.

1. *Background.* In 2004, the Legislature rewrote the then-existing antismoking legislation, G.L. c. 270, § 22, substantially expanding the reach of that statute to "protect the **health** of the employees of the commonwealth." St.2004, c. 137, preamble. Compare G.L. c. 270, § 22, as appearing in St.2004, c. 137, § 2, with G.L. c. 270, § 22, as amended through St.1997, c. 85. The 2004 smoke-free workplace law mandated a "smoke free environment for all employees working in an enclosed workplace." G.L. c. 270, § 22(*b*)(1). To that end, the 2004 statute "prohibited" smoking in all workplaces, private[9] and public.[10] The 2004 legislation further provided that smoking "*may* be permitted" in nine specifically enumerated "places and circumstances," G.L. c. 270, § 22(*c*), one of which is ***314** "premises occupied by a membership association"[11] if the premises is owned or under lease for a term of not less than ninety consecutive days by the association, G.L. c. 270, § 22(*c*)(2)(i) (emphasis added). The statute also provided that smoking is *not* permitted in "an enclosed indoor space" of a membership association during the time the space is "open to the public," "occupied by a non-member who is not an invited guest of a member or an ****236** employee of the association," or "rented from the association" for compensation. G.L. c. 270, § 22(*c*)(2)(i)(A)-(C).

Of further relevance to this litigation is the provision of the 2004 legislation concerning preemption. Specifically, G.L. c. 270, § 22(*j*), provides:

> "Nothing in this section shall permit smoking in an area in which smoking is or may hereafter be prohibited by law including, without limitation: any other law or ordinance or by-law or any fire, **health** or safety regulation. Nothing in this section shall preempt further limitation of smoking by the commonwealth or any department, agency or political subdivision of the commonwealth."

In the wake of the 2004 legislation, the **board** promulgated a local antismoking regulation to "protect and improve the public **health** and welfare by prohibiting smoking in membership associations."[12] The town regulation recites that "conclusive evidence" exists that tobacco smoke "causes cancer, respiratory ***315** and cardiac diseases" and other diseases and harmful **health** effects enumerated in the regulation, notes the harmful effects of smoking on smokers and nonsmokers alike, states that second-hand smoke has been classified as a "known human carcinogen" by the United States Environmental Protection Agency, among others, and recognizes "the right of those who wish to breathe smoke free air." The town regulation prohibits smoking at all times "in the enclosed areas of membership associations, also known as private clubs," and declares it "unlawful" for any person having control of such premises to permit a violation of the regulation. Violation of the regulation "may" result in either criminal or noncriminal consequences.[13]

Subsequent to the adoption of the town regulation, the Department of Public **Health** (department) promulgated State-wide antismoking regulations, 105 Code Mass. Regs. §§ 661.000 (2005), to provide standards for the implementation of G.L. c. 270, § 22. The department's regulations concern, among other things, smoking in membership associations. See 105 Code Mass. Regs. §§ 661.003 (adopting definition of membership associations utilized in G.L. c. 270, § 22), 661.100.[14] The ****237** department's regulations contain an antipreemption provision directed to the local regulation of smoking. See 105 Code Mass. Regs. § 661.001 ("Nothing in [these regulations] shall be interpreted as limiting or preempting further restrictions on smoking by any local by-law, ordinance or regulation").

***316** Shortly after the **board** promulgated the town regulation, the plaintiffs, the American Lithuanian Naturalization Club, Athol, Mass., Inc. (Lithuanian Club); the Franco–American Naturalization Club, Inc. (Franco–American Club); and the American Legion Post # 102, Inc. (American Legion), brought this action challenging the validity of the town regulation. The plaintiffs asserted that they are "private clubs" not generally open to the public and that the **board** had no **authority** to prohibit smoking in their premises when the public is excluded and only members are present. We briefly describe the plaintiffs, their organizational structures, and facilities.

Each plaintiff is organized as a charitable corporation under G.L. c. 180,[15] and owns its building. Each has been licensed to serve alcoholic beverages. Only adults are permitted to become members; guests are permitted in each club at any time if accompanied by a member. Members perform all labor at the clubs, including bartending.[16] Although the clubs are "private," all three "regularly" conduct fund raising activities for local charities, consistent with their charters and their mission statements.[17] The premises of all three are also open to the public during "sanctioned" social events. At such times each club prohibits all smoking in all parts of its premises. At all other times the doors to the buildings are locked and signs posted to indicate that only members may enter.

*Tri–Nel Mgt., Inc. v. **Board of Health** of Barnstable, supra* at 221, 741 N.E.2d 37 (given dangers of environmental tobacco smoke, local **board of health** regulation prohibiting smoking in all food service establishments, lounges, and bars is "within the standard of reasonableness").

[6] 3. *Preemption by G.L. c. 270, § 22.* Turning to the 2004 smoke-free workplace law, G.L. c. 270, § 22, the judge concluded that the town regulation was invalid because, in crafting the 2004 statute "to prevent smoking in public buildings and workplaces," the Legislature focused on places "where the *public* would congregate" (emphasis in original). He pointed to the nine places and circumstances "exempted" (in his words) by the Legislature from the outright prohibition mandated by the 2004 statute, including "membership associations." See G.L. c. 270, § 22(*c*) (2)(ii). The judge reasoned that the Legislature could not have "intended to grant a local **[b]oard of [h]ealth** that broad an **authority** over smoking in private ***320** membership clubs." The judge misconstrues the specific language of the statute.

Both the statute, G.L. c. 270, § 22, and its implementing regulations, 105 Code Mass. Regs. §§ 661.000, define places and circumstances in which smoking "*shall* be *prohibited* " (or "no smoking shall be permitted") and other places and circumstances in which smoking "*may* be permitted" (emphasis added). Compare G.L. c. 270, § 22(*c*)(2)(i), and 105 Code Mass. Regs. § 661.100(A), with G.L. c. 270, § 22(*c*)(2)(ii), and 105 Code Mass. Regs. § 661.100(B), (C). Neither the statute nor ****240** the implementing regulations provides that smoking "*shall* be *permitted* " in any place or circumstance. The enumerated circumstances in which smoking "may" be permitted are not "exempt" from the statute, as the judge ruled.[21] To the contrary, these places and circumstances (including membership associations) "may" be subject to stricter regulations on smoking by municipalities and their **boards of health**. See G.L. c. 270, § 22(*j*); 105 Code Mass. Regs. § 661.001. See also *Tri–Nel Mgt., Inc. v. **Board of Health** of Barnstable, supra* at 226, 741 N.E.2d 37.

There were sound reasons for the Legislature to conclude that further regulation of the nine "places and circumstances" specified in G.L. c. 270, § 22(*c*)(2)(ii), including the premises of membership associations, was better left to local regulatory entities. The range of membership associations is broad. Some may be employers, subjecting them to the smoke-free workplace statute and regulations. See G.L. c. 270, § 22(*a*) (defining "[e]mployer" for purposes of statute). Some, but not all, are licensed to sell alcohol. Some, but not all, invite members of the public or guests to their premises. Some, but not all, have members who are both smokers and nonsmokers. Recognizing ***321** the broad range of membership associations throughout the Commonwealth, the Legislature did not determine that smoking "shall be prohibited" in all such associations; it expressly left it to local **boards of health** to establish smoking restrictions, should they deem it appropriate. The intention of the Legislature could not be more clear: the language of the statute itself defeats any claim of preemption. See *Tri–Nel Mgt., Inc. v. **Board of Health** of Barnstable, supra* at 224, 741 N.E.2d 37.

[7] That the 2004 smoke-free workplace law expressly permits further smoking regulation by local **authorities** does not end our inquiry. A town may not promulgate a regulation that is inconsistent with State law. See art. 2, § 6, of the Amendments to the Massachusetts Constitution, as amended by art. 89 of the Amendments ("Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court ..."). The plaintiffs argue, and the judge agreed, that the town regulation restricting smoking in membership associations conflicts with the 2004 statute. We see no conflict. "In determining whether a local ordinance or by-law is inconsistent with a State statute, we have given municipalities 'considerable latitude,' requiring a 'sharp conflict' between the ordinance or by-law and the statute before invalidating the local law." *Take Five Vending, Ltd. v. Provincetown*, 415 Mass. 741, 744, 615 N.E.2d 576 (1993), quoting *Bloom v. Worcester*, 363 Mass. 136, 154, 293 N.E.2d 268 (1973). See *Tri–Nel Mgt., Inc. v. **Board of Health** of Barnstable, supra* at 223, 741 N.E.2d 37 (applying same reasoning to **board of health** regulation). Where, as here, the Legislature expressly authorized local action, and where the statute was not "so comprehensive that an inference would be justified ****241** that the Legislature intended to preempt the field," *Wendell v. Attorney Gen.*, 394 Mass. 518, 524, 476 N.E.2d 585 (1985), a conflict appears only where "the purpose of the statute cannot be achieved in the face of the local [regulation]." *Grace v. Brookline*, 379 Mass. 43, 54, 399 N.E.2d 1038 (1979).

The purpose of the statute and the town regulation are complimentary; the latter merely extends the reach of the former to membership associations. The purpose of the 2004 revision ***322** to G.L. c. 270, § 22, is to "protect the **health** of the employees of the commonwealth." St.2004, c. 137, preamble. The purpose of the town regulation is

(1994). There is no claim that "smoking" is any aspect of any "belief" of the association members or that smoking is related to any religious practices that take place on the plaintiffs' premises. See *Attorney Gen. v. Bailey, supra.* The town regulation does not infringe any rights the plaintiffs may have under the freedom of religion clause of the Federal or State Constitution.

The plaintiffs claim that the regulation improperly deprives them of their property in violation of the Fourteenth Amendment to the United States Constitution in two respects. Observing that the **board** is required to publish notice of the regulation ***325** after its adoption, the plaintiffs claim both that the required publication has not "been verified" and that they were deprived of due process because they were not provided with notice before the regulation was promulgated. Second, they claim that the town regulation "severely curtail[s]" their use or enjoyment of their property, without adequately compensating them. The town did not challenge these factual assertions.

[15] With one exception not relevant,[27] neither G.L. c. 111, § 31, nor principles of due process require a hearing or findings to support the exercise of a **board** of **health's** rule making **authority**. See *Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge,* 395 Mass. 535, 540–541, 481 N.E.2d 441 (1985). The plaintiffs have no basis on which to claim a right to a hearing. See *id.* The **board** is required to give notice by publication after adoption of a regulation. G.L. c. 111, § 31.[28] While we cannot determine whether the defendants complied with this requirement, the plaintiffs have not alleged that they were harmed in any respect by any failure of the **board** to publish the town regulation.

[16] The town argues on appeal that whether the town regulation constituted a deprivation of property without adequate compensation cannot be resolved on the record before us. We therefore remand only this aspect of the plaintiffs' takings claim to the Superior Court for further proceedings consistent with this opinion.

[17] **[18]** Finally, the plaintiffs claim that the defendants violated the Civil Rights Act, G.L. c. 12, § 11I.[29] It is not resolved whether the Civil Rights Act applies to municipalities. Cf. *Swanset Dev. Corp. v. Taunton,* 423 Mass. 390, 396, 668 N.E.2d 333 (1996) ("Even if we assume ***326** that the Act applies to municipalities ..."). Even if the Civil Rights Act applies, to succeed in their claim under G.L. c. 12, § 11I, "the plaintiffs must prove that (1) their exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) ****244** that the interference or attempted interference was by 'threats, intimidation or coercion.' " *Id.* at 395, 668 N.E.2d 333. With the exception of their takings claim, the plaintiffs have not established that the town regulation interferes with, or attempts to interfere with, any of their constitutional rights. There is no basis for recovery under G.L. c. 12, § 11I.

5. *Conclusion.* We vacate the judgment and remand the case to the Superior Court for consideration of the plaintiffs' claim that the town regulation constitutes a deprivation of property without adequate compensation.

So ordered.

Appendix.

REGULATION PROHIBITING SMOKING IN MEMBERSHIP ASSOCIATIONS IN ATHOL

"A. Statement of Purpose:
"Whereas conclusive evidence exists that tobacco smoke causes cancer, respiratory and cardiac diseases, negative birth outcomes, irritations to the eyes, nose, and throat; and whereas the harmful effects of tobacco smoke are not confined to smokers but also cause severe discomfort and illness to nonsmokers; and whereas environmental tobacco smoke [hereinafter ETS], which includes both exhaled smoke and the side stream smoke from burning tobacco products, causes the death of 53,000 Americans each year (McGinnis JM, Foege W, 'Actual Causes of Death in the United States', JAMA 1993 270:2207–2212); and whereas the U.S. Environmental Protection Agency classified secondhand smoke as a known human carcinogen and the International Agency for Research on Cancer (IARC) of the World **Health** Organization also classified secondhand smoke as a known human carcinogen (IARC–WHO, 2002); now, therefore, the **Board** of **Health** of the town of Athol recognizes the right of those who wish to breathe smoke free air and establishes this regulation to protect and improve the public **health** and welfare by prohibiting smoke in membership associations.

"B. **Authority**: This regulation is promulgated under the **authority** granted to ***327** the Athol **Board** of **Health** under Massachusetts General Laws Chapter 111, Section 31 that '**boards** of **health** may make reasonable **health** regulations.'

"3. Three or more violations within 24 months of the current violation, including the current violation: a fine of three hundred dollars ($300.00).

"G. Enforcement:

"This regulation shall be enforced by the **Board of Health** and its designees. One method of enforcement may be periodic, unannounced inspections of those establishments subject to this regulation. Any citizen who desires to register a complaint under this regulation may request that the **Board of Health** initiate an investigation.

"H. Non–Criminal Disposition:

"Whoever violates any provision of this regulation may be penalized by the non-criminal method of disposition as provided in Massachusetts General Laws, Chapter 40, Section 21D or by filing a criminal complaint at the appropriate venue.

"Each day on which any violation exists shall be deemed to be a separate offense.

"Penalty: $100 for the first offense.

$200 for the second offense within 24 months of the date of the first violation.

$300 for the third or subsequent offense within 24 months of the current violation, including the current violation.

"Enforcing Persons: Athol **Board of Health** and its designees

"I. Severability:

"If any paragraph or provision of this regulation is found to be illegal or against public policy or unconstitutional, it shall not affect the legality of any remaining paragraphs or provisions.

*329 "J. Conflict with Other Laws or Regulations:

"Notwithstanding the provisions of the foregoing Paragraph D of this regulation nothing in this regulation shall be deemed to amend or repeal applicable fire, **health** or other regulations so as to permit smoking in areas where it is prohibited by such fire, **health** or other regulations.

"K. Effective Date:

"This regulation shall be effective on Dec 1, 2004.

"Passed on the 9th day of November in the year 2004."

All Citations

446 Mass. 310, 844 N.E.2d 231

Footnotes

1 Athol Franco–American Naturalization Club, Inc.; and American Legion Post # 102, Inc.

2 Town of Athol.

3 The judge in the Superior Court and the parties refer to the plaintiffs as "private clubs." We use the term "membership associations," which is consistent with the language of the applicable State statute and State and local regulations. See, e.g., G.L. c. 270, § 22(*a*) and (*c*) (2), as appearing in St.2004 c. 137, § 2 (concerning smoking on "premises occupied by a membership association"); 105 Code Mass. Regs. § 661.100 (2005) (same); regulation prohibiting smoking in membership associations in Athol (town regulation) (same) (see Appendix).

4 We acknowledge the amicus brief filed by the Boston Public **Health** Commission.

5 The regulation was passed by the **board of health** of Athol (**board**) on November 9, 2004, and became effective on December 1, 2004.

6 General Laws c. 111, § 31, discussed *infra,* provides in relevant part that "**[b]oards of health** may make reasonable **health** regulations."

7 General Laws c. 270, § 22(*j*), discussed *infra,* provides: "Nothing in this section shall permit smoking in an area in which smoking is or may hereafter be prohibited by law including, without limitation: any other law or ordinance or by-law or any fire, **health** or safety regulation. Nothing in this section shall preempt further limitation of smoking by the commonwealth or any department, agency or political subdivision of the commonwealth."

20 The plaintiffs rely on *Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 v.* ***Board*** *of* ***Health*** *of Yarmouth*, 439 Mass. 597, 790 N.E.2d 203 (2003). The antismoking municipal regulation at issue in that case, promulgated before the enactment of the 2004 smoke-free workplace law, prohibited smoking "in all food service establishments, lounges and bars." *Id.* at 598, 790 N.E.2d 203. Because we concluded that the plaintiff lodge did not qualify as a food service establishment under the regulation itself, we enjoined the town's enforcement of the regulation at the lodge. See *id.* at 602–603, 790 N.E.2d 203. In this case, by contrast, the plaintiffs make no claim that the town regulation's definition of "membership association" does not apply to them. See note 11, *supra*. Their reliance on *Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 v.* ***Board*** *of* ***Health*** *of Yarmouth, supra,* is misplaced.

21 The judge stated that G.L. c. 270, § 22 (*c*) (2)(i), "exempts membership associations and provides that if the premises is owned and not located in a public building, smoking *is permitted* except in three specific instances" (emphasis added). He also stated that "smoking *is permitted* in the enclosed indoor space of the membership association" under certain circumstances, pursuant to G.L. c. 270, § 22 (*c*) (2)(ii) (emphasis added). This is inconsistent with the language of the statute, which provides that "smoking *may be* permitted" under specified conditions (emphasis added). See G.L. c. 270, § 22(*c*)(2).

22 In the Superior Court, but not on appeal, the plaintiffs argued that the **board's** action was void and unenforceable because the vote of one member, Joan E. Hamlett, was tainted by a conflict of interest and therefore invalid under several provisions of G.L. c. 268A. We see no reason to address that claim, Mass. R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975), which is specific to the particular defendant in this case.

23 The regulation provides for the filing of a criminal complaint as a possible consequence of its violation.

24 The plaintiffs argued that a "person of normal intelligence in Athol cannot know in advance whether one can smoke in a particular place or not" because "every square inch of the Town of Athol could be a 'private club' if two or more people gather there, including private residences." The argument is frivolous. "Membership association" is defined in the town regulation as a not-for-profit entity.

25 General Laws c. 214, § 1B, provides, in pertinent part: "A person shall have a right against unreasonable, substantial or serious interference with his privacy."

26 The plaintiffs asserted, and we accept as undisputed, that "[a]t their events and social gatherings, [the plaintiff associations] foster and communicate a common system of beliefs and values for members and others to follow, and engage to some extent in religious activities." The regulation does not prevent members from assembling for these purposes. There is no claim that smoking, or the promotion of tobacco products, is central to any expressive activities.

27 General Laws c. 111, § 31, requires a hearing for regulations or amendments thereto that "relate[ ] to the minimum requirements for subsurface disposal of sanitary sewage."

28 General Laws c. 111, § 31, provides, in pertinent part: "A summary which shall describe the substance of any regulation made by a **board** of **health** under this chapter shall be published once in a newspaper of general circulation in the city or town, and such publication shall be notice to all persons."

29 This claim is the only one for which the plaintiffs made no argument in their motion for preliminary injunction. We nevertheless address it because, to the extent that the plaintiffs cannot establish a violation of their constitutional rights, there is no recovery under G.L. c. 12, § 11I.

End of Document

Acts (2020)

Chapter 321

AN ACT PROVIDING FOR AGRICULTURAL COMMISSION INPUT ON MUNICIPAL BOARD OF HEALTH REGULATIONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 31 of chapter 111 of the General Laws, as appearing in the 2018 Official Edition, is hereby amended by striking out the second paragraph and inserting in place thereof the following 2 paragraphs:-

In a municipality with a municipal agricultural commission established pursuant to section 8L of chapter 40, the board of health shall, prior to enacting any regulation that impacts: (i) farmers markets as defined in department regulations; (ii) farms as defined in section 1A of chapter 128; (iii) the non-commercial keeping of poultry, livestock or bees; or (iv) the non-commercial production of fruit, vegetables or horticultural plants, provide the municipal agricultural commission with a copy of the proposed regulation. The municipal agricultural commission shall have a 45-day review period during which the commission may hold a public meeting and may provide

written comments and recommendations to the board of health relative to the proposed regulation. Upon a majority vote of the members, the agricultural commission may waive the 45-day review period.

If the board of health determines that an emergency exists, the board or its authorized agent, acting in accordance with section 30 of chapter 111, may, without notice of hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to address the emergency. The board of health shall comply with the local enforcement emergency procedures set forth in department regulations, as amended from time to time.

Approved, January 11, 2021.