

Supreme Judicial Court Upholds Board of Health Enforcement of Massachusetts Flavored Tobacco Ban January 16, 2025

On January 15, 2025, the Supreme Judicial Court (“SJC”) issued a decision affirming the Superior Court’s entry of judgment in favor of the Town of Braintree Board of Health in Cumberland Farms, Inc. v. Braintree Board of Health, SJC-13613, 495 Mass. 225 (Jan. 15, 2025). This is a significant victory for the Braintree Board of Health, ably represented by KP Law Senior Attorney Roger L. Smerage, as this case reaffirms the broad authority of municipal boards of health to protect the public health by regulating the sale of tobacco products and specifically affirms their ability to enforce violations of state tobacco laws through statutorily authorized administrative procedures designed to allow for enforcement of violations without court involvement.

The SJC decision specifically confirmed that the Braintree Board of Health, and by extension, other boards of health, may impose fines for violations of G.L. c. 270, § 28, which statute prohibits retailers from selling, or offering to sell, flavored tobacco products, through administrative hearings conducted pursuant to Department of Public Health (“DPH”) tobacco regulations, 105 CMR 665. The SJC also held that the Braintree Board of Health had sufficient evidence to find an “offer for sale” violation where the retailer’s district manager admitted that flavored cigars “were ‘delivered to the [store] and . . . put up for sale’,” in addition to testimony from the Town inspector and photographs of an open box of flavored cigars on the behind-the-counter shelf where the retailer kept all for-sale tobacco products.

In 2023, the Town inspector conducted a routine compliance inspection and, observing the open box, issued the retailer a citation. The Braintree Board of Health then sent the retailer a notice of violation, advising the retailer of possible penalties, and scheduling a hearing. Following testimony of the district manager and inspector at the hearing, the Board found a violation of G.L. c. 270, § 28 and imposed penalties, including a \$1,000 fine mandated by G.L. c. 270, § 6. The retailer challenged the Board’s decision in Superior Court, which court entered judgment on the pleadings in favor of the Board as to the violation finding and fine, concluding that DPH was authorized by G.L. c. 270, § 28 to adopt regulations providing for a new administrative procedure to impose the statutorily mandated fines. The retailer appealed and sought direct appellate review by the SJC, which heard argument on November 6, 2025.

The SJC decision, consistent with arguments offered by Attorney Smerage on behalf of the Braintree Board of Health, rejected the retailer’s arguments that municipal boards of health are required to file criminal complaints for fines under G.L. c. 270, § 28 or, alternatively, that they must adopt a local regulation expressly providing for assessment of fines. The SJC reasoned that the DPH regulations provide “an extensive set of procedural requirements for enforcement proceedings” that “are by default governed by” those procedural requirements. The SJC also refused to consider the retailer’s arguments that the Board failed to follow those default procedural

THE LEADER IN PUBLIC SECTOR LAW

requirements, concluding that the retailer had waived the arguments by not raising them to the Board and that public policy did not demand the SJC decide them where the statutory fines are mandatory and the retailer had notice, an opportunity to be heard, and the ability to seek judicial review.

In summary, this decision recognizes the important statutory role of boards of health to regulate tobacco products and to enforce violations, without resort to the courts, using statutorily authorized administrative procedures.

Please contact Attorneys Roger L Smerage (rsmerage@k-plaw.com) or Gregg Corbo (gcorbo@k-plaw.com) for more information about this important decision.

Disclaimer: This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship with KP Law, P.C. Whether to take any action based upon the information contained herein should be determined only after consultation with legal counsel.