

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

[Filed: October 30, 2018]

SAMS FOOD MART, LLC, ABDUL KAHN, :  
SAUDABBAD CONVENIENCE, INC., :  
MOHAMMAD SIDDIQUI, :  
*Plaintiffs,* :

v. :

C.A. No. NC-2017-0443

TOWN OF MIDDLETOWN, :  
*Defendant,* :

and :

THE STOP & SHOP SUPERMARKET :  
COMPANY, LLC, MAXI DRUG SOUTH, :  
L.P., COLBEA ENTERPRISES, LLC, :  
CUMBERLAND FARMS, INC., :  
AQUIDNECK PACKAGE STORE, INC., :  
SHAWS SUPERMARKET, INC., :  
BJS WHOLESALE CLUB, INC., :  
NEWPORT NATIONAL GOLF CLUB, INC., :  
MICHAEL SANTOS d/b/a SANDY'S :  
LIQUORS, SKEES REALTY, LTD., BEACH :  
LIQUORS, LLC, SPEEDWAY, LLC, :  
7-ELEVEN, INC., WALGREEN EASTERN :  
CO., INC., ANDREW'S AT EASTGATE, :  
LTD., SPLASH ECIG AND VAPOR :  
EMPORIUM, LLC, :  
*Interested Parties.* :

**DECISION**

**NUGENT, J.** Before this Court is a complaint for declaratory judgment and injunctive relief with respect to the Town of Middletown's (Middletown) Tobacco Ordinance. Plaintiffs seek a declaration from the Court that the Tobacco Ordinance is unconstitutional, exceeding the constitutional authority of the municipality. Jurisdiction is pursuant to the Uniform Declaratory Judgments Act (UDJA), G.L. 1956 §§ 9-30-1, *et seq.*

## I

### Facts

On December 4, 2017, the Middletown Town Council adopted an ordinance regulating the sale of tobacco (Tobacco Ordinance). Middletown Code of Ordinances § 119; Am. Compl. ¶ 26. The Tobacco Ordinance requires anyone selling tobacco products in Middletown to obtain a “tobacco dealer’s license from the Town Council,” and pay an annual fee of \$100. Middletown Code of Ordinances § 119.02. Additionally, the Tobacco Ordinance prohibits the use of coupons or volume discounts with the sale of tobacco as well as the sale of any flavored tobacco products. Middletown Code of Ordinances §§ 119.05(D), (E).

The Plaintiffs are owners and operators of retail stores in Middletown which sell tobacco products. Plaintiffs Mohammad Siddiqui and Saudabbad Convenience, Inc. operate a store known as Newport Mart located at 52 East Main Road in the Town of Middletown. Am. Compl. ¶ 1. Plaintiffs Abdul Khan and Sams Food Mart, LLC operate a store known as Sam’s Food Mart located at 356 West Main Road in the Town of Middletown. Am. Compl. ¶ 2. The Plaintiffs have separate licenses to sell tobacco products from the State Division of Taxation under G.L. 1956 §§ 44-20-1, *et seq.* and/or from the Department of Health pursuant to G.L. 1956 § 23-1-56. Am. Compl. ¶ 31.

The Middletown Town Council initially enacted a similar ordinance on June 19, 2017, but the Plaintiffs asserted a violation of the Open Meetings Act, G.L. 1956 §§ 42-46-1, *et seq.* as part of their initial Complaint on October 26, 2017. *See* Middletown Code of Ordinances § 118; Compl. ¶¶ 33-39. Pursuant to a consent order entered on December 4, 2017, enforcement of Chapter 118 was stayed. The new Tobacco Ordinance Chapter 119 was enacted on December 4, 2017. *See* Am. Compl. ¶ 26. In their Amended Complaint filed on December 5, 2017, the Plaintiffs request declaratory and injunctive relief, alleging the Tobacco Ordinance is

unconstitutional under the Rhode Island Constitution and is therefore null and void. Am. Compl. ¶¶ 37-40. Pursuant to a consent order entered on February 6, 2018, Middletown agreed to be temporarily enjoined from enforcing the Tobacco Ordinance until further order of this Court.

## II

### Standard of Review

Under the UDJA, the Superior Court possesses the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Sec. 9-30-1; *see also P.J.C. Realty, Inc. v. Barry*, 811 A.2d 1202, 1207 (R.I. 2002) (quoting § 9-30-1). The Court’s power under UDJA is broadly construed, and allows the trial justice to “facilitate the termination of controversies[.]” *Malachowski v. State*, 877 A.2d 649, 656 (R.I. 2005). Therefore, the plaintiff must present the Court with an actual controversy when seeking declaratory relief. *Millett v. Hoisting Eng’rs’ Licensing Div. of Dep’t of Labor*, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977). Further, it is well-established that a trial court’s “decision to grant or to deny declaratory relief under the [UDJA] is purely discretionary.” *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997).

“[I]n deciding whether to issue a preliminary injunction, the hearing justice should determine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.” *Iggy’s Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999). When deciding upon the constitutional validity of a municipal enactment, it is true that “[a] plaintiff is generally entitled to injunctive relief when a municipality seeks to enforce an invalid ordinance.” *Women & Infants Hosp. v. City of Providence*, 527 A.2d 651, 654 (R.I. 1987). Ultimately, “[t]he issuance

and measure of injunctive relief rests in the sound discretion of the trial justice.” *Cullen v. Tarini*, 15 A.3d 968, 981 (R.I. 2011).

### III

#### Analysis

##### A

#### **Authority Under Middletown’s Home Rule Charter**

Middletown contends the Tobacco Ordinance is a valid exercise of a municipality’s authority under the Home Rule Amendment to the Rhode Island Constitution. R.I. CONST. art. XIII, § 2. “Traditionally, cities and towns were held to be creatures of the Legislature having no inherent right to self-government but deriving all of their authority and power from the Legislature.” *Lynch v. King*, 120 R.I. 868, 876, 391 A.2d 117, 122 (1978) (citing *City of Providence v. Moulton*, 52 R.I. 236, 246, 160 A. 75, 79 (1932)). Under the Home Rule Amendment, cities and towns have the . . . “power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this Constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly.” R.I. CONST. art. XIII, § 2. This legislative authority for cities and towns is still limited to addressing something of “purely local concern.” *Westerly Residents for Thoughtful Dev., Inc. v. Brancato*, 565 A.2d 1262, 1264 (R.I. 1989) (quoting *DePetrillo v. Coffey*, 118 R.I. 519, 523, 376 A.2d 317, 319 (1977)). The limits of a municipality’s authority under its Home Rule Charter can be easily defined as whatever constitutes a purely local concern, but discerning between state and local concerns requires first looking to what the state has exclusive domain over under its police power.

There are certain subject areas where any legislative action categorically falls under the state's police power, barring any further legislation by a municipality in that same area without some express delegation to do so. *See Bruckshaw v. Paolino*, 557 A.2d 1221, 1223 (R.I. 1989). (“This court has held that the state maintains sovereignty over the regulation of police affairs, the conduct of business, licensing, education, and elections.”). The Tobacco Ordinance’s licensing provision clearly conflicts with what is an exclusive power of the General Assembly over a statewide concern. *See Newport Amusement Co. v. Maher*, 92 R.I. 51, 56, 166 A.2d 216, 218 (1960) (“Licensing is definitely not a local matter. The power to license has never been exercised by the municipalities of this state as far as we are aware **except by express authorization** of the legislature.”) (Emphasis added.) The Rhode Island Supreme Court’s language in *Newport Amusement Co.* leaves this Court with no option other than to find the Tobacco Ordinance’s licensing provision invalid. *See D’Arezzo v. D’Arezzo*, 107 R.I. 422, 426-27, 267 A.2d 683, 685 (1970) (“[A]n opinion declares the law and the law thus announced becomes a precedent which must be followed by any inferior court.”).

While the licensing provision of the Tobacco Ordinance is clearly in excess of Middletown’s authority as a municipality under the Home Rule Amendment, Middletown, relying on *Landrigan v. McElroy*, contends that the Tobacco Ordinance would still be constitutionally valid as a whole because the licensing requirement is severable. 457 A.2d 1056, 1061 (R.I. 1983) (“The test for determining the separability of portions of a statute is whether, at the time the statute was enacted, the legislature would have passed it absent the constitutionally objectionable provision.” (Internal quotations omitted)). However, Middletown’s reliance on *Landrigan* is misplaced. The problems with the Tobacco Ordinance do not end with the

licensing requirement because the other provisions still interfere with the General Assembly's exclusive authority to regulate business.

With respect to the state's sovereignty over regulating "the conduct of business," there is no bright line for where a municipal regulation—addressing a local concern such as health or safety—becomes an unconstitutional infringement upon the state's exclusive authority over the conduct of business. *Bruckshaw*, 557 A.2d at 1223. Elaborating upon the state's authority over such conduct of business, the Rhode Island Supreme Court has previously stated:

“[T]he general assembly, as representing the sovereign power of the state, has the right to impose reasonable conditions upon the right to carry on business, or to follow any given trade, profession, or calling, is beyond question; . . . If the imposition of such a condition has for its primary object the regulation of the business, trade, or calling to which it applies, its exercise is properly referable to the police power; but, if the main object is the obtaining of revenue, it is properly referable to the taxing power.”  
*State v. Foster*, 22 R.I. 163, 46 A. 833, 835-36 (1900).

By prohibiting the use of coupons and volume discounts, as well as prohibiting the sale of flavored tobacco, the Tobacco Ordinance would have a clear effect on the Plaintiffs and other Middletown businesses by restricting the products one can have available for sale—and the manner by which those products can be sold.

Middletown, in its memorandum, contends the Tobacco Ordinance is intended to promote the health and safety of its citizens, so the impact on private businesses is merely incidental—however great that impact may be. Middletown may have a legitimate local concern it is attempting to address under its home rule authority, but the best of intentions will not permit a municipality to act beyond its constitutional authority. *See Nugent v. City of E. Providence*, 103 R.I. 518, 525, 238 A.2d 758, 763 (1968) (“[W]e are unable to agree that legislation accomplishing the regulation and control of business can ever be, absent some peculiar

circumstance, an appropriate matter for local legislation, absent a grant of such power either in express terms or by necessary implication.”). While it may be well-intentioned, the Tobacco Ordinance does “accomplish[] the regulation and control of business,” and the constitutional authority for this action concerns the effect rather than a municipality’s intent. *Id.*

Case law pertaining to the outer limits of the state’s police power does not provide a full diagnostic for what is—and isn’t—under that control, but the Rhode Island Supreme Court has supplied a test for such an instance where an ordinance arguably falls in between. *See Town of E. Greenwich v. O’Neil*, 617 A.2d 104, 111 (R.I. 1992). These factors further support finding that tobacco regulation is better addressed as a statewide concern rather than a purely local concern. In *O’Neil*, the Rhode Island Supreme Court put forth three variables to consider in order to “define the limits of the local-general equation.” *Id.* These variables are:

“First, when it appears that uniform regulation throughout the state is necessary or desirable, the matter is likely to be within the state’s domain. 1 *Antieau*, § 3.40 at 3–113. Second, whether a particular matter is traditionally within the historical dominion of one entity is a substantial consideration. 1 *Antieau*, § 3.40 at 3–115; *see Marro v. Gen. Treasurer of Cranston*, 108 R.I. 192, 196, 273 A.2d 660, 662 (1971); *Nugent v. City of E. Providence*, 103 R.I. 518, 524–26, 238 A.2d 758, 761–63 (1968); *Op. to the House of Representatives*, 80 R.I. 288, 294, 96 A.2d 627, 630 (1953); 2 *McQuillin*, § 4.85 at 206. Third, and most critical, if the action of a municipality has a significant effect upon people outside the home rule town or city, the matter is apt to be deemed one of statewide concern. 1 *Antieau*, § 3.40 at 3–115 to 3–119; 2 *McQuillin*, § 4.85 at 208; *see McCarthy*, 574 A.2d at 1231; *Brancato*, 565 A.2d at 1264; *Bruckshaw*, 557 A.2d at 1223.” *Id.*

With respect to the first factor, uniform regulation throughout the state would certainly better effect what the Tobacco Ordinance seeks to accomplish. “A subject in need of statewide uniformity is one in which the ‘needs with respect to those matters do not vary locally in their

nature or intensity. Municipal action would not be useful, and indeed diverse local decisions would be mischievous and even intolerable.”” *Mack Paramus Co. v. Mayor and Council of Borough of Paramus*, 103 N.J. 564, 577, 511 A.2d 1179, 1186 (N.J. 1986) (quoting *Summer v. Township of Teaneck*, 53 N.J. 548, 553, 251 A.2d 761, 763-64 (N.J. 1969)). If intended to protect children by preventing them from getting their hands on these tobacco products, the Tobacco Ordinance only better prevents the children from getting tobacco in Middletown. If enacted locally, piece-meal regulation by similarly-minded municipalities across the state does not effectively address youth smoking—even for those municipalities that do enact such ordinances. At most, the Tobacco Ordinance merely inconveniences the consumer who can drive to the next municipality, but this is something any regular commuter will do anyway. Although the Tobacco Ordinance is aimed at preventing children from getting their hands on tobacco, and younger children are unable to drive themselves to the next municipality, it is reasonable to anticipate many of these children can still acquire these prohibited tobacco products from enabling adults who can purchase it for them on their regular commute. Thirty-eight state licensed tobacco dealers are within three and one-half miles of Plaintiffs’ stores just over in Newport—ten of which are within less than a mile and one-half of these stores. *See Stipulated Facts*, Ex. J. Indeed, this impediment for children actually puts the hardship more squarely at the feet of those such as the Plaintiffs, who may lose regular customers to a store in a nearby municipality. This practical reality shows the flaw with the Tobacco Ordinance’s incidental impact relative to its goal, suggesting this is a matter of statewide concern.

With respect to the second factor, it appears the state possesses historical dominion over tobacco. In its brief, Middletown asserts that the state and municipalities have shared dominion over the sale of tobacco products. The state has long imposed a tax on tobacco products and

required licensure of tobacco dealers. Secs. 44-20-2; 44-20-12. The state has also imposed age restrictions to buy tobacco. G.L 1956 § 11-9-13. With respect to the municipalities, a number of them have enacted their own forms of tobacco ordinances in recent years. The state has a longer history of tobacco regulation. The various municipal ordinances are more recent. Out of the three, this factor is the least helpful to Middletown.

With respect to the third factor—and the most important of the three—the effect of piecemeal regulation such as this will create a patchwork of inconsistent rules among the municipalities. Typically, the appropriate subject matter for municipal regulation would be for something specific in the town and its effects will not be felt elsewhere. *See, e.g., Brancato*, 565 A.2d at 1264 (finding municipal regulation of Westerly’s sewers and drains appropriate because it was a matter of local concern); *Bruckshaw*, 557 A.2d at 1223 (finding Providence’s employee pension plan to be a matter of local concern). The Tobacco Ordinance’s incidental impact on commerce may very well endanger the livelihoods of store owners subjected to such ordinances when their regular customers—whether from this municipality or another municipality—are redirected to another store simply because they can offer more in their municipality. Municipal regulation will have far more of an impact on competition between businesses in different municipalities than it would with its primary goal for public health and safety. Therefore, legislation regulating tobacco sales—whether business-related or motivated by public health and safety—should be recognized as a statewide concern. Having determined that regulating the sale of tobacco is not a purely local concern, Middletown is without the authority to legislate unilaterally under the Home Rule Amendment on this matter.

## B

### Delegation of Authority

Recognizing tobacco regulation is a statewide concern, Middletown lacked the authority under its Home Rule Charter to enact the Tobacco Ordinance. *See Bertrand v. Di Carlo*, 111 R.I. 509, 511, 304 A.2d 658, 659-60 (1973) (“It is a well-settled rule that cities and towns have no power to enact ordinances, except those powers from time to time delegated to them by the Legislature. And it is a fundamental rule of construction that such powers, *being delegated*, should be strictly construed.”) (Emphasis added.) “The police power is vested in the state and may be exercised by the several municipalities only when authorized so to do by the general assembly and then only within such limitations as the general assembly may have provided.” *State v. Krzak*, 97 R.I. 156, 160, 196 A.2d 417, 420 (1964).

In order to determine whether the General Assembly intended to delegate any authority to the municipalities, this Court must first see if the intent behind the statute can be determined from “the plain language used in the statute.” *Kingston Hill Acad. v. Chariho Reg’l Sch. Dist.*, 21 A.3d 264, 271 (R.I. 2011). This Court “shall not interpret a statute to include a matter omitted unless the clear purpose of the legislation would fail without the implication.” *State v. Feng*, 421 A.2d 1258, 1264 (R.I. 1980). More specifically, in *Nugent*, the Rhode Island Supreme Court displayed hesitation that “legislation accomplishing the regulation and control of business can ever be, absent some peculiar circumstance, an appropriate matter for local legislation, absent a grant of such power either in express terms or by necessary implication.” 103 R.I. at 526, 238 A.2d at 763.

Middletown further contends that the Tobacco Ordinance is not preempted by state law because the General Assembly did not express its intent to exclusively occupy the field of

tobacco regulation. For the reasons explained above, this argument fails to recognize the crucial preceding step: citing an express delegation or necessary implication of authority from the General Assembly upon which a municipality can legislate in that given area. *See Nugent*, 103 R.I. at 522, 238 A.2d at 761. With that said, “preemption only exists in circumstances in which the municipality would have the authority to regulate a particular subject in the absence of state action.” *Town of Warren v. Thorton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). After finding that the Tobacco Ordinance could not have been enacted under Middletown’s home rule authority because it did not address a local concern, this Court does not even encounter a preemption issue unless Middletown acted with authority delegated to the municipalities by the General Assembly. *See id.* at 1260 (“[B]efore [the Rhode Island Supreme Court] could conclude that such a delegation has occurred, [the Court] would require an *express statement* of intent by the Legislature to delegate that authority.”) (Emphasis added.)

To uphold the Tobacco Ordinance, this Court must look for some “express statement” by the General Assembly that this type of authority has been delegated to the municipalities. *Id.* “When we determine the true import of statutory language, it is entirely proper for us to look to ‘the sense and meaning fairly deducible from the context.’” *In re Brown*, 903 A.2d 147, 150 (R.I. 2006) (quoting *In re Estate of Roche*, 16 N.J. 579, 109 A.2d 655, 659 (N.J. 1954)).

Middletown cites G.L. 1956 § 45-6-1(a), which states:

“(a) Town and city councils may, from time to time, *make and ordain all ordinances and regulations for their respective towns and cities, not repugnant to law, which they deem necessary for the safety of their inhabitants* from fire, firearms, and fireworks; to prevent persons standing on any footwalk, sidewalk, doorstep, or in any doorway, or riding, driving, fastening, or leaving any horse or other animal or any carriage, team, or other vehicle on any footwalk, sidewalk, doorstep, or doorway within the town or city, to the obstruction, hindrance, delay, disturbance, or annoyance of passersby or of persons residing or doing business in this vicinity;

to regulate the putting up and maintenance of telegraph and other wires and their appurtenances; to prevent the indecent exposure of any one bathing in any of the waters within their respective towns and cities; against breakers of the Sabbath; against habitual drunkenness; *respecting the purchase and sale of merchandise or commodities within their respective towns and cities*; to protect burial grounds and the graves in these burial grounds from trespassers; and, generally, all other ordinances, regulations and bylaws for the well ordering, managing, and directing of the prudential affairs and police of their respective towns and cities, not repugnant to the constitution and laws of this state, or of the United States.” (Emphasis added.)

To say the General Assembly’s express delegation for municipal regulation of tobacco is clear from this very broad language—so as to permit municipalities to prohibit sales of tobacco products under this authority—is far-fetched. The statute permits municipalities to “make and ordain all ordinances and regulations . . . which they deem necessary for the safety of their inhabitants . . .” and then goes on to provide a laundry list of what may endanger the safety of those inhabitants. Sec. 45-6-1(a). As a whole, these listed concerns are more related to the safe operation of a town, and this one vague provision regarding enacting ordinances “respecting the purchase and sale of merchandise or commodities within their respective towns and cities” is surrounded by what could be considered rather specific concerns about the operation of a town. *Id.* This lack of express delegation is further supported by the catch-all language near the end of the statute, stating, “and, generally, all other ordinances, regulations and bylaws for the *well ordering, managing, and directing of the prudential affairs and police of their respective towns and cities . . .*” *Id.* (Emphasis added.) Due to the fact that the Rhode Island Supreme Court has expressed such reservation for municipalities “accomplishing the regulation and control of business . . . absent some peculiar circumstance,” it would seem the language of § 45-6-1 does not provide the “express terms” needed for the delegation of authority required for Middletown to enact the Tobacco Ordinance. *Nugent*, 103 R.I. at 526, 238 A.2d at 763.

Furthermore, the authority for the Tobacco Ordinance has not been delegated or authorized by necessary implication. *See id.* This Court’s interpretation of § 45-6-1(a) does not render the relevant clause “mere surplusage.” *State v. Clark*, 974 A.2d 558, 572 (R.I. 2009) (quoting *State v. DeMagistris*, 714 A.2d 567, 573 (R.I. 1998)). Even without the authority to ban the sale of tobacco for safety reasons, a municipality would still have the authority to enact a wide array of ordinances “respecting the purchase and sale of merchandise or commodities.” Sec. 45-6-1(a). The regulation of tobacco for safety purposes was not a necessary part of § 45-6-1, so the authority to enact an ordinance to that effect was not authorized by necessary implication.

In addition to § 45-6-1(a), Middletown summarily cites in its reply memorandum to other statutes as evidence of “an overarching intent from the General Assembly for cities and towns to be partners with the State in the areas of smoking regulation and the control of youth access to tobacco.” *See* Def.’s Reply Mem. 3 (citing §§ 23-20.10-12; 23-20.10-9(d)(2); 11-9-13.6). This Court will not “search the record to substantiate that which a party alleges.” *Riley v. Stone*, 900 A.2d 1087, 1098 n.14 (R.I. 2006); *see also Tworog v. Tworog*, 140 A.3d 159, 160 (R.I. 2016). However, it does not appear as though these aforementioned statutes provide any better support for either finding an express delegation from the General Assembly or one that is necessarily implied.

## **IV**

### **Conclusion**

For the foregoing reasons, this Court finds Middletown's Tobacco Ordinance is in excess of the municipality's authority under the Home Rule Amendment, and Middletown lacked the necessary delegation of authority by the General Assembly. The Tobacco Ordinance is unconstitutional and, therefore, null and void. Plaintiffs' complaint for a declaratory judgment is granted. Middletown is enjoined from enforcing the Tobacco Ordinance. The Plaintiffs will submit a form of final order and judgment consistent with this Decision.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Sams Food Mart, LLC, Abdul Kahn, Saudabbad Convenience, Inc., Mohammad Siddiqui v. Town of Middletown

**CASE NO:** NC-2017-0443

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** October 30, 2018

**JUSTICE/MAGISTRATE:** Nugent, J.

**ATTORNEYS:**

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For Defendant: Peter B. Regan, Esq.; Mark T. Boivin, Esq.  
(**Interested Parties**): Joseph Avanzato, Esq.; Sonja L. DeYoe, Esq.; Joshua Carlin, Esq.; Speedway, LLC