

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

**CUMBERLAND FARMS, INC.
Plaintiff-Appellant**

v.

**TOWN OF BRAINTREE BOARD OF HEALTH,
Defendant-Appellee**

**APPLICATION OF
APPELLANT CUMBERLAND FARMS, INC.
FOR DIRECT APPELLATE REVIEW**

**Appeals Court Docket No. 2024-P-0416
On Appeal from the Superior Court, Norfolk County**

Joshua D. Dunlap (BBO# 672312)
jdunlap@pierceatwood.com

Pierce Atwood LLP
254 Commercial Street
Portland, ME 04101
Tel. 207-791-1100
Fax 207-791-1350

Nicholas L. Anastasi (BBO# 703171)
nanastasi@pierceatwood.com

Pierce Atwood LLP
100 Summer St., Ste. 2200
Boston, MA 02210
Tel. 617-488-8100
Fax 617-824-2020

I. REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure, Plaintiff-Appellant Cumberland Farms, Inc. (“CFI”) requests direct appellate review of the Norfolk County Superior Court’s judgment affirming in part the decision and order by the Town of Braintree Board of Health (“Board”) imposing fines and a suspension of the Tobacco Product Sales Permit (“Permit”) for the CFI store at 831 Washington Street, Braintree, Massachusetts (the “Store”). Direct appellate review is appropriate because this appeal raises novel questions of law and matters of public interest that require final determination by this Court.

First, this case presents a novel and important question regarding the interpretation of Chapter 270, Section 28, Massachusetts’ flavored tobacco law. Specifically, this appeal implicates the scope of the prohibition stating that “No person, retailer or manufacturer shall sell, distribute, cause to be sold or distributed, [or] *offer for sale* any flavored tobacco product” G.L. c. 270, § 28(b) (emphasis added). In affirming the Board’s order, the Superior Court held that the term “offer for sale” includes the act of placing a flavored tobacco product on the shelf by mistake, without any intent on the part of the retailer to sell the product and despite procedural safeguards imposed by the retailer that prevented any such sale. This Court has never defined the term “offer for sale” in Section 28(b), which applies to all retailers of tobacco products across the Commonwealth.

Second, this case presents a novel and important question regarding the authority of a municipal board of health to impose a fine via administrative process absent statutory authorization. Applying its version of model regulations widely used across Massachusetts, the Board assumed the authority to issue fines via administrative proceedings. State law, however, does not expressly grant boards of health such authority. Nor does state law implicitly grant boards of health the authority to impose fines administratively, given the availability of criminal process or non-criminal disposition as procedural avenues to impose fines. G.L. c. 280, § 1; *id.* c. 40, § 21D. This Court has never addressed the scope of a board of health's authority to impose fines administratively absent legislative authorization, although this issue affects countless regulated entities across the Commonwealth.

The Supreme Judicial Court should accept direct review of this appeal and answer these novel and important questions of law, for the reasons set forth below.

II. PRIOR PROCEEDINGS

On July 10, 2023, CFI filed a verified complaint against the Board, seeking relief from substantive and procedural errors by the Board related to the Board's decision to uphold a violation notice with respect to the Store.¹ The violation notice alleged that CFI had unlawfully offered flavored tobacco products for sale at the

¹ On the same date, CFI filed an identical amended verified complaint that appended exhibits which were referenced in but inadvertently omitted from the initial complaint.

Store. In upholding the violation notice, the Board voted to suspend the Store's Permit for five days and assess a monetary fine of \$1,000. In Count I, CFI requested certiorari review (G.L. c. 249, § 4). In Count II, CFI requested declaratory judgment (G.L. c. 249, § 1). CFI also sought a permanent injunction.

Simultaneously with filing the complaint, CFI filed a motion for preliminary injunction to bar imposition of the suspension and penalty. The Superior Court (Davis, J.) heard argument on the motion on September 19, 2023, but did not act on the motion following the Board's agreement to defer enforcement of the sanctions pending final resolution of the certiorari action.

CFI subsequently filed a motion for judgment on the pleadings. The motion challenged (1) the Board's finding of violation, (2) the Board's suspension of the Permit, and (3) the Board's assessment of a \$1,000 fine. The Superior Court (Davis, J.) heard argument on the motion on December 14, 2023. On December 28, 2023, the Superior Court issued a decision and order that (1) upheld the Board's finding of violation, (2) vacated the Board's suspension of the Permit, and (3) upheld the Board's assessment of a fine.

CFI timely filed a Notice of Appeal on January 26, 2024, appealing the December 28, 2023 decision and judgment, excepting only that portion of the judgment vacating the suspension of the Permit. The Board did not cross-appeal the Superior Court's vacatur of the suspension of the Permit.

III. STATEMENT OF FACTS

CFI operates a convenience store in Braintree, Massachusetts at 831 Washington Street, which possesses a Tobacco Product Sales Permit. R. Doc. 3. On April 12, 2023, the Town of Braintree Tobacco and Compliance Inspections Officer, Kathleen Mahoney (“Mahoney”), inspected and cited the Store for the following violation: “flavored products or flavor enhancers (including mint/menthol flavors) sold...” R. Doc. 4 (NOV Letter) at 4.

On April 24, 2023, the Town’s Director of Licenses and Inspections, Mary McGrath (“McGrath”), issued a “Notice of Sale of Tobacco Product Violations” (the “NOV Letter”) to CFI, providing notice that (1) the Store had been found to be “storing and offering for sale to the public” flavored tobacco products and (2) the matter had been scheduled for a hearing before the Board. R. Doc. 4 at 1. The NOV Letter indicated that the Board would review and determine the imposition of suspensions and/or monetary fines on May 11, 2023 (the “Hearing”). *Id.*

CFI district manager Michael Connolly (“Connolly”) attended the Hearing on behalf of CFI. R. Doc. 1 (Hrg. Tr.) at 1; R. Doc. 2 (Mtg. Minutes) at 1. Connolly explained that the allegedly violative product, Black & Mild Jazz, was inadvertently delivered to the Store because of an error at CFI’s warehouse. R. Doc. 2 at 1-2. As he stated, the flavored tobacco products “should not have been delivered to the site,” but, despite “procedures in place to stop this from happening

. . . human error was involved and it was delivered to the site and it was put up for sale.” R. Doc. 2 at 1-2; *see* R. Doc. 1 at 1.

Connolly further explained, however, that CFI did not intend to sell flavored tobacco products; in fact, they could not be sold at the Store because any attempted purchase of such products inadvertently placed in Massachusetts stores would be blocked by CFI’s point-of-sale (“POS”) system. R. Doc. 2 at 2. As he stated, “there is a second [protective] measure at the store level where if they try and scan a banned product it would come up locked for sale and they would not be able to sell it at that time.” R. Doc. 2 at 2; *see* R. Doc. 1 at 1 (“[I]f these items are scanned it would come up blocked for sale and they would not be able to sell it.”).

Finally, Connolly explained that, because the POS system precludes sale of flavored tobacco products, no sale had occurred at the Store. As he explained: “I don’t believe one was sold out of the pack. I believe there was still a whole pack because the clerks don’t have the option to ring that through the POS system.” R. Doc. 2 at 2; *see* R. Doc. 1 at 1 (“He does not think any of the packs were sold, as the clerks cannot override the code system.”).

Following Connolly’s statement, McGrath recommended a finding of a violation based on the flavored tobacco product being “on premises and being able to be offered for sale.” R. Doc. 2 at 2. She represented to the Board “this would be considered a first violation and under the Board’s new amended regulations the

first violation is a \$1000 fine and a five day suspension of the tobacco sales permit.” *Id.* at 1; *see* R. Doc. 1 at 1. McGrath recommended that the Board approve the penalties. R. Doc. 2 at 2; R. Doc. 1 at 1-2.

Based on this recommendation, the Board imposed a \$1,000 fine and a 5-day suspension (with removal of tobacco products) to begin the next day. R. Doc. 2 at 2-3; R. Doc. 1 at 2. The Board did not assess the fine pursuant to either a noncriminal disposition or criminal complaint.

IV. ISSUES RAISED BY THE APPEAL

The following two issues are raised by CFI’s appeal and merit direct appellate review:

1. Whether inadvertent placement of flavored tobacco product on a shelf in public view constitutes an “offer for sale” under G.L. c. 270, § 28(b), even if the retailer did not intend to sell the product and in fact had in place a POS system that would preclude any sale of the product.

2. Whether a board of health can impose a fine for violation of health regulations via administrative process, even though the Legislature has never explicitly or implicitly granted boards of health authority to directly impose fines by means of administrative hearings.

The issues above were raised and properly preserved in the trial court. Each of the issues was expressly argued by CFI and addressed by the Superior Court.

V. ARGUMENT

A. **A retailer does not “offer for sale” flavored tobacco products by inadvertently placing such products on a shelf, when the retailer does not intend to sell and has foreclosed the sale of the products.**

The Board imposed penalties on CFI based on a flavored tobacco product being “on premises [at the Store] and being able to be offered for sale.” R. Doc. 2 at 2. This finding is erroneous as a matter of law. Because storage is not prohibited by law and CFI had neither the intent nor the ability to sell flavored tobacco products at the Store, CFI therefore did not offer such products for sale to consumers in the Commonwealth.

As an initial matter, mere storage of a flavored tobacco product on the premises of the Store is not and cannot be a violation of Section 28(b) of Chapter 270. That provision only prohibits the sale or offer of sale of flavored tobacco products to consumers in the Commonwealth, not storage. G.L. c.270 § 28(b); 105 CMR 665.010(D). CFI is thus entitled to possess flavored tobacco products as long as it does not sell or offer for sale such products to consumers in Massachusetts.

Unlike storage or possession, Section 28(b) of chapter 270 regulates the sale or offering for sale of flavored tobacco products. That provision sets out the state prohibition on the sale of flavored tobacco products as follows:

No person, retailer or manufacturer shall sell, distribute, cause to be sold or distributed, offer for sale any flavored tobacco product or tobacco product flavor enhancer in any retail establishment, online or through any other means to any consumer in the commonwealth;

provided, however, that this subsection shall not apply to the sale or distribution by a smoking bar . . . for on-site consumption.

G.L. c. 270 § 28(b). This section does not define the term “offer for sale.” The supporting state regulations likewise do not define this term, but instead provide:

No person shall sell, distribute, cause to be sold or distributed, or offer for sale to a consumer located in the Commonwealth a flavored tobacco product or tobacco product flavor enhancer, except for a smoking bar for on-site consumption only in accordance with federal law and regulations.

105 CMR 665.010(D). CFI did not violate state law or regulations, as CFI did not sell or offer for sale flavored tobacco products.

An undefined term must be given its ordinary meaning and approved usage. *Welch v. Sudbury Youth Soccer Ass’n*, 453 Mass. 352, 354-55 (2009); *see Town of Boylston v. Comm’r of Rev.*, 434 Mass. 398, 406 (2001) (ordinary meaning is usually determined by a term’s dictionary definition). “Sell” is defined as: “to give up (property) to another for something of value (such as money).” *Sell*, Merriam-Webster Dictionary, *available at* <https://www.merriam-webster.com/dictionary/sell>. Further, to “offer” something is “to make available.” *Offer*, *id.*, *available at* <https://www.merriam-webster.com/dictionary/offer>. Specifically, offering something for “sale” involves making it available for transfer in return “for a price.” *Sale*, *id.*, *available at* <https://www.merriam-webster.com/dictionary/sale> (“The act of selling, *specifically*, the transfer of ownership of and title to property from one person to another for a price.”).

Accordingly, to offer flavored tobacco products for sale means to make those goods available in exchange for a price.

Merely having an item on the shelf, without the possibility that such an item could be sold, does not constitute a “sale” or “offer for sale.” Here, Mahoney cited CFI because Jazz Black and Mild cigars were sitting “[o]n the shelf behind the register.” R. Doc. 1 at 1; *see* R. Doc. 2 at 1. CFI does not contest that flavored tobacco products were delivered to the Store in error, despite its distribution safeguards, and placed on a shelf. R. Doc. 1 at 1. But that is not determinative, because a violation of Massachusetts tobacco laws requires a showing that CFI made an exchange of flavored tobacco products for money available to consumers.

The record contains no competent evidence that CFI made the box of flavored tobacco products available in exchange for a price. To the contrary, the only relevant evidence in the record demonstrates that flavored tobacco products cannot be sold at a CFI store “because the clerks don’t have the option to ring that through the POS system.” R. Doc 2 at 2. The Board’s meeting minutes reflect that a flavored tobacco product, if scanned, “would come up blocked for sale and they would not be able to sell it.” R. Doc. 1 at 1. This POS safeguard was failsafe, because “the clerks cannot override the code system.” R. Doc. 1 at 1. Because CFI implemented a POS system that precludes any exchange of flavored tobacco products for money, CFI did not sell or offer for sale any prohibited products.

It ineluctably follows from this conclusion that the Superior Court erred by finding that CFI violated state law. CFI operated within its rights by simply possessing flavored tobacco products. Because CFI did not intend to sell the products and because its systems preclude a sale of such flavored tobacco products, it was an error of law to conclude that CFI offered such for sale at the Store.

B. Municipal boards of health have no authority to assess a fine via administrative process rather than criminal complaint or non-criminal disposition.

Boards of health, which are constrained by the scope of their enabling acts, have never been granted authority—either explicitly or implicitly—to directly impose fines for violation of health regulations by means of administrative hearings. The Board therefore may not pursue recovery of fines by administrative process. *Burlington Sand & Gravel, Inc. v. Town of Harvard*, 31 Mass. App. Ct. 261, 264-65 (1991) (holding that town could not seek fine via civil counterclaim, but rather only by criminal complaint or non-criminal disposition, where statute did not authorize imposition of fines by civil actions); *see Maroney v. Planning Bd. of Haverhill*, 97 Mass. App. Ct. 678, 685-87 (2020) (same). Accordingly, the Board’s decision to impose fines on CFI after conducting an administrative hearing was ultra vires. *See Commonwealth v. Maker*, 459 Mass. 46, 50 (2011) (agency action was unlawful because the power exercised was neither expressly delegated nor necessarily implied by statute); *Morey v. Martha’s Vineyard Comm’n*, 409

Mass. 813, 818 (1991) (commission’s action found to be ultra vires because it was “neither expressly nor impliedly” authorized by statute); 38 Mass. Prac. § 3:3.

A board of health’s authority is confined by the scope of powers delegated to it by the Legislature. A board of health is a “municipal agency.” *Clean Harbors of Braintree, Inc. v. Bd. of Health of Braintree*, 415 Mass. 876, 878 (1993). Boards of health are created by state statute, *id.*, and their powers derive from those enabling statutes, *see* G.L. c. 111, § 26 (allowing for appointment of board of health); *id.* § 31 (granting board regulatory authority). *See also* 38 Mass. Prac. § 3:2. As a creature of the State, a board of health “has no inherent authority beyond its enabling act and therefore it may do nothing that contradicts such legislation.” *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 421 Mass. 570, 586 (1996); *see ENGIE Gas & LNG LLC v. Dep’t of Pub. Utils.*, 475 Mass. 191, 205 (2016); 38 Mass. Prac. §§ 3:2, 3:3. As this Court has observed, “[t]he regulatory power of [a] board of health [is] measured and limited by [its] enabling statute.” *Commonwealth v. Rivkin*, 329 Mass. 586, 587 (1952).

Because, as a municipal agency, a board of health “has no inherent or common law authority to do anything,” but rather is limited by its enabling statute, a board “may act only to the extent that it has express or implied statutory authority to do so.” *Comm’r of Revenue v. Marr Scaffolding Co.*, 414 Mass. 489, 493 (1993). *See* 38 Mass. Prac. § 3:3 n.3. Implied powers “must be essential and not merely

convenient to the implementation of express powers conferred by statute,” such that they are “powers provided by necessary implication.” *Greater Boston Real Estate Bd. v. City of Boston*, 397 Mass. 870, 877 (1986); *see Springfield Pres. Tr., Inc. v. Springfield Library & Museums Ass’n*, 447 Mass. 408, 418 (2006). Boards of health lack express or implied power to impose fines via administrative hearing.

The enabling statute for boards of health does not expressly authorize a board of health to impose fines via an administrative hearing. The statute provides that “[b]oards of health may make reasonable health regulations,” G.L. c. 111, § 31, and allows for monetary penalties, *see id.* The statute does not, however, grant authority to impose fines directly, *i.e.*, without judicial process.²

Nor does the enabling statute impliedly authorize boards of health to impose fines via an adjudicatory hearing. It is not “essential” to the exercise of a board’s “express powers conferred by statute” for it to be able to assess fines administratively. *Greater Boston Real Estate Bd.*, 397 Mass. at 877. Chapter 111, Section 31 “authoriz[es] criminal proceedings for violations of . . . local board of health regulations.” *Commonwealth v. Porrazzo*, 25 Mass. App. Ct. 169, 172 (1987); *see City of Waltham v. Mignosa*, 327 Mass. 250, 253 (1951). Boards of health therefore may pursue fines by criminal complaint. *See* G.L. c. 280, § 1.

² By contrast, the Legislature has expressly authorized imposition of fines by administrative hearings in other contexts. *See* G.L. c. 40U, §§ 1 *et seq.*; 18 Mass. Prac. § 15.11.50.

Moreover, pursuant to Chapter 40, Section 21D, municipal agencies may pursue non-criminal disposition of violations of municipal ordinances with penalties below \$300. *See* G.L. c. 40, § 21D. Accordingly, boards have no implied power to impose fines directly. *Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 264.

The Superior Court erred by upholding the Board's imposition of a fine via administrative process. The Board lacks statutory authorization to impose fines administratively, and therefore can utilize only criminal process or noncriminal disposition to impose fines. In this case, because the \$1,000 fine exceeds the maximum for which G.L. c. 40, § 21D may be employed, the Board's sole option would have been to adopt an order authorizing its agent(s) to apply for a criminal complaint in state court. The Board did not do so, and instead assessed a criminal fine via administrative process outside the scope of its authority pursuant to governing statutes and regulations. This was error. *See Maroney*, 97 Mass. App. Ct. at 686; *Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 264-65.

VI. REASONS WHY DIRECT APPELLATE REVIEW IS PROPER

Direct appellate review is warranted here because the case presents novel questions of law that have not been decided by this Court. This Court has never decided, *first*, whether placing a flavored tobacco product on a shelf constitutes an "offer for sale" under G.L. c. 270, § 28(b) even if the company did not intend to sell the product and in fact had in place procedural safeguards that would preclude

any sale of the product; and *second*, whether a board of health can impose a fine via administrative process, absent explicit or implicit legislative authority to directly impose fines for violation of health regulations.

Direct appellate review is also warranted here because these questions are of substantial public interest. These questions are likely to arise in the future given that they implicate both the scope of the Legislature's regulatory scheme governing flavored tobacco products, as well as the procedural mechanisms that municipal boards of health across the Commonwealth may use in enforcing that regulatory scheme. Answering these novel questions will not only provide useful guidance to the numerous retailers subject to the Commonwealth's flavored tobacco regulations, but it will also protect due process. Municipal agencies can largely operate without consideration for the procedural safeguards state agencies must follow. *See Arthur D. Little, Inc. v. Comm'r of Health and Hosps. of Cambridge*, 395 Mass. 535, 540 (1985); 38 Mass. Prac. § 1:14 n.2. Thus, compelling boards of health—including the Board in this case—to utilize proper judicial process will ensure rigor in adjudicating alleged violations of health regulations.

Accordingly, the questions presented in this case should be taken up by this Court on direct appellate review, as further explained below.

A. The meaning of “offer for sale” in G.L. c. 270, § 28(b) presents a novel and important question of law.

The trial court held that merely placing a flavored tobacco product on display on a shelf constitutes an “offer for sale” under Chapter 270, Section 28(b). It did so without considering the proper statutory interpretation of that term, because it relied solely upon a statement by an employee of CFI that the flavored tobacco products had been “put up for sale,” even though (1) the employee was a layperson with no legal expertise, (2) the employee explained that it was in fact impossible to sell flavored tobacco products at the Store because any purchase of such products would be blocked by CFI’s POS system, which could not be overridden by CFI employees. The trial court’s conclusion was legal error. Connolly’s statement that flavored tobacco products were “put up for sale,” *see* R. Doc. 2 at 2, does not concede the legal issue of what constitutes “offering for sale” under the statute.³ The Supreme Judicial Court should grant direct appellate review and hold that mere storage or display of a flavored tobacco product, without intent or ability to make an exchange of the products for a price, does not constitute an “offer for sale” under Chapter 270, Section 28(b).

³ As discussed above, the plain meaning of those words requires something beyond merely putting an item on display, as occurred here. Connolly’s full description makes it clear that flavored tobacco products could not be exchanged for money at the Store because CFI’s POS system precludes that possibility. The trial court erred by viewing a single statement, divorced from Connolly’s full explanation, as determinative of the legal issue presented.

B. The authority of municipal boards of health to impose administrative fines absent legislative authorization is a novel and important question of law.

The trial court held that a municipal board of health may assess fines via administrative procedure, absent any legislative authorization, based solely on regulations promulgated by the Department of Public Health. 105 C.M.R. 665.055(B)(1) (boards of health “may enforce 105 CMR 665.000, or otherwise at law or in equity in the same manner that local rules and regulations are enforced”). The trial court’s reliance on this regulation to permit administrative enforcement was circular, as it merely allows boards of health to utilize procedures *that they are otherwise permitted to use*; and, as explained above, the Legislature has not authorized municipal boards of health to use administrative hearings to impose penalties. The Supreme Judicial Court should grant direct appellate review and hold that a municipal board of health may not impose fines via ad hoc administrative processes not authorized by statute.

VII. CONCLUSION

For all the foregoing reasons, CFI respectfully requests that this Honorable Court grant direct appellate review on its appeal of the decision and judgment of the Norfolk Superior Court.

Date: April 18, 2024

Respectfully submitted,

CUMBERLAND FARMS, INC.

By their attorneys,

/s/ Joshua D. Dunlap

Joshua D. Dunlap (BBO# 672312)

jdunlap@pierceatwood.com

Pierce Atwood LLP

254 Commercial Street

Portland, ME 04101

Tel. 207-791-1100

Fax. 207-791-1350

Nicholas L. Anastasi (BBO# 703171)

nanastasi@pierceatwood.com

Pierce Atwood LLP

100 Summer St., Ste. 2200

Boston, MA 02210

Tel. 617-488-8100

Fax 617-824-2020

CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

Pursuant to Mass. Rules of Appellate Procedure 11(b), 16(k), and 20(a), I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(13) (addendum);
Mass. R. A. P. 16(e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and
other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 11(b) because it is produced in proportional font Times New Roman in size 14, contains 4,014 total words, and the Argument section contains 1,754 total words, as counted using the word count feature of the Microsoft Word program.

Dated: April 18, 2024

/s/ Joshua D. Dunlap
Joshua D. Dunlap (BBO# 672312)
jdunlap@pierceatwood.com
Pierce Atwood LLP
254 Commercial Street
Portland, ME 04101
Tel. 207-791-1100
Fax. 207-791-1350

*Counsel for Plaintiff-Appellant
Cumberland Farms, Inc.*

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I, Joshua D. Dunlap (BBO# 672312), counsel for Plaintiff-Appellant Cumberland Farms, Inc. in the matter *Cumberland Farms, Inc. v. Town of Braintree Board of Health*, Appeals Court No. 2024-P-0416, hereby certify that the Application for Direct Appellate Review of Plaintiff-Appellant Cumberland Farms, Inc. is being served on the following counsel of record by email and through the Supreme Judicial Court's electronic filing system on April 18, 2024:

Jeffrey T. Blake (BBO# 655773)
Roger L. Smerage (BBO# 675388)
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110-1109
(617) 556-0007
jblake@k-plaw.com
rsmerage@k-plaw.com

/s/ Joshua D. Dunlap
Joshua D. Dunlap (BBO# 672312)
jdunlap@pierceatwood.com
Pierce Atwood LLP
254 Commercial Street
Portland, ME 04101
Tel. 207-791-1100
Fax. 207-791-1350

*Counsel for Plaintiff-Appellant
Cumberland Farms, Inc.*

ADDENDUM
TABLE OF CONTENTS

A. Trial court docket sheet

B. Decision and Order (Dec. 28, 2023)

ADDENDUM A

Trial court docket sheet



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

2382CV00610 Cumberland Farms, Inc. vs. Town Of Braintree Board Of Health

CASE TYPE: Administrative Civil Actions ACTION CODE: E03 DESCRIPTION: Certiorari Action, G. L. c. 249 § 4 CASE DISPOSITION DATE: 12/29/2023 CASE DISPOSITION: Judgment after Finding on Motion CASE JUDGE:	FILE DATE: 07/10/2023 CASE TRACK: X - Accelerated CASE STATUS: Open STATUS DATE: 07/10/2023 CASE SESSION: Civil A
---	--

DCM TRACK

Tickler Description	Due Date	Completion Date
Service	10/10/2023	12/29/2023
Under Advisement	01/13/2024	12/28/2023
Judgment	07/09/2024	12/29/2023
Notice of Appeal Filed	07/24/2024	

PARTIES

Plaintiff

Cumberland Farms, Inc.
165 Flanders Road
Westborough, MA 01581

Attorney

Joshua D Dunlap
Pierce Atwood LLP
Pierce Atwood LLP
Merrills Wharf
254 Commercial Street
Portland, ME 04101
Work Phone (207) 791-1103
Added Date: 07/10/2023

672312

Attorney

Nicholas Anastasi
Pierce Atwood LLP
Pierce Atwood LLP
100 Summer St
Suite 2200
Boston, MA 02110
Work Phone (617) 448-8230
Added Date: 07/10/2023

703171



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

Defendant Town Of Braintree Board Of Health 1 John F. Kennedy Memorial Drive Braintree, MA 02184	Attorney 655773 Jeffrey T Blake KP Law, P.C. KP Law, P.C. 101 Arch St Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 02/22/2024 Attorney 675388 Roger L Smerage KP Law, P.C. KP Law, P.C. 101 Arch St 12th Floor Boston, MA 02110 Work Phone (617) 654-1774 Added Date: 02/22/2024
--	--

EVENTS

Date	Session	Event	Result	Resulting Judge
09/19/2023	Civil A	Hearing on Preliminary Injunction	Held via Video/Phone	Davis
12/14/2023	Civil A	Hearing for Judgment on Pleading	Held - Under advisement Decision rendered	Davis Davis

FINANCIAL DETAILS

Date	Fees/Fines/Costs/Charge	Assessed	Paid	Dismissed	Balance
07/10/2023	Civil Filing Fee (per Plaintiff) Receipt: 27363 Date: 07/10/2023	240.00	240.00	0.00	0.00
07/10/2023	Civil Security Fee (G.L. c. 262, § 4A) Receipt: 27363 Date: 07/10/2023	20.00	20.00	0.00	0.00
07/10/2023	Civil Surcharge (G.L. c. 262, § 4C) Receipt: 27363 Date: 07/10/2023	15.00	15.00	0.00	0.00
Total		275.00	275.00	0.00	0.00



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

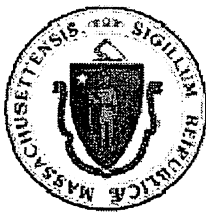
INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
07/10/2023	1	Complaint electronically filed.	
07/10/2023	2	Civil action cover sheet filed.	
07/10/2023		Case assigned to: DCM Track X - Accelerated was added on 07/10/2023	
07/10/2023		EDocument sent: A Tracking Order was generated and sent to: Plaintiff, Attorney: Joshua D Dunlap, Esq. jdunlap@pierceatwood.com Plaintiff, Attorney: Nicholas Anastasi, Esq. nickanastasi48@gmail.com	
07/10/2023	3	Amended: First amended complaint filed by Cumberland Farms, Inc.	
07/13/2023	4	Party(s) file Stipulation of Service of verified complaint and amended verified complaint upon defendant via counsel. mk Applies To: Cumberland Farms, Inc. (Plaintiff)	
07/13/2023		Attorney appearance On this date Crystal Huff, Esq. added for Defendant Town Of Braintree Board Of Health	
08/01/2023	5	Plaintiff Cumberland Farms, Inc.'s Motion for Preliminary Injunction (E-Filed 7/31/23)pl	
08/01/2023	5.1	Cumberland Farms, Inc.'s Memorandum in support of Plaintiff's Motion For Preliminary Injunction (E-Filed 7/31/23)pl	
08/01/2023	5.2	Opposition to p#5.0 Plaintiff's Motion for Preliminary Injunction-Opposition filed by Town Of Braintree Board Of Health (E-Filed 7/31/23). pl	
08/01/2023	5.3	Reply/Sur-reply Plaintiff Cumberland Farms Inc's reply to Defendant's Opposition to Motion for Preliminary Injunction (e-Filed 7/31/23). pl	
08/04/2023	6	EDocument sent: Notice to Appear IN PERSON on September 19, 2023 at 2:30 P.M. for hearing on P. 5.0 Plaintiff's Motion for a Preliminary Injunction P. 5.1 Plaintiff's Memorandum in Support P. 5.2 Defendant's Opposition P. 5.3 Plaintiff's reply to Defendant's Opposition was generated and sent to: Plaintiff: Joshua D Dunlap, Esq. jdunlap@pierceatwood.com Plaintiff: Nicholas Anastasi, Esq. nickanastasi48@gmail.com Defendant: Crystal Huff, Esq. chuff@braintreema.gov Sent On: 08/04/2023 10:29:28	



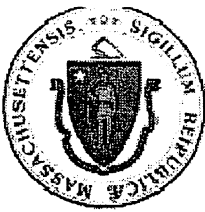
**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

09/19/2023		Event Result:: Hearing on Preliminary Injunction scheduled on: 09/19/2023 02:30 PM Has been: Held via Video/Phone Comments: one attorney joined by zoom.. everyone else was here in person; counsel agreed to move forward on a Motion for Judgment on the Pleadings Hon. Brian A Davis, Presiding	Davis
09/20/2023		Endorsement on Motion of the Plaintiff Cumberland Farms, Inc. for a Preliminary Injunction; After a hearing, the Court takes (#5.0): No Action Taken on this motion for Preliminary Injunction in light of Defendants' agreement to defer enforcement of the sanctions ordered against Plaintiff on May 11, 2023, pending the resolution of this certiorari action. The Court will conduct an in-person hearing on Plaintiff's to-be-filed Motion for Judgment on the Pleadings on Thursday, December 14, 2023 at 2:30 P.M. dg	Davis
09/20/2023		EDocument sent: Clerk's Notice (eDoc) Sent On: 09/20/2023 10:17:59 Notice Sent To: Joshua D Dunlap, Esq. jdunlap@pierceatwood.com Notice Sent To: Nicholas Anastasi, Esq. nickanastasi48@gmail.com Notice Sent To: Crystal Huff, Esq. chuff@braintreema.gov	
09/28/2023	7	Administrative record filed: (not scanned has a flash drive taped to the front) Applies To: Huff, Esq., Crystal (Attorney) on behalf of Town Of Braintree Board Of Health (Defendant)	
10/17/2023	8	Defendant Town Of Braintree Board Of Health's Joint Motion to complete administrative record (efiled 10/16/23) mc	
10/19/2023		Endorsement on Motion to complete administrative record. (#8.0): ALLOWED (dated 10/19/2023) ns ni Judge: Davis, Hon. Brian A	Davis
10/19/2023		EDocument sent: Clerk's Notice (eDoc) Sent On: 10/19/2023 14:32:35 Notice Sent To: Joshua D Dunlap, Esq. jdunlap@pierceatwood.com Notice Sent To: Nicholas Anastasi, Esq. nickanastasi48@gmail.com Notice Sent To: Crystal Huff, Esq. chuff@braintreema.gov	
10/19/2023		Docket Note: Exhibits for the Administrative Record have been attached to the Administrative pursuant to endorsement on P#8.0.	
11/28/2023	9	Plaintiff Cumberland Farms, Inc.'s Motion for judgment on the pleadings MRCP 12(c) (E-Filed 11/28/23)pl	
11/28/2023	9.1	Cumberland Farms, Inc.'s Memorandum in support of plaintiff Cumberland Farms Inc's Motion for Judgment on the Pleadings (E-Filed 11/28/23)	



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

11/28/2023	9.2	Town Of Braintree Board Of Health's Memorandum in opposition to Plaintiff's Motion for Judgment on the Pleadings (E-filed 11/28/23)	
11/28/2023	9.3	Reply/Sur-reply	
		Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Judgment on the Pleadings (E-Filed 11/28/23)	
12/14/2023		Matter taken under advisement: Hearing for Judgment on Pleading scheduled on: 12/14/2023 02:30 PM Has been: Held - Under advisement Comments: FTR Room 10 -start time of 2:39:30 Hon. Brian A Davis, Presiding	Davis
12/29/2023		Endorsement on Motion for judgment on the pleadings MRCP 12(c) After hearing; Motion is (#9.0): ALLOWED -IN-PART. See Decision and Order. (dated 12/28/2023) ns ni	Davis
12/29/2023		EDocument sent: Clerk's Notice (eDoc) Sent On: 12/29/2023 10:25:03 Notice Sent To: Joshua D Dunlap, Esq. jdunlap@pierceatwood.com Notice Sent To: Nicholas Anastasi, Esq. nickanastasi48@gmail.com Notice Sent To: Crystal Huff, Esq. chuff@braintreema.gov	
12/29/2023	10	ORDER: DECISION AND ORDER REGARDING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS. (Docket Entry No. 9.0) (dated 12/28/2023) certified copies sent ni	Davis
12/29/2023	11	JUDGMENT on the Pleadings entered: After hearing and consideration thereof; The Court issued its Decision and Order modifying the Decision of the Braintree Board of Health. It is ORDERED and ADJUDGED: The May 11, 2023 decision and order of Town of Braintree Board of Health concerning Plaintiff's violation of G. L. c. 270, sec. 28, at its Braintree, Massachusetts store on or about April 12, 2023, is modified in that the suspension of Tobacco Product Sales Permit for Plaintiff's store imposed is vacated. (dated 12/28/2023) certified copies sent ni Judge: Hickey, Mary K	Hickey
12/29/2023		Disp for statistical purposes	
01/26/2024	12	Plaintiff Cumberland Farms, Inc.'s Notice of Appeal of the Superior Court's decision and judgment dated December 28, 2023, excepting only the portion of the decision and judgment vacating the suspension of the Tobacco Product Sales Permit (efiled 1/26/24) mc	



COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report

01/26/2024	13	<p>Notice of appeal sent to</p> <p>Applies To: Dunlap, Esq., Joshua D (Attorney) on behalf of Cumberland Farms, Inc. (Plaintiff); Huff, Esq., Crystal (Attorney) on behalf of Town Of Braintree Board Of Health (Defendant); Anastasi, Esq., Nicholas (Attorney) on behalf of Cumberland Farms, Inc. (Plaintiff)</p>
02/01/2024	14	<p>Plaintiff Cumberland Farms, Inc.'s Submission of transcript certification - Plaintiff will not be ordering any transcripts (efiled 2/1/24) mc</p>
02/06/2024		<p>Docket Note: Per email from Attorney Huff, she will be ordering transcript for the appeal</p>
02/08/2024		<p>Docket Note: Per email from Attorney Crystal Huff, she advised she will be ordering transcripts for 9/19/23 and 12/14/23 for the appeal</p>
02/22/2024		<p>Attorney appearance On this date Jeffrey T Blake, Esq. added for Defendant Town Of Braintree Board Of Health (rec'd 2/15/2024)</p>
02/22/2024		<p>Attorney appearance On this date Roger L Smerage, Esq. added for Defendant Town Of Braintree Board Of Health (rec'd 2/15/2024)</p>
02/22/2024	15	<p>Certification/Copy of Letter of transcript ordered from Court Reporter 09/19/2023 02:30 PM Hearing on Preliminary Injunction, 12/14/2023 02:30 PM Hearing for Judgment on Pleading (e-filed; rec'd 2/15/2024)</p> <p>Applies To: Town Of Braintree Board Of Health (Defendant)</p>
02/29/2024		<p>Attorney appearance On this date Crystal Huff, Esq. dismissed/withdrawn for Defendant Town Of Braintree Board Of Health</p>
02/29/2024		<p>Attorney withdrawal electronically filed of Huff, Esq., Crystal (Attorney) on behalf of Town Of Braintree Board Of Health (Defendant) (E-Filed 02/29/2024) mk</p>
03/21/2024	16	<p>CD of Transcript of 12/14/2023 02:30 PM Hearing for Judgment on Pleading received from Christine D. Blankenship, CVR. (received 3/6/2024)</p>
03/21/2024	17	<p>CD of Transcript of 09/19/2023 02:30 PM Hearing on Preliminary Injunction received from Christine D. Blankenship, CVR. (received 3/6/2024)</p>
03/21/2024		<p>Pursuant to Mass. R. App. P. 8 (b)(3), the parties are hereby notified that all transcripts have been received by the clerk's office and that the record will be assembled pursuant to Mass. R. Civ. P. 9(e).</p>



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

03/21/2024		<p>EDocument sent:</p> <p>Clerk's Notice (eDoc)</p> <p>Sent On: 03/21/2024 15:31:38</p> <p>Notice Sent To: Joshua D Dunlap, Esq. jdunlap@pierceatwood.com</p> <p>Notice Sent To: Nicholas Anastasi, Esq. nickanastasi48@gmail.com</p> <p>Notice Sent To: Jeffrey T Blake, Esq. jblake@k-plaw.com</p> <p>Notice Sent To: Roger L Smerage, Esq. rsmerage@k-plaw.com</p>
04/05/2024		<p>Notice of assembly of record sent to Counsel</p> <p>Applies To: Blake, Esq., Jeffrey T (Attorney) on behalf of Town Of Braintree Board Of Health (Defendant); Dunlap, Esq., Joshua D (Attorney) on behalf of Cumberland Farms, Inc. (Plaintiff); Smerage, Esq., Roger L (Attorney) on behalf of Town Of Braintree Board Of Health (Defendant); Anastasi, Esq., Nicholas (Attorney) on behalf of Cumberland Farms, Inc. (Plaintiff)</p>
04/05/2024	18	Notice to Clerk of the Appeals Court of Assembly of Record
04/05/2024	19	Appeal: Statement of the Case on Appeal (Cover Sheet).

**I ATTEST THAT THIS DOCUMENT IS A
CERTIFIED PHOTOCOPY OF AN ORIGINAL
ON FILE.**

Deputy Assistant Clerk


4/5/24

ADDENDUM B

Decision and Order (Dec. 28, 2023)

Docket 12/28/23

11.0

JUDGMENT ON THE PLEADINGS		Trial Court of Massachusetts The Superior Court	
DOCKET NUMBER 2382CV00610		Walter F. Timilty, Clerk of Courts Norfolk County	
CASE NAME Cumberland Farms, Inc. vs. Town Of Braintree Board Of Health		COURT NAME & ADDRESS Norfolk County Superior Court 650 High Street Dedham, MA 02026	

This action came before the Court, Hon. Brian A Davis, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof;

The Court issued its Decision and Order modifying the Decision of the Braintree Board of Health

It is **ORDERED AND ADJUDGED**:

The May 11, 2023 decision and order of Town of Braintree Board of Health concerning Plaintiff's violation of G.L. c. 270, Sec. 28, at its Braintree, Massachusetts store on or about April 12, 2023, is modified in that the suspension of the Tobacco Product Sales Permit for Plaintiff's Store imposed is Vacated.

RECEIVED & FILED
CLERK OF THE COURTS
NORFOLK COUNTY
12/29/23

I ATTEST THAT THIS DOCUMENT IS A
CERTIFIED PHOTOCOPY OF AN ORIGINAL
ON FILE.


Deputy Assistant Clerk

12/29/23

DATE JUDGMENT ENTERED 12/28/2023	CLERK OF COURTS/ ASST. CLERK X 
-------------------------------------	---

Cumberland Farms, Inc. v. Town of Braintree Board of Health

Norfolk Superior Court Action No. 2382CV00610

Decision and Order Regarding Plaintiff's Motion for Judgment on the Pleadings (Docket Entry No. 9.0):

Plaintiff Cumberland Farms, Inc. ("Plaintiff") commenced this action in July 2023 seeking *certiorari* review, pursuant to G.L. c. 249, § 4, of a decision of defendant Town of Braintree Board of Health (the "Board") penalizing Plaintiff for purportedly offering flavored tobacco products for sale at one of its convenience stores in Braintree, Massachusetts (the "Braintree Store"), in violation of Massachusetts law. On April 12, 2023, the Board's Tobacco and Compliance Inspection Officer discovered a quantity of "Black & Mild Jazz" cigars in an open display container on a shelf behind the cash register at the Braintree Store during a routine premises inspection (the "Alleged Violation"). It is undisputed that "Black & Mild Jazz" cigars qualify as a "flavored tobacco product" that cannot be "offer[ed] for sale" or sold in the Commonwealth of Massachusetts pursuant to G.L. c. 270, § 28(b), with certain exceptions not applicable here.¹ It also is undisputed that Plaintiff's Braintree Store did not have, prior to the Alleged Violation, any reported violations of the Commonwealth's tobacco control laws.

The Board conducted a public hearing on Plaintiff's Alleged Violation on May 11, 2023. During the hearing, Plaintiff's authorized representative acknowledged, in his testimony, that the flavored cigars at issue mistakenly had been "put up for sale" at Plaintiff's Braintree Store, but he denied that any of the cigars actually had been sold to any customers, or that they could have been sold to any customers due to restrictions enforced by Plaintiff's point-of-sale ("POS") merchandising system.² At the conclusion of the hearing, the Board found that Plaintiff had, in fact, violated G.L. c. 270, § 28(b), and imposed, as a first-time penalty, a \$1,000.00 monetary fine and a five-day suspension of all sales of tobacco products at Plaintiff's Braintree Store pursuant to Section Q(1)(a) of the Board's "Regulations of the Braintree Board of Health Restricting the Sale of Tobacco Products" in effect at the time of Plaintiff's alleged violation

¹ The state-wide ban on the sale of flavored tobacco products imposed by General Laws c. 270, § 28, expressly does not apply to the "sale or distribution" of such products for "on-site consumption" at a "smoking bar." G.L. c. 270, § 28(b).

² Specifically, Plaintiff asserts that the "Black & Mild Jazz" cigars were "delivered to the [Braintree] Store in error," and that Plaintiff's POS system would have "blocked" the sale of any of the cigars at the Braintree Store if a customer had attempted to purchase one. Plaintiff's Memorandum in Support of [Its] Motion for Judgment on the Pleadings ("Plaintiff's Memo.," Docket Entry No. 9.1) at 6.

(the “Board Regulations”),³ and Section 665.045(A)(1) of the Massachusetts Department of Health’s (“DPH”) comprehensive “Minimum Standards for Retail Sale of Tobacco and Electronic Nicotine Delivery Systems,” which appear at 105 Code of Mass. Regs. § 665.000 *et seq.* (the “DPH Regulations”).⁴ Plaintiff commenced this *certiorari* action challenging the Board’s decision shortly thereafter. By voluntarily agreement between the parties, execution of the fine and suspension imposed on Plaintiff by the Board has been deferred pending the resolution of Plaintiff’s Motion for Judgment on the Pleadings.

In challenging the Board’s decision to impose a \$1,000.00 fine and a five-day suspension of tobacco product sales on account of the Alleged Violation, Plaintiff makes essentially three arguments. First, it argues that the Board erred in finding that a violation occurred because, according to Plaintiff, it did not, in fact, “offer for sale” any flavored tobacco products at its Braintree Store. Second, Plaintiff argues that, if a violation did occur, the Board was not legally authorized to impose a suspension of tobacco product sales on its Braintree Store for a first-time violation. Third, Plaintiff argues that the \$1,000 fine imposed upon Plaintiff by the Board is void and unenforceable because the Board did not follow the proper legal procedures for assessing an administrative penalty for violations of G.L. c. 270, § 6 and 28, which are criminal statutes.⁵

The Court conducted an in-person hearing on Plaintiff’s Motion for Judgment on the Pleadings on December 14, 2023. Both sides appeared and argued. Upon

³ Section Q(1)(a) of the Board Regulations in effect at the time of Plaintiff’s alleged violation in April 2023 provided, in relevant part, that “[i]n the case of a first violation, a suspension of the [offender’s] ‘Tobacco Product Sales Permit’ shall be for a period of five (5) consecutive days, [and] a fine of one hundred dollars (\$100.00)” shall be imposed. The Board has since amended its regulations so as to eliminate suspensions for first time violations, except when the violation “is a sale of a tobacco product to a person under the age of 21....” See Section S(1)(a) of the “Amended Regulations of the Braintree Board of Health Restricting the Sale of Tobacco Products,” effective May 1, 2023, and included in the Administrative Record (“Adm. Rec.,” Docket Entry No. 7.0). In resolving Plaintiff’s Motion for Judgment on the Pleadings, the Court has looked to the Board Regulations in effect at the time of Plaintiff’s alleged violation. See *Board of Health of Northbridge v. Couture*, 95 Mass. App. Ct. 296, 299 (2019) (“[W]hile curative or remedial changes intended to provide clarification may be applied retroactively, regulatory[] changes of substance apply only to events that occur after the change’s effective date.”) (internal quotation marks and citation omitted).

⁴ Section 665.045(A)(1) of the DPH Regulations provides only that, “[i]n the case of a first violation, a fine of \$1,000 shall be imposed.” 105 Code of Mass. Regs. § 665.045(A)(1).

⁵ General Laws c. 270, § 28, does not state what penalty applies to a violation of its terms. Rather, subsection (e) of Section 28 provides that “[a] person who violates this section shall be subject to the same fines established for violations of [G.L. c. 270] section 6.” General Laws c. 270, § 6, in turn, provides, in relevant part, that “[a] person who violates this section shall be punished by a fine of \$1,000 for the first offense.”

consideration of the parties' written submissions and the oral arguments of counsel, Plaintiff's Motion will be **ALLOWED IN PART** for the reasons explained, briefly, below.

Discussion

Superior Court Standing Order 1-96 provides that a *certiorari* claim for judicial review "shall be resolved through a motion for judgment on the pleadings, Mass. R. Civ. P. 12(c), in accordance with Superior Court Rule 9A ... No testimony or other evidence shall be presented at the hearing, and the review shall be confined to the record." Superior Court Standing Order 1-96 (effective Dec. 10, 2020), Processing and Hearing of Complaints for Judicial Review of Administrative Agency Proceedings, at 3.

Certiorari review is "a limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi-judicial tribunal." *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 575-576 (2007). In order to obtain *certiorari* review of an administrative decision, the following three elements must be present:

- (1) a judicial or quasi-judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the proceeding under review.

Figgs v. Boston Housing Auth., 469 Mass. 354, 361 (2014) (internal quotation marks and citations omitted). "[T]he proper standard of review under the *certiorari* statute is flexible and case specific, but ... as with review under G. L. c. 30A, § 14, the disposition must ultimately turn on whether the agency's decision was arbitrary and capricious, unsupported by substantial evidence, or otherwise an error of law." *Langan v. Board of Registration in Med.*, 477 Mass. 1023, 1025 (2017) ("*Langan*") (internal quotation marks and citation omitted).

Having in mind the applicable standard of review, the Court separately addresses each of Plaintiff's three arguments below.

1. Plaintiff Did Not, In Fact, "Offer for Sale" Any Flavored Tobacco Products at its Braintree Store.

The Court rejects Plaintiff's argument that it did not, in fact, "offer for sale" any flavored tobacco products at its Braintree Store. It is undisputed that an open package of "Black & Mild Jazz" cigars were discovered by the Board's enforcement officer in an open display container situated directly behind the cash register at the Braintree Store where they were visible to all store patrons, including young adults and children. Plaintiff's

duly-authorized representative appeared at the May 11, 2023, hearing on the Board's resulting notice of violation and admitted that these flavored tobacco products were mistakenly "put up for sale" at Braintree Store, which this Court regards as the functional and legal equivalent of "offering" the products "for sale."⁶ It certainly was not arbitrary or capricious for the Board to conclude that the fact that the products were displayed in an open container at Plaintiff's Braintree Store, combined with Plaintiff's admission that they were, in fact, "put up for sale," provided "substantial evidence" that they had been "offered for sale" to members of the consuming public. See *Langan*, 477 Mass. at 1025.

Accordingly, the Court finds that the Board's determination that Plaintiff violated G.L. c. 270, § 28(b), on or about April 12, 2023, by offering flavored tobacco products for sale at its Braintree Store was not arbitrary and capricious, unsupported by substantial evidence, or otherwise legally erroneous. See *Langan*, 477 Mass. at 1025.

2. The Board is Not Legally Authorized to Impose a Suspension of Tobacco Product Sales on Plaintiff's Braintree Store for a First-Time Violation under Applicable State Regulations.

The Court agrees with Plaintiff that the Board was not legally authorized to impose a suspension of tobacco product sales at Plaintiff's Braintree Store in the circumstances of this case because: (1) the DPH Regulations explicitly state that "a fine of \$1,000," and only a fine, "*shall* be imposed" for a "first violation" of the Commonwealth's tobacco control laws (see 105 Code of Mass. Regs. § 665.045(A)(1) (emphasis added)); and (2) the DPH regulations, on their face, preempt any local "rules and regulations" that "conflict with regulations promulgated by [DPH] or state or federal law" (see *id.*, § 665.057), including any conflicting provision of the Board's Regulations. The mandatory language of the DPH Regulations leaves little wiggle room for the Board and it cannot be ignored by this Court. Massachusetts law requires a regulation to be interpreted "in the same manner as a statute, and according to traditional rules of construction," *Warcewicz v. Department of Env'tl. Protection*, 410 Mass. 548, 550 (1991), and in a manner consistent with the Legislature's intent, *Armstrong v. Secretary of Energy & Env't Affairs*, 490 Mass. 243, 247 (2022). This means that the Court must "[f]irst ... look to the text of the regulation, and ... apply the clear meaning of unambiguous words unless doing so would lead to an absurd result." *Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Beverages Control Comm'n*, 482 Mass. 683, 687 (2019) ("*Mass. Fine Wines.*").

⁶ Plaintiff's public acknowledgement that flavored tobacco products were "put up for sale" at its Braintree Store effectively moots the long argument concerning the proper interpretation of the terms "offer" and "sale" set out on pages 5-6 of Plaintiff's Memorandum in Support of its Motion for Judgment on the Pleadings.

It is not “absurd” to hold the Board to the precise violation penalties set out in the DPH Regulations in this case. The monetary penalties imposed for initial and subsequent violations (*i.e.*, \$1,000 for a “first violation,” \$2,000 for a “second violation,” and \$5,000 for a “third violation”) are unambiguous and they undeniably reflect the Legislature’s intent in promulgating G.L. c. 270, § 28, because they exactly match the statutory penalties imposed for violations of that law. See G.L. c. 270, § 6(d) (“A person who violates this section shall be punished by a fine of \$1,000 for the first offense, \$2,000 for a second offense and \$5,000 for a third or subsequent offense.”). There is, at the same time, a certain logic and fairness in establishing a level of consistency in how boards of health across Massachusetts punish violations of the Commonwealth’s tobacco control laws. See *Torrey v. Inhabitants of Millbury*, 38 Mass. 64, 67 (1838) (“[M]any regulations are made by statute ... and [are] intended to promote method, system and uniformity in the modes of proceeding....”).

It also is not “absurd” to apply the preemption language of the DPH Regulations (see 105 Code of Mass. Regs. § 665.057) literally so as to preclude the Board from imposing an additional penalty on Plaintiff for a first violation in the form of a five-day suspension of the Tobacco Product Sales Permit for Plaintiff’s Braintree Store. The DPH Regulations only authorize the imposition of a “prohibition on the sale of tobacco products” as a sanction for *second* and *third* violations of the Commonwealth’s tobacco control laws (see *id.*, § 665.045(A)(2) and (3)), and the Board’s Regulations undeniably “conflict[ed]” with the DPH Regulations to that extent that Section Q(1)(a) of the Board’s Regulations previously required a mandatory suspension of Plaintiff’s Tobacco Product Sales Permit for a “first violation.” It is reasonable to conclude that DPH’s decision to authorize the imposition of a “prohibition on the sale of tobacco products” as a sanction for second and third violations -- but not for first violations -- constitutes an “implied exclusion” of such a prohibition for a first violation that must be given effect by this Court. Cf. *DiMasi v. Secretary of the Commonwealth*, 491 Mass. 186, 197 (2023) (“[S]tatutory expression of one thing is an implied exclusion of other things omitted from the statute.”) (internal quotation marks and citation omitted).

The Board, not surprisingly, disagrees with the proposition that it is bound in any way by the penalty scheme set out in the DPH Regulations, but the Court finds none of its arguments in this regard persuasive. For example, the Board’s assertion that Section Q(1)(a) of its Regulations in effect as of April 2023, which required a mandatory suspension of an offender’s Tobacco Product Sales Permit for a first violation, did not “conflict” with the DPH Regulations is obviously untrue for the reasons explained

above.⁷ See Board's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings ("Board Opp.," Docket Entry No. 9.2) at 7-10.

Similarly, the Board's argument that it is authorized by the DPH Regulations to impose a suspension for a *first* violation because the DPH Regulations authorize the imposition of a suspension for *second* and *third* violations (see Board Opp. at 7) is simply nonsensical and contrary to basic rules of regulatory interpretation. See, e.g., *Mass. Fine Wines*, 482 Mass. at 687 (in interpreting a regulation, court must "apply the clear meaning of unambiguous words unless doing so would lead to an absurd result").

The Board's related argument that the comprehensive penalty scheme set out in the DPH Regulations is, in effect, a "floor" that the Board may "exceed" as it sees fit (Board Opp. at 8-9) once again impermissibly ignores the unambiguous, mandatory language contained of the DPH Regulations. See, e.g., 105 Code of Mass. Regs. § 665.045 ("[V]iolations of 105 CMR 665.000 *shall* be assessed as follows....") (emphasis added). This argument also relies, to an extent, on outdated and non-binding case law that was decided more than a decade before the DPH Regulations, with their express preemption provision, went into effect. See *Fanta v. Braintree Bd. of Health*, 65 Mass. App. Ct. 1126, 2006 WL 860135 *2 (2006) (Rule 1:28) (upholding board of health's imposition of fine and suspension for violation of Commonwealth's tobacco control laws where the only law then in effect was "silent on the scope of permissible penalties").

Accordingly, the Court finds that the Board's imposition of a five-day suspension of tobacco product sales at Plaintiff's Braintree Store, based on Plaintiff's first-time violation of G.L. c. 270, § 28(b), on or about April 12, 2023, was legally erroneous. See *Langan*, 477 Mass. at 1025.

3. The Fine Imposed Plaintiff by the Board is Void and Unenforceable Because the Board Did Not Follow the Proper Legal Procedures for Assessing an Administrative Penalty for Violations of G.L. c. 270, § 6 and 28, Which Are Criminal Statutes.

Plaintiff further argues that the \$1,000 fine levied by the Board on account of Plaintiff's April 2023 violation is void and unenforceable because the Board purportedly "acted

⁷ To the extent that, notwithstanding the plain language of Section 665.057 of the DPH Regulations, a finding that one or more of the Board Regulations are preempted by the DPH Regulations requires proof of a "sharp conflict," as opposed to simply a "conflict," between the two (see *Take Five Vending, Ltd. v. Provincetown*, 415 Mass. 741, 744 (1993)), the Court finds that Section Q(1)(a) of the Board Regulations in effect as of April 2023 is, in fact, in sharp conflict with Section 665.045 of the DPH Regulations, read in its entirety. See *Commonwealth v. Buccella*, 434 Mass. 473, 479 (2001), cert. denied, 534 U.S. 1079 (2002) (regulations must be interpreted by looking at them "in their entirety, and in the context of the regulatory scheme as a whole....").

unlawfully by imposing a fine without filing a criminal complaint” as permitted by G.L. c. 40, § 21D.⁸ This argument, however, overlooks aspects of the DPH Regulations that Plaintiff otherwise embraces. Specifically, Section 665.055 of the DPH Regulations, titled “Enforcement,” states, in part, that,

[u]nless otherwise expressly provided in any general law to the contrary, each board of health may enforce [the DPH Regulations], or otherwise at law or in equity in the same manner that local rules and regulations are enforced.

105 CMR 665.055(B)(1). Other portions of Section 665.055 set out detailed procedures for the assessment of administrative fines for violations of the Commonwealth’s tobacco control laws, including notice procedures and hearing procedures. Given that the Legislature expressly empowered DPH in G.L. c. 270, § 28(g), to “promulgate such procedures, rules or regulations as it deems necessary to implement this section,” the Court interprets Section 665.055 of the DPH Regulations -- reasonably it believes -- as authorizing and establishing a new procedural path, separate and apart from G.L. c. 40, § 21D, for the administrative enforcement of the Commonwealth’s tobacco control laws. See *Morey v. Martha’s Vineyard Comm’n*, 409 Mass. 813, 818 (1991) (An administrative agency has “the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission.”). Thus, the Board was not required to pursue a criminal complaint against Plaintiff in district court under G.L. c. 40, § 21D, in order to assess and collect the \$1,000 fine that it imposed.

Plaintiff’s follow-on argument that the Court still should void the Board’s fine because the Board purportedly “failed to follow” the administrative procedures set out in Section 665.055 of the DPH Regulations is equally unavailing. See Plaintiff’s Memo. at 19-20. The undisputed record shows that Plaintiff received fair notice of the violations alleged (see Adm. Record);⁹ received a full and fair evidentiary hearing before the Board (see *id.*); received fair notice of the Board’s resulting decision and the penalties imposed (Amended Verified Complaint, ¶ 18); and now has the chance to challenge the Board’s resulting findings and order in this Court. The Court is persuaded, in the circumstances, that Plaintiff has had “ample opportunity to present its case,” and that “[t]here is no indication in this record that the procedure [employed by the Board] was in any way so unfair as to raise a question of procedural due process.” See *RicMer Properties, Inc. v.*

⁸ General Laws c. 40, § 21D, provides authorization and a procedural mechanism for cities and towns in the Commonwealth to assess and collect administrative fines of up to \$300 for violations of criminal laws. G.L. c. 40, § 21D. The assessment and collection of fines exceeding \$300 only can be accomplished under Section 21D, however, through the filing of a criminal complaint in district court. *Id.*

⁹ The Court is unable to provide page citations to the Administrative Record in this action because it is not paginated.

Board of Health of Revere, 59 Mass. App. Ct. 173, 179 (2003) (affirming board of health's denial of siting permit for waste disposal facility, despite alleged procedural violations in board proceedings, where "[a] fair review of the public hearing process indicates that there was no prejudice to [the plaintiff's] procedural due process rights.").

Accordingly, the Court finds that the Board's determination that Plaintiff violated G.L. c. 270, § 28(b), on or about April 12, 2023, by offering flavored tobacco products for sale at its Braintree Store is not void and unenforceable because it was procedurally improper and, therefore, legally erroneous. See *Langan*, 477 Mass. at 1025.


Order

For the foregoing reasons, plaintiff Cumberland Farms, Inc.'s ("Plaintiff") Motion for Judgment on the Pleadings (Docket Entry No. 9.0) is **ALLOWED IN PART**.

IT IS HEREBY ORDERED that the May 11, 2023, decision and order of defendant Town of Braintree Board of Health (the "Board") concerning Plaintiff's violation of G.L. c. 270, § 28, at its Braintree, Massachusetts store (the "Store") on or about April 12, 2023, is modified in that the suspension of the Tobacco Product Sales Permit for Plaintiff's Store imposed is **VACATED**. In all other respects, Plaintiff's Motion for Judgment on the Pleadings is **DENIED**.

Judgment consistent with this decision and order shall enter forthwith.

SO ORDERED this 28th day of December, 2023.



Brian A. Davis,
Associate Justice of the Superior Court

I ATTEST THAT THIS DOCUMENT IS A
CERTIFIED PHOTOCOPY OF AN ORIGINAL
ON FILE.



Deputy Assistant Clerk 12/29/23