

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2182CV00863

SIX BROTHERS, INC. d/b/a BROOKLINE SUNOCO & others¹

vs.

TOWN OF BROOKLINE & others²

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MASS. R. CIV. P. 12(b)(6) MOTION TO DISMISS**

Plaintiffs Six Brothers, Inc., *et al.* (collectively, "Plaintiffs") are licensed vendors who purportedly sell tobacco products and e-cigarettes in the Town of Brookline, Massachusetts ("Town").³ By way of this action, Plaintiffs challenge the legality of a recently enacted Town by-law prohibiting the sale of tobacco or e-cigarette products in the Town to anyone born after January 1, 2000 (the "By-Law"). In their First Amended Complaint and Prayer for Declaratory Relief Pursuant to M.G.L. c. 231A, § 1 ("Amended Complaint," Docket Entry No. 9.0), Plaintiffs assert claims against the Town and members of its Select Board (collectively, "Defendants") for a declaratory judgment setting aside the By-Law as null and void because it

¹ Fahd Iqbal, IPGG, Inc. d/b/a/ One Stop Market, Sukhjinder Gill, Comm. Ave. Gas & Service, Inc. d/b/a Commonwealth Mobil, Emile Heraiki, OMR Corporation d/b/a Village Mobile, and Elias Audy.

² Heather Hamilton, as Chair of Brookline Select Board, Raul Fernandez, as Vice Chair of Brookline Select Board, and Bernard Greene, John Vanscoyoc, and Miriam Aschkenasy, as Brookline Select Board Members.

³ According to the First Amended Complaint, plaintiff Comm. Ave. Gas & Service, Inc. d/b/a Commonwealth Mobil actually is located and does business in the City of Boston, not in Brookline. See First Amended Complaint, ¶ 6. The Town previously moved, as a result, to dismiss Commonwealth Mobil and its owner, Emile Heraiki, as plaintiffs for lack of standing. See Defendants' Mass. R. Civ. P. 12(b)(6) Motion to Dismiss, and in the Alternative, Defendants' Mass. R. Civ. P. 12(b)(1) Motion to Dismiss Plaintiffs Commonwealth Mobil and Emile Heraiki for Lack of Standing (the "Motion to Dismiss," Docket Entry No. 12.0). The Town withdrew that part of its Motion to Dismiss, however, in its reply memorandum. See Defendants' Reply Brief at 5 (Docket Entry No. 12.3).

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purportedly: (1) is preempted by state law, specifically St. 2018, c. 157, “An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction” (Count I); and (2) violates the equal protection guarantees set forth in art. 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution (Count II).

The case came before the Court most recently on Defendants’ Mass. R. Civ. P. 12(b)(6) Motion to Dismiss (the “Motion,” Docket Entry No. 12.0). The Court heard oral argument on the Motion on July 28, 2022. Upon consideration of the parties’ written submissions and the oral arguments of counsel, Defendants’ Motion will be **ALLOWED** for the reasons summarized below.

Background

The following facts are taken from the Amended Complaint, with certain additional facts reserved for discussion below.

On November 17, 2020, Brookline voters approved a warrant article amending Section 8.23 of the Town’s General By-Laws (again, the “By-Law”). In its present, amended form, the By-Law states, in relevant part:

SECTION 8.25.5 – SALE AND DISTRIBUTION OF TOBACCO PRODUCTS

d. Prohibition of Sales – No person, firm, corporation, establishment, or agency shall sell tobacco or e-cigarette products to anyone born on or after 1/1/2000.

.....

h. Required Signage

.....

2. The owner or other person in charge of an entity authorized to sell tobacco or e-cigarette products at retail shall conspicuously post a sign stating that “The sale of tobacco or e-cigarette products to someone born on or after 1/1/2000 is prohibited.”

Amended Complaint, Exhibit G at 14-12.

The Town warrant article amending the By-Law subsequently was approved by the Massachusetts Attorney General's Office and published by the Town pursuant to G.L. c. 40, § 32. The By-Law became effective on August 27, 2021, and its enforcement commenced on September 27, 2021.

As previously noted, Plaintiffs are licensed to sell cigarettes and other tobacco products at retail in Massachusetts. They complain that the effect of the By-Law is to unlawfully "prohibit legal tobacco sales" in the Town, by themselves and other licensed retailers, "to any persons born on or after January 1, 2000, purely on the basis of their age" in violation of state law. Amended Complaint, ¶ 56. Plaintiffs filed their original Complaint and Prayer for Declaratory Relief Pursuant to M.G.L. c. 231A, § 1 (Docket Entry No. 1.0) on September 17, 2021, and their Amended Complaint on November 15, 2021. Defendants' Motion was filed on December 24, 2021.

Discussion

I. The Rule 12(b)(6) Standard.

Defendants have moved to dismiss both counts of Plaintiffs' Amended Complaint under Mass. R. Civ. P. 12(b)(6) for failure to state a claim. To survive a motion to dismiss under Rule 12(b)(6), a complaint must set out "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief...." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). The allegations must be "more than labels and conclusions," and must "raise a right to relief above the speculative level...." *Id.* at 636, quoting *Twombly*, 550 U.S. at 555. In assessing a complaint under Rule 12(b)(6), the court accepts as true the well-pleaded factual allegations in the complaint

and draws all reasonable inferences in the plaintiff's favor. See *Osborne-Trussell v. Children's Hosp. Corp.*, 488 Mass. 248, 253 (2021). The extent of the court's review generally is limited to the facts alleged in the complaint and any facts contained in any attached exhibits. See *Eigerman v. Putnam Invs., Inc.*, 450 Mass. 281, 285 n.6 (2007). The court also may consider, however, matters of public record, items in the record of the case, and any documents cited and relied upon in the complaint. See *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000).

Applying the foregoing standard, the Court concludes that Plaintiffs' Amended Complaint does, in fact, fail to state a claim upon which relief can be granted with respect to both Plaintiffs' preemption claim and their equal protection claim. The Court addresses each claim separately.

II. Plaintiffs' Preemption Claim.

In Count I of their Amended Complaint, Plaintiffs claim that the By-Law is preempted by St. 2018, c. 157, "An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction" (the "Act"). The Act was passed by the Massachusetts Legislature on July 27, 2018, and it became effective, by its terms, on December 31, 2018. The Act, among other things, amended G.L. c. 270, §§ 6 and 7. See St. 2018, c. 157, § 9. Of particular relevance here is the amendment to G.L. c. 270, § 6(b), which effectively raised the minimum age at which most Massachusetts residents can purchase tobacco products from 18 to 21 by revising Section 6(b) to state that "[n]o person shall sell or provide a tobacco product to a person who is under 21

years of age.”⁴ Also relevant is Section 22 of the Act, which expressly addresses the preemptive effect of the Act on other state and local laws.⁵ Section 22 states, in its entirety, that:

[t]his act shall preempt, supersede or nullify any inconsistent, contrary or conflicting state or local law relating to the minimum sales age to purchase tobacco products; provided, that this act shall neither preempt, supersede nor nullify any inconsistent, contrary or conflicting local law in effect on December 30, 2018 that prohibits the sale of tobacco products to persons under the age of 19, 20, or 21 as applied to persons who attained the age of 18 before December 31, 2018. This act shall not otherwise preempt the authority of any city or town to enact any ordinance, by-law or any fire, health or safety regulation that limits or prohibits the purchase of tobacco products.

St. 2018, c. 157, § 22.

Plaintiffs contend that Section 22 of the Act demonstrates an express legislative intent to preempt local rules and ordinances like the By-Law. In Plaintiffs’ view, the By-Law’s prohibition on the sale of tobacco or e-cigarette products to anyone born on or after January 1, 2000, “relat[es] to the minimum sales age to purchase tobacco products,” is “inconsistent, contrary or conflicting” with the minimum age for purchasing such products set by G.L. c. 270, § 6(b), and therefore is preempted by the Act. Plaintiffs’ Opposition to Defendants’ Mass. R. Civ. P. 12(b)(6) Motion to Dismiss (“Plaintiffs’ Opp.,” Docket Entry No. 12.2), at 6-7.

The Town disagrees. It argues that the plain purpose of the By-Law is to “incrementally prohibit tobacco and e-cigarette sales [in the Town] altogether” over a period of years, which is exactly the type of local “ordinance, by-law or ... fire, health or safety regulation ... limit[ing] or prohibit[ing] the purchase of tobacco products” that Section 22 expressly permits.

⁴ Section 6(a) of c. 270 defines “tobacco product” as “a product containing, made or derived from tobacco or nicotine that is intended for human consumption” with certain exceptions not relevant here, and expressly includes, among other things, “electronic cigarettes.”

⁵ Section 22 was not codified.

Memorandum in Support of Defendants' Rule 12(b)(6) Motion to Dismiss ("Defendants' Memo.," Docket entry No. 12.1), at 6-8.

Massachusetts law as to when a local ordinance or by-law is preempted by purportedly contrary state law is reasonably well developed. "Municipal by-laws," as a general matter, "are presumed to be valid." *Take Five Vending, Ltd. v. Provincetown*, 415 Mass. 741, 744 (1993). Municipalities have "considerable latitude" in crafting their ordinances and by-laws, so long as the ordinance or by-law is not in "sharp conflict" with state law. *Id.* (internal quotation marks and citation omitted). A "sharp conflict" exists where "either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *Id.* (internal quotation marks and citation omitted). Absent demonstration of a "sharp conflict," the ordinance or by-law is not preempted. *Id.*

This Court has carefully examined both the Act and the By-Law, and it perceives no conflict, let alone a "sharp conflict," between the two laws. The Act was approved by the Legislature for the express purpose of *raising* the minimum age at which most Massachusetts residents can purchase tobacco products. It was intended to *restrict* the sale of such products (as a general matter) to residents below the age of twenty-one. Section 22 makes it clear, however, that the Legislature intended to permit cities and towns to *further restrict* the sale of tobacco products within their jurisdictions if they wish to do so, including to the point of *prohibiting the sale of tobacco products entirely*. Certainly, the proviso in Section 22 that the Act does not "preempt the authority of any city or town to enact any ordinance, [or] by-law ... that limits or prohibits the purchase of tobacco products" cannot reasonably be read in any other way. See, e.g., *Casseus v. Eastern Bus Co.*, 478 Mass. 786, 787 (2018) ("Courts must follow the plain language

of a statute when it is unambiguous and when its application would not lead to an absurd result, or contravene the Legislature's clear intent.") (internal quotation marks and citation omitted). The Court is persuaded that "[t]he intention of the Legislature [in adopting the Act] could not be more clear: the language of the statute itself defeats any claim of preemption." See *American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Bd. of Health of Athol*, 446 Mass. 310, 321 (2006).

It is equally clear that the By-Law is not subject to preemption for the further reason that it complements, rather than conflicts with, the purpose of the Act. The By-Law, on its face, places additional restrictions on the sale of tobacco products within the Town by imposing, over the course of years, a complete prohibition on the sale of such products to all persons, not just those under the age of twenty-one. It thus "augments" the protection against smoking-related illnesses provided by the Act by going beyond where the Legislature was willing to go, but where the Legislature (by means of Section 22) expressly has invited cities and towns to go, if they so desire. See *Take Five Vending, Ltd.*, 415 Mass. at 746 (holding that town by-law banning cigarette vending machines "does not detract from, but rather augments" state law prohibiting use of cigarette vending machines by minors). Compare *American Lithuanian Naturalization Club, Athol, Mass., Inc.*, 446 Mass. at 321-322 (town regulation prohibiting smoking in membership associations that was intended to protect and improve public health and welfare was "complimentary" to statute prohibiting smoking in all workplaces that was intended to protect health of employees in the Commonwealth); *Tri-Nel Management, Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 224 (2001) (town regulation prohibiting smoking in restaurants did not conflict with statute setting forth minimum restrictions on smoking in restaurants that was intended to protect and accommodate nonsmokers). In this way, the By-Law "not only does not conflict with the [Act], but instead helps

create an ‘harmonious structure faithful to the basic designs and purposes of the Legislature.’” See *Metropolitan Property & Casualty Ins. Co. v. Emerson Hosp.*, 99 Mass. App. Ct. 513, 520, review denied, 487 Mass. 1108 (2021), quoting *Mailhot v. Travelers Ins. Co.*, 375 Mass. 342, 345 (1978).

Because the Legislature, in adopting the Act, did not intend to preempt the Town’s authority to enact the By-Law, and because the By-Law does not conflict with the purpose of the Act, Plaintiffs’ preemption claim fails.⁶

III. Plaintiffs’ Equal Protection Claim.

In Count II of their Amended Complaint, Plaintiffs further claim that the By-Law violates the equal protection guarantees set forth in the Massachusetts Constitution because it,

arbitrarily divides the adult (over-21) population into two groups -- those born before January 1, 2000 and those born on or after January 1, 2000 -- and allows retailers to sell tobacco products only to the former, but never to the latter.

Plaintiffs’ Opp. at 7.

The Town, once again, disagrees. It asserts that “reduction of tobacco use – a deadly product – serves a valid governmental ... purpose,” which is all that is required to justify the restrictions imposed by the By-Law for equal protection purposes. Defendants’ Memo. at 8-10.

Massachusetts law holds that a local ordinance or by-law that neither “burdens the exercise of a fundamental right protected by our State Constitution, [nor] discriminates on the basis of a suspect classification” is “subject to a rational basis level of judicial scrutiny.”

⁶ The Court’s determination that the By-Law is not preempted by the Act also disposes of Plaintiffs’ related argument that the By-Law’s signage requirement (which obligates sellers of tobacco products within the Town to post signs informing the public of the terms of the By-Law) is preempted by the Act. It is neither unlawful, nor nonsensical for the Town to require sellers to notify potential purchasers of the additional restrictions that the By-Law permissible imposes.

Commonwealth v. Roman, 489 Mass. 81, 86 (2022) (internal quotation marks and citations omitted). See *Take Five Vending, Ltd.*, 415 Mass. at 748. Plaintiffs conceded at oral argument on Defendants' Motion that the By-Law at issue in this case does not implicate a fundamental right or discriminate based on a suspect classification. Accordingly, the By-Law is appropriately subject to "rational basis" review.⁷

Under the rational basis test, "a State action will be upheld as long as it is rationally related to the furtherance of a legitimate [S]tate interest." *Roman*, 489 Mass. at 86 (internal quotation marks and citation omitted). See *Take Five Vending, Ltd.*, 415 Mass. at 748. In the equal protection context, this "requires that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Roman*, 489 Mass. at 89 (internal quotation marks and citation omitted). The party challenging a particular law on equal protection grounds has the "onerous burden" of proving its invalidity. *Take Five Vending, Ltd.*, 415 Mass. at 748 (internal quotation marks and citation omitted).

Here, there is no plausible set of facts that Plaintiffs could prove to show that the Town's By-Law is not rationally related to the furtherance of a legitimate state interest. The Massachusetts Supreme Judicial Court already has ruled that "the ill effects of tobacco use, particularly when it involves minors, [constitute] a legitimate municipal health concern justifying municipal regulation of tobacco products." *Tri-Nel Management, Inc.*, 433 Mass. at 222. Thus,

⁷ Notwithstanding their concession that the By-Law does not violate any fundamental right or discriminate based on any suspect classification, Plaintiffs urge the Court to apply "a heightened standard of review" because the By-Law is "novel." Plaintiffs' Opp. at 8. Novelty, however, is not a legally recognized basis for subjecting a challenged ordinance or by-law to a higher level of judicial scrutiny. Moreover, adopting Plaintiffs' position would effectively do away with the "rational basis" standard of review because courts rarely are faced with equal protection challenges to longstanding laws.

the real question presented is whether the By-Law's incremental prohibition on the sale of tobacco products is "rationally related" to the Town's recognized interest in addressing that legitimate health concern.

It plainly is. As explained by the Town, "[b]y incrementally phasing out the sale of tobacco over time," the By-Law will simultaneously serve the goal of "preventing new users from starting [to use tobacco] and helping those that want to quit" and "not impact anyone with the present right to purchase tobacco and allow[] owners to adapt to a new business model incrementally." Amended Complaint, Exhibit G at 14-13. This explanation makes eminent sense. It also provides a sufficient basis for an impartial lawmaker to logically believe that the By-Law's incremental, age-based prohibition serves a legitimate public purpose that transcends the harm that may be suffered by the segment of the population that the By-Law renders unable to lawfully purchase tobacco products in the Town. See *Roman*, 489 Mass. at 89.

Plaintiffs nonetheless insist that the By-Law's January 1, 2000, birthdate cut-off for purchasing tobacco products "cannot survive even [a] rational basis review" because,

[t]here is no rational reason to prohibit someone born on January 1, 2000 from purchasing cigarettes while allowing someone born just one day earlier, on December 31, 1999, to purchase them.

Plaintiffs' Opp. at 8.

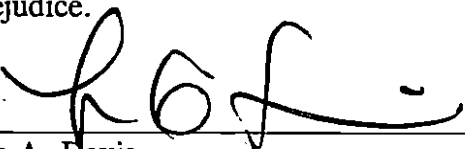
This argument, upon scrutiny, rings hollow. Every law that incorporates a bright line of one type or another is equally susceptible to being described as "irrational." Bright lines are, by their very nature, arbitrary. However, the mere fact that the By-Law includes a January 1, 2000, birthdate cut-off for purchasing tobacco products does not make it arbitrary, irrational, or unlawful. "Every economic classification is in some manner arbitrary but the drawing of the

line between classifications is a task to be exercised at the discretion of the appropriate branch of government.” *Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm’n*, 429 Mass. 721, 724 (1999) (internal quotation marks and citation omitted). It is well-settled that “[l]egislative line drawing ... does not violate equal protection principles simply because it ‘is not made with mathematical nicety or because in practice it results in some inequality.’” *Doe No. 1*, 479 Mass. at 395, quoting *Chebacco Liquor Mart, Inc.*, 429 Mass. at 723. Such is the case here.

Because the By-Law is rationally related to the furtherance of a legitimate state interest, Plaintiffs’ equal protection claim fails.⁸

Order

For the foregoing reasons, Defendants’ Mass. R. Civ. P. 12(b)(6) Motion to Dismiss (Docket Entry No. 12.0) is **ALLOWED** in its entirety. All claims asserted in Plaintiffs’ Amended Complaint shall be **DISMISSED**, with prejudice.



Brian A. Davis
Associate Justice of the Superior Court

Date: October 17, 2022

⁸ The fourth Prayer for Relief in Plaintiffs’ Amended Complaint requests an award of the reasonable attorneys’ fees and costs that Plaintiffs incurred in bringing this action pursuant to G.L. c. 12, § 11I, the Massachusetts Civil Rights Act (“MCRA”). At oral argument on Defendants’ Motion, Plaintiffs’ counsel explained that Plaintiffs have not asserted an independent claim under the MCRA, but rather seek statutory fees and costs on account of their equal protection claim. Because Plaintiffs’ equal protection claim fails as a matter of law, the Court need not address whether they would be entitled to fees and costs under the MCRA.