SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002253-23
Appeal Filed: March 28, 2024

THOMAS BONFIGLIO, 1030 PARTNERS, LLC, and 1030 LIQUOR PARTNERS, LLC,

Plaintiffs-Respondents,

v.

BOROUGH OF SEA BRIGHT, and the MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF SEA BRIGHT,

Defendants-Appellants.

Civil Action

ON APPEAL FROM

SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY

DOCKET NO: MON-1883-17

SAT BELOW

Honorable Linda Grasso Jones, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS BOROUGH OF SEA BRIGHT, and the MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF SEA BRIGHT

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PROCEDURAL HISTORY

Plaintiffs filed a Complaint, an Action In Lieu of Prerogative Writs, in this matter on May 18, 2017, challenging a noise ordinance of the Borough of Sea Bright. Da1. On July 19, 2017, Defendant filed an Answer to Complaint and Separate Defenses. Da23. On June 29, 2017, Plaintiffs filed an Amended Complaint. Da32. Thereafter, on August 28, 2017, Defendant filed an Answer to Amended Complaint and Separate Defenses. Da48.

The parties, pursuant to the Court's direction and in preparation for a pretrial conference on September 6, 2017, prepared Pretrial Submissions and filed same with the Court on August 30, 2017 and August 31, 2017 respectively.

On May 3, 2018, counsel for Plaintiffs advised the Court that the parties agreed to dismiss Counts Four, Six, Seven and Eight of the Complaint; however, Counts One, Two, Three and Five remained unresolved. And pursuant to a July 13, 2018, Case Management Order the Court severed the Third Count (Inverse Condemnation) of the Amended Complaint.

The Honorable Lisa P. Thornton, A.J.S.C. entered an Amended Pretrial Order on August 15, 2018, and trial briefs were submitted by Plaintiffs on September 14, 2018 and Defendant Sea Bright on October 12, 2018. Da57. Trial was held on

December 7, 2018[1]. The parties submitted supplemental briefing upon Judge Thornton's request and an additional hearing took place on March 5, 2019.

On October 24, 2023, the Honorable Linda Grasso Jones, J.S.C. entered an Order finding Sea Bright Municipal Ordinance 17-2017 preempted by a Monmouth County Regional Health Commission ("MCRHC") Ordinance; unconstitutionally overbroad; and held the Sea Bright Ordinance 17-2017 void. Da60-Da61. The October 24, 2023 Order disposed of all counts other than Count Three[2], Inverse Condemnation. Da61. Plaintiff informed the Court that it did not intend to continue with the remaining counts. Thus, a final Order closing the matter was entered on February 22, 2024. Da89.

Defendant Borough of Sea Bright filed the within Notice Of Appeal on March 13, 2024. Da90.

STATEMENT OF FACTS

This Prerogative Writ action centers around Plaintiffs' challenge of the Borough's enactment of Sea Bright Municipal Ordinance 17-2017 ("Ordinance 17-

[1] T1 Transcript of Trial held December 7, 2018.
T2 Transcript Of Hearing held March 5, 2019.

[2] Judge Jones' order of October 24, 2023 states, in the final paragraph, that plaintiffs were to advise the court if they intend to continue with "Count IV, the inverse condemnation, claim" or whether any other issues remain. It appears the trial court incorrectly referenced the inverse condemnation claim as Count IV, rather the inverse condemnation claim was Count III of the Amended Complaint.

2017[3]"). Da32; Da37. Plaintiffs Thomas Bonfiglio, 1030 Partners, LLC, and 1030 Liquor Partners, LLC (collectively the "Plaintiffs") own and operate a restaurant at 1030 Ocean Avenue in Sea Bright, known as Tommy's Tavern + Tap ("Tommy's"). Da32-Da33. Plaintiffs brought this Prerogative Writ action against the Borough of Sea Bright, Mayor and Borough Council of the Borough of Sea Bright (collectively the "Borough") specifically challenging the Borough's amendment to its Nuisance Code, with provisions governing noise, via Ordinance No. 17-2017. Da32-Da47.

The Borough and Monmouth County Regional Health Commission

The Borough is a member of the Monmouth County Regional Health Commission ("MCRHC" or the "Commission") pursuant to N.J.S.A. 26:3-92. Da63. On February 23, 1968, the Borough adopted Chapter 25, Health Commission, and set forth its membership in the MCRHC. By way of Chapter 25 of the Borough Code, the Borough also adopted and subscribed to all the "requirements and regulations" of the Commission.

On July 27, 1983, the Commission adopted its Ordinance No. 2, "An Ordinance Establishing A Public Health Nuisance Code", which adopted by reference the New Jersey Public Health Nuisance Code of 1953, a general code.

[3] Originally, Plaintiffs brought the within action challenging Ordinance 05-2017; however, that ordinance was replaced by Ordinance 17-2017 and Plaintiffs proceeded to challenge 17-2017.

Da63-Da64. Section IV of the Public Health Nuisance Code of 1953, sets forth the provision on Prohibition of Certain Noises or Sounds:

> It shall be unlawful for any person to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him or it, or upon any public street, alley or thoroughfare in this municipality, any unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to person, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of this municipality or any number thereof.
>
> §IV, 4.1 Prohibition of Certain Noises or Sounds. Da97.

The Public Health Nuisance Code Of New Jersey (1953) is preceded by a preface specifically setting forth the recommendation that the Code be adopted in full and that "[t]his Public Health Nuisance Code is a general code." Da96. Further the preface states, "[s]pecific codes may prove more suitable for local adoption in municipalities having the necessary enforcement facilities." Da96.

The Borough Adoption of Ordinance No. 17-2017

Since the early 1990s the Borough has maintained a regulatory scheme for noise. On April 4, 2017, the Borough adopted Ordinance No. 05-2017, an ordinance amending Chapter 146, "Nuisances," Article II, "Nose Nuisances" of the Code of the Borough of Sea Bright. Da64. Plaintiffs brought the within action on May 18, 2017, seeking a declaration that Ordinance No. 05-2017 was void because it was

allegedly (1) arbitrary, capricious and unreasonable, (2) did not comply with the New Jersey Noise Control Act, N.J.S.A. § 13:1G-1 et seq. and (3) was unconstitutionally vague. Da1; Da4-Da5; Da8; Da65.

Ordinance No. 05-2017 amended Chapter 146, Nuisances, Article II, Noise Nuisances of the Code of the Borough of Sea Bright in its entirety setting forth §146-5 et seq. "Noise Nuisances Prohibited" relating prohibited acts, definitions, permissible sound levels, proof of violation, penalties, permits and enforcement.

On October 17, 2017, the Borough adopted Ordinance No. 17-2017, which amended the Borough Code by deleting the measurable noise standards by decibels that were contained in §146-8 of Ordinance 05-2017. Da66-Da67. Ordinance No. 05-2017 was amended in its entirety, thus Ordinance No. 17-2017 effectively repealed No. 05-2017. Da66. Ordinance No. 17-2017 now constitutes Sea Bright's entire noise regulatory scheme and is the sole subject of this litigation. Da67. Ordinance No. 17-2017 states in part:

> It shall be unlawful for any person to make, continue or cause to be made or permitted any unnecessary and unreasonable loud, disturbing noise which is plainly audible and either annoys, injures or endangers the comfort, repose, health or welfare or otherwise within the limits of the Borough. Such unlawful activity shall be considered a "noise nuisance" as further defined in §146-7 of this Article.
>
> Da67; Da110.

The Ordinance goes on to set forth "Proof of violation" as being determined by "plainly audible means as detected at more than fifty (50) feet from the property lines from which the noise nuisance is emanating[.]" See Da67; Da113.

The court below found Ordinance No. 17-2017 preempted by the Commission's Ordinance No. 2, finding the Borough subject to the jurisdiction of the Commission in matters of public health and that the Commission's Ordinance addressed noise nuisance. Da88. The court also found Ordinance No. 17-2017 to be unconstitutionally overbroad. Da88. The Borough files the within Appeal seeking Appellate review of the lower court's decision. Da90.

LEGAL ARGUMENT

POINT I

THE LEGISLATURE DID NOT PREEMPT THE HOME RULE PROVISIONS DEALING WITH NOISE REGULATIONS BY ENACTING THE STATUTORY PROVISIONS ON LOCAL BOARDS OF HEALTH. (RAISED BELOW: ORDERED AND DECISION (Da60; Da80-82)

The Court below found that Ordinance No. 17-2017 was void because the Borough and its Board of Health "are subject to the jurisdiction of the MCRHC in matters of public health, and the MCRHC already adopted an ordinance addressing noise nuisance, which preempts Ordinance No. 17-2017 adopted by Defendants on the same subject. N.J.S.A. 26:3-92-93." Da80.

The Court further held that:

> even if MCRHC's Model Nuisance Ordinance did not preempt Defendants' ordinance under N.J.S.A. 26:3-92, 93, MCRHC is part of a comprehensive statutory and administrative framework to furnish Public Health Services, thus the ordinance adopted by MCRHC is under a specific grant of authority which preempts Defendant Borough's general grant of authority under the Home Rule Act.
>
> [Ibid.]

Before reviewing these alternate bases for finding the ordinance preempted, a review of when municipal action is preempted by state action is in order. The concept of preemption rests on the principal "a municipality, which is an agent of the State, cannot act contrary to the State." Overlook Terrace Management Corp. v. Rent Control Board of West New York, 71 NJ 451, 461 (1976). "When the Legislature has preempted a field by comprehensive regulation, a municipal ordinance attempting to regulate the same field is void if the municipal ordinance adversely affects the legislative scheme." Plaza Joint Venture v. Atlantic City, 174 N.J. Super 231, 238 (App. Div. 1980) (citing Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Ed., 79 N.J. 574, 586 (1979); Summer v. Teaneck, 53 N.J. 548, 554 (1969)). The Overlook Terrace Court stated five pertinent questions for a court to consider when deciding whether a field has been preempted by the State Legislature:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance

forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?

2. Was the state law intended, expressly or impliedly, to be exclusive in the field?

3. Does the subject matter reflect a need for uniformity?

4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?

5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

[Overlook Terrace, 71 N.J. 461-62 (internal citations omitted)].

The above case law is clear that in order to be preempted the subject must be the domain of State legislation because only the State preempts, and that the regulation must be comprehensive. "A legislative intent to preempt a field will be found either where the State scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the State statutes or stands as an obstacle to State policy expressed in enactment of the Legislature". Garden State Farms, Inc. v. Bay, 77 N.J. 439, 450 (1978). However, because municipalities are due "a liberal construction of legislation in favor of local authority...legislative intent to supersede local powers must clearly be present." Id. at 450 (citing Kennedy v. City of Newark, 29 N.J. 178, 187 (1959)). See also Summer, supra, 53 N.J. at 554 ("[A]n intent to occupy the field must appear clearly."); Mannie's Cigarette Service, Inc. v. Township of West

New York, 259 N.J. Super. 343, 348 (App.. Div. 1992); McGovern v. Borough of Harvey Cedars, 401 N.J. Super. 136, 149 (App. Div. 2008).

A review of the statutes, their history, and the case law interpreting them is warranted to demonstrate that the statutory grant of authority under which the Borough proceeded in adopting Ordinance 17-2017 is not preempted by another source of statutory authority, however, before doing so we should first note that the Court below, in several places in its decision, states that the preemption occurs not only because the Legislature adopted a more comprehensive field or scheme, but, also, that preemption occurs because the MCRHC has adopted an ordinance which deals with, to a certain degree, noise nuisances. Da60; Da80; Da88. It is important to note at the outset that preemption does not arise because some other local government entity has chosen to regulate in the field, even if its jurisdiction overlaps with a municipal governing body. Preemption only arises where the State Legislature has acted to enact and to establish a comprehensive and pervasive scheme that does not allow for other regulation. In short, preemption does not and cannot exist by the fiat of a body of local government enacting an ordinance, code or a resolution. It only exists if the State Legislature has acted to preclude other forms of rule or prescription. Hence, the Trial Court's reference to the MCRHC action preempting Ordinance 17-2017 should not withstand scrutiny. The MCRHC cannot preempt a field. Only the State Legislature can.

A. The Home Rule Act

Ordinance No. 17-2017 was enacted under the Borough Council's powers pursuant to the Home Rule Act. The specific power is located at N.J.S.A. 40:48-1, which provides that "The governing body of every municipality may make, amend, repeal and enforce Ordinances to: …

***

> 6. prevent vice, drunkenness and immorality; to preserve the public peace and order, to prevent and quell riots, disturbances and disorderly assemblages;
>
> ***
>
> 8. Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises; … (emphasis supplied).

N.J.S.A. 40:48-1, cited in part above, was enacted as part of the "Home Rule Act." Denbo v. Moorestown, 23 N.J. 476, 478 (1957); Kovalycsik v. Garfield, 58 N.J. Super. 229, 233 (App. Div. 1959); Jersey City v. Department of Civil Service, 10 N.J. Super. 140, 147 (App. Div. 1950). The Home Rule Act applies to every municipality in the State of New Jersey, and was enacted in 1917 as L.917, c.152. In Re City of Margate City, 424 N.J. Super. 242, 245 (App. Div. 2012). The language cited above was contained in the original enactment in 1917, and has remained unaltered since. Da102.

Further, "Home rule is basic in our government. It embodies the principle that the police power of the State may be invested in local government… to meet…needs

of the community." Inganamort v. Ft. Lee, 62. N.J. 521, 528 (1973) (citing Bergen County v. Port of New York Authority, 32 N.J. 303, 312-14 (1960)). "Express powers as well as those that arise by fair implication are given broad latitude, so long as they are not wielded in contravention of the overarching statutory grant of authority…". Varsolona v. Breen Capital Services Corp., 180 N.J. 605, 625 (2004); Timber Glen Phase III, LLC v. Township of Hamilton, 441 N.J. Super. 514, 524 (App. Div. 2015).

Given that the Court is reviewing an ordinance, a word regarding the deference to be given to municipal governing body enactments within their statutory powers would be in place here. "A municipal ordinance under review by a court enjoys a presumption of validity and reasonableness. Municipal ordinances are liberally construed in favor of the municipality and are presumed valid. It is the burden of the party seeking to overturn the ordinance to prove otherwise." State v. Clarksburg Inn, 375 N.J. Super. 624, 632 (App. Div. 2005) (citations omitted). "Anyone challenging an ordinance as arbitrary or unreasonable bears a heavy burden. Accordingly, a court will sustain an ordinance if it is supported by a rational basis." First Peoples Bank v. Medford, 126 N.J. 413, 418-19 (1991) (citations omitted). Only a showing of "clear and convincing evidence" may overcome the presumption of validity. Spring Lake Hotel & Guest House Assoc. v. Spring Lake, 199 N.J. Super. 201, 210 (App. Div. 1985). "A municipality's legislative exercise is not to be set aside if any basis may reasonably be conceived to justify the ordinance."

Mannie's Cigarette Service, supra, 259 N.J. Super at 496 (citing Quick Chek Food Stores v. Springfield Twp., 83 N.J. 438, 447 (1980)).

Hence, a municipal ordinance is entitled to presumption of validity and deference in review. First Peoples Bank, supra 126 N.J. at 418 (1991); Lake Valley Associates, LLC v. Township of Pemberton, 411 N.J. Super. 501, 505 (App. Div.), certif denied, 202 N.J. 43 (2010). See also N.J. Constitution, Article IV, Section VII, paragraph 11 ("The provisions of this Constitution and of any law concerning municipal corporations formed for local government..., shall be liberally construed in their favor. The powers of...municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication..."). Therefore, if statutory authority exists for an ordinance, the examination as to whether a municipality was enabled to enact it ends. See Inganamort, supra, 62 N.J. at 538 (Police powers of a municipality may exist under enabling statute in the absence of a statutory restraint). Additionally, N.J.S.A. 40:48-2 provides further authority for an enactment of a municipal governing body to regulate noises. That provision states:

> Any municipality may make, amend, repeal and enforce such other Ordinances, regulations, rules, and by-laws not contrary to the laws of this state or of the United States, as it may deem proper and necessary for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may

> be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

Indeed, multiple cases before this Court have upheld ordinances regulating noise in a substantially similar way to how Ordinance No. 17-2017 does, citing N.J.S.A. 40:48-1 & -2, i.e., the Home Rule Act, as the source of such municipal authority.

In State v. Holland, 132 N.J. Super. 17 (App. Div. 1975), the Court dealt with a challenge to an Ordinance enacted by the governing body of the City of South Orange. As part of its analysis upholding the Ordinance, the Court noted, "it has long been established that municipalities in this State have the authority to adopt Ordinances regulating or preventing loud, disturbing and unnecessary noises which are detrimental to the public health and welfare." Id. at 22. The Court specifically cited N.J.S.A. 40:48-1 and N.J.S.A. 40:48-2 as the source of that authority, upholding the Ordinance on review. Ibid. In Bynum v. Mayor & Township Committee, 181 N.J. Super. 2 (App. Div. 1981), certif. denied, 89 N.J. 440 (1982), the Court reviewed a "municipal Ordinance" and noted regarding this governing body Ordinance, "It is an entirely proper exercise of police power to protect the health, safety and welfare of local residents by abatement of nuisances and preservation of order. To that end, municipalities may adopt Ordinances regulating or preventing loud, disturbing or unnecessary noise detrimental to the public health and welfare." Id. at 6 (internal citations omitted) (emphasis supplied). In stating

same, the Court cited State v. Holland, which, as related, cites specifically to N.J.S.A. 40:48-1 and N.J.S.A. 40:48-2 as the enabling authority. In State v. Friedman, 304 N.J. Super. 1 (App. Div. 1997), the Court examined a challenge to Washington Township's anti-noise Ordinance. In its analysis, the Court noted that the statutory authority for the Ordinance was N.J.S.A. 40:48-1 and N.J.S.A. 40:48-2, which gave municipalities the power to regulate, "loud, disturbing and unnecessary noises." Id. at 6.

In Clarksburg Inn, 375 N.J. Super. 624, the Plaintiff challenged a municipal noise Ordinance of the Township of Millstone. The Clarksburg Inn Court related the following in regard to a governing body's authority to pass anti-noise Ordinances: "The governing body of every municipality may make, amend, repeal and enforce ordinances to preserve the public peace and order, and to prevent disturbing noises." Id. at 633. The Court then cited to N.J.S.A. 40:48-1. Ibid. See also State v. Powell, 250 N.J. Super. 1 (App. Div. 1991) (Court upheld a municipal governing body's "noise pollution" Ordinance of the City of East Orange).

Hence, there is clear unambiguous statutory authority for municipal governing bodies to make, amend, repeal and enforce ordinances to "prevent disturbing noises" even going so far as to refer to same as "nuisances". See Bynum, 181 N.J. Super. at 6. Again, this Court has repeatedly upheld such ordinances and has done so stating that the authority for these ordinances is the Home Rule Act.

B. Local Boards of Health and Nuisance Ordinances

By N.J.S.A. 26:3-1, with certain limited exceptions, the Legislature mandated that municipalities must have local Boards of Health. Ibid. ("There shall be a Board of Health in every municipality in this state...")[4]

N.J.S.A. 26:3-1 to 26:3-94 (The "Health Act") are the statutes dealing with local Boards of Health. They are contained in Title 26 "Health and Vital Statistics". Chapter 3 of Title 26 declares, among other things, the powers and duties of local Boards of Health. Those powers and duties include the ability to "adopt rules, regulations or ordinances for its government and that of its officers and employees not inconsistent with law or the State Sanitary Code". N.J.S.A. 26:3-2. A local Board also has the power to "pass, alter or amend ordinances and make rules and regulations to declare and define what shall constitute a nuisance in lots, streets, docks, wards, vessels and piers, and all public or private places within its jurisdiction." N.J.S.A. 26:3-45. There are also powers of the local Board to "pass, alter or amend ordinances and make rules and regulations in regard to the public health within its jurisdiction" for certain specific defined purposes, which are spelled out at N.J.S.A. 26:3-31. A more generalized ordinance and rule making ability is given in N.J.S.A. 26:3-64, which permits a local Board of Health to enact and amend

[4] The exception to the municipal Board of Health requirement appears to be limited to those municipalities operating under the Faulkner Act, N.J.S.A. 40:69A-1, et seq. See Myers v. Cedar Grove, 36 N.J. 51, 59 (1961). This is not applicable here. Sea Bright operates under the Borough form of government found at N.J.S.A. 40A:60-1, et seq.

"health ordinances...in the execution of any power delegated to it or in the performance of any duty imposed upon it by law...". Another very general legislative grant of authority to pass ordinances by a local Health Board is found in "the Public Health and Sanitation Codes Adoption by Reference Act". N.J.S.A. 26:3-69.1 to -69.6 ("the PHSCARA"). The PHSCARA applies to both county and municipal Boards of Health.[5]

Article 6 of Chapter 3 of Title 26 deals with "regional health commissions". These statutes are codified at N.J.S.A. 26:3-83 to 3-94. N.J.S.A. 26:3-84 provides the opportunity of 2 or more local (municipal) Boards of Health "to form an association to furnish such Boards with public health services". That section further provides that, "an association formed under the provisions of this act shall be known as a "regional health commission." Ibid. The powers, duties and jurisdiction of a regional health commission are stated in N.J.S.A. 26:3-92, which provides:

> Each regional health commission shall have jurisdiction in matters of public health within the geographic area of the participating municipalities. It shall succeed to all powers and perform all of the duties conferred and imposed upon the municipal Boards of Health which it shall have superseded, and, in addition, shall have all the powers and perform all the duties within the geographic area of the participating municipalities which by law are conferred and imposed upon any Township, City or other local Board of Health in the State.

[5] Among other possible statutory sources, a Board of Chosen Freeholders of any county may create and establish a county Board of Health. N.J.S.A. 26:3A2-4.

As related in the Statement of Facts, the Borough has joined with other municipalities which have formed the Monmouth County Regional Health Commission (MCRHC) and therefore, the MCRHC has succeeded to the powers of the local (Sea Bright) Board of Health. Indeed, "regional health commissions have no more authority than the local Boards of Health that they supersede...Those powers are limited to public health issues...". LDM Inc. v. Princeton Regional Health Commission, 336 N.J. Super. 277, 317 (Law Div. 2000) (internal citations omitted).

It is important to note here that, in accordance with the above referenced statutory scheme, the MCRHC only exists and only has power because it has succeeded local Boards of Health. There is no independent establishment of the MCRHC except as a successor of local Boards of Health that have chosen to regionalize. This is important because the only statutory authority that allows the MCRHC to establish a model nuisance code is the same general statutory authority that permits local Boards of Health to adopt codes by reference pursuant to the PHSCARA.

As mentioned before, the concept of preemption exists only where the State Legislature has comprehensively and pervasively regulated the field, not because some other local government entity has passed an ordinance or regulation. This is true because the case law unambiguously says it is true, and also, no logic or sense

exists which would preempt a municipality in a field it otherwise could act, under its police powers, because another local entity has acted first, i.e., beating the municipality in its legislatively entrusted powers to the punch. Despite this, the Court below ruled that is what happened here as one of the alternative grounds for concluding that Ordinance 17-2017 is preempted. Again, the Court decided that the MCRHC's adoption of the Model Public Health Nuisance Code under the PHSCARA, preempted Sea Bright from passing the noise related ordinance that it did. Da60; Da80; Da88. Such a holding, however, leaves the issue of preemption to the whim of another local board on whether it will or will not pass an ordinance. As established before, a municipality has the power to pass an ordinance to prevent disturbing noises pursuant to the Home Rule Act. Yet, a municipality is preempted, under the Court below's logic, depending on whether or not a local Board of Health, or if applicable a superseding regional health commission, has passed an ordinance on the same subject. Therefore, by that holding, the municipal governing body is preempted if the local board has already passed such an ordinance, but, apparently not preempted, if it has not. A municipal governing body where a local Board of Health has not passed an ordinance, but wishes to regulate disturbing noises for its residents, under this rationale, would always have a Sword of Damocles over its head as to whether it could or should pass such an ordinance. The only logical application of preemption is the application that the case law has given it, i.e., when

The Legislature has comprehensively acted. Otherwise, one is left with a situation where a field may be a "little bit" preempted. This, respectfully, makes no common sense.

C. The Noise Control Act

The Noise Control Act ("NCA") is another example of Legislative regulation of noise. Although the NCA was a major issue in the arguments at the Trial Court, it does not figure in the arguments on appeal. However, because arguments infra make reference to the NCA, some words regarding it may be beneficial.

The NCA was enacted as L.1971, c.148. It became effective on January 24, 1972. Its purpose was to address the need of the people of the State to enjoy "an environment free from noise which unnecessarily degrades the quality of life." The NCA sought the fulfillment of that purpose by authorizing the New Jersey Department of Environmental Protection (DEP) to adopt and enforce noise standards "embodied in regulations." N.J.S.A. 13:1G-2. Indeed, much of the substance of the NCA is devoted to providing authorization to the DEP to adopt, "reasonable codes, rules and regulations necessary to carry out the intent of" the NCA. N.J.S.A. 13:1G-4. See also N.J.S.A. 13:1G-5; N.J.S.A. 13:1G-6.

The DEP has acted on that authorization, adopting regulations found at N.J.A.C. 7:29-1.1, et. seq. The standards found in those regulations define permissible limits and therefore, ultimately violations, in terms of decibels. (See

N.J.A.C. 7:29.1.2 Adopted standards on industrial, commercial, or community service facilities). N.J.A.C. 7:29-1.6 provides that for "the purposes of measuring sound in accordance with the applicable provisions of these regulations, test equipment methods and procedures shall conform to the provisions of N.J.AC. 7:29-2." Reference to provisions of N.J.A.C. 7:29-2 demonstrate that the "Procedures for the Department's determination of noise from stationery sources" is accomplished by measures gauged by decibels, as determined by "a qualified investigator using instruments and procedures prescribed by the Department." (emphasis supplied)

One provision of the Noise Control Act is N.J.S.A. 13:1G-21, which permits municipalities, counties or Boards of Health to adopt noise control ordinances defining violations in terms of decibels. Sea Bright has chosen not to do so in Ordinance No. 2017-17. Rather, standards are pursuant to the Home Rule Act provisions, similar to Clarksburg Inn and the other cases cited supra.

D. The Legislature has not preempted municipal governing bodies from enacting noise ordinances pursuant to the Home Rule Act.

1. The ordinance does not conflict with State law and does not forbid what the Legislature has permitted or permit what the Legislature has forbidden.

Ordinance 17-2017 was enacted pursuant to a specific legislative grant of authority at N.J.S.A. 40:48-1(8). Nothing in the ordinance conflicts with legislative proscriptions. In fact, Ordinance No. 17-2017 regulates in precisely the same

manner, pursuant to the Home Rule Act, that other ordinances that have been upheld by the Appellate Division have done.

In Bynum, supra, 181 N.J. Super. 2, the court rejected the plaintiff's challenge of an ordinance as being an *ultra vires* exercise of a municipality's police power. Id. at 6. The ordinance banned "[l]oud and unusual noises which 'annoy, disturb, injure or endanger the comfort, repose, health, peace or safety of others.'" Ibid. The court found that

> [i]t is an entirely proper exercise of police power to protect the health, safety and welfare of local residents by abatement of nuisances and preservation of order. To that end, municipalities may adopt ordinances regulating or preventing loud, disturbing and unnecessary noise detrimental to the public health and welfare. The regulations in question are presumed valid...and may be stricken down only if the presumption of validity is overcome by a clear showing that it is arbitrary or unreasonable. No such showing has been made here.
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> [Id. at 6-7 (citations omitted).]

In Clarksburg Inn, the court found that Millstone Township enacted Anti-Noise Ordinance No. 3-15 for the safety of its residents and that the ordinance was presumed to be valid and reasonable. Id. at 637. Sea Bright has done the same herein.

Nor does Ordinance No. 17-2017 permit anything that the Legislature has said is prohibited. There is nothing in statute or regulation which precludes the enactment of an ordinance like Ordinance No. 17-2017. To the contrary, as just stated,

substantially similar ordinances have been upheld under the same statutory authority cited here, the Home Rule Act.

2. The State law here, the Health Act, is neither expressly or impliedly exclusive in the field of noise regulation.

The Court below decided that the State law that the MCRHC acted under to adopt the model Public Health nuisance code ("The Model Nuisance Code") was a "specific grant of authority which preempts Defendant Borough's general grant of authority under the Home Rule Act." Da80. Therefore, an examination of the legislative authority under which the MCRHC acted is in order.

The Court below notes, as has been examined, that each municipality must maintain a local Board of Health and that these Boards may, if they choose, form a Regional Health Commission. (Da72 citing N.J.S.A. 26:3-1 et seq.; N.J.S.A. 26:3-84 et seq.). The Court below notes that such a regional Health Commission would succeed the local Board of Health in its powers and duties. Da72.

The only legislative powers, however, that the MCHRC has used, and the only ones that a regional Health Commission can use to regulate in the field of noise, are the abilities of the local Board of Health to declare and define nuisances, N.J.S.A. 26:3-45, and the ability to adopt a code by reference pursuant to the PHSCARA. Neither the general power to declare and define nuisances, nor the ability to adopt a code by reference, are in any way specific to the regulation of noise. In fact, none of these legislative provisions even mention noise. Rather, to the extent that noise

is implicated, it is because some other body, producing a model code, chose to mention a regulation of noise. As to the Model Nuisance Code, we note it refers to itself as "a general code" and relates that there are "more detailed and specific codes in special sanitation fields" that "have been adopted by reference by local boards of health". Da96.

We respectfully submit that this does not carry a degree of specificity needed to preempt a field. Again, preemption rests upon pervasive and comprehensive regulation completely precluding the coexistence of any other regulation. That is not what we have here. Rather, we have a removed regulation of a subject that is not even mentioned in law. The drafters of any regulations regarding noise are at least twice removed from any legislative scheme: (1) first, there must be drafters of a model code; and, (2) then there must be another body, either a local Health Board or a regional Health Commission, adopting this model code. The code may have many regulations or virtually none. It might mention noise, or it might not. In this case the model nuisance code has one short paragraph dealing with noise which, as we will address, is so vague that it may be unenforceable.

The Court also relies upon, as a basis for preemption, that "Defendants have chosen to participate in the MCRHC. By doing so, they have acted under the authority of the Local Health Services Act (N.J.S.A. 26:3A2-2), a more specific Act, to regulate noise nuisance, which effectively preempts N.J.S.A. 40:48-1 of the Home

Rule Act, a more general grant of power." Da82. These statements are inaccurate in a number of ways. First, the Defendants have never chosen to participate in the MCRHC. By statute, only the local Boards of Health may do so. Second, participation in the regional Health Commission is not done under the authority of the Local Health Services Act, N.J.S.A. 26:3A-1 to N.J.S.A. 26:3A-2-20.10. Rather, a regional health commission is formed, and local Boards of Health join, pursuant to N.J.S.A. 26:3-84. Third, and more importantly, the Local Health Services Act is a quite general law designed to:

> assure the provision of a modern and manageable array of public health services to all citizens of the State and to encourage the efficient delivery of such services by areawide health departments where such arrangements are needed to enable municipalities to meet "standards of performance" as determined by the Public Health Council.
>
> [N.J.S.A. 36:3A2-2.]

The Local Health Services Act is largely concerned with procedures to ensure that municipalities meet a "program of health services meeting the 'standards of performance', as determined by the Commissioner" of Health. N.J.S.A. 26:3A2-10. Accordingly, the Local Health Services Act deals generally with insuring that local health services meet certain defined standards as determined by the Commissioner and/or the Public Health Council. It has no specific regulatory scheme whatsoever. It does not mention noise at all.

The Court below then goes on to reference the New Jersey Administrative Code stating that, "the Administrative Code explicitly addresses noise regulation in its standards of performance." (Da81 citing N.J.A.C. 8:52-3.2(a)(6)). N.J.A.C. Title 8, Chapter 52, Subchapter 3 deals with "Public Health Practice". It provides, at N.J.A.C. 8:52-3.1(a), that local Boards of Health should insure for each of their residents "the programs and capacities to provide services as set forth at N.J.A.C. 8:52-3.2(a)." Ibid. In turn, N.J.A.C. 8:52-3.2 "Services and Capacities" define what are included within "Public Health Services". One of several of these is found in Subsection 6 which deals with enforcing a number of laws and regulations "that protect public health and ensure safety". Among those listed in that Subsection is "III. Compliance with environmental health activities regarding air, water, noise and nuisances…". This is the full extent of the statutory regulations regarding noise pursuant to the standards of practice for local Health Boards, adopted pursuant to the Local Health Services Act.

The regulation deals with health activities regarding a number of general subjects, which are air, water, noise and nuisances, as they affect the environment. As we explored supra, this is different from municipal regulations in furtherance of the police powers to prevent disturbing noises and protect the public safety and welfare of the residents of a municipality under the Home Rule Act. See NJ Builders Association v. Mayor and Township Council of East Brunswick, 60 N.J. 222, 226-

227 (1972); Clarksburg Inn, supra, 375 N.J. Super. at 633; Bynum, supra, 181 N.J. Super at 6; Holland, supra, 132 N.J. Super at 22.

In any case, it is not a pervasive and comprehensive scheme which expressly or impliedly governs the field of regulation of noise. In fact, we know this because there is further legislative and administrative regulation through the Noise Control Act, demonstrating the Legislature did not mean this general reference in regulation, not statute, to preempt the field. Indeed, also existing is a common law which deals with noise, which still survives. See Malhame v. Demarest, 162 N.J. Super. 248, 258 (Law Div. 1978) (Common law nuisance claim dealing with noise continues to exist post adoption of the Noise Control Act, citing N.J.S.A. 13:1G-21).

Indeed, the Legislature knew how to make a specific grant of authority in this field when it chose to do so. N.J.S.A. 26:3-31 delineates specific grants of enabling authority to local Boards of Health in terms of adopting ordinances and rules and regulations. As stated before, none of these deal with noise. The very oblique reference to noise in regard to enforcement of laws, rules and regulations dealing with compliance with environmental health activities does not rise to the level of specificity needed to convey that a state statute was intended expressly or impliedly to govern the field. The case law is clear that simply because the Legislature has legislated on a subject is insufficient, by itself, for preemption of a municipal ordinance to be found. Tumino v. Long Beach Township, 319 N.J. Super. 514, 521

(App. Div. 1999); Mannie's Cigarette Service, supra, 259 N.J. Super. at 348 (citing State v. Crawley, 90 N.J. 241, 249 (1982)).

In fact, this attenuated reference to noise under a model nuisance code or in a regulation does not rise to the level of those areas where the Courts have found preemption to be present. In Overlook Terrace, supra, 71 N.J. 451, The Court found State preemption of a local rental control board restriction in rent increase where a State created agency, the New Jersey Housing Finance Agency, had approved and ordered the increase. "There is a general presumption that state legislation creating a state agency preempts municipal control of that state agency." Id. at 464. See also Plaza Joint Venture, supra, 174 N.J. Super. at 241 (Presumption of preemption of municipal control applies where there is state legislation creating a state agency and so state agency controls the conversion of rental units into condominiums in Atlantic City). We have nothing like that here. There is no state legislation creating a state agency with jurisdiction.

The Court found preemption in City of Ocean City v. Somerville, 403 N.J. Super. 345 (App. Div. 2008) precluding an initiative to adopt an ordinance imposing a cost of living cap on budgeted municipal expenditures in a Faulkner Act City. The Court reviewed the extensive statutory "comprehensive regulation of the field of municipal spending" to conclude there was no room for ceding any authority. Id. at 372. See also Tumino, supra, 319 N.J. Super. at 525-26 (Comprehensive regulations

from the DEP precluded municipal ordinance on the placement and length of docks.); G.H. v. Township of Galloway, 401 N.J. Super. 392, 419 (App. Div. 2008) (Megan's Law precludes municipal ordinances on requiring convicted sex offenders from living within designated distance of schools, parks, playgrounds and daycare centers.) As noted here, though, there is no such comprehensive and detailed state structure.

3. Uniform policy is not needed in this context in that the subject of noise can be regulated for different purposes and in different ways.

As related earlier, the Legislature has regulated, and has allowed for regulation by others, noise in different ways. This is true even outside of the decibel related standards of the Noise Control Act. Hence, one uniform policy for all purposes does not exist. The environmental health consequences of noise are proper subjects for regulation under the Health Act. However, other aspects of noise, i.e. the disturbance of peace, quiet, safety and general welfare of municipal residents fall under the domain of the governing body, as evidenced by the existence of the explicit power to regulate disturbing noises in the Home Rule Act. Indeed, the fact that noise may in some ways, and for some objectives, fall under the realm of health and, therefore may be governed by the Health Act or the Local Health Services Act, does not diminish the fact that it can be regulated in other ways for other goals at other times. Such cursory references to noise, if applied in other circumstances, would limit, on the grounds of supposed preemption, fundamental powers of municipal governing

bodies. For instance, in Fred v. Old Tappan, 10 N.J. 515, 522 (1952), the Court noted that both a municipality and a board of health have powers to abate nuisances "created by removal of soil." In Wilber Township v. Witts, 7 N.J. Super. 259, 261 (App. Div. 1950), the Court noted that both municipal governing bodies and municipal boards of health have power to deal with disposition of garbage. For that proposition, the Court cited to the provisions of Title 26 and N.J.S.A. 40:48-2, as well as another set of statutes dealing with the same area, beginning at N.J.S.A. 40:66-1. In Izen & Robertson, Inc., 89 N.J. Super. 374, 380 (Law Div. 1965), the Court noted that it is within the powers of both municipal corporations and boards of health to adopt suitable measures with respect to cesspools and septic tanks. Ibid. (citing 7 McQuillan, Municipal Corporations (3d. Ed. 1949), 24.263, pp. 107-109)). The fact that there sometimes can be relationships between the powers of a board of health and a municipal governing body should not abrogate the powers of a municipal governing body, especially when such powers are entrusted to the governing body by specific language in an enabling statute as here in N.J.S.A. 40:48-1.

Indeed, an exercise of municipal power is not barred by existence of other general statutes dealing with the subject matter. See Inganamort v. Borough of Ft. Lee, 62 N.J. 521, 537 (1973) (Statutes dealing with tenancy generally in other places do not block municipal power in rent control); Trombetto v. Mayor &

Commissioners of Atlantic City, 81 N.J. Super. 203, 226 (Law Div. 1981) (Municipalities may act under grants of general power even though the same ordinances might also be enacted under the zoning power.). Further examples exist. The Model Nuisance Code contains regulations regarding the "existence or presence of any accumulation of garbage, refuse," etc. Da96. Yet, N.J.S.A. 40:66-1 et seq. provides extensive enabling authority for municipal governing bodies in the field of solid waste collection and disposal. Section II, Subsection 2.1(d) of the Model Nuisance Code regulates as a nuisance "the escape into the air from any stack, vent, chimney or any entrance to the open air, or from any fire into the open air of such quantities of smoke, fly ash, dust, fumes, vapors, mists, or gasses as to cause injury, detriment or annoyance to the inhabitants…". However, in N.J.S.A. 40:48-1(16 & 19), the Legislature entrusted regulations of chimneys and boilers, and soft coal, respectively to municipal governing bodies. The Legislature also conferred powers on a municipal governing body, in other realms in the Home Rule Act, which might be said to touch upon areas dealing with public health. These include N.J.S.A. 40:48-1(10) prohibiting annoyance of persons or animals; (11) establishment and regulation of animals in pounds; (15) regulation of dangerous structures; (22) regulation of sample medicines; N.J.S.A. 40:48-1.1 removal or demolition of dangerous buildings or structures; as well as N.J.S.A. 40:48-2.3 regulation of unfit buildings including those found to be "insanitary"; and N.J.S.A. 40:48-2.12(m)

ordinances regulating condition of rental property prior to new occupancy, including regulation for the purpose of "healthfulness" and "public health and safety".

Hence, a uniform policy is not needed in the sense that it will preclude a governing body from adopting ordinances specifically for the powers entrusted to it by statute, which is the case here pursuant to the Home Rule Act.

4. The State scheme is not so pervasive or comprehensive that it precludes coexistence of municipal regulation.

For the foregoing reasons, given the paucity of regulation in the State statutes specifically as to noise regulation, and given the fact that the Home Rule Act allows for this type of regulation by governing bodies, as apparent by the case law, it cannot be said that any State enactment is so pervasive or comprehensive that municipal regulation is not allowed. This is also true taking into account the state regulations. Here, the state regulation under the health powers are general of nature. Defendants submit that it would be contrary to the legislative intent to interpret this general attenuated power of a Board of Health to adopt by reference general codes, so as to compel the obliteration of the specific grant of statutory authority to municipal governing bodies in the Home Rule Act to enact ordinances "to prevent disturbing noises," which authority has specifically been found to be the underpinning of the noise ordinances in the cases mentioned above, including State v. Clarksburg Inn. Indeed, in any conflict between specific and general statutory language, the specific

should prevail. Brennan v. Byrne, 31 N.J. 333, 337 (1960); State v. Hotel Bar Foods, Inc. 18 N.J. 115, 128 (1955).

We should also note, in judging the comprehensiveness and pervasiveness of the supposed state regulation of noise in this context, that what the lower Court is saying is that it is the Model Nuisance Code which preempts. Section IV of that code deals with prohibition of certain noises or sounds and provides as follows:

> It shall be unlawful for any person to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him, or it, or upon any public street, alley or thoroughfare in this municipality, any unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of this municipality or any number thereof.

In Clarksburg Inn, supra, 375 N.J. Super. 624, the Court clearly related that in order to be enforceable against the challenge of vagueness, a penal ordinance must contain "specific, objective criteria for a violation to occur". Id. at 637. In Clarksburg Inn, the Court found that a standard of an audible noise at a distance of 100 feet from the building from which the noise emanated met that standard. But, no such objective standard is given in the Model Nuisance Code. Hence, if challenged, it likely would be found unenforceable. Therefore, Sea Bright, and any other municipality within the MCHRC, would be without any ability to regulate

noise outside of the Noise Control Act by the Court's decision below, despite Clarksburg Inn stating a municipality may regulate noise under the Home Rule Act, outside the limitations of the Noise Control Act. Id. at 638-39. Indeed, sections of the Model Nuisance Code have been struck down as unconstitutionally vague. State v. Golin, 363 N.J. Super. 474, 483 (App. Div. 2003).

5. The ordinance does not interfere with any legislative objective.

Ordinance No. 17-2017 does not interfere with any of the Legislature's objectives established in the Local Health Services Act or in the statutes dealing with local Boards of Health. The MCHRC is still able to perform all the duties and services needed to meet the standards of conduct as established by the Commissioner of Health or the Public Health Council. The Borough's ability to enforce a local ordinance to ensure peace and quiet for its residents does not impact the ability to maintain the environmental standards called for in the Local Health Services Act. Rather Ordinance No. 17-2017 only furthers the Legislature's specific enabling grant of authority for a governing body to be able to regulate disturbing noises.

POINT II

A READING OF THE HEALTH LAW TO PREEMPT THE MUNICIPAL POWER TO REGULATE DISTURBING NOISES UNDER THE HOME RULE ACT WOULD ACT AS AN IMPLIED REPEALER AND RENDER THAT PORTION OF THE HOME RULE ACT A NULLITY. (RAISED BELOW: DA (ORDER AND DECISION)

As related, there is explicit municipal power to regulate disturbing noises under the Home Rule Act. The Health Act, in turn, compels a municipality such as Sea Bright to have a Board of Health. In this instance the powers of the local Board of Health are now the domain of a regional health commission, the MCHRC. These bodies have the power to define nuisances and to adopt codes. The Court below said that this power preempts the governing body's power under the Home Rule Act. But because a municipality must have a Board of Health and, if as the lower Court says, the Board of Health has exclusive power to regulate noise, in all cases, no municipality may pass a noise related ordinance outside of the NCA. This renders the provision of the Home Rule Act dealing with disturbing noises meaningless and constitutes an implied repeal of same.

If the Health Act legislative scheme preempts the governing body's prerogative under the Home Rule Act, then it applies in all municipalities, again, except for those limited exceptions. The legislative scheme must apply uniformly or it is not truly a legislative scheme. If, according to the lower Court's logic, a local Board of Health's power and authority to take these actions preempts, no action under N.J.S.A. 40:48-1(8) can occur. Indeed, such a rule would apply outside the realm of noise and would apply wherever the health regulations of a Model Code adopted by a local Board of Health or a regional health commission touch.

The reasoning of the lower Court here would repeal provisions of the Home Rule Act and other stated powers of municipal governing bodies. Specifically, as to N.J.S.A. 40:48-1(8), because this section has not been explicitly repealed, the Court's reasoning would invoke an implied repealer. The Home Rule Act, adopted in 1917, appears to predate the Health Act and the Local Health Services Act. The Local Health Services Act was adopted as P.L. 1975, c. 329, effective April 1, 1976. The Health Act provisions appear to have been adopted at different times. The PHSCARA was adopted by P.L. 1950, c. 188. The statutes dealing with regional health commissions were adopted by P.L. 1938, c. 67. Hence, the court's ruling below results in these acts, on which the Court states preemption rests, repealing portions of the Home Rule Act. Because there is no expressed repeal of the Home Rule Act, the repeal is implied. However, implied repealers are not favored. They require a finding that the later statute be "utterly inconsistent or repugnant to the earlier." Board of Education of City of Sea Isle City, 196 N.J. 1, 16 (2008); Brewer v. Porch, 53 N.J. 167, 173 (1969); Department of Labor and Industry v. Cruz, 45 N.J. 372, 380 (1965); Goff v. Hunt, 6 N.J. 600, 606 (1951); Hotel Registry Realty Corp. v. Stafford, 70 N.J.L. 528, 536 (1904); State v. Drake, 79 N.J. Super. 458, 461 (App. Div. 1963). The later laws are not inconsistent or repugnant to the Home Rule Act, for all the reasons stated, not the least of which is that the Courts have upheld

substantially similar ordinances to the one present here on multiple times and as late as Clarksburg Inn in 2005.

Similarly, it would render the language of that section of the Home Rule Act regarding "disturbing noises" a nullity. The case law on statutory interpretation is plain. Statutory language should not be read by a Court in such a way as to render any phrase a nullity or redundant. Burgos v. State, 222 N.J. 175, 203 (2015) (citing Innes v. Innes, 117 N.J. 496, 509 (1990)); State v. Rangel, 213 N.J. 500, 512 (2013). Every word of a statute "is presumed to have import and none to be mere surplusage." Rangel, supra, 213 N.J. at 513 (citing State v. Regis, 208. N.J. 439, 449 (2011)). Further, when construing a statute, "[l]egislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless." Regis, supra, 208 N.J. at 449 (quoting Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 613 (1999)). As the Legislature has specifically included the language "disturbing noises" to the statute, it must mean what it says.

POINT III

THE TRIAL COURT ERRED IN FINDING ORDINANCE NO. 17-2017 UNCONSTITUTIONALLY OVER BROAD.

(RAISED BELOW: Da61; Da83-88.)

The trial court erred as a matter of law in finding Ordinance No. 17-2017 unconstitutionally overbroad. The Appellate Division's review in determining the validity of Ordinance No. 17-2107 is de novo. State v. Clarksburg Inn, 375 N.J.

Super. 624, 631 (App. Div. 2005). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Township Comm. Of Manalapan, 140 N.J. 366, 378 (1995). A trial court's determination as to the meaning of an ordinance is not entitled to any deference by the Appellate Division, rather the ordinance's plain language will be reviewed de novo. Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Twsp. Of Franklin, 448 N.J. Super. 583, 595 (App. Div. 2017).

The question of whether Ordinance No. 17-2017 was overbroad was not raised by the parties below, rather, Plaintiffs argued the Ordinance was vague. The trial court's Pretrial Order of August 15, 2018 sets forth four (4) issues to be determined at trial:

> 1. Whether Borough of Sea Bright's Ordinance No. 05-2017 ("the Noise Ordinance") is arbitrary, capricious or unreasonable.
> 2. Whether the Noise Ordinance complies with the New Jersey Noise Control Act, N.J.S.A. §13:1G-1 et seq. and regulations promulgated pursuant thereto.
> 3. Whether the Noise Ordinance is unconstitutionally vague.
>
> Da58.

The trial court Decision stated "it cannot find the Sea Bright Ordinance to be unconstitutionally vague" but the trial could did find, *sua sponte*, the Ordinance void for overbreadth.[6] Da83.

[6] The Plaintiffs did not challenge the Ordinance based on it being unconstitutionally overbroad. The trial court raised the issue *sua sponte* after briefing and oral argument and found the Ordinance to be unconstitutionally overbroad. The

Ordinance 17-2017 was enacted by the Borough to legislate noise nuisances within the Borough of Sea Bright. Like all legislative enactments, there is a strong presumption in favor of the validity of municipal ordinances. Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994).

> First and foremost, there is a strong presumption in favor of the validity of legislative enactments, including municipal ordinances. While the presumption may be rebutted, the affirmative burden placed upon a party seeking to overturn a statute or ordinance is a heavy one. The presumption is not overcome, and a legislative enactment will not be declared void unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt.
>
> Singer v. Twp. of Princeton, 373 N.J. Super. 10, 19–20 (App. Div. 2004). (internal citations omitted)

Further, in evaluating legislation and an inquiry into whether the Ordinance at issue is overly broad, substantive due process must be considered and the government's reach and intrusion into Constitutionally protected areas measured.

> The Legislation must reach "a substantial amount of constitutionally protected conduct," and "there must be a strong showing that the statute's deterrent effect on legitimate expression is real and substantial." The overbreadth concept "rests on principles of substantive due process" and "whether the reach of the law extends too far. The evil of an overbroad law is that in proscribing constitutionally protected activity, it may reach farther than is permitted or necessary to fulfill the state's interests."

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trial court found the Ordinance, similar to the ordinance at issue in State v. Clarksburg Inn, 375 N.J.Super. 633 (App. Div. 2005), not vague as the Ordinance specifically sets forth objective criteria for a violation to occur. Pa22.

> United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 35 (App. Div. 2001). (internal citations omitted)(emphasis added)

Substantive due process requires that the Ordinance have a legitimate purpose or "rational basis" and where a fundamental right is involved, due process will require a "more exacting" standard. Ibid.

Review of the plain language of the Ordinance and its potential "sweep" illustrates that the Ordinance is not overbroad.

A. Ordinance No. 17-2017 is clear on its face and serves a legitimate and rationale purpose.

The sections of Ordinance No. 17-2017 that the trial court found overbroad are referenced in the trial court's decision as §146-7(c) and (p):

> The following acts are declared to be loud, disturbing and unnecessary noise nuisances in violation of this article but said enumeration shall be not be deemed to be exclusive, namely:
>
> Shouting. The excessive shouting, screaming or loud taking of peddlers, hawkers, vendors, patrons, or others who disturb the peace and quiet of the neighborhood.
>
> ***
>
> Other noises. Any other continuous noise not enumerated above which is unreasonably loud, disturbing, unnecessary, and which annoys, injures or endangers the comfort, repose, health or welfare of others within the limits of the Borough.
>
> Da83.

The trial court found that the Ordinance's "proof of violation" by "plainly audible means as detected at more than fifty (50) feet from the property line from which the noise nuisance is emanating" reached too far and held the Ordinance "unreasonably restricts individual property owners/occupiers and allows officials an unconstitutional amount of discretionary power in its enforcement[.]" Da83; Da87. Interestingly, the trial court spent a considerable amount of time comparing the within case to the Clarksburg Inn decision, also a challenge to a noise ordinance, wherein the Appellate Division held the ordinance in question to be "neither vague nor overbroad" and the plain meaning of the ordinance to follow the law. State v. Clarksburg Inn, 375 N.J. Super. at 642. While the trial court agreed Ordinance 17-2017 was not vague considering the Clarksburg Inn decision, it sua sponte raised overbreadth, despite the striking similarities between the two ordinances. Da83.

The trial court stated "in light of the Appellate Division in State v. Clarksburg Inn the court cannot find that Ordinance No. 17-2017 is unconstitutionally vague." Da83. Yet the trial court appears to have missed the holding of the Clarksburg Inn decision wherein the Court also stated that the Millstone ordinance was not overbroad. The trial court finds Ordinance No. 17-2017 to be overbroad because the Ordinance "attempts to regulate unamplified voices that can be heard more than fifty feet away from a property line." Da83. However, Ordinance No 17-2017 does not differ in any material way to the Millstone ordinance that this Court found to be

neither vague nor overbroad. Both ordinances contain nearly identical language on "shouting" and "other noises" which this Court has upheld as not implicating constitutional rights and both set a perimeter for noise nuisances. Arguably Ordinance 17-2017 is more defined than the Millstone ordinance which states in part:

> 3-15.1 Noise Prohibited. It shall be unlawful for a person to make, continue or cause to be made or continued any loud, unnecessary or unusual noise or any noise which does or is likely to annoy, disturb, injure or endanger the comfort, repose, health, peace or safety of others.
> 3-15.2 Definition of Noise. Without intending to limit the generality of subsection 3-15.1, the following acts are hereby declared to be examples of loud, disturbing and unnecessary noise in violation of this section:
>
> a. Radios; Televisions; Phonographs. . . . . The operation of any radio receiving set, instrument, phonograph, machine or device so that it is clearly audible at a distance of **one hundred (100) feet** from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this section.
>
> b. Yelling; Shouting. Yelling, shouting, hooting, whistling or singing on the public streets, particularly between the house of 11:00 p.m. and 7:00 a.m., or at any time or place, which annoys or disturbs the quiet, comfort or repose of persons in any office, dwelling, hotel, motel or other type of residence or of any persons in the **vicinity**.
>
> c. Animals; Birds. . . . .
>
> d. Horns. . . . .
>
> Da103-Da104. (emphasis added)

Interestingly, a side-by-side analysis of the Millstone Ordinance 3-15.1 and Ordinance 17-2017 §146-7(p) reveal nearly identical language.

Further, the section of the Millstone Ordinance which sets forth noise violations and the 100 foot qualifier for such violations only pertains to subsection 3-15.2(a), versus Ordinance 17-2017 which states that proof of violation shall be determined by "plainly audible means as detected at more than fifty (50) feet from the property line from which the noise nuisance is emanating from" applicable to all subsections thereby providing far more specificity. Da104; Da113. A close look at the 100-foot distance versus the 50-foot distance, since the trial court seems to find the differential pivotal, illustrates a scenario that could easily be established where the 50-foot requirement is actually a greater distance. For example, if a home is set back 100 feet on its property, the 50-foot requirement really becomes 150 feet in Sea Bright since measurement begins at the property line versus only 100 feet from the structure where noise is emanating from in Millstone. The trial court, focusing on the very same language already adjudged by this Court in Clarksburg Inn to be reasonable, found Ordinance 17-2017 overbroad:

> The generally smaller lot sizes in Sea Bright do not provide a basis for permitting the ordinance adopted by Sea Bright, which permit subjective application of a rule that prohibits the sound generated by an unamplified human voice, during daytime hours, that can be heard 50 feet from the sound generator's property line and which "annoys, injures or endangers the comfort, repose, health or welfare or others within the limits of the Borough" to

> stand. When viewed from the applicable reasonableness standard, the Ordinance is overbroad.
>
> Da87.

When examined side by side, the Millstone Ordinance, which this Court found to be neither vague nor overbroad, and Ordinance 17-2017 use nearly identical language to describe prohibited noise.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." United States v. Williams, 553 U.S. 285, 293 (2008). Further, "[i]n an overbreadth challenge, the proper focus belongs on 'what the [law] covers,' not what regulators or legislators may have intended it to cover." Usachenok v. Dep't of the Treasury, 257 N.J. 184 (2024). The trial court construed Ordinance No. 17-2017 to include prohibitions on the unamplified human voice such as family members speaking with each other or shouts of children playing; the clear terms of the Ordinance do not reach this far. Nor does the trial court's emphasis on discussions at council meeting bear upon the clear language and reach of the Ordinance.

There are two sections of the Ordinance that the trial court points to in its analysis and determination that the Ordinance is constitutionally overbroad. Neither is overbroad when read in their clear context.

> We ascribe to the statutory words their ordinary meaning and significance and read them in context with related provisions so as to give sense to the legislation as a whole. It is not the function of this Court to "rewrite a plainly-written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language.
>
> DiProspero v. Penn, 183 N.J. 477, 492 (2005). (internal citations omitted)

The trial court expresses an opinion that the clear terms of the Ordinance could extend to "unamplified voices of family members speaking" or "shouting of children playing in a swimming pool or jumping on a trampoline" as reason to deem the Ordinance overbroad; however, in ascribing the statutory words their ordinary meaning this is simply not the case. Da84.

First, §146-7(c) specifically references "shouting", "screaming" or "loud talking", not conversation, or talking, or debate, and certainly not family members speaking to one another, but rather shouting which is in alignment with the purpose of the Ordinance, prohibiting noise nuisances. Da111. The Merriam-Webster Dictionary defines "shout" as a "loud cry or call" which is very different than the trial court's concern that the Ordinance would reach family member conversations. Further, the word "excessive" is utilized as a qualifying word in this section to explicitly set forth the extent of shouting, screaming or loud talking, that would be necessary to fall under the parameters of the Ordinance. Excessiveness implies an amount or degree too great to be reasonable or acceptable. The Ordinance puts a

rational and reasonable limiting parameter on this section of the Ordinance in the use of the word "excessive." Not only does this provision not go to the unamplified voices of family members speaking, shouting, would have to be excessive to be considered a nuisance under this Ordinance.

The trial court also takes issue with the language of §146-7(p) "Other noise", however this section is also limited by the clear terms of the Ordinance to effectuate the goal of prohibiting noise nuisances. Da113 Of importance to this section is the qualifying word "continuous" which is specifically defined in the Ordinance and the word "unreasonably." While the trial court seems to opine that shouting children playing in a swimming pool or jumping on a trampoline would be prohibited noise nuisances under the Ordinance, the language clearly reads otherwise. First, "continuous" is defined in the Ordinance to mean "any sound that is not impulsive sound" and "impulsive sound" is defined as "a single pressure peak or a single burst (multiple pressure peaks) that has duration of less than one second." Da110. A child playing and letting out an impulsive shout does not fall under the Ordinance. Further, any such noise must be deemed unreasonable to be a violation of the Ordinance and surely children playing is most reasonable.

The language of the Ordinance is both clear and reasonable. The trial court's decision to look behind the Ordinance and find scenarios of overbreadth is proscribed by the Supreme Court. The first step in an overbroad analysis is to

consider the text of the Ordinance to determine its scope, specifically looking at what the law covers, not what legislators may have intended, and in doing so here, the Ordinance sets forth noise nuisance prohibitions appropriately limited and defined, such that a look beyond the Ordinance's clear terms would be inappropriate. Usachenok, 257 N.J. at 198.

B. Ordinance No. 17-2017 is not unconstitutionally overbroad nor does it implicate a 1st Amendment right.

While the trial court does not specifically cite the First Amendment as the reasoning for its finding of overbreadth, it is clear from the trial court's opinion that the court held concern that the Ordinance could prohibit speech.

> The ordinance is also unconstitutionally overbroad, as it attempts to provide for subjective enforcement of a rule that prohibits sound generated by an unamplified human voice during daytime hours that can be heard a mere 50 feet from the sound generator's property line and which "annoys, injures, or endangers the comfort, repose, health or welfare of others within the limits of the Borough."
>
> Da88.

Overbroad laws can have the effect of deterring or chilling speech. The overbreadth doctrine considers the extent of the law's "deterrent effect on legitimate expression." State v. Hoffman, 149 N.J. 564,582 (1997).

> As this Court recently observed, "[o]verbreadth is unlike a typical facial challenge." "[I]t does not require a challenger to 'establish that no set of circumstances exists under which [a statute] would be valid.' " Courts may find that a law is facially invalid on overbreadth grounds "[i]f

> the challenger demonstrates that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'"
>
> Usachenok, 257 N.J. at 196 (2024)(internal citations omitted).

The trial court below performed no analysis of the plain language of each section called into question, rather, the trial court looked behind the law to discussions which took place during a Borough hearing addressing the predecessor ordinance to the Ordinance which is the subject of this appeal. While there can be no question that conversations such as family members speaking at a barbeque may be protected speech under the First Amendment, no prohibition on content is given and there is also no question or concern that the Ordinance "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." United States v. Hansen, 599 U.S. 762, 770 (2023). Indeed, the Ordinance, and its purpose of prohibiting noise nuisance, is clearly and concisely set forth.

CONCLUSION

For the foregoing reasons, the order of the trial court should be reversed.

Respectfully submitted,

RICHARD J. SHAKLEE

THOMAS BONFIGLIO, 1030 PARTNERS, LLC, and 1030 LIQUOR PARTNERS, LLC Plaintiffs-Respondents, v. BOROUGH OF SEA BRIGHT, and the MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF SEA BRIGHT, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO.: A-002253-23 CIVIL ACTION Sat Below: HONORABLE LINDA GRASSO JONES, J.S.C. SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY Docket No. MON-L-1883-17 Date of Submission: 8/22/2024

BRIEF FOR PLAINTIFFS-RESPONDENTS, THOMAS BONFIGLIO, 1030 PARTNERS, LLC, AND 1030 LIQUOR PARTNERS, LLC

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PRELIMINARY STATEMENT

This matter arises from a Complaint in Lieu of Prerogative Writs filed by Plaintiffs, Thomas Bonfiglio, 1030 Partners, LLC, and 1030 Liquor Partners, LLC ("Plaintiffs") challenging the Borough of Sea Bright's ("Defendant" or "Borough") enactment of its Noise Ordinance, Ordinance No. 17-2017 (the "Noise Ordinance"). The trial court properly found the Ordinance was void both because it was preempted by the health nuisance requirements of Title 26, and because it was unconstitutionally overbroad. Plaintiffs respectfully submit that the decision below rendering the Ordinance void should be affirmed.

Plaintiffs own and operate a restaurant and bar at 1030 Ocean Avenue in Sea Bright, known as "Tommy's Tavern + Tap" (also referred to herein as "Tommy's"). Tommy's is located in Sea Bright's BR Zone, which allows both residential use as well as numerous classes of business uses, including restaurants. In order to get approvals for Tommy's, Plaintiffs applied to the Sea Bright Planning Board. After multiple hearings, Plaintiffs withdrew proposals for live outdoor music after concerns were raised that the noise could disturb the neighbors. The Board carefully weighed the application after Plaintiffs accepted many conditions such as bringing outdoor patrons from a rear yard into a patio area after 10:00pm, enclosing the patio area, and installing drop down curtains over the rear dining area to reduce any noise emanating from the property.

Ultimately, the Board found that "the granting of the variances will have no substantial detrimental impact on surrounding properties nor will it substantially impair the intent and purpose of the zone plan and zoning ordinance."

The Borough of Sea Bright attempted to adopt a new noise ordinance in 2017, which Plaintiffs have challenged since its original enactment. Since then, it has undergone a number of iterations and Defendant has asserted a number of justifications for their authority to adopt such an ordinance. The first version of the Noise Ordinance was adopted as Ordinance No. 05-2017 on April 4, 2017. After Plaintiffs filed their Complaint challenging the Ordinance and asserting that Sea Bright failed to obtain approval from the New Jersey Department of Environmental Protection (the "DEP") pursuant to the New Jersey Noise Control Act of 1971, Sea Bright then submitted the ordinance to the DEP for approval, which was denied.

Rather than attempt to comply with the DEP's model, Sea Bright then amended the ordinance, removing certain objective decibel reading requirements. The new Noise Ordinance, Ordinance No. 17-2017 was adopted on October 17, 2017. Defendant initially argued that the Noise Ordinance "was adopted in accordance with the Borough's authority under N.J.S.A. § 26:3-45 to pass ordinances to declare and define what shall constitute a nuisance … ." (Pa55-56). When Plaintiffs argued that Defendants ceded the authority to adopt

health nuisance ordinances to the Monmouth County Regional Health Commission, Defendant's argument shifted to its current position, that the Home Rule Act authorizes its regulation of noise.

Much like a game of Whac-A-Mole, Plaintiffs pointed out that the Noise Ordinance is "not a proper ordinance under the nuisance code, it's not a proper ordinance under the [Noise Control Act]. And every time we squish it, it goes somewhere else on us." (2T:39-2 to 5) The trial court aptly found that the Noise Ordinance was preempted by the State's regulation of noise nuisances under Title 26.

The trial court also declared the Noise Ordinance void as its provisions addressing "loud talking" and "other noises" were unconstitutionally overbroad. These sections attempt to inappropriately regulate the unamplified human voice at any time and over a minimal distance. The court found that this could potentially tread on everyday conversations, and afforded unlimited discretion to an enforcing officer.

Defendants submit that the trial court's determinations that the Noise Ordinance is void as both preempted and overbroad were proper, and respectfully requests that the decision below be affirmed.

COUNTERSTATEMENT OF FACTS

Plaintiffs largely agree with the Statement of Facts as set forth in Defendants' Brief, but provide the facts set forth below for additional context.

TOMMY'S TAVERN + TAP

Plaintiffs collectively own and operate a restaurant and bar at 1030 Ocean Avenue in Sea Bright, known as "Tommy's Tavern + Tap" (or "Tommy's").[1] Tommy's is located within the Borough's BR zone. (Da63) The BR Zone establishes a mixed-use zone, permitting single family homes, government services buildings, and eight separate classes of permitted business uses. (Da63)

Plaintiff 1030 Partners, LLC, sought, and was granted, bulk variances and site plan approval for Tommy's from the Borough's Planning Board by way of Resolution dated March 24, 2015. (Pa1-10) The Borough's Planning Board examined and considered all details of the application for the restaurant. Plaintiffs later applied for amended site plan approval, and while they initially sought to have outdoor entertainment, including live bands, the Planning Board was concerned with the effect the outdoor entertainment would have on neighboring property. In light of the Planning Board's concerns, 1030 Partners, LLC withdrew its proposal for outdoor entertainment, and agreed to the

[1] Thomas Bonfiglio passed away on July 1, 2022 while the decision below was pending. Tommy's continues to be operated by the remaining Plaintiffs.

condition that "no outdoor speakers, no outdoor music or entertainment" would be present on the property. (Pa9) Outdoor seating areas, however, were approved by the Planning Board. Ibid. The Planning Board's Resolution noted that "the applicant proposes a complete upgrade of the property that was severely impacted by Superstorm Sandy, a major benefit to the public good as it is an investment in Sea Bright's future. . . . The structure will be aesthetically pleasing, and the applicant also intends to upgrade the site. With the withdrawal of the outdoor entertainment component, the Board felt that this was a good use for this site. . . . The Board found that the variances could be granted without any negative impact on the zoning ordinance or zone plan. The proposal is aesthetically pleasing, takes advantage of the river views, improves existing conditions and is a permitted use. . . . The Board found that the granting of the variances will have no substantial detrimental impact on surrounding properties nor will it substantially impair the intent and purpose of the zone plan and zoning ordinance." (Pa6-7)

Plaintiff, 1030 Partners, LLC, later applied to the Borough's Planning Board to allow additional seating for 79 patrons in the rear yard of Tommy's Tavern + Tap. On May 9, 2017, the Planning Board approved of this application, with the condition that the patrons move into the gated patio area after 10:00 p.m.; this was memorialized in the Resolution dated June 28, 2017. (Pa11-28)

THE NOISE ORDINANCE

The Borough's Noise Ordinance was formerly codified at Chapter 144 of the Code of the Borough of Sea Bright. That section was repealed on July 5, 2016 by Ordinance No. 20-2016. On April 30, 2015, the Borough Clerk emailed a proposed Noise Ordinance 06-2015 to David E. Triggs, Noise Coordinator for the Department of Environmental Protection, for review. (Pa29-37) By way of letter dated May 13, 2015, Triggs notified Sea Bright that "[a]ny noise ordinance submitted to the Department must be identical to the most recent [DEP Model Noise Ordinance.]" He further noted that Ordinance 06-2015 was not approved as it "significantly varie[d] from the [DEP Model Noise Ordinance.]" (Pa38)

On March 21, 2017, the Borough introduced Ordinance No. 05-2017, entitled "An Ordinance Amending Chapter 146, Nuisances, Article II, Noise Nuisances of the Code of the Borough of Sea Bright." On April 4, 2017, the Borough adopted Ordinance No. 05-2017. In light of the repeal of the Borough's Chapter 144, Ordinance No. 05-2017 then provided the entire noise code of the Borough of Sea Bright. (Da116-124) Plaintiffs filed the instant Complaint challenging the Noise Ordinance on May 18, 2017.

On July 19, 2017, the Borough Clerk emailed David E. Triggs, Noise Coordinator for the Department of Environmental Protection, a copy of the sections of the Borough Code which codified the Noise Ordinance adopted by

Ordinance No. 05-2017. In that email, the Borough Clerk stated that "[t]he Code refers to 'Noise' nuisances throughout and requires approval by the DEP." (Pa39) On July 27, 2017, David E. Triggs responded to the Borough Clerk's July 19 email, and again notified Sea Bright that "[a]ny noise ordinance submitted to the Department must be identical to the most recent [DEP Model Noise Ordinance.]" (Pa53) He further noted that sections of the Borough Code which codified the Noise Ordinance adopted by Ordinance No. 05-2017 was not approved as it "significantly varie[d] from the [DEP Model Noise Ordinance.]" Ibid.

On October 3, 2017, the Borough introduced Ordinance No. 17-2017, also entitled "An Ordinance Amending Chapter 146, Nuisances, Article II, Noise Nuisances of the Code of the Borough of Sea Bright." On October 17, 2017, the Borough adopted Ordinance No. 17-2017. In light of the repeal of the Borough's Chapter 144, Ordinance No. 05-2017 (the "Noise Ordinance") provides the entire noise code of the Borough of Sea Bright. (Da110-115) The revised Ordinance No. 17-2017 continued to prohibit the "loud talking" and "other noise" provisions complained of by Plaintiffs; it effectively only eliminated the requirement of proof by means of decibel readings for certain offenses. (Da112-113) Sea Bright's Noise Ordinance No. 17-2017 was neither submitted to the DEP for review, nor approved in writing by the DEP. (Da67)

LEGAL ARGUMENT

STANDARD OF REVIEW

On appeal, Plaintiffs challenge the trial court's determination that the Noise Ordinance was determined to be void as both preempted and overbroad. "A trial court's interpretations of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995). "We review *de novo* the issue of whether access to public records under OPRA and the manner of its effectuation are warranted." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). Of course, while the Appellate Division's review of questions of law is de novo, it may consider the trial court's interpretation of law persuasive. Kernahan v. Home Warranty Admin. of Fla., Inc., 236 N.J. 301, 316 (2019).

On the other hand, the trial court's findings of facts are subject to deference when supported by credible evidence on the record below. The Court in Rova Farms provided:

> [O]ur courts have held that the findings on which it is based should not be disturbed unless '* * * they are so wholly insupportable as to result in a denial of justice,' and that the appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter. That the finding reviewed is based on factual determinations in which matters of credibility are involved is not without significance. Findings by the trial judge are considered binding on

> appeal when supported by adequate, substantial and credible evidence. It has otherwise been stated that 'our appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,' and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions.
> [Rova Farms Resort, Inc. v. Investors Insurance Co. of America, 65 N.J. 474, 483-84 (1974)(internal citations omitted).]

Defendants submit that de novo review of the trial court's determination is warranted, but argue that finding that the Noise Ordinance is void is persuasive. The trial court's findings of fact regarding the potential restrictions the Noise Ordinance would have on ordinary conversations over the minimal distance of 50 feet should be subject to deference.

This matter also involves the review of a municipal ordinance. Ordinarily, municipal ordinances under court review are presumed valid and reasonable. State v. Clarksburg Inn, 375 N.J. Super. 624, 632 (App. Div. 2005). "However, because municipal court proceedings to prosecute violations of ordinances are essentially criminal in nature, penal ordinances must be strictly construed. A penal ordinance that fails to provide legally fixed standards and adequate guidelines for police and others who enforce the laws violates due process. While the ordinance or statute does not have to be specific in all regards, it should be 'afforded flexibility and reasonable brea[d]th,' given the nature of the

problem and the wide range of human conduct." Id. at 632 (emphasis added, internal citations omitted).

POINT I

THE TRIAL COURT CORRECTLY FOUND THAT THE BOROUGH'S NOISE ORDINANCE IS PREEMPTED BY EXISTING COMPREHENSIVE HEALTH NUISANCE LEGISLATION (Da60, Da80-82)

The regulation of noise in New Jersey implicates a variety of statutes, regulation, and case law. So, too, has the Borough's justification of its Noise Ordinance in its multiple forms. As examined below, the trial's court's finding that existing State law has preempted the Borough's Noise Ordinance was proper.

A. Preemption is warranted as the State has fully regulated the field of noise control.

Preemption, specifically in the context of the Noise Control Act, was addressed in detail in State v. Krause, 399 N.J. Super. 579, 583 (App. Div. 2008) as follows:

> Preemption is a 'judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State.' *Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of the Town of West New York,* 71 *N.J.* 451, 461 (1976) (citation omitted). In deciding whether preemption applies, we are obliged to take these considerations into account: (1) whether the ordinance conflicts with state law by prohibiting what the Legislature permits or by permitting what the Legislature prohibits; (2) whether the state law was expressly or impliedly intended to entirely govern the issue; (3) whether a uniform policy

> is needed; (4) whether the state enactment is so pervasive or comprehensive that a coexistent municipal regulation would be improper; and (5) whether the ordinance interferes with the Legislature's objectives. *Id.* at 461-62.

Further, a municipality cannot simply rely on a general grant of authority to regulate in a manner contrary to State law, as we now see in Defendants' attempts to rely on the Home Rule Act. The Appellate Division in Plaza Joint Venture v. City of Atl. City, 174 N.J. Super. 231 (App. Div. 1980) found that:

> [A]n ordinance properly enacted and within the police power of the municipality [of N.J.S.A. 40:48-2] will be invalid if it intrudes upon a field preempted by the Legislature. When the Legislature has preempted a field by comprehensive regulation, a municipal ordinance attempting to regulate the same field is void if the municipal action adversely affects the legislative scheme.
> [Id. at 238 (citing Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574, 586 (1979); Summer v. Teaneck, 53 N.J. 548, 554 (1969)).]

The Plaza Joint Venture court also noted that:

> A legislative intent to preempt a field will be found either where the state scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the state statutes or stands as an obstacle to state policy expressed in enactments of the Legislature.
> [Id. at 238 (citing Garden State Farms, Inc. v. Bay, 77 N.J. 439, 450, (1978)).]

As examined in more detail below, Plaintiffs submit that the existing extensive regulation of noise in New Jersey, whether it be general noise ordinances under the Noise Control Act, or noise nuisance ordinances under the

provisions of Title 26, are so pervasive in the field of noise regulation that Defendants' Noise Ordinance should be deemed preempted. The Noise Ordinance directly conflicts with the State's exemptions to the regulation of the unamplified human voice. If it is deemed to be a nuisance ordinance, it directly conflicts with the State's delegation of authority over noise nuisances to the Local Health Boards. The existing law in either field, whether "noise" or "noise nuisances", is pervasive and established, and leaves no room for attempted municipal regulation, especially which does not comply with the State's clear procedural requirements and grants of authority.

B. In enacting the Noise Ordinance, Defendants failed to comply with either the Noise Control Act or the noise nuisance provisions of Title 26.

In the past, New Jersey's municipalities were guided by the broad grants of authority under N.J.S.A. 40:48-1 (providing the ability to adopt ordinances that "Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises") and N.J.S.A. 40:48-2 (providing for the adoption of other "necessary and proper" ordinances for health, safety and welfare) in crafting localized noise ordinances. Those general provisions were "further refined" by the Noise Control Act of 1971 (the "NCA"), codified at N.J.S.A. 13:1G-1 to -23, which

provides for the adoption and enforcement of noise standards throughout the State. See State v. Krause, 399 N.J. Super. 579, 582 (App. Div. 2008). The NCA vests the Department of Environmental Protection ("DEP") with, among other things, the power to adopt rules to carry out the intent of the NCA. See N.J.S.A. 13:1G-4.

The DEP has codified its rules on noise control at N.J.A.C. 7:29-1.1 et seq. It, too, provides specific prerequisites for the passage and enforcement of municipal noise ordinances at N.J.A.C. 7:29-1.8 as follows:

> (a) A governing body of a municipality or county or board of health may adopt a noise control ordinance in accordance with the Noise Control Act of 1971, at N.J.S.A. 13:1G-21, provided that the ordinance shall be more stringent than the Noise Control Act or the regulations promulgated pursuant thereto, must be otherwise consistent with the Statewide scheme of noise control, and meets with the written approval of the Department.
>
> (b) Enforcement of a noise control ordinance is limited to the authorized enforcement agency as specified in the ordinance and enforcement actions shall be conducted in accordance with N.J.A.C. 7:29-1.7, Enforcement.
>
> [Emphasis added.]

Defendants confirmed that they did not submit the Noise Ordinance to the DEP for written approval, a mandatory prerequisite for the passage of ordinances that establish standards more stringent than the Act. (Da67) The DEP regulates sound emanating from commercial premises (such as Tommy's) based on specified decibel levels at N.J.A.C. 7:29-1.2. However, N.J.A.C. 7:29-1.5

provides exceptions from the noise limitations of N.J.A.C. 7:29-1.2. Specifically, N.J.A.C. 7:29-1.5(a)(11) provides that "The operational performance standards established at N.J.A.C. 7:29-1.2 shall not apply to any of the following noise sources: . . . 11. The unamplified human voice[.]" Accordingly, since this Noise Ordinance specifically attempts to regulate the unamplified human voice through its prohibition on "loud talking", it is both more stringent than the DEP regulations and inconsistent with the State's specific exemptions.

The DEP's guidance on the regulation of noise, while noting that such ordinances must be submitted to the Department to verify they are "consistent with the statewide strategy for noise control", does recognize that the NCA is not the only means of noise regulation in New Jersey. (Pa54) In addition to the NCA and regulations promulgated by the DEP, N.J.S.A. 26:3-45 allows for regulation of noise nuisances by local health boards, providing that "[t]he local board may pass, alter or amend ordinances and make rules and regulations to declare and define what shall constitute a nuisance in lots, streets, docks, wharves, vessels and piers, and all public or private places within its jurisdiction." (Emphasis added). While the Defendants specifically recognized and quoted from this section in its trial brief, citing to it as the authority for

adoption of the Noise Ordinance at page 14, they failed to recognize the grant of authority to the local board, instead noting that:

> The Borough adopted the Nuisance Ordinance to supplement the adoption of the Public Health Nuisance Code of New Jersey by specifically addressing noise nuisances. Thus, the Nuisance Ordinance was adopted in accordance with the Borough's authority under N.J.S.A. § 26:3-45 to pass ordinances to declare and define what shall constitute a nuisance . . . .
> [Pa55-56.]

Local boards are specifically established pursuant to N.J.S.A. 26:3-1, which provides that:

> There shall be a board of health in every municipality in this state, which board shall consist of members appointed or designated, or both, as provided by this chapter, except that in any municipality operating under laws establishing a form of government for such municipality under which the full powers of a local board of health can not be exercised by a local board of health so appointed or designated, the respective functions of a local board of health shall be exercised by such boards, bodies, or officers as may exercise the same according to law.

An alternative to individual local boards is for municipalities to join a regional health commission pursuant to N.J.S.A. 26:3-92. That section, in turn, provides that:

> Each regional health commission shall have jurisdiction in matters of public health within the geographic area of the participating municipalities. It shall succeed to all powers and perform all the duties conferred and imposed upon the municipal boards of health which it shall have superseded and, in addition, shall have all the powers and perform all the duties within the geographic area of the

> participating municipalities which by law are conferred and imposed upon any township, city or other local board of health in this State.

Sea Bright has joined the Monmouth County Regional Health Commission No. 1 (the "MCRHC"), and has therefore surrendered its authority over local health nuisances to the MCRHC. (Da63) In 1983, the MCRHC adopted an ordinance which adopts by reference the New Jersey Public Health Nuisance Code of 1953. (Da64) Section IV of the Public Health Nuisance Code of 1953, entitled "Prohibition of Certain Noises or Sounds", makes the following unlawful:

> to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him or it . . . any unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of this municipality or any number thereof.
> [Da64, Da97.]

And Section X, provides that the "Board of Health or its Enforcing Official" are responsible for enforcement of the Public Health Nuisance Code. (Da97)

Accordingly, Sea Bright clearly already has a "noise nuisance ordinance," and the Borough Council lacks the authority to alter the MCRHC's enactment. While Defendants now argue that the Noise Ordinance was adopted pursuant to

its grant of general municipal police power, numerous factors confirm that this was an attempt at adopting a "noise nuisance ordinance."

The history of the Noise Ordinance reflects that the Defendants failed to comply with either the Noise Control Act or the provisions of Title 26. Initial drafts of the proposed Noise Ordinance were mailed to the DEP in both 2015 and 2017 as required under the NCA, but neither was approved by the DEP. The Defendants then, apparently relying on the DEP's "Noise Ordinance versus Nuisance Code" guidance, concluded that removal of decibel measurements would result in the Noise Ordinance being considered a "Nuisance Code", and thus would not require DEP approval.

The Defendants then introduced the current version of the Noise Ordinance (Ord. 17-2017) on September 19, 2017, and held a public hearing on October 3, 2017. During that hearing, in response to a question about why the Noise Ordinance was being revised, the Borough Attorney explained as follows:

> MR. McLAUGHLIN: We're changing it for, for one reason. You said you weren't here at the last meeting. We did discuss it. We're changing – the ordinance was written by my office. The modifications were written by my office **for the specific purpose of making sure that this ordinance is a noise nuisance ordinance** and not a noise ordinance subject to the approval of the NJDEP, which is why the only changes relate to the elimination of the decibel readings and, and measures, and the ordinance –
> MS. ROSS: So it still eliminates the decibel reading? It still eliminates it?

> MR. McLAUGHLIN: It eliminates the decibel level. . . . And we're going – what we're going to do is we're going to revisit that in a separate noise ordinance, so that that would be subject to DEP approval. We want to make sure this ordinance is not subject to DEP approval.
> [Pa63-64.]

The clear language of the Noise Ordinance, as well as its context within the Borough's Code, also suggest that this is a nuisance ordinance. The Noise Ordinance adds an "Article II" entitled "Noise Nuisances" to the presently existing Chapter 146 of the Borough Code, entitled "Nuisances". Article I of Chapter 146 is entitled "Public Health Nuisance Code of New Jersey", and Section 146-1 had apparently attempted to adopt the Public Health Nuisance Code of New Jersey (1953), with the exception of Section IV. (Da100) As noted above, Section IV addresses the "Prohibition of Certain Noises or Sounds". Thus it appears that the Borough had intended to carve out that Section IV, and insert the provisions that are currently at issue in the Noise Ordinance as a substitute for those standardized noise nuisance provisions. However, also as examined above, the Borough has ceded its authority in this regard to the MCRHC, rendering this attempt invalid.

Defendants' authority for the Noise Ordinance has been a shifting target since the first version of the ordinance was adopted. First, Defendants sought DEP approval and were denied. Then, upon adopting the new version of the

Noise Ordinance, Defendants sought to justify it under Title 26, which Plaintiffs refuted. Finally, Defendants landed on the general grants of authority under the Home Rule Act. The trial court determined that Defendants' attempted regulation of noise constituted a noise nuisance ordinance which did not comply with the "comprehensive statutory and administrative framework to furnish public health services." (Da80) The trial court properly found that the Noise Ordinance was void since it was contrary to and preempted by the specific grants of authority over noise nuisances to local health boards (and in this case the MCRHC) provided by Title 26. (Da80-82)

C. The Home Rule Act cannot substitute as authority for the Noise Ordinance which is preempted by existing legislation.

After all other efforts at justifying the Noise Ordinance had failed, Defendants then relied on the general grants of authority to municipalities under the Home Rule Act of 1917 to legitimize its adoption. N.J.S.A. 40:48-1, provides that a governing body may adopt ordinances that "Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises", and N.J.S.A. 40:48-2 provides for the adoption of other "necessary and proper" ordinances for health, safety and welfare of the municipality and its inhabitants. Plaintiffs submit that if these sections are found not to be explicitly preempted in the area of noise regulation,

then they must give way to the specific grants of authority set forth in the Noise Control Act of 1971 and the Public Health Nuisance laws.

The authority involved in the regulation of noise in New Jersey spans multiple statutes and regulations. While statutes *in pari materia* are to be read together, it is well-recognized that "[w]hen there is a conflict between a general and specific act on the same subject, the latter shall prevail." Kingsley v. Wes Outdoor Advertising Co., 55 N.J. 336, 339 (1970). In other words, "where there is any conflict between a general and specific statute covering a subject in a more minute and definite way the latter will prevail over the former and will be considered an exception to the general statute[.]" State v. Hotel Bar Foods, 18 N.J. 115, 128 (1955)(quoting Hackensack Water Co. v. Division of Tax Appeals, 2 N.J. 157 (1949)).

The Appellate Division in State v. Krause, 399 N.J. Super. 579 (App. Div. 2008) noted that "The Legislature has authorized municipalities 'to prevent disturbing noises.' N.J.S.A. 40:48-1. That general authorization was further refined in the Noise Control Act of 1971 (the 'NCA'). N.J.S.A. 13:1G-1 to-23." (Emphasis added). The appellant in that matter was convicted of a violation of Hackettstown's noise ordinance, which provided a similar standard to that at issue

in Sea Bright's Noise Ordinance.[2] There, the issue of preemption was apparently not raised at trial, and the Appellate Division refused to consider it further, recognizing however that:

> The state law clearly contemplates and, indeed, expressly authorizes municipal ordinances regulating noise. The only noted limitations on municipal regulation of noise are that: (1) the local ordinance must be "more stringent" than any regulations issued under the NCA, *N.J.S.A.* 13:1G-21; and (2) the ordinance must be submitted for approval to the Department of Environmental Protection ("DEP").
>
> Defendant failed to present evidence in the municipal court or in the Law Division indicating that Hackettstown's ordinance was not more stringent than the pertinent regulation, *N.J.A.C.* 7:29-1.2(a), or that the ordinance had not been approved by the DEP. Since the latter point was not raised below and does not involve jurisdiction or substantially implicate a public interest, we will not consider it.
> [Id. at 583 (emphasis added).]

The Krause court further noted that "the determination of whether a municipal ordinance is more or less stringent than the [Noise Control Act] may require a determination by the DEP. Consequently, a local noise ordinance may be unenforceable against commercial entities unless the ordinance has received DEP approval." Id. at 584, n.3 (emphasis added).

Here, it is clear that Sea Bright's Noise Ordinance is more stringent than what the DEP permits under the Noise Control Act. Through its prohibition on

[2] Hackettstown's Ordinance prohibited the operation of a radio, television, or phonograph that is "clearly audible at a distance of one hundred [feet] from the building ... in which it is located[.]"

"excessive…loud talking", it seeks to regulate what is specifically exempted from the Noise Control Act – the unamplified human voice. And unlike in Krause, here the Defendants confirmed and the trial court recognized that the Noise Ordinance was neither submitted to the DEP nor approved by the DEP. Thus, to the extent the Defendants seek to rely on the Home Rule Act as authority for adoption of the Noise Ordinance, this court should find that the general authorizations for noise regulation under the Home Rule Act are preempted by the specific requirements of the NCA. The NCA and the DEP's regulations on noise pursuant thereto are a comprehensive means of addressing noise standards in New Jersey. The factors examined in Overlook Terrace and reiterated in Krause suggest that if the Noise Ordinance is found to be a noise control ordinance, Defendants cannot rely on the general provisions of the Home Rule Act and instead the Noise Ordinance should be preempted by the NCA.

Similarly, if the Noise Ordinance is found to be a noise nuisance ordinance, then as the trial court found, it is preempted by the nuisance ordinance requirements of Title 26. N.J.S.A. 26:3-45 requires that nuisance ordinances be passed by the local health board. Sea Bright has, along with many other municipalities, opted to utilize the MCRHC as a regional health board, thereby surrendering its authority to enact such nuisance ordinances under Title 26 to the MCRHC. Since the MCRHC is the entity responsible for adoption of

health nuisance ordinances in Sea Bright (and has in fact done so through its adoption of the Public Health Nuisance Code (Da108-109), which the trial court found contained provisions inconsistent with the Noise Ordinance), Defendants are preempted from attempting to usurp that jurisdiction and adopt their own noise nuisance ordinance.

Defendants claim that Malhame v. Demarest, 162 N.J. Super. 248, 258 (Law Div. 1978) supports their argument that Title 26 should not preempt the Noise Ordinance, and stands for the proposition that a separate "Common law nuisance claim dealing with noise continues to exist post adoption of the Noise Control Act". Db26. However, the facts of that case reflect that the municipal sirens at issue were found to be a nuisance by the Demarest board of health. The court noted that:

> On June 12, 1975 five residents … filed a 'formal complaint' in the form of a letter with the Demarest board of health charging the use of the sirens at present noise levels to be a nuisance under the local ordinance. On July 10, 1975 the board of health adopted a resolution finding that the noise levels from the sirens in their present locations represent 'a severe nuisance and possible health hazard to the residents of Demarest living in close proximity … . [Id. at 255 (emphasis added).]

The case does not reflect a separate common law noise nuisance, and instead reflects exactly what is argued herein, that the legislative and enforcement authority over noise nuisances is with the local board of health pursuant to Title 26.

Defendants also point to the decisions in State v. Holland, 132 N.J. Super. 17 (App. Div. 1975), Bynum v. Mayor & Township Committee, 181 N.J. Super. 2 (App. Div. 1981), certif. denied, 89 N.J. 440 (1982), State v. Friedman, 304 N.J. Super. 1 (App. Div. 1997), and State v. Clarksburg Inn, 375 N.J. Super. 624 (App. Div. 2005) for the proposition that the Home Rule Act can serve as authority for the adoption of the Noise Ordinance. All of those cases are distinguishable from the matter at hand. First, it is important to note that all such cases were decided prior to the Appellate Division's decision in State v. Krause in 2008, which as noted above specifically recognized the possibility of a municipal noise ordinance being preempted as the trial court found below. Indeed, all of those cases except for Clarksburg Inn were decided prior to the adoption of the DEP's preemption provision, N.J.A.C. 7:29-1.8, which specifically requires written approval of the DEP; that regulatory provision only became effective on June 19, 2000. The focus of all those cases was not whether the municipalities complied with State law and regulations, but instead were limited to the question of whether the ordinances at issue were unconstitutionally void as vague or arbitrary.

A review of the facts in each case confirms that they differ significantly from Sea Bright's Noise Ordinance. The ordinance in Holland prohibited "The making, creation or permitting of any unreasonably loud, disturbing or

unnecessary noise" and "The making, creating or permitting of any noise of such character, intensity or duration as to be detrimental to the life, health or welfare of any individual or which either steadily or intermittently annoys, disturbs, injures or endangers the comfort, repose, peace or safety of any individual" Holland, 132 N.J. Super. at 21. While the decision did not reflect the facts upon which the defendant was found guilty, the ordinance did not contain Sea Bright's same limitation against "loud talking" or "other noises" at issue in this matter.

In Bynum, the court addressed violations of an ordinance prohibiting "The transmission of radio signals and/or emissions causing any interference upon the visual and/or auditory operation of [television and other devices] in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants[.]" Bynum, 181 N.J. Super. at 4-5. The defendant was a radio operator attacking the ordinance under which he was issued summonses since his transmissions interfered with neighbors' electronic devices. Again, the unamplified human voice was not addressed in the ordinance or in the case.

In Friedman, the defendants were charged with violating an anti-noise ordinance because their dog repeatedly barked in the early morning hours, often waking up a neighbor. Friedman, 304 N.J. Super. at 3. There, the ordinance provided: "It shall be unlawful for any person to make, continue or cause to be made or continued any loud, unnecessary or unusual noise or any noise which

either annoys, disturbs, injures or endangers the comfort repose, health, peace or safety of others within the limits of the Township of Washington." Id. at 5. It also contained a provision specifically addressing frequent or continuous noise from animals. Ibid. It did not specifically prohibit the human voice.

And in Clarksburg Inn, the ordinance provided that "It shall be unlawful for a person to make, continue or cause to be made or continued any loud, unnecessary or unusual noise or any noise which does or is likely to annoy, disturb, injure or endanger the comfort, repose, health, peace or safety of others." Id. at 633. It also specifically prohibited noise from radios, televisions, musical instruments, and other devices. Ibid. The Clarksburg Inn was issued summonses because loud music from the establishment could be heard by neighbors. Again, the unamplified human voice was not explicitly prohibited and was not at issue.

While those cases all upheld the ordinances in question, none dealt specifically with the facts or issues seen in the present matter. None dealt with a specific prohibition on the unamplified human voice as Sea Bright seeks to now regulate. And none addressed an argument that the ordinances were preempted. Plaintiffs submit that those matters which all stem from municipal court decisions, based on limited facts and limited legal issues, should not inhibit this court's review and rejection of Sea Bright's Noise Ordinance.

While there do not appear to be any cases interpreting the Home Rule Act's provision addressing noise as being either preempted by or deemed less specific than either the NCA or Title 26, Plaintiffs submit that Gannon v. Saddle Brook Twp., 56 N.J. Super. 76, 81–82 (App. Div. 1959) offers guidance in an analogous situation. There, the plaintiff challenged the defendant Township's removal of plaintiff as superintendent of public works and the subsequent appointment of a new superintendent. The court was tasked with interpreting the separate provision of N.J.S.A. 40:48-1, providing that the municipality can "Prescribe and define, except as otherwise provided by law, the duties and terms of office or employment, of all officers and employees[,]" and the provisions of the later Township Act, N.J.S.A. 40:145-1 et seq., which at N.J.S.A. 40:145-13 provided that "All appointive officers, except where otherwise provided, shall hold office until January first next following their appointment." Specifically addressing the issue of what statute guided the superintendent's term, the court found:

> It is not to be doubted that with respect to the creation of offices and the fixing of terms of the same the Home Rule Act is to be regarded as the more general enactment and the Township Act as the more specific one, and it is a familiar rule of statutory construction that 'Where there is a seeming conflict between a general statute and a specific statute covering a subject in a more minute and definite way, the latter shall prevail over the former and will be considered an exception to the general statute.'
> [Id. at 81–82.]

The court then concluded that the specific provision of N.J.S.A. 40:145-13 established the term of the incumbent.

A similarly analogous result was found, again not in the context of noise but when dealing with an alleged public health nuisance, in the matter of Earrusso v. Township of East Hanover, 14 N.J. Misc. 96 (N.J. Sup. Ct. 1936). In that case, the plaintiffs challenged an ordinance that prohibited the dumping, depositing, or placing in the township of any garbage collected outside that township; plaintiffs operated a pig farm and had contracted with Morristown to cart in trash for use as pig food or fertilizer. There, as authority for the ordinance in question, the township had relied on a provision of the Home Rule Act "which by its terms gives the governing body of a municipality power to provide for the cleaning of streets of the municipality and for the collection, removal, and disposal of ashes, garbage, and other refuse." Id. at 97. The court found that that provision of the Home Rule Act, though its basic terms appeared to address garbage and refuse, "is clearly aimed at something different." Id. at 97. Instead, the court found that "Ordinance powers over matters therein pertaining to health are ordinarily conferred upon the local board of health [under the] Board of Health Act . . . It does not follow that because the presence of garbage may be harmful to health the township committee may legislate thereon." Id. at 98. The court held: "No authority having been shown for the exercise by the township

committee of legislative powers over the subject-matter, we conclude that the ordinance is void." Ibid.

Here, too, the Borough seeks to utilize the Home Rule Act's broad grant of general police powers instead of the more specific grants of authority in the NCA and the public health nuisance provisions of Title 26. Perhaps the Borough would arguably have the authority to pass an ordinance without DEP approval if it only addressed the noise emanated by the ringing of bells and crying of goods at auction, as that much is specifically provided by N.J.S.A. 40:48-1. However, to the extent that statute tacks on the phrase "and to prevent disturbing noises", it is undoubtedly general in nature. Those five words provide no framework or standards, unlike the NCA and regulations promulgated thereunder, and to borrow a phrase from the Earrusso court, that section of the Home Rule Act appears to be "clearly aimed at something different."

And to the extent the Borough relies on the "necessary and proper" or "police power" provision of N.J.S.A. 40:48-2 as authority for the Noise Ordinance, that section is clearly an even more generalized "catch-all" provision which, again, cannot overcome the specific statutes at issue. The Supreme Court in Wagner v. Mayor & Mun. Council of City of Newark, 24 N.J. 467, 475–77 (1957), examined the extent of this section as "an express grant of broad general police powers to municipalities." The Court stated:

> As the law now stands any municipality, in addition to any powers elsewhere more specifically granted, has authority by virtue of R.S. 40:48—2, N.J.S.A., to take such action 'as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and general welfare of the municipality and its inhabitants,' subject only to the limitation that such action not be prohibited by or inconsistent with the Constitution or the other statutes.'
> [Id. at 477 (emphasis added).]

Given the fact that any enactment pursuant to this police power provision would be inconsistent with either the NCA or the health nuisance provisions of Title 26, it too cannot provide the statutory authority Defendants seek.

In sum, if this is considered a Noise Ordinance, then the Borough has not met the mandatory requirement of obtaining written approval from the DEP under the Noise Control Act and regulations, and the Ordinance is void. If this is considered a Nuisance Ordinance, then the Borough has usurped the authority of regulation of nuisances that has been specifically granted to the MCRHC, and the Ordinance is void. Principles of statutory interpretation do not allow for a third "necessary and proper" Noise Ordinance that does not already fall into one of these two categories.

D. The Court's finding that the Noise Ordinance is preempted does not serve as an implied repealer of the Home Rule Act.

Finally, Defendants argue that a finding of preemption here results in an implied repealer of the Home Rule Act and render its language a nullity.

Plaintiffs submit that this is not the case as the Home Rule Act, NCA, and health nuisance provisions of Title 26 must all be read *in pari materia* so that the more specific acts serve as an exception to the former.

New Jersey courts have long expressed that an implied repealer must only result as a last resort. In Morris & E.R. Co. v. Comm'r of R.R. Taxation, 37 N.J.L. 228, 228 (Sup. Ct. 1874), aff'd, 38 N.J.L. 472 (1875), the Court found that:

> In construing a statute containing a general enactment, and also a particular enactment, the effort must be, in the first instance, to harmonize all the provisions of the statute, by construing all parts together, and it is only when on such construction, the repugnancy of specific provisions to the general language is plainly manifested, that the intent of the legislature, as declared in the general enacting part, is superseded.

The Home Rule Act's general language permitting municipalities to "Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises" found in N.J.S.A. 40:48-1 dates back to 1917. As to that provision, the Appellate Division in State v. Krause, 399 N.J. Super. 579, 582 (App. Div. 2008) stated "That general authorization was further refined in the Noise Control Act of 1971[.]"

Certainly, this single sentence of general authority can be read in conjunction with both the NCA and the noise nuisance provisions of Title 26.

The Home Rule Act is not repealed by the trial court's finding of preemption here, as municipalities can still enact ordinances addressing noise; they simply must do so in accordance with the State's requirements under the NCA. Alternatively, municipalities can act through their local health boards to adopt noise nuisance ordinances. While both add procedural nuance to the adoption of noise regulation, neither prohibits what the Home Rule Act permits. The trial court's finding that Defendants did not comply with those statutory requirements therefore does not serve as an implied repealer of the Home Rule Act.

POINT II

THE TRIAL COURT CORRECTLY FOUND THAT THE BOROUGH'S NOISE ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD (Da61, Da83-88)

The Borough's Noise Ordinance was rendered void not only on the grounds of preemption noted above, but additionally due to its unconstitutional overbreadth. Specifically, the prohibitions of the Noise Ordinance include "excessive … loud talking of … patrons, or others who disturb the peace and quiet of the neighborhood" and "any other continuous noise … which is unreasonably loud, disturbing, unnecessary, and which annoys, injures, or endangers the comfort, repose, health or welfare of others … ." The proof of such violations is merely "by plainly audible means as detected at more than 50

feet from the property line from which the noise nuisance is emanating or from within the receptor's premises in the event the source and the receptor share a common or abutting wall, floor or ceiling or are on the same property." These terms exceed the bounds of reasonableness, allow for unlimited discretion in enforcement, and necessarily prompt a subjective determination by an enforcing officer. The trial court aptly determined that such provisions cannot stand.

In arguing against this point on appeal, Defendants first note that the question of overbreadth "was not raised by the parties below, rather, Plaintiffs argued the Ordinance was vague[,]" and indicates that "The Plaintiffs did not challenge the Ordinance based on it being unconstitutionally overbroad. The trial court raised the issue *sua sponte* … ." Pb37, Pb37 n.6. However, Defendants are mistaken. While it is fair to say that Plaintiffs primarily argued that the Noise Ordinance was vague, overbreadth was indeed raised. In Plaintiffs' Amended Complaint, Paragraph 52 notes that "The Noise Ordinance is overly inclusive, overly vague, and fails to specify the activity that it seeks to prohibit." Da42 (emphasis added). And during the hearing on March 5, 2019, overbreadth was raised by Plaintiffs numerous times, and addressed by Defendants and the trial court.[3]

[3] Such examples include:

A. Noise ordinances cannot regulate conduct until it exceeds the bounds of reasonableness and acceptable behavior.

"[A]n ordinance proscribing conduct which causes loud, disturbing noise is violated when the conduct to which the ordinance is to be applied constitutes a nuisance." State v. Friedman, 304 N.J. Super. 1, 6–7 (App. Div. 1997)(citing State v. Holland, 132 N.J. Super. 17, 25-26 (App. Div. 1975)); see also State v. Clarksburg Inn, 375 N.J. Super. 624, 634 (App. Div. 2005). The Appellate Division in Holland additionally found that:

> From the beginning our cases dealing with nuisances based upon noise have held that the matter is a relative one, requiring the weighing of the competing interests and rights of the parties in each case, and that to constitute a nuisance and a disturbance of the peace a noise must be an [u]nreasonable one in the circumstances or cause [m]aterial annoyance. The leading case, and the one most often

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"And therefore we believe that the ordinance as it has been adopted is invalid and over-broad with respect to the activity it attempts to regulate." 2T11-16 to 19.

"That was my first argument. And then I'm also suggesting that there's an over-breadth problem with regulating unamplified voices." 2T51-17 to 20.

"But I think this way this was handled, this was wrong in this situation and I think that it's even over-broad." 2T54-4 to 6.

"MR. SHAKLEE: … "It's not under the Noise Control Act because it doesn't use measurable standards by way of decibels, and it's not broad or vague because it's very similar to the language of all those other cases that the Court specifically found were not over-broad and vague.
THE COURT: So overly broad and vague. I thought I was done, but we haven't spent a whole lot of time on that. Isn't it overly broad or vague when you, the actor is not put on notice of how they could violate the law, right?" 2T55-22 through 2T56-7.

> cited, is *Benton v. Kernan,* 130 *N.J. Eq.* 193, 21 *A.*2d 755 (E. & A.1941) which laid down the test that "A noise may constitute an actionable nuisance ... but it must be a noise which affects injuriously the health or comfort of ordinary people in the vicinity to an *unreasonable extent* ", and it "... becomes actionable only when it passes the limits of *reasonable* adjustment to the conditions of the locality and of the needs of the maker to the needs of the listener[.]"
> [Id. at 25-26. (emphasis added).]

The Friedman court elaborated, noting that "This ordinance, however, cannot proscribe reasonable noises associated with common, acceptable behavior. Such an application would deprive defendants of due process." State v. Friedman, 304 N.J. Super. 1, 10 (App. Div. 1997)(citing Coates v. Cincinnati, 402 U.S. 611, 614 (1971))(emphasis added).

In this matter, the trial court correctly found that the Noise Ordinance's general prohibition of "any unnecessary and unreasonable loud, disturbing noise which is plainly audible and either annoys, injures or endangers the comfort, repose, health or welfare of others…", as well as the specific prohibitions of "loud talking" and "other noises" strayed too far over the bounds of permissible regulation and into the realm of prohibiting common, acceptable behavior. The decision reflected the fact that these definitions:

> could clearly include the unamplified voices of family members speaking with each other while enjoying a backyard barbeque, or the shouting of children playing in a swimming pool or jumping on a trampoline; while those sounds, which can be made at a relatively high volume, is music to the ears of some, they would likely not be welcomed by all. Some individuals who are within 50 feet of the

> property line from which the voices emanate would potentially describe the sounds as annoying and/or endangering their comfort and repose.
> [Da84.]

Indeed, this point was demonstrated by Judge Thornton during the March 5, 2019 hearing. The court made clear the issues with the Noise Ordinance's application to everyday speech, especially in light of the limited detectable distance for proof of a violation:

> THE COURT: Read to me what, as far as who's loud and what's loud. I'm loud, right?
> MR. SHAKLEE: What is loud --
> THE COURT: I'm just loud. Right?
> MR. SHAKLEE: I think Your Honor's tone is always appropriate.
> THE COURT: I know I'm loud. I know I'm loud. You know, sometimes people say oh, you're yelling.
> …
> THE COURT: You gentlemen, your voice is not as loud as mine. So I don't know. Just being my regular self and, like I said, I don't think I go around screaming at the top of my lungs. But if I were to go out to a restaurant, you know, I have to make a conscious decision sometimes when I'm out to say, oh, I might be talking a little too loud.
> MR. SHAKLEE: Well Your Honor, the standard is 50 feet from the property line. If it's plainly audible as detected more than 50 feet from the property line. The plaintiffs did submit quite a few police reports as to this, none of which by the way, -- A summons has never been issued.
> THE COURT: That's like almost the back of the courtroom maybe. That's maybe from me to the back of the courtroom is about 50 to 60 feet.
> …
> THE COURT: So I'm in the courtroom, right, I don't use a microphone, right? I know for sure that somebody in the back of the courtroom can hear me. So the only difference between me being in my courtroom is me being at, I don't know, one of the restaurants

> in Sea Bright. I get a summons because somebody that far can hear me, when it would be expected for me to conduct myself that people can hear me in the courtroom?
> …
> THE COURT: But this is 50 feet, right?
> MR. SHAKLEE: 50 feet from the property line. So that gives a few more feet. And a difference was drawn because Sea Bright is much more dense in terms of residences.
> THE COURT: I don't know. So if your table, or the person is right within the property line, that's like an example of in the courtroom, right? Say my desk is the property line and I'm sitting, I don't know, right before the property line. And from where I am to where [the portrait of] Judge Lawson is at the wall, is probably a little over 50 feet. I would estimate he's probably about 60 feet. I did it, the 10 –
> …
> THE COURT: If Judy goes into the back of the courtroom -- Randy, go to the back of the courtroom where Judge Lawson is. How are you doing today, Randy?
> THE OFFICER: I can hear you.
> THE COURT: I didn't even talk loud that time. Sometimes I'm loud. I wasn't even loud that time.
> [2T56-14 through 2T60-10.]

Under the Noise Ordinance's definitions, basic speech and human activity would be subject to the whims of a complaining neighbor or responding officer. To allow this Noise Ordinance to stand would be especially problematic for Tommy's, a business establishment located in Sea Bright's BR Zone that the Planning Board determined would be "a major benefit to the public good" and "a good use for this site". The property boundary for Tommy's is located less than 50 feet from a neighboring condominium, and Tommy's cannot expect its patrons to sit in silence for fear that a disgruntled neighbor would deem their quiet to be disrupted by human speech. What is "loud", "excessive", or

"annoying" to some is inherently different, and this unbridled subjectivity is exactly what the trial court recognized and rejected.

Again, Judge Thornton touched on exactly this point during the March 5, 2019 hearing:

> MR. SHAKLEE: Well Your Honor, it also said it has to be excessive. It has to be excessive in order to meet that standard under the ordinance. It also has to be --
> THE COURT: So what if I'm just standing with it right there and I'm just having a conversation with somebody, right? Who's to determine -- What if I'm talking for five minutes and somebody says, listen -- You're a municipal attorney?
> MR. SHAKLEE: Yes, Your Honor.
> THE COURT: You are too. We all know there are people that is like the Hatfields and the McCoys in some towns, right? And somebody is going to complain because they don't like somebody, because they're standing outside on their property having a conversation over a glass of Merlot in their backyard. And it's very quiet over there where they, same distance, my house and where [the portrait of] Judge Lawson is, is another neighbor. And they're peeping out the window and they hear me talking to my husband. I wasn't even loud and Randy hears me. What prevents someone and why should I be subject to an ordinance violation when I just think I'm having a conversation with my husband? And I wasn't even loud. I'll say when I'm loud. And I know when I go loud.
> MR. SHAKLEE: Yes, Your Honor. But in order to make out a violation that a prosecutor would have to bring and that a municipal court would have to find, and a police officer would have to write in the very first place, it would also have to be excessive, unnecessary, unreasonable, loud, disturbing, and plainly audible.
> THE COURT: That was plainly audible.
> MR. SHAKLEE: It was, Your Honor. But it was not --
> THE COURT: Maybe somebody could say is excessive. Because maybe they could say Lisa, you should shut up and if you want to go talk to your husband, go in the house and talk to him.
> MR. SHAKLEE: Well, Your Honor --

> THE COURT: Don't sit out by your pool and have a conversation with him.
> MR. SHAKLEE: The question would be whether a police officer would write it. And whether the prosecutor would bring it, whether the municipal court would find it unnecessary, unreasonable and excessive. Two people talking to each other --
> THE COURT: That's not hard to do. In many towns, that's not hard to do to have a police officer -- What if they don't like Lisa? She's a little too mouthy and she's -- they're getting sick of her fighting with the other person. That's not hard to do. We all know it's not hard to do to write a summons. Boom. Here, I'm sick of hearing it from you. Here it is.
> MR. SHAKLEE: Well, --
> THE COURT: Do I have a reasonable expectation that me talking in my backyard with my not really loud voice that we know we can hear from over 50 feet away in the back of the courtroom, that somebody should write a summons because I'm having a conversation? I don't know.
> MR. SHAKLEE: I don't think it would fall under the terms of the statute, Your Honor. And again, Clarksburg Inn was 100 feet from the -- not from the property line but from the building. So, factoring that in, this is not that different from the 100 feet. I don't know how --
> THE COURT: That was. That doesn't seem unreasonable to you, that I can't have a regular conversation from where I am to before Judge Lawson's picture without somebody filing a summons?
> MR. SHAKLEE: I don't think that any summons would file from that, Your Honor.
> [2T60-12 through 2T63-11.]

Defendants argue that the trial court erred because it "construed Ordinance No. 17-2017 to include prohibitions on the unamplified human voice such as family members speaking with each other or shouts of children playing; the clear terms of the Ordinance do not reach this far." (Db43) Similarly, they note that "While the trial court seems to opine that shouting children playing in

a swimming pool or jumping on a trampoline would be prohibited noise nuisances under the ordinance, the language clearly reads otherwise. … A child playing and letting out an impulsive shout does not fall under the Ordinance." (Db45) While Defendants continue to argue that no summons would issue and such conversations would not be subject to the Noise Ordinance, the broad language of the Ordinance suggests otherwise.

Section 146-7(C)'s prohibition against "loud talking" violates the common thread of nuisance law repeated in the cases above. The only qualifiers necessary are that the loud talking be "excessive", "disturb the peace and quiet of the neighborhood", and be plainly audible 50 feet from the property line per Section 146-9. The determination of what is "excessive" or "loud" is far too subjective, and lacks any safeguards to prevent violations being issued for ordinary conversations. And while Defendants cite to the definition of a "shout" and argue that family members speaking would not be affected by the Noise Ordinance (Db44-45), this argument glosses over the fact that Section 146-7(C) is disjunctive, and that "loud talking" alone, rather than only that speech which amounts to "shouting," can qualify as a violation.

Similarly, Section 146-7(P)'s prohibition against "any other continuous noise which is unreasonably loud, disturbing, unnecessary, and which annoys, injures or endangers the comfort, repose, health or welfare of others" could be

triggered by any type of noise as long as it lasts for one second or more. Certainly, not all children limit their shouting while playing to under one second to be sure they meet Defendants' definition of "impulsive sound", and if they fail to adhere to that limitation and a neighbor is "annoyed", summonses would be fair game. Additionally, the lack of any time limitations on when these provisions against "loud talking" or "other noises" can be enforced could lead to such complaints being lodged in the middle of the afternoon.

These provisions of the Noise Ordinance could apply to common and acceptable actions and speech, and to allow the Noise Ordinance to stand would unreasonably burden the needs of Plaintiffs to allow patrons and guests to be able to speak in a restaurant and bar. It can hardly be said that human speech presents the same types of "material annoyance" as with other types of noise nuisances regulated by ordinance such as amplified music, sirens, automobiles, and construction equipment. Contrary to Defendants' assertions, the Noise Ordinance lacks sufficient safeguards to ensure that only "unreasonable" noises are prohibited, and allows far too much subjectivity in the determination of what constitutes a noise nuisance.

B. The Borough's Noise Ordinance is overly broad and regulates common behavior, including constitutionally protected free speech.

The unconstitutional overbreadth of the Noise Ordinance resulted in the trial court's proper determination that it is void. Defendants challenge the trial court's finding that the Noise Ordinance "provide[s] for subjective enforcement of a rule that prohibits sound generated by an unamplified human voice during daytime hours that can be heard a mere 50 feet from the sound generator's property line and which 'annoys, injures, or endangers the comfort, repose, health or welfare of other[.]'" Da88. Arguably it is even broader than that, since the prohibition of excessive loud talking found in Section 146-7(C) need not even "annoy, injure or endanger the comfort, repose, health or welfare of others," and instead need only "disturb the peace and quiet of the neighborhood."

Defendants apparently recognize the trial court's concern with the Noise Ordinance's prohibition of free speech, and argue that "While there can be no question that conversations such as family members speaking at a barbeque may be protected speech under the First Amendment, no prohibition on content is given and there is also no question or concern that the Ordinance 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" Db47. Plaintiffs can certainly agree that this is a content-neutral

ordinance, but obviously disagree that there is "no question or concern" that the overbroad terms of the Ordinance prohibiting "loud talking" impinge First Amendment rights.

Content-neutral restrictions on speech "may not substantially burden more speech than necessary to further the government interest[.]" E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 582 (2016). "A vague or overbroad statute, however, is likely to have a deterrent effect which is beyond that necessary to fulfill the state's interests. Rather than chance prosecution, people will tend to refrain from speech and assembly which might come within the statute's ambit." State v. Profaci, 56 N.J. 346, 350-51 (1970).

The concept of overbreadth "rests on principles of substantive due process which forbid the prohibition of certain individual freedoms." Id. at 350. The primary issue is "whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution." Ibid. The Profaci Court explained that:

> Frequently, the resolution of this issue depends upon whether the statute permits police and other officials to wield unlimited discretionary powers in its enforcement. If the scope of the power permitted these officials is so broad that the exercise of constitutionally protected conduct depends on their own subjective views as to the propriety of the conduct, the statute is unconstitutional.
> [Ibid.]

The Court further provided five factors to be taken into consideration when determining whether a regulation is overbroad:

> (1) whether a substantial interest worthy of protection is identified or apparent from the language of the statute; (2) whether the terms of the regulation are susceptible to objective measurement by men of common intelligence; (3) whether those charged with its enforcement are vested only with limited discretion; (4) if penal, whether some element of knowledge or intent to obstruct a state interest is required; and (5) whether its clarity is dependent upon manifold cross-reference to inter-related enactments or regulations. [Id. at 351.]

These standards support the trial court's decision declaring the Noise Ordinance overbroad. Almost all the Profaci factors compel a finding of overbreadth. First, the trial court identified its concern that free speech, clearly a substantial interest worthy of protection, is impacted by the language of the Noise Ordinance. While Defendants argue that it "does not differ in any material way to the Millstone Ordinance" (Db40), they fail to recognize that the Noise Ordinance specifically prohibits "excessive…loud talking" which is noticeably absent from Millstone's ordinance at issue in State v. Clarksburg Inn, 375 N.J. Super. 624 (2005). Without question, free speech merits protection from the unnecessary intrusion of this penal ordinance.

Next, significant concerns were raised with the complete lack of ability to measure potential violations of the Noise Ordinance objectively. During Sea Bright's April 4, 2017 public hearing on the adoption of the Noise Ordinance,

the governing body did not even try to provide a means of objective measurement when asked about it by the public. Instead, the governing body freely admitted that "it's subjective. But there's no way for it not to be subjective", "the police are going to make a subjective decision as to whether it is a noise. But there's no other way to do it", "it is subjective, so, you, I mean, if, if it's – you know, if – I don't know how to put it", and "it's a subjective noise, unfortunately." (Da85-86) The second factor also bleeds into the third, as the police officers charged with enforcement of the Noise Ordinance have unlimited discretion in determining what is "excessive", "loud", "unreasonable" and "annoying".

The fourth Profaci factor also weighs against the ordinance, as there is no element of knowledge or intent on behalf of the individuals making the noise. As Judge Thornton noted during the March 5, 2019 hearing, some people are "just loud", and depending on the peculiarity of the listener who may be "annoyed" or "disturbed" by their speech, a violation could occur due to the individual simply having a conversation.

As to the final factor, while clarity of the Noise Ordinance does not depend on reference to other enactments or regulations, it is hard to argue that the ordinance is clear on its face. For example, in order to figure out whether "other continuous noise" constitutes a violation, one must look to five separate sections

to gain a full understanding: Section 146-7(P) for a definition of "other continuous noise", Section 146-6 for internal definitions including both "continuous sound" and "impulsive sound", Section 146-5 to know that a noise nuisance is prohibited, Section 146-9 to determine the plainly audible standard and distance required, and Section 146-10 to understand the penalties involved. It is doubtful that a lay person attempting to understand what noise is prohibited would find that to be clear.

The trial court properly found that the above issues support a finding that the Noise Ordinance is overbroad and void. The lack of clarity and unchecked subjectivity, especially when combined with the minimal 50-foot measurement distance in a municipality with smaller lot sizes,[4] result in an ordinance that fails to pass constitutional muster.

CONCLUSION

The trial court was correct in determining the Noise Ordinance to be void, both as preempted and as overbroad. The State has regulated extensively with respect to noise, both through specific noise restrictions under the Noise Control

[4] It should be noted that Defendants argue that the 50-foot distance from the property line could hypothetically result in a larger measurement distance than the 100-foot standard utilized in Clarksburg Inn, providing an example of a home set back 100 feet on its property. Db42. A quick glance at Google Maps, however, reveals few (if any) properties in Sea Bright that are set back to any such extent, and instead the trial court recognized that individuals in Sea Bright must expect to hear sounds from neighboring properties more clearly than in a town with larger lots. Da86-87.

Act and Department of Environmental Protection regulations, as well as noise nuisance provisions delegated to the local health boards under Title 26. The Defendants fail to comply with either of these statutory schemes, and lack the authority to adopt the Noise Ordinance otherwise, warranting the finding that the Noise Ordinance is preempted. In addition, the finding of unconstitutional overbreadth due to the Noise Ordinance's attempted regulation of the unamplified human voice and complete subjectivity in determining what constitutes a violation was proper. For the reasons set forth herein, the Plaintiffs respectfully submit that the trial court's decision finding the Noise Ordinance to be void as both preempted and unconstitutionally overbroad should be affirmed in all respects.

Respectfully submitted,

DAVISON EASTMAN MUÑOZ PAONE, P.A.
ATTORNEYS FOR PLAINTIFFS-RESPONDENTS

BY: 
ANDREW J. BALL, ESQ.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002253-23
Appeal Filed: March 28, 2024

THOMAS BONFIGLIO, 1030 PARTNERS, LLC, and 1030 LIQUOR PARTNERS, LLC,

Plaintiffs-Respondents,

v.

BOROUGH OF SEA BRIGHT, and the MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF SEA BRIGHT,

Defendants-Appellants.

Civil Action

ON APPEAL FROM

SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY

DOCKET NO: MON-1883-17

SAT BELOW

Honorable Linda Grasso Jones, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS BOROUGH OF SEA BRIGHT, and the MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF SEA BRIGHT

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PRELIMINARY STATEMENT

The Borough brought the within appeal challenging the lower court's decision finding Sea Bright Municipal Ordinance 17-2017 ("Ordinance 17-2017") preempted by a Monmouth County Regional Health Commission ("MCRHC") Ordinance and unconstitutionally overbroad. The Honorable Linda Grasso Jones, J.S.C. found Ordinance 17-2017 void on the above noted grounds. While Respondents address these arguments on appeal, Respondents also inappropriately argue that the Noise Control Act ("NCA") preempted Ordinance 17-2017, which the Court below determined negatively and which was **not** appealed. In short, Respondents' argument that the NCA preempts Ordinance 17-2017 should be disregarded as the Trial Court determined that the NCA does not preempt Ordinance 17-2017 and Respondents failed to cross-appeal this issue.

From the start, the Borough has relied on its authority stemming from the Home Rule Act ("HRA"), N.J.S.A. 40:48-1, to regulate noise nuisances and enact Ordinance 17-2017. While Respondents seem to imply that that the Borough's position as to the HRA was somehow a last-ditch effort to justify the enactment of Ordinance 17-2017, "after all efforts at justifying the Noise Ordinance had failed", the procedural history is replete with reference to the Borough's position that Ordinance 17-2017 was properly enacted pursuant to the HRA. Moreover, though, the only preemption issue on appeal is whether the lower court properly found

Ordinance 17-2017 preempted by a MCRHC Ordinance, as Respondent did not cross appeal the lower Court decision that the NCA did not prevent Ordinance 17-2017.

The Borough properly enacted Ordinance 17-2017 pursuant to the HRA and this Court has repeatedly upheld such ordinances so enacted. Further, Ordinance 17-2017 is not overbroad. As set forth in the Borough's Appellate Brief and highlighted below, Ordinance 17-2017 is clear on its face, serves a legitimate and rationale purpose, and is in complete alignment with similar noise nuisance ordinances which have clearly defined terms to protect individual Constitutional rights.

STATEMENT OF FACTS

The Borough refers the Court to the Statement of Facts set forth in the Borough's Appellate Brief at pages two (2) through six (6). Given Respondents' lengthy discussion of and reliance on the NCA in their preemption argument, it is important to note that Judge Jones explicitly ruled on the applicability of the NCA and found "Plaintiffs contention that the Ordinance is not valid because defendants did not obtain approval from the NJDEP under the Noise Control Act is misplaced." Da82. The Court went on to state that NJDEP guidance and case law make it clear that the Borough was **not** required to enact an ordinance under the NCA. Ibid. The Court found that the NCA was not triggered and found Ordinance 17-2017 preempted because the Borough is a member of the MCRHC "to which it has relinquished its authority to regulate noise nuisances under the Health Law", which

is the only preemption issue on appeal. Da82, Da88. Therefore, Respondents references to the NCA, to any requirements set forth in the NCA, like submission of the ordinance to the New Jersey Department of Environmental Protection ("NJDEP") for approval, should be disregarded.

LEGAL ARGUMENT

STANDARD OF REVIEW

Appellate review of the Court's decision below is a de novo review. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Township Comm. Of Manalapan, 140 N.J. 366, 378 (1990). Further, as set forth in our initial brief, municipal ordinances are entitled to a presumption of validity and deference in review. First Peoples Bank v. Township of Medford, 126 N.J. at 413, 418 (1991); Lake Valley Associates, LLC v. Township of Pemberton, 411 N.J. Super. 501, 505 (App. Div.), certif denied, 202 N.J. 43 (2010). Just as the Appellate Court set forth in review of a Millstone Township municipal ordinance, review of a Constitutional challenge to a township's noise ordinance is de novo. State v. Clarksburg Inn, 375 N.J.Super. 624, 631 (2005).

Respondents' position that the trial court's "findings of fact" surrounding Ordinance 17-2017 as it relates to "ordinary conversations over the minimal distance of 50 feet should be subject to deference" is misplaced. There were no findings of

fact in this matter. Indeed, there was no hearing. This matter came before the court as an Action In Lieu of Prerogative Writs challenging Ordinance 17-2017. There was no testimony or review of any exhibits by witnesses at a plenary hearing. As such, the appropriate standard of Appellate Review is de novo and no deference should be shown to the lower court's decision.

POINT I

THE LEGISLATURE DID NOT PREEMPT THE HOME RULE PROVISIONS DEALING WITH NOISE BY ENACTING THE STATUTORY PROVISIONS ON LOCAL BOARDS OF HEALTH.

(RAISED BELOW: ORDERED AND DECISION (Da60; Da80-82)

Before addressing the Borough's authority to enact Ordinance No. 17-2017 pursuant to the HRA, we will briefly address the lower court's finding that the NCA did not preempt Ordinance No. 17-2017 since Respondents intertwined and spent a large part of their responding papers raising preemption arguments pursuant to the NCA.

A. The lower court found that New Jersey Noise Control Act, N.J.S.A. 13:1G-1 et seq. does not preempt Ordinance 17-2017 and this finding was not cross-appealed.

Respondents' emphasis on the NCA for a preemption argument must be set aside. The lower court entered an order on October 24, 2023 finding:

> in favor of plaintiffs, . . . that the Ordinance is preempted by the Monmouth County Regional Health Commission Ordinance because defendants and their local board are

> subject to the jurisdiction of the MCRHC in matters of public health, and the MCRHC already adopted an ordinance addressing noise nuisance, which preempts Ordinance No. 17-2017 adopted by defendants on the same subject.
>
> Da60.

The lower court's order is clear, and it is the focus of this appeal. Ordinance 17-2017 was found to be preempted by MCRHC ordinance not because of the NCA, which Judge Jones conclusively and rightfully found did not preempt nuisance ordinances. As such, pursuant to New Jersey Court Rule and case law, this argument has no place on appeal since a cross-appeal was not filed. See R. 2:3-4; Burbridge v. Paschal, 239 N.J. Super. 139, 151 (App. Div. 1990) ("A party may not attack the judgment under review without having appealed."); State v. Elkwisni, 190 N.J. 169, 175 (2007)("Because the State did not appeal from the judgment remanding the issue of the admissibility of defendant's statement to the police, that issue is not before us."); Reich v. Borough of Fort Lee Zoning Bd. Of Adjustment, 414 N.J.Super. 483, 499 n. 9 (App. Div. 2010)("a respondent must cross-appeal to obtain relief from a judgment.")

A brief note on the applicability of the NCA to Ordinance 17-2017. As briefed and argued below, and properly found by the lower court, a nuisance ordinance that regulates noise nuisances, which does not establish specific decibel levels for measuring sound, is **not** a noise control ordinance under the NCA, and therefore,

need not be submitted or approved by the NJDEP. The NJDEP has established guidance providing an overview of the difference between a noise ordinance and a nuisance code for local governments, as those terms are defined by the NJDEP, specifically, a noise ordinance will establish standards, measurable by a certified noise investigator using a calibrated sound meter, whereas a nuisance ordinance does not establish equipment measurable standards. Ordinance 17-2017 does not establish measurable noise standards; thus, it is not governed by the Noise Control Act and does not trigger a review by the NJDEP. Accordingly, and as found below, any argument of preemption of a nuisance ordinance by the NCA is misplaced. "NJDEP guidance and case law make it clear that defendants were not required to enact an ordinance under the Noise Control Act." Da82. Indeed, a municipality need not comport to the NCA decibel requirements in enacting noise nuisance ordinances. State v. Clarksburg Inn, 375 N.J.Super. 624, 637-639 (App. Div. 2005). Respondents' decision to include an argument of preemption based on the NCA is prejudicial to the Borough as the Borough does not have an opportunity in a reply brief to respond fully to what should have been a cross-appeal. See R. 2:6-7 (Reply briefs shall not exceed 15 pages while Appellant/Cross Respondent Reply shall not exceed 50 pages). The lower court entered a final decision as to preemption pursuant to the NCA and Respondents failed to cross-appeal. As such any reference to the NCA and preemption should be disregarded by this Court. Franklin Disc. Co. v. Ford, 27 N.J.

473, 491 (1958)("The plaintiff has not cross-appealed from the judgment below and we have held that a party, in order to attack the actions below which were adverse to him, must pursue a cross-appeal.").

B. Ordinance 17-2017 is properly enacted pursuant to the Home Rule Act. (Raised Below: Da60; Da80-82)

On page sixteen (16) of Respondents' brief we finally see discussion regarding the preemption issue on appeal, whether the lower court properly determined that the MCHRC's Ordinance preempts Ordinance 17-2017. The Borough is a member of the MCHRC; however, despite Respondents' assertions the Borough has not surrendered its authority over preventing disturbing noises to the MCHRC, nor does the MCHRC's Ordinance preempt Ordinance 17-2017. While the MCHRC did adopt an ordinance in 1983, which adopted by reference the New Jersey Public Health Nuisance Code of 1953 (Da64) (The "Model Nuisance Code"), this does not prohibit the Borough from enacting Ordinance 17-2017 pursuant to the HRA. Despite Respondents' repeated assertion that the Borough's reliance on the HRA as authority to enact Ordinance 17-2017 is seemingly a new argument, the Borough's papers below reference the HRA as a source of authority many times over. Indeed, the Borough, just like Millstone Township, has adopted Ordinance 17-2017 pursuant to the HRA.

Respondents argue that the lower court properly found Ordinance 17-2017 void because it was preempted by specific grants of authority over noise nuisances to the local health board (MCRHC) provided by Title 26; however, as set forth in the Borough's Appellate brief and expanded upon below, it is clear the Borough properly enacted Ordinance 17-2017.

The HRA specifically grants municipalities the ability to regulate noise. The specific power is located at N.J.S.A. 40:48-1, which provides that "The governing body of every municipality may make, amend, repeal and enforce Ordinances to: …

***

> 6. prevent vice, drunkenness and immorality; to preserve the public peace and order, to prevent and quell riots, disturbances and disorderly assemblages;
>
> ***
>
> 8. Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises; … (emphasis supplied).

As set forth in the Borough's Appellate brief, multiple cases before this Court have upheld ordinances regulating noise in a substantially similar way to how Ordinance No. 17-2017 does, citing to the HRA as the source for municipal authority. Respondents' argument that the HRA's specific grant of authority for municipal regulation of noise is somehow preempted because of the MCRHC's adoption of the Model Nuisance Code must fail. The only legislative powers the MCHRC has used, and the only ones that a regional Health Commission can use to

regulate in the field of noise, are the abilities of the local Board of Health to declare and define nuisances, N.J.S.A. 26:3-45, and the ability to adopt a code by reference pursuant to the PHSCARA. Neither the general power to declare and define nuisances, nor the ability to adopt a code by reference, are in any way specific to the regulation of noise. The Model Nuisance Code, refers to itself as "a general code" and relates that there are "more detailed and specific codes in special sanitation fields" that "have been adopted by reference by local boards of health". Da96. As set forth in the Borough's Appellate brief, we submit that this does not carry the degree of specificity needed to preempt a field, such that a municipality would not be able to provide for a specific ordinance to regulate noise per the HRA. Respondents' reference to State v. Krause, 399 N.J. Super. 579 (App. Div. 2008) is misplaced. While the Krause Court specifically discussed preemption in the context of the NCA, which is not applicable here, it is important to note the Krause Court reiterated the presumption of validity when it comes to municipal ordinances and found the ordinance in question was not preempted by the NCA. Respondents' citation to Krause and discussion of the NCA is once again misplaced as preemption pursuant to the NCA was decided below and not cross appealed; however, it is also not on point as Ordinance 17-2017 was enacted pursuant to the HRA and did not include specific decibel standards.

Respondents also contend that the Borough, by virtue of being part of the MCRHC, "surrendered" its authority to enact noise nuisance ordinances such as Ordinance 17-2017; however, the Borough did not cede the ability to regulate where it has explicit statutory authority, via the HRA, to regulate. As set forth above and in the Borough's Appellate brief (Db23-25), the Borough's participation in the MCRHC is through its local Boards of Health, under the authority of N.J.S.A. 26:3-84, wherein a regional health commission was formed and local Boards of Health join. The Borough did not relinquish its ability to enact noise regulating ordinances because of The Local Health Services Act, which does not mention noise at all, but is rather a general law to ensure municipalities meet a "program of health services meeting the 'standards of performance', as determined by the Commissioner" of Health. N.J.S.A. 26:3A2-10.

Respondents next launch into a review of case law cited in the Borough's Appellate brief and contend all are distinguishable from the matter herein. Respectfully we disagree. As stated throughout this reply, once again the Respondents are inappropriately turning to the NCA as a basis for preemption when it was specifically determined by the lower court that the NCA did not apply. Further, State v. Holland, State v. Bynum and State v. Friedman, all cited in the Borough's Appellate brief, refer to the HRA as authority for the respective municipality's enactment of noise ordinances. The fact that the Court in Krause,

which did not find the ordinance at issue to be preempted, recognized the potential preemption power of the NCA in defined circumstances does not mean the Krause case is applicable herein. In fact, Krause referenced the State v. Clarksburg Inn case, and notes that it sustained a "virtually identical noise ordinance, rejecting defendant's claim that it was unconstitutionally vague." Krause, 399 N.J.Super. 579, 584 (App. Div. 2008). Respondents go on to attack the omission of the unamplified voice in the Holland, Bynum and Friedman ordinances; however, this has nothing to do with whether MCRHC preempts the field. Indeed, the Model Nuisance Code, which respondent maintains preempts Ordinance 2017-17, regulates the unamplified human voice[1]. Da 97. Hence, Respondents argue both that an ordinance cannot regulate human voice and that the Borough's ordinance is preempted by an ordinance that does just that.

Respondents admit there is no case interpreting the HRA's provision addressing noise as "being either preempted by or deemed less specific than either the NCA or Title 26" yet points to Gannon v. Saddle Brook Twp. 56 N.J. Super. 76 (App. Div. 1959) as authority for the proposition that the HRA can in fact be

[1] Although not mentioned in the Appellate Division decision in Clarksburg Inn, the Millstone ordinance which was upheld in that decision also regulates the unamplified human voice ("yelling, shouting, hooting, whistling or singing in the public streets …"). Da 104. In addition, for purposes of brevity, the Borough directs the Court to its Appellate brief and the review of applicable case law for further argument. (13-14; 21-22; 32-33).

preempted by another more specific State statute. The Borough does not argue with this position; however, it is not pertinent to the matter herein where the HRA is more specific that the nuisance laws under Title 26 which are not specific. The Respondents' reference to Earruso v. Township of East Hanover, 14 N.J. Misc. 96 (N.J. Sup. Ct. 1936) is also not relevant as it is (1) not a noise nuisance and (2) by its terms is more specific than the HRA. Respondents miss the mark. Here, the HRA is more specific than Title 26, which does not even mention noise, and as such the Borough properly enacted Ordinance 17-2017 pursuant to the HRA.

C. The lower court's finding that Ordinance 17-2017 is preempted by the MCRHC Ordinance acts as an implied repealer of the Home Rule Act.

(Raised Below: Da60a (Order and Decision)

The Borough relies on its argument set forth in its Appellate Brief and responds to Respondents' argument by stating any reference to the NCA is inappropriate for the reasons set forth above, but specifically because the trial court set forth a decision stating the NCA did not preempt Ordinance 17-2017 and that decision was not cross appealed by Plaintiffs. Further, notwithstanding the above, Respondents' reference to the NCA as discussed in the Krause matter misses the mark. The NCA is a different statutory scheme than the HRA, and it sets forth entirely different law whereby a municipality can act under either. Indeed, as the Clarksburg Inn Court found, both the HRA and the NCA are different laws under which a municipality can act. Clarksburg Inn, 375 N.J. Super. 624, 638-639 (App.

Div. 2005). Setting the NCA aside, as it should be given it was not cross appealed, and looking solely at the lower court's decision that the MCRHC ordinance preempted Ordinance 17-2017, the reasoning of the lower Court here would repeal provisions of the HRA and other stated powers of municipal governing bodies. Db 35-36.

POINT II

THE TRIAL COURT ERRED IN FINDING ORDINANCE NO. 17-2017 UNCONSTITUIONALLY OVER BROAD.

(RAISED BELOW: ORDERED AND DECISION (Da60; Da80-82)

The Borough relies on its Appellate brief and legal arguments and respectfully submits that the lower court's decision that Ordinance 17-2017 is over broad is in error. The Borough takes the opportunity here to address several of the misstatements set forth in the Respondents' brief on the issue of overbreadth.

First, the Borough disagrees with Respondents' assertion that the issue of overbreadth was raised below in Respondents' Amended Complaint. Indeed, the Fifth Count of Respondents' Amended Complaint is entitled "Void For Vagueness." Da42. A reference to Ordinance 17-2017 being "overly inclusive" in paragraph 52 does not raise a new cause of action for overbreadth which is an entirely separate issue. Da42. Respondents use of the word "over-broad" in its arguments below also does not create a separate cause of action. Case law clearly requires a cause of action to be specifically plead with a statement of facts on which a claim is based, showing

the pleader is entitled to relief and a demand for judgment of that relief. R. 4:5-2. "Pleadings must fairly apprise the adverse party to the claims and issues to be raised at trial." Jardine Estates, Inc. v. Koppel, 24 N.J. 536, 542 (1957). Here, Respondents' Amended Complaint fails to plead overbreadth and it was not listed in the Pre-trial Order or briefed below. As such, the Borough relies on its argument that Respondents never properly raised the over broad cause of action and that it was raised *sua sponte* by the trial court, which was prejudicial to the Borough.

Respondents go on to argue that Ordinance 17-2017 is over broad, failing to recognize the limiting criteria within the ordinance to assure its reasonableness and Constitutional application. Indeed, Respondents give short shrift to the Clarksburg Inn case wherein this Court notably found the municipal ordinance in question, nearly identical to Ordinance 17-2017, was neither overbroad nor vague. Respondents only argue that the Millstone Ordinance in the Clarksburg Inn case did not include Ordinance 17-2017's "excessive . . . loud talking" parameter under the definition of noise nuisances. First, Respondents misstate Ordinance 17-2017's definition. Ordinance 17-2017 clearly limits and defines what constitutes a noise nuisance regarding "shouting":

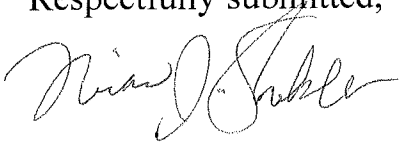
> Shouting. The excessive shouting, screaming or loud talking of peddlers, hawkers, vendors, patrons, or others who disturb the peace and quiet of the neighborhood.
>
> Da111.

When read in context, the word "of" qualifies who this is directed towards, i.e. those who "disturb the peace and quiet of the neighborhood". It's a subset of "noise nuisances" which are categorized as "any unnecessary and unreasonable loud, disturbing noise which is plainly audible and either annoys, inures or endangers the comfort, repose, health or welfare of others within the limits of the Borough." Da110. There is no guessing here, the ordinance is as clear, if not more defined, then the Millstone Ordinance in Clarksburg Inn. Ordinance 17, 2017, much like the Millstone Ordinance, is neither vague nor overboard when read in its clear context.

CONCLUSION

For the foregoing reasons, and those already set forth in the Borough's Appellate brief, the order of the trial court should be reversed.

Respectfully submitted,



RICHARD J. SHAKLEE