

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4083-15T1

SPARROWEEN, LLC d/b/a  
CIGAR EMPORIUM and RICHARD  
YANUZZI,

Plaintiffs-Appellants,

v.

TOWNSHIP OF WEST CALDWELL,  
TOWNSHIP OF WEST CALDWELL  
BOARD OF HEALTH and WILLIAM  
WALLACE, INDIVIDUALLY AND  
IN HIS CAPACITY AS HEALTH  
OFFICER OF THE TOWNSHIP OF  
WEST CALDWELL,

Defendants-Respondents.

**APPROVED FOR PUBLICATION**

**November 14, 2017**

**APPELLATE DIVISION**

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Argued telephonically October 3, 2017 –  
Decided November 14, 2017

Before Judges Reisner,<sup>1</sup> Gilson, and Mayer.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Docket No. L-1966-  
16.

Steven J. Martino argued the cause for  
appellants (Iacullo Martino, LLC, attorneys;  
Mr. Martino, on the brief).

Andrew Gimigliano argued the cause for  
respondents (O'Toole, Scrivo, Fernandez,  
Weiner, Van Lieu, LLC, attorneys; Juan C.

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<sup>1</sup> Judge Reisner did not participate in oral argument. She joins  
the opinion with the consent of the parties. R. 2:13-2(b).

Fernandez, of counsel; Anthony D. Capasso and Michael Garcia, on the brief).

The opinion of the court was delivered by  
GILSON, J.A.D.

Plaintiffs appeal from an April 18, 2016 order that dismissed their prerogative writs action and denied their request to invalidate a municipal smoking ordinance. Plaintiffs primarily argue that the New Jersey Smoke-Free Air Act (the Smoke-Free Act), N.J.S.A. 26:3D-55 to -64, supersedes the municipal ordinance. We affirm because the ordinance is valid and is not superseded by the Smoke-Free Act.

I.

Plaintiffs are Sparroween, LLC, d/b/a Cigar Emporium (Sparroween) and Richard Yanuzzi, the sole owner of Sparroween (collectively, plaintiffs). Since June 2015, Sparroween has operated a tobacco retail store in West Caldwell.<sup>2</sup> One-third of the store consists of sale space for purchasing cigars, pipe tobacco, and related accessories. The remainder of the store consists of seating areas for customers.

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<sup>2</sup> At oral argument, counsel for the parties informed us that Sparroween has ceased operating the store. Counsel for plaintiffs also represented that the store might reopen if the ordinance was invalidated.

In early 2014, Sparroween submitted an application to the West Caldwell Planning Board (the Planning Board) for site plan and development approval to open a tobacco retail establishment. The application stated that Sparroween's intent was to sell cigars, pipe tobacco, and various accessories, and that the premises would have seating areas where customers could smoke tobacco products purchased from the store. The Planning Board forwarded plaintiffs' application to other Township officials, including the Board of Health and the Health Officer.

In response, the Health Officer submitted a memorandum to the Planning Board and Sparroween, commenting on the application and identifying certain "requirements" for the application (the Memorandum). The Memorandum noted that for Sparroween to receive a tobacco retail establishment waiver under the Smoke-Free Act, plaintiffs would need to submit a notice of claim for exemption. In the Memorandum, the Health Officer also suggested certain conditions, including that: (1) the establishment be a "cash and carry" business, "with the general purpose of purchasing product[s] for off-premise[s] consumption[;]" and (2) "pre-purchase sampling shall be limited to no more than 3 minutes prior to making a multi-unit purchase from the [tobacco retail establishment]."

Thereafter, the Planning Board held a hearing on Sparroween's application. At the hearing, the chairman of the Planning Board informed Sparroween that if its application was approved, the approval would only cover its use as a retail store and a lounge for customers. Thus, the approval would not cover indoor smoking. In response, representatives of Sparroween acknowledged that they would be subject to regulatory requirements to get approval for indoor smoking.

Following the hearing, the Planning Board approved Sparroween's application, and on April 21, 2014, it issued a resolution approving the application for "the retail sale of [t]obacco products and accessories." The resolution was conditioned on Sparroween complying "with all [f]ederal, state and local laws, rules and regulations[.]" The resolution also noted that Sparroween had read the recommendations of the Health Officer set forth in the Memorandum.

Following receipt of its development and site plan approval, Sparroween leased and renovated the premises. In June 2015, Sparroween opened Cigar Emporium. In August 2015, the Health Officer issued a notice of violation to Sparroween for failing to file a claim for exemption of a tobacco retail establishment under the Smoke-Free Act. Sparroween eventually submitted the claim for exemption on August 31, 2015.

In early December 2015, the West Caldwell Board of Health passed an ordinance governing smoking inside tobacco retail establishments (the Smoking Ordinance). Under that ordinance, smoking was restricted to "pre-purchase sampling" and was limited to "no more than 2 minutes[.]" The ordinance also required operators of tobacco retail establishments to register with the Board of Health and to obtain a license from the Township's Health Officer.

Later that month, on December 24, 2015, the Health Officer sent Sparroween a notice of violation of the Smoking Ordinance for allegedly allowing "continuous smoking" inside Cigar Emporium. The notice directed Sparroween to cease allowing smoking and stated that failure to comply would result in the issuance of summonses and the imposition of fines. Counsel for Sparroween contacted the Board of Health, but the parties did not resolve their differences.

Thereafter, on March 19, 2016, the Health Officer came to Cigar Emporium, found patrons smoking, and issued four summonses to Sparroween for violations of the Smoking Ordinance.<sup>3</sup> In response, on March 21, 2016, plaintiffs filed an order to show

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<sup>3</sup> Plaintiffs alleged that the Health Officer also issued summonses to five customers who were found smoking inside Cigar Emporium. The individual customers, however, were not parties to the matter in the trial court and there is no issue concerning the individual customers before us on this appeal.

cause seeking temporary restraints against the enforcement of the Smoking Ordinance. Plaintiffs also filed a verified complaint for declaratory judgment and in lieu of prerogative writs, naming as defendants the Township of West Caldwell, the Township Board of Health, and the Township Health Officer. The complaint sought a declaration that the Smoking Ordinance was illegal and void.

The trial court initially granted the temporary restraints and set a return date for a hearing. Defendants filed opposition to the restraints, and a motion to dismiss the complaint. After hearing oral argument on April 12, 2016, the trial court entered an order vacating the temporary restraints and dismissing plaintiffs' complaint with prejudice. The court explained the reasons for its ruling in a cogent decision read into the record. In short, the court held that the Smoke-Free Act did not supersede the Smoking Ordinance. The court also held that the Smoking Ordinance was a validly enacted health ordinance and plaintiffs were not entitled to declaratory relief.

## II.

On appeal, plaintiffs make three arguments, contending that: (1) the Smoking Ordinance is not valid because it is superseded by the Smoke-Free Act; (2) alternatively, the Smoking Ordinance operates as a land use ordinance and is not applicable to plaintiffs' non-conforming pre-existing use; and (3) the trial

court erred in dismissing their complaint before allowing discovery. We are not persuaded by any of these arguments, and we affirm the trial court's April 18, 2016 order.

A. The Smoke-Free Act Does Not Supersede the West Caldwell Smoking Ordinance

The primary issue on appeal is whether the Smoking Ordinance is superseded or preempted by the Smoke-Free Act. That issue is a question of law, which we review de novo. McGovern v. Rutgers, 211 N.J. 94, 108 (2012).

The Smoke-Free Act generally prohibits smoking of tobacco in an indoor public place or workplace. N.J.S.A. 26:3D-58. An indoor public place includes a "structurally enclosed place of business, commerce or other service-related activity," including a for-profit privately owned structure, "which is generally accessible to the public . . . ." N.J.S.A. 26:3D-57.

In enacting the Smoke-Free Act, the Legislature found that tobacco is a leading cause of preventable disease and death in New Jersey, tobacco smoke constitutes a substantial health hazard to the non-smoking "majority" of the public, and it was in the public's interest to prohibit smoking tobacco products in indoor places of public access. N.J.S.A. 26:3D-56.

The Smoke-Free Act allows for certain exemptions and states that its prohibitions do not apply to any "tobacco retail

establishment[,]" "cigar bar[,]" "cigar lounge[,]" or other identified places. N.J.S.A. 26:3D-59. The Smoke-Free Act then defines "tobacco retail establishment", "cigar bar", and "cigar lounge". N.J.S.A. 26:3D-57.

The Smoke-Free Act also supersedes other statutes, municipal ordinances, rules, or regulations concerning smoking in an indoor public place or workplace, with certain exceptions. N.J.S.A. 26:3D-63. Specifically, the Smoke-Free Act states:

The provisions of this act shall supersede any other statute, municipal ordinance and rule or regulation adopted pursuant to law concerning smoking in an indoor public place or workplace, except where smoking is prohibited by municipal ordinance under authority of [N.J.S.A.] 40:48-1 or 40:48-2 or by any other statute or regulation adopted pursuant to law for purposes of protecting life and property from fire or protecting public health, and except for those provisions of a municipal ordinance which provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under this act.

[Ibid.]

Plaintiffs rely on N.J.S.A. 26:3D-63 and argue that it supersedes the Smoking Ordinance. In that regard, plaintiffs contend that the Smoke-Free Act allows for their operation of a tobacco retail establishment and does not limit the amount of time that customers can smoke in the establishment. Plaintiffs then contend that the superseding provision of the Smoke-Free Act

grandfathered municipal ordinances that pre-dated the 2006 enactment of the Smoke-Free Act, but prohibited all future ordinances that are more restrictive. We disagree with this suggested interpretation because the plain language of the Smoke-Free Act does not support such a reading.

West Caldwell's Smoking Ordinance requires tobacco retail establishments, claiming to be exempt from the Smoke-Free Act, to file an annual notice with the Board of Health and to be licensed. The Smoking Ordinance also places restrictions on indoor smoking. Specifically, the Smoking Ordinance limits smoking to pre-purchase sampling not to exceed two minutes. These provisions are more restrictive than the Smoke-Free Act. Accordingly, the Smoking Ordinance is only valid if it is not superseded by the Smoke-Free Act.

The starting place for statutory interpretation is the Act's plain language. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 557 (2017). Here, the controlling provision is the superseding section of the Smoke-Free Act, N.J.S.A. 26:3D-63. That provision states that the Smoke-Free Act supersedes "any other statute, municipal ordinance and rule or regulation adopted pursuant to law concerning smoking in an indoor public place or workplace . . . ." The provision then identifies three exceptions when the Smoke-Free Act does not supersede such laws. The

exceptions are: (1) "where smoking is prohibited by municipal ordinance under authority of [N.J.S.A.] 40:48-1 or 40:48-2[;]" (2) where smoking is prohibited "by any other statute or regulation adopted pursuant to law for purposes of protecting life and property from fire or protecting public health[;]" and (3) "provisions of a municipal ordinance which provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under this act." N.J.S.A. 26:3D-63.

Applying the plain language of the superseding provision of the Smoke-Free Act, the Smoking Ordinance arguably falls under all three exceptions, but clearly falls under the first and third exceptions. As to the first exception, the West Caldwell Board of Health adopted the Smoking Ordinance pursuant to its authority under N.J.S.A. 40:48-2, which allows municipalities to enact ordinances for the preservation of public health. As to the third exception, it is uncontested that the Smoking Ordinance imposes greater restrictions than the Smoke-Free Act.

Plaintiffs focus on the word "adopted" and argue that such language limits the applicability of the exceptions to previously adopted laws, municipal ordinances, rules and regulations. Reading the plain language of the superseding provision does not support such an interpretation. The word "adopted", as used in the Smoke-Free Act, plainly refers to existing laws, ordinances,

rules and regulations, as well as those that may be adopted in the future.

B. The Smoking Ordinance Is Not a Land Use Ordinance

Plaintiffs next argue that if the Smoking Ordinance is valid, it is effectively a land use ordinance and because it was adopted after Cigar Emporium opened, the Emporium is a pre-existing non-conforming use exempt from the prohibitions of the Smoking Ordinance. We reject this argument because the Smoking Ordinance was a validly adopted health ordinance.

Municipal health boards are granted the authority to enact and amend health ordinances. N.J.S.A. 26:3-64. Accordingly, a municipality may pass an ordinance or regulation "as it may deem necessary and proper . . . for the preservation of public health, safety and welfare of the municipality and its inhabitants . . . ." N.J.S.A. 40:48-2. See LDM, Inc. v. Princeton Reg. Health Comm'n, 336 N.J. Super. 277, 291 (App. Div. 2000) (citing State v. Crawley, 90 N.J. 241, 247 (1982)) (explaining that municipalities may enact health ordinances that are reasonably related to a legitimate object of public health, safety, or welfare).

The Smoking Ordinance, like all municipal ordinances, is entitled to a presumption of validity. Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015). Here, the Smoking Ordinance

was enacted by the West Caldwell Board of Health in accordance with its authority under N.J.S.A. 26:3-64 and N.J.S.A. 40:48-2. The Smoking Ordinance is rationally related to the Township's legitimate interest in protecting the health and welfare of its citizens by limiting their exposure to second-hand smoke. Additionally, many ordinances, including health ordinances, touch on the use of land, but are not within the planning and zoning concerns of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -17. "[S]uch ordinances are enacted pursuant to the general police power and apply to everyone." See, e.g., N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38, 53-54 (2009) (applying the rational basis test to determine the validity of a municipal ordinance adopted pursuant to N.J.S.A. 40:48-2, and holding that the ordinance did not fall within the purview of the MLUL despite affecting the use of land). Consequently, the Smoking Ordinance is a valid municipal health ordinance and it is not a land use ordinance.

#### C. Plaintiffs' Complaint Was Properly Dismissed

We use a de novo standard when reviewing an order dismissing a complaint for failure to state a claim. When reviewing a motion to dismiss under Rule 4:6-2(e), we assume that the allegations in the pleadings are true and afford the pleader all reasonable inferences. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-

50 (App. Div. 2002). "Where, however, it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 397 (App. Div. 2010) (quoting Cty. of Warren v. State, 409 N.J. Super. 495, 503 (App. Div. 2009), certif. denied, 201 N.J. 153, cert. denied sub nom., 561 U.S. 1026, 130 S. Ct. 3508, 177 L. Ed. 2d 1092 (2010)).

Here, plaintiffs' complaint alleged four causes of action and sought two forms of relief: (1) a declaration that the Smoking Ordinance was illegal and void; and (2) a damages award holding the Health Officer liable for his alleged wrongful and malicious interference with plaintiffs' business. Because we have held as a matter of law that the Smoking Ordinance was valid, neither of these forms of relief could be granted. Moreover, there was no need for discovery since the controlling issue was an issue of law.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION