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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-20

CUMBERLAND FARMS, INC.

vs.

BOARD OF HEALTH OF YARMOUTH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The town of Yarmouth board of health (Board) found a store operated by Cumberland Farms, Inc. (Cumberland) in violation of a local regulation prohibiting the sale of flavored tobacco products. The Board imposed a two-hundred dollar fine, and suspended the store's permit to sell tobacco for one week. In a certiorari action before the Superior Court, Cumberland argued that the Board's decisions were not based on substantial evidence, the Board's decisions were arbitrary and capricious, and the Board exceeded its authority by imposing an administrative monetary fine without following the procedures delineated in G. L. c. 40, § 21D. A Superior Court judge

disagreed, and Cumberland Farms now appeals. We affirm in part and reverse in part.¹

Background. 1. Facts. Pursuant to G. L. c. 111, § 31, the Board promulgated a regulation titled "Regulation of the Town of Yarmouth Board of Health Restricting the Sale and Use of Tobacco Products" (Regulation), effective July 1, 2014. The Regulation sets forth, among other things, a restriction on the sale of tobacco products, a permit scheme for establishments that wish to "sell or otherwise distribute tobacco products," and the means by which the Regulation will be enforced. Section G of the Regulation prohibits the sale of flavored tobacco products, mandating that "[n]o person shall sell or distribute or cause to be sold or distributed any flavored tobacco product at retail." The Regulation defines a "[f]lavored tobacco product" as "[a]ny tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor."² Furthermore, the Regulation

¹ We acknowledge the thoughtful amicus curiae briefs submitted by the New England Convenience Store and Energy Marketers Association, and the Public Health Law Center.

² The Regulation defines a "[c]haracterizing flavor" as:
"A distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted or detectable either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor

mandates that "[a] public statement, claim or indicia made or disseminated by the manufacturer of a tobacco product . . . that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product."

The Regulation also sets forth penalties for noncompliance with the Regulation. Specifically, § Q of the Regulation provides a schedule of penalties, including monetary fines up to \$300, permit suspensions for up to thirty days, and the possibility of revoking a tobacco sales permit for "repeated, egregious violations." The immediately-following provision, § R, additionally allows for penalty "by the non-criminal method of disposition as provided in [G. L. c.] 40, [§] 21D or by filing a criminal complaint at the appropriate venue."

On February 23, 2017, a Yarmouth Health Department agent (agent) conducted an inspection of Cumberland Farms Store 2268 in West Yarmouth (Store), and determined that the Store offered three flavored tobacco products for sale in violation of § G: Black & Mild "Jazz" cigars, White Owl "Green Sweet" cigars, and Garcia Y Vega Game "Red" Cigars.³ In so doing, the agent did not

solely because of the use of additives or flavorings that do not contribute to the distinguishable taste or aroma of the product or the provision of ingredient information."

³ The Regulation provides that the issuance of a permit to sell tobacco products "shall be conditioned on an applicant's consent

smell or open the packaging of the products, and instead relied on a document (hereinafter Guidance List) created and maintained by the Massachusetts Association of Health Boards (MAHB).⁴ The Board referred to this document, which lists tobacco products that "MAHB believes are flavored," in its prior communications with Cumberland.⁵ The three products identified by the agent were on the MAHB's Guidance List at the time of the inspection.

to unannounced, periodic inspections of his/her retail establishment to ensure compliance with [the Regulation]."

⁴ The MAHB is a private organization whose "mission is to assist local boards of health through training, technical assistance, and legal education." This list, labelled by a MAHB representative as a "guidance document[]," is updated "[q]uarterly," and is derived from a similar list developed by the city of Chicago to enforce restrictions on flavored tobacco products, as well as independent research MAHB inspectors conduct.

⁵ Prior to the February 23, 2017, inspection, Cumberland received a number of communications from the Board regarding the restriction on the sale of flavored tobacco products. On November 3, 2015, the Board issued a memorandum to all tobacco permit holders that stated "[t]he sale of any flavored tobacco products is prohibited," and included a link to a website where a "[l]ist of products that MAHB believes are flavored" can be found. On November 17, 2015, the Board sent to Cumberland a letter issuing a warning that an inspector recently found a total of fifteen packs of flavored cigars available for sale to customers in the Store. This letter also referred Cumberland to the MAHB's website "for the flavored tobacco restricted list." In response to this warning, Cumberland sent to Yarmouth's director of health a letter asserting that it had not violated the Regulation, and arguing, inter alia, that nothing in the Regulation incorporates any list developed by MAHB, and that the MAHB list itself states that it is merely a "guidance" document meant to "assist" health inspectors. In February 2017, the Board sent another memorandum to tobacco permit holders (and retail food stores) that again stated that "[t]he sale of any flavored tobacco products is prohibited," and included a link to the MAHB website.

2. Proceedings below. After sending Cumberland a formal notice of violation, the Board held a public hearing on Cumberland's violation on March 20, 2017, and July 17, 2017.⁶ At the hearings, Cumberland's attorney argued that the Board could not rely on the Guidance List in finding Cumberland in violation of the Regulation. On the other side, three witnesses testified in support of finding that the three products were flavored: Cheryl Sbarra, MAHB's director of policy and law; Sarah McColgan, the tobacco control director of the Massachusetts Health Officers Association (MHOA);⁷ and Robert Collett, director of the Cape Code Regional Tobacco Control Program (CCRTCP).⁸ The Board also considered the then-current version of the Guidance List, a sworn written statement authored by Sbarra, copies of online advertising material for "Jazz" cigars and Game "Red" cigars,⁹ two peer-reviewed articles about tobacco product

⁶ A separate subsequent regulatory violation for the sale of tobacco to minors was also addressed at the July 17, 2017 hearing, in addition to the flavored tobacco product violation. Cumberland has not appealed, to the Superior Court or this court, from the violation for the sale of tobacco to minors. Therefore, only the flavored tobacco product violation is before this court.

⁷ The MHOA is a private organization that "provide[s] technical assistance in policy development to Boards of Health across the state."

⁸ The CCRTCP is a division of the Barnstable County Department of Health and Environment.

⁹ The hearing transcripts indicate that advertising materials for both "Jazz" and Game "Red" cigars were distributed at the March 20, 2017 hearing. We note, however, that the advertising

manufacturers' practice of marketing flavored products in ways that do not explicitly state a flavor, and notarized written declarations signed by Cumberland's attorney and another Cumberland employee. Additionally, the Board examined and smelled packages of the three offending tobacco products.¹⁰ At the hearing's conclusion, the Board unanimously voted to "accept . . . the violation that Cumberland Farms in West Yarmouth sold flavored tobacco that was on . . . the guidance list from the [MAHB], and that this is subject to fine and the other suspension." After the vote, the Board imposed a two-hundred dollar fine and a one-week suspension of the store's permit to sell tobacco.¹¹

On July 28, 2017, Cumberland filed a two-count verified complaint in the Superior Court seeking certiorari review pursuant to G. L. c. 249, § 4, and declaratory relief. Contemporaneously with its complaint, Cumberland also filed an ex parte motion for a temporary restraining order, and a motion

materials pertaining to Game "Red" cigars do not appear in the administrative record before us.

¹⁰ While one Board member stated she "believe[d]" that the Board had smelled all three of the offending products at the July 17, 2017, hearing, the record is unclear as to whether the Board members in fact did so. However, we agree with the Superior Court judge that this factual issue does not materially affect the analysis.

¹¹ The one-week permit suspension was imposed as a result of the flavored tobacco violation being deemed Cumberland's second violation. The first violation was the sale of tobacco products to a minor, which is not before this court. See note 6, supra.

for a preliminary injunction. A judge issued a temporary restraining order staying the fine and suspension, and ordering Cumberland "not to sell or offer for sale" the three products found in violation. After the restraining order was issued, the MAHB removed from the Guidance List two of three products Cumberland was charged with selling in violation of § G -- Garcia Y Vega Game "Red" Cigars and White Owl "Green Sweet" cigars -- effective September 18, 2017. Cumberland thereafter filed a supplemental memorandum of law in support of its motion for a preliminary injunction, in which Cumberland noted that MAHB had revised the Guidance List since the temporary restraining order was issued.

Following a hearing on October 5, 2017, a different judge allowed Cumberland's motion for a preliminary injunction, and enjoined the Board from imposing the fine and suspension. The judge also remanded the matter to the Board "for hearing on the issue of sale to minor, seven day suspension and the sale of flavored tobacco products."

On November 20, 2017, the Board held a remand hearing. At this hearing, the Board considered an updated version of the Guidance List that no longer contained the two removed products, as well as additional testimony from Sbarra. In addition to her testimony, Sbarra submitted to the Board a package of "Jazz" cigars she had purchased earlier that day, which each Board

member smelled over Cumberland's objection. On behalf of Cumberland, its attorney reiterated the argument that the Board could not properly rely on the Guidance List in enforcing the restriction on flavored tobacco products, and that the violation should be dismissed. At the conclusion of the hearing, the Board voted unanimously to accept the finding that the Store sold flavored tobacco in violation of the Regulation, and re-imposed the two-hundred dollar fine and the seven-day suspension of Cumberland's permit. The Board further voted¹² to find that "Jazz" cigars were "flavored tobacco products" within the meaning of the Regulation because it is on the Guidance List and the Board members "smelled an aroma" that renders it subject to the Regulation.¹³

After the Director of Health formally notified Cumberland of the Board's decision, Cumberland filed an amended verified complaint in the Superior Court on January 19, 2018. On July 5, 2018, Cumberland moved for judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). After a hearing on the motion, a Superior Court judge issued a written order denying Cumberland's motion for judgment on the pleadings and

¹² One Board member stated that he had "no sense of smell," and abstained from this vote.

¹³ The Board did not vote on and made no findings as to whether "Green Sweet" and Game "Red" cigars -- which had been removed from the Guidance List -- were "flavored tobacco products."

affirming the Board's decision, after remand, to find the Store in violation of the Regulation and to impose the fine and permit suspension. Cumberland has appealed from the Superior Court judgment.

Discussion. On appeal, Cumberland contends that the Board's decisions are not supported by substantial evidence, and that the Board's reliance on the Guidance List was arbitrary and capricious. Cumberland also asserts that in seeking to impose penalties for regulatory violations, the Board was required to either seek the issuance of a criminal complaint or follow the noncriminal disposition procedures set forth in G. L. c. 40, § 21D, and that the Board exceeded its authority by failing to do either.

"Our function in reviewing an appeal of a decision in a certiorari proceeding is a limited one." Durbin v. Selectmen of Kingston, 62 Mass. App. Ct. 1, 5 (2004). We "may rectify only those errors of law 'which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public.'" Carney v. Springfield, 403 Mass. 604, 605 (1988), quoting Murray v. Second Dist. Court of E. Middlesex, 389 Mass. 508, 511 (1983). See Johnson Prods., Inc. v. City Council of Medford, 353 Mass. 540, 541 n.2 (1968). See also Tracht v. County Comm'rs of Worcester, 318 Mass. 681, 686 (1945) ("The function of a writ of certiorari is not to

reverse or revise findings of fact but to correct errors of law committed by a judicial or quasi judicial tribunal where such errors appear upon the face of the return and are so substantial and material that, if allowed to stand, they will result in manifest injustice to a petitioner who is without any other available remedy").

1. Substantial evidence. Cumberland first contends that the Board's decisions were not supported by substantial evidence. Specifically, Cumberland argues that neither the Board's smell test nor the Guidance List it relied on can constitute substantial evidence to find that Cumberland violated § G of the Regulation. The Superior Court judge agreed with the Board, and found that the other evidence the Board considered (in addition to the Board's smell test and the Guidance List) constituted substantial evidence to support its decisions. We discern no error in the judge's analysis.

"Ordinarily, where the action being reviewed is a decision made in an adjudicatory proceeding where evidence is presented and due process protections are afforded, a court applies the 'substantial evidence' standard." Figgs v. Boston Hous. Auth., 469 Mass. 354, 361-362 (2014). See G. L. c. 30A, § 14 (7) (e). "Substantial evidence" exists to support a decision where the record contains "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6).

"Under this standard we are required to decide 'whether experience permits the reasoning mind to make the finding; (i.e.,) whether the finding could have been made by reference to the logic of experience'" (emphasis added). New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981), quoting Boston Edison Co. v. Selectmen of Concord, 355 Mass. 79, 92 (1968). A court sets aside a decision only where "the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary" (citation omitted). Boston Edison Co., supra.

Cumberland claims error in the assignment of any probative value to the smell test and the Guidance List, and argues that both are unreliable in substance. The smell test is unreliable, according to Cumberland, because it has "no uniform criteria for how it is to be applied, or by whom, or under what circumstances," which is compounded by "the fact that [the Board's] members are all lay volunteers with no relevant expertise in sensory evaluation." We are not persuaded. Initially, Cumberland does not explain what "relevant expertise in sensory evaluation" might entail. To the extent Cumberland suggests that something approximating expert testimony is required for the smell test to be reliable, it fails to explain why discerning the aroma emitted by a tobacco product requires any "scientific, technical, or other specialized knowledge."

Mass. G. Evid. § 702(a) (2020). Board members sought to discern the aroma of a tobacco product by using their own olfactory senses, and the one Board member who admitted to having "no sense of smell" abstained from the vote on the "Jazz" cigars' aroma. Furthermore, the Regulation does not state or intimate anywhere that any specialized criteria or standard must be used to determine whether a particular tobacco product is a "[f]lavored tobacco product" within the meaning of § C, or that any particular training or expertise is required to make that determination.¹⁴ As the judge noted, the Board was "entitled to credit the perceptions of odor by its own members in concluding that Jazz was a flavored tobacco product." See Arthurs v. Board of Registration in Med., 383 Mass. 299, 312 (1981) ("The inferences drawn from the evidence in this case were largely matters of common experience and common sense, not matters of specialized or technical knowledge"). Ultimately, Cumberland's argument in this regard speaks to the weight that should be ascribed to the results of the smell test. See Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996) ("If the agency has, in the discretionary exercise of its

¹⁴ In fact, § C of the Regulation defines "[d]istinguishable" (in the phrase "distinguishable taste or aroma") only as "[p]erceivable by either the sense of smell or taste." The Regulation sets forth no other standard, process, or mechanism by which compliance with § G is to be measured.

expertise, made a 'choice between two fairly conflicting views,' and its selection reflects reasonable evidence, '[a] court may not displace [the agency's] choice . . . even though the court would justifiably have made a different choice had the matter been before it de novo'" [citation omitted]).

Cumberland also criticizes the Board's reliance on the Guidance List in not only issuing the citation but also in finding that "Jazz" cigars were "[f]lavored tobacco products" at the hearings. For substantially similar reasons, we are not persuaded by this claim either. In essence, Cumberland asserts that the Board should not have relied on the Guidance List because it is based in substantial part on information and advertisements found on the Internet, and is thus unreliable. As with the smell test, nothing in the text of the Regulation prevents the Board from referring to a list compiled by an outside organization in enforcing § G. Moreover, Cumberland's attack on the reliability of the Guidance List may be relevant to the weight Cumberland would have the Board ascribe to it, but is not an argument the Board was required to accept. At the hearings, the Board heard testimony from Sbarra and McColgan about the process for adding and removing items from the Guidance List and the research that is conducted leading to a product being placed on the Guidance List. The Board was entitled to credit that testimony in assessing the probative

value of the Guidance List. See School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978) ("It is for the agency, not the courts to weigh the credibility of witnesses and resolve factual disputes").

Even assuming, arguendo, that the smell test and the Guidance List do not constitute substantial evidence, the Board received and considered other evidence independently sufficient to support its determination that Cumberland sold a flavored tobacco product in violation of the Regulation. The Board had before it "indirect evidence of third party conclusions" that "Jazz" cigars exude an aroma other than tobacco, menthol, wintergreen, or mint. At the hearings, McColgan distributed copies of several advertisements from online tobacco retailers variously describing "Jazz" cigars as "available in several flavors . . . like apple and cream," as having "its own unique sweet flavor," and as "[i]nfused with a unique fruity taste." Sbarra's sworn written statement also reported that online "video reviewers said [a "Jazz" cigar] was 'orange and tangerine with a little splash of lemon' and 'kind of berry in citrus.'" In addition, Sbarra testified at the hearings that MAHB employees had found "over and over" that "Jazz" cigars "smelled like a special sauce" that is "a distinguishable taste or aroma other than tobacco or mint." Sbarra's sworn written statement also averred that she had personally smelled "Jazz" cigars and

that "it was clear that the product contained a strong aroma other than tobacco or menthol." McColgan also testified that she had purchased multiple packs of the offending tobacco products from one of Cumberland's stores, opened and smelled each one, and reported that she perceived "a fruity type of smell" emanating from the "Jazz" cigars. The Board was entitled to credit the testimony it heard from witnesses who not only smelled the products themselves, but who are also familiar with the field of tobacco regulation. See Number Three Lounge, Inc. v. Alcoholic Beverages Control Comm'n, 7 Mass. App. Ct. 301, 309 (1979) ("The agency is the sole judge of the credibility and weight of evidence before it during the administrative proceeding"). See also Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988) ("Although the stipulated testimony of the licensees' witnesses tended to disprove testimony [of another witness], the ABCC was entitled to believe the one and disregard the other"). Given the evidence and testimony that was before the Board, we cannot say that this case is one in which "the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary" (citation omitted). Boston Edison Co., 355 Mass. at 92. Contrast New Boston Garden, 383 Mass. at 473, 475 (agency's "selection of a recapture of investment rate of 5% based upon an economic life of twenty

years [was] not supported by substantial evidence" where key figure in agency's calculations was "neither explained by [key witness], nor corroborated by other evidence").¹⁵

In sum, because the Board had before it "such evidence as a reasonable mind might accept as adequate to support a conclusion," we conclude that its decision to find Cumberland in violation of § G of the Regulation was supported by substantial evidence. G. L. c. 30A, § 1 (6).

2. Arbitrary and capricious. Cumberland next contends that the Board's reliance on the Guidance List in finding Cumberland in violation of § G was arbitrary and capricious. We disagree.

"[W]here the action sought to be reviewed [is] the proper exercise of the [agency's] discretion . . . an 'arbitrary and

¹⁵ Cumberland also argues that the Board "ignore[d] all the evidence (favorable to) [it] . . . and with studied design [gave] credence to the testimony (favorable to) the other side" (citation omitted). New Boston Garden, 383 Mass. at 474 n.11. Cumberland further contends that the "particularized case-by-case facts underlying [its position] were not adequately addressed by the [B]oard." Grenier v. Selectmen of Shrewsbury, 80 Mass. App. Ct. 460, 466 (2011). We disagree. The transcript of the Board hearing after remand reveals that the Board attentively engaged with the evidence and testimony before it, including objections raised by Cumberland's counsel. Board members asked questions of counsel for all parties, and discussed in some detail the Regulation's specifics and the practical issues related to enforcement of § G. While the Board ultimately credited the evidence and testimony presented in favor of finding Cumberland in violation, we cannot say that the Board did so "with studied design" or ignored all contrary evidence. New Boston Garden, supra.

capricious' standard should be applied" (citation omitted).
T.D.J. Dev. Corp. v. Conservation Comm'n of N. Andover, 36 Mass.
App. Ct. 124, 128 (1994). See Forsyth Sch. for Dental
Hygienists v. Board of Registration in Dentistry, 404 Mass. 211,
217 (1989) ("An appeal under G. L. c. 249, § 4, through an
action in the nature of certiorari, is not generally available
to review discretionary administrative action except to
determine whether the board acted arbitrarily and
capriciously"). "A decision is not arbitrary and capricious
unless there is no ground which 'reasonable men might deem
proper' to support it." T.D.J. Dev. Corp., supra, quoting
Cotter v. Chelsea, 329 Mass. 314, 318 (1952). Under this
standard, the reviewing court must "give due weight to the
overall judgment of the [Board]", Dubuque v. Conservation Comm'n
of Barnstable, 58 Mass. App. Ct. 824, 828 (2003), and "should
cast about to discover, if possible, some ground which
reasonable men might deem proper on which the action can rest,"
id. at 829 n.9, quoting Cotter, supra.

Here, Cumberland primarily argues that the Board's decision
was arbitrary and capricious because the Board relied on a list
that was prepared by a private organization and that has not
been expressly incorporated into the Regulation. However, as
discussed, supra, the Board did not rely solely on the Guidance
List in finding Cumberland in violation of § G. Rather, at the

initial hearings, the Board had before it a then-current version of the Guidance List containing the three offending products, descriptions of online advertising material and online video reviews of the offending products, and testimony from McColgan and Sbarra regarding the origins and methodology behind the creation and maintenance of the Guidance List. Sbarra testified to the emergence of "concept" flavors and tobacco manufacturers' increasing use of them as the impetus behind the Guidance List's development, and also submitted two peer-reviewed articles explaining what "concept" flavors are and illustrating with relevant data the recent trends in the use of such flavors. At the hearing held after remand from the Superior Court, the Board considered an updated version of the Guidance List that no longer included "Green Sweet" cigars and Game "Red" cigars.. Sbarra explained MAHB's then-recent decisions to take "Green Sweet" and Game "Red" cigars off the Guidance List, stating that upon reexamination, the two products "smelled like sweet tobacco" instead of exuding "a distinctive aroma," and that "[t]he marketing of those products had changed" after MAHB employees reexamined them and no longer referenced a flavor. In so doing, Sbarra also explained that a product's placement on the list could be challenged if a product's manufacturer so requests, and noted that the manufacturer of "Jazz" cigars never

asked for a reexamination. One Board member also read aloud the relevant definitions set forth in § C of the Regulation.

In light of the extensive evidence and testimony that the Board received relating to the origins and processes behind the Guidance List and specifically relating to the distinguishing aroma of "Jazz" cigars, we cannot conclude that the Board's determinations were arbitrary and capricious. The Board expressly considered the fit between the facts presented and the definitions found in § C, and independently evaluated the credibility of witnesses and evidence on both sides. At the hearing's conclusion, the Board reasonably credited the evidence in favor of finding that Cumberland had violated the Regulation. The record demonstrates that the Board conscientiously applied the Regulation's definitions to "Jazz" cigars, and did not vote to find Cumberland in violation solely based on "Jazz" cigars' presence on the Guidance List. We therefore cannot conclude that the Board's decisions were arbitrary and capricious such that "no ground [exists] which 'reasonable men might deem proper' to support [them]" (citation omitted).¹⁶ T.D.J. Dev. Corp., 36 Mass. App. Ct. at 128. Contrast Fieldstone Meadows

¹⁶ The Board was entitled to credit Sbarra's testimony as to the reasons for the removal of "Green Sweet" and Game "Red" cigars from the Guidance List. See Number Three Lounge, Inc., 7 Mass. App. Ct. at 309. The removal of those two products after the initial hearing is thus of no moment in the analysis.

Dev. Corp. v. Conservation Comm'n of Andover, 62 Mass. App. Ct. 265, 266-269 (2004); Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 512 (2000) ("There was . . . no evidentiary support for the facts on which the board had pitched its decision, and that decision was consequently arbitrary and capricious").

After careful consideration of the Board's actions, and "giv[ing] due weight to [its] overall judgment," Dubuque, 58 Mass. App. Ct. at 828, we conclude that the Board's decisions were not arbitrary and capricious. In other words, this case is not one in which "action . . . [was] taken without consideration and in disregard of facts and circumstances" (quotation and citation omitted). Hercules Chem. Co. v. Department of Env'tl. Protection, 76 Mass. App. Ct. 639, 643 (2010).¹⁷

3. G. L. c. 40, § 21D. Cumberland argues that the judge erred in concluding that the Board did not exceed its authority

¹⁷ Cumberland also argues that the Board's subsequent incorporation by reference of the Guidance List to the Regulation demonstrates that the Board's prior reliance on the Guidance List was arbitrary and capricious. We disagree. The relevant standard is whether the decision is such that "there is no ground which 'reasonable men might deem proper' to support it." T.D.J. Dev. Corp., 36 Mass. App. Ct. at 128, quoting Cotter, 329 Mass. at 318. As detailed above, the Board received detailed testimony and evidence that a reasonable person could deem appropriate to support its conclusions, even where the Regulation does not explicitly refer to the Guidance List. The later addition of the reference to the Guidance List does not materially alter that analysis.

in issuing a monetary fine without following the "non-criminal disposition" process set forth in § R of the Regulation. On the limited record before us, we agree.¹⁸

General Laws c. 40, § 21D, provides, in relevant part, "[a]ny city or town may by ordinance or by-law not inconsistent with this section provide for non-criminal disposition of violations of any ordinance or by-law or any rule or regulation of any municipal officer, board or department the violation of which is subject to a specific penalty." Section 21D then sets forth the process for the noncriminal disposition of violations of ordinances, bylaws, rules, or regulations. Here, there is no dispute that in or around 1980, the Town of Yarmouth adopted the provisions of § 21D. See Town of Yarmouth Bylaws, § 25-1.¹⁹ Furthermore, the plain language of § Q of the Regulation

¹⁸ Cumberland raised the G. L. c. 40, § 21D, issue in a footnote in its memorandum in support of its motion for judgment on the pleadings, in its reply to the Board's opposition to its motion for judgment on the pleadings, and in its appellate brief. The appellate record is somewhat limited, but the Town does not contend that the issue is waived. See Rivas v. Chelsea Hous. Auth., 464 Mass. 329, 336 (2013) ("the defense of waiver is itself waivable"). Accordingly, we address the issue herein, but limit our conclusion to the specific Regulation, specific facts, and limited record before us.

¹⁹ Town of Yarmouth Bylaws, § 25-1 provides as follows: "Any bylaw of the Town of Yarmouth or rule or regulation of its boards, commissions and committees, the violation of which is subject to a specific penalty, may, in the discretion of the Town official who is the appropriate enforcing person, be enforced by the method provided in Section 21D of Chapter 40 of the General Laws."

delineates specific penalties in the form of fines for violations of the Regulation. Section Q also separately provides for Board suspensions or revocations of a tobacco product sales permit. Section R of the Regulation then prescribes the method of imposing fines. By its terms, § R gives the Board a choice between proceeding via the noncriminal method provided in § 21D or via a criminal complaint. Here, the Board did neither.

The Board responds that § R merely provides an alternative way of imposing fines. In other words, the Board contends that it may impose fines administratively via § Q of the Regulation, via the noncriminal process delineated in § 21D, or via criminal complaint.²⁰ We disagree. If the Board had intended there to be a third way to impose fines, i.e., through administrative proceedings, paragraph four of § Q could have stated so. However, there is no such language therein.²¹ Absent such

²⁰ At oral argument counsel for the Board acknowledged that § 21D "has been adopted by the Town."

²¹ The language in § Q paragraph four of the Regulation governs the administrative process for imposing suspensions or revocations of tobacco product sales permits. Section Q paragraph four states, in relevant part, "[f]or purposes of . . . suspensions or revocations [of tobacco product sales permits], the Board shall make the determination notwithstanding any separate criminal or non-criminal proceedings brought in court hereunder or under the Massachusetts General Laws for the same offense." This language means that the Board can impose suspensions or revocations in administrative proceedings, regardless of the pendency or results of court proceedings (whether civil or criminal) to impose and collect fines.

language, we will not read into the Regulation the authority to impose monetary fines administratively. See generally Burlington Sand & Gravel, Inc. v. Harvard, 31 Mass. App. Ct. 261, 264-265 & n.2 (1991) (town that sought to enjoin violations of zoning by-law under G. L. c. 40A, § 7, lacked authority under that section to seek assessment of civil fines but, instead, was limited to pursuing criminal prosecutions under G. L. c. 40, § 21, or noncriminal proceedings pursuant to G. L. c. 40, § 21D). To be clear, this determination is limited to the specific language and structure of the Regulation and facts of this case, and does not require us to interpret § 21D itself.

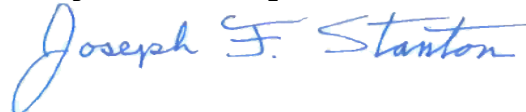
Conclusion. Because the Board considered extensive evidence and testimony in finding Cumberland in violation of § G of the Regulation, we conclude that its decisions were supported by substantial evidence and were not arbitrary and capricious.²²

²² We note that on November 27, 2019, the Governor of the Commonwealth signed into law "An Act Modernizing Tobacco Control" that sets forth new restrictions on the sale of tobacco products and "electronic nicotine delivery system[s]" across the Commonwealth. St. 2019, c. 133. Pursuant to that statutory authority, the Department of Public Health (DPH) has promulgated new regulations implementing these restrictions. See 105 Code Mass. Regs. §§ 665 (2020). These new restrictions include a prohibition on the sale of flavored tobacco products throughout the Commonwealth except by statutorily-defined "smoking bar[s]" for on-site consumption, which will take effect on June 1, 2020. St. 2019, § § 25, 28. The relevant DPH regulation states, *inter alia*, that its provisions "shall not limit the right of an appropriate authority in a city or town to adopt rules and regulations as may be necessary" as long as the local rules and

Accordingly, so much of the judgment as affirms the Board's decision, after remand, imposing a monetary fine is reversed. In all other respects the judgement is affirmed.

So ordered.

By the Court (Wolohojian,
Agnes²³ & Neyman, JJ.²⁴),



Clerk

Entered: April 17, 2020.

regulations do not conflict with DPH regulations or State or Federal law. 105 Code Mass. Regs. § 665.057 (2020).

²³ Justice Agnes participated in the deliberation on this case prior to his retirement.

²⁴ The panelists are listed in order of seniority.