



TOBACCO CONTROL EFFORTS AND TRENDS IN MASSACHUSETTS

Nikysha Harding, MPH, Boston Public Health Commission's Tobacco Control Program
Cheryl Sbarra, Esq., Executive Director, Mass. Assoc. of Health Bds.
MEHA 2024 Annual Seminar



TOBACCO INDUSTRY'S NEVER- ENDING LITIGATION

Cumberland Farms, Inc. v. Town of Braintree Board of Health (2023-2024)

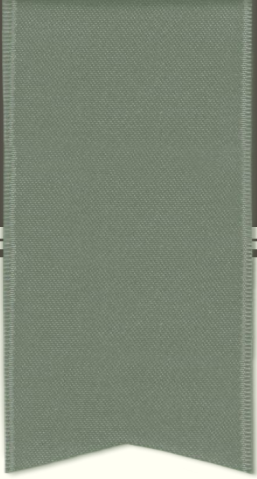
- Statement of Facts: CF was issued a Cease and Desist Order offering for sale Black and Mild Flavored Jazz cigars. The cigars were in plain sight behind the cash register. CF appealed the order, claiming that the cigars were there by mistake, and that they were not offering them for sale because if the clerk tried to sell them, a warning signal would show after scanning the product and the sale could not take place. After a hearing, the board of health found that CF did offer the flavored cigars for sale. It was a first offense for CF. The board fined CF \$1000 and issued a 5-day suspension as authorized in their local regulation.
- CF appealed to Norfolk Superior Court. The Court held the following.
 - The board had the authority to issue the \$1000 fine.
 - CF did offer for sale the flavored tobacco products.
 - The DPH state regulation that required a mandatory suspension for a first offense for selling to someone under 21 did NOT permit the board to enact a regulation that provided a suspension for a first offense for selling a flavored tobacco product. The only offense that can have a mandatory suspension for a first offense is selling to someone under 21.
- CF appealed this to the Massachusetts Appeals Court.



Six Brothers, Inc & others vs. Town of Brookline & another, Massachusetts Supreme Judicial Court (3.8.24)

- Patrick Tinsley, Esq. for Six Brothers, with Adam Ponte, Esq., Fletcher Tilton (Jones Day local attorneys).
 - Firm that sued cities and towns when they banned menthol.
- Chris Banthin, Esq. for Brookline, with Mark Gottlieb, Esq.
- Friend of the Court Briefs from
 - MA Attorney General
 - American Cancer Society Cancer Action Network
 - American Snuff Company, LLC





BROOKLINE TOWN MEETING BANNED THE SALE OF TOBACCO TO ANYONE BORN AFTER JANUARY 1, 2000

Charlie and Tommy will never be able to buy tobacco in
Brookline, MA.



Arguments

- State law that raised the age to 21 prevents Brookline from going further.
 - Preemption argument.
 - Court held that this is not the case.
 - Brookline went further “following a **long tradition of local communities augmenting the protections against the harmful effects of tobacco products** available at the State level.”
 - “local community laboratories”
 - “Municipalities . . . have let the State in enacting . . . smoking-related protections.”
 - Bylaw is not inconsistent or conflicting with state law.
 - It’s stricter.
 - Bylaw is rationally related to a legitimate government interest.
 - *American Lithuanian Naturalization Club v. Board of Health of Athol* (2006)
 - *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable* (2001)
 - *Take Five Vending, Ltd. V. Provincetown*(1993)



Arguments (cont.)

- Bylaw violates Equal Protection guarantees because it discriminates on the basis of birth year.
 - Court held that this is not the case.
 - There is no fundamental right to smoke.
 - Persons born after January 1, 2000, are not a “suspect classification.”
 - Bylaw is “rationally related to the furtherance of a legitimate [s]tate interest.”
- Birthdate cutoff is arbitrary.
 - Line drawing is a legislative necessity and does not make a law unconstitutional.

Current Status of NFG

- No sales to a person born after January 1, 2004
- **Passed NFC policy – effective January 1, 2025**
 - Wakefield
 - Stoneham
 - Melrose
- **Hearings held:**
 - Winchester
 - Malden
- **Future hearings:**
 - Medford
 - Reading
- **Considering regulation:**
 - Worcester
 - Beverly
 - Chelsea
 - Salem





MENTHOL 2.0

MAHNB

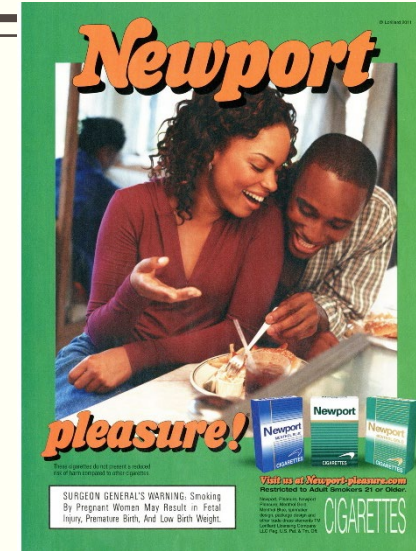
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“New” product, same old story – Menthol 2.0

History of menthol and flavor ban

- Flavor
 - Flavors are a critical means of initiating new tobacco users
 - Menthol with its cooling sensation facilitates the initiation of new users
 - Reduces harshness of cigarette use and tobacco taste
- Targeted marketing
 - African Americans, LGBTQIA+, Youth



Newport Menthol Non-Menthol

- MA and CA flavor bans, explicitly including “menthol, mint, [and] wintergreen”
- Replaces Menthol with synthetic coolant in an effort to circumvent flavor laws.
 - WS-3 (menthol carboxamide): Other uses include chewing gum, breath mints, cooling face cream.



Characterizing Flavor

“A distinguishing **taste** or aroma, other than the **taste** or aroma of **tobacco**, imparted or detectable before or during consumption of a tobacco product.” (105 CMR 665.000)

“Taste” not defined in state law.

Chelsea Board of Health fined on product.

Jones Day testified at the hearing representing R.J. Reynolds.

“As a matter of science, humans cannot perceive the taste or aroma of WS-3.”





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Upcoming earnings

LOCATIONS

UNITED STATES

EUROPE

LATIN AMERICA

MIDDLE EAST

ASIA PACIFIC

Atlanta
Boston
Chicago
Cleveland

Dallas
Detroit
Houston
Irvine

Miami
Minneapolis
New York
Pittsburgh

San Francisco
Silicon Valley
Washington

How do we define “taste”



Cumberland Farms, Inc. v. Board of Health of Yarmouth (2020)

- The law “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’”
 - The fact that WS-3 may not “taste” like anything on its own does not mean that when you add it to tobacco, it cannot change the “taste” of the tobacco.
- “[C]ommon experience and common sense” can be used to determine whether a product is flavored.
- Multiple factors can be used to determine whether a product is flavored.
 - Social media
 - Marketing
 - Reviews, etc.

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More about WS-3 in the industry's own words

- **It's a flavoring additive**

- It imparts “a very localized dot of intense cooling” and a faint mint-like taste.” (Brown and Williamson, 1972).
- A “flavor compound that does not contain menthol but provides a cooling sensation.” (RJR sensory evaluation study, 1990).”
- “The somesthetic (feeling) effect is a distinct part of the taste system and has at least three and perhaps more dimensions.” (The trigeminal effect as it relates to sensory attributes of tobacco products, 1981).

- **FDA**

- “The multisensory experience (i.e., taste, aroma, and cooling or burning sensations in the mouth and throat) of a flavor during use of a tobacco product.”

- **RJR**

- Admits it mimics menthol in that it produces a cooling sensation.
- **Isn't this the entire reason MA and CA have banned it?**
- **Common sense = the Duck Test**



CHELSEA, MA

40,000 population

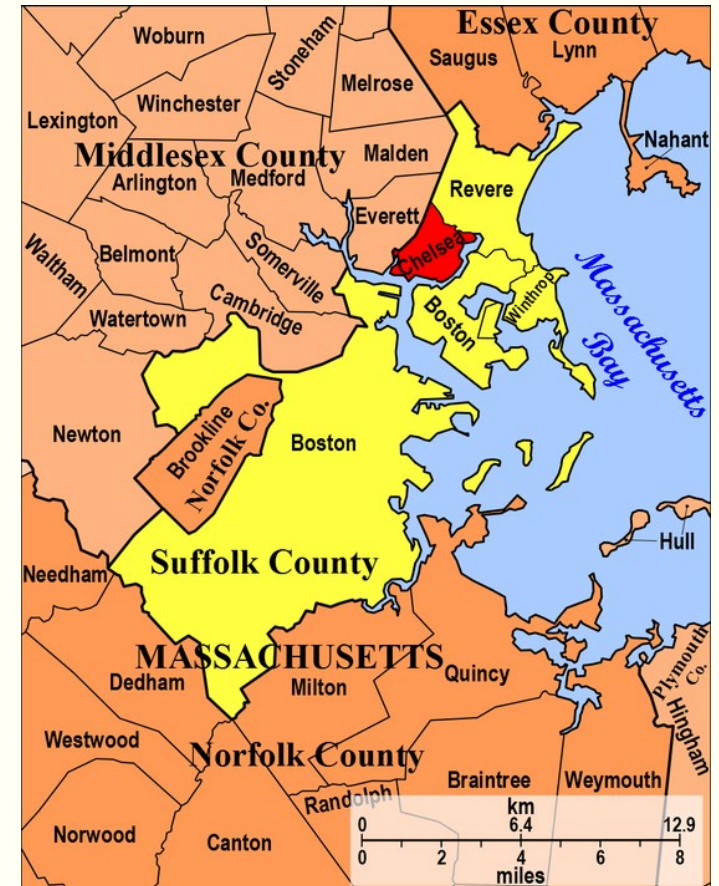
White alone: 20%

Hispanic or Latino: 67.4%

2 or more races: 44%

Owner-occupied housing rate: 27.9%

City



Chelsea Health Department Enforcement Action

May 2023 – letter sent to all tobacco retailers that enforcement would begin on Newport Non-Menthol cigarettes as flavored tobacco products after June 15, 2023.

July 5, 2023 – inspected retailers and found Newport Non-Menthols for sale at 3 different establishments and issued fines.

July 20, 2023 – letter from Patrick Haney, Esq. from Jones Day requesting to appeal the decision on behalf of RJ Reynolds.

July 25, 2023 – Board of Health hearing at Chelsea Middle School.



Testimony from the following:

- Robert Collett, Cape Cod Regional Tobacco Control Program
- Attorney Cheryl Sbarra, Massachusetts Association of Health Boards
- Attorney Patrick Haney, Jones Day representing RJ Reynolds
- Dr. Mike Davis, Master Scientist at RJ Reynolds
- Attorney Lisa Stevens-Goodnight, Massachusetts Municipal Association
- Attorney Mark Gottlieb, Public Health Advocacy Institute
- Attorney Chris Banthin, Public Health Advocacy Institute



Others in attendance at hearing



- Numerous additional RJ Reynolds
- Driver for RJ Reynolds
- Stenographer for RJ Reynolds
- Atmosphere

Substance of testimony



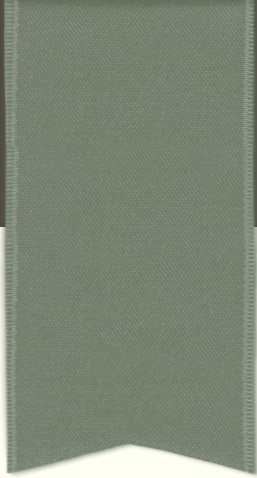
- RJ Reynolds:
 - As a matter of science, Newport Non-Menthol CANNOT have a taste.
 - Just ask our esteemed chemist.
 - Too dumb to understand our sophisticated arguments.
 - Board of Health Member – Harvard Medical School Professor, MGH Chief Physician.
 - Mrs. Sbarra
- Our testimony
 - Duck test
 - Smokers' views
 - Taste the product
 - RJ Reynolds internal documents
 - Coolness is a flavor



Board of Health meeting 9.26.23

- Board found that Newport Non-Menthol cigarettes violated the flavored tobacco product ban.
- Their WS-3 chemical constitutes constituted a flavored tobacco product because it produces a characterizing flavor.
- They have a “distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable before or during consumption. . .”
- WS-3 activated thermal receptors.
- The board opted for an interpretation of “taste” rooted in the **experience of ordinary people**.
- And that the use of the term “taste” is consistent with tobacco industry documents that characterize the oral feel of tobacco products as part of their taste.
- **RJ Reynolds did not appeal the decision of the Board of Health.**





WHAT'S NEXT?

Zyn-like products with WS-3

ZYN

- Created by Phillip Morris in 2014
- Available in a variety of flavors
- Placed between lip and gums
 - Nicotine is slowly released into the gums
- Market as an alternative to smoking and as a cessation tool.
- Growing in popularity amount teens over the past year or two.
- While thought to be safer than cigarettes and vaping, the long-term effects of Zyn use are unknown.



Enforcement Issues in Boston

- Illegal sales of menthol Newport cigarettes
- High illegal underage tobacco sales 13%
 - At the beginning of the round, the sales rate was 23%.
 - Images of underage buyers were shared among retailers.
 - Due to safety concerns, compliance checks were paused.
- Compliance letters
 - All tobacco sold must have an accompanying compliance letter from the manufacturer to confirm that they are in compliance with Massachusetts law.
 - Compliance letters are being distributed for products that are not in compliance.

