NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5831-12T1

ADAM SZYFMAN and GRAHAM FEIL,

Plaintiffs-Appellants,

v.

BOROUGH OF GLASSBORO,

Defendant-Respondent.

Argued May 14, 2014 – Decided July 3, 2014

Before Judges Grall, Nugent and Accurso.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-634-13.

Donald M. Doherty, Jr., argued the cause for appellant.

Gary M. Marek argued the cause for respondent (Law Office of Timothy D. Scaffidi and Mr. Marek, attorneys; Mr. Scaffidi and Mr. Marek on the brief).

PER CURIAM

Plaintiffs Adam Szyfman and Graham Feil filed a complaint seeking a declaration that Section 354-18 of the Borough of Glassboro Code (the Borough's Code) addressing "disorderly" houses and houses of "ill fame" is preempted by the Code of

Criminal Justice (the Code), N.J.S.A. 2C:1-1 to N.J.S.A. 2C:104-9. The trial court concluded that N.J.S.A. 40:48-1 and N.J.S.A. 40:48-2 authorize local laws like Section 354-18. Plaintiffs appeal and we reverse, because the ordinance is plainly preempted by the Code.

The facts are undisputed, and preemption is a question of law. Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 304 (App. Div. 2009), certif. denied, 201 N.J. 154 (2010). Consequently, our review is de novo. St. Peter's Univ. Hosp. v. New Jersey Bldg. Laborers Statewide Welfare Fund, 431 N.J. Super. 446, 462 (App. Div. 2013), certif. denied, 216 N.J. 366 (2013). Thus, no deference is owed to the trial court's determination.

"[M]unicipalities generally have broad authority to legislate in the areas of 'public health, safety and welfare' in the interest of 'local inhabitants.'" Club 35, L.L.C. v. Borough of Sayreville, 420 N.J. Super. 231, 235 (App. Div. 2011) (quoting State v. Crawley, 90 N.J. 241, 247-48 (1982)); see N.J. Const. art. IV, § 7, ¶ 11; N.J.S.A. 40:48-1; N.J.S.A. 40:48-2. The Code, however, has "a specific provision, N.J.S.A. 2C:1-5d, that limits" the generally broad grant of municipal authority to legislate on matters of local concern. Club 35, supra, 420 N.J. Super. at 235. N.J.S.A. 2C:1-5d furthers "[t]he Legislature's

central purpose in enacting the [Code]," which "was to create a consistent, comprehensive system of criminal law," one without "'inconsistencies, ambiguities, outmoded and conflicting, overlapping and redundant provisions.'" Crawley, supra, 90 N.J. at 250-51 (internal citation and emphasis omitted). In short, the Legislature determined that local versions of criminal offenses defined in the Code would undermine those goals. Id. at 251; see also State v. Paserchia, 356 N.J. Super. 461, 464-65 (App. Div. 2003); State v. Felder, 329 N.J. Super. 471, 474-75 (App. Div. 2000); State v. Meyer, 212 N.J. Super. 1, 4-5 (App. Div. 1986).

In enacting N.J.S.A. 2C:1-5d, the Legislature preempted local ordinances where it has expressed the State's policy on the criminalization of certain conduct by either including a prohibition against the conduct or by excluding such a prohibition. The statute provides:

> Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.
>
> [N.J.S.A. 2C:1-5d (Emphasis added).]

The preemption by inclusion clause reflects the Legislature's "intent to exclude local legislation from areas covered by the Code." Crawley, supra, 90 N.J. at 251. Thus, in Felder, we held that a municipal ordinance was preempted because it and provisions of the Code both prohibited unlawful acquisition of a controlled dangerous substance and solicitation of drug transactions. 329 N.J. Super. at 473-75. Similarly, in State v. Paserchia, we held that a municipal ordinance prohibiting disturbance of a lawful congregation or assembly was preempted because the Code offense covered "the conduct sought to be prohibited by" the ordinance. 356 N.J. Super. 461, 464, 466-67 (App. Div. 2003).

The preemption by exclusion clause of N.J.S.A. 2C:1-5d goes further by "'protect[ing] . . . negative unexpressed state policies.'" Crawley, supra, 90 N.J. at 244-45 (quoting Final Report of N.J. Law Revision Commission, Vol. II: Commentary at 12-13). In applying that clause, courts must determine if the Code's silence on conduct addressed by a local ordinance – the fact that there is no Code offense addressing it – "signifies an affirmative legislative intent to decriminalize that conduct except as covered by the Code." Id. at 245.

Applying the preemption by exclusion clause, the Supreme Court concluded that an ordinance prohibiting loitering was

preempted because the legislative history and structure of the Code demonstrated the Legislature's intention to "decriminalize" the conduct. Crawley, supra, 90 N.J. at 245-47. Applying Crawley in State v. Felder, supra, 329 N.J. Super. at 473-75, Judge Skillman noted the exclusionary clause of N.J.S.A. 2C:1-5d would preempt an ordinance addressing the same subject even if the local ordinance focused on a different aspect of the conduct.

The foregoing cases clearly establish that the broad municipal authority to legislate granted in N.J.S.A. 40:48-1 and N.J.S.A. 40:48-2 is narrowed by N.J.S.A. 2C:1-5d. Thus, the question whether Section 354-18 of the Borough's Code is preempted must be addressed under N.J.S.A. 2C:1-5d and the cases construing it, not under the general grants of municipal authority to legislate.

Section 354-18 of the Borough's Code provides:

> A. No person shall keep or maintain a disorderly house or a house of ill fame or allow or permit any house, shop, store or other building owned by or occupied by him or her to be used as a disorderly house or house of ill fame or to be frequented by disorderly persons, prostitutes, gamblers or vagrants.
>
> B. Violations and penalties. Any person violating any of the provisions of this section shall, upon conviction, be punished by one or more of the following:
> [Added 8-23-2011 by Ord. No. 11-35]

> (1) First offense: mandatory fine of $200; no court appearance required if pleading guilty to the offense.
>
> (2) Second or subsequent offenses: a fine not less than $200 and not more than $2,000; or by imprisonment not exceeding 90 days or by a period of community service not to exceed 90 days, or both, in the discretion of the Court.

The terms "disorderly house," "house of ill fame," "disorderly persons," "prostitutes," "gamblers" and "vagrants" are not defined in Section 354-18.[1] Nevertheless, those broad prohibitions must be understood to reach conduct that is addressed as maintaining a nuisance in N.J.S.A. 2C:33-12, promoting prostitution in N.J.S.A. 2C:34-1 and maintenance of a gambling resort in N.J.S.A. 2C:37-4. Felder, supra, 329 N.J. Super. at 473-75.

Pursuant to N.J.S.A. 2C:33-12,

> [a] person is guilty of maintaining a nuisance when:
>
> a. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons;
>
> b. He knowingly conducts or maintains any premises, place or resort where persons

[1] We set aside the lack of clarity with which the prohibited conduct is described because plaintiffs do not contend that 354-18 is void for vagueness, see State v. Cameron, 100 N.J. 586 (1985) (discussing constitutionally impermissible vagueness).

> gather for purposes of engaging in unlawful conduct; or
>
> c. He knowingly conducts or maintains any premises, place or resort as a house of prostitution or as a place where obscene material, as defined in [N.J.S.A.] 2C:34-2 and [N.J.S.A.] 2C:34-3, is sold, photographed, manufactured, exhibited or otherwise prepared or shown, in violation of [N.J.S.A.] 2C:34-2, [N.J.S.A.] 2C:34-3, and [N.J.S.A.] 2C:34-4.
>
> . . . .

To the extent that Section 354-18's reference to a house of "ill fame" covers owners of property used for illegal conduct, it is preempted by the Legislature's decision to include this crime in the Code. To the extent that the Legislature did not define maintaining a nuisance to include undesirable conduct that is not illegal or to reach those who invite persons who are "vagrants" or practice prostitution elsewhere to their premises, it is preempted because the Legislature opted not to criminalize such conduct on private property. Similarly, the Legislature's selections of conduct to include and exclude conduct from the offenses of promoting prostitution and maintenance of a gambling resort compel the conclusion that Section 354-18 is preempted.

In concluding that Section 354-18 is not preempted, the trial court relied on N.J.S.A. 40:48-2.12n to -2.12r. That reliance was misplaced. Those statutes "enable municipal governing bodies to take effective action to assure that . . .

landlords be held to sufficient standards of responsibility." N.J.S.A. 40:48-2.12n. To that end, the Legislature authorized governing bodies of municipalities to enact ordinances requiring landlords to "post adequate bonds against the consequences of disorderly behavior of their tenants," which may be forfeited as provided in the Act for non-compliance. N.J.S.A. 40:48-2.12p.

The Legislature has required municipalities to include specific provisions. One of the mandatory provisions limits imposition of an obligation to post bond to landlords whose tenant or tenants have, on no fewer than two occasions in a twenty-four-month period, been convicted of violating a provision of the Criminal Code or any "municipal ordinance governing disorderly conduct." N.J.S.A. 40:48-2.12q(a). The trial court concluded that the reference to local disorderly conduct ordinances suggests the Legislature's approval of ordinances like Section 354-18. In our view, this non-specific reference cannot reasonably be understood to authorize adoption of an ordinance that is preempted under the principles enunciated in N.J.S.A. 2C:1-5d.

For all of the foregoing reasons, Section 354-18 is preempted.

Reversed.