IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CYNTHIA HARPER,

Plaintiff,

v.

The CITY OF LINCOLN; JAMES BOWERS, RICHARD MEGINNIS, JANE RAYBOULD, TAMMY WARD, SÄNDRA WASHINGTON, ROY CHRISTENSEN, and BENNIE SHOBE, in their official capacities as members of the Lincoln City Council; LEIRION GAYLOR BAIRD, in her official capacity as the mayor of Lincoln; the LINCOLN-LANCASTER COUNTY HEALTH DEPARTMENT; and JUSTIN DANIEL, in his official capacity as the Environmental Public Health Supervisor for the Lincoln-Lancaster County Health Department,

Defendants.

Case No. CI 20-1706

ORDER

LANCASTER COUNTY
2020 OCT 26 AM 10: 52
CLERK OF THE DISTRICT COURT

This case is before the Court on the Defendants' Motion to Dismiss. On August 31, 2020, the Court heard argument on the motion and took it under advisement. David Lopez, Joshua Windham, and Keith Neely appeared for the Plaintiff. Richard Tast appeared for the Defendants. Being fully advised on the premises, the Court sustains in part and overrules in part the Defendants' Motion to Dismiss.

I. BACKGROUND

The Plaintiff is a home baker who would like to sell "cottage foods" to the public. Compl. ¶ 10. Such foods are "non-time/temperature control for safety foods," meaning that they are "shelf-stable and do[] not require refrigeration to prevent the growth of pathogenic microorganisms or the formation of toxins." *Id.* at ¶¶ 16–17. Examples of cottage foods include cookies, cakes, breads, jams, popcorn, and pasta. *Id.* ¶ 18.

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The Nebraska Pure Food Act creates a regulatory regime (including inspections) for businesses that sell food for human consumption. Such businesses are defined as "food establishments." Neb. Rev. Stat. § 81-2,245.01 (Supp. 2019). Before 2019, the Pure Food Act applied to persons who wished to sell cottage foods from their home. In 2019, the Legislature amended the statutes to exclude cottage foods from the definition of "food establishment." Section 81-2,245.01 as amended provides:

> Food establishment shall mean an operation that stores, prepares, packages, serves, sells, vends, delivers, or otherwise provides food for human consumption. The term does not include:
>
> . . . .
>
> (7) A private home or other area where food that is not time/temperature control for safety food is prepared for sale directly to the consumer including, but not limited to, at a farmers market, fair, festival, craft show, or other public event or for pick up at or delivery from such private home or other area, if:
>
> (a) The consumer is informed by a clearly visible notification that the food was prepared in a kitchen that is not subject to regulation and inspection by the regulatory authority and may contain allergens. For sales conducted at a farmers market, fair, festival, craft show, or other public event, such notification shall be at the sale location. For sales conducted for pick up at or delivery from a private home or other area, such notification shall be at such private home or other area, on the producer's web site if one exists, and in any print, radio, television, or Internet advertisement for such sales;
>
> (b) The name and address of the producer is provided to the consumer on the package or container label;
>
> (c) Product delivery is made directly from the producer to the actual customer in a person-to-person transaction or by United States mail or a commercial mail delivery service;

(d) The producer follows any food safety and handling guidelines for sale at a farmers market, fair, festival, craft show, or other public event required by the county, city, or village where the food is sold;

(e) Prior to conducting any food sales, the producer, other than one selling directly to the consumer at a farmers market, has successfully completed (i) a nationally accredited food safety and handling education course that covers topics such as food safety issues, regulations, and techniques to maintain a food-safe environment or (ii) a certified food safety and handling training course offered at a culinary school or as required by a county, city, or village to obtain a food handler permit;

(f) The producer, if using private well water to produce food sold under this subdivision (7), has had such well water tested for contamination by nitrates or bacteria prior to conducting any food production and sales; and

(g) The producer complies with section 81-2,280;

. . . .

The Legislature also added a new section to the Pure Food Act, which is now codified at Neb. Rev. Stat. § 81-2,280 (Supp. 2019):

> A producer of food described in subdivision (7) of section 81-2,245.01 shall register with the department prior to conducting any sales of food. The registration shall be made on forms prescribed by the department and include (1) the name, address, and telephone number of the producer, (2) the type of food safety and handling education or training course taken and the date of its successful completion, and (3) proof of private well water testing pursuant to subdivision (7)(f) of section 81-2,245.01, if applicable. This section shall not apply to a producer of food selling directly to the consumer at a farmers market.

After the 2019 law took effect, the Plaintiff registered with the State and began selling home-baked cookies and cakes at farmers markets and through the mail. Compl. ¶¶ 45, 55–56, 63. But in December 2019, the City of Lincoln ("City") announced that it was drafting its own

cottage food rules and that selling such food was forbidden until the ordinances were enacted. *Id.* at ¶ 57.

In February 2020, the City amended its ordinances as they concern sellers of cottage food. Compl. at Ex. B. The ordinances now require cottage food operations to apply for a permit from the Lincoln-Lancaster County Health Department ("Health Department"). The Director of the Health Department is required to inspect the cottage food operation within 30 days of an application. *Id.* Thereafter, the Director may inspect the cottage food operation at any reasonable time to determine compliance with regulatory requirements. *Id.* The ordinances require cottage food operations to follow regulatory requirements beyond those in the Pure Food Act. *Id.*

In May 2020, the Plaintiff filed a Complaint for Declaratory and Injunctive alleging that the Pure Food Act preempts the ordinances. In addition to the City and Health Department, the Plaintiff sues Leirion Gaylor Baird in her official capacity as the City's mayor ("Mayor") and James Bowers, Richard Meginnis, Jane Raybould, Tammy Ward, Sändra Washington, Roy Christensen, and Bennie Shobe in their official capacity as members of the city council (collectively "City Councilors"). The Plaintiff also sues Justin Daniels in his official capacity as the Health Department's Environmental Public Health Supervisor.

The Plaintiff prays for a judgment declaring that the ordinances are void and an injunction preventing the Defendants from enforcing them. She also prays for nominal damages of $1. The Defendants moved to dismiss the Complaint under Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6).

II. STANDARD

Nebraska is a notice pleading jurisdiction. *Vasquez v. Chiproperties, LLC*, 302 Neb. 742 (2019). Plaintiffs only need to set forth a short and plain statement of the claim showing that they

are entitled to relief. *Id.* They are not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. *Id.*

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Vasquez*, *supra*. A court should sustain a motion to dismiss under § 6-1112(b)(6) only in the unusual case in which the face of the complaint shows some insuperable bar to relief. *Id.*

III. ANALYSIS

A. The Plaintiff has not stated a claim for damages.

In her Complaint, the Plaintiff prays for nominal damages for the "economic, personal, and constitutional injuries" caused by the Defendants. The Plaintiff has not, however, identified any basis to award such damages and the Court has found none. Neither the Uniform Declaratory Judgements Act nor the injunction statutes allow persons to recover damages caused by a preempted ordinance. The Court therefore dismisses the Plaintiff's claim for damages under Neb. Ct. R. Pldg. § 6-1112(b)(6).

B. The Mayor and City Councilors have not shown that they are entitled to legislative immunity for the Plaintiff's declaratory and injunctive claims.

The Mayor and City Councilors argue that they cannot be sued in their official capacities for declaratory and injunctive relief for a couple of reasons. First, they argue that the "Ex Parte Young exception" has not been "extended to violations of state law." Reply brief at 2–3. As explained above, the Plaintiff alleges that the ordinances are preempted by the Nebraska Pure Food Act.

Generally, a suit against a public officer in his or her official capacity is not a suit against the officer but rather a suit against the state or political subdivision for which the officer works. See *Cappel v. Neb. Dep't of Nat. Res.*, 298 Neb. 445 (2017). But a suit against a public officer

for prospective declaratory or injunctive relief from an invalid act or abuse of authority is not a suit against the state or political subdivision. See *Concerned Citizens of Kimball County, Inc. v. Dep't of Environ. Control*, 244 Neb. 152 (1993). Such actions are not barred by the state or political subdivision's sovereign immunity unless the requested relief would require the government to expend public funds. See *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379 (2012), overruled in part, *Griffith v. Neb. Dep't of Corr. Servs.*, 304 Neb. 287 (2019).

The Defendants correctly analogize this rule to the similar doctrine created by the U.S. Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908). But the Defendants incorrectly argue that Nebraska's rule is limited to claims based on federal law. It is not. Both *Project Extra Mile* and *Concerned Citizens of Kimball County* involved state law claims.

Perhaps a better question is why the Mayor and City Councilors should remain parties now that the City has consented to this lawsuit. Generally, *Ex Parte Young* and Nebraska's analogue are ends-around the state or political subdivision's sovereign immunity. That is, although sovereign immunity prevents a plaintiff from directly enjoining the government from enforcing an invalid law, a plaintiff can effectively obtain the same relief by enjoining the officers in their official capacity. This "fiction" is necessary to harmonize the government's sovereign immunity with the need to vindicate individual rights. See *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 900 (2017). But there is no need for this fiction here because the City concedes in its briefing that the Plaintiff may sue it for declaratory and injunctive relief. Nonetheless, while the Mayor and City Councilors certainly do not need to be parties, the Court does not believe that their superfluity alone requires that they be dismissed.

The Mayor and City Councilors also argue that the Court should dismiss them under § 6-1112(b)(1) because they have "sovereign, legislative immunity." Defendants' brief at 11.

Although the Defendants imply that legislative immunity for local lawmakers is an aspect of sovereign immunity, it is instead a common law doctrine. See *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). In *Bogan*, the U.S. Supreme Court explained that local legislators have absolute legislative immunity for actions taken "in the sphere of legitimate legislative activity." *Id.* at 54 (citation omitted).

Now that the Court has dismissed the Plaintiff's damages claim, it is not clear if the Mayor and City Councilors will still press their legislative immunity defense. In their opening brief, the Defendants seemingly argued that the Mayor and City Councilors were immune from all the relief sought in the Complaint. But their reply brief asserts that they are entitled to legislative immunity "[a]s it relates to monetary damages." Reply brief at 3.

Other courts have held that legislative immunity can also apply to claims for declaratory or injunctive relief. These cases often cite *Consumers Union v. Supreme Court of Virginia*, in which the U.S. Supreme Court held that legislative immunity barred a suit for declaratory relief against a state supreme court justice in his official and individual capacities. 446 U.S. 719 (1980). A few years later, the U.S. Supreme Court stated that personal immunity defenses are unavailable in official capacity actions because such actions are treated as suits against the government. *Kentucky v. Graham*, 473 U.S. 159 (1985). But under the *Ex Parte Young* doctrine, suits for prospective relief against public officers are not deemed to be suits against the state. Thus, federal courts have subsequently held that officers sued in their official capacity for prospective relief can still assert legislative immunity. See *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71 (2d Cir. 2007); *Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005); *Larsen v. Senate of the Commonwealth*, 152 F.3d 240 (3d Cir. 1998); *Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991); *Harris v. Ariz. Indep. Redistricting Comm'n*, (D. Ariz. 2014); *Hall v. Louisiana*,

974 F. Supp. 2d 944 (M.D. La. 2013); *Gonzalez-Droz v. Gonzalez-Colon*, 717 F. Supp. 2d 196 (D. P.R. 2010).

Legislative immunity does not apply, however, to claims for declaratory or injunctive relief that do not restrain legislative activity. See, e.g., *State Emps. Bargaining Agent Coal.*, *supra* ("even where a defendant's prior conduct giving rise to the cause of action consists of legislative acts for which the defendant is immune, the same may not be true of the future acts that would be compelled or prohibited by a grant of injunctive relief"). Thus, for example, actions to enjoin officers from *enforcing* a challenged law are not barred by legislative immunity even if those same officers enacted the law. See *id.*; see also *Scott*, *supra* (state legislators without any role in enforcing the challenged law were immune from declaratory and injunctive claims); *Harris*, *supra* (members of redistricting commission were immune because they did not enforce the district map); *Hall*, *supra* (state legislative bodies were immune because the plaintiff did not allege that they enforced the challenged law).

Here, the Plaintiff specifically alleges that the Mayor, Health Department, and Daniels—but not the City Councilors—"enforce" the ordinances. Compl. ¶¶ 11, 13–15. But her Complaint also "seeks both permanent and temporary injunctive relief against Defendants' *enforcement* of the [ordinances]." *Id.* at ¶ 7 (emphasis added). The Court thus concludes that the Plaintiff has put the City Councilors on notice that she wants to enjoin them from enforcing the ordinances. At this point, the Court cannot review the municipal code to decide whether the City Councilors actually have enforcement powers. Trial courts cannot take judicial notice of municipal ordinances. See *Hawkins Constr. Co. v. Dir. of Omaha Human Relations Dep't*, 240 Neb. 1 (1992).

The Court observes again that resolving these complicated questions of capacity and immunity are unnecessary because the City has consented to the lawsuit. But if the Plaintiff insists that the Mayor and City Councilors remain parties to this case, the Court will resolve these issues at the proper time.

C. The Defendants have not shown that the Health Department lacks the capacity to be sued.

The Defendants argue that the Health Department lacks the capacity to be sued, although their reasoning has changed between their opening and reply briefs. Initially, the Defendants argued that the Health Department was nothing more than a department of the City, like the police department. If that is true, then the Defendants have a strong argument that the Health Department cannot be sued. See *Meyer v. Lincoln Police Dep't*, 347 F. Supp. 2d 706 (D. Neb. 2004) (holding that the Lincoln Police Department cannot be sued because it "has no separate legal status under Nebraska law").

But in their reply brief, the Defendants argue that the Health Department is joint agency created by an interlocal agreement, while maintaining that it lacks the capacity to be sued. The Defendants stand on less solid ground here. The Interlocal Cooperation Act expressly provides that a joint entity "shall have power . . . to sue and be sued." Neb. Rev. Stat. § 13-804(6) (Reissue 2012); see also Neb. Rev. Stat. § 25-510.02(3) (Reissue 2016) (describing how a "political subdivision" can be served); Neb. Rev. Stat. § 13-903(1) (Reissue 2012) (defining "political subdivision" to include "entities created pursuant to the Interlocal Cooperation Act").

The Plaintiff's Complaint alleges that the Health Department is an interlocal agency and includes a hyperlink to an Interlocal Agreement dated in April 1998. Compl. ¶ 14. It is possible that this agreement is no longer valid and the municipal code establishes that the Health

Department is now a mere city department, but the Court obviously cannot make such assumptions on a motion to dismiss.

That leaves Daniels, whom the Complaint alleges enforces the ordinances for the Health Department. The Defendants' only argument regarding Daniels is that the Health Department is a mere city department and, because the City has consented to suit, suing Daniels in his official capacity is "duplicative." Defendants' brief at 15.

But the Court has not decided whether the Health Department is just a city department. Nor, assuming that the Health Department is a political subdivision, have the Defendants indicated whether it will assert a sovereign immunity defense. The Court will therefore not dismiss Daniels at this point.

D. The Plaintiff has stated a plausible claim that the ordinances are preempted.

The Court now considers the Defendants' argument that the Plaintiff has failed to state a plausible claim that the ordinances are preempted by state law. Municipal ordinances are preempted by inconsistent state law because they are inferior in status and subordinate to the laws of the state. *Butler County Dairy, L.L.C. v. Butler County*, 285 Neb. 408 (2013). There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption. *Id.*

Because the Plaintiff has stated a plausible claim for conflict preemption, the Court does not need to address the first two kinds of preemption at this stage. The Nebraska Supreme Court has described conflict preemption as follows:

> In conflict preemption, legislative intent to preempt local laws is inferred to the extent that [a local law] actually conflicts with state law. As this court has previously explained, [t]hat which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state. Conversely, without express

> legislative grant, an ordinance cannot authorize what the statutes forbid. Nonetheless, when a court considers preemption claims, it is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.
> *Butler County Dairy*, *supra*, 285 Neb. at 432 (cleaned up).

An ordinance is preempted if it cannot coexist with a statute. *State v. Loyd*, 265 Neb. 232 (2003). But if an ordinance can coexist with a statute, then it is not preempted just because it is more stringent than state law. *Butler County Dairy*, *supra*.

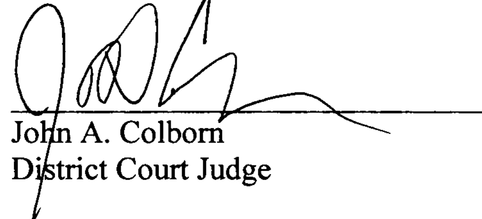
Here, the Pure Food Act provides that cottage food sellers must inform consumers that "the food was prepared in a kitchen that is not subject to regulation and inspection by the regulatory authority." § 81-2,245.01(7)(a). But the ordinances subject cottage food sellers to regulation and inspection by the Health Department, which the parties agree is a regulatory authority. There seems to be some tension here. The Court emphasizes that it does not yet decide whether the ordinances are preempted or not. On a motion to dismiss for a failure to state a claim, it is enough to say that the Plaintiff has plausibly alleged that the statute and ordinances are not consistent.

IV. CONCLUSION

The Court dismisses the Plaintiff's claim for nominal damages. Otherwise, the Court overrules the Defendants' Motion to Dismiss. **IT IS THEREFORE ORDERED** that the Defendants' Motion to Dismiss is **SUSTAINED IN PART** and **OVERRULED IN PART**.

DATED this 26 day of October, 2020.

BY THE COURT:



John A. Colborn
District Court Judge