SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C. Justice

PART 44

N.Y. Statewide Coalition

-v-

N.Y.C. Dept. of Health

INDEX NO. 653584/12

MOTION DATE 2/26/13

MOTION SEQ. NO. 12

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

The motion is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/11/13

MGF, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

NEW YORK STATE SUPREME COURT, NEW YORK COUNTY

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE, THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION, SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, THE NATIONAL RESTAURANT ASSOCIATION, THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE, and THE AMERICAN BEVERAGE ASSOCIATION,

Petitioners,

For a judgment pursuant to Article 78 and 30 of the Civil practice Law and Rules,

-against-

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, THE NEW YORK CITY BOARD OF HEALTH, and DR. THOMAS FARLEY, in his official capacity as Commissioner of the New York Department of Health and Mental Hygiene,

Respondents

Index No. 653584/12

HON. MILTON A. TINGLING, JSC

The petitioners New York Statewide Coalition of Hispanic Chambers of Commerce, The New York Korean-American Grocers Association, Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters, The National Restaurant Association, The National Association of Theatre Owners of New York State, and The American Beverage Association move by Notice of verified Petition dated October 11, 2012, for an order enjoining

and permanently restraining the respondents The New York City Department of Health and Mental Hygiene, The New York City Board of Health and Dr. Thomas Farley and any of their agents, officers, and employees from implementing or enforcing §81.53 of the New York City Health Code, as purportedly amended by the Department of Health in September 2012, and declaring §81.53 invalid; alternatively declaring that §§556(c)(2) and (c)(9), 558(b) and © and/or § 1043 of the N.Y.C. Charter are unconstitutional and in violation of the separation of powers doctrine; alternatively, enjoining and permanently restraining the respondents and any of their agents, officers and employees from implementing or enforcing § 81.53 of the New York City Health Code, as purportedly amended by the DOH in September 2012, on the basis that it is arbitrary and capricious; and awarding such further relief including attorneys' fees and the costs and disbursements of this proceeding pursuant to CPLR § 8101.

Subsequently the Petitioners have moved by Order to Show Cause for an Order pursuant to CPLR §§ 6301, 6311, 6312 and 7805, preliminarily enjoining the respondents to stay the effectiveness of §81.53 in Title 24 of the Rules of the City of New York and enjoining respondents from taking any steps whatsoever to implement or enforce it.

The parties are varied in this proceeding and a brief synopsis of each is required to give proper perspective to each side. The plaintiff The New York Statewide Coalition of Hispanic Chambers of Commerce (Hispanic Chambers of Commerce) is a New York not-for-profit corporation representing twenty-five Hispanic and minority chambers of commerce throughout New York State, which in turn represent nearly 200,000 Hispanic businesses.

The petitioner The New York Korean-American Grocers Association ("KAGRO") is a New York not-for-profit trade association serving the interests of nearly 4,000 Korean-American grocery, deli and store owners in New York City and the greater New York metropolitan area.

Petitioner Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of teamsters ("Local 812") is an affiliated local union of the International Brotherhood of Teamsters and a member of the Soft Drink and Brewery Conference and has approximately 3600 members including those who work in haulage, warehouse and distribution jobs for companies that have exclusive distribution rights in the New York metropolitan area for several breweries. Local 812 is the collective bargaining representative for employees who work in haulage, warehouse, distribution and merchandising jobs for the major New York metropolitan soft drink companies as well.

Petitioner The National Association of Theatre Owners of New York State ("Theatre Owners") is a not-for-profit trade association representing movie theaters. In New York City, Theatre Owners represents 52 movie theaters, 312 screens and 1800 employees across the five boroughs.

The petitioner The National Restaurant Association ("National Restaurant") is a business association of the restaurant and food-service industry representing more than 435,000 member restaurant establishments. Almost seven hundred of its members are located in New York City.

The petitioner The American Beverage Association ("American Beverage") is a national trade organization representing the non-alcoholic beverage industry, including beverage producers, distributors, franchise companies and support industries.

The respondent the New York City Department of Health and Mental Hygiene ("DOH") is an administrative agency in the executive branch of the New York City government. The DOH includes the respondent Board of Health ("Board') which is comprised of eleven individuals unilaterally appointed by the executive branch pursuant to §§ 551 and 553-54 of the N.Y.C. Charter. Of the ten Board members, the chairperson being the eleventh, five must be doctors of medicine. If not physicians, the other five members must hold at least a masters degree in "environmental, biological, veterinary, physical or behavioral health or science, or rehabilitative science or in a related field." NYC Charter §553(b). All ten of the members must have at least ten years of pertinent experience. Id.

The respondent Dr. Thomas A. Farley is the Commissioner of the New York City Department of Health and Mental Hygiene, and serves as the Chair of the Board.

New York City Health Code § 81.53 seeks to limit the sale of "sugary drinks" to containers no larger than 16 ounces. The passage of § 81.53 of the New York City Health Code is aimed at addressing the rising obesity rate in New York City. The statute reads as follows:

§81.53 Maximum Beverage Size

(a) *Definition of terms used in this section.*

(1) *Sugary drink* means a carbonated or non-carbonated beverage that:
(A) is non-alcoholic;
(B) is sweetened by the manufacturer or establishment with sugar or another caloric sweetener;
© has greater than 25 calories per fluid 8 ounces of beverage; and
(D) does not contain more than 50 percent of milk or milk substitute by volume As an ingredient.

The volume of milk or milk substitute in a beverage will be presumed to be less than or equal to 50 percent unless proven otherwise by the food service establishment serving it.

(2) *Milk substitute* means any liquid that is soy-based and is intended by its manufacturer to be a substitute for milk.

(3) *Self service cup* means a cup or container provided by a food service establishment that is filled with a beverage by the customer.

(b) *Sugary drinks*. A food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces.

© *Self-service cups*. A food service establishment may not sell, offer, or provide to any customer a self service cup or container that is able to contain more than 16 fluid ounces.
(d) Violations of this section. Notwithstanding the fines, penalties, and forfeitures outlined in Article 3 of this Code, a food service establishment determined to have violated this section will be subject to a fine of no more than two hundred dollars for each violation and no more
then one violation of this section may be cited at each inspection of a food service establishment.

Notes: § 81.53 was added to Article 81 by resolution adopted September 13, 2012 to establish maximum sizes for sugary drinks and self service beverage cups sold and offered in FSEs. People tend to consume more calories at meals that include large beverage sizes. Its intent is to address the super-size trend and reacquaint New Yorkers with smaller portion sizes, leading to a reduction in consumption of sugary drinks among New York City residents.

The history of the enactment of the Rule is as follows. At a June 12, 2012 Board meeting, the DOH proposed that Article 81 be amended to add a rule capping portion sizes at establishments that provide and sell sugary beverages. The Board approved allowing the DOH to publish the proposal in the City record. No mention is made in the Respondents' moving papers as to who drafted the proposed rule. Petitioners assert and it is not refuted, that the Mayor's office proposed the Rule, verbatim, to the Board.

On June 9, 2012, a Notice of Public Hearing scheduled for July 24, 2012 was published in the City Record. The Notice contained a description of the portion cap rule along with the

certification of approval of the proposed rule by the representatives of the New York City Law Department and the Mayor's Office of Operations on June 5, 2012. The Notice also informed the public that they could submit written commentary about the proposed rule by mail or electronically on or before 5:00 p.m. on July 24, 2012.

The hearing was held on July 24, 2012. The DOH provided the Board with a memorandum, dated September 6, 2012, summarizing and responding to the testimony elicited at the hearing.

On September 13, 2012, the Board voted 8-0, with one abstention, to adopt the portion cap rule. A Notice of Adoption of an Amendment (§81.53) to Article 81 of the Health Code was published in the City Record on September 12, 2012.

This lawsuit was commenced on October 12, 2012.

The respondents in this action all state, in some shape manner or form, "There is an obesity epidemic among New York City residents which severely affects the public's health" as the basis for the passage of §81.53. *Memorandum of Law in Opposition to the Verified Petition.* p.4. The words "epidemic" and "obesity" are neither examined nor explained as much as they are stated as fact. While this court is not in the business of mandating or promulgating health edicts, it is nevertheless interested in how obesity is defined and how an event or situation is classified as an "epidemic."

Webster's Dictionary defines obesity as a condition characterized by the excessive accumulation of fat in the body. The aforementioned's medical definition of obesity is a condition that is characterized by excessive accumulation and storage of fat in the body and that

in adults is typically indicated by a body mass index of 30 or greater. The body mass index ("B.M.I.") is reached by dividing your weight by height.

Webster's Dictionary defines epidemic as affecting or tending to affect a disproportionately large number of individuals within a population, community or region at the same time.

The respondents claim 57.5% of adult New York City residents are overweight or obese. Nearly 40% of New York City schoolchildren (K-8 grade) are overweight or obese. The latest figures from 2011 show 23.7% of New York City adults are obese. This is practically double the rate from 1995. Both the petitioners and respondents agree the obesity rates seem to be leveling out after a meteoric rise. Both parties also agree consumption of sweetened drinks has decreased in recent years.

Obesity is generally acknowledged as a risk factor in many chronic and sometime fatal diseases including hear disease, cancer, strokes, osteoarthritis, hypertension, gall bladder disease and type 2 diabetes. The effect of obesity on children is devastating. Childhood obesity leads to serious health consequences including cardiovascular disease and increased mortality.

The health of its residents affects the economics of a town, village, city, state and nation. New York City, as throughout the country, battles to maintain services in light of tough economic times. One of the fiercest budgetary fights is over Medicaid/Medicare. Currently there are approximately 500-700 thousand people with diabetes in New York City. That works out to one in eight New Yorkers suffering from diabetes. The costs to the City, State and Federal governments are alarming. There were approximately 20,000 hospitalizations with diabetes related symptoms in 2003. Each person diagnosed with diabetes is expected to incur an extra

$6,649 extra per year in medical costs. Obese individuals spend $1,443 more on health needs than normal weight individuals. The number of those individuals receiving medicaid/medicare means tax payer dollars being poured into a preventable disease. It is estimated that obesity and overweight are responsible for approximately $4,000,000,000.00 in direct medical costs. In New York City alone, over 5500 people pass away yearly due to obesity complicated deaths.

The Centers for Disease Control and Prevention ("CDC") released a list of recommendations in 2009 on how to prevent obesity. In Recommended Community Strategies and Measurements to Prevent Obesity in the United States, the CDC recommended establishing and supporting state and local policies for individuals to make healthy food and beverage choices. One of those measures was to discourage the use of sugar sweetened beverages.

A 2004 Harvard University study of more than 50,000 women showed that women who increased their intake of sugary drinks over a four year period had significantly higher increases in weight than those who reduced their sugary drink intake. The study also demonstrated a link between sugary drink intake and type 2 diabetes. Specifically, the study showed that women who drank one or more sugary drink per day had an 83% greater risk of developing type 2 diabetes than women who infrequently consumed sugary drinks. *Schultze MB, Manson JE, et. al.,Sugar Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women, Journal of The American Medical Association,* 2004; 292 (8):927-34. Another study of followed 88,000 women for 24 years found that heavy sugary drink consumers, those taking more than two servings per day, had a 35% greater risk of developing coronary heart disease compared to women who consumed sugary drinks infrequently, those taking less

than one serving a month. *Fung TT, Malik V, et. al., Sweetened beverage Consumption and Risk of Coronary Disease in Women, American Journal of Clinical Nutrition,* 2009; 89:1037-42.

The petitioners do not dispute the seriousness of obesity and the myriad of effects on society. On the other hand, the petitioners argue the link between sugary drinks and obesity are not as clear as the respondents assert. For example, petitioners point out that Dr. Brian Wansink, whose study the respondents cited as supporting their position on portion limiting, has stated the Rule will not succeed because his study was based on people unknowingly being given larger portions as opposed to people knowingly purchasing whatever portion size they desire. Ostensibly, the crux of the argument is people knowingly buy whatever portion size they desire, and are therefore aware of what they are ingesting. The respondents submit a compendium of scientific literature demonstrating that sugary drinks do not drive obesity or contribute significantly to chronic disease.

The petitioners further argue the respondents' actions in enacting §81.53 fails to address with any serious effect the alleged health consequences the respondents cite as the basis for promulgating §81.53. Specifically, Petitioners argue the Rule is an exercise in futility on practical and scientific based grounds, separate and apart from the legal grounds discussed later in this decision. The petitioners state the decision to target only certain sugary sweetened drinks is nonsensical as a host of other drinks contain substantially more calories and sugar than the drinks targeted herein, including alcoholic beverages, lattes, milk shakes, frozen coffees, and a myriad of others too long to list here. Petitioners also point out the exceptions to enforcement of the Rule whereby certain food service establishments are exempt from complying with this Rule. The effect would be a person is unable to buy a drink larger than 16 oz. at one establishment but

may be able to buy it at another establishment that may be located right next door. Furthermore, no restrictions exist on refills further defeating the Rule's stated purpose.

The court does not find the necessity to address at this point the appropriateness of the Board's attempts to classify obesity as an epidemic or a contributing factor to chronic disease. The parties agree obesity constitutes a serious issue. However the issue before this court is whether the Board has the authority to mandate which issues come under its jurisdiction as a basis to promulgate regulations. Specifically, in this case it the Portion Cap Rule and whether the Board has the authority to promulgate same.

The petitioners in this matter center their main argument on the contention that the Board of the NYC Department of Health & Mental Hygiene, in promulgating § 81.53 of the Health Code, exceeded their authority and impermissibly trespassed on legislative jurisdiction. They aver that the actions taken are governed by the seminal case in this area, *Boreali v Axelrod,* 71 N.Y. 2d 1 [1987].

The respondents' position is that this matter is not properly subject to review under *Boreali.* In addition, respondents state that even under a *Boreali* review, there are no infirmities in the amendment to § 81.53 of the Health Code which would mandate its invalidation.

The *Boreali* case involved a challenge to the Public Health Council's [PHC] declaration of an anti-smoking code. Specifically, the PHC passed an ordinance banning indoor smoking in certain establishments after the legislature had failed to pass a smoking ban in some manner, shape or form addressing same. The Legislature had already passed a smoking ordinance imposing smoking restrictions in a narrow class of public locations but the PHC argued the legislature did not preempt the field with that regulation. The Court of Appeals found the PHC

had entered the domain of the legislature and exceeded it's administrative mandates and authority. The Court of Appeals concluded the "agency stretched that statute [the legislative grant of authority] beyond its constitutionally valid reach when it uses the statute as a basis for embodying its own assessment of what public policy ought to be." *Boreali, supra.*

There is no reasonable opposition to the long established proposition that a legislative body may vest in an administrative body certain authority. However, as stated in *Boreali:*

> "A legislative grant of authority must be construed, whenever possible , so that it is no broader than that which the separation of powers doctrine permits.....Even under the broadest and most open ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever social evils it perceives " And "While the separation of powers doctrine give the Legislative considerable leeway in delegating its regulatory powers, enactments conferring authority on administrative agencies In broad or general terms must be interpreted in light of the limitations that the constitution imposes [NY const. Art 111 § 1."

In *Boreali* , the Court of Appeals found the PHC had overstepped the bounds of its authority. Here the respondents assert the history of the New York Legislature's grants of authority as well as the history of the City Charters create a "quasi legislative body uniquely charged with enacting laws protecting the public health in New York City." (Respondents Memorandum of Law, p.2) . The respondents therefore conclude the holdings of *Boreali* do not apply to the Board's adoption of the "Portion Cap Rule." (As New York Health and Mental Hygiene § 81.53 is commonly referred to.)

The allegation that a regulation may be an improper assertion of a legislative function was also addressed in *American Kennel Club v City of New York,* 13584/89 [Sup. Ct. N.Y. County, Sept. 19, 1989. In *American Kennel,* on a motion seeking an injunction, the court addressed the issue of an ordinance and the boundaries extant in a legislative grant of authority.

In *American Kennel* the Department of Health amended §161.08 of the Health Code by a breed specific regulation requiring the registration of all pit bulls within the City of New York and forbids the introduction of pit bulls into the City after a said date. The legislation also imposed the following registration requirements on current pit bull owners: owner must be at least 18 years old, show proof of liability insurance in the amount of $100,000, prove the dog has been spayed or neutered, an then must bring the dog to a facility designated by the Department of Health where the dog would be tattooed with a registration number. The registration also required the dog to be leashed or muzzled at all times. Any litters or dogs brought into the City after a said date would have to be turned into the Department of Health, where the dog could presumably be destroyed.

The City argued *Boreali* did not apply to the facts of the case. The petitioners in the case set forth similar legal arguments as are made herein as to why *Boreali* did apply. The court there ruled *Boreali* did apply. The court cited the totality of the four *Boreali* factors as a basis for its decision. No one factor in Boreali may validate or invalidate a regulation. Rather, the four factors must be viewed in combination and in totality when analyzing a regulation under *Boreali.*

the separation of powers basis upon which the court ruled. The court found the Department of Health's actions in promulgating the legislation had exceeded the authority it claimed the

legislature had given it. Furthermore, the court ruled the Department of Health had failed to exercise any expertise in promulgating the regulation.

As in *American Kennel, supra*, after an extensive review of the history of the City Charter, and its predecessor enabling legislation, as well as a review of the authority granted to administrative predecessors of the respondents under same, this court is convinced that §81.53 of the Health Code is definitively subject to the governing authority of *Boreali.*

The seminal case in the area of modern constitutional separation of powers in New York State, *Boreali* lists four factors to be utilized in analyzing whether an administrative rule may have run afoul of the separation of powers doctrine. The four factors to be considered are (1) whether the challenged regulation is based upon concerns not related to the stated purpose of the regulation, i.e., is the regulation based on other factors such as economic, political or social concerns? (2) was the regulation created on a clean slate thereby creating its own comprehensive set of rules without the benefit of legislative guidance? (3) did the regulation intrude upon ongoing legislative debate? In other words, did the regulation address a matter the legislature has discussed, debated or tried to address prior to this regulation? And (4) did the regulation require the exercise of expertise or technical competence on behalf of the body passing the legislation? *Boreali, supra.* The first factor in *Boreali* probes whether the challenged regulation carves out exemptions based on economic, political and social considerations. The New York Health Code §81.53 applies to maximum sizes for beverages offered and sold in food service establishments (FSE's). The petitioners allege that on its face, §81.53 would appear to exempt grocery stores, convenience stores, bodegas and markets from having to comply with the Rule. However, the respondents assert the Portion Cap Rule is based

solely on health considerations and the aforementioned establishments, including the 7-11 market chains and their famous, or infamous, Big Gulp containers, are exempt because they are not under the jurisdiction of the Health Department pursuant to a Memorandum of Understanding between the Department of Health and the New York State Department of Agriculture and Markets.

Petitioners further point out the Rule exempts soy based milk substitutes, but other milk substitutes such as almond, hemp and rice milk are not exempt. The Rule also does not preclude unlimited free refills or multiple purchases of 16-oz. beverages or providing unlimited sugars after purchase at the regulated businesses but does limit the containers at self service fountains to be limited to 16 oz irrespective of whether a consumer is purchasing water or one of the non-regulated drinks.

Food service establishments are defined in § 14-1.20 (a) of the NYCRR as a place where food is prepared and intended for individual portion service and includes the site at which the individual portions are provided, whether consumption occurs on or off the premises. The term excludes food processing establishments, retail food stores, private homes where food is prepared or served for family consumption and food service operations where a distinct group mutually provides, prepares, serves and consumes the food such as a covered dish limited to a congregation, club or fraternal organization. Petitioners argue and respondents do not deny that the "MOU" requires the respondents to coordinate with the Department of Agriculture and Markets and does not independently limit the Board's authority over those businesses. The respondents offer no evidence of any prior attempts to coordinate with the Department of

Agriculture and Markets on the Portion Cap Rule. This could be construed as evidencing political considerations outside of the Statement of Basis and Purpose.

The respondents' memorandum of law in opposition to the verified petition states on page 4, note 7, that "the obesity toll is not just limited to the physical health of New Yorkers, but also imposes an enormous toll on their economic health. As Commissioner Farley notes "Obesity related health care expenditures in New York City now exceed $4.7 billion annually ... Medicare and Medicaid programs funded by tax dollars, pay approximately 60 per cent of those costs." As to 7-11 and the famous or infamous Big Gulp, the respondents aver that they did not specifically or intentionally exempt the 7-11 stores, but rather that same are within a group of businesses that are regulated by the state under a long term agreement (the "MOU") and exempt from all of Health Code Art. 81's requirements. The respondents submit that should it be determined these hybrid establishments are to be treated as food service establishments, then same will have to obtain food service establishment permits and comply with Article 81 , including the portion cap rule.

This court finds that the regulation herein is laden with exceptions based on economic and political concerns. The failure of the Department to seek agreement under the "MOU" on what is termed a chronic epidemic is a demonstration of the respondents weighing its stated goal of health promotion against political considerations. The statement of the financial costs related to the chronic epidemic further evidences a balancing being struck between safeguarding the public's health and economic considerations. This is impermissible and the court therefore holds the regulation violates the first prong of *Boreali.*

The second prong of *Boreali* inquires whether the regulation was written on a clean slate. The Court of Appeals describes a clean slate as adopting regulations that does not merely fill in the details of a broad legislation, but instead creates its own set of comprehensive rules without the benefit of legislative guidance.

The petitioners allege the respondents have totally written on a clean slate as the legislative body of the City of New York, The City Council, has not set forth any broad legislation or provided guidance as to the regulation at issue herein.

The respondents contend the Rule is not written on a clean slate. They cite to the "extraordinary grant of authority," to regulate all matters affecting the health in the City of New York" and to perform acts as may be necessary and proper to carry out the provisions of the chapter", Charter §§ 556 & 556(e)(4) as the granting of authority for drafting the Rule. Aff. In Opp. p. 29. It is the respondents' position that the "legislative guidance" cited in *Boreali* and the broad authority it alleges to have are one and the same. Respondents state Charter §§ 556(c)(2) & (9), which specifies areas which the DOH may regulate, including control of communicable and chronic diseases and the oversight of the food and drug supply of the city, as specifically granting authority for the promulgation of the Portion Cap Rule. They cite several cases in support of this proposition including *Health Ins Ass'n of Am v Corcoran,* 154 A.D.2d 61, (1990); *Motor Vehicle Mfrs. Ass'n v Jorling,* 181 A.D.2d 83 (1992) and *Pet Professionals v. City of New York*, 215 A.D.2d 742.

Petitioners assert none of these cases involve the Charter provisions relied upon by the respondents and furthermore the cases involved express grants of authority for specific purposes, something petitioners insist is missing here.

In *Health Ins. Ass'n*, the Superintendent of Insurance promulgated a regulation prohibiting insurers selling insurance policies from certain underwriting practices with respect to blood testing of an applicant for health insurance, or using test results, for evidence of the presence of the human immunodeficiency virus ("HIV"). *Supra.* Specifically, the regulation absolutely bans an insurer from (1) considering HIV test results in determining an applicant's insurability, (2) requesting an applicant to submit to HIV testing, and (3) inquiring whether an applicant has previously submitted to an HIV test or about the results of any such test." In this case, the regulation was invalidated on the grounds the Superintendent exceeded his authority by implementing his own ideals of society policy choices after the legislature had not addressed this subject nor granted authority to the Superintendent of Insurance to address same. *Health Ins. Ass'n,* citing *Matter of Campagna v. Shaffer,* 73 N.Y.2d 237. *Supra.*

In *Motor Veh. Mfrs., supra*, the issue before the court was whether the Environmental Conservation Law ("ECL") conferred upon the Department of Environmental Conservation ("DEC") authority to promulgate new regulations concerning tail pipe emissions on new motor vehicles. The petitioners' allegations in that case amounted to challenges based upon federal preemption and questions of whether the DEC had been conferred with the authority to promulgate the regulation and whether the actual ECL regulation, as written, granted the explicit authority the DEC was claiming to regulate tail pipe emissions in new cars or used vehicles only. The court held the federal government had no preempted the legislature from conferring the authority to the ECL when the federal guidelines on same subject expired. Furthermore, the court held the enabling language was clear and specific and the DEC's authority to pass the regulation was upheld. *Motor Veh. Mfrs., supra.*

In *Pet Professionals, supra,* the court addressed the issue of whether the Mayor's designation of the Department of Health as the City agency responsible for dog licensing as well as the subsequent adoption by the Health Department and its implementation of the new designation and procedures were invalid. The court held that since there was already legislation authorizing the Mayor to designate a City agency to license dogs, the act of the Mayor designating the Department of Health as the agency for same was legal. Furthermore, once this was established, State and City agencies have clear authority to implement programs to carry out their duly authorized functions.

The parties vehemently disagree on the history of the New York City Charter and whether same grants the Board the power it seeks to exercise herein. A review of the history of the Charter clarifies the parties' contentions and settles the issue for the court.

The first charter for the city of New York was written in 1686. This Charter was written by Thomas Dongan, lieutenant governor and vice admiral of New York, under King James of England. This charter vested all lands, rivers, creeks, ponds, and waters onto the Mayor, Aldermen and Commonalty of the City of New York. The Charter also created a Common Council made up for the time being of the Mayor, Recorder, and three or more Aldermen and Assistants, of the City of New York; and granted to them full power and authority to call and hold a Common Council and, for the time being, make laws, orders, ordinances and constitutions in writing.

In 1708 another Charter was created under Queen Anne of England. This Charter extended the lands and waters of New York to Nassau Island (Long Island). This new Charter granted the power to establish as many ferries as necessary to common council.

In 1730 another Charter was written for the City of New York. In this Charter a seal was created, the boundaries of New York were increased and the City was divided into wards. This Charter further classified the duties of the Mayor. Same was authorized to appoint one Alderman and one Deputy Mayor. This Charter is the first in the City to call for votes of the people to elect collectors, assessors, and constables of each ward. The Charter also set term limits as yearly for all elected officials. This Charter gave the Mayor and Common Council the authority to decide the products and types of bread, wine, beer, ale and any and all other victuals and things, set to be sold in the city, and there liberties and limits.

Charter of 1752 was passed next. This Charter confirmed all the rights and privileges as granted in the Charter before it. It was not until 1803 that the New York City Charter was amended. This Charter amendment began by setting an election day for all representatives, dividing the City into nine wards, and explaining the duties and privileges of those wards. The Charter then goes on to dictate who can vote, voting requirements and where voting will take place. This Charter also creates the court system of New York and prison regulations of New York. The Charter goes on to determine how taxes will be levied in accordance with the will of the people represented in Senate and Assembly of the State of New York. The provision allows the Mayor, Recorder and Alderman of the City of New York to perform all duties as created by the Senate and Assembly in this act. This Charter amendment then goes on to detail how estates will be handled when no will exists. It also creates regulations for jurors, the building and maintenance of fences in the city, the building of highways and the regulations for the City to handle the poor and aliens. The charter allows for the Common Council to set up penalties for violations of the aforementioned acts. The main provision of this Charter says that the Mayor, Recorder, Alderman or Common Council will not make ordinances and regulations that are

contrary to the laws and constitution of this state or of the United States. The Charter also creates, for the safety of the city and its people, a restriction on the storing of gunpowder as dictated by the legislature of the State of New York. The Charter, enacted by the People of the State of New York, represented in Senate and Assembly, gives power to the Common Council to prescribe rules for the city's fire department and police, regulate buildings and streets, direct piers and bridges to be created or destroyed, and call for the creation of sewers and streets. The Charter also makes the Mayor, Recorder and Alderman supervisors of the City of New York who shall meet annually to decide taxes and to publish annually an account of all expenditures. The Charter makes it lawful for the Mayor, Recorder, and Alderman of the city, or any five or more officials, of whom the Mayor or Recorder must always be one, to perform every act that they are *authorized or required* to by the acts in the Charter, enacted by the legislature.

The Charter of 1803 is the first mention the duties of the Mayor in relation to the police and health of the city. This amendment allows the Council to make ordinances for the filing, draining and regulating of grounds, cellars, and lots. It also regulates the disposal of the dead including the certification by a physician of their deceased patient. It allows the Mayor to seek the opinion of an appointed doctor as to any contagious disease in the city. The powers of police and health in the 1803 charter also looks at the power enacted to the Mayor, Alderman, and commonalty to hire inspectors for food and to destroy any beef, pork, fish, hides or skins of any kind to protect and promote the health of the city. The act only refers once to the powers of the Commissioners of the Health Office. The power delegated to this office is limited to the direction and order of cotton being brought into the city. The Health Act of the 1803 Charter is considered a public act and is to be construed to advance the ends of promoting the heath and

improving the police of the city by enabling the Mayor, Aldermen and Commonalty to take requisite measures under this amendment.

In 1805, the 1803 Charter was amended and another Act relative to the Public Health in the City of New York was passed. This Act transferred powers belonging to the Health Commissioners to prevent against infectious and pestilential diseases to the Mayor, Aldermen and Commonalty of the City of New York. It also granted to the Mayor, Aldermen and Commonalty the power to institute a Board of Health and invest the Board with the powers of the Mayor, Aldermen, and Commonalty, in relation to the public health, as they may judge proper and to enforce a compliance with the orders of the board, by the infliction of penalties. The Act for the Better Government of the City of New York was added to the 1803 Charter in 1806 to "invest the Mayor, Aldermen, and Commonality of the City of New York with adequate powers in relation to certain objects of importance to the police and health of the said city." The Charter ends by making clear that all powers granted to the Mayor, Aldermen, and Commonalty are granted by the legislature and may at any time be repealed.

The Charter of 1836 dictates that the Mayor is to recommend adoption of all "such measures connected with police, security, health, cleanliness, and ornament of the City, and the improvement of it's government, and finances," as he shall see fit. It also dictates that before a City Board may pass an ordinance or resolution, it must be approved by the Mayor of the City. The Mayor can make changes and send the act, ordinance or resolution back to the proposing board, to be reworked, or the Mayor can sign the act, ordinance, or resolution and put it into full effect.

The next Charter was adopted in October 1846. This Charter begins by vesting all legislative power in the Common Council of the City (Art. I, § 2). This article created two

Boards in which power was vested to act as a legislature. Every act, ordinance, or resolution must pass through both Boards and must be certified by the Mayor before it can take effect (Ibid, § 6).

The Charter of 1866 is the first time the Board of Health's responsibilities and powers are explained in depth. The section begins by vesting, by power of the legislature, any powers granted to the Board of Health are also granted to the Mayor and Common Council of the City of New York. (Art. IV Chap. XXII §1). The Mayor acts as the President of the Board of Health and has the power to convene the Board at any time (Ibid, §2). Under Article IV Chapter XXII § 74, the Mayor, Aldermen and Commonalty of the City of New York is given the "full power and authority" to make and pass all such by-laws and ordinances that may be necessary for the "public health of the city." The language of the Article is dedicated to protecting the city from communicable disease. The duties of the Board of Health are explained in §77 (1)-(6) of the chapter. All of the Board of Health's duties, granted by the charter, are specifically linked to preventing the spread of disease within the City. The Article in §86-93 does allow the Board of Health to call for a prohibition on packing and selling of certain foods. However, looking at the history of those provisions, the Charter of 1803 uses similar language but makes clear that the provisions are to promote the health of the city by preventing disease.

The next Charter was amended and agreed upon in 1901. This charter determined a Board of Health, made up of three Commissioners, would run the Department of Health (§1167). Section 1168 of the 1901 Charter also conferred all powers of the 1866 Charter upon the new Department of Health and Board of Health. It conferred these powers for the "health and sanitation matters, and the prevention of pestilence and disease," (New York City Charter. Chap. XIX, Title 1, §1168, 932) in the City of New York. The Board of Health is also given the power,

by the Charter, to enforce all laws of the state to aid in the "preservation of human life, or to the care, promotion or protection of health" and the power includes all laws related to, "cleanliness and to the use or sale of poisonous, unwholesome, deleterious, or adulterated drugs, medicines, or food, and the necessary sanitary provisions for the purity and wholesomeness of the water supply (Ibid, §1169, 933)." The Board of Health also has the power to declare a "matter or thing" as a condition or in effect dangerous to life or health. They can then order the "matter or thing" be "removed, abated, suspended, altered, or otherwise improved or purified" (Ibid, §1176, 941-42). When making and authorizing measures beyond the aforementioned powers, the Board of Health can authorize a declaration for the preservation of public health, which the Mayor must approve in writing. This extraordinary power can only be used when "imminent peril to the public by reason of impending pestilence" exists (Ibid, §1181, 944-45). The Board of Health, by §1198 of the New York City Charter of 1901, may compel execution of any order made by the Department of Health, its Board, or its authorities, with all terms having the necessary legal effect. The Board of Health may, when it deems necessary, order the removal and/or destruction of "any thing within the city that may be putrid or otherwise dangerous to public health." (Ibid, §1207-1210, 954-55). The expressed duties of the Board of Health under §1219 clearly deem that the Board of Health's main responsibilities are to "prevent the spread of all contagious, infectious, and pestilential diseases" for the safety of the public. The Board of Health, under §1229, defines its ability to make laws to protect from nuisances and defines public nuisance as "whatever is dangerous to human life or detrimental to health" and "whatever renders the air, or human food or drink, unwholesome." It also declares these nuisances to be illegal.

The City Charter of New York was amended again in 1921. This Charter states the Board of Health's powers are not limited "only to the subject of health." (Greater New York

Charter. IV., "The Board of Health," 27). The Charter calls for the Board of Health to "enforce all laws for the preservation of human life, the care, promotion or protection of health" (§ 1169). It also allows for the Board of Health to "abate all nuisances detrimental to the public health or dangerous to human life" (§1171). As to stores and markets, the Board of Health can "regulate and control the cleanliness and ventilation of public markets and the selling or vending therein of improper articles" (§1171).

In 1936 the Charter was again amended. Chapter 22 §553 (a) changes the amount of members of the Board of Health to include a chairman and four members and §553 (b) says that except for the chairman, the four members "shall serve without compensation and shall be appointed by the Mayor." They shall also serve staggered terms, for the first ones appointed, and then all subsequent appointments shall be for eight years. The authority, duties and powers of the department are dictated by §556. The Board of Health "shall have jurisdiction to regulate all matters affecting health in the city" (§556 (a)). The duties entrusted to the Board of Health, unless otherwise provided by law, are for "the preservation of human life, for the care, promotion and protection of health" (§556 ©). The 1936 Charter also removed the Board of Health's duties regarding public markets, and wholesomeness of foods.

The New York Charter was amended again in 1961. The Charter's Sanitary Code under §558 was changed to the Health Code. This section calls for the Board of Health to make and enforce provisions for the security of life and health in the City. Although §558 © does allow the Board of Health to extend their powers beyond only health, this particular section codifies health as dealing with sanitary regulations. §558 (b) makes clear that no regulation made in connection with the powers of the Board of Health may be inconsistent with the constitution or laws of New York State or the New York City Charter as a whole.

The largest amendment to Chapter 22 of the New York City Charter came in 1989, when the duties of the Board of Health were expanded. Chapter 22 §556 of the Charter designates that except as otherwise provided by law, the Department of Health can regulate all health matters in New York City and perform all functions and operations that relate to the health of the city. The section lists duties but doesn't limit them. The section, as with all other earlier versions of the Charter, allows the department to enforce "all provisions of law for the preservation of human life, for the care, promotion and protection of health." The expansions in this Charter amendment call for the department to "supervise the reporting and control of communicable diseases and conditions hazardous to life and health" and "exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health" (§556 (f)). The Board of Health may also "supervise and regulate the public aspects of the food and drug supply of the City and other businesses and activities affecting public health in the City," except as otherwise provided by law (§556 (q)). The Board of Health's power to amend the Health Code is limited to "provisions for the security of life and health in the City," as provided by §558 (b). The Board of Health may amend the Health Code only to the extent from which its power extends (§558 ©). The expansion of duties is once again limited to no greater than what is allowable by law. The amendment grants the Board the right to enforce all provisions of law, not to make laws to then enforce. The legislature did not bequeath upon the Board greater rights than which an executive administrative agency is entitled to have for the enforcement of legislation.

In 2004 the New York City Charter was again amended and Chapter 22 "Board of Health" contains some of those amendments. First, the Board was changed from five to ten members (§553 (b)). Like the 1989 Charter, the Board, under §556 © (2), can supervise the "reporting and control" of communicable and chronic diseases. The Board is also called to

analyze the needs of the public for better health and plan and promote programs for such needs (§556 (a) (8)). Programs differ from regulations or laws. The Charter also keeps the duties from the 1989 Charter but changes its format. In the 1989 Charter, section §556 (q) allowed the Board of Health to supervise and regulate the food and drug supply of the city. In the 2004 Charter amendment, this now becomes §556 © (9) and adds that the Board of Health can ensure that such businesses and activities are conducted in a "manner consistent with the public interests." Section 558 of the 2004 Charter remains consistent with the 1989 Charter. The rule-making authority designated to all agencies within the Charter is dictated by §1043 of the Charter. This section declares that agencies are "empowered to adopt rules necessary to carry out the duties it is delegated pursuant to federal, state, and local law." It also lists the steps an agency must take before placing a law into effect and it must make sure the law is consistent with the constitution and statutes of the State.

The most up to date Charter amendment is the Charter of 2012. This Charter lists the Board of Health as the Department of Health and Mental Hygiene (Chapter 22). This Charter maintains all the provisions of the 1989 and 2004 Charters. It calls for the Board of Health to "enforce all provisions of law for the preservation of human life, for the care, promotion and protection of health" (§556 (a) (1)). It also allows for the Board of Health to review public health services and general public health planning (§556 (b)), and determines the public health needs of the City and prepare plans and a program addressing such needs (§556 (b)(8). The Charter's §556 (c)(2) and 556 (c)(9) are consistent with the 1989 and 2004 Charter amendments. The Board of Health also has the power to provide for or promote programs for the prevention and control of diseases §556(d)(5). The Board of Health may amend, add or repeal any regulations in the Health Code that it has the power to control. (§558 (b)(c)(g)).

The City of New York's Board of Health has very broad powers under the New York City Charter dating all the way back to its conception in 1698. However, in looking at the history of the Charter, the intention of the legislature with respect to the Board of Health is clear. It is to protect the citizens of the city by providing regulations that prevent and protect against communicable, infectious, and pestilent diseases. In looking at the major amendments to the Charter, history shows they all occurred under times of increased diseases. During the 1800's many amendments were made and powers increased to help prevent the spread of diseases being brought in through immigration, most traveling by ship. This is specially clear through all the amendments made to Chapter 22. For example, the Board of Health was given the authority to quarantine houses and vessels at one point. The Board of Health was also given the power to create a floating hospital so any and all contagious citizens would be put to sea on the floating hospital until they were deemed to be healed and/or no longer a threat to the general population of the City.

It is also clear that the Board of Health's control over food was for the same reason. The Board of Health could call for any food to be destroyed if it was deemed unwholesome. In the 1930's, during the great depression, when diseases were again common, the Board of Health's power was expanded. In 1989, at a time of the AID's epidemic, the Board of Health was again given more power to control and report on "communicable and chronic diseases."

However, one thing not seen in any of the Board of Health's powers is the authority to limit or ban a legal item under the guise of "controlling chronic disease," as the Board attempts to do herein. The Board of Health may supervise and regulate the food supply of the City when it affects public health, but the Charter's history clearly illustrates when such steps may be taken,

i.e., when the City is facing eminent danger due to disease. That has not been demonstrated herein.

The Board states since its extraordinary "powers originate in the mid 19th century, they are protected under the State Constitution from the impact of any modern separation of powers analysis that would apply to the City Council (N.Y. Const., Art. IX, §3[b]) and may in fact be protected even from analysis of the delegation by the State Legislature." The aforementioned history and review of the City Charter clearly dispels these notions. One of the fundamental tenets of democratic governance here in New York, as well as throughout the nation, is the separation of powers. No one person, agency, department or branch is above or beyond this. "The Legislature must set bounds to the field, and must formulate standards which shall govern the exercise of discretion within the field." *Small v. Moss*, 279 N.Y.2d 288. A study of the New York City Charter makes clear the Legislature did not grant the powers claimed herein. Even were the court to entertain the Board's position that the Legislature meant to provide such a broad delegation of power to the Board, same would not pass constitutional muster under the Separation of Powers doctrine.

In analyzing the history of the New York City Charter, there is no mistaking these two facts: (1) the New York City Council is the legislative body of the City of New York, and it, and it alone, has the authority to legislate as the Board seeks to do here. It "remains the task of the City Council" to make primary decisions as to policy in this area. *Jewish Home & Infirmary of Rochester v. Comm'r of N.Y. State Dep't of Health*, 84 N.Y.2d 252 (1994). The Board's arguments of having extraordinary powers as claimed herein have been previously rejected. *See American Kennel v. City of New York,* (N.Y. County Supreme Court, Sept. 19, 1989, opinion unpublished). The second (2) fact is the Board is an executive administrative agency that

operates no different than a myriad of other agencies in New York City or State. Their own regulations in how it operates attest to same. The Board's arguments fail the test of time; as time has passed, local legislatures have been strengthened and the characterizations which the Board claims, have since passed as the courts have recognized and enforced that which has been codified by state and local legislatures. "It is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing interests." *Boreali, supra.* This court finds the City Charter §§556 , 556(e)(4) & 556(c)(2) & (9) do not grant the Health Department the sweeping and unbridled authority to define, create, authorize, mandate and enforce § 81.53 of the Health Code. Accordingly, the court holds the Rule violates *Boreali's* second factor.

The third *Boreali* prong is whether "the agency acted in an area in which the legislature has repeatedly tried ... and failed .. .to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" *Boreali, supra.*

The petitioners assert the Board has completely trespassed over territory that is properly under the jurisdiction of the legislature. They cite to the New York City Council and their rejection of three (3) resolutions specifically targeting sugar sweetened beverages (SSBs); N.Y.C. Council Res No. 1265-2012 (tax on SSBs); No. 1264-2012 (warning labels for SSBs); No. 0768-2011 (prohibiting food stamp use for SSBs). They further cite to NYS Assembly Bills NO.1 0010 (SSBs in certain establishments and vending machines); No. 8812 (placement and sales of SSBs in certain establishments); and No. 843 (tax on certain items including SSBs). None of the aforementioned bills were passed.

In their Amicus Curiae memorandum of law, several New York City Council members

have pointed to the actions of the Council itself in the general area of health and specifically, sugar sweetened beverages. N.Y.C. Council Resolution NO. 1265-2012 sought state legislation to add an excise tax to certain sugar sweetened beverages, endorsing a specific means of discouraging its consumption by increasing its costs relative to other products via a tax. N.Y.C. Council Resolution No. 0768-2011 sought the permission of the U.S. Department of Agriculture to permit the City to prohibit the use of food stamps for the consumption of sugary beverages. The purpose of the resolution was to withhold a benefit for a distinct class of residents of the City.

Other examples cited by the petitioners illustrating how the legislature has sought to address the issue of sugar sweetened beverages include the N.Y.S Assembly Bill No. 10010 which would have flatly prohibited the sale of sugary beverages at food establishments and vending machines on state government property. The N.Y.S. Assembly Bill No. 08812 would have prohibited stores with more than ten (10) employees from displaying "candy or sugared beverages" at the "check out counter or aisle." None of the aforementioned were enacted.

The respondents stake out the position that neither the NY City Council nor the State Legislature has ever considered proposed legislation on capping portion sizes. Respondents propose the Court of Appeals in *Boreali* found this prong to have been violated because in *Boreali*, the legislature had already promulgated legislation and the PHC then administratively enacted more expansive restrictions going beyond that which the legislature had already addressed. Respondents stress that here there is no history of legislative failure as there was in *Boreali*. They point out the N.Y.C. Council's resolutions were only resolutions which even if passed would not have had the force of law. (N.Y. Municipal Home Rule Law §29 (defining local law as " A law (a) adopted pursuant to this chapter or another authorization of a state

statute or charter by the legislative body of a local government...but shall not mean or include a resolution...of the legislative body); Chapter 32 ("all legislative action by the council shall be by local law"). Therefore the respondents assert the failure of the legislature to specifically address cap portion sizes equates to the issue having not been addressed and open to the Board acting on a clean slate.

There is no rational argument purporting to demonstrate legislative inaction in this area. Addressing the obesity issue as it relates to sugar-sweetened drinks, or sugary drinks, is the subject of past and ongoing debate within the City and State legislatures. The respondents attempt to distinguish the aforementioned as substantial public debate and lobbying by interested parties. The respondents point out the N.Y.C. Council resolutions are not law and the State Assembly has never addressed cap portion size directly. Same is an attempt at creating a distinction without a difference. To accept this argument would force any legislative body to consider any and all avenues of addressing a regulated issue. Failure to think, or list or consider, any and all possibilities, would justify the usurpation by an administrative agency of a legislatively mandated function. The court therefore holds the regulation also violates the third factor of *Boreali.*

The fourth and final prong in *Boreali* is whether the regulation requires the exercise of expertise or technical competence on behalf of the body passing the legislation. *Boreali, supra.*

The petitioners assert the Rule was drafted, written and proposed by the Mayor's office and submitted to Board for enactment. Parties agree that thereafter the Rule, without any substantive changes was enacted by the Board. The petitioners claim same renders any alleged expertise or technical competence exercised as a subterfuge and nothing more than an illusion. The Respondents do not dispute the origin of the Rule and can not cite to who on the Board, if

anyone, specifically crafted the Rule after exercising the requisite expertise or technical competence. However, the respondents assert the exercise of its expertise and technical competence is evident in the Memorandum it published after the Public Hearing and before official passage of the Rule wherein it addressed concerns and points raised at the Public Hearing. The memorandum addressed scientific studies and the like detailing links between sugary drinks, obesity and chronic diseases as well as evaluating some pertinent studies concerning portion control. Admittedly, this memorandum was published after the Rule had been written and introduced to the Board, but again, before passage of the Rule.

The enactment of the Rule is the promulgation of a simple code which can not be traced to New York City's legislative body, the City Council, as previously mentioned. It appears the DOH. and the Board accepted the Mayor's office's proposed Rule as perfectly addressing the obesity issue at this time in New York City and made no changes whatsoever to the Mayor's proposal. The development requirement in *Boreali* does not specifically require an agency to draft its own regulations to exercise their expertise or technical competence. The development requirement can be demonstrated, in this court's opinion, by the exercise of the requisite expertise in a field prior to the passage of a regulation. There is no clear black marker line detailing how many drafts of a regulation, or how many debates and/or hearings have to be held, before an agency is determined to have exercised its expertise in crafting the regulation enacted by it. The agency merely has to exercise its expertise or technical competence and upon a challenge to a regulation, be able to cite where and how same was exercised. In the case at bar, the Board's Public Hearing and the memorandum after the Hearing evidence the exercise of the Board's expertise. The fact the Board accepted a proposed regulation and chose not to make any substantive changes to it speaks to its agreement with the language of the regulation, not its

failure to exercise its expertise or technical competence. Accordingly, the court finds the respondents satisfy the fourth prong of *Boreali.*

Next we address the petitioners' claim under Article 78 of the CPLR.

An Article 78 proceeding is the vehicle by which a party may challenge the determination or ruling of administrative agencies, public bodies or officers. *CPLR 7803.* The court satisfied the Board is an executive agency, this proceeding is brought by the petitioners to challenge the Board's actions in enacting §81.53 of the New York City Health Code.

An administrative regulation is upheld only if it has a rational basis and is not unreasonable, arbitrary or capricious. *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y. 2d 158; *Matter of Consolidation Nursing Homes, Inc. v. Comm'r New York State Dept. of Health*, 85 N.Y.2d 326 (1995). Administrative regulations are scrutinized for reasonableness and rationality in the context which in they were passed. *Matter of Bernstein v. Toia*, 45 N.Y.2d 460. The challenger to a regulation must demonstrate that the regulation "is so lacking in reason for its promulgation that it is essentially arbitrary." *Matter of Marburg v. Cole*, 286 N.Y. 202.

The two step process requires examination of the reasonableness of the action and secondly, whether the alleged action is arbitrary and capricious. Failing to demonstrate the reasonableness of the action and the lack of the arbitrary and capricious nature of the determination, in this case the Portion Cap Size Rule, dooms the aforementioned to be invalidated. There is no room for a court to impose its own version of a more adequate measure or proper determination. *Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 N.Y.2d 753 (1991).

In examining the reasonableness of enacting the Rule, the agency is only required to demonstrate a reasonable basis for this Rule. Putting aside the aforementioned illegality of the

Board's promulgation of the Rule, the stated premise of enacting the Portion Cap Rule is to address the rising obesity rate in New York City. Accepting the Board's claims it considered the material it allegedly examined in promulgating the Rule, the reasonableness for enacting the Rule meets the criteria under Article 78 standards. *See N.Y. State Ass'n of Counties v. Axelrod*; *Matter of Consolidation Nursing Homes, Inc. v. Comm'r New York State Dept. of Health. Supra.*

Next the court addresses whether the Portion Cap Rule itself is arbitrary or capricious. The standard for same can be described as whether the administrative action is without foundation in fact. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, (1974).

The court affords the Board every degree of judicial deference in promulgating the Rule. *Fanelli v. N.Y. City Conciliation & Appeals Bd.*, 90 A.D.2d 756 (1st Dept. 1982). The Rule is nevertheless fraught with arbitrary and capricious consequences. The simple reading of the Rule leads to the earlier acknowledged uneven enforcement even within a particular City block, much less the City as a whole. Furthermore, as previously discussed, the loopholes in this Rule effectively defeat the stated purpose of the Rule. It is arbitrary and capricious because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule, including but not limited to no limitations on re-fills, defeat and/or serve to gut the purpose of the Rule.

For the aforementioned reasons, in the Article 78 branch of this action, The Portion Cap Rule is found to be arbitrary and capricious.

In conclusion, the Appellate Division in *Boreali*, in affirming the trial court's invalidation of the promulgated regulations in *Boreali* on a different theory, the court expressed concern about the administrative agency having a virtually limitless authority. This court agrees

that the regulation herein takes the issue to new heights. To accept the respondents' interpretation of the authority granted to the Board by the New York City Charter would leave its authority to define, create, mandate and enforce limited only by its own imagination. The fact that respondents interpret the Charter precisely to conclude same, tolls the bell on this regulation. The Portion Cap Rule, if upheld, would create an administrative Leviathan and violate the separation of powers doctrine. The Rule would not only violate the separation of powers doctrine, it would eviscerate it. Such an evisceration has the potential to be more troubling than sugar sweetened beverages.

Accordingly, the petitioners Notice of Verified Petition dated October 11, 2012, for an order enjoining and permanently restraining the respondents The New York City Department of Health and Mental Hygiene, The New York City Board of Health and Dr. Thomas Farley and any of their agents, officers, and employees from implementing or enforcing §81.53 of the New York City Health Code, as purportedly amended by the Department of Health in September 2012, and declaring §81.53 invalid; alternatively declaring that §§556(c)(2) and (c)(9), 558(b) and © and/or § 1043 of the N.Y.C. Charter are unconstitutional and in violation of the separation of powers doctrine; or alternatively, enjoining and permanently restraining the defendants and any of their agents, officers and employees from implementing or enforcing § 81.53 of the New York City Health Code, as purportedly amended by the DOH in September 2012, on the basis that it is arbitrary and capricious; and awarding such further relief including attorneys' fees and the costs and disbursements of this proceeding pursuant to CPLR § 8101 is granted to the following extent: The respondents and any of their agents, officers, and employees are hereby enjoined and permanently restrained from implementing or enforcing §81.53 of the New York City Health Code, as purportedly amended by the Department of Health in September 2012, and

same is hereby declared to be invalid. All other reliefs sought including attorneys' fees are denied.

The petitioners' Order to Show Cause for an Order pursuant to CPLR §§ 6301, 6311, 6312 and 7805, preliminarily enjoining the respondents to stay the effectiveness of §81.53 in Title 24 of the Rules of the City of New York and enjoining respondents from taking any steps whatsoever to implement or enforce it. is hereby denied as moot.

DATED: March 11, 2012

MAT

Hon. Milton A. Tingling, JSC

HON. MILTON A. TINGLING
J.S.C.