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# Growing Obesity in America: New York City's Plan to Curb Obesity

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*Growing Obesity in America: New York City's Plan to Curb Obesity*

*By: Kimberly Gilhooly*

*AWR Research Paper*

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## *Growing Obesity in America: New York City's Plan to Curb Obesity*

By: Kimberly Gilhooly,<sup>1</sup> AWR Research Paper

### **I. Introduction**

Supply and demand normally regulates which products are sold, but when a major epidemic is negatively affecting the population, legislative implementations should be put into effect to intervene. Obesity has been is a growing concern among Americans and that concern has increased substantially.<sup>2</sup> As of 2010, the Center for Disease Control and Prevention estimated that roughly forty percent of adults, age twenty years and over were obese, and that thirty-three percent of those in that same age bracket, were considered overweight.<sup>3</sup> During the same time period eighteen percent of adolescents, age twelve to nineteen, and seventeen percent of children age six to eleven, were found to be obese.<sup>4</sup>

These staggering statistics pushed New York City's Department of Health and Mental Hygiene to adopt Amendment § 81.53 to the New York City Health Code.<sup>5</sup> The purpose of the amendment is to limit the size of sugary drinks that customers can purchase at restaurants, entertainment venues and street carts.<sup>6</sup> This ban becomes effective in March of 2013 and is the first of its kind to pass in the United States.<sup>7</sup> As with any controversial piece of legislation, there

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<sup>1</sup> The author is currently a 2L Day Student at Seton Hall University Law School.

<sup>2</sup> Dr. K M Flegal, MD Carroll, R J Kuczmarski & C L Johnson, Overweight and Obesity in the United States: Prevalence and Trends, 1960-1994, 22 Int'l J. Obesity 39-47 (1998).

<sup>3</sup> Center for Disease Control and Prevention, Overweight and Obesity, Adult Obesity Facts <http://www.cdc.gov/obesity/data/adult.html> (last visited December 12, 2012).

<sup>4</sup> Center for Disease Control and Prevention, Adolescent and School Health, Childhood Obesity Facts, <http://www.cdc.gov/obesity/data/childhood.html> (last visited December 12, 2012).

<sup>5</sup> See The City Record: Official Journal of the City of New York, Sept. 21, 2012, at 2602-03 (to be codified in the Rules of the City of New York (R.C.N.Y.) tit. 24, § 81.53).

<sup>6</sup> Id.

<sup>7</sup> Raven Clabough, Soda Industry Sues NYC Over Supersized Soda Ban, The New America, Oct. 16, 2012, <http://www.thenewamerican.com/usnews/item/13228-soda-industry-sues-nyc-over-supersized-soda-ban>.

are always arguments drawn for and against it.<sup>8</sup> Current opponents of Amendment § 81.53 have argued five main issues that are of consequence.<sup>9</sup> Those arguments are as follows: (1) the health impact of sugary drinks is not a substantial concern; (2) freedom of choice will become impaired if this Amendment is enacted; (3) feasibility of both converting to the limited drink size and selling profitability will be burdened; (4) the rationale behind the restrictions and requirements are inappropriate for government to implement; and (5) that overall, reducing drink size is not going to affect the obesity problems.<sup>10</sup> These arguments are rebutted below and merely represent concerns that should not be of consequence.<sup>11</sup>

Disagreement over the implementation of the Amendment by the Board of Health has also been debated, since the Board of Health is merely an agency of the executive branch.<sup>12</sup> The issue is currently being litigated in N. Y. Statewide Coal. of Hispanic Chambers of Commerce v. The New York City Department of Health and Mental Hygiene.<sup>13</sup> The ability of the Board of Health to implement such restrictions is valid because they are appointed by the Mayor, who is responsible New York City's public health.<sup>14</sup> Any implementation by the Board of Health is an exercise of the Mayor's executive power.<sup>15</sup> The Amendment adopted by New York City's Board of Health is a step in the right direction, and has led to the New York City's Obesity Strategy, which has been complied and implemented to correlate with the new legislation.<sup>16</sup>

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<sup>8</sup> DOH Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code to Establish Maximum Sizes for Beverages Offered and Sold in Food Service Establishments at 1 (Sept. 6, 2012) ("Response to Comments").

<sup>9</sup> Id.

<sup>10</sup> Id. at 2.

<sup>11</sup> Id.

<sup>12</sup> Raven Clabough, Soda Industry Sues NYC Over Supersized Soda Ban, The New America, Oct. 16, 2012, <http://www.thenewamerican.com/usnews/item/13228-soda-industry-sues-nyc-over-supersized-soda-ban>.

<sup>13</sup> N. Y. Statewide Coal. of Hispanic Chambers of Commerce v. The New York City Department of Health and Mental Hygiene, No. 0653584, 2012 WL 4844476, at 1 (N.Y. Sup. October 11, 2012).

<sup>14</sup> Eleanor D. Kinney, Administrative Law and the Public's Health, 30 J.L. Med. Ethics 212-23 (2002).

<sup>15</sup> 4C N.Y.Prac., Com. Litig. in New York State Courts § 102:18 (3d ed.).

<sup>16</sup> New York City Department of Health & Mental Hygiene, Physical Activity and Nutrition, [http://www.nyc.gov/html/doh/html/cdp/cdp\\_pan\\_pop.shtml](http://www.nyc.gov/html/doh/html/cdp/cdp_pan_pop.shtml) (last visited Dec. 12, 2012).

The adopted Amendment § 81.53 of the New York City Health Code was created through proper legal methods, will be successful in curbing obesity rates and all of the counter points made by opponents of the Amendment should be considered invalid.<sup>17</sup>

## **II. Power of the New York City’s Board of Health**

The Department has historic power to regulate restaurants and food safety in New York City.<sup>18</sup> Any alterations made by the Board of Health to the Health Code are automatically granted according to §§ 556, 558 and 1043 of the Charter; sections 558(b) and (c) of the Charter.<sup>19</sup> The relevant sections are as follows:

Section 556 of the Charter provides the Department of Health and Mental Hygiene (“Department”) with jurisdiction to regulate all matters affecting health in the City of New York.

Section 556(c)(2) empowers the Department to supervise the control of chronic disease;

Section 556(c)(9) empowers the Department to supervise and regulate the food supply.

Section 558(b) and (c) of the Charter empower the Board of Health to amend the Health Code and to include in it all matters to which the Department’s authority extends.

Section 1043 of the Charter grants the Department rulemaking Powers.<sup>20</sup>

Marice Ashe, Esq., Founder and CEO of Change Lab Solutions (formerly Public Health Law & Policy) strongly believes that “[p]ublic officials are charged with protecting our health and welfare, and [that] New York City is taking a perfectly appropriate step to meet that obligation”<sup>21</sup> by adopting this Amendment.

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<sup>17</sup> Thesis

<sup>18</sup> New York City Charter, Department of Health and Mental Hygiene *see at* <http://law.onecle.com/new-york/new-york-city-charter/chapter22.html>

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Marice Ashe, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

## A. New York City's Recent Amendment<sup>22</sup>

As of September 2012, New York City's Board of Health adopted Amendment § 81.53 to Article 81 of New York City Health Code can be found in Title 24 of the Rules of the City of New York.<sup>23</sup> This Amendment will be effective beginning in March of 2013 and states the following:

### § 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;

(C) has greater than 25 calories per 8 fluid 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.

(c) 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 than one violation of this section may be cited at each inspection of a food service establishment.<sup>24</sup>

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<sup>22</sup> Department of Health and Mental Hygiene, Board of Health, Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the New York City Health Code.

<sup>23</sup> Id.

<sup>24</sup> Id.

Sugary drinks are not just limited to soda; they include energy drinks, sweetened ice tea, sweetened coffee drinks, fruit drinks including lemonade and fruit punch, sports drinks, powdered drinks, sweetened flavored waters, and malt drinks.<sup>25</sup> Sugary drinks have been identified as the single largest contributor to the nation's obesity problem.<sup>26</sup> A major problem exists when these types of beverages account for roughly half of the added sugar in Americans diets and provide no additional nutrients.<sup>27</sup>

New York City's Board of Health's Amendment §81.53 is a response to research which shows that the heaviest Americans have become even heavier in the past decade.<sup>28</sup> Statistics indicate that over one-third of adults and roughly seventeen percent of children, ages two to nineteen, are classified as obese.<sup>29</sup> In the United States, both overweight and obese adults comprise two-thirds of the population.<sup>30</sup> In New York City, approximately six in ten adult residents are either overweight or obese, approximately seven in ten low-income community residents are overweight or obese, and approximately four in ten public school children

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<sup>25</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>26</sup> Sara N. Bleich, Y Claire Wang, and Steven L Gortmaker, Increasing Consumption of Sugar-Sweetened Beverages Among US Adults: 1988-1994 to 1999-2004, *Am. J. Clin. Nutr.* 89:372:381 (2009)

<sup>27</sup> Susan Kansagra, Pouring on the Pounds Slide Show, New York City Department of Health and Mental Hygiene (Dec. 12, 2012, 1:05 PM), <http://www.nyc.gov/html/doh/downloads/pdf/cdp/cdp-pan-pop-pouring-pounds-slides.pdf>.

<sup>28</sup> DOH Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code to Establish Maximum Sizes for Beverages Offered and Sold in Food Service Establishments at 4 (Sept. 6, 2012) ("Response to Comments").

<sup>29</sup> Center for Disease Control and Prevention, Overweight and Obesity. Adult Obesity Facts <http://www.cdc.gov/obesity/data/adult.html> (last visited December 12, 2012).

<sup>30</sup> Obesity in America, Understanding Obesity, <http://www.obesityinamerica.org/understandingObesity/diseases.cfm> (last visited Dec. 10, 2012).

(Kindergarten through Eighth Grade) are overweight or obese.<sup>31</sup> These numbers represent the growing obesity endemic.<sup>32</sup>

In the time leading up to the Board of Health's decision about Amendment §81.53, approximately thirty-eight thousand comments were sent to Mayor Bloomberg's office.<sup>33</sup> According to the Assistant Commissioner of New York City's Department of Health and Mental Hygiene, there were thirty-two thousand comments in favor of the proposed amendment and six thousand opposed.<sup>34</sup> In those comments, there were five main issues opponents of the Amendment raised: (1) the health impact of sugary drinks is not a substantial concern; (2) freedom of choice will become impaired if this amendment is enacted; (3) feasibility of both converting to the limited drink size and selling profitability will be a burden; (4) the rationale behind the restrictions and requirements are inappropriate for government to implement; and (5) reducing drink size is not going to affect obesity problems.<sup>35</sup>

#### **i. Health Impact of Sugary Drinks**

Some comments suggested that sugary drinks only make up a small percentage of diets and it is really food that supplies the body with a majority of the sugar.<sup>36</sup> It has been concluded that more than forty percent of added sugars emanate from beverages, which is more than any other single food source.<sup>37</sup> Roughly seven percent of an average American's daily diet is made

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<sup>31</sup> New York City Department of Health & Mental Hygiene, Community Health Survey, <http://www.nyc.gov/html/doh/html/survey/survey.shtml> (last visited Dec. 12, 2012).

<sup>32</sup> Department of Health and Mental Hygiene Board of Health, Notice of Adoption of an Amendment to Article 81 of the New York City Health Code, 2 (2012).

<sup>33</sup> DOH Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code to Establish Maximum Sizes for Beverages Offered and Sold in Food Service Establishments at 1 (Sept. 6, 2012).

<sup>34</sup> Id.

<sup>35</sup> Id. at 2.

<sup>36</sup> Id. at 3.

<sup>37</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

up of to sugary drinks.<sup>38</sup> Although this percentage seems relatively small, it amounts to roughly one-hundred and forty calories a day, which leads to the substantial weight gain of fifteen pounds a year.<sup>39</sup> Dr. Samuel Klein, a professor at William H. Danforth Medicine and Nutritional Science, and Director of the Center for Human Nutrition at Washington University School of Medicine believes that “[t]he most important health concern about sugar intake is that it adds nutrition empty calories to the diet, which can be a ticket to weight gain and obesity.”<sup>40</sup> A study published in the American Journal of Clinical Nutrition indicates that the intake of sugar-sweetened beverage has increased within the past decade, comprising a large percentage of individual’s daily sugar intake.<sup>41</sup> This increased intake of sugar-sweetened beverages has led to an obesity epidemic.<sup>42</sup>

To be considered obese, one must have a body mass index of thirty or greater, and to be considered overweight, one must have a body mass index ranging from twenty five to twenty-nine and nine tenths.<sup>43</sup> Body mass index is calculated by a measure of body fat based on height and weight.<sup>44</sup> There are many diseases, some life threatening, that relate to obesity.<sup>45</sup> Diseases including diabetes, heart disease, hypertension, depression, asthma, infertility, stroke, arthritis, liver disease, and cancer are all related, or in many cases, caused by obesity.<sup>46</sup>

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<sup>38</sup> Welsh JA, Sharma AJ, Grellinger L, Vos MB, Consumption of Added Sugars is Decreasing in the United States, 94 Am. J. Clinical Nutrition 726-34 (2011).

<sup>39</sup> Id.

<sup>40</sup> Dr. Samuel Klein, Statements in Support of New York City’s Limit on Size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 20012).

<sup>41</sup> Sara N. Bleich, Y Claire Wang, and Steven L Gortmaker, Increasing Consumption of Sugar-Sweetened Beverages Among US Adults: 1988-1994 to 1999-2004, Am. J. Clin. Nutr. 89:372:381 (2009)

<sup>42</sup> Id.

<sup>43</sup> Hazel A. Hiza, Charlotte Pratt, Anne L. Mardis, & Rajen Anand, Body Mass Index and Health, United States Department of Agriculture, Center for Nutrition Policy and Promotion ( 2012), <http://www.cnpp.usda.gov/publications/nutritioninsights/insight16.pdf>.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Center for Disease Control and Prevention, Overweight and Obesity, Causes and Consequences, <http://www.cdc.gov/obesity/adult/causes/index.html> (last visited December 12, 2012).

Center for Disease Control and Nutrition Examination Survey III demonstrates that approximately two-thirds of American men and women classified as overweight and unhealthy are diagnosed with Type 2 diabetes, the most common form of the disease.<sup>47</sup> Type 2 diabetes develops due to the body producing low amounts of insulin as a result of the blood or cells ignoring the insulin already produced.<sup>48</sup> When a person is obese, the body is less able to control blood sugar so the body begins to overproduce insulin in order regulate the levels, resulting in irregular sugar levels.<sup>49</sup> “Obesity can cause the development of kidney disease directly or indirectly through type 2 diabetes.”<sup>50</sup> When one in three adults in the United States is already at risk for kidney disease, health issues enhancing that chance should be eliminated to the greatest extent possible.<sup>51</sup> Studies show that six out of the eight New York residents are overweight or obese and one out of those eight has diabetes.<sup>52</sup> It is suggested that physical inactivity and unhealthy eating may lead to being overweight or obese which increases a person’s risk of developing diabetes.<sup>53</sup> Over eighty percent of New Yorkers do not get the recommended amount of exercise, which is at least thirty minutes per day, five or more days a week.<sup>54</sup> The current Amendment § 81.53 will assist in limiting caloric intake and help to at least curb weight gain as a result of reduced physical activity.<sup>55</sup>

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<sup>47</sup> Id.

<sup>48</sup> Obesity in America, Understanding Obesity, <http://www.obesityinamerica.org/understandingObesity/diseases.cfm> (last visited Dec. 10, 2012).

<sup>49</sup> Id.

<sup>50</sup> Dr. Joseph Vassalotti, MD, Chief Medical Officer, National Kidney Foundation, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

<sup>51</sup> Id.

<sup>52</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>53</sup> New York City Department of Health & Mental Hygiene, Diabetes Prevention and Control, <http://www.nyc.gov/html/doh/html/diabetes/diabetes.shtml> (last visited Dec. 12, 2012).

<sup>54</sup> New York City Department of Health & Mental Hygiene, Physical Activity and Nutrition, [http://www.nyc.gov/html/doh/html/cdp/cdp\\_pan\\_pop.shtml](http://www.nyc.gov/html/doh/html/cdp/cdp_pan_pop.shtml) (last visited Dec. 12, 2012).

<sup>55</sup> Id.

Another condition facing the overweight and obese population more prevalently is heart disease.<sup>56</sup> Higher body fat percentages equate to “bad cholesterol” and in turn create “optimal conditions for developing heart disease.”<sup>57</sup> Heart disease often times leads to heart attack, congestive heart failure, sudden cardiac death, angina, and abnormal heart rhythm.<sup>58</sup> In addition to heart disease, hypertension is more likely to develop when a person is obese.<sup>59</sup> Hypertension is high blood pressure.<sup>60</sup> Blood pressure is the pressure at which the blood pushes against the artery walls as the heart beats.<sup>61</sup> As body weight increases so does the blood pressure.<sup>62</sup> The heavier the individual the higher the blood pressure, and in turn, the more susceptible that person is to having a heart attack, stroke or kidney failure.<sup>63</sup> Dr. Alwyn Cohall contends that “[f]ocused attention on life-style changes, including limiting intake of sugar-sweetened beverages, is a critical component of hypertension control.”<sup>64</sup>

As a result of these high percentages of obese Americans, negative effects are being felt by the health care system.<sup>65</sup> Both government and private employers have heightened efforts to address obesity.<sup>66</sup> However, data from the Center for Disease Control indicates that obesity rates from 1998-2006 have increased by thirty-seven percent, and the Center has suggested that these rates correlate with the recent increase in medical costs.<sup>67</sup> It is concluded that the increased

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<sup>56</sup> Obesity in America, Understanding Obesity, Obesity Related Disease, <http://www.obesityinamerica.org/understandingObesity/diseases.cfm> (last visited Dec. 10, 2012).

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Obesity in America, Understanding Obesity, <http://www.obesityinamerica.org/understandingObesity/diseases.cfm> (last visited Dec. 10, 2012).

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Dr. Alwyn Cohall, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

<sup>65</sup> Center for Disease Control and Prevention, FastStats, Overweight and Obesity, <http://www.cdc.gov/nchs/fastats/overwt.htm> (last visited December 12, 2012).

<sup>66</sup> Id.

<sup>67</sup> Id.

prevalence of obesity is driving increases in total medical spending.<sup>68</sup> Medicare takes on the heightened cost of obese beneficiaries, which is over six-hundred dollars more, per year, per person, as compared to beneficiaries of normal weight.<sup>69</sup> Over seven billion dollars in medical costs are spent on obesity related illness annually in New York.<sup>70</sup> Obesity not only hurts economic productivity, but statistics show that obese workers miss more days due to illness, injury or disability.<sup>71</sup> Furthermore, employee insurance premiums are growing due to the obesity related health expenses that increase insurance costs.<sup>72</sup>

These are just a few of the diseases that affect those that are overweight and obese. It is projected that by 2030, adult obesity rates in thirteen states could exceed sixty percent.<sup>73</sup> Further rates could be above fifty percent in thirty-nine states and across all fifty states combined rates could be above forty-four percent.<sup>74</sup> By 2030, an additional forty-eight to sixty-six billion dollars is estimated to be spent per year on medical costs and between three-hundred ninety billion and five-hundred eighty billion will be lost on economic productivity.<sup>75</sup> Current estimates say medical costs for obese adults in the United States will be anywhere between one-hundred seven billion dollars to over two-hundred ten billion dollars annually.<sup>76</sup> It is projected that in the next twenty years obesity-related health care costs will rise by over twenty percent in approximately nine states.<sup>77</sup>

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<sup>68</sup> Id.

<sup>69</sup> Eric A. Finkelstein, Justin G. Trogon, Joel W. Cohen and William Dietz Annual Medical Spending Attributable To Obesity: Payer-And Service-Specific Estimates, Health Affairs, 28, no.5, (2009), <http://content.healthaffairs.org/content/28/5/w822.abstract>.

<sup>70</sup> Office of the New York State Comptroller, Summary Report on Obesity-Related Initiatives, (2009), [http://nyshepa.org/documents/DiNapoli%20Summary%20Report%20-%20Obesity%20in%20NYS%20an%20\\$8%20billion%20problem.pdf](http://nyshepa.org/documents/DiNapoli%20Summary%20Report%20-%20Obesity%20in%20NYS%20an%20$8%20billion%20problem.pdf).

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.

Analysis of a study done by Trust for Americans Health and the Robert Wood Johnson Foundation show that states could prevent obesity related disease and dramatically reduce health care cost if, they lower the average body mass index of their residence by just five percent by 2030.<sup>78</sup> The Robert Wood Johnson Foundation agreed with the Institute of Medicines recommendation that business and government leaders need to adopt policies and implement practices to reduce overconsumption of sugar-sweetened beverages.<sup>79</sup>

When a problem arises that causes damaging effects and a solution is available, it should be taken. That is what New York City has done; after years of trying to implement similar proposals to aid in reducing the number of obese and overweight residents, Mayor Bloomberg and the Board of Health took the necessary steps to accomplish what the State Legislature and City Council could not.<sup>80</sup> But, not by implementing a complete ban, by allowing the individual to choose the quantity he or she will consume through a conscious selection.<sup>81</sup>

## **ii. Impairing Choice**

The second concern is that §81.53 could impact consumer freedom since it is suggested that consumer demand drives large portion sizes.<sup>82</sup> However, contrary to what most think and as clearly stated above, the proposal is not a ban on sugary drinks entirely; consumption of more than sixteen ounces of sugary drink is permissible at one of the limited venues as long as it done

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<sup>78</sup> Robert Wood Johnson Foundation and Trust for America's Health, Bending the Obesity Cost Curve in New York: Reducing the Average Body Mass Index in the State by 5 Percent Could Lead to Health Care Savings of More than \$14 Billion in 10 Years and \$40 Billion in 20 Years, (2012), [http://healthyamericans.org/assets/files/TFAHSept2012\\_ALL\\_ObesityBriefs.pdf](http://healthyamericans.org/assets/files/TFAHSept2012_ALL_ObesityBriefs.pdf).

<sup>79</sup> Risa Lavizzo-Mourey, Statements in Support of New York City's Limit on size of Sugary Beverages, Press Release, New York City Mayor's Office (July 19, 20012).

<sup>80</sup> N. Y. Statewide Coal. of Hispanic Chambers of Commerce v. The New York City Department of Health and Mental Hygiene, No. 0653584-2012, 2012 WL 4844476, at 4 (N.Y. Sup. October 11, 2012).

<sup>81</sup> Id.

<sup>82</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

through the purchase of an additional drink or by a re-fill of the current one.<sup>83</sup> “Soda companies will fight tooth and nail to say this issue is about choice, but it’s really about profit.”<sup>84</sup>

Long before New York City implemented restrictions on the size of containers, consumers already had limited choice of portion sizes, those that were and still are determined by restaurants and beverage companies.<sup>85</sup> It is suggested that the restrictions on sugary drinks exceeding sixteen ounces will actually increase freedom of choice.<sup>86</sup> It is now up to the consumer to decide how much of a drink they would like to consume, rather than relying on the best deal through value size pricing.<sup>87</sup>

Opponents have also suggested that the proposal will not have an impact because people can purchase more than one drink, get free refills or obtain a bigger drink at another location as mentioned above.<sup>88</sup> However, although this is an option, a study published by the New England Journal of Medicine, shows that the policy appears to be associated with a decrease in calories from sugar-sweetened beverages purchased at fast-food restaurants and overall, suggests that the proposal will reduce consumption under most scenarios.<sup>89</sup> Studies also suggest that consumers prefer “one stop” shopping and will make their choice of the limited size drinks available at their

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<sup>83</sup> Robert Kenner, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

<sup>84</sup> Id.

<sup>85</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>86</sup> Lauren Hunter, Soda Ban May Actually Increase Freedom of Choice, Huffington Post (Nov. 29, 2012, 6.:08 PM), [http://www.huffingtonpost.com/lauren-hunter/new-york-soda-ban\\_b\\_1904920.html](http://www.huffingtonpost.com/lauren-hunter/new-york-soda-ban_b_1904920.html).

<sup>87</sup> Id.

<sup>88</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>89</sup> Christina Coyle, Nagagopal Venna, Potential Effect of the New York City Policy Regarding Sugared Beverages N.E. J. of Med. (2012) *available at* <http://www.nejm.org/doi/pdf/10.1056/NEJMc1208318>.

current place of consumption, rather than going from a fast food restaurant to a grocery store to purchase a larger than sixteen ounce drink.<sup>90</sup>

Dr. Pascal James Imperato, MPH & TM, Dean and Distinguished Service Professor at Suny Downstate Medical Center, School of Public Health is inclined to believe that “[t]he role of large portion sizes of both food and sugared-sweetened beverages in causing obesity is directly related not only to their excessive caloric value, but also to the fact that Americans have come to accept that such excessive intake is perfectly normal.”<sup>91</sup> When people associate one soda as a single entity, regardless of the size (six ounces through thirty-two ounces or larger), it is considered an amount appropriate to consume.<sup>92</sup> Numerous studies show people given larger portions simply eat more without recognizing it.<sup>93</sup> A study from 2007 indicates that people given beverages fifty percent larger consumed twenty to thirty-three percent more (women compared to men) with no decrease in food consumed at that current meal.<sup>94</sup> Dr. Lisa M. Powell, Senior Research Scientist at the Institute for Health Research and Policy, believes that the implementation of “[t]his measure will help to eliminate these types of options which have previously incentivized people to consume excess quantities of sugar-sweetened beverages. This effort will also help society to reclaim from industry healthier norms with respect to portion size.”<sup>95</sup> Mayor Bloomberg of New York City also contends that the “ban will reacquaint [ ] New

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<sup>90</sup> Messinger PR, Narasimhan, C., A Model of Retail Formats Based on Consumers’ Economizing on Shopping, 16 Marketing Science 1,1-23 (1997); Strople M., From Supermarkets to Supercenters: Employment Shifts to the One-Stop Shop, Monthly Labor Review 2, 39-46 (2006).

<sup>91</sup> Pascal James Imperato, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 20012).

<sup>92</sup> Id.

<sup>93</sup> Wansink B, Cheney MM, Super Bowls: Serving Bowl Size and Food Consumption, 293 J. Am. Med. Ass’n 1727, 1727-28 (2005).

<sup>94</sup> Roll BJ, Roe LS, Meengs JS, Larger Portion Sizes Lead to a Sustained Increase in Energy Intake Over 2 Days, J. of the Am. Dietetic Ass’n; 106, 543-49. (2006).

<sup>95</sup> Lisa M. Powell, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 20012).

Yorkers with more appropriate portion sizes.”<sup>96</sup> If the consumer wants more, they need to make a cognitive decision to get more, whether it is by getting a re-fill or purchasing an additional sugary drink.<sup>97</sup>

### iii. Feasibility

The third concern is the feasibility behind § 81.51, in other words, whether the regulated food service establishment will be able to maintain a competitive advantage.<sup>98</sup> Non-regulated or non-food-service establishment food retailers including supermarkets, bodegas, and pharmacies and they are regulated by the state.<sup>99</sup> On the other hand, to regulated food retail outlets are those controlled by the city, including restaurants, sport and entertainment venues and street carts.<sup>100</sup> It is suggested that the non-regulated establishments will have a competitive advantage because the Amendment will reduced patronage at regulated establishments due to their lack of ability to customize drinks for the customers.<sup>101</sup> However, customization is still possible; it is just limited in most cases to drinks sixteen ounces or smaller.<sup>102</sup> For those drinks over sixteen ounces, customization can occur provided they it does not exceed twenty-five calories per eight ounces with sweetener, and if that is the case, then the establishment can provide patrons with more sweeteners to add for themselves.<sup>103</sup>

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<sup>96</sup> The City Record: Official Journal of the City of New York, Sept. 21, 2012, at 2603 & n.30 (to be codified in the Rules of the City of New York (R.C.N.Y.) tit. 24, § 81.53).

<sup>97</sup> Id.

<sup>98</sup> DOH Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code to Establish Maximum Sizes for Beverages Offered and Sold in Food Service Establishments at 1 (Sept. 6, 2012) (“Response to Comments”).

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>103</sup> Id.

However, the same concerns about competitive ability were raised during the New York City's implementation of calorie labeling.<sup>104</sup> In this case, it was said that those who had to implement caloric labeling would cease to hold any advantage against those that did not, because people will not want to purchase certain items after seeing the calorie amount in each item.<sup>105</sup> A receipt study of Starbucks, done by the National Bureau of Economic Research, showed no revenue loss occurred following calorie labeling implementation.<sup>106</sup> It is therefore suggested that the same will follow from this new size restriction of sixteen ounces.<sup>107</sup>

Personally, as a consistent customer at Dunkin Donuts, my drink of choice is a medium coffee 'light and sweet'. A medium is larger than sixteen ounces, and 'light and sweet', contains light cream and extra sugar, which exceeds the calorie limitation on drink larger than sixteen ounces. So, in New York City this drink will not be available to me, pre-made. However, the only repercussion for me would be to have to add the additional sugar to my own drink rather than the employees at Dunkin Donuts doing it from me, and this would not stop me from going as religiously as I do. Most consumers of chain brands such as Dunkin Donuts and Starbucks, whose entire business is, for the most part, based on specialty drinks, will still keep their loyal customers. The drinks created at these establishments are distinct to the brand name and can only be purchased at that those stores, which will keep customers coming back for more.

Another fear that was addressed is the potential costs that may be associated with compliance of § 81.53.<sup>108</sup> Contrary to skepticism, the proposal does not affect pricing or

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<sup>104</sup> Bollinger B, Leslie P, Sorensen, [A Calorie Posting in Chain Restaurants](#), National Bureau of Economic Research. Working Paper 15648. (Jan. 2010).

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Susan Kansagra, [Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show](#), Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

promotion of products, which further reduces the burden felt by the entrepreneur and companies selling the sugary drinks.<sup>109</sup> Shortly after § 81.53 was adopted by the Board of Health, the Barclays Center, entertainment and sporting venue, voluntarily decided to comply with the requirement months before the March deadline.<sup>110</sup> Chairman and Chief Executive Officer of Forest City (operator of the Barclays Center), Bruce Ratner, said “[a]s the newest sports and entertainment venue in Brooklyn, Barclays Center is thrilled to work with the Mayor and the City to help achieve the Mayor’s public health goals.”<sup>111</sup>

The costs associated with the proposal are small compared to the obesity-related healthcare costs that face New York City.<sup>112</sup> Obesity related direct medical costs in New York City equate to roughly five billion dollars annually;<sup>113</sup> the cost of obesity to each New York City household, based on over three million households, is approximately one-thousand five-hundred dollars annually.<sup>114</sup> Further, the increase in medical spending for obese or over-weight adults as compared to normal weight adults, costs around one-thousand four hundred and twenty-nine dollars annually.<sup>115</sup>

#### **iv. Rationale of Exclusions and Requirements**

Comments pertaining to the rationale behind the specified exclusions and requirements of § 81.53, and the appropriateness of the government limiting the size of beverages able to be sold

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<sup>109</sup> Id.

<sup>110</sup> Mayor Bloomberg & Deputy Mayor Gibbs, Health Commissioner Farley and Bruce Ratner Announce Barclays Center will Voluntarily adopt Regulations to Limit Size of Sugary Beverages, Press Release, New York City Mayor’s Office ( Sept 13, 2012).

<sup>111</sup> Id.

<sup>112</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>113</sup> Trogon JG, Finkelstein EA, Feagan CW, Cohen JW, State- and Payer-Specific Estimates of Annual Medical Expenditures Attributable to Obesity, *Obesity* 214, 220. (2012).

<sup>114</sup> Finkelstein EA, Trogon JG, Cohen JW, Dietz W, Annual Medical Spending Attributable to Obesity: Payer-and Service-Specific Estimates, 28 *Health Affairs* 822, 822-31 (2009).

<sup>115</sup> Id.

are both being called into question<sup>116</sup> Some suggest regulating the maximum size of sugary drinks which can be sold or available to be purchased goes beyond possible methods that should be available to address obesity and borderlines unconstitutionality.<sup>117</sup> However, this amendment is not prohibiting the sale of sugary drinks in all of New York City, only at the specified establishments regulated by the City.<sup>118</sup> Non-food service establishment food retails are excluded, which include supermarkets, bodegas, and pharmacies regulated by the state.<sup>119</sup>

By implementing a calorie threshold and a sixteen ounce maximum, it “allows for lightly sweetened drinks and is consistent with other New York City standards to keep New Yorkers healthy.”<sup>120</sup> More than half of New York City adults (fifty-eight percent) are overweight or obese.<sup>121</sup> Over five thousand deaths per year in New York City are estimated to be due to obesity or from people being overweight.<sup>122</sup> Plus, many widely accepted policies were once controversial and no longer are today because of their success, including smoke-free restaurants, restrictions on trans-fat, and removal of lead from paint.<sup>123</sup>

Furthermore, the only beverages that are regulated are those that contain added sugar to further sweeten the beverage.<sup>124</sup> Fruit juice is excluded because it is pure fruit juice, which

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<sup>116</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> New York City Department of Health & Mental Hygiene, Community Health Survey, <http://www.nyc.gov/html/doh/html/survey/survey.shtml> (last visited Dec. 12, 2012).

<sup>122</sup> New York City Department of Health and Mental Hygiene, Preventing Non-Communicable Diseases and Injuries: Innovative Solutions from New York City, (2011), <http://www.nyc.gov/html/doh/downloads/pdf/ip/un-rpt.pdf>.

<sup>123</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>124</sup> Id.

contains no added sugar and provides many of the nutritional benefits of whole fruit.<sup>125</sup> Dairy is excluded because it contains calcium, vitamin D, potassium and makes individuals satisfied.<sup>126</sup> Finally, alcohol is excluded because it is regulated by the State.<sup>127</sup>

**v. New York City Anti-Obesity Strategy**

Overall, the City of New York’s approach is comprehensive, as it involves increasing healthy food access, educating New Yorkers about proper nutrition and physical activity, and promoting opportunities for physical activities.<sup>128</sup> Dr. Frank Hu, Professor of Nutrition and Epidemiology at The Harvard Medical School of Public Health explains that “studies have shown that changing the food environment by limiting access to large portion sizes of soda is effective in reducing consumption, while education alone is not sufficient to change peoples’ behaviors.”<sup>129</sup> Physical activity is just not enough.<sup>130</sup> Statistics show that to burn off the calories of one twenty ounce soda, one must walk approximately three miles<sup>131</sup> Plus, it is easier to reduce weight gain by lowering caloric intake than it is to consume high amount of calories and then try to burn them off.<sup>132</sup>

The New York City Anti-Obesity Strategy was formulated by “The Obesity Task Force” including commissioners from eleven City Agencies and representatives from the Mayor’s

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<sup>125</sup> Id.

<sup>126</sup> Id.

<sup>127</sup> Id.

<sup>128</sup> New York City Department of Health & Mental Hygiene, Physical Activity and Nutrition, Sugary Drinks, [http://www.nyc.gov/html/om/pdf/2012/otf\\_report.pdf](http://www.nyc.gov/html/om/pdf/2012/otf_report.pdf) (last visited Dec. 12, 2012).

<sup>129</sup> Frank B. Hu, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

<sup>130</sup> New York City Department of Health & Mental Hygiene, Physical Activity and Nutrition, Sugary Drinks, [http://www.nyc.gov/html/om/pdf/2012/otf\\_report.pdf](http://www.nyc.gov/html/om/pdf/2012/otf_report.pdf) (last visited Dec. 12, 2012).

<sup>131</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>132</sup> New York City Department of Health & Mental Hygiene, Physical Activity and Nutrition, Sugary Drinks, [http://www.nyc.gov/html/om/pdf/2012/otf\\_report.pdf](http://www.nyc.gov/html/om/pdf/2012/otf_report.pdf) (last visited Dec. 12, 2012).

Office.<sup>133</sup> The Task Force has compiled twenty seven initiatives as part of this prevention plan<sup>134</sup> and identified four keys goals when creating their strategy: (1) reduce obesity, (2) address disparities between communities, (3) reduce preventable health conditions, and (4) create strategies to lower health care spending and lost productivity.<sup>135</sup> By 2016, New York City anticipates positive indications that the anti-obesity strategy is working.<sup>136</sup> It is expected that the number of New York City adults who are obese will be reduced by ten percent and children (Kindergarten through Eighth Grade) by fifteen percent.<sup>137</sup> Additionally, it is anticipated that there will be a thirty percent reduction in the number of individuals that consume one or more sugary drinks per day.<sup>138</sup>

Obesity is an extremely important health topic, one that affects government costs.<sup>139</sup> Statistics in New York City alone are alarming. Residences that are considered overweight or obese account for six in ten New Yorkers and four in ten New York City public school children.<sup>140</sup> Although this strategy seems to incorporate all elements that could reduce the obesity problem facing New York City, there still many opposed to its recent implementation.

### **III. Pending Lawsuit<sup>141</sup>**

After the Board of Health passed the limitation on the size of sugar drinks available for sale at certain venues and establishments groups including the (1)The New York Statewide Coalition of Hispanic Chambers of Commerce (“Hispanic Chambers of Commerce”), (2) The

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<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> Id. at 1.

<sup>136</sup> Id. at 2.

<sup>137</sup> Id. at 7.

<sup>138</sup> Id.

<sup>139</sup> Id. at 3.

<sup>140</sup> New York City Department of Health & Mental Hygiene, Community Health Survey, FitnessGram 2007-2008, <http://www.nyc.gov/html/doh/html/survey/survey.shtml> (last visited Dec. 12, 2012).

<sup>141</sup> N. Y. Statewide Coal. of Hispanic Chambers of Commerce v. The New York City Department of Health and Mental Hygiene, No. 0653584-2012, 2012 WL 4844476, at 4 (N.Y. Sup. October 11, 2012).

New York Korean-American Grocers Association (“KAGRO”), (3) Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters (“Local 812”), (4) The National Association of Theatre Owners of New York State (“NATO”), (5)The National Restaurant Association (“NRA”), and (6) The American Beverage Association (“ABA”) filed a law suit in the Supreme Court of New York.<sup>142</sup>

On October 11, 2012 this suit was filed against (1) New York City Department of Health and Mental Hygiene (“DOH”), and (2) Dr. Thomas A. Farley, Commissioner of the New York City Department of Health and Mental.<sup>143</sup>

Overall, Plaintiffs are seeking:

- (i) Enjoining and permanently restraining 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 Department of Health (“DOH”) in September 2012, and declaring §81.53 invalid;
- (ii) Alternatively, declaring the §§ 556(c)(2) and (c)(9), 588(b) and (c), and/or § 1043 of the N.Y.C. Charter are unconstitutional and in violation of the separation of powers doctrine;
- (iii) Alternatively, enjoining and permanently restraining 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 unlawfully arbitrary and capricious;

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<sup>142</sup> (1)The New York Statewide Coalition of Hispanic Chambers of Commerce (“Hispanic Chambers of Commerce”) which represents 25 Hispanic and minority chambers of commerce throughout New York, which in turn represent nearly 200,000 Hispanic businesses, (2) The New York Korean-American Grocers Association (“KAGRO”), which represents approximately 4,000 small business throughout the region, (3) Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters (“Local 812”), a collective bargaining representative for employees who work in haulage, production, warehouse, distribution and merchandising jobs for the major New York metropolitan soft drink companies, and has approximately 3,600 members, (4) The National Association of Theatre Owners of New York State (“NATO”), which represents 52 movie theaters, 312 screens, and 1,800 employees across the five boroughs, (5)The National Restaurant Association (“NRA”) representing more than 435,000 member restaurant establishments, 687 located in New York City , and (6) The American Beverage Association (“ABA”)

<sup>143</sup> (1) New York City Department of Health and Mental Hygiene (“DOH”), comprised of eleven individuals appointed by the Mayor pursuant to sections 551 and 553-54 of the N.Y.C. Charter, and (2) Dr. Thomas A. Farley, Commissioner of the New York City Department of Health and Mental Hygiene and serves as Chair of the Board of Health

- (iv) Granting such further relief as this Court deems just and proper, including attorneys' fees and the costs and disbursements of this Proceeding pursuant to CPLR § 8101.<sup>144</sup>

Plaintiff's most compelling argument is dependent on the ultra vires (beyond the power) document. The Plaintiffs state that the Board of Health went beyond its power in implementing this legislation. Furthermore, Plaintiffs argue that the Board of Health "bypassed the proper legislative process for governing the City" and within that a violation of the separation of power doctrine.<sup>145</sup> They reason that there have been similar initiatives that have been turned down by State Legislation and the City Council and therefore this 'soda ban' should not have been passed by the Board of Health.<sup>146</sup>

**i. Previous Proposals<sup>147</sup>**

The proposals that were previously rejected are as follows: (1) New York City Council Resolution No. 1265-2012, which would have called upon the New York Legislature to adopt legislation adding an excise tax on sugar-sweetened beverages, (2) New York City Council Res. No. 1264-2012, which would have called upon the United States Food and Drug Administration to require warning labels on sugar-sweetened beverages, (3) New York City Council Res. No. 0768-2011 which would have called upon the United States Food and Drug Administration to prohibit the use of food stamps to purchase sugar-sweetened beverages, (4) 2001 New York Assembly Bill No. 10010, which would have prohibited the sale of sugar-sweetened beverages in food service establishments and vending machines located on government property, (5) 2001 New York Assembly Bill No. 8812 which would have restricted the placement and sale of certain sugar-sweetened beverages in grocery stores, markets, supermarkets, and general stores, (6) 2011

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<sup>144</sup> N. Y. Statewide Coal. of Hispanic Chambers of Commerce v. The New York City Department of Health and Mental Hygiene, No. 0653584, 2012 WL 4844476, at 1 (N.Y. Sup. October 11, 2012).

<sup>145</sup> Id. at 5.

<sup>146</sup> Id. at 9.

<sup>147</sup> Id.

New York Assembly bill No. 843 which would have imposed additional taxes on certain “sweets or snacks,” including sugar-sweetened beverages, and (7) 2009 New York Assembly Bill No. 10965, which would have prohibited the purchase of certain items, including sugar-sweetened beverages, with food stamps.

The Plaintiffs suggest that the motive of the Board of Health is clear.<sup>148</sup> They argue that due to the similar proposals that were turned down by the City Council and the State Legislature, mentioned above, this was an alternative way to get an implementation of this kind enacted as law.<sup>149</sup> In a New York Court of Appeals case, Boreali v. Axelrod, Plaintiffs suggest that it exemplifies the exact type of implementation by and agency that is invalid.<sup>150</sup>

ii. **Boreali v. Axelrod**<sup>151</sup>

In 1987 suit was brought against the Public Health Council of New York, and it focused on whether the Council had the power to regulate smoking.<sup>152</sup> The crux of the argument presented in this case was that the Public Health Council over stepped its scope of authority by implementing regulation pertaining to smoking in a wide array of venues.<sup>153</sup> Although the Court accepted that the Legislature imposed a certain amount of power to the Public Health Council as an agency in order to create regulations for the promotion of the overall health of the public, it specifically ruled that “it had not delegated to the Council the authority...to determine the general policy of the state relating to smoking in public.”<sup>154</sup> The Court suggested that the

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<sup>148</sup> Id. at 4.

<sup>149</sup> Id.

<sup>150</sup> Id. at 5.

<sup>151</sup> Boreali v. Axelrod, 517 N.E.2d 1350, 1351-58 (1987).

<sup>152</sup> Id. at 1352.

<sup>153</sup> Id. at 1351.

<sup>154</sup> 4C N.Y.Prac., Com. Litig. in New York State Courts § 102:18 (3d ed.).

regulation sought out by the Public Health Council was not health focused, but rather policy based.<sup>155</sup>

The Public Health Council was creating policy in regards to smoking that would pertain to the entire state of New York.<sup>156</sup> The Boreali Court explained that “the Legislature had itself been grappling with the issue before the Council initiated the regulatory scheme but had repeatedly failed to reach a consensus regarding the same policy concerns that the Council had taken it upon itself to decide.”<sup>157</sup> The power that is given to agencies like the Public Health Council is to be used to enforce policy implemented by the Legislature, not to take over as a rule making body and create legislation that has never been created before.<sup>158</sup>

#### **A. Likely Argument for the Defendants**

Plaintiffs rely heavily on the Boreali v. Axelrod case as a precedent for the New York Courts to rule in their favor.<sup>159</sup> Although an answer has not been filed by the defendants, there is a main flaw in the Plaintiffs argument and a plausible route that the defense may take. The Plaintiffs rest the majority of their argument on the similarities between the Public Health Commission and the New York City Board of Health’s limited permissible scope as agencies of the State, not legislative bodies.<sup>160</sup> In Medical Society of New York v. Serio, the court notes that there is a difficult-to-define line between administrative rule-making and legislative policy-making.<sup>161</sup> Plaintiffs argue that the Public Health Councils efforts in the Boreali case, to

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<sup>155</sup> Boreali 517 N.E.2d at 1353.

<sup>156</sup> Id.

<sup>157</sup> 4C N.Y.Prac., Com. Litig. in New York State Courts § 102:18 (3d ed.).

<sup>158</sup> Id.

<sup>159</sup> N. Y. Statewide Coal. of Hispanic Chambers of Commerce, 2012 WL 4844476, at 5.

<sup>160</sup> Id.

<sup>161</sup> Med. Soc’y of State v. Serio, 800 N.E.2d 728, 734 (2003).

implement a smoking ban, and the New York City Board of Health's Amendment § 81.53 are comparable, meaning the Amendment is likely invalid.<sup>162</sup>

However, there are two major differences between the Boreali case and the current case. The Boreali case pertained to the Public Health Council, which presides over the entire state of New York.<sup>163</sup> The Council was trying to implement a more policy-based health approach to ban smoking in specific venues and establishments.<sup>164</sup> However, their specification as to venues was not solely based off of concern for the health of New York.<sup>165</sup> The Court ruled that it was beyond the Council's administrative role to implement state regulations on smoking before any legislation had been made.<sup>166</sup>

Here, the New York City Board of Health controls the Health and Hygiene of the City of New York.<sup>167</sup> The Board of Health has instituted this Amendment solely as a means to better the health of New Yorkers.<sup>168</sup> Additionally, the Amendment only puts a size constraint on the sugary drink container availability.<sup>169</sup> The regulation does not ban the consumption of sugary drinks in the specified establishments and venues, nor does it eliminate the amount one can consume while there, it merely limits the size of a sugary drink that can be sold.<sup>170</sup>

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<sup>162</sup> N. Y. Statewide Coal. of Hispanic Chambers of Commerce, 2012 WL 4844476, at 5.

<sup>163</sup> Boreali 517 N.E.2d at 1351.

<sup>164</sup> Id. at 1353.

<sup>165</sup> Id.

<sup>166</sup> Id. at 1356.

<sup>167</sup> New York City Department of Health & Mental Hygiene, About NYC DOH, <http://www.nyc.gov/html/doh/html/about/about.shtml> (last visited Dec. 12, 2012).

<sup>168</sup> Department of Health and Mental Hygiene, Board of Health, Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the New York City Health Code.

<sup>169</sup> Id.

<sup>170</sup> Department of Health and Mental Hygiene, Board of Health, Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the New York City Health Code.

Additional evidence that this Amendment will be sustained, in spite of the Boreali case, where the smoking ban instituted by the Public Health Council was ruled invalid, is available.<sup>171</sup> Less than two years following this case, the Board of Health in Nassau County, New York, implemented an almost identical smoking ban as to the one that was turned down in the Boreali case.<sup>172</sup> The Board of Health in Nassau County had the power to institute a regulation that pertained to their jurisdiction.<sup>173</sup> This further exemplifies how the Board of Health of New York City can do the same.

When there is a serious endemic facing a City, City officials should take on the duty to intervene. Since the State and Local governance have not taken the measures to implement a piece of legislation that would affect the health of their constituency, then the only other option is for the Board of Health to utilize its power to make positive changes for New Yorkers' health.<sup>174</sup> Overall, "a government agency's view of a regulation will generally be upheld unless it is irrational, unreasonable or directly contradicted by the text of the enabling legislation."<sup>175</sup>

#### **IV. Conclusion**

The question really comes down whether this agency, the Board of Health, overstepped their legislative authority.<sup>176</sup> The current Amendment §81.53 is focused solely on the health of New Yorkers. Although it is considered a restriction to sugary drinks over sixteen ounces, it is really more of a limitation.<sup>177</sup> The regulation of sugary drinks is a valid use of the state's police

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<sup>171</sup> E.R. Shipp, Deciding Which Branch of Government Has the Power to Regulate, April 25, 1987. <http://www.nytimes.com/1987/04/25/nyregion/deciding-which-branch-of-government-has-the-power-to-regulate-smoking.html>.

<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> Id.

<sup>175</sup> 4C N.Y.Prac., Com. Litig. in New York State Courts § 102:18 (3d ed.).

<sup>176</sup> Id.

<sup>177</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and

power; the Amendment represents an accommodation between the desire to reduce the consumption of sugary drinks over sixteen ounces at all venues and establishments.<sup>178</sup>

Policy changes are important when social norms include unhealthy behaviors.<sup>179</sup> The role of the government is to ensure the promotion and protection of public health but, in order for that to occur we must rely on our elected officials to create the proper guidelines.<sup>180</sup> Dr. Alwyn Cohall, Director of the Harlem Health Promotion Center, believes that “Mayor Bloomberg’s...ban on the sale of large sugary drinks is a significant move in addressing the health problems that are devastating the lives of thousands of New Yorkers who suffer from chronic diseases related to obesity and overweight.”<sup>181</sup>

Although the implementation of § 81.53 has caused controversy, it is an encouraging step towards curbing obesity rates.<sup>182</sup> As Dr. Pascal Imperato believes, “[t]his proposal...will help set a new standard...for what is a healthy and acceptable portion size. It may not dissuade people from ordering a second sixteen ounce portion of a sugared-sweetened drink, but it may remind them that to do so does not represent a healthy choice.”<sup>183</sup> At the bare minimum, the controversy over the application of this new restriction has sparked conversation about on the growing issue of obesity in our society.<sup>184</sup>

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Mental Hygiene, (Sept. 13, 2012, 12:30 PM), <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>178</sup> Id.

<sup>179</sup> Frank B. Hu, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

<sup>180</sup> <http://academic.udayton.edu/health/syllabi/bioterrorism/4phealthlaw/PHLaw00k.htm>

<sup>181</sup> Dr. Alwyn Cohall, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

<sup>182</sup> DOH Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code to Establish Maximum Sizes for Beverages Offered and Sold in Food Service Establishments at 4 (Sept. 6, 2012) (“Response to Comments”).

<sup>183</sup> Pascal James Imperato, Statements in Support of New York City’s Limit on size of Sugary Beverages, Press Release, New York City Mayor’s Office (July 19, 2012).

<sup>184</sup> Susan Kansagra, Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response Comments Slide Show, Bureau of Chronic Disease Prevention and Tobacco Control New York City Department of Health and

