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**MUNICIPAL LAW**

BY JEFFREY D. FRIEDLANDER

# *Promoting Public Health*

During the administration of Mayor Michael Bloomberg, the New York City Board of Health and the City's Department of Health and Mental Hygiene have developed a number of noteworthy initiatives to protect and promote the health and well-being of New Yorkers. Whether in the areas of food, tobacco products or disease prevention, the board and Health and Mental Hygiene have led in the establishment of innovative public health programs.

Established in 1822 in response to repeated outbreaks of yellow fever in the city, the Board of Health adds to and amends the New York City Health Code, codified at Title 24 of the Rules of the City of New York, whose provisions "have the force and effect of law." Section 558 of the New York City Charter authorizes the board of health to legislate in the health code regarding "all matters to which the power and authority of [Department of Health and Mental Hygiene] extends," embracing, pursuant to §556, "all matters affecting health in the city of New York and…all those functions and operations performed by the city that relate to the health of the people of the city[.]" Accordingly, the health code governs matters fundamental to the well-being of city residents, from school health services to the safety of radiation equipment.

In recent years, the board of health and department of health and mental hygiene, together with the mayor and city council, have addressed certain long-lasting health problems, among other things by acting to limit smoking and to ensure that all New Yorkers have an opportunity to obtain food that provides good nutrition. Law Department attorneys support these efforts by assisting in the drafting and review of legislation and rules that implement the city's health initiatives and defending those initiatives when they are challenged in court. In this article, I will focus on several initiatives that have received significant attention.

**Smoking**

An early health initiative of the Bloomberg administration was the New York City Smoke-Free Air Act, Local Law 47 of 2002 (Administrative Code §17-501 et seq.), which became effective on March 30, 2003. As explained by then Commissioner of Health and Mental Hygiene Thomas R. Frieden, the Act "serve[s] as a national model for worker protection…from deadly secondhand smoke that disproportionately affects minority workers" in New York City, where "400,000 non-smokers…are second-hand smokers in their own workplaces."

The act and its implementing regulations, both of which were drafted with the assistance of attorneys of the Law Department's division of legal counsel, prohibits smoking in all enclosed areas within public places and in nearly every indoor area in the city where people work and congregate, e.g., transportation facilities, restrooms, retail stores, restaurants, libraries, schools, elevators, and places of public assembly such as movie theaters and concert halls. Administrative Code §17-503 (a).

In July 2003, NYC C.L.A.S.H. (Citizens Lobbying Against Smoker Harassment) Inc., an organization describing itself as protecting the rights of smokers, challenged the city's law (as well as the New York State Clean Indoor Air Act, Public Health Law §1399-n et seq., which, like the city's law, prohibits smoking in virtually all indoor spaces) in U.S. District Court for the Southern District. Plaintiffs sought a declaratory judgment declaring the law invalid, as well as injunctive relief against its enforcement. CLASH alleged that the city's and state's prohibition of smoking in bars and food service establishments was invalid as violating protections codified in the Fourteenth Amendment to the U.S. Constitution, specifically: freedom of association, assembly, and speech; the right to travel; equal protection; and the right to enter into contracts. *NYC C.L.A.S.H. Inc. v. City of New York*, 315 F. Supp.2d 461 (S.D.N.Y. 2004).

Southern District Judge Victor Marrero converted the city's motion to dismiss into a motion for summary judgment and granted the motion, together with the state's identical motion, concluding that none of the constitutional claims had merit. The court found that the challenged laws did not infringe on any recognized right of association or assembly, whether the fundamental right allegedly denied was "the 'right to smoke' as such," the "right to assemble, associate and speak," or "a right to smoke during the course of assembling, associating, and speaking[.]" The court rejected the argument of CLASH "that in every instance the act of smoking in a bar or restaurant is ordinarily or inextricably intermeshed with a message that it always merits First Amendment protection."

The court was similarly unpersuaded by CLASH's claim that the challenged laws impacted smokers' right to travel in any material way and, with regard to the Equal Protection challenge, concluded that, in view of "the well-documented harmful effects" of second hand smoke, both the city's and the state's anti-smoking laws were "a valid exercise of the State's police powers over the health and welfare of its citizens."

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Another element of the Bloomberg administration's strategy for reducing the harmful effects of tobacco in the city relies on the economic principle that high prices reduce consumption. The phenomenon of price elasticity accurately predicts that, for a given rise in the cost of cigarettes, there will be a certain reduction in the number of smokers and the amount smoked. Accordingly, through taxation, the city maintains among the highest cigarette prices in the nation.

Unfortunately, high prices encourage cigarette bootlegging, in which cigarettes from low-tax jurisdictions are transported into the city, where they can be sold for far less than the legal price.

One of the principal sources of bootleg cigarettes for the city has been the Poospatuck Indian Reservation, located in Mastic, Long Island, where middlemen have taken advantage of the ability of Native Americans to purchase cigarettes for personal consumption free of taxes. Reservation sellers, most of whom are not Native Americans, have exploited that loophole by purchasing millions of cartons of untaxed cigarettes and re-selling them to bootleggers for transport into the city.

Recently, the city took successful action to stop such illegal cigarette sales. In *City of New York v. Golden Feather Smoke Shop Inc.* 2009 U.S. Dist. LEXIS 76306 (E.D.N.Y. Aug. 25, 2009), attorneys of the affirmative litigation division, representing the department of finance (as collector of the cigarette tax), obtained a preliminary injunction against cigarette bootlegging from the Poospatuck reservation.

In that case, Eastern District Judge Carol Bagley Amon held that the city had successfully shown that it had sustained irreparable injury from cigarette bootlegging on the basis of the testimony before the court of Dr. Frieden, who concluded that if the untaxed cigarettes trafficked to the city from the Poospatuck Reservation by a single bootlegger in one year were fully taxed, 1,370 New York city smokers would quit smoking, avoiding 450 premature deaths.

The court further noted, on the basis of Dr. Frieden's testimony, that "there are health benefits to decreasing the [amount] one smokes, even without quitting altogether," and that "increasing the price of cigarettes, through taxation or otherwise, leads smokers to consume fewer cigarettes[.]"

Accordingly, the court concluded that the city had shown that the bootlegging of untaxed cigarettes into the city caused irreparable harm and was likely, in the absence of a preliminary injunction, to continue.

The most recent of the city's smoking-related health initiatives is Local Law 69 of 2009, enacted on Oct. 28, 2009, which prohibits the sale of flavored non-cigarette tobacco products in New York City. Tobacco vendors sell certain products that impart non-tobacco flavors such as bubblegum, chocolate or fruit. These products are often marketed to highlight such flavors and are directed particularly towards children.

Two manufacturers of chewing tobacco (the primary form in which flavored tobacco is sold) have filed a lawsuit in the Southern District to strike down the local law, arguing among other things that federal law preempts the city council from enacting such a ban. *U.S. Smokeless Tobacco Manufacturing Company LLC and U.S. Smokeless Tobacco Brands Inc. v. City of New York*, 09 Civ. 10511 (S.D.N.Y.).

**Food Habits**

Another focus of the Bloomberg administration's health initiatives is the food consumption and food habits of New Yorkers. The best known and perhaps most noteworthy of these is the board of health's calorie posting rule. In December 2006, the board adopted §81.50 of the health code, which required the posting of calorie information on menus and menu boards in certain restaurants. The calorie posting requirement applied to restaurants that sold standardized menu items and made calorie content information publicly available in some form. Covered restaurants were required "to post on menu boards and menus the calorie content values…for each menu item next to the listing of each menu item."

Shortly before the provision became effective, it was challenged by the New York State Restaurant Association in the Southern District.

The association argued that §81.50 was preempted by the federal Nutrition Labeling and Education Act of 1990 (21 U.S.C. §§343, 343-1, "NLEA") and, further, that it violated the association's members' First Amendment rights.

The restaurant association argued that those of its members who voluntarily provided calorie information (and were thereby subject to the city's calorie posting requirement) were asserting claims about their food that were governed exclusively by the Nutrition Labeling and Education Act, so that the health code provision was preempted. Attorneys of the administrative law division, representing the board of health, argued in response that the calorie information whose posting by certain restaurants was mandated by the health code was entirely factual in nature and was therefore not in the nature of a claim about food governed by the Nutrition Labeling and Education Act.

In September 2007, Southern District Judge Richard Holwell held in favor of the plaintiff that the city's calorie posting requirement was preempted by the federal law. *New York State Restaurant Association v. New York City Board of Health*, 509 F.Supp.2d 351 (S.D.N.Y. 2007). Reviewing a complex set of implementing regulations issued and statements made by the U.S. Food and Drug Administration, the court concluded that factual calorie information voluntarily made available by food purveyors constituted a claim governed by the federal statute. The court noted, however, that the Nutrition Labeling and Education Act left the city "free to enact mandatory [calorie] disclosure requirements" applicable to restaurants within its borders.

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Since the court found the 2006 calorie posting requirement preempted, it did not address the restaurant association's First Amendment claim.

In January 2008, following the court's ruling, the board of health repealed and reenacted health code §81.50. Section 81.50 in its amended form applies not to restaurants that voluntarily provide access to calorie information, but rather to every restaurant "that is one of a group of 15 or more [restaurants] doing business nationally, offering for sale substantially the same menu items, in servings that are standardized for portion size and content[.]" All restaurants located within the city that fall within that category are required by §81.50 to post calorie information on their menus and menu boards.

The restaurant association again challenged the board of health's calorie posting requirement in federal court, again arguing that §81.50 was preempted by the Nutrition Labeling and Education Act and that it violated the First Amendment rights of its members.

In April 2008, Judge Holwell upheld the city's new requirement. *New York State Restaurant Association v. New York City Board of Health*, 2008 U.S. Dist. LEXIS 31451 (S.D.N.Y. 2008), aff'd, 556 F.3d 114 (2d Cir. 2009). The court held that the federal law "explicitly leaves to state and local governments the power to impose mandatory nutrition labeling by restaurants" and, therefore, that §81.50 was not preempted by federal law.

As for the restaurant association's First Amendment claim, the court held that, since §81.50 applied to the "disclosure of 'factual and uncontroversial' commercial information" and not to the expression of opinion, the city need demonstrate only a "rational connection" between the disclosure requirement and its purpose in imposing it.

The court was satisfied that the new calorie posting requirement met this standard: "Based on the evidence presented by the City, as well as common sense, it seems reasonable to expect that some consumers will use the information disclosed pursuant to [section] 81.50 to select lower calorie meals when eating at covered restaurants and that these choices will lead to a lower incidence of obesity."

Judge Holwell's ruling was affirmed by the Second Circuit. *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009).

Another city health initiative directed to the food consumption of New Yorkers is the green cart law, Local Law 9 of 2008, enacted on March 13, 2008. That enactment was intended to correct the shortage or absence in certain parts of the city of food stores selling fresh and unprocessed fruits and vegetables. Without an opportunity to purchase such foods, the city council found in approving the measure, residents suffered disproportionately from obesity, diabetes, heart disease and other conditions associated with poor nutrition.

Local Law 9, drafted with the assistance of attorneys of the division of legal counsel, authorizes the commissioner of health and mental hygiene to permit the sale from vehicles or pushcarts, known as "green carts," of fresh fruits and vegetables. The commissioner may issue one thousand fresh fruits and vegetables permits for the entire city, divided into a specified number of permits for each borough. Each permit may be used to vend fresh fruits and vegetables within certain police precincts, specified in the law, in the borough for which the permit was issued. Administrative Code §17-307(4)(a), (b).

The most recent of the city's food-related health initiatives is a proposal by the board of health that would require each restaurant to post a letter grade reflecting the result of the establishment's most recent sanitary inspection.

The department of health and mental hygiene, which conducts restaurant inspections, makes available on its Web site a point score that reflects inspection findings for a restaurant. This system has several limitations: computer-based information is used disproportionately by more affluent and educated consumers and must be viewed in advance of dining out; and the number and severity of sanitary violations are summarized more satisfactorily by letters (A through F) than on an increasing numerical scale. The adoption of restaurant grading by other jurisdictions (such as Los Angeles County) has been associated with declines in hospitalizations for food-borne illnesses.

The board's proposal, formulated with the assistance of attorneys of the division of legal counsel, would add a new provision to the health code authorizing the department to provide by rule for the issuance of a letter grade following inspection of each restaurant, which would be required to post the grade in a conspicuous place. Each letter in the grading system would correspond to a range of points in the current scoring system. A restaurant receiving any grade lower than "A" (the highest grade) would be able to defer posting the grade pending a hearing scheduled by the department. A public hearing on the board's proposal will be held on Feb. 5, 2010.

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