

THE DAILY CALLER

Soda ban ruling a devastating defeat for Mayor Bloomberg

By: Walter Olson – March 11, 2013

For all the public irritation over New York City Mayor Michael Bloomberg's high-handed attempt to ban large-size sugary drinks, most New Yorkers were expecting it to pass into effect Tuesday as planned. Although opponents had gone to court in an effort to block the measure, the press had not paid much attention to their challenge.

Public health activists were already pursuing plans to use the ban as an entering wedge to get laws passed in other cities and states restricting food and beverage choices. "I think you're not going to see a lot of push back here," predicted Bloomberg himself.

And then they were struck by a sudden Tingling. Judge Milton Tingling of the state trial-level court in Manhattan, that is.

On Monday, Judge Tingling struck down the soda ban in a sweeping opinion that does everything but hand Mayor Poppins his umbrella and carpetbag. This wasn't just a temporary restraining order putting the regulation on hold for a few weeks. The judge struck down the ban permanently both on the merits ("fraught with arbitrary and capricious consequences") and as overstepping the rightful legal powers of the New York City Department of Health — meaning that the board cannot go back and reissue the regulations on its own authority even if it should develop a better factual basis for them.

- **Arbitrary and capricious.** The ban would have covered some but not other food establishments, some but not other highly sweet or fattening drinks (the "latte exception"), and the health department had resorted to "suspect grounds" in distinguishing the two. "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 ... the loopholes in this rule effectively defeat the stated purpose of the rule," wrote the judge.
- **Beyond the agency's powers.** Lawyers for the Department of Health claimed that it was an agency with broad power to issue edicts and decrees protecting public health, and pointed to old cases in which courts had upheld its power to act on its own. Judge Tingling slapped down this dangerous claim. Just because an agency may possess sweeping *emergency* powers — to quarantine innocent persons during a raging epidemic, for example — does not mean it can assert similar powers in situations that are not emergencies. It's a crucial point.
- **Separation of powers.** When Mayor Bloomberg wanted the soda ban, he went not to the New York City Council — which had indeed debated similar ideas in the past —

but to a city Department of Health staffed with his own appointees. Judge Tingling blew the whistle on this infringement on the principle of separation of powers. The soda ban was in essence a venture into legislation, and as such needed to be taken up, if at all, by the legislative branch of government. Again, the implications are significant, since Bloomberg is hardly alone in his efforts to bypass fractious legislators and make law instead by executive edict.

The city administration vows to appeal, and it almost has to, for the sake of the reputation of the mayor and his public health crew. For them, the biggest reproach in the decision isn't in being found to have gotten the facts wrong, it's being found to have violated the law.

And if anyone is expected to know and play by the rules, it's a nanny.