

DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH

NOTICE OF INTENTION TO REPEAL AND REENACT ARTICLE 89
OF THE NEW YORK CITY HEALTH CODE

NOTICE OF PUBLIC HEARING

In compliance with Section 1043(b) of the New York City Charter and pursuant to the authority granted to the Board of Health by Section 558 of the Charter, notice is hereby given of intention to repeal and reenact Article 89 (Mobile Food Vending) of the New York City Health Code.

NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT WILL HOLD A PUBLIC HEARING ON THE PROPOSAL ON FRIDAY, OCTOBER 31, 2008 FROM 2:00 P.M. TO 4:00 P.M. IN THE THIRD FLOOR BOARDROOM (ROOM 330) AT 125 WORTH STREET, NEW YORK, NEW YORK 10013.

PERSONS INTERESTED IN PRE-REGISTERING TO SPEAK SHOULD NOTIFY, IN WRITING, RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET, CN-31, NEW YORK, NEW YORK; (212) 788-5010 BY 5:00 P.M., THURSDAY, OCTOBER 30, 2008. PLEASE INCLUDE A TELEPHONE NUMBER WHERE, IF NECESSARY, YOU MAY BE REACHED DURING NORMAL WORKING HOURS. SPEAKERS WILL BE LIMITED TO FIVE (5) MINUTES.

PERSONS WHO REQUEST THAT A SIGN LANGUAGE INTERPRETER OR OTHER FORM OF REASONABLE ACCOMMODATION FOR A DISABILITY BE PROVIDED AT THE HEARING ARE ASKED TO NOTIFY RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013; (212) 788-5010 BY OCTOBER 17, 2008.

REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 10A.M. HOWEVER, PREFERENCE WILL BE GIVEN TO THOSE WHO PREREGISTER.

WRITTEN COMMENTS REGARDING THE PROPOSAL ADDRESSED TO THE ATTENTION OF THE BOARD OF HEALTH MUST BE SUBMITTED TO RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, BY MAIL TO 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013, BY FAX TO (212) 788-4315, BY E-MAIL TO RESOLUTIONCOMMENTS@HEALTH.NYC.GOV OR ONLINE (WITHOUT ATTACHMENTS) AT <http://www.nyc.gov/html/doh/html/notice/notice.shtml> ON OR BEFORE 5:00 P.M., FRIDAY, OCTOBER 31, 2008. ATTACHMENTS TO ONLINE COMMENTS MUST BE MAILED OR FAXED.

WRITTEN COMMENTS RECEIVED BY THE SECRETARY TO THE BOARD OF HEALTH AND A TRANSCRIPT OF THE PUBLIC HEARING WILL BE AVAILABLE FOR PUBLIC INSPECTION WITHIN A REASONABLE TIME AFTER RECEIPT, BETWEEN THE HOURS OF 9:00 A.M. AND 5:00 P.M. AT THE OFFICE OF THE SECRETARY. THE DEPARTMENT'S GENERAL POLICY IS TO MAKE WRITTEN COMMENTS AVAILABLE FOR PUBLIC VIEWING ON THE INTERNET. ALL COMMENTS RECEIVED, INCLUDING ANY PERSONAL INFORMATION PROVIDED, WILL BE POSTED WITHOUT CHANGE TO <http://www.nyc.gov/html/doh/html/comment/comment.shtml>.

STATUTORY AUTHORITY

These amendments to the New York City Health Code (“Health Code”) are promulgated pursuant to §§556, 558 and 1043 of the New York City Charter (the “Charter”). Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department” or “DOHMH”) with jurisdiction to regulate all matters affecting the health in the city of New York. Section 558(b) and (c) of the Charter empower the Board of Health (the “Board”) to amend the Health Code and to include in the Health Code all matters to which the DOHMH’s authority extends. Section 1043 of the Charter grants the DOHMH rulemaking powers.

STATEMENT OF BASIS AND PURPOSE

INTRODUCTION

As part of a comprehensive review of the Health Code to assess the efficacy of the articles in protecting public health, the DOHMH proposes that the Board of Health repeal and reenact Article 89 (Mobile Food Vending) to provide a reorganized article, better reflect practice and the regulatory environment, assure that the revised provisions provide adequate legal tools to effectively address the health and safety needs of the public and to harmonize such provisions with related provisions of Title 17 of the New York City Administrative Code (“Administrative Code”), the Department’s rules in Chapter 6 of Title 24 of the Rules of the City of New York and the State Sanitary Code (10 NYCRR). As part of the revision effort, particular attention has been placed on food preparation and protection and maintenance of mobile food vending units, as well as on attempting to clarify enforcement procedures. Article 89 has not been substantively modified since it was adopted in 1978 and many of its provisions are obsolete. Pursuant to this review and assessment of the Health Code, the DOHMH proposes that the Board repeal and reenact Article 89 as provided below.

§89.01(Scope) is partly derived from current §89.25(a) concerning compliance with the applicable provision of the Health Code, and emphasizes that all mobile food vending, regardless of whether it occurs only in public spaces regulated by §§17-306 et seq. of the Administrative Code, or in private and restricted spaces, is subject to Health Code and State Sanitary Code requirements, as well as the Department’s rules in Chapter 6 of Title 24 of the Rules of the City of New York.

§89.03 (Definitions) has been updated, adding new definitions, and clarifying terms used in this Article. The definition of “restricted space” has been added to cover spaces that may be open to the public, but where commercial activity, such as mobile food vending, may only be conducted with the written approval of the owners of the spaces. The definition of “stand” has been deleted, since the Department does not allow a stand to be used as or an adjunct of a mobile food vending unit. “Operation” of a mobile food vending unit has been defined to clarify that all the activities involved in setting up a unit for vending are considered to be part of operating a mobile food vending unit, making vendors responsible for violations that occur during preparation for vending, even though food is not being sold at the time the violations are observed.

§89.05 (Permits and licenses required) and §89.07 (Licenses and badges) update requirements in current §89.03 (Permits, licenses; badges, identifying plates and insignia) to reflect current practice.

§89.09 (Terms of permits and licenses) is new and codifies the terms for all mobile food vending permits and licenses issued by the Commissioner.

§89.11 (Applications for permits and licenses) includes some of the provisions of current §89.03, but has been updated to reflect current practice.

§89.13 (Duties of licensees and permittees) includes many of the provisions of current § 89.07, but adds provisions reflecting current practice.

§89.15 (Prohibitions against transfer of foods) is the same as current §89.11.

§89.17 (Prohibitions against transfer of a license or permit) is new, reflects current practice and attempts to clarify that a license or permit may not be transferred, although the Department does not prohibit the leasing of a mobile food vending unit, to which a decal has been affixed by the Department, by the individual permittee to another licensed vendor. These arrangements are common industry practices. However, neither a permit or license document, nor a cart decal or a vendor badge may be transferred from one person to another. Decals are only affixed to carts that have passed a preoperational Department inspection and are considered fit for food vending. Licenses are issued only to persons who have passed a food protection course. Unregulated transfer of decals and licenses ill serves the public's expectation that foods served by such units are safe to eat.

§89.19 (Food protection and safety) updates current provisions in §§89.33 (Food preparation) and 89.37 (Condiments) and adds requirements similar to those in Article 81 for food protection related to food sources, use of thermometers, and hot and cold holding facilities, including ice. The section also prohibits butchering meat and service of fish products, requires refrigeration for processed fruits and vegetables, establishes vendor hygiene standards and requires that units be serviced and cleaned at least daily.

§89.21 (Water supply) has been expanded and updates requirements in current §89.35 (Potable water).

§89.23 (Equipment and hand wash sinks) retains the requirement for use of single-service articles in current §89.27, and requires that mobile food vending units be equipped to facilitate prevention of food contamination in accordance with Article 81. Physical specifications for various types of mobile food vending units will be incorporated in the Department's rules in Chapter 6 of Title 24 of the Rules of the City of New York.

§89.25. (Garbage, refuse and liquid wastes) has been updated and incorporates provisions requested by the City's Department of Sanitation to clarify the responsibility of mobile food vendors for maintaining cleanliness of street areas surrounding their vending units. It also specifically authorizes various City agencies to enforce its provisions, by issuing orders and writing notices of violation.

§89.27 (Mobile food commissaries) updates requirements of current §89.31 (Cleaning and servicing of mobile food units), eliminating references to "depots", and incorporates many related provisions of the State Sanitary Code. It prohibits using streets and sidewalks for cleaning units, and requires commissaries to maintain records of the mobile food vending units serviced.

§89.29 (Imminent health hazards) is new, and adds provisions from current §81.39 authorizing the Department to order cessation of operations when the Department believes that continuing operation endangers the public health. Permittees, whose carts are very often operated by other mobile food vendors, on notice that they, too, will be accountable for imminent health hazards created by the mobile food vendors, other than the permittee, who are operating the permittee's mobile food vending unit. The Department believes these provisions are necessary to promote more responsible ownership and operation of mobile food vending units. The section authorizes the Department inspector to remove or cover the mobile food vending unit and includes provisions for substantive due process, including timely hearings, for permittees and licensees ordered to cease operations.

§89.31 (Enforcement) includes the provision in current §89.19(c) authorizing seizure of a non-permitted unit in subdivision (a), prohibits vendors from leaving mobile vending food units unattended whenever food is maintained on the unit, and authorizes denial of a license or permit by the Commissioner in accordance with applicable law. Subdivisions (d) and (e) of this section are substantially the same as current §89.19 (Enforcement).

§89.33 (Suspension and revocation of license or permit) continues the four current provisions of §89.13 (Suspension and revocation of license or permit), and adds a new subdivision (e) to provide that a person not authorized to hold a license or permit, who has been issued a license or permit in error, may be notified that the license or permit is void. It also provides that failure to notify the Department of a change of address is not a defense to any proceeding brought by the Department for revocation of a license or permit. Also added to this section are provisions of current §89.15 (Notice; hearings).

§89.35 (Modification) preserves the current authority of the Commissioner in §89.25 (Compliance and modification) to modify any requirements of this article that present practical difficulties or unreasonable hardships, provided that the public health is not compromised. Other provisions of the current section in subdivisions (a) and (c) have been incorporated in other sections.

The following provisions have been deleted in their entirety as either obsolete, or duplicative of provisions of the Administrative Code or the Health Code: §89.09 Restrictions on the placement of mobile food units; §89.21 Seizure of perishable foods; §89.23 Penalties or fines; and §89.39 Identification of individual food servings. §89.09 (Placement of units in public spaces) is entirely subject to provisions of the Administrative Code. Penalties and fines for placement violations in public areas are established in the Administrative Code (public space vending) or Article 3 of the Health Code (restricted or private area violations and all other violations of any Health Code provisions). Seizure of perishable foods by the Department is authorized by Article 3's provisions for seizure or embargo of any article that is found unfit for use. Labeling of packaged foods is currently subject to federal regulation.

The proposal is as follows:

Matter underlined is new.

RESOLVED, that the list of sections and section headings in Article 89 of the New York City Health Code and Article 89 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, as last amended by resolution adopted on the twelfth of December two thousand two, be, and the same hereby are repealed and reenacted, to be printed together with explanatory notes to read as follows:

Article 89

Mobile Food Vending

§89.01 Scope.

§89.03 Definitions.

§89.05 Permits required.

§89.07 Licenses and badges.

§89.09 Terms of permits and licenses.

§89.11 Applications for permits and licenses.

§89.13 Duties of licensees and permittees.

§89.15 Prohibition against transfer of foods.

§89.17 Prohibition against transfer of a license or permit.

§89.19 Food protection and safety.

§89.21 Water supply.

§89.23 Equipment and hand wash sinks.

§89.25 Garbage, refuse and liquid wastes.

§89.27 Mobile food commissaries.

§89.29 Imminent health hazards.

§89.31 Enforcement.

§89.33 Suspension and revocation of license or permit

§89.35 Modification.

Introductory Notes:

As part of a comprehensive revision of the Health Code, Article 89 was repealed and reenacted by resolution of the Board of Health on XXX, effective January 1, 2010, to enhance the protection of the public health by requiring mobile food vending units to be operated in the safest manner possible, and to regulate various forms of mobile food vending.

§89.01 Scope In addition to Article 81, and all other applicable provisions of this Code and Chapter 6 of Title 24 of the Rules of the City of New York, the provisions of this article shall apply to all mobile food vending operations, including, but not limited to, the sale of foods, and foods distributed without charge, from mobile food vending units on or in public, private and restricted spaces, both indoors and outdoors, including mobile food vendors and units that are regulated by the Administrative Code.

§89.03 Definitions. When used in this article:

(a) Charitable organization shall mean any charitable organization required to register with the State Attorney General that distributes food free of charge.

(b) Decal shall mean the identifying plate, insignia, seal or other identifying device that is placed on a mobile food vending unit by the Department, after the unit has been approved and inspected by the Department and authorizing use of the unit for mobile food vending.

(c) Food shall have the same meaning as in Article 71 of this Code.

(d) License shall mean the paper or other license document and photo identification badge issued to a mobile food vendor authorizing such person to sell food from a mobile food vending unit that has been issued a permit by the Commissioner.

(e) Material alteration shall mean any alteration that changes or results in replacement of any part of the body structure or equipment in a mobile food vending unit including, but not limited to, any food contact surface or non-food contact surface. A tire change or repair, replacement of the axle, or straightening a dent in a panel shall not be considered a material alteration.

(f) Mobile food commissary shall mean a food service establishment or a non-retail food service establishment, as those terms are defined in Article 81 of this Code, or other facility approved by the Department that complies with Chapter 6 of Title 24 of the Rules of the City of New York, which provides any of the following services to one or more mobile food vending units:

(1) Storage of the unit when the unit is not being used for vending;

(2) Cleaning and sanitizing of the unit;

(3) Cleaning and sanitizing of the equipment and utensils used on a unit;

(4) Disposing of liquid and solid wastes and refuse generated by the operation of a unit; or

(5) Supplying of potable water and food, whether pre-packaged by the manufacturer, or prepared at the commissary, and furnishing of non-food supplies.

(g) Mobile food vending shall mean setting up to sell, and preparing, storing, holding and selling food, or distributing food free of charge, to the public from a mobile food vending unit.

(h) Mobile food vending unit shall mean a food service establishment as defined in Article 81 of this Code located in a pushcart or vehicle, self or otherwise propelled, used to store, prepare, display, serve or sell food, or distribute food free of charge to the public, for consumption in a place other than in or on the unit. Any such pushcart or vehicle shall be deemed a mobile food vending unit whether operated indoors or outdoors, on public, private or restricted space. A mobile food vending unit shall not mean a stand or a booth.

(i) Mobile food vendor shall mean a person who sells or offers for sale food, or distributes food free of charge, from a mobile food vending unit in any public, private or restricted space.

(j) Operate or operation of a mobile food vending unit shall mean setting up, preparing, storing, holding and selling food, or distributing food free of charge, from a mobile food vending unit.

(k) *Permit* shall mean the paper or other permit document authorizing the use of a specific mobile food vending unit to sell or distribute food, and the decal affixed to the unit by the Department after such unit has passed a pre-permit inspection.

(l) *Potentially hazardous foods* shall have the same meaning as provided in Article 81 of this Code.

(m) *Private space* shall mean all privately owned or leased property where use of the property for commercial purposes, including mobile food vending, is restricted to persons who have the written permission of the owner or lessee of the property.

(n) *Public space* shall mean all publicly owned property between the property lines on a street as such property lines are shown on City records including, but not limited to, a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines.

(o) *Pushcart* shall mean a wheeled device, not required to be licensed as a vehicle, that is equipped in accordance with this Article and that is approved by the Department for use as a mobile food vending unit. Pushcart shall not mean a stand or booth.

(p) *Restricted space* shall mean publicly owned property where the owner or the lessee has the right to restrict or limit commercial activity, including mobile food vending.

(q) *Service, servicing or providing services* to a mobile food vending unit shall mean providing the services listed under subdivision (f) of this section, at a mobile food commissary, or other facility approved by the Department in accordance with Chapter 6 of Title 24 of the Rules of the City of New York.

(r) *Temporary mobile food vending permit* shall mean a seasonal permit issued for operating a mobile food vending unit from April 1 to October 31 in a calendar year.

(s) *Vehicle* shall mean a motor vehicle or trailer, as defined in the Vehicle and Traffic Law, equipped in accordance with this Article and Chapter 6 of Title 24 of Rules of the City of New York.

(t) *Volunteers* shall mean persons who provide services free of charge to charitable organizations that operate mobile food vending units distributing food free of charge.

§89.05 Permits required.

(a) *Mobile food vending units.* No person, including a charitable organization, shall operate a mobile food vending unit in any public, private or restricted space without a permit issued by the Commissioner and a decal issued and placed on the unit by the Department after inspection by the Department.

(1) No mobile food vending unit permit or decal shall be issued until the Department determines, upon inspection, that the unit is of sanitary construction and design, and equipped with sanitary facilities for mobile food vending in accordance with Chapter 6 of Title 24 of the Rules of the City of New York.

(2) The permittee shall provide proof satisfactory to the Department that the mobile food vending unit is supplied and serviced at a mobile food commissary permitted by the Commissioner, or other facility approved by the Department in accordance with Chapter 6 of Title 24 of the Rules of the City of New York.

(3) Only a currently licensed mobile food vendor may apply for or hold a mobile food vending unit permit.

(b) *Permit and decal.* After a mobile food vending unit passes a pre-permit inspection by the Department, as defined in Chapter 6 of Title 24 of the Rules of the City of New York, and a decal is affixed by the inspector conducting the inspection, the Commissioner shall issue a permit document to the permittee provided that the applicant has satisfied all other applicable requirements.

(c) *Material alterations prohibited.* A mobile food vending unit shall not be materially altered after it has been inspected by the Department and the Department has attached a permit decal. Any material alteration of a mobile food vending unit after it has been inspected by the Department shall automatically void the permit issued to that unit. When an employee of the Department determines that a unit has been materially altered, such employee shall remove the decal and seize the vendor's permit and the Department may revoke or suspend such permit in accordance with §89.33.

(d) *Ice cream trucks.* No decal shall be issued for any vehicle to be used to vend ice cream and other frozen desserts unless such vehicle is equipped with fully operational warning beepers and signage arms required by the State Vehicle and Traffic law and the rules promulgated thereunder.

(e) *Mobile food commissaries.* No person shall maintain or operate a mobile food commissary that services City mobile food vending units unless such commissary holds a current permit issued by the Commissioner, the Department of Agriculture and Markets, or the permit issuing official of a jurisdiction outside New York State in which the commissary is located.

§89.07 Licenses and badges.

(a) *License required.* No person shall operate a mobile food vending unit in any public, private or restricted space without having first obtained a license issued by the Commissioner. A new or renewal license shall be issued when a complete application and all documentation required by this Code and other applicable law have been submitted, and the Commissioner has determined that the applicant is eligible to hold such license.

(b) *Food protection course.* No mobile food vendor license shall be issued to any person unless such person submits proof satisfactory to the Department that he or she has successfully completed a food protection course in accordance with Article 81 of this Code.

(c) Charitable organization volunteers. Volunteers for charitable organizations operating mobile food vending units that distribute food free of charge shall not be required to hold a mobile food vendor license, but shall be required to present proof prior to vending, of satisfactory completion of a food protection course approved by the Department.

(d) Documentation required. No person shall operate any mobile food vending unit unless the badge issued to such person by the Department is conspicuously displayed on his or her outer clothing, and is carrying both the original food vendor license issued to such person and the original mobile food vending unit permit documents. Such license and permit shall be exhibited upon demand to any police officer, Department employee or agent, or other authorized officer, employee or agent of the City. Until the permit document is received by the permittee, the operator of the mobile food vending unit shall have in his or her possession the original pre-permit inspection report of the Department, indicating that a permit has been approved for issuance to the permittee.

§89.09 Terms of permits and licenses.

(a) Two year terms. Mobile food vending unit permits, and mobile food vendor licenses shall be valid for two years unless suspended or revoked by the Commissioner.

(b) Temporary permits. Seasonal mobile food vending unit permits shall be issued annually for operation from April 1 through October 31 of each calendar year, unless suspended or revoked by the Commissioner.

(c) Commissary permits. Mobile food commissary permits shall be valid for one year unless sooner suspended or revoked by the Commissioner.

(d) Restricted or private space permits. Mobile food vending units operating exclusively in restricted or private spaces shall have the same term as the term of the written agreement between the permittee and the owner or lessee of the premises, but shall not exceed the terms specified in subdivision (a) or (b) of this section.

§89.11 Applications for permits and licenses.

(a) Fees. All applications for a license or permit to vend in a public space shall be accompanied by payment of the fees prescribed in §17-308 of the Administrative Code, or successor law, or, if the mobile food vending unit will operate in a private or restricted space, the fee prescribed by Article 5 of this Code

(b) Applications. All applications shall be submitted in a form and contain all information and documentation required by the Department, and shall include, but not be limited to, the following information:

- (1) The name, home and business address of the applicant;

(2) The name, home address and license number of every food vendor who will be authorized by the permittee to operate the mobile food vending unit;

(3) A description of the food to be vended and a description of the type of mobile food vending unit to be operated pursuant to the permit;

(4) At least one piece of current valid photo identification issued by a government agency of any jurisdiction;

(5) Proof that the applicant has obtained a certificate of authority to collect sales taxes pursuant to §1134 of the Tax Law, and has a tax clearance certificate from the State Tax Commission;

(6) If the applicant is a partnership, limited liability company or other business entity, the name, and address of each partner, member, officer or manager, as may be applicable, of such entity; if a corporation, the names and addresses of the corporation, the names, home and business addresses of the principal stockholders, officers, directors and shareholders;

(7) Proof that the applicant has obtained clearance from the Environmental Control Board showing the payment of all penalties and fines pursuant to Chapter 6 of Title 24 of the Rules of the City of New York; and

(8) An application for a permit for a mobile food vending unit to operate in a private or restricted space shall include a copy of a written agreement with the owner of the private or restricted space indicating that the applicant has the right to operate in such space.

(c) *Renewals.* An application for renewal of a license or permit shall be received by the Department, with the fee required by Article 5 of this Code or the Administrative Code, at least thirty days prior to the expiration date of the existing license or permit. Such application shall be accompanied by tax clearance certificates issued by the State Tax Commission and New York City Department of Finance, and proof that all penalties and fines for sustained or defaulted notices of violation issued to the mobile food vendor licensee or permittee for violations of Title 17 of the Administrative Code, the Health Code, the Sanitary Code, and Chapter 6 of Title 24 of the Rules of the City of New York have been paid in full in accordance with such chapter.

(d) *Duplicates.* Applications for duplicate license and permit documents, decals and badges shall be accompanied by documentation acceptable to the Department demonstrating that the original documents, decals or badges have been lost, stolen, damaged or destroyed. Such documentation shall include, but not be limited to a sworn notarized statement by the applicant attesting to the circumstances of the loss, theft or damage of the document, decal or badge and, in cases of theft, a police report for the stolen document, decal or badge

(e) *Representatives.* An application for a new or renewal license or permit that is prepared or submitted by an authorized representative of the applicant shall contain a sworn statement indicating that the

representative provided the applicant with a complete application packet provided by the Department, including a copy of all laws and regulations applicable to vending, and that all applicable laws and regulations were explained to the applicant.

(f) Signed by applicant. Applications for new, renewal or duplicate documents shall be signed by the applicant, and not by a representative.

(g) Affirmation. Every applicant for a new or renewal or duplicate license or permit shall affirm or swear as to whether such applicant has or has not previously had a license or permit suspended or revoked by the Commissioner.

Notes:

See Khalil v. Spencer, 143 Misc. 2d 429; 541 N.Y.S.2d 301 (Sup Ct. NY Cty. 1989), which upheld the license renewal process for mobile food vendors as reasonable.

First class mail and certified mail service of petition and notice of hearing at vendor's last known address of record was deemed sufficient to establish jurisdictional prerequisites for default. Licensees and permittees are required to maintain a current address on file with the Department. Dep't of Health v. El Hossini, OATH Index No. 1768/98 (Aug. 26, 1998); Dep't of Health v. Moustafa, OATH Index No. 1769/98 (Aug. 26, 1998).

§89.13 Duties of licensees and permittees

(a) Inspections. Permittees and licensees shall permit inspections by the Department of any mobile food vending unit subject to this Article, and any premises in which food is stored, prepared, processed distributed or served. Permittees and licensees shall present mobile food vending units for inspection at such place and time as may be designated by the Department.

(b) Commissary used. Permittees and licensees shall provide to the Department upon request the names and home and business addresses of the owners of the mobile food commissaries, or other approved facility from which the permittee or licensee receives her or his food and supplies, and the address at which the food supplies are stored, where his or her mobile food vending unit is serviced and where the unit is stored when not in operation.

(c) Documented food source. Permittees and licensees shall have in their possession and make available for inspection documentation satisfactory to the Department identifying the source of all foods being held, stored, offered for sale, sold or distributed free of charge from the mobile food vending unit.

(d) Authorized foods. Permittees and licensees shall not use or allow others to use a mobile food vending unit to vend any foods other than those foods authorized in writing by the Commissioner to be vended by the permittee or licensee.

(e) Expired or suspended or revoked permits and licenses. Permittees and licensees shall not operate a mobile food vending unit after expiration or revocation of a permit or license or during any period when a permit or license is suspended.

(f) Surrender of licenses and permits. Licenses, permits, badges and decals shall be surrendered promptly to the Commissioner upon revocation, suspension, termination or expiration.

(g) Unlicensed vendors prohibited. Permittees and licensees shall not allow a person who does not hold a currently valid mobile food vending license issued by the Commissioner to operate such permittees' or licensees' mobile food vending unit.

(h) Notice to the Department. Permittees and licensees shall notify the Department within ten business days of any change in the information provided on an application for a license or a permit, including, but not limited to, the address and contact information for the licensee or permittee, and the names and license numbers of persons authorized to operate a permittee's mobile food vending unit. Failure to timely notify the Department of a change in address by a licensee or permittee shall result in the declaration of a default if the Department commences a proceeding for the licensee or vendor to show cause why the Commissioner should not revoke or suspend the license or permit and mails the petition and notice of hearing to the licensee's or permittee's last known address as maintained in Department records.

(i) Damaged and repaired mobile food vending units. Any mobile food vending unit that has been damaged and repaired or materially altered, as defined in this Article, shall be re-inspected by the Department prior to its re-use as a mobile food vending unit. No decal shall be transferred from any mobile food vending unit to another mobile food vending unit, except by the Department. The Department may impose a reasonable fee to cover the costs of all such inspections.

(j) Restricted or private area permit limitations. Any person who operates a mobile food vending unit with a private or restricted area permit in any area other than the area specified on the permit shall be deemed to be operating without a permit.

(k) Permittees liable for mobile food vending unit operation. Permittees shall be jointly and severally liable for violations of this Code, and other applicable law, that occur in the course of operating mobile food vending units. A person operating a mobile food vending unit who is not the permittee shall be deemed an agent of the permittee, and the mobile food vending unit being operated by such person shall be deemed the place of business of the permittee, for the purpose of service of any Department notice of violation, order, or petition and notice of hearing issued to the permittee. A licensee served with any notice of violation, order, or petition and notice of hearing directed to the permittee shall deliver such notice of violation, order or petition to the permittee within two business days of delivery of such document to the licensee, and the Department shall mail such notice of violation, order, or petition and notice of hearing to the permittee by any method authorized in Article 3 of the Code.

§89.15 Prohibition against transfer of foods. Except for charitable organizations, it shall be unlawful for any person to sell food or distribute food free of charge to any other mobile food vendor for resale or distribution if such vendor does not have a valid permit and license for mobile food vending.

§89.17 Prohibition against transfer of a license or permit.

(a) Transfers prohibited. No person holding a permit for a mobile food vending unit or a license to operate a mobile food vending unit shall sell, lend, lease or in any manner transfer his or her license, permit, badge or decal, except in accordance with applicable law.

(b) Unauthorized transfer voids permit and license. Any unauthorized transfer or attempt to transfer a license, permit, badge or decal shall automatically void such license, permit, badge and identification insignia.

(c) Notice to the Department. The Department shall be notified in writing at least ten business days in advance of any transfer of a license or permit authorized by applicable law.

Notes: Ad Code §17-314.1 prohibits transfers of mobile food vending licenses or permits except in certain cases where family members who hold permits are incapacitated or deceased. Health Code §5.11 automatically voids a permit that is transferred for operation of any business regulated by the Department.

§89.19 Food protection and safety.

(a) Food sources. Food shall be obtained from approved sources operating pursuant to licenses or permits issued by federal, state or local regulatory agencies. All potentially hazardous foods shall be cooked, processed, packaged, and labeled at a licensed mobile food commissary or other approved facility.

(b) Thermometers required. Metal stem-type, numerically scaled, indicating thermometers, thermocouples, or thermistors, accurate to plus or minus two degrees Fahrenheit (one degree Celsius), shall be used to determine that required internal cooking, holding or refrigeration temperatures of all potentially hazardous foods are obtained and maintained in accordance with Article 81.

(c) Hot and cold holding. Sufficient hot and cold storage facilities shall be provided and used to maintain potentially hazardous foods, as defined in Article 81 of this Code, at required temperatures.

(d) Ice. Ice that is consumed or that touches food and food contact surfaces or utensils shall be made from potable water from approved sources in a manner that protects it from contamination. Ice shall be obtained only in chipped, crushed or cubed form and in single-use food grade plastic or wet-strength paper bags filled and sealed at the point of manufacture. Ice shall be held until dispensed, in the manufacturer's bags, in a manner that protects it from contamination.

(e) Cold storage on ice. Packaged food may be stored in direct contact with ice or water if the food's packaging, wrapping, container or position in the ice prevents ice or water from direct contact with food or entering the package or container upon opening. Areas of packaging intended for use as eating or drinking surfaces shall not be in contact with ice or water at any time.

(f) Prohibitions on sale or service of specific foods. The Commissioner may by rule prohibit the sale or service of specific potentially hazardous foods or types of foods by mobile food vending units.

(1) Meat. All meat shall be processed and prepared for cooking at a mobile food commissary. No raw meat shall be butchered, de-boned, dressed, or cut into portion size in or on a mobile food vending unit.

(2) Fish. No fish, shellfish, or any food consisting of or made with an aquatic animal, as defined in Article 81, shall be prepared, stored, held for service or sold from a mobile food vending unit.

(3) Processed fruits and vegetables. Mobile food vending units in which sliced, peeled or processed fruits and vegetables are prepared, stored, held for service or sold shall have adequate refrigeration at all times, and shall during a pre-permit inspection. Mobile food vending units only authorized to sell whole fresh pre-packaged fruits and vegetable may not sell or hold for service sliced, peeled or processed fruits and vegetables and as such refrigeration for such units is not required..

(g) Displayed foods. Food placed on display on the mobile food vending unit shall be protected from contamination, in accordance with Article 81 of this Code. Foods, including but not limited to, pretzels and nuts, shall be displayed only in protective containers approved by the Department.

(h) Condiments. Individual single-service containers, sealed by the manufacturer, shall be provided for condiments such as sugar, mustard, ketchup, salt, pepper and relish, unless dispensed directly by the food vendor from a shaker or container with a pump, made of a food grade material.

(i) Mobile food vendor hygiene. At all times while operating a mobile food vending unit, persons shall maintain personal hygiene in accordance with Article 81, shall not smoke, shall be fully clothed (no sleeveless shirts or bare midriffs) in clean outer garments, and shall wash hands after using toilets.

(j) Contamination. All foods on a mobile food vending unit shall be protected against contamination in accordance with Article 81 of this Code. Water in which food is boiled, heated, or otherwise processed shall not be used to heat containers of other foods.

(k) Toxic materials. No poisonous or toxic materials, including, but not limited to, pesticides and cleaning compounds, shall be kept on or in a mobile food vending unit. In a vehicle used as a mobile food vending unit, vehicle maintenance materials shall not be stored in parts of the vehicle where food is stored, prepared or served.

(l) Servicing frequency. All mobile food vending units shall be cleaned and serviced at least daily at a mobile food commissary or other facility approved by the Department.

§89.21 Water supply

(a) Potable water. All water, including City tap water, supplied to a mobile food vending unit shall be potable water and obtained from a supply complying with the requirements of Article 81 of this Code and the State Sanitary Code.

(b) Water storage tanks. Water storage tanks, fill piping and distribution piping shall be constructed from food-grade materials; installed and maintained to protect water from contamination; designed to be drained by gravity; and sanitized, emptied and rinsed daily with potable water before use.

§89.23 Equipment and hand wash sinks.

(a) Compliance with Article 81 and rules. A mobile food vending unit shall be designed and equipped to hold, prepare, store and serve food in accordance with Chapter 6 of Title 24 of the Rules of the City of New York and Article 81 of this Code.

(b) Operations exclusively on the mobile food vending unit. The sale, storage, holding, distribution, or display of food from boxes or from any place other than a mobile food vending unit is prohibited.

(c) Single-service articles. Consumers shall be provided with single service articles, such as plastic forks and paper plates. Mobile food vendors shall not re-use single service articles and shall provide a container for their disposal. All waste containers shall be emptied and cleaned at the commissary servicing the mobile food vending unit, in accordance with §89.25 of this Article.

(d) Equipment placement. Equipment shall be located and installed in a way that prevents food contamination and facilitates cleaning the unit, in accordance with Chapter 6 of Title 24 of the Rules of the City of New York.

(e) Unobstructed work areas. Unobstructed working spaces are to be provided sufficient to permit persons operating a mobile food vending unit to perform their duties readily without contamination of food or food-contact surfaces by clothing or personal contact.

(f) Hand washing facilities required. Hand wash sinks shall be provided in accordance with Chapter 6 of Title 24 of the Rules of the City of New York.

§89.25 Garbage, refuse and liquid wastes. Garbage, refuse and other solid and liquid wastes shall be collected and stored at the mobile food vending unit while the unit is in use and removed from the unit and disposed of so as to prevent a nuisance.

(a) Collection and disposal. Mobile food vending permittees and licensees shall collect garbage, refuse and other solid and liquid wastes at the vending site in a vermin-proof receptacle and remove and dispose of the receptacle at the mobile vending unit's commissary or other facility authorized by the Department.

Solid and liquid waste shall not be discarded on public streets or sidewalks or in Department of Sanitation litter baskets.

(b) *Liquid wastes and sewage holding and disposal.* Sewage and liquid wastes shall be stored in a permanently installed holding tank that has at least 15 percent greater capacity than the water supply tank in a manner that protects the vending location, personnel and contents within the mobile food vending unit from contamination. All plumbing shall be constructed and maintained so as to prevent contamination of or contact with the potable water supply, food, equipment, utensils, food contact surfaces and non-food contact surfaces, employees and patrons. All sewage and liquid waste shall be disposed of at the mobile food commissary or a sewage disposal system constructed and operated in a manner acceptable to the Department.

(c) *Debris and consumer litter.* The operator of a mobile food vending unit is responsible for and shall remove and clean solid and liquid wastes, debris and food spillage caused by the operation of the unit and consumer littering adjacent to the mobile vending food vending unit.

(d) *Enforcement.* In addition to authorized officers, employees and agents of the Department, authorized officers, employees and agents of the City Department of Sanitation, may order cleanup of wastes and issue summonses and notices of violations for violations of subdivisions (a) and (c) of this section.

§89.27 Mobile food commissaries

(a) *Compliance with applicable law.* A mobile food commissary shall be constructed, maintained and operated in accordance with this article, Article 81 of this Code, Subpart 14-2 of the State Sanitary Code or successor regulations, and Chapter 23 of Title 24 of the Rules of the City of New York, and shall not create or maintain a nuisance with respect to the health or safety of any consumer or the public because of the condition of the mobile food vending unit, its equipment, utensils, personnel, mode of operations, vending location, water supply, liquid and solid waste and sewage disposal, food and appurtenances.

(b) *Records of food vending units to be maintained.* Mobile food commissaries and other facilities approved by the Department shall maintain a list of the mobile vending units serviced by such facilities and make the list available for inspection by the Department on request.

(c) *Cleaning.* Such commissaries or facilities shall provide a cleaning area for cleaning and servicing mobile food vending units that shall be:

(1) Large enough to accommodate the largest size mobile food vending unit utilizing the facility.

(2) Physically separated from all food operations to avoid contamination of food, equipment and food contact surfaces.

(3) Provided with potable water, plumbing fixtures and facilities for the drainage and disposal of liquid wastes and the storage of solid wastes in accordance with Article 81 of this Code.

(d) *Street and sidewalk cleaning prohibited.* Mobile food vending units shall not be cleaned or serviced on public streets and sidewalks, including those adjacent to commissaries.

(e) *Garbage and waste disposal.* Commissaries shall collect and remove garbage, refuse and liquid wastes in accordance with Article 81 of this Code and other applicable law.

(f) *Enforcement.* In addition to authorized officers, employees and agents of the Department, authorized officers and employees of the Department of Sanitation, or successor agency, may issue notices of violation or orders to remediate any nuisances created by vendors in violation of this section.

§89.29 Imminent health hazards.

(a) *Cessation of operations of a mobile food vending unit for imminent health hazards.* The Department may order immediate cessation of operations and service of food by any person operating a mobile food vending unit if continued operation presents an imminent hazard to public health. Any person ordered to cease operations and service of food pursuant to this section shall comply with such order immediately, and shall, within 10 business days thereafter, be provided with a hearing as to why the cessation order should be rescinded and as to why the mobile food vendor's license and the permit for the unit should not be further suspended or revoked.

(b) *Seizure of permit and license(s) authorized.* In such cases, the Department shall seize the permit document, and the operator's license document and badge, and may apply a seal or sign to cover the mobile food vending unit's decal, or remove the decal.

(c) *Operation prohibited until after hearing.* No person shall operate the unit until there has been a hearing at OATH followed by expeditious adoption by the Commissioner of the report and recommendation of an OATH administrative law judge, setting forth a finding that continued operation of the unit by or on behalf of the permittee does not present a continuing hazard to the public health. If the administrative law judge finds that continued operation of the mobile food vending unit by the permittee and the licensee presents a continuing hazard to the public health, the permittee and licensee may request that the Commissioner provide them with an opportunity to correct the violations and to demonstrate that they are willing and able to operate the mobile food vending unit in compliance with all applicable law. If such request is not received the Commissioner shall issue an order suspending or revoking the permittee's mobile food vending unit permit and license and the operator's mobile food vending license.

(d) *Service of cessation order.* If the operator of the mobile food vending unit is not the permit holder, the order issued pursuant to this section shall be served upon the permittee by delivery to the person operating the mobile food vending unit, and by mailing the order to the permittee's address, as maintained in Department records, pursuant to §3.05 (b) of this Code.

(e) Cessation signs not to be removed. Cessation signs or seals affixed by the Department shall not be removed except by order of the Commissioner or designee.

§89.31 Enforcement

(a) Operation without permit. Any mobile food vending unit being operated without a currently valid mobile food vending unit permit issued by the Commissioner shall be deemed an imminent health hazard and may be seized by the Department and all the food therein denatured or otherwise disposed of.

(b) Denial of license or permit. The Commissioner may refuse to issue or renew, or may suspend or revoke a license or permit in accordance with provisions of this Code, or other applicable law.

(c) Unattended units prohibited. No mobile food vending unit shall be parked on the street overnight, or left unattended at any time food is kept in the mobile food vending unit.

(1) Any mobile food vending unit which is found to be unattended or which a vendor has abandoned shall be considered an imminent health hazard subject to the provisions of §89.29 of this Article.

(2) Any cessation order issued for abandoning a mobile food vending unit or leaving such unit unattended shall, in the absence of the operator of such unit, be served by posting or affixing notice of such cessation order on such unit. Notice of the cessation order shall thereafter be mailed to the permittee's address, as maintained in the Department's records, pursuant to Article 3 of this Code.

(d) Authorized enforcement officers. Public health sanitarians or other authorized officers of employees of the Department and other City departments or agencies having jurisdiction over matters applicable to the operations of mobile food vendors and mobile food vending units, including, but not limited to, officers of the Police Department, shall have the power to enforce all laws, rules and regulations relating to mobile food vendors and mobile food vending units, including the provisions of this Article. This Article shall not be construed as restricting in any way any other power granted by law to any officer or employee of the City. Any such officer or employee may seize any food or mobile food vending unit which does not have a permit or which is being used by an unlicensed mobile food vendor. Such mobile food vending unit and food shall be subject to forfeiture and disposal or sale in accordance with applicable law.

(e) Removal costs. A mobile food vending unit and its contents that are seized pursuant to subdivision (d) of this section, or other applicable law may be removed to any garage, automobile pound or other place of safety, and the owner, or other person lawfully entitled to the possession of such vehicle or pushcart may be charged with reasonable costs for such removal and storage, payable prior to the release of the mobile food vending unit.

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§89.33 Suspension and revocation of license or permit. A license or permit issued pursuant to the provisions of this Article may be suspended or revoked by the Commissioner upon notice and hearing for any of the following causes:

- (a) Fraud, misrepresentation or false statements contained in the application for the license or permit;
- (b) Fraud, misrepresentation or false statements made in connection with the selling of any item of food;
- (c) Having been found in violation four or more times of the provisions of Subchapter 2 of Chapter 3 of Title 17 of the Administrative Code within a two-year period, or a violation of the provisions of Part 14 of Chapter 1 of the State Sanitary Code or of this Code, or of Chapter 6 of Title 24 of the Rules of the City of New York within a two-year period;
- (d) Failure to answer a summons or notice of violation, or failure to appear at a hearing for violation of Subchapter 2 of Chapter 3 of Title 17 of the Administrative Code, or of Chapter 6 of Title 24 of the Rules of the City of New York, or of this Code or the State Sanitary Code, or failure to pay a fine or penalty imposed by the Commissioner, Department or court for any such violation.
- (e) A license or permit that has been issued to a person who is not eligible pursuant to Subchapter 2 of Chapter 3 of Title 17 of the Administrative Code or this Code to hold such license or permit shall be deemed automatically invalid, and issued in error. Notice of such determination shall be made by first class mail to the last known address of the licensee or permittee, as maintained in Department records, and shall be a final agency determination.
- (f) It shall not be a defense in any proceeding to revoke a license or permit that the licensee or permittee changed his or her address without providing notice to the Department.
- (g) Notice; hearings. Notice and hearing upon denial of an application, refusal to issue or renew, or where the Commissioner seeks to suspend or revoke a license or permit shall be provided in accordance with this Code, Chapter 7 of Title 24 of the Rules of the City of New York, and §17-317 of the Administrative Code.

Notes: Where respondents were proven to have received four or more adjudicated violations of statutory provisions, food vendor license revocation was recommended and imposed. Dep't of Health v. Khedr, OATH Index No. 928/99 (Jan. 19, 1999), *aff'd*, Comm'r Dec. (Feb. 1, 1999).

§89.35 Modification. The Commissioner may modify any requirements in this Article which present practical difficulties or unusual or unreasonable hardships in a specific instance consistent with the purpose and intent of this Article and this Code upon such conditions as are necessary to assure the service of safe food and to protect the public health.

