

**NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH**

**NOTICE OF INTENTION TO REPEAL AND REENACT
ARTICLE 88 OF THE NEW YORK CITY HEALTH CODE**

NOTICE OF PUBLIC HEARING

In compliance with §1043(b) of the New York City Charter (the "Charter") and pursuant to the authority granted to the Board of Health by §558 of the Charter, notice is hereby given of the proposed repeal and reenactment of Article 88 (Temporary Food Service Establishments) of the New York City Health Code (the "Health Code").

NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE WILL HOLD A PUBLIC HEARING ON THE PROPOSAL FROM 2:00 P.M. TO 4:00 P.M. ON FRIDAY, OCTOBER 24, 2008 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 23, 2008. PLEASE INCLUDE A TELEPHONE NUMBER WHERE, IF NECESSARY, YOU MAY BE REACHED DURING NORMAL BUSINESS 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 FRIDAY, OCTOBER 24, 2008.

REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 12:00 P.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 24, 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 proposed 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 (“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 the public health, the DOHMH proposes that Article 88, now titled "Temporary Food Establishments", be repealed and reenacted, and retitled "Temporary Food Service Establishments." The title change would better reflect practice and the regulatory environment; it would provide adequate legal tools to effectively address the health and safety needs of the public; and would harmonize such provisions with related provisions of the State Sanitary Code. As part of the revision effort, particular attention has been placed on emphasizing the applicability of relevant provisions of Article 81 ("Food Preparation and Food Establishments") to the operation of temporary food service establishments. Pursuant to this review and assessment of the Health Code, the DOHMH proposes that the Board repeal and reenact Article 88. Proposed changes to the existing Article 88 are set forth below.

§88.01 Scope.

This section would be new. It would reinforce the policy that temporary food service establishments are a type of food service establishment and also subject to Article 81, other pertinent provisions of the Code, New York State Sanitary Code (10 NYCRR Chapter 2) and all rules and regulations governing the use of public streets.

§88.03 Definitions.

Definitions that are currently set forth in §88.01 would be moved to a new § 88.03, and the section would be expanded from two to five definitions. The term “temporary food service establishment” would be redefined because these establishments may be found in many public and private, indoor and outdoor settings, and in connection with many different kinds of events and promotions. The section would contain definitions for other terms used in Article 88, including “event,” “food,” “sponsor,” and “operator.” The definition of “temporary food processing establishment” would be deleted as obsolete.

§88.05 Permit required.

This section would amend existing §88.03 ("Permit, registration") in several ways. First, it would eliminate the requirement of registration for events taking one day or less, or occupying more than one block. Second, it would eliminate the distinction between temporary food processing and non-food processing establishments. Finally, it would require that all operators have a permit, to be obtained at least 30 days prior to the event. The effective date of this Article would be January 1, 2010, providing sufficient notice to all operators of temporary food service establishments of the new requirements. This new section would incorporate provisions of existing §88.21 ("Responsibility of sponsor") which would be repealed.

§88.07 Food safety and protection.

This section would replace existing §§ 88.05 and 88.09. It would require that all permittees hold a food protection certificate (currently required by § 88.19) issued by the Department or a certificate issued by another jurisdiction that is acceptable to the Department. New requirements would be added for thermometers to be provided and used to confirm that the establishment is holding potentially hazardous foods at required temperatures, and for using ice safely when holding potentially hazardous foods. However, current requirements prohibiting service of specific potentially hazardous foods without the approval of the Department would be eliminated. The Department has concluded that requiring that every operator or supervisor of food services at a temporary food service establishment hold a food protection certificate would result in increased food safety: operators and supervisors would be better educated and more aware of the dangers of serving some potentially hazardous foods in various event settings where environmental conditions may be difficult or impossible to control.

Subdivision (g) would retain the Commissioner's existing authority to prohibit sales or service of specific potentially hazardous foods or types of foods.

§88.09 Construction, facilities, equipment and utensils.

This section would incorporate provisions from existing §§ 88.07 and 88.15, as well as provisions from Article 81 regarding maintenance of food contact surfaces; sanitizing utensils and equipment; providing adequate shielded lighting; and the ventilation of steam, condensation, odors and fumes to prevent a nuisance.

Subdivision (e) would require that adequate hand washing facilities be provided, in accordance with Article 81. However, because the Department recognizes that there may be substantial variability in the plumbing facilities available at events and at participating temporary food service establishments, this provision would allow the Department to approve alternative arrangements for hand washing where strict compliance with this Code requirement is not feasible.

§88.11 Cooking and heating equipment.

This section would retain existing requirements that equipment not create a hazard, and that flammable materials be maintained in accordance with Fire Department regulations and specifications.

§88.13 Water supply.

This section would be amended to incorporate more rigorous requirements governing the provision and use of potable water for food preparation, and for hand washing and cleaning equipment, to protect food from contamination from untreated water, in accordance with the State Sanitary Code.

§88.15 Toilets.

This section would be new and would require that sponsors of events provide adequate portable toilets and adjacent hand washing facilities for use of workers and patrons of temporary food service establishments where fixed plumbing facilities are not adequate or available.

§88.17 Single service articles.

This section would retain the requirement for use of single service articles, as defined in Article 81.

§88.19 Refuse and trash.

This section would be amended to clarify that its provisions for clean up do not apply to events regulated by the Mayor's Community Assistance Unit (CAU) Street Activity Permit

Office. The CAU rules set forth in Chapter 1 of Title 50 of the Rules of the City of New York now regulate all City street and sidewalk events, and require event sponsors to arrange with the New York City Department of Sanitation for the cleaning of streets and sidewalks and the appropriate disposal of wastes generated at such events. For other events, this section of the Health Code applies to required cleaning and maintenance.

§88.21 Enforcement.

The provision authorizing the closure of a temporary food service establishment, now set forth in § 88.23, would be added to subdivision (b) of the revised § 88.21. A new subdivision (a) (“Imminent health hazards”) would allow the Department to dispose of food or order the disposal or sealing of unsafe, unclean, damaged or otherwise unsafe equipment that it identifies as an imminent health hazard, as defined in Article 81.

§88.23 Modification .

This section would retain the authority of the Commissioner to modify requirements when strict compliance with a provision presents practical difficulties or unusual or unreasonable hardship.

The Proposal is as follows:

Matter underlined is new

RESOLVED, that Article 88 and the list of section headings for Article 88 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be and the same hereby are repealed and reenacted, to be printed together with introductory notes to read as follows:

ARTICLE 88

TEMPORARY FOOD SERVICE ESTABLISHMENTS

§88.01 Scope.

§88.03 Definitions.

§88.05 Permit required.

§88.07 Food safety and protection.

§88.09 Construction, facilities, equipment, and utensils.

§88.11 Cooking and heating equipment.

§88.13 Potable water supply.

§88.15 Toilets.

§88.17 Single service articles.

§88.19 Refuse and trash.

§88.21 Enforcement.

§88.23 Modification

Introductory Notes:

As part of a comprehensive review of the Health Code to assess the efficacy of its articles in protecting the public health, Article 88, "Temporary Food Service Establishments," was repealed and reenacted by resolution of the Board of Health on XXXX, to be effective January 1, 2010, to better reflect current practice and the regulatory environment, to provide adequate legal tools to effectively address the health and safety needs of the public and to harmonize its provisions with related provisions of the State Sanitary Code. As part of the revision effort, particular attention has been focused on the applicability of Article 81 ("Food Preparation and Food Establishments") to the operation of temporary food service establishments.

§88.01 Scope.

A temporary food service establishment 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 (Food Service Establishment Sanitary Inspection Procedures) of Title 24 of the Rules of the City of New York. Such temporary food service establishment shall not present a danger to the health or safety of patrons or to the public health with respect to the condition of the establishment, its equipment, utensils, personnel, mode of operations, surroundings, water supply, liquid and solid waste and sewage disposal, food served and appurtenances.

§88.03 Definitions. When used in this Article:

(a) *Event* shall mean a single event or activity, not to exceed fourteen (14) consecutive days, where food or food samples are distributed to the public, with or without charge, that occurs indoors or outdoors, in public or privately owned or leased premises, and shall include but not be limited to:

(1) A street activity, regardless of whether the event requires a permit issued in accordance with the rules of the New York City Community Assistance Unit, or successor agency;

(2) A business, advertising or media promotion or convention;

(3) A celebration; a street or other fair; or

(4) A sporting event, carnival, flea market, circus, public exhibition, festival, religious or fraternal organization function, parade or other similar gathering.

(b) *Food* shall have the same definition as found in Article 71 of this Code.

(c) *Operator* shall mean the permittee or person who owns, operates, manages or otherwise controls a temporary food service establishment providing food services at an event, who has been issued a permit by the Commissioner in accordance with §88.05 of this Article.

(d) *Sponsor* shall mean the person or organization that organizes, controls and manages the event at which a temporary food service establishment provides food service.

(e) *Temporary food service establishment* means an individual food service establishment, as defined in Article 81 of this Code, operating from a booth, stand, vehicle, or cart, in a fixed public or private, indoor or outdoor location, at a single event, where foods are stored, prepared or held for service to the public. A food service establishment issued a permit in accordance with Article 81 of this Code that operates a temporary food service establishment in connection with an event on a sidewalk directly outside and adjacent to the permitted establishment, that serves food prepared within the permitted establishment or by workers employed by the permitted establishment, shall not also be required to obtain a temporary food service establishment permit pursuant to this Article. A temporary food service establishment shall also mean a person who vends or distributes pre-packaged non-potentially hazardous foods from a container, approved by the Department, that is carried upon his or her person at an event.

§88.05 Permit required.

(a) A sponsor of an event shall not rent space to, nor allow food to be prepared, stored, served or sold by, any temporary food service establishment that fails to obtain a current and valid temporary food service establishment permit for the event.

(b) The sponsor shall submit to the Department, at least thirty (30) days prior to the first date of the event, a list of all individual food establishments and operators expected to participate in the event and, where feasible, an application for a permit from each operator of a temporary food service establishment at the event.

(c) The operator of each temporary food service establishment at an event shall obtain a permit issued by the Commissioner.

§88.07 Food safety and protection.

(a) *Food protection certificate required.* The operator or supervisor of food services at each temporary food service establishment shall hold a food protection certificate issued by the Department, or a certificate issued by another jurisdiction that is acceptable to the Department.

(b) *Food sources.* Food shall be obtained from approved sources, as defined in Article 81, operating pursuant to licenses or permits issued by federal, state or local regulatory agencies.

(c) 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 provided and 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.

(d) 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.

(e) 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.

(f) 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.

(g) Prohibitions on sale or service of specific foods. The Commissioner may prohibit the sale or service of specific potentially hazardous foods or types of foods by temporary food service establishments. No cooked or raw fish or shellfish shall be sold at a temporary food service establishment.

§88.09 Construction, facilities, equipment, and utensils.

(a) Food contact surfaces.

(1) Food contact surfaces, equipment and utensils shall be designed and constructed of materials that facilitate cleaning and inspection of all parts and shall be smooth and free from cracks or pits.

(2) All food contact surfaces shall be kept clean and shall be sanitized immediately prior to and during use as needed to prevent food contamination.

(3) Operators shall not use utensils, pots or containers that are chipped, cracked, rusted, corroded, badly worn or otherwise not easily cleaned and sanitized.

(b) Sanitizing. Equipment, utensils and other food contact surfaces shall be effectively cleaned and sanitized in accordance with Article 81. Between uses, food dispensing utensils shall be

stored in food with the handle extended out of the food, or kept clean and dry and protected from contamination.

(c) Lighting. When the temporary food service establishment uses artificial lighting, shatter-proof or shatter guarded lighting shall be installed to adequately light all food contact and food preparation surfaces. Lighting fixtures located over or near food storage, preparation and service facilities shall be shielded to prevent broken glass from falling into food or onto food-contact surfaces.

(d) Ventilation. Temporary food service establishments shall be ventilated so as to prevent nuisances from excessive heat, steam, condensation, vapors, odors, smoke and fumes.

(e) Hand washing facilities. Permanently installed or portable hand washing sinks dispensing hot and cold potable water and equipped with drying devices shall be provided in or adjacent to each temporary food service establishment and in or adjacent to all toilet facilities at an event. When the operator or event sponsor cannot meet the hand washing requirements of Article 81, the operator or event sponsor shall, in advance of the event, obtain prior Department approval for alternate hand washing arrangements.

(f) Overhead structure. An overhead device, structure or awning shall be installed to protect food from dust, birds, dirt, rodents, insects and other pests, foreign material and other forms of contamination, in accordance with Article 81 of this Code.

§88.11 Cooking and heating equipment.

(a) Hazards. Cooking and heating equipment shall be constructed, located and used so as not to create a hazardous condition.

(b) Flammable materials. Storage and use of flammable material and fuel shall comply with all applicable law, including the rules, regulations and standards of the Fire Department.

§88.13 Potable water supply. Each temporary food service establishment shall be provided with sufficient potable hot and cold water from sources approved by the Department for food preparation, cleaning equipment and hand washing.

(a) Bottled and packaged water. Bottled and packaged potable water shall be obtained from a source approved by the State Commissioner of Health and handled and stored in a way that protects it from contamination. Bottled and packaged potable water shall be dispensed from the original container.

(b) Water tanks.

(1) Potable water storage tanks in temporary food service establishments shall be constructed from food-grade materials, in accordance with Article 81 of this Code.

(2) Water storage tanks shall be sanitized, emptied and rinsed with potable water before use and between temporary food service events.

(3) Water shall not be transported from one event to another event.

§88.15 Toilets. Where sufficient fixed or permanent plumbing facilities are not available, the sponsor of an event shall provide and maintain portable chemical toilets, hand washing sinks and drying facilities for use by temporary food service establishment food workers and patrons.

§88.17 Single service articles. Only single use articles as defined and described in Article 81 of this Code shall be provided for patrons' use, and shall be discarded after use.

§88.19 Refuse and trash.

(a) Containers. Where an event is not subject to Chapter 1 of Title 50 of the Rules of the City of New York, the rules of the Community Assistance Unit, or successor agency, the sponsor shall provide or arrange for an adequate number of receptacles and containers, constructed in compliance with Article 151 of this Code, for the storage and disposal of refuse and garbage.

(b) Cleaning and maintenance. The sponsor shall maintain or arrange for maintenance of the event area and for the collection and removal of accumulated refuse and garbage at regularly scheduled intervals during and after the event.

§88.21 Enforcement.

(a) Imminent health hazards. When, in the opinion of the Department, any food, equipment, or temporary food service establishment at an event presents an imminent health hazard as defined in Article 81 of this Code, or is in an unclean condition, or is in disrepair or damaged to such an extent so as to render it unsafe, such food, equipment, establishment or any part thereof may be ordered sealed and its use or operation immediately discontinued upon the order of the Commissioner or designee. Upon such sealing, the Department shall affix thereto labels or conspicuous signs stating that the establishment has been closed because of an imminent health hazard. The operator may request an immediate opportunity to be heard by the Department, and an opportunity to reopen upon curing the imminent health hazard. Labels or signs affixed by the Department shall not be removed except as authorized by the Department.

(b) Closure. A temporary food service establishment found operating without a valid permit in violation of this Article shall be ordered closed and the operator ordered to cease all food operations and to remain closed until the operator obtains a currently valid permit for the temporary food service establishment.

§88.23 **Modification.** The Commissioner may modify requirements of this Article, when compliance presents practical difficulties or unusual or unreasonable hardships in a specific instance consistent with the purpose and intent of this Article and this Code.