

**DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH**

**NOTICE OF INTENTION
TO REPEAL AND REENACT ARTICLE 3 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 said Charter, notice is hereby given of the proposed amendment of Article 3 of the New York City Health Code.

NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT WILL HOLD A PUBLIC HEARING ON THE PROPOSAL ON MONDAY, APRIL 14, 2008 FROM 10A.M. TO 12P.M. IN THE FIFTH FLOOR BOARDROOM (ROOM 532) 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 FRIDAY, APRIL 11, 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 MONDAY, MARCH 31, 2008.

REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 10:00 A.M. HOWEVER, PREFERENCE WILL BE GIVEN TO THOSE WHO PREREGISTER.

WRITTEN COMMENTS REGARDING THE PROPOSAL MUST BE SUBMITTED BY MAIL TO RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 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/notice/notice.shtml> ON OR BEFORE 5:00 P.M. ON APRIL 14, 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 Sections 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 its efficacy in protecting the public health, the DOHMH proposes that the Board of Health update various provisions of Article 3 of the Health Code to assure that it provide the adequate legal tools for the Board and the DOHMH to effectively address the City’s current and future public health needs. The revisions reflect modern thinking about public health and legal preparedness subsequent to the September 11, 2001 terrorist attacks. The revisions reflect current law, policies and practices, and address the needs of the DOHMH regarding such matters as authorizing a rapid response by the Commissioner in the event of a public health emergency, the inspection of records and proceedings of the DOHMH, and the protection of the privacy of persons who are the subjects of such information. Pursuant to this review and assessment of the Health Code, the DOHMH proposes that the Board repeal and reenact Article 3 as provided for in the Resolution set forth below. The substance of the salient changes proposed is summarized here.

Section 3.01

Currently existing subdivision 3.01(b) implies that pursuant to Section 556(c) of the Charter the DOHMH has an affirmative duty to ensure compliance with the Health Code and other relevant law. However, after 3.01(b) was adopted, Section 556(c) of the Charter was amended and no longer mandates that the DOHMH ensure compliance with the Health Code or any other provisions of law.

Instead, the Charter now provides that the DOHMH has the “jurisdiction to regulate all matters affecting health in the city of New York and to perform those functions and operations performed by the city that relate to the health of the people of the city....” It also provides in Section 556(a) that the DOHMH has the jurisdiction to enforce “all provisions of law applicable in the area under the jurisdiction of the DOHMH for the preservation of human life, for the care, promotion and protection of health and relative to the necessary health supervision of the purity and wholesomeness of the water supply and the sources thereof; ...”. The proposed amendment to subdivision 3.01(b) will harmonize the Health Code with the amended Charter.

Subdivisions 3.01(c) and (d)

Existing subdivision 3.01(c) provides that the DOHMH may take such actions as may become necessary to ensure the care and safety of the public health and, that subject to the directions of the Board, the Commissioner may establish procedures to be followed during an emergency declared by the Board. Since September 11, 2001, there have been concerns raised regarding the adequacy of the public health emergency powers of the Commissioner and how those powers interact with the powers and procedural requirements of the Board. The current subdivision (c) hampers the Commissioner’s ability to act and respond rapidly to an emergency owing to the procedural requirements it sets forth and the need to await the further direction and

discretion of the Board. The current subdivision would seem to require in any emergency that the Commissioner wait for the Board membership to meet pursuant to the procedures as set forth in Public Officers Law and to direct how the Commissioner may actively respond to the public health emergency.

For example, in the event of a bioterrorist attack on the city where mass quantities of a virulent contagious agent may have been unleashed and disseminated, the current Health Code would seem to require that the Commissioner wait for the Board to formally declare a public health emergency and then for its direction before he or she is able to implement procedures to be followed that are not provided for in the Health Code. However, in a situation such as this, it would likely not be feasible or even prudent to postpone a response pursuant to these procedural requirements. Indeed, in such an emergency event, it is questionable as to whether the Board will be able to comply with these requirements. While this example illustrates a public health emergency from an act of bioterrorism, the application of this subdivision would include any and all emergency scenarios impacting the public health within the DOHMH's jurisdiction, such as, for example, the emergency concerns created by the power outage in August 2003. The blackout left all of New York City without electricity and much of its population without water or any means of communication. Indeed, it is feasible that there may also be occasions when, because of transportation or communications interruptions, it might even be difficult to assemble the Board to convene a meeting.

The DOHMH proposes that the Board amend and create a new subdivision (c) retaining the first sentence of currently existing subdivision (c) and that substantive concepts addressing procedures in the event of an emergency be removed to and addressed in new subdivision (d). The new subdivision (d) would address and enhance the authority needed by the Commissioner to respond effectively, efficiently and appropriately in the event of an imminent or existing emergency affecting the public health and necessitating immediate action.

The amended powers of the Commissioner as set forth herein would allow the Commissioner to act immediately to prevent an imminent threat or respond to existing emergency circumstances as may be appropriate and necessary upon the Commissioner's declaration of a public health emergency. A public health emergency may be declared in conjunction with, or independent of, a declaration of a local state of emergency by the mayor or a declaration of a disaster emergency by the governor. The amendments to this subdivision would create a more timely and efficient response in a public health emergency by removing procedural obstacles. In addition, upon the declaration of a public health emergency, the Commissioner may establish procedures to be followed for the protection of public health. These procedures may also include the suspension, alteration or modification of any provision of the Health Code, or the exercise of any power that the Board may have to respond to an emergency.

Enhancing the Commissioner's powers would not mean that the Board would be removed from the emergency response process. The Commissioner's actions would be effective only until the next meeting of the Board, which would have to be held within five business days if a quorum of the Board can be convened and, if not, then as soon as reasonably practicable. At that time, the Board would review the need for continuing, modifying or terminating any of the actions of the Commissioner. Thus, while the amended powers of the Commissioner will allow the Commissioner to respond immediately, the time-limited delegation of authority to, for example, suspend, alter or modify the Health Code, combined with the mandatory Board review of actions, will serve a precautionary function and enable full participation and input by the Board of Health. The Commissioner's and Board's authority to act in such situations is consistent with the Charter and other applicable law, including Article 2-B of the State Executive Law (authorizing the governor and mayors of localities to declare emergencies). Subdivision (d) also sets forth the manner in which orders issued thereunder are to be served.

Finally, subdivision (e) makes it clear that the authority granted to the Commissioner by this section is distinct from powers that he or she may have under other laws, and that such authority may be exercised in conjunction with other powers.

Section 3.03

Currently existing Section 3.03 consists of two subdivisions, (a) and (b). The DOHMH proposes that the Board amend this Section by reorganizing and separating currently existing subdivision (a) into several subdivisions and relettering currently existing subdivision (b) to new subdivision (e) and thus make subdivision (a) easier to read and comprehend. Subdivision (a) will be further divided to enumerate the conditions whereby the DOHMH may seize, embargo or condemn certain materials.

Subdivision (b), consistent with Section 17-118 of the Administrative Code, makes it clear that not only is an owner not entitled to compensation when the Department destroys, or otherwise disposes of, property that is dangerous and not capable of being reasonably salvaged, but also that such destruction or disposition can be at the owner's expense.

The Department sometimes encounters dangerous food or other products the source of which needs to be ascertained, or which may have been already distributed commercially within the City. While the department's authority to issue subpoenas and orders is otherwise clearly established in law, subdivision (e) re-emphasizes this authority in order to locate the source or destination of embargoed goods.

Otherwise no substantive changes are proposed.

Section 3.05

Currently existing Section 3.05 authorizes the Department to inspect places where services for children under 16 are provided. The DOHMH proposes that the Board delete this section as it is unnecessarily overlapping and redundant with the authority provided in Section 3.01. The new Section 3.05, formerly 3.07, now makes reference to the service of orders issued under subdivision 3.01(d). Subsequent Sections 3.09 and 3.11 are renumbered accordingly without substantive change. Current Section 3.12 is renumbered to 3.11, and the title of the Section is changed.

Section 3.11

Existing Section 3.12 addresses the monetary limits that may be imposed through compulsory civil enforcement proceedings for violation of this Code or other applicable law. The DOHMH proposes to renumber and re-title this Section, and to simplify the language of the provision without substantive change.

Sections 3.13 and 3.15

No changes are proposed to these sections.

Section 3.17

Currently existing Section 3.17 only prohibits the destruction or removal of notices of the DOHMH. However, there may be other posted materials, such as informational posters, or materials or notices that are required to be posted that should not be removed or destroyed. The DOHMH proposes that the Board amend Section 3.17 and its title to broaden the application of this Section to prevent the destruction or removal of all posted materials or notices and materials required to be posted by the Department, unless the DOHMH grants permission to remove the posted materials or the materials are removed pursuant to the Health Code or other relevant body of law.

Section 3.19

Currently existing Section 3.19 prohibits a person from making a false, untrue or misleading statement or forging the signature of another on a certificate, application, registration, report or other document required to be prepared pursuant to the Health Code or submitted to the Department. Section 3.19 was drafted prior to the use of modern conveyance methods such as electronic delivery and prior to the use of electronic and other methods of reproduction and is therefore limited in the scope of its application. The DOHMH proposes that the Board amend Section 3.19 to prohibit submission of false or misleading statements in any form, or medium, paper, electronic or otherwise and to conform this Section to other Sections referencing modernized concepts.

The DOHMH also proposes that Sections 3.19 and currently existing 3.21 be combined by merging Section 3.21, including its Notes, into Section 3.19 to create one Section to address false and/or misleading representations in the form of statements, reproductions or alterations. Section 3.21 will be new subdivision (b) of 3.19. The text of currently existing Section 3.21 will also be amended to reflect the usage of electronic delivery and electronic reproductions and to conform to other Sections using modernized concepts.

Current Section 3.21 was drafted prior to the use of electronic delivery and electronic reproduction. Currently, this Section prohibits the reproduction or alteration of permits, reports, certificates or “other paper” issued by the Commissioner, DOHMH or the Board to evade or violate any provision of the Health Code or other law. The DOHMH proposes that the Board amend this Section and broaden the scope of its application to prohibit the reproduction or alteration of any documents, paper, electronic or otherwise, issued by the Commissioner, DOHMH or the Board. In addition to documents in electronic form, the Section has been amended to prevent the reproduction of any material of the DOHMH for illegitimate purposes.

In addition, current Section 3.21 makes it unlawful to reproduce or alter DOHMH documents if the purpose of such reproduction or alteration is to evade or violate any provision of the Health Code or any other law. The DOHMH proposes to amend the text of current Section 3.21 to make it also unlawful if the effect of such reproduction or alteration is to evade or violate the law, or induce issuance of a license or permit. Providing evidentiary proof of the effect of an act is less difficult than proving that the actor had the intent or purpose to violate the law when reproducing or altering a DOHMH document.

Section 3.21

The DOHMH proposes that the Board remove Section 3.21 and its Notes to Section 3.19, and that current Section 3.23 be renumbered as 3.21.

The DOHMH proposes that the Board amend this Section by removing from the Section “foreign” in reference to other languages, and to allow the Department, in its discretion, to accept non-English documents if they are accurately translated.

In addition, the DOHMH also proposes that the Board amend this Section by bifurcating currently existing 3.23 into subdivisions (a) and (b) and moving the clause addressing the use of the other languages in labels or signs in addition to the English language to subdivision (b) thereby separating and creating one subdivision to address materials that must be submitted to the DOHMH and one subdivision to address the use of language in signs, labels and other required writings that may affect the public.

The DOHMH also proposes that this Section be renumbered as 3.21 to conform with the Health Code’s numbering scheme and according to the revisions in the repeal and reenactment of Article 3.

Section 3.23

The DOHMH proposes to renumber current Section 3.25 to 3.23, and to simplify its language while retaining its substance, which, essentially makes clear that documents which are

signed or certified by employees of the Department or other governmental agency shall be presumptive evidence of the facts stated therein.

Section 3.25

The DOHMH proposes that the Board renumber and amend currently existing Section 3.27 to reflect current law and DOHMH policy concerning the inspection of records and proceedings of the DOHMH and the protection of the privacy of persons who are the subjects of such information while providing for the conditions under which information may be disclosed. It should be noted that subdivision (e) of current section 3.27, which currently allows access to the printed indexes of vital statistics records would be repealed in its entirety. The Department would no longer make such indexes available as they are in the current Health Code, since such access can be abused and result in identity theft and attendant security risks. In addition, genealogists and others interested in genealogical research can access appropriate information from the Municipal Archives. While the proposed amendments to Section 3.25 reflect the policies and practices of the DOHMH, the proposed provisions also take into consideration the federal regulations promulgated pursuant to the Health Insurance Portability and Accountability Act (HIPAA). HIPAA represents the federal privacy standard to protect patients' medical records and other health information provided to health plans, doctors, hospitals and other health care providers. Among other things, HIPAA provides for enhanced security and confidentiality of health information, and the final regulation covers health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions electronically. The new privacy regulations ensure a national floor of privacy protections for patients by limiting the ways that health plans, pharmacies, hospitals and other covered entities can use patients' personal medical information. The regulations protect medical records and other individually identifiable health information, whether it is on paper, in computers or communicated orally. The HIPAA regulations, however do not apply to traditional public health activities such as surveillance and epidemiological investigations. DOHMH has always recognized the importance of protecting individual privacy and respecting individual dignity to maintaining the quality and integrity of health data. The notes to proposed Section 3.25 provide a further discussion of its purpose and rationale.

Current Sections 3.28 and 3.29

Section 3.28 currently provides a list of fees for searches other than vital statistics records. Rather than defining the various types of searches that may be performed and what fees shall be paid pursuant to the type of search involved, the DOHMH proposes that these issues would be more appropriately addressed in the Commissioner's regulations. Accordingly, the DOHMH proposes that the Board delete section 3.27 in its entirety, and that the authority to charge a reasonable fee for access to Departmental records be subsumed in subdivision (d) of Section 3.25. It is also proposed that current Section 3.29 be deleted as unnecessary.

Section 3.27

The DOHMH proposes that the Board amend this Section to renumber current Section 3.30 to 3.27, and to simplify its language without substantive change.

Section 3.29

Currently, Section 3.31 provides that the Health Code is intended to be consistent with applicable Federal and State law and will be construed as consistent whenever necessary to

achieve such consistency. Principles of federal preemption and consistency with federal law are beyond the scope of the Health Code and are subject to evolving trends. Therefore, the DOHMH proposes to renumber Section 3.31 to 3.29 and to amend it to reflect the language of the City Charter, which requires the health Code to be consistent with the federal and state constitutions, state law and the Charter itself.

Section 3.31

The DOHMH proposes to renumber current Section 3.33, regarding “separability”, to 3.31.

The proposal is as follows:

Note-matter in brackets [] to be deleted

Matter underlined is new

RESOLVED, that Article 3 and the list of section headings for Article 3 of the New York City Health Code, set forth 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 explanatory notes, to read as follows:

Article 3

General Provisions

§3.01 General powers of the Department

§3.03 Seizure, embargo, condemnation and disposition of prohibited materials

§3.05 Orders of the Board, Commissioner or Department

§3.07 General standards to protect health and safety; prohibited acts; necessary acts and precautions

§3.09 Abatement of nuisances

§3.11 Civil Enforcement of the Code

§3.13 Enforcement of Code otherwise than by prosecution or other compulsory means

§3.15 Interfering with or obstructing Department personnel; gifts, gratuities and bribes

§3.17 Notices, orders and other posted materials not to be mutilated, obstructed or torn down

§3.19 False and misleading statements, reproductions and alterations

§3.21 Use of English language in complying with Code; use of other languages

§3.23 Reports of departmental or governmental officials; presumptive evidence of facts

§3.25 Inspection of records and proceedings of the Department

§3.27 Fees for searches for other than vital statistic records

§3.29 Compliance with other applicable laws and regulations

§3.31 Construction

§3.33 Separability

Introductory Notes:

Article 3 was repealed and reenacted on [] to strengthen the legal tools necessary to address the City's public health needs. Article 3 contains provisions of general applicability, such as emergency powers of the Commissioner, general powers of the Department, abatement of nuisances, prohibited acts and inspection of records. Newly enacted Article 3 has been strengthened to more fully support and protect the health of the City, especially in the area of emergency response.

§3.01 General powers of the Department.

(a) The Department may inspect any premises, matter or thing within its jurisdiction, including but not limited to any premises where an activity regulated by this Code is carried on, and any record required to be kept pursuant to this Code, in accordance with applicable law.

(b) In order to determine whether the provisions of this Code or the provisions of other law which the Department has the authority to enforce are being complied with, the Department may investigate or authorize an investigation to be made of any matter, incident, thing, person or event within its jurisdiction.

(c) Subject to the provisions of this Code or other applicable law, the Department may take such action as may become necessary to assure the maintenance of public health, the prevention of disease, or the safety of the City and its residents.

(d) Where urgent public health action is necessary to protect the public health against an imminent or existing threat, the Commissioner may declare a public health emergency. Upon the declaration of such an emergency, and during the continuance of such emergency, the Commissioner may establish procedures to be followed, issue necessary orders and take such actions as may be necessary for the health or the safety of the City and its residents. Such procedures, orders or actions may include, but are not limited to, exercising the Board's authority to suspend, alter or modify any provision of this Code pursuant to subdivision b of section 558 of the New York City Charter, or exercising any other power of the Board of Health to prevent, mitigate, control or abate an emergency, provided that any such exercise of authority or power shall be effective only until the next meeting of the Board, which meeting shall be held within five business days of the Commissioner's declaration if a quorum of the Board can be convened within such time period. If a quorum of the Board cannot be so convened, then said meeting shall be held as soon as reasonably practicable. At its next meeting, the Board may continue or rescind the Commissioner's suspension, alteration, modification of Health Code provisions or exercise of

power. An order issued pursuant to this subdivision shall be effective from the time and in the manner prescribed in the order and shall be published as soon as practicable in a newspaper of general circulation in the city and transmitted to the radio and television media for publication and broadcast. In the alternative, in circumstances where the order is directed at a finite number of known persons, the Commissioner may transmit the order to such persons in a manner the Commissioner deems practicable under the circumstances, including but not limited to mail, electronic mail, facsimile, closed electronic network, in person, or by telephone. Copies of orders issued pursuant to this subdivision shall be immediately circulated to and filed with the Board, and the Department shall maintain records attesting to the manner and timing of their publication or transmittal.

(e) The Commissioner's powers under this section are separate and apart from his or her powers pursuant to other provisions of law, including powers arising from a proclamation of emergency issued by the Mayor under section 24 of Article 2-B of the New York State Executive Law or the Mayor's directions thereunder. Nothing in this section shall be construed to preclude the exercise of the powers granted under this section in combination with powers authorized under any other law or arising from such a proclamation or directions.

Notes:

This section is derived in part from its predecessor section.

See, in connection with this section, Charter §566, right of entry of officers of Department and Charter §398, ex parte administrative warrants. Charter §566 provides that the Commissioner or members of the Department may, at reasonable times, and pursuant to a search warrant when required by law, enter, examine and inspect a place for compliance with the provisions of law, rules and regulations enforced by the Department. Charter §398 provides that if entry to a location or premises to be inspected pursuant to the Department's powers and duties is not gained on consent, or if circumstances call for entry without prior notice, the Commissioner, or his or her authorized representative, may request corporation counsel to make an application, ex parte, in any court of competent jurisdiction for an order directing the entry and inspection of such premises or location and, in accordance with applicable law, to abate any nuisance thereon.

The Fourth Amendment and the State Constitution prohibit unreasonable searches and seizures without a warrant. Accordingly, administrative search warrants are generally required for health or safety inspections of both residential and private commercial properties when an inspector is affirmatively refused access to inspect the premises. It should be noted that if an establishment, which is pervasively regulated, refused entry to the regulatory agency, then that in and of itself would be a violation of the Code that could result in civil penalties or permit revocation.

Although administrative warrants are generally required, warrantless inspections are allowed in limited situations. Courts have permitted inspections of properties without warrants (1) when the occupant, owner, manager or person in control of the premises expressly consents to the inspection, (2) when exigent circumstances exist or (3) when the inspections relate to a pervasively regulated business. See, for example, Colonnade Catering Corp. v. U.S., 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); U.S. v. Biswell, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972).

The Commissioner's power to declare a public health emergency, and to take necessary action, including the suspension, alteration or modification of health code provisions, where urgent public health action is needed, such as for terrorism or naturally-occurring events, would allow the Department to proceed with rapid detection, investigation, and control of infectious diseases or chemical, biological, and radiological agents that threaten the public health, or to, for example, alter the manner or timeframe, otherwise set forth in the Health Code, for preparing or filing birth and death certificates.

§3.03 Seizure, embargo, condemnation and disposition of prohibited materials.

(a) The Department may seize, embargo or condemn any food, drug, device, cosmetic, article or thing that it determines (1) is unfit for human consumption or use; (2) is in a condition, kind, weight, quality or strength prohibited by this Code or other applicable law; (3) is not labeled as required by this Code or other applicable law; (4) contains false or misleading labeling; (5) is adulterated or misbranded; or (6) constitutes a danger or nuisance, or is otherwise prejudicial to the public health.

(b) The Department may destroy, render harmless, or otherwise dispose of all seized, embargoed or condemned material without compensation and, in its discretion, at the expense of the owner or person in control thereof, or may direct such owner or person to do so. Embargoed, seized and condemned material which is hazardous shall be disposed of in accordance with applicable law.

(c) When the Department determines that embargoed material consists in part of materials which are not in violation of the Code and which may be reasonably salvaged, or that embargoed materials or any part thereof can be reasonably brought into compliance with the Code, the Department shall permit the owner or person in control of such embargoed material, unless the public health otherwise requires, to separate the salvageable portions or to bring such materials into compliance with the Code at the place of embargo or seizure, or other place acceptable to the Department, in a manner directed by the Department. When seized material is disposed of by the

Department otherwise than by destruction, it may be released to the owner or person in control if it may be rendered harmless.

(d) All activities carried on pursuant to this section shall be done in a manner consistent with the maintenance of the public health, giving due regard to the property rights of the owner or person in control of the affected material.

(e) Except where the Department determines that immediate action is required to protect the public health, the Department shall not seize, embargo, condemn, destroy, render harmless or otherwise dispose of any material pursuant to this section until the owner or person in control is notified by any effective means of communication and is given opportunity to be heard by such personnel of the Department as the Commissioner may designate. No person shall fail to comply with any order or subpoena of the Commissioner requiring disclosure of information concerning the sources or recipients of the embargoed or seized material.

Notes:

This section is derived without substantive change from its predecessor section in the Code.

The right to seize, embargo, condemn and destroy unfit food pursuant to local ordinances has been held not to violate the due process clause of the Fourteenth Amendment to the United States Constitution. See North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908). Furthermore, the seizure or destruction of property that is dangerous or constitutes a nuisance, does not require that the owner receive just compensation as in the case of a governmental taking under eminent domain. Such seizure, condemnation or destruction is not converting private property for the benefit of government and putting it to a public use; it is abating a public health danger for the protection of the public. Therefore, the owner is not entitled to be compensated. See, Mugler v. Kansas, 123 U.S. 623; 8 S.Ct. 273; 31 L. Ed. 205 (1887). Section 17-118 of the City Administrative Code makes it clear that the destruction or removal of any dangerous matter or thing can be at the owner's expense.

§3.05 Orders of the Board, Commissioner or Department.

(a) No person shall violate an order of the Board, Commissioner or Department.

(b) Service of any order of the Commissioner or Department shall be deemed legally sufficient if delivered personally or if mailed by ordinary first class, certified or registered mail, express or overnight mail, through the United States Postal Service or through any commercial expedited mail or parcel delivery service, in no particular order of priority, upon any person, officer, department or employee referred to in Section 17-141 of the Administrative Code. The Department shall maintain records attesting to the manner of service used and the person or entity

served in each instance. Service of any order issued pursuant to subdivision (d) of section 3.01 of this article shall be deemed legally sufficient if served in accordance with the provisions specified therein.

Notes:

This section is derived without substantive change from its predecessor, section 3.07 of the Code.

The substance of subdivision b was added to former Section 3.07 the Code, now Section 3.05, in 2003 to specify that service by mail of orders of the Commissioner or Department is a legally sufficient form of service.

§3.07 General standards to protect health and safety; prohibited acts; necessary acts and precautions.

No person shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any individual unless the act is authorized by law. No person shall fail to do any reasonable act or take any necessary precaution to protect human life and health.

Notes:

This section is derived without substantive change from its predecessor, section 3.09 of the Code.

§3.09 Abatement of nuisances.

No person shall commit or maintain a nuisance as defined in §17-142 of the Administrative Code, and no person shall allow such a nuisance to exist or to be created in respect of any matter, thing, chattel or premises which he or she owns or controls.

Notes:

This section is derived without substantive change from its predecessor, section 3.11 of the Code.

The maintenance of a public nuisance as defined in Penal Law § 240.45 is also declared to be a misdemeanor by Penal Law §240.45. For cases defining public nuisances and holding that the relative importance of the public and private interests involved must be considered, see annotations to §240.45 in McKinney's Penal Law.

§3.11 Civil Enforcement of the Code.

(a) Except as provided in subdivisions (b) and (c) herein, any person who is determined to have violated this Code or any other applicable law or regulation that the Department is authorized to

enforce, shall, unless otherwise specified in such other law or regulation, be subject to a fine, penalty and forfeiture of not less than two-hundred and not more than two thousand dollars for each violation of a provision of this Code or any other such applicable law or regulation. Each such violation may be treated as a separate and distinct offense, and in the case of a continuing violation, each day's continuance thereof may be treated as a separate and distinct offense.

(b) Any person who is determined to have conducted, carried on, or in any way engaged in an activity without a permit, license, registration, or other authorization required by this Code shall be subject to a fine, penalty and forfeiture of not less than one thousand and not more than two thousand dollars.

(c) Where a person fails to appear in a proceeding brought pursuant to Article 7 of this Code, the penalties imposed for each sustained violation shall be double the amount that would otherwise be assessed by the hearing examiner, but shall not exceed the maximum penalty specified in subdivisions (a) or (b) of this Section, or in the other applicable law or regulation.

Notes:

See also section 12(a) of the state Public Health Law which currently establishes a maximum civil penalty of \$2000.00 for a violation of health laws.

§3.13 Enforcement of this Code otherwise than by prosecution or other compulsory means.

In lieu of enforcement of this Code by way of prosecution, recovery of civil penalties, revocation of permits, seizure, embargo and condemnation, and other compulsory means, the Department may seek to obtain the voluntary compliance with this Code by way of notice, warning or other educational means; this section does not, however, require that such non-compulsory methods be used before proceeding by way of compulsory enforcement.

Notes:

This section is derived without substantive change from its predecessor section in the Code.

§3.15 Interfering with or obstructing Department personnel; gifts, gratuities and bribes.

(a) No person shall interfere with or obstruct Department personnel in carrying out an inspection, survey or examination or in the performance of any other duty for the Department or Board.

(b) No person shall give or offer a gift, gratuity, benefit, favor or bribe, including but not limited to money, food, and drink, to an employee or agent of the Department engaged in carrying out an inspection, survey or examination or in the performance of any other duty for the Department or Board.

Notes:

This section is derived without substantive change from its predecessor section in the Code.

§ 3.17 Notices, orders and other posted materials not to be mutilated, obstructed or torn down.

No material, order or notice posted or required to be posted by the Department shall be mutilated, obstructed, torn down or removed unless authorized to do so by the Department or by this Code or other applicable law.

Notes:

This section is derived from its predecessor section in the Code.

§3.19 False and misleading statements, reproductions and alterations.

(a) No person shall make a false, untrue or misleading statement or forge the signature of another on a certificate, application, registration, report or other document in paper, electronic or any other form or medium, required to be submitted or filed with the Department. No person shall make a false, untrue or misleading oral statement to the Department as to any matter investigated by the Department.

(b) No person shall reproduce or alter or cause to be reproduced or altered a permit, report, certificate or other document in paper, electronic or any other form or medium, issued by the Commissioner, Department or Board if the purpose or effect of such reproduction or alteration is the evasion or violation of any provision of this Code or any other law.

Notes:

This section is derived without substantive change from its predecessor sections 3.19 and 3.21. This section creates one section to address false statements in all forms and false reproduction of Department documents in all forms. Note that a violation of the Code would result regardless of whether or not the false statement or alteration was intentional or willful.

§3.21 Use of English language in complying with Code; use of other languages.

(a) When the Department or a provision of this Code requires the submission of an application, certificate, report or other document in paper, electronic or any other form, to the Department, any required writing shall be in the English language except that the Department may in its discretion allow the submission of such a required writing in another designated language, if such required writing is accompanied by an accurate, English translation of such writing.

(b) When the Department or a provision of this Code requires the use of warning or instructional signs or labels, any required writing shall be in the English language. If the Department is of the

opinion that the persons to whom a required warning or instructional sign or label is addressed may not understand the English language, the Department may require that such sign or label appear legibly both in English and other designated languages.

Notes:

This section is derived from its predecessor section 3.23 in the Code, without substantive change other than to reference the ability to accept non-English documents if accompanied by an English translation.

§3.23 Reports of departmental or governmental officials; presumptive evidence of facts.

Written reports or documents in paper, electronic or any other form concerning a matter or subject within the jurisdiction of the Department or regulated by this Code, which are signed or certified by a person employed by any agency of the City, State or Federal government, shall be presumptive evidence of the facts stated therein.

Notes:

This section is derived without substantive change, other than to accommodate the variety of documents possible in the modern electronic age, from its predecessor section in the Code.

§3.25 Inspection of records and proceedings of the Department.

(a) Except as prohibited, required or authorized by this Code, including this section, or other applicable law:

(1) Records of the Department containing individually identifiable information, or other information that the Department reasonably believes may endanger the health or safety of any person if disclosed, shall be confidential and used only by authorized personnel of the Department or its authorized agents. For the purposes of this section the term “individually identifiable information” shall mean any information or data which by itself or in combination with any other publicly available information could, in the opinion of the Department, be used to identify a particular individual;

(2) A person, upon submission of a legally appropriate written request or consent, and proof of identity satisfactory to the Department if deemed necessary by the Department, may inspect, or obtain a copy of, or authorize his or her attorney or representative to inspect or obtain a copy of a file, record, report, proceeding of the Department or any other document, whether oral, written, electronic, visual or in any other form which contains individually identifiable information pertaining to such person; provided that individually identifiable information pertaining to another person is not disclosed. A person who owns, manages, operates or has any legal interest

in a premises may, in the manner set forth above, have access to Departmental reports and records of the Department's environmental inspections pertaining to such premises; provided that said records are redacted of any personal information concerning the occupants of such premises. A request to inspect or consent to disclose shall be made in writing and shall describe the information to be inspected or disclosed. Inspections of records shall be permitted during times and at such places as the Department may determine. A written authorization for an attorney or representative to inspect or obtain copies of Department records shall be made on forms provided or a format approved by the Department.

(b) Subdivision (a) of this section shall not prevent authorized personnel of the Department from furnishing appropriate information to a physician or institution providing examination or treatment to a person suspected of or affected with a disease or condition, to an agency approved by the Department for prevention, treatment or social care, or to any person when necessary for the protection of health. A person, institution or agency to whom such information is furnished or to whom access to records has been given, shall not divulge any part thereof so as to disclose individually identifiable information of the person to whom such information or record relates, except insofar as such disclosure is necessary for the treatment of such person or for the protection of the health of others. Notwithstanding the subdivision (a) or (b) of this section, no such access or disclosure shall occur if such is otherwise prohibited by this Code or other applicable law.

(c) No person shall violate any term or condition of a written data use agreement, protocol or other understanding upon which the Department has relied to grant access to individually identifiable information or data.

(d) The Department may charge a reasonable fee, established in accordance with applicable law, for the provision of access to, or inspection or copying of, information, data or records pursuant to this section.

Notes:

Administrative Code §17-112 authorizes the Department to establish "reasonable regulations as to the publicity of any of its papers, files, reports, records and proceedings. . ." This section generally describes the Department's policies with regard to the inspection or disclosure of its records. It makes clear, however, that if other parts of this Code or other applicable law specifically prohibit, require or authorize inspection or disclosure, then such other provisions of law will govern inspection or disclosure.

Any individually identifiable information, including health data that is subject to and protected by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) or other

applicable law or regulation, will not be released except in accordance with such laws or regulations, and will be exempt from New York State Freedom of Information Law (FOIL) requests accordingly. As a general proposition, FOIL governs the disclosure of information in the hands of governmental agencies to any member of the public, whether the information pertains to them or not. This section provides greater specificity with regard to Departmental information which is not required to be disclosed pursuant to FOIL.

Paragraph (1) of subdivision (a) makes clear that Departmental information containing individually identifiable information will be treated with the utmost confidentiality. Similarly, information that may not contain personal information, but which may endanger the health or safety of anyone, will be treated confidentially.

Paragraph (2) of subdivision (b) establishes the procedures by which individuals, or persons legally interested in premises inspected by the Department, may access information about themselves or their property with due regard to the privacy rights of others.

Subdivision (b) articulates the principle that disclosure can be made if necessary to protect the health of the public. Such a determination can only be made by Departmental employees specifically authorized to do so. Furthermore, such information can only be divulged if necessary for the same purposes. However, if this Code or other applicable law otherwise prohibits disclosure, as is the case with A1C or HIV information, then disclosure under this section will not be allowed.

Subdivision (c) importantly makes it a violation of the Health Code to breach any agreement with the Department pursuant to which individually identifiable information has been disclosed, including business associate or data use agreements.

Subdivision (d) authorizes the charging of fees in accordance with applicable law; for example, section 18 of the New York State Public Health Law with regard to medical records or in accordance with regulations of the Department.

§3.27 Compliance with other applicable laws and regulations.

The approval of any plans or the issuance of any permit pursuant to this Code which involves the construction, alteration or renovation of any building, structure or premises, or the use of any site, or the installation or alteration of any service equipment, regulated by the Building Code or other applicable law, shall not relieve the person receiving such approval or permit from such person's responsibility to comply with all of the applicable provisions of the Building Code, zoning regulations and other applicable laws and regulations.

Notes:

This section is derived without substantive change from its predecessor section in the Code.

§3.29 Construction.

(a) This Code is intended to be consistent with the federal and New York State Constitutions, applicable State law and the New York City Charter, and shall be so construed, to the fullest extent possible, whenever necessary to achieve such consistency.

(b) This Code shall be liberally construed for the protection of the health and safety of the people of the city of New York.

Notes:

This section is derived from section 558(b) of the Charter which requires provisions enacted by the Board as part of the Code to be consistent with the Constitution and laws of the State and with the Charter.

§3.31 Separability.

If a provision of this Code is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the applicability of such provision to other persons and circumstances and the constitutionality or validity of every other provision of the Code shall not be affected thereby.

Notes:

This section is derived without substantive change from its predecessor section in the Code.

Article 3 Intention.doc

2/28/08