



Waitakere City Council
Te Taiao o Waitakere

NOTICE OF MEETING

PLANNING AND REGULATORY COMMITTEE (BYLAW REVIEW HEARING)

I hereby give notice that a Meeting of the Planning and Regulatory Committee will be held on:-

DATE: Monday, 14 November 2005 **TIME:** 10.00 am

VENUE: Civic Centre, 6 Waipareira Avenue, Lincoln, Waitakere City

to consider submissions on the Draft Food Safety Bylaw and to take any necessary action connected therewith.

9 November 2005

Owena Schuster
COMMITTEE SECRETARY

Telephone (09) 836 8000 extn 8864

MEMBERSHIP:

Councillors	VS	Neeson, JP (Chairperson)
	RP	Dallow, QPM, JP (Deputy Chairperson)
	DQ	Battersby, JP
	PJ	Booth, OBE
	MFP	Chan, JP
	JM	Clews, QSO, JP
	RI	Clow
	LA	Cooper
	AK	Corban, OBE, JP
	WW	Flaunty, QSM, JP
	DE	Gilmour
	PA	Hulse
	JP	Lawley
	CA	Stone

Mayor, RA Harvey, QSO, JP (ex officio)

(Quorum 5 members)

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(The reports and recommendations contained in all agendas are reports and recommendations only and are not to be construed, in any way, as Council policy until adopted.)

**AGENDA FOR A MEETING OF THE PLANNING AND REGULATORY COMMITTEE
(BYLAW REVIEW HEARING) TO BE HELD IN THE CIVIC CENTRE,
6 WAIPAREIRA AVENUE, LINCOLN, WAITAKERE CITY,
ON MONDAY, 14 NOVEMBER 2005
COMMENCING AT 10.00 AM**

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1 APOLOGIES



2 BYLAW REVIEW HEARING REPORT 2005

PURPOSE OF THE REPORT

The purpose of this report is to consider submissions arising out of the Special Consultative Procedure on the draft Food Safety Bylaw, and the proposal to repeal 7 redundant bylaws.

BACKGROUND

At the Council meeting held on the 27 July 2005, recommendations by the Planning and Regulatory Committee were considered in respect of a review of Bylaw No.26 (1994) Food Safety, and the proposal to repeal 7 redundant bylaws.

“2. *That the Planning and Regulatory Committee’s recommendations to Council In respect of the review of Bylaw No.26 (1994) Food Safety be approved, namely:*

- (a) That having considered the possible options, a Bylaw is the most appropriate mechanism to assist in the regulation of food premises and to ensure the provision of safe food within the City;*
- (b) That for the reasons given in the agenda report, the draft form of Bylaw produced and amended at the Planning and Regulatory Committee on 12 July 2005 updating the existing Food Safety Bylaw No.26 (1994), is the most appropriate form of Bylaw to achieve Council's objectives;*
- (c) That the draft Bylaw has no implications which are inconsistent with the New Zealand Bill of Rights Act 1990;*
- (d) That the Statement of Proposal and Summary of Information attached to the report is approved in principle. Officers are authorised to make any necessary editorial and formatting changes and implement the Special Consultative Procedure as set out in section 83 Local Government Act 2002;*
- (e) That the Planning and Regulatory Committee will hear any submissions during November 2005 with a report relating to the proposed Bylaw to be brought back to Council for final decision.”*

1413/2005

In respect of the Planning and Regulatory Committee's recommendations regarding the proposal to repeal certain redundant bylaws, Council also resolved as follows:

- “3. (a) *That the 7 Bylaws listed below be repealed for the reasons given on the agenda reports:*

No.3 (1990) Land Subdivision and Development

No.12 (1990) Certification Fee for Documents

No.15 (1990) Dangerous Goods Approvals and Inspection Fees

No.16 (1990) Fencing of Swimming Pools

No.23 (1990) Clean Indoor Air

No.21 (1990) Hazardous Substances

No.24 (1990) Construction Noise

- (b) *That the Summary of Information and Statement of Proposal attached to the agenda in respect of the proposed repeals, are approved.*
- (c) *That officers be authorised to proceed with the Special Consultative Procedure as defined in the Local Government Act 2002.”*

1413/2005

STRATEGIC CONTEXT

One of the objectives of the Strong Communities platform of the Long Term Council Community Plan is to ‘make the city a safe and interesting place to live.’ This has the aim of protecting and improving the health, wellbeing, and safety of the community. A bylaw with the purpose of improving standards of food protection and reducing incidents of food related diseases within the City is consistent with this key objective. In addition, the bylaw is wholly consistent with the Chief Executive Officer’s Policy initiative that ‘food safety is not negotiable in Waitakere City.’

CONSULTATION

Notice of the proposed changes to the existing Food Safety Bylaw, and the proposed repeal of the 7 redundant bylaws was published in the New Zealand Herald on 10 August 2005 and the Western Leader on 11 August 2005. In accordance with section 83 Local Government Act 2002, the notice advised how to obtain a copy of the consultation documents and confirmed that submissions could be made up to and including 30 September 2005. The consultation papers were also available at the Civic Centre counter and on Council’s website for that seven week period.

No comments or submissions have been received in respect of the proposal to repeal the 7 redundant bylaws; the recommendation to Council will therefore continue to be their repeal.

With regard to the draft Food Safety Bylaw, all 780 food premises operators within the City were informed by letter dated 15 August of the proposed changes to the existing bylaw and advised how to make a submission if they wished to do so. Letters were also sent to restaurant associations, the community boards, Te Taumata Runanga, the Pacific Island Advisory Board and the Waitakere Ethnic Board.

A number of food premises operators have contacted Council for further information on the draft bylaw particularly regarding the staff qualification section.

SUBMISSIONS ON DRAFT FOOD SAFETY BYLAW 2005

A1-A22

Four submissions have been received and are attached at pages A1 to A10. Mr Chan will address the meeting regarding his submission. The draft bylaw is attached at pages A11 to A22 for information. The issues raised in all four submissions are summarised below:

(i) Proposed changes to the Grading Certificate display requirements (clause 10.6)

The existing bylaw provides that certificates must be '*displayed in a prominent place on the food premises so as to be readily visible to members of the public visiting the premises*'.

The draft bylaw at clause 10.6 proposes that certificates are: '*conspicuously displayed in or about the premises in a location which is visible to members of the public before they enter the premises. If all points of entry to the premises are not clearly defined, (such as in the case of a food hall in a mall) the certificate must be displayed on the food premises at a location or locations approved by an Environmental Health Officer, being a location which is visible to members of the public before they make a selection or purchase food items and is in accordance with any policy for the display of grading certificates made by Council from time to time.*'

The change relating to display requirements was proposed by the Team Manager: Environmental Compliance to ensure the overall purpose of the display requirement was met, namely that customers are aware of the current 'grade' before they decide whether or not to patronise the premises. The Planning and Regulatory Committee considered that ideally certificates should be displayed at all points of entry, but acknowledged that it is not always practicable to do so. A draft policy containing further guidance on various scenarios and layouts was also thought to be useful.

Two submitters have made reference to the proposed change of display requirement proposals:

1. Mr Chan considers the draft bylaw is too severe and the current bylaw provision is fairer. He would like to see references to '*before the public enter*' removed from the clause believing the public will still see the sign even if it is inside the premises.
2. Wendco ('Wendy's') oppose the guideline contained in the draft policy document regarding display of certificates at the start of 'drive throughs', stating that it is not always practical to do so, due to limited signage space.

It is a matter for the Planning and Regulatory Committee to consider whether any change should be made to this particular clause of the bylaw in light of the submissions received.

(ii) Proposed changes to the Food Handler Qualification Requirements (clause 8.4)

The existing bylaw states that every food premise will have within 3 months of its first registration, a person who has received credit for unit standards 167, 168 and 169 present whilst food preparation is being undertaken, or a manager with that qualification, '*and every other person employed as a food handler on those premises has received credit for Unit Standards 167 and 168 or satisfies an Environmental Health Officer that they are enrolled in an appropriate course and pursuing a course of study with the intent of gaining such credits within 12 months of the date upon which application for registration is made*'.

The proposed clause 8.4 reads that in addition to the holder of the certificate of registration, or manager, every occupier shall ensure that:

- (a) *At least 75% of all persons on the premises at any one time employed as food handlers, have passed an Approved Basic Food Hygiene Course and*
- (b) *All food handlers who have not attended an Approved Basic Food Hygiene Course shall complete such a course within 3 months of this bylaw coming into force or within 3 months of commencing work on the premises.*

The Planning and Regulatory Committee will recall that when this matter was initially discussed, the proposal was for 50% of food handlers to have taken an approved course. That replicated the percentage referred to in the North Shore's bylaw. The North Shore bylaw also states that occupiers must require all food handlers who do not hold the appropriate qualification to enrol and complete the course of study or cease working as a food handler. The aim is therefore for every food handler to be qualified. In Auckland City the required percentage is 75% but there is no requirement for all other food handlers to undertake the course. After careful consideration the Planning and Regulatory Committee concluded that 50% was too low a proportion and out of step with Council's policy that 'food safety is not negotiable'.

Two submitters refer to this proposal:

1. Wendco suggests further definition of an 'Approved Food Hygiene Course' is required and parameters for an "alternative course approved in writing by an Environmental Health Officer" should be set. Wendco also considers that organisations that employ large numbers and have high staff turnover are not catered for.
2. Mr Bray (Subway) submits that the current bylaw requirement of 20% of all food handlers holding food safety certificates is more than adequate. Note that this is not what the current bylaw states, see above. Mr Bray believes that the requirement for all staff undertake external training is not practical due to staff turnover and cost. He refers to additional in-house mandatory training that staff undertake in his franchise operation. He requests the status quo be retained, because the proposal is unreasonable.

Note that a list of Approved Food Hygiene Courses is already displayed on Council's website and appears on the application form for a certificate of registration. Environmental Health Officers only approve alternative courses when they know New Zealand Qualifications Authority has accepted them in the past, otherwise approval in writing from the New Zealand Qualifications Authority would be required.

Subway submits that the proposed qualification requirements are onerous for premises such as theirs, given the level of staff turnover and in house training all employees must also undergo. Staff turnover was considered by the Planning and Regulatory Committee during its initial deliberations particularly casual student employment during holiday periods. It was decided that allowing a 3 month period of employment before requiring attendance on an approved course, acknowledged the issue providing a balance between the reality of high staff turnover/casual staff in the industry, and the desire to ensure a high level of staff qualification. As regards the question of in house training, advice has been sought from the Team Manager: Environmental Compliance as to whether Council could assess such training and determine whether it is an acceptable alternative to an 'Approved Food Hygiene Course' thereby reducing the need for all food handlers to attend external courses. The Team Manager: Environmental Compliance advises however that Environmental Health Officers are not qualified training assessors, and would not be comfortable assuming the role of New Zealand Qualifications Authority. It remains open to any franchise operation to apply to the New Zealand Qualifications Authority for an assessment of their internal training. The options for the Planning and Regulatory Committee are to leave the draft bylaw as it is, or revisit the proposal and perhaps reduce the staff qualification requirements.

(iii) The period before an application for re-grading will be considered by Council (clause 10.8)

Proposed clause 10.8 states *'An application for re-grading of food premises may be made by the occupier of food premises at any time, but no such application will be considered by the Council until two months has expired since the last grading inspection.'*

Mr Chan states that this clause should be amended because owners can complete necessary repairs in less than 2 months. The '2 month period' is not a new proposal - the clause has been in the bylaw since 2003 when grading requirements were added. The purpose of the clause is to act as an incentive (or deterrent) ensuring occupiers use their best endeavours to obtain high grades and therefore keep hygiene standards high, or face the prospect of having to display a low grade certificate for 2 months even if remedial works are undertaken promptly. Having to display a D or E grade for 8 weeks may have a detrimental effect on business during that period. A similar clause is included in Manukau and Auckland's bylaws.

(iv) 'E' Grades should be more clearly defined – Grading of Food Premises Policy 2005 Part 1 section 2

An automatic 'E' grade for a cockroach, is 'not satisfactory' in Mr Chan's view.

The grades are not defined in the draft bylaw itself, Mr Chan refers to the draft 'Grading of Food Premises Policy' attached to the draft bylaw. An E grade according to the policy will be given where the premises fall 'well below minimum requirements'. An E grade results in an automatic and immediate closure order, and a prosecution.

(v) Remove discretion of Environmental Health Officer to recommend prosecution where D grade awarded - Grading of Food Premises Policy 2005 Part 1 section 2

Wendco submits that 'discretion' on the part of Environmental Health Officers should be removed in determining whether or not to prosecute when a 'D' grade has been given. Set criteria should be developed by Council and communicated to operators. Prosecutions should only follow if faults are not rectified within a specified time frame.

The Team Manager: Environmental Compliance confirms that Environmental Health Officers work from a 'food grading fault sheet', which in turn is based upon the Food Hygiene Regulations. A copy of the fault sheet can be provided on request to occupiers, and will also be displayed on Council's website. Whilst the criteria used to arrive at the correct grade can be made more widely available, prosecutorial discretion must always be retained. The grading criteria does not and cannot cover every situation, for example where an unacceptable state of affairs is not the fault of the food premises occupier but rather a neighbour, or utility provider. There is an inherent element of subjective interpretation involved in analysing the condition of premises at any particular point of time, that requires a degree of discretion to remain.

The submissions referred to at (iv) and (v) relate to the draft policy attached to the bylaw. Mr Chan requests discretion rather than a hard and fast rule in relation to 'E' grades, whereas Wendco would prefer less discretion and more rules regarding the circumstances in which a prosecution will ensue for a 'D' grade. It is difficult to reconcile those two apparently conflicting submissions.

(vi) Add a right of appeal against the grade given by an Environmental Health Officer

The grade awarded to a food premise by an Environmental Health Officer will directly affect the occupiers' business interests for better or worse. Not only can a low grade result in the closure of premises (permanently or temporarily) or even a prosecution, the grading certificate must be displayed for 2 months even if remedial works are immediately undertaken. It is therefore submitted that the occupier ought to be able to contest that grading decision, acknowledging a fundamental principle of natural justice namely that where public authorities have power to make decisions in respect of a persons rights or interests, that person should have a right to contest that decision. The current bylaw at clause 8.9 allows occupiers to contest a grading by writing to the Manager-Environmental Compliance within 14 days of receiving the Grading Certificate. Manukau City has a similar clause in its bylaw.

A23

Attached at page A23 is an example of an appeal clause which could be used if the Planning and Regulatory Committee agreed that an appeal clause should be inserted into the bylaw. There are however various options to consider:

- To whom should the appeal be made - currently the appeal is to the Manager: Environmental Compliance, however an appeal in writing to the Group Manager: Regulatory would take the review out of the department dealing with the case and to a more senior level.
- What period of time should an occupier have to lodge an appeal – currently it is 14 days, that is considered too long a timescale. It is important that these appeals are dealt with promptly, 5 or less working days is considered more than adequate to lodge an appeal. For this reason it is thought an appeal to the Planning and Regulatory Committee itself which inevitably involves a delay, is not appropriate in this instance.
- Should the grade awarded stand pending the outcome of the review process or not? This is the way the current appeal mechanism works, but if the grading is overturned on appeal the occupier will have already suffered the adverse effect of a D or E grade on business for the length of time it took to review the grading decision and issue a response. There is an argument to say that if an appeal is lodged, then the grading should not be applied until the decision has been reviewed. However there are clear safety implications of postponing the imposition of a D or E grade (with consequent closure requirements) for any period of time. If that course was adopted, it would mean that no grading could be implemented until the appeal period had expired. Even if the appeal period was reduced, there would still be a period of safety risk.

SUMMARY AND DISCUSSION

Having considered all possible options earlier in the review process, the Planning and Regulatory Committee decided that updating the existing bylaw was the preferred course enabling Council to confirm its commitment to improving food safety within the City, and enabling improvements to be made to the existing bylaw where appropriate. Careful consideration was given at that time to the most appropriate form of bylaw. Both the 'staff qualification' section and the 'display of grading certificate' section were debated in detail and compared with corresponding provisions in the bylaws of neighbouring Councils. It is now for the Planning and Regulatory Committee to decide in light of the submissions received, if amendments to the final version of the bylaw are required, and if so, what they should be. Recommendation 2 (b) below will be amended at the conclusion of the Planning and Regulatory Committees deliberations to reflect the changes, if any, to be made to the draft bylaw.

RECOMMENDATIONS

1. That the Bylaw Review Hearing 2005 report be received.
2. That it be recommended to Council that:
 - (a) There were no submissions received in relation to the proposal to repeal the 7 redundant bylaws listed below, and therefore the recommendation is that they are repealed for the reasons given in the original agenda reports:
 - No.3 (1990) Land Subdivision and Development
 - No.12 (1990) Certification Fee for Documents
 - No.15 (1990) Dangerous Goods Approvals and Inspection Fees
 - No.16 (1990) Fencing of Swimming Pools
 - No.23 (1990) Clean Indoor Air
 - No.21 (1990) Hazardous Substances
 - No.24 (1990) Construction Noise
 - (b) Following a consideration of submissions received as a result of the Special Consultative Procedure, the draft Food Safety Bylaw 2005 be adopted.

Report prepared by: Denis Sheard, Manager: Legal Services and Yvonne Donaldson,
Team Leader: Legal Services.

