

W. I. B.

FILE NOTE

TO: Board of Commissioners

FROM: Trina Laidlaw, Assistant County Counsel

AGENDA DATE: April 15, 2009 (Second Reading and Public Hearing)

AGENDA ITEM: Ordinance No. 1-09/ In the Matter of Adopting and Codifying the Order and Rules of Board of Health on Chain Restaurant Nutrition Labeling by Amending Chapter 9 of Lane Code to Include Those Rules (LC 9.711 – 9.730)

On March 31, 2009, the Board of Commissioners, acting on behalf of the County (not Board of Health) had a first reading of the title to this ordinance. At that time you also appropriately included the Board of Health policy order and text of the proposed rules in this first reading.

I am attaching an ordinance packet in the standard format used by the county. While it was probably OK in the first reading to simply refer to the Board of Health order and relying on the text of the rules in that order, it would be best to have a complete packet attached to any signed ordinance, should the Board make that decision.

I am also recommending and have included a slight change in the title of the ordinance to say: "Matter of Codifying the Adopted Rules of the Board of Health...." instead of "In the Matter of Adopting and Codifying the Order and Rules of the Board of Health". The changed title better reflects the substance of the text of this ordinance at the first reading which was to have the Board of Commissioners codify and publish the Board of Health rules in Lane Code.

This process of the Board of Health adopting its policies and rules with the Board of Commissioners (on behalf of the county) codifying those rules for publication in Lane Code is consistent with the Lane Manual procedure which you have considered on this date. If you are going to meet jointly with the Board of Health on this matter, I would like you to keep in mind that the action you are asked to take is to review the Board of Health order and rules (not adopt them) and to codify the Board of Health rules on chain restaurant nutrition labeling into Lane Code. The action the Board of Health would be considering is whether to adopt its order and rules.

W. 1b.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY,
OREGON

ORDINANCE NO. 1-09

IN THE MATTER OF CODIFYING THE
ADOPTED RULES OF BOARD OF
HEALTH ON CHAIN RESTAURANT
NUTRITION LABELING BY AMENDING
CHAPTER 9 OF LANE CODE TO
INCLUDE THOSE RULES (LC 9.711 –
9.730)

WHEREAS, the Lane County Board of Health adopted a policy order and rules to require chain restaurant nutrition labeling; and

WHEREAS, the Lane County Board of Commissioners on behalf of the county reviewed the Board of Health orders and rules; and

WHEREAS, the Lane County Board of Health policy order and rules to require chain restaurant nutrition labeling require codification to publish those rules for public review subject to the Board of Health requirements;

NOW, THEREFORE, the Board of County Commissioners of Lane County ordains as follows:

Chapter 9 of Lane Code is hereby amended by removing, substituting and adding new sections as follows:

DELETE THESE SECTIONS

None

INSERT THESE SECTIONS

9.710 – 9.730
Located on pages 9-29 through 9-35
(a total of 7pages)

Said sections are attached hereto and incorporated herein by reference. The purpose of these additions is to amend Lane Code to add chain restaurant nutrition labeling.

Enacted this _____ day of _____, 2009.

Chair, Lane County Board of Commissioners

Recording Secretary for this Meeting of the
Board

EXHIBIT A**CHAIN RESTAURANT NUTRITION LABELING**

The following rules were adopted by the Lane County Board of Health pursuant to specific grant of authority by the state, in accordance with state requirements, policies and laws, including but not limited to ORS 431.415, rather than Home Rule. These rules are published here for public convenience pursuant to LM 9.901.

9.711 Authority, Purpose and Policy.

The purpose of this policy is to provide Lane County residents with basic nutrition information about prepared foods sold at chain restaurants licensed by Lane County Public Health. Readily available product disclosures are necessary to allow customers to make informed purchasing decisions about the food that they and their children and dependents eat. Further, product disclosures help foster free market competition based on the true nutritional quality of chain restaurants' products. The Lane County Board of Health has adopted this policy and following rules pursuant to ORS 431.415.

9.715 Definitions.

The definitions in this section apply throughout these rules unless the context clearly requires otherwise:

(1) "Restaurant" means any establishment where food or drink is prepared for consumption by the public or any establishment where the public obtains food or drink so prepared in form or quantity consumable then and there, whether or not it is consumed within the confines of the premises where prepared, and also includes establishments that prepare food or drink in consumable form for service outside the premises where prepared, but does not include railroad dining cars, bed and breakfast facilities or temporary restaurants.

(2) "Chain Restaurant" means a Restaurant that is licensed by Lane County as a full service restaurant, and that is part of an affiliation of Restaurants and for which the affiliated Restaurants:

- (a) Have at least fifteen or more restaurants within the United States;
- (b) Sell Standard Menu Items that comprise at least eighty percent of Menu Items served in at least fifteen restaurants; and
- (c) Operate under the same or substantially the same brand name, regardless of whether the restaurants are subject to the same ownership or type of ownership (e.g., corporate ownership, individually-owned franchise, etc.).

(3) "Food Product" means a discrete item of Food such as a hamburger or a soda that is offered for sale separately or as a part of a combination meal. A "Food Product" includes each different size or flavor offered. A Food Product does not include ingredients except ingredients that are sold separately, such as a slice of cheese added to a hamburger for an additional charge.

(4) "Food Tag" means any informational label placed in proximity to an individual Food Product it identifies or characterizes for example:

- (a) A label placed next to a cherry pie showing a picture of a cherry and listing the price per slice, or
- (b) A label placed next to a container of pasta in a salad bar with the text, "Pesto Pasta Salad".

Food Tag is not synonymous with a Menu or a Menu Board.

(5) "Menu" means a printed or pictorial list of Food Products offered for sale. A Menu is intended to assist customers in ordering Food Products whether the ordering is done on the restaurant premises or off premises (for example, a phone-in menu or take out menu). A menu does not include printed or pictorial materials intended for the purpose of marketing.

(6) "Menu Board" means any posted list or pictorial display of Food Products offered for sale. A Menu Board may be posted inside or outside a restaurant, and is typically designed to be visible to multiple customers, and/or visible at a moderate distance. A Menu Board is intended to assist customers in ordering Food Products, and may take various forms, including but not limited to, a back-lit marquee sign above an ordering counter, a chalk board or other hand-written board, or a drive-through area signboard. A Menu Board does not include posted text or pictorial materials intended for the purpose of marketing.

(7) "Menu Item" means

(a) A single Food Product listed on a Menu, Menu Board, or Food Tag, or

(b) A combination of Food Products offered together on a Menu, Menu Board, or Food Tag, for example, a "kids meal" combining a hamburger, french-fries, and a carton of milk.

(8) "Standard Menu Item" means a Menu Item that is essentially the same between affiliated restaurants and prepared using a consistent standardized recipe.

(9) "Self-Service Item" means any Food Product or Menu Item that customers in a restaurant are permitted to obtain without assistance of a Restaurant employee or agent, for example, foods offered at a salad bar or buffet line. Condiments placed on a dining table or on a counter for general use without charge are not considered "Self Service Items".

(10) A Supplemental Menu Board is an alternative printed or pictorial list of Menu Items offered for sale and provides the full set of nutrition information required by Lane Code 9.720(1) for each Menu Item. A "Supplemental Menu Board" must be similar in appearance to the Menu Board, and must list food categories and Menu Items in the same order as these appear on the Menu Board. All nutritional information required by Lane Code 9.720(1) shall be displayed next to each Menu Item on the Supplemental Menu Board. The nutrition labeling shall be easily readable, in a typeface similar to the Menu Board, clear and conspicuous, and at least as prominent in size and appearance as that used to post either the name or price of the Menu Item. The use of abbreviations is acceptable (e.g. cal for calorie). The Supplemental Menu Board shall include, in an easily readable, clear and conspicuous manner, the following statement: "Recommended limits for a 2,000 calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium. A supplemental menu is not required to contain photos or menu item descriptions that may appear on the menu.

(11) A "Supplemental Menu" is an alternative printed or pictorial list of Menu Items offered for sale and provides the full set of nutrition information required by Lane Code 9.720(1) for each Menu Item. A "Supplemental Menu" must be similar in appearance to the Menu, and must list food categories and Menu Items in the same order as these appear on the Menu. All nutritional information required by Lane Code 9.720(1) shall be displayed next to each Menu Item on the Supplemental Menu. The nutrition labeling shall be easily readable, in a typeface similar to the Menu, and in a font no less than nine point. The use of abbreviations is acceptable (e.g. cal for calorie). A supplemental menu is not required to contain photos or menu item descriptions that may appear on the menu.

(12) A "Menu Insert" is an additional printed or pictorial list of Menu Items offered for sale that is intended to be used along with a Menu in order to provide the full set of nutrition information required by Lane Code 9.720(1) for each Menu Item. A "Menu Insert" must be similar in appearance to the Menu it accompanies, and must list food categories and Menu Items in the same order as these appear on the Menu. All nutritional information required by Lane Code 9.720(1) shall be displayed next to each Menu Item on the Menu Insert. The nutrition labeling shall be easily readable, in a typeface similar to the Menu, and in a font no less than nine point. The use of abbreviations is acceptable (e.g. cal for calorie). A Menu Insert is not required to contain photos or menu item descriptions that may appear on the menu.

(13) "Reasonable basis or reasonable bases" means any reliable and verifiable method for determining calorie and nutrient contents of Food Products offered for sale by the Chain Restaurant. These may include the use of calorie and nutrient databases, cookbooks, laboratory analyses, and other reliable and verifiable methods of analysis.

9.720 Food Nutrition Labeling Requirements.

(1) **Required Product Information.** Each Chain Restaurant shall accurately ascertain, and make available to customers the following product information for each Menu Item, as the item is usually prepared and offered for sale:

- (a) Total calories;
- (b) Total grams of saturated fat;
- (c) Total grams of trans fat;
- (d) Total grams of carbohydrates;
- (e) Total milligrams of sodium.

(2) **Food Item Exclusions and Exemptions.** Requirement Lane Code 9.720(1) does not apply to:

- (a) Food Products or Menu Items that are offered for sale for less than ninety (90) days in a calendar year;
- (b) Condiments available for use without charge.
- (c) Alcoholic beverages not listed as Menu Items.
- (d) Unopened pre-packaged food products that are not intended to be part of the standard menu item or combination meal. Examples include a jar of sauce or dressing intended primarily for home use, or a bag of coffee beans. In contrast, pre-packaged food products that are intended to be part of the standard menu item or combination meal (e.g. a bag of potato chips that comes as part of the meal) must be included in Required Product Information per Lane Code 9.720(1).

(3) **Nutrition Labeling on Menus.** Each Chain Restaurant that uses a Menu shall list the total number of calories next to each Standard Menu Item in a size and typeface that is easily readable, clear and conspicuous, and at least as prominent in size and appearance as that used to post either the name or price of the Menu Item. The use of abbreviations is acceptable (e.g. cal for calorie). The Menu shall include, in an easily readable, clear and conspicuous manner, a statement substantially similar to the following: "Recommended limits for a 2,000 calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium. Additional nutrition information available upon request."

(4) **Nutrition Labeling on Menu Boards.** Each Chain Restaurant that uses a Menu Board shall list the total number of calories next to each Menu Item on the Menu Board in a size and typeface that is clear and conspicuous, and at least as prominent in size and appearance as that used to post either the name or price of the Menu Item. The use of abbreviations is acceptable (e.g. cal for calories). no less prominent than the price. The Menu Board shall include, in an easily readable, clear and conspicuous manner, a statement substantially similar to the following: "Recommended limits for a 2,000 calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium. Additional nutrition information available upon request."

(5) **Nutrition Labeling of Food Tags.** Each Chain Restaurant that uses a Food Tag shall list the total number of calories for each Standard Menu Item represented on the Food Tag in a size and typeface that is clear and conspicuous and at least as prominent in size and appearance as that used to post either the name or price of the Menu Item. The use of abbreviations is acceptable (e.g. cal for calories). Menu Items labeled with Food Tags do not need to be labeled on Menu Boards.

(6) **Nutrition Labeling of Self-Service and Buffet Items.** Each Self-Service and Buffett Item shall be accompanied by a Food Tag or the Self-Service/Buffer Item shall be listed on a Menu Board that is readily visible from the self-service/buffet location. Each Standard Buffet Menu Item must specify the size of the serving and nutrition information for an individual serving.

(7) **Nutrition Labeling of Variable Items.** For any Standard Menu Item that comes in more than one flavor, variety, or size (e.g. varieties of bagels), the Chain Restaurant shall provide required nutrition information for Standard Menu Items as follows:

- (a) If both the highest and lowest value of the Standard Menu Item that comes in more than one flavor, variety, or size are within 0-10% of the median value, the median value alone of the required nutrition information may be listed; .

(b) If both the highest and lowest value of the Standard Menu Item that comes in more than one flavor, variety, or size are within 11-20% of the median value, the range of values of the required nutrition information may be listed; and

(c) If neither subsection (1) or (2) applies, each flavor, variety, or size of the Standard Menu Item must be listed as a separate Standard Menu Item and accompanied by the appropriate ascertained values of the required nutrition information.

(8) Nutrition Labeling of Combination Meals. A combination meal means a Standard Menu Item that is comprised of two or more food products and gives the consumer a choice of food items to be included in the meal.

(1) A Chain Restaurant may provide calorie labeling for a combination meal that uses a range of the lowest and highest values of calorie content among all possible combinations of food products offered in a combination meal.

(2) If the calorie range for combination meals is greater than 20%, labeling of individual combinations is not required as long as nutrition labeling is provided on the menu board, menu, or food tag for the individual food products that comprise the combination meal.

(9) Nutrition Labeling of Shared Meals. By nature or manner of serving, some Standard Menu Items can be intended to serve either one or multiple individuals. Nutrition Information for such Standard Menu Items must be provided for the entire Menu Item. In addition, the number of diners intended to be served may also be listed. Pizzas intended to serve more than one individual can be listed by two options: 1) by the slice or 2) the whole pizza.

(10) Listing of Additional Nutrition Information. Chain Restaurants shall provide, upon the request by a customer, at the time of ordering a list of values for nutrition information other than calories required under Lane Code 9.720(1). The nutrition information shall be in an easily readable format, in a typeface similar to the Menu, and in a font no less than nine point. The use of abbreviations is acceptable (e.g. cal for calories). This listing is not required to contain photos or Menu Item descriptions that may appear on the Menu. Approved methods for providing this information to a customer, if requested, include:

(a) A Supplemental Menu, or

(b) A Menu Insert, or

(c) A brochure or printed handout, or an electronic kiosk, or

(d) An alternate method not otherwise provided for in this section, only after the method has been submitted to and approved by the Department of Health & Human Services, and found to be substantially equivalent to the identified methods for providing the additional nutritional information. A Chain Restaurant shall seek approval of the proposed method by submitting a written proposal to the Department of Health & Human Services that describes how the proposed nutrition labeling approach will operate, including sample nutrition labeling materials and other documents that demonstrate the form in which nutrition information would be provided to customers.

(11) Nutrition Labeling of Alcoholic Beverages. A Chain Restaurant may use the following average nutritional values for beers, wines, and spirits:

(a) Wine – 5 ounces: 122 calories, 4 grams carbohydrates, 7 milligrams sodium;

(b) Regular beer – 12 ounces: 153 calories, 13 grams carbohydrates, 14 milligrams sodium;

(c) Light beer – 12 ounces: 103 calories, 6 grams carbohydrates, 14 milligrams sodium;

(d) Distilled spirits (80 proof gin, rum, vodka, whiskey) – 1.5 ounces: 96 calories. Calorie values may be rounded in accordance with Lane Code 9.720(12), which follows.

(12) Rounding Rules. Whenever a Restaurant, pursuant to this policy, is required to disclose information to the public, the Restaurant shall round numerical values as follows:

(a) For values above 50 calories, the disclosed value shall be rounded to the nearest value evenly divisible by 10 (e.g., 322 calories is rounded to 320, 435 calories is rounded to 440, etc);

(b) For values equal to or less than 50 calories, the disclosed value shall be rounded to the nearest value evenly divisible by 5 (e.g., 43 calories is rounded to 45, 21 calories is rounded to 20, etc.).

(13) Verifiable and Accurate Information Required. If requested by the Department of Health & Human Services, Chain Restaurants shall provide information and documentation of the reasonable basis or bases of calorie and nutrient content of Food Products.

(14) Disclaimers Permitted. Nothing in this policy prohibits the Restaurant from publishing truthful disclaimers, including on the Menus, Menu Boards, and Food Tags, notifying customers that there may be small variations in nutritional content across servings, due to differences in preparation, service sizes, ingredients, or custom orders.

(15). Additional Nutrition Labeling Permitted. Nothing in this policy precludes Restaurants from voluntarily providing additional nutrition labeling of Menu Items.

(16) Restaurant Exemptions. The following types of Restaurants are exempted from the requirements of this policy:

(a) A food facility that is not a full service facility licensed by Lane County Department of Health & Human Services. Examples include:

- (b) Public and private school cafeterias
- (c) Hospital cafeterias serving patients and staff only
- (d) Government operated food facilities
- (e) Private organization or association facilities
- (f) Facilities whose revenue exceeds 51% from retail sales
- (g) Movie theatres and other theatrical venues
- (h) Licensed, temporary food service points-of-sale

9.730 Enforcement.

The Director of the Lane County Department of Health & Human Services or his or her authorized designees are authorized to enforce the nutrition labeling requirements of this chapter.

(1) The Department of Health & Human Services shall maintain a system for receiving reports of failures to comply, providing educational materials and site visits, and issuing notices of failure to comply.

(2) The Department of Health & Human Services shall: 1) develop procedures to identify Chain Restaurant Status, 2) provide education and assistance to restaurants to help them comply with nutrition labeling requirements, and 3) receive, respond to, and investigate reports of failure to comply and take appropriate action to assure compliance.

(3) An Environmental Health Specialist who notes a possible failure to comply of these rules during a regular inspection of a full service chain restaurant licensed and inspected by the Department of Health & Human Services shall note a possible failure to comply of these rules and report the possible failure to comply to Department of Health & Human Services staff delegated to supervise compliance with these rules.

(4) Complaint Response. The Department of Health & Human Services shall respond to a report of failure to comply as follows:

(a) The Department of Health & Human Services shall determine status as a Chain Restaurant and if confirmed:

- (i) Provide the owner or operator with a notice of possible failure to comply,
- (ii) Provide the owner or operator with educational materials and other assistance to come into compliance with these rules,
- (iii) Gather information to make the determination if the Restaurant is in compliance with these rules. This may include but is not limited to conducting site visits, requesting additional information from the Restaurant, carrying out additional independent analyses of nutritional content of Menu Items, and obtaining consultation from nutrition professionals.

(b) **Finding of Failure to comply:** A failure to comply is deemed to have occurred if the Department of Health & Human Services finds that:

(i) Nutrition information required by this policy is not present or is not in the form required by Lane Code 9.720(1); or

(ii) The nutritional content of one or more Standard Menu Items as posted on a Menu, Menu Board, Food Tag or other authorized method of display deviates by more than twenty percent (20%) from what actual analysis or other reliable evidence shows to be the actual nutritional content.

(c) **Remediation Plan:** After a finding of a failure to comply, the Department of Health & Human Services representative and the Restaurant will jointly agree on the contents of a plan contemplated to bring the restaurant into compliance with these rules by a clearly identified date. The Restaurant will submit and initiate implementation of a remediation plan that remedies the failure to comply within 14 days of reaching agreement with the Department of Health & Human Services representative. A restaurant owner or operator may request in writing an extension of time in which to complete implementation of the remediation plan for good cause.

(d) **Follow-up Visit:** A Department of Health & Human Services representative shall make a follow-up visit within 14 days of the remediation plan completion date to confirm implementation.

(e) **Failure to Complete the Remediation Plan on Schedule.** If during the follow-up visit, the Department of Health & Human Services representative finds that the remediation plan has not been implemented, the representative shall document the finding and notify the Restaurant that a citation will be issued. The citation, including a civil fine, shall be personally delivered to the restaurant employer or agent or mailed to the business address by both first class mail certified mail, return receipt requested.

(5) **Civil Fine Schedule:**

(a) A fine of \$100 will be assessed for failure to submit a remediation plan that remedies the failure to comply within 14 days of reaching agreement with the Health Department of Health & Human Services representative.

(b) A fine of \$500 will be assessed for failure to fully implement the remediation plan within 60 days of the implementation date specified in the plan.

(c) Additional fines of \$250 will be assessed for each 30 day period that the remediation plan has not been fully implemented.

(6) **Phased-in Implementation:** The rules take effect on April 15, 2009. However, from April 15, 2009, through December 31, 2009, a Chain Restaurant shall not be deemed to be in failure to comply

(7) **Appeals Process:** A Chain Restaurant cited with a failure to comply may request and shall be provided an opportunity to challenge the citation, including an opportunity to refute any evidence against it.

(a) The owner or operator of a Restaurant receiving a notice of failure to comply or citation as provided in these rules may request a hearing by writing the Director of the Lane County Department of, Health & Human Services or designee within seven days of the date of notice.

(b) The Director or the Public Health Manager shall designate an hearings official who shall schedule and oversee the hearing and submit a recommended ruling to the Director within 20 days of the date of it conclusion. In the absence of the Director of Health & Human Services, the Public Health Manager has designated authority to make a final ruling. The Director or Public Health Manager's ruling shall be final.

(c) If the Director finds the failure to comply to exist, the ruling shall set a date for remedy of the failure to comply to be accomplished by the Chain Restaurant.

(d) If the Director determines that the failure to comply was issued in error, the ruling may order the Department of Health & Human Services representative to vacate any fines and take other necessary and appropriate actions to remedy the situation.

(8) If any provision of these rules or its application to any person or circumstance is held invalid, the remainder of these rules of the application to other persons or circumstances is not affected.