

Note: These minutes are not official until approved by the Health and Human Services Committee at a subsequent meeting. Please refer to the meeting minutes when these minutes are approved to obtain any changes to these minutes.

DeKalb County Government
Sycamore, Illinois

**Health & Human Services Committee Minutes
May 4, 2015**

The Health and Human Services Committee of the DeKalb County Board met on Monday, May 4, 2015 at 6:30 p.m. in the Administration Building's Conference Room East. Chairman Haji-Sheikh called the meeting to order and those Committee Members present were Ms. Askins, Ms. Little, Mr. Reid, and Mr. Whelan. At roll call five Members were present and one was absent. Mr. Porterfield arrived at 6:34 p.m. All Committee Members were then present.

Others present were Gary Hanson, Tom Zucker, Tammy Anderson, Greg Maurice, Jane Lux, and Chairman Mark Pietrowski.

APPROVAL OF THE MINUTES

It was moved by Ms. Askins, seconded by Mr. Whelan and it was carried unanimously to approve the minutes from April 6th and April 13th.

APPROVAL OF THE AGENDA

Chairman Haji-Sheikh noted that she would like to remove item #8 from the agenda, she had asked Ms. Christensen to present her Regional Office of Education Annual Report at a later time.

It was moved by Ms. Little, seconded by Ms. Askins, and it was carried unanimously to approve the agenda as amended.

PUBLIC HEARING: STATE OF ILLINOIS SECTION 5311 RURAL/DOWNSTATE OPERATING ASSISTANCE COMBINED APPLICATION

A Public Hearing was called to order at 6:35 p.m. to hear comments on DeKalb County's intent to submit to the State of Illinois a Section 5311 Rural/Downstate Operating Assistance Combined Application. Mr. Tom Zucker of the Voluntary Action Center presented himself and spoke in favor of the County submitting such an application. The assistance provided to the residents of DeKalb County through this operating grant has proven to be very beneficial and this service provided addresses a very real need in DeKalb County.

No other persons presented themselves for the Public Hearing and Chairman Haji-Sheikh closed the Hearing.

**RESOLUTION AUTHORIZING TO EXECUTE & FILE A SECTION 5311
DOWNSTATE OPERATING ASSISTANCE GRANT AGREEMENT**

Mr. Zucker presented information to the Committee concerning this application. This application, if approved, provides funding for the County's rural transportation services such as TransVac and MedVac. The County has been applying for these funds for the past twelve years and these funds are used for services outside the DeKalb/Sycamore/Cortland area. When funds are approved they are passed through the County to the Voluntary Action Center along with all responsibilities and liability. This assistance program combines Federal and State Funds. Funding limits have not increased in several years for the Federal Funds to be allocated and they would remain at \$372,475.00. The State Funds have not been set yet due to the uncertainty of the Governor's proposed budget. Federal Funds are required to be utilized first and then the State Funds. The Federal Grant requires a 50% local match for operations and a 20% local match for administration. The State Grant requires a 35% local match and the State Grant is used as the local match for the Federal Grant.

It was moved by Mr. Whelan, seconded by Mr. Porterfield and it was moved unanimously by voice vote to forward the resolution to the full County Board recommending approval.

**RESOLUTION FOR THE ACCEPTANCE OF A SPECIAL WARRANTY AS A
CONDITION TO RECEIVE SECTION 5311 FUNDS**

Mr. Zucker explained that when the County applies for Financial Assistance it must also agree to certain conditions. These conditions mainly deal with ensuring that the County would not be in competition with any private transportation service and that union employees of those companies would not be adversely affected by the awarding of the financial assistance. Mr. Zucker informed the Committee there are no other unionized transportation services operating in DeKalb County and therefore has no problems meeting and complying with the Special Warranty.

It was moved by Ms. Askins, seconded by Mr. Whelan and it was moved unanimously by voice vote to forward the resolution to the full County Board recommending approval.

**RESOLUTION AUTHORIZING SUBMITTAL OF THE APPLICATION FOR A
PUBLIC TRANSPORTATION CAPITAL ASSISTANCE GRANT**

Mr. Zucker explained to the Committee that they have outgrown their transportation facility for some time now and they have been working towards building a new facility on land that the County has provided. Mr. Zucker continued that the resolution before the Committee is to authorize submittal of an application dated May 20, 2015 for a Public Transportation Capital Assistance Grant in order to apply for funds that are available to offset eligible capital costs required for providing and improving public transportation facilities, rolling stock, equipment and services.

It was moved by Mr. Porterfield, seconded by Mr. Whelan and it was moved unanimously by a voice vote to forward the resolution to the full County Board recommending its approval.

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VETERAN'S ASSISTANCE COMMISSION – TAMMY ANDERSON

Chairman Haji-Sheikh shared with the Committee that she received a letter from Ms. Anderson outlining what had been happening with the Veterans Assistance Commission Office and the Chairman wanted Ms. Anderson to come and share her great report with the whole Committee.

Ms. Tammy Anderson, Superintendent of the DeKalb County Veterans Assistance Commission (VAC) Office introduced herself to the Committee and shared that the VAC provides assistance with claims to the Veterans Administration for such benefits as Service Connected compensation, GI Home Loans, Education, Pension, Health Care or for any other benefits that the veteran or his/her family may be seeking from the United States Department of Veterans Affairs. They also refer veterans to local, state, and federal agencies for entitlements which they are eligible for such as Employment, Public Aid, Food Stamps, Social Security, Hospitalization and Counseling. The VAC also helps to provide, if needed, payment toward the bare necessities of life such as shelter, utilities, and food.

Ms. Anderson provided information for the type of Veterans that they are currently seeing mostly of as well as other statistical information pertaining to Veterans in DeKalb County. She continued that the Veteran Assistance Commission are excited to report beneficial services provided to over 2,700 Veterans and/or Veteran families, who have sought information or assistance from the office.

They've processed 209 application for VA Disability, 103 applications for VA Pension, 169 Applications for VA Healthcare and 74 applications for VA Education benefits. They have also processed over 371 claims for benefits such as: Burial, Death Insurance, Headstones, VA Waivers of Debt, VA Audits, etc.

Due to the amount of claims filed with the VA, the time frame of a claim from start to finish has been taking approximately 8-10 months. Of the 312 claims VAC filed last year, 87 have been adjudicated. Ms. Anderson was extremely proud to report that these 87 claims have brought retroactive compensation of \$1,017,342.61 and continuing monthly payments of \$109,224.20 to DeKalb County Veterans. These numbers are only for the calendar year 2014. In 2015, they will start from scratch again and hope they can be as productive as last year. She was even prouder to report that this is the VAC's second year in a row where their Retroactive Pay was over \$1,000,000.00.

They also work with those who have little or no means to care for themselves. They have paid 771 claims for direct financial assistance totaling \$169,008.52 via vouchers to vendors. This includes payments for shelter, utilities, education, food and transportation.

Volunteer drivers are utilized to transport DeKalb County Veterans to and from VA Medical Centers, such as Hines VAMC & Capt James A. Lovell Federal Health Care Center in Illinois, Madison VAMC & Milwaukee VAMC in Wisconsin. Their 8 volunteer drivers completed 245 trips totaling 43,303 miles transporting 315 Veterans with a total of 1,225 hours of time donated.

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VAC has also enrolled 169 Veterans in the VA Healthcare System this last year. These Veterans are eligible for minimal or free medical care and drug prescriptions. This enables county Veterans to have more disposable income to spend in DeKalb County.

Lastly, Ms. Anderson shared that she believes the 10th year of DeKalb County's Veterans Assistance Commission has provided great benefits for the county and our county Veterans. They believe they will play an even greater role in the coming year, as they continue to expand and reach out to a far greater number of Veterans.

Chairman Haji-Sheikh noted that she could not wait to praise the Veterans Assistance Commission for the work that they do and the rest of the Committee joined in and thanked Ms. Anderson for meeting with them and commended her and her staff for the great work they are doing within DeKalb County for our Veterans.

HOME KITCHEN ACT

Ms. Jane Lux and Mr. Greg Maurice from the County's Health Department joined the Committee to review information regarding the Home Kitchen Act, informally known as the Illinois "Cupcake Law". She passed out an Analysis of the legislation by Sorling Northrup Attorneys for the Illinois Public Health Association (including a draft model Ordinance), Illinois Public Health Association fact sheet (Cottage Food and Home Kitchen legislation) regarding HB 99-2486 (the bill has been assigned to the Senate Public Health Committee), and "Cottage food vs. home kitchen," a summary sheet we provided for the Board of Health to illustrate inconsistencies between the Home Kitchen and Cottage Food sections of the Food Handling Regulation Enforcement Act.

Ms. Lux shared that the Board of Health has discussed the Home Kitchen Operation Legislation and the reason that they did not bring this issue forward sooner was because they still had many concerns and were hoping with the changes that are being proposed legislatively will be addressed.

The Committee continued to review the documents presented to them but decided that they would take no other action on this item until they knew more about the proposed legislative changes that are going through the Senate right now.

FEES & REGULATIONS PERTAINING TO TORNADO RELIEF

The Chairman shortly reviewed the updated status of Fairdale after the April 9th tornado. The Committee assessed any fees that have that they may waive in order to help aid in the recovery and reconstruction process for the residents that feel victim to damage from the tornado.

The Committee determined that as part of the short and long-term recovery from the tornado, property owners must apply for and be granted Septic and Well Permits in the event reconstruction, repair, or new systems are needed; dogs that were displaced as a result of structural damage had to be picked up by Animal Control wardens; residents needed water sample testing to confirm safety of drinking water after structural damage to wells; temporary food establishments to address feeding needs of residents and volunteers working on emergency

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response efforts were inspected for food safety; and residents and volunteers conducting clean-up were in need of tetanus shots for protections against disease, and all of these services require the payment of fees set forth by the Board of Health and in the DeKalb County Code are set to be waived by the County Health Department.

It was moved by Ms. Askins, seconded by Mr. Porterfield to forward a resolution to the full County Board recommending waiving fees from the County Health Department for short and long-term tornado recovery. The motion was passed unanimously by voice vote.

PUBLIC COMMENTS

There were no public comments made.

CHAIRMAN'S COMMENTS

Chairman Haji-Sheikh shared the following community updates with the Committee:

She shared that tomorrow, May 5, 2015, is Give Local DeKalb County. Give Local DeKalb County is a national event with local impact. It's about bringing as many people as possible together around the spirit of giving. It's also about raising awareness about the amazing work of our local nonprofits.

The Chairman along with Ms. Askins shared information regarding Safe Passage's Annual "Take Back the Night" event. The event was held Tuesday, April 28th and the group walked downtown DeKalb to help bring awareness to sexual violence. Ms. Askins said they had a great turnout and the event was very successful.

Lastly, Chairman Haji-Sheikh shared about an event that was put on by Tails that brings animals to Opportunity House for stress release/management.

ADJOURNMENT

It was moved by Mr. Porterfield, seconded by Ms. Little, and it was carried unanimously to adjourn the meeting.

Respectfully submitted,



Misty Haji-Sheikh, Chairman



Tasha Stogsdill, Recording Secretary

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**SORLING
NORTHRUP**
ATTORNEYS

Reply To:
**1 North Old State Capitol
Plaza, Suite 200
P.O. Box 5131
Springfield, IL 62705**
**P: 217-544-1144
F: 217-522-3173**

www.sorlinglaw.com

MEMORANDUM

TO: BRITTAN BOLIN
FROM: LISA HARMS HARTZLER
DATE: OCTOBER 1, 2014
SUBJECT: ILLINOIS HOME KITCHEN OPERATION STATUTE

Lisa Harms Hartzler
Attorney
lhhartzler@sorlinglaw.com

Public Act 98-643 became effective on June 10, 2014. Known informally as the Illinois “Cupcake Law,” the Home Kitchen Operation statute was passed in reaction to the shuttering of a young girl’s in-home cupcake business by the Madison County Health Department for failure to have a certified kitchen. The Illinois Public Health Association has asked for an analysis of the law and a draft model ordinance for local governments.

The Home Kitchen Operation statute amended the Food Handling Regulation Enforcement Act (the “Food Handling Act”), codified at 410 ILCS 625/0.01 *et seq.* by adding a new Section 3.4—Home Kitchen Operation. Although brevity is frequently a positive characteristic for legislation, what this amendment omits or fails to address raises a number of questions that have no easy answers and may create enforcement issues for health departments. The issues this statute raises are so numerous that not all can be addressed, even though this memorandum is lengthy.

This memorandum will first set forth the Home Kitchen Operation statute and briefly summarize the Food Handling Act. It will then analyze some of the various issues the Home Kitchen Operation amendment raises, including its definitions, notice requirements, inspection problems, and the lack of enforcement authorization. Answers to questions forwarded to us from local health departments are incorporated where possible. The memo will conclude with a draft model ordinance for local governing bodies.

I. The Home Kitchen Operations Law

The Home Kitchen Operation statute is short:

Sec. 3.4. Home kitchen operation.

(a) For the purpose of this Section, “home kitchen operation” means a person who produces or packages non-potentially hazardous food in a kitchen of that person’s

primary domestic residence for direct sale by the owner or a family member, or for sale by a religious, charitable, or nonprofit organization, stored in the residence where the food is made. The following conditions must be met in order to qualify as a home kitchen operation:

- (1) Monthly gross sales do not exceed \$1,000.
 - (2) The food is not a potentially hazardous baked food, as defined in Section 4 of this Act.
 - (3) A notice is provided to the purchaser that the product was produced in a home kitchen.
- (b) The Department of Public Health or the health department of a unit of local government may inspect a home kitchen operation in the event of a complaint or disease outbreak.
- (c) This Section applies only to a home kitchen operation located in a municipality, township, or county where the local governing body has adopted an ordinance authorizing the direct sale of baked goods as described in Section 4 of this Act.

The fundamental rule of statutory construction is to ascertain and give effect to the intent of the Legislature. The best indicator of the Legislature's intent is the language in the statute, which must be accorded its plain and ordinary meaning. Where the language in the statute is clear and unambiguous, this court will apply the statute as written without resort to extrinsic aids of statutory construction. *Landis v. Marc Realty, L.L.C.*, 235 Ill.2d 1, 6-7 (2009). When construing a statute, a court will always try to harmonize conflicting sections and to give effect to every clause. *See Oak Park Federal Savings and Loan Association v. Village of Oak Park*, 54 Ill.2d 200, 203 (1973). In this case, interpreting the Home Kitchen Operations amendment, even when applying the rules of statutory construction, is a challenge.

II. Food Handling Regulation Enforcement Act

A. In general

In general, the Food Handling Act requires all business establishments to comply with safe food handling procedures. Sections 3.1 (potluck dinners) and 4 (cottage food operations) carve out exceptions to the general rule that the Department of Public Health and local health departments may regulate the handling of food for public consumption. Persons preparing and selling food to the public, therefore, must comply with the Food Handling Act unless they qualify for one of the exceptions.

B. Cottage Food Operations

Section 4 of the Food Handling Act is most relevant and important to interpreting the Home Kitchens Operations amendment. It is worth summarizing here not only because it is referred to twice in the new amendment, but also because it demonstrates what could have been included in the Home Kitchen Operations amendment and was left out. Section 4 governs “cottage food operations.” The section defines a cottage food operation in a way that is nearly identical to the Home Kitchen Operations definition, but without any reference to sales by religious, charitable or nonprofit organizations. Section 4 also defines “potentially hazardous food” as “a food that is potentially hazardous according to the Department’s administrative rules. Potentially hazardous food (PHF) in general means a food that requires time and temperature control for safety (TCS) to limit pathogenic microorganism growth or toxin formation.”

Notably, Section 4(b) *prohibits* the Departments of Public Health and Agriculture and local health departments from regulating the service of food by a cottage food operation as long as it is “not a potentially hazardous baked good, jam, jelly, preserve, fruit butter, dry herb or blend, or dry tea blend” that is intended for end-use only. Baked goods include, but are not limited to breads, cookies, cakes, pies and pastries. Pies must use only high-acid fruit and cannot include potentially hazardous fillings or toppings like pumpkin, sweet potato, cheesecake, custard and crèmes. The food must be sold at a farmers market for no more than \$25,000 in a calendar year.

Section 4(b) also requires food packaging to conform to labeling requirements in the Illinois Food, Drug and Cosmetic Act, contain the name and address of the cottage food operation, the common name of the product, all ingredients, the date the product was processed, allergen labeling as specified in federal labeling requirements, and the following phrase: “*This product was produced in a home kitchen not subject to public health inspection that may also process common food allergens.*” This statement must be prominently displayed at the point of sale.

Section 4(b) requires the person preparing the product to be registered with the local health department and have a Department of Public Health approved Food Service Sanitation Management Certificate. Section 4 grants the State and local health departments the power to require the cessation of sales upon receipt of a consumer complaint or when there is reason to believe that an imminent health hazard exists or that a product has been found to be misbranded, adulterated, or not in compliance with Section 4. This section also gives State-certified local health departments the authority to regulate the service of food by cottage food operations, including requiring annual registration for a \$25 fee; requiring the cottage food operation to agree to grant access to the local health department for inspection purposes; and to make those inspections upon consumer complaint or the outbreak of a food borne illness.

III. Issues Raised by the Home Kitchens Operations Law

The Home Kitchens Operations amendment, in its brevity, creates some ambiguities and raises a number of issues with regard to how it should be interpreted and enforced.

A. Section 3.4 does not by itself create an exception to the Food Handling Act

First and foremost, the Home Kitchens Operation statute does not, by itself, create an exception to the requirements of the Food Handling Act similar to the exceptions created for potluck events and cottage food operations. Those exceptions both explicitly state that neither the State nor a local health department may regulate those activities as long as certain conditions are met. The Home Kitchens Operations section does not contain that prohibition. It does not explicitly prohibit the State or any local governments from regulating home kitchen sales if the home kitchen operation meets the statutory definition. It simply defines a home kitchen operation, requires certain conditions to qualify as a home kitchen, authorizes inspections, and then *limits the application of the section to home kitchen operations located within local governing units that have authorized the direct sale of baked goods.*

The inescapable conclusion is that the statute has no effect and is not applicable to any person or operation *unless* a local government passes an ordinance. Thus, home kitchen operations may continue to be regulated fully under other sections of the Food Handling Act until a local government chooses to authorize them. Local governments that want to prohibit home kitchen operations should not pass an ordinance authorizing them. Local health departments may then continue to regulate food preparation in accordance with the rest of the Food Handling Act. A local government that does want to authorize home kitchen operations may pass an ordinance authorizing them; however, the question then becomes what that ordinance may require beyond what the face of the Home Kitchen Operations amendment states.

1. Ordinance adopted by a home rule unit

Home rule municipalities and counties have all of the powers of the State except as they are limited by the Legislature under Section 6 of Article VII of the Illinois Constitution. A court may preempt a home rule unit's ordinances if they do not pertain to its own government and affairs or the Legislature has explicitly limited home rule powers under Sections 6(g) or (h) of the Constitution. The Food Handling Act contains two explicit limitations on home rule powers. Sections 3.05(d) and 3.06(h) state that the regulation of food handling training is an exclusive function of the State and local regulation is prohibited and is an explicit denial and limitation of home rule powers and functions under subsection 6(h) of Article VII of the Illinois Constitution. Section 3.3, establishing a Farmers' Market Task Force to facilitate the uniform statewide implementation of standards established by the Department of Public Health, does prohibit "local public health departments and all other units of local government" from creating sanitation guidelines, rules, or regulations for farmers' markets that are more stringent than those adopted by the Department of Public Health; however, that prohibition is not accompanied by a specific reference to a denial of home rule powers under the Constitution. None of the other sections of the Food Handling Act, including the Home Kitchens Operations amendment, contains any explicit home rule limitations.

Consequently, in order to prohibit a home rule unit from regulating home kitchen operations as it sees fit and without regard to the amendment, a court construing the Home Kitchens Operations

amendment would have to find that regulating those activities did not pertain to a home rule unit's government and affairs. The statute itself belies this interpretation because it allows local governments to decide whether or not to authorize home kitchens. Consequently, it appears that a home rule unit would not be limited, except as to food handler training, in the types of restrictions or requirements it may impose on home kitchen operations, and could even be contradictory to State law.

2. Ordinance adopted by a non-home rule unit

A non-home rule unit has only those powers explicitly granted by the Legislature and those powers necessary to implement powers explicitly granted. Municipalities and counties have the authority to impose health regulations on operations providing food to the public. The Illinois Municipal Code gives all municipalities the authority to regulate the sale of all beverages and food for human consumption, including the places where and the manner in which food is sold, to provide for and regulate the inspection of all food for human consumption, and to do all acts and make all regulations that may be necessary or expedient for the promotion of health. 65 ILCS 5/11-20-2, 11-20-3, and 11-20-5. A municipality may also provide for a board of health and prescribe its powers and duties. 65 ICLS 5/11-16-1. Similarly, counties are authorized to establish health departments, which may initiate and carry out programs and activities of all kinds and not inconsistent with law that may be deemed necessary or desirable in the promotion and protection of health and in the control of disease. 55 ILCS 5/5-25001 and 5-25013. Such authority includes promulgating necessary regulations and making inspections of public food-service operations. *Macon County v. Board of Education of Decatur School District No. 61*, 165 Ill.App.3d 1, 5 (4th Dist. 1987).

Unlike a home rule unit, a non-home rule unit may not adopt an ordinance that is inconsistent with or contrary to a State statute. Thus, while non-home rule units have plenty of authority to regulate and inspect food produced for public consumption, the effect of the Home Kitchen Operation amendment to the Food Handling Act appears to place some limits on that authority, should a non-home rule government decide to authorize home kitchen operations.

In *Kavanagh v. County of Will*, 293 Ill.App.3d 880 (3d Dist. 1997), the State Legislature authorized local governing bodies to adopt an ordinance regulating lobbying activities that impose requirements similar to those imposed by the State Lobbyist Registration Act. The court held that by using the word "similar," that statute permitted local governments to enact legislation that was not identical, but it could not differ in substance or in essential elements. The local ordinance being challenged added disclosure requirements that were substantially more intrusive than those in the statute and some were in direct conflict with the statute. The court concluded that the additional mandates were not minor modifications or details added to suit local circumstances and procedural variations. They were, therefore, *ultra vires* and void.

Consequently, any ordinance regarding home kitchen operations that is adopted by a non-home rule municipality or county must be consistent with, and not contrary to, the Home Kitchens Operations amendment to the Food Handling Act. If the amendment is construed as a limitation

on the power of a local government, then a non-home rule unit that authorizes home kitchen operations will indeed be restricted in how far beyond the amendment's minimal requirements it can go in adding requirements or conditions not included in the State statute.

3. Problems for a model ordinance

The different authorities of home rule and non-home rule units may create difficulties in drafting a model ordinance satisfying both types of local governments. By necessity, a single model ordinance will have to meet the requirements of the most restrictive unit. The draft model ordinance attached generally tracks the Home Kitchen Operations amendment. It changes some wording and it adds some details with regard to inspections and enforcement (as discussed below) in an attempt to add some clarity.

B. Who is a home kitchen operator

The Home Kitchens Operations amendment begins with an unusual definition, calling a home kitchen operation a "person" as opposed to a type of operation. The amendment applies to individuals producing non-potentially hazardous food in their own home kitchens. That food must be sold directly to the consumer. In addition to allowing the Madison County girl to continue to bake and sell her cupcakes, the new law allows such food to be sold through a religious, charitable, or nonprofit organization. According to one article reporting on the law, Representative Charlie Meier, the sponsor of the bill that became the Food Handling Act, noted that "many churches and other charitable organizations have dinners as fundraisers, where individual members of the organization each bring baked items. For example, he said, a church might sell chicken dinners, with each dinner including a slice of home-baked pie or cake. Meier said he's OK with the church's kitchen having to meet health regulations, but it's going too far to impose health regulations on every home kitchen where a pie is baked." B. Brueggemann, "Revised 'cupcake' bill passes Illinois House, *News-Democrat*, April 10, 2014 (found on www.bnd.com on 8-22-14).

The Home Kitchens Operations amendment is, consequently, designed to reach individuals selling relatively small amounts of their baked goods directly to the public and to traditional bake sales and fundraisers conducted by churches, schools and other not-for-profit organizations throughout the state. Thus, activities that take on the appearance of a retail business will not be in compliance with the law. For example, three women who each bake goods in their own homes but sell them from one woman's home would not meet the definition of a home kitchen operation. They are not individually baking and selling their own goods; they would appear to be running a joint bakery business.

In addition, the statute requires inclusion of gross sales in the calculation of the \$1,000 limit on monthly proceeds. No deductions for expenses for ingredients, supplies, or utility costs can be considered, nor is the use of the income relevant. Charitable donations of proceeds may be reported on a person's income tax forms but do not reduce the monthly limit.

C. What food is allowed

1. Baked goods only

The definition of home kitchen operation refers to production or packaging of “non-potentially hazardous food” without any qualification that the food be a baked food. As defined in Section 4 of the Food Handling Act, a “non-potentially hazardous food” is any food that does not require time and temperature control for safety. Consequently, the definition of a home kitchen operation introduces some ambiguity as to whether the statute only applies to baked goods or as more broadly defined and permitted under Section 4 to include jams, fruit butters and herbs.

There are three reasons why the Home Kitchens Operations amendment would probably be interpreted as applying only to baked goods. First, Subsection 3.4(c) provides that the law is not effective unless a local government has adopted an ordinance authorizing the direct sale of *baked* goods as described in Section 4” (emphasis added). Second, Subsection 3.4(a)(2) requires that the food be “not a potentially hazardous *baked* food” (emphasis added). This condition is less than eloquent, but supports the conclusion that the Legislature intended the Section to apply only to baked goods. Third, paragraph (b) of Section 4 specifically exempts from regulation baked goods sold at farmers’ markets if conditions are met with regard to the type of fruits used, gross proceeds, packaging and labeling (described above in Part I). Although jams, jellies, preserves, fruit butters, dry herbs or blends, or dry tea blends are also exempted in Section 4, paragraph (b), taken as a whole, a reasonable interpretation of the Cupcake Law would be that it applies only to the baked goods that are specifically exempted in paragraph (b) of Section 4. Further, they must be baked fully so that no time and temperature considerations come into play.

2. Other foods and storage

Candy does not appear to be considered a baked good (and, further, is not a permitted food in a cottage food operation). There are no restrictions in the statute on storing baked goods in the owner’s own freezer as long as it is in the home kitchen operator’s residence.

D. Where sales are allowed

Section 3.4 offers little guidance on where sales may be made. There are no explicit restrictions on the location of sales in the statute. Sales must be “direct” but whether that means customers must travel to the home kitchen operator’s residence or whether goods may be delivered (in person or by mail) is not clear. The only clue as to where sales must take place is in the requirement that baked goods must be stored in the owner’s residence. Consequently, taking baked goods to another location where they would sit on a shelf, a counter or anywhere other than the operator’s residence, waiting to be sold, could be considered storing them in a location that is not the owner’s home. Thus, goods may not be taken to a retail store that otherwise sells commercially prepared food, a restaurant, or any other type of food establishment where they would be offered for sale to the general public, including a farmers’ market. As an example, an

owner of a bridal shop who bakes wedding cakes (and who might qualify as a home kitchen operation) may not sell cake samples at her shop because the samples would be “stored” at the shop, not her residence. On the other hand, a home kitchen operator who delivers baked goods directly to a buyer who has ordered or agreed to buy them may be authorized, although “storing” the baked goods in a car veers into a gray area. A home kitchen operator would not be able to pack the vehicle with baked goods and sell to all takers in a public place, but making direct deliveries of orders does not seem unreasonable.

The problem with this reasoning, of course, is that Section 3.4 does allow religious, charitable or non-profit organizations to accept and sell baked goods prepared at home. The goods are obviously “stored” somewhere other than the home kitchen operator’s residence while waiting to be sold to the public as part of the organization’s fund raiser. This inconsistency points up the inadequacies of the statute and may simply have to be reconciled as a commingling of two different concepts in one statute: an exception under the Food Handling Act for small home businesses and an exception for the traditional fund raiser/bake sale.

E. What notice is required

Section 3.4(a)(3) requires only that a notice be provided to the purchaser that the product was produced in a home kitchen. It omits the many other notice requirements placed on cottage food operations, such as the name and address of the producer, ingredients and allergens, and the date the food was produced. The limited notice requirement in the statute may raise questions as to whether a non-home rule local government may impose stricter labeling standards. The draft model ordinance does not add any additional statements to the notice.

F. Inspections

Section 3.4(b) gives the Department of Public Health or the local health department authority to inspect a home kitchen operation only in the event of a complaint or disease outbreak. Thus, home kitchens cannot be subject to regular inspections. Indeed, a regular inspection program would be impossible to carry out if home kitchens are not registered or licensed. Unlike Section 4’s exemption of cottage food operations, available only if the operation is registered with a local health department, Section 3.4 neither requires nor prohibits registration or licensure. To make sense of 3.4(b), one must assume that the Legislature intended that regular inspections would not be conducted and that inspections, at least for non-home rule units, are authorized only after a complaint has been lodged or an outbreak of disease.

Under the Fourth Amendment to the United States Constitution, an individual has a right to be protected from unreasonable searches and seizures both in the home and in a commercial establishment. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). Generally, a search is unreasonable if it is conducted without consent or a warrant. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. *Camara*, 387 U.S. at 539. If a valid public interest justifies the intrusion, then there is probable cause to

issue a suitably restricted search warrant. *Id.* Thus, a warrant is generally required; there are exceptions, of course, for emergency situations, or where a person is engaged in a heavily regulated industry and has impliedly consented to impromptu inspections by virtue of securing a license to participate in that industry. *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless search of gun dealer's locked storeroom during business hours as part of inspection procedure authorized by Gun Control Act did not violate Constitution); *Marcowitz v. Department of Public Health*, 106 Ill.App.3d 422, 427-28 (1st District 1982) (plaintiff's pursuit and receipt of surgery center license under state statute was acceptance of rules and regulations attached to license, including inspections at reasonable times).

In this case, a heavily regulated industry—food service to the public—is combined with an activity carried out in one's home—a generally private place that cannot be inspected without consent or a warrant—but that is not registered or licensed. Although courts have acknowledged that most people gladly consent to inspections that are carried out for a public health or welfare purpose, not all are willing. Consequently, even though the statute authorizes certain inspections, any local government that authorizes home kitchen operations should be prepared to obtain an administrative search warrant to inspect a home kitchen. Particularly in following up on a complaint, local health departments should be careful that there is adequate probable cause for the inspection. Only in extreme emergencies would a non-consensual, warrantless search of a person's home be considered reasonable. The draft model ordinance attached anticipates voluntary compliance with a request to inspect a home kitchen operation and authorizes a local health department to obtain an administrative search warrant if necessary.

G. Enforcement

1. Verification of income

Section 3.4 provides no mechanism for verification of income. Without any registration or licensing requirement, as there is for cottage food operations, a local government or health department has no ability to determine whether a home kitchen operation is exceeding the \$1,000 income limit per month. Inspections would appear to apply only to health safety issues in food production, not an inspection of receipts or bank accounts. There really is no way to address this problem under the statute as it is.

2. Cessation orders

Unlike other sections of the Food Handling Act, Section 3.4 does not explicitly give a local health department the authority to order cessation of a home kitchen operation. Even non-home rule units, however, have all powers necessary to carry out the authority granted to them by the Legislature. The power to inspect and do all things necessary for the protection of public health should include the ability to shut down a home kitchen operation that has caused, or is alleged to have caused, a health hazard. It would not be inconsistent with the Food Handling Act as a whole to provide for this type of enforcement in State or local regulations. Nevertheless, since the Home Kitchen Operations amendment does not explicitly authorize this type of enforcement,

it is conceivable that a court might interpret that absence of authority in this section, while explicitly granting it in other sections, to mean that the Legislature did not intend to bestow such authority. As a result, the draft model ordinance attached anticipates voluntary compliance but also authorizes a local health department to seek a court order for cessation of home kitchen operations.

IV. Conclusion

The Home Kitchen Operations amendment to the Food Handling Act raises a number of concerns for implementation and enforcement. Because the amendment is not effective unless a local government enacts an ordinance authorizing home kitchen operations, a non-home rule unit would retain broader powers under existing statutes and regulations if it did not enact such an ordinance. If it does, however, it should be aware that some aspects of any local ordinance might be subject to challenge, although an ordinance that is substantially consistent with the amendment and the Food Handling Act in general may pass judicial scrutiny. Home rule units do not appear to be limited in an ability to regulate home kitchen operations. This inequality in authority may make drafting single model ordinance for both types of local governments unworkable. Nevertheless, the attached draft of home kitchen operations ordinance attempts that task.

LHH:dw

Attachment

ORDINANCE
AUTHORIZING AND REGULATING
HOME KITCHEN OPERATIONS

WHEREAS, _____ is a [municipality, township, county] with the authority and power to do all acts necessary to protect the public health and welfare; and

WHEREAS, the preparation and sale of food for public consumption is an activity that greatly affects the public health and welfare; and

WHEREAS, home kitchen operations that prepare and package non-potentially hazardous baked goods on a small scale have been determined by the Illinois State Legislature to need less regulation than larger-scale operations; and

WHEREAS, the Illinois State Legislature has enacted Section 3.4 of the Illinois Food Handling Regulations Enforcement Act (410 ILCS 625/0.01 *et seq.*) to govern home kitchen operations but has provided that such Section 3.4 is applicable only in a municipality, township, or county where the local governing body has adopted an ordinance authorizing direct sales of baked goods by home kitchen operations; and

WHEREAS, this governing body has determined that authorizing such home kitchen operations is in the best interests of the citizens of the community; and

WHEREAS, this governing body has determined that the _____ Health Department shall be delegated the responsibility and authority to enforce the provisions of this ordinance;

NOW, THEREFORE, BE IT ORDAINED:

SECTION 1. This ordinance shall be called the Home Kitchen Operations Authorization Ordinance. The recitals set forth above are hereby incorporated into and made a part of this Ordinance as though set forth in this Section.

SECTION 2. Section ___ of the Code of Ordinances is hereby amended to add the following:

Section __. Definitions.

- 1) "Home kitchen operation" means an operation conducted by a person who produces or packages non-potentially hazardous baked goods in a kitchen of that person's primary domestic residence for direct sale by the owner or a family member, or for sale by a religious, charitable, or nonprofit organization, stored in the residence where the baked goods are made.
- 2) "Non-potentially hazardous baked goods" mean breads, cookies, cakes, pies and pastries that are not potentially hazardous food and which, if included, contain only high-acid fruit as described in Section 4(b)(1)(C) of the Illinois Food Handling Regulations Enforcement Act; pumpkin pie, sweet potato pie, cheesecake, custard pies, crème pies, and pastries with potentially hazardous fillings or toppings are prohibited.

- 3) “Potentially hazardous food” means food that is potentially hazardous according to the Illinois Department of Public Health’s administrative rules issued under the Illinois Food Handling Regulations Enforcement Act. Potentially hazardous food (PHF) in general means a food that requires time and temperature control for safety (TCS) to limit pathogenic microorganism growth or toxin formation.

Section __. Conditions for qualifying as a home kitchen operation. In order to be a qualified home kitchen operation, the following conditions must be met:

- a) Monthly gross sales may not exceed \$1,000.
- b) Only non-potentially hazardous baked goods may be sold.
- c) A notice is provided to the purchaser that the product was produced in a home kitchen.

Section __. Notice. When non-potentially hazardous baked goods produced by a home kitchen operation are sold directly to the public for off-premises consumption, the notice provided to the purchaser shall be affixed to the package containing the baked goods. When such goods are sold to the public as part of a meal provided by a religious, charitable, or nonprofit organization, notice may be given on a placard placed at the point of sale.

Section __. Inspections. Upon receipt of a complaint involving products produced in a home kitchen operation or upon the outbreak of a disease that may be connected to a home kitchen operation, the _____ Health Department shall have authority to inspect the home kitchen operation involved. The Health Department Director or designee shall request consent to inspect a home kitchen operation during daytime hours. In the absence of consent, the Health Department Director or designee shall obtain an administrative search warrant to inspect a home kitchen.

Section __. Cessation of Operations. In the event of a disease outbreak reasonably connected to a home kitchen operation, the Health Department Director or designee shall request the home kitchen operation, or a religious, charitable, or nonprofit organization, as applicable, to cease food sales to the public until the Health Department has determined that operations may continue. In the absence of voluntary compliance, the Health Department Director or designee may seek a court order for cessation of a home kitchen operation or food sales by a religious, charitable, or nonprofit organization.

SECTION 3. All other parts of the Code of Ordinances as amended, except as modified herein, are hereby reaffirmed and ratified and are in full force and effect.

SECTION 4. This ordinance shall become effective upon its passage and publication as required by law.



Illinois Public Health Association

223 South Third Street, Springfield, IL 62701-1144

Phone: 217-522-5687 FAX: 217-522-5689 E-mail: ipha@ipha.com Web Site: www.ipha.com

Legislative Action Day HB 2486 (Cottage Food Act)

IPHA Supports HB 2486

Background

House Bill 2486 (HB2486) is making several changes to three sections of the Food Handling Regulation Enforcement Act (FHREA).

Section 3.3 of FHREA pertains to Farmers' Markets, which the law defines as "a common facility or area where the primary purpose is for farmers to gather to sell a variety of fresh fruits and vegetables and other locally produced farm and food products directly to consumers."

HB 2486 makes technical changes to the Act. Amendments passed last year resulted in the Act having two sections labeled, "3.4."

Section 3.6 of FHREA pertains to Home Kitchen Operations, which the law defines as "a person who produces or packages non-potentially hazardous food in a kitchen of that person's primary domestic residence for direct sale by the owner or a family member."

HB2486 makes several changes to the operation of Home Kitchens:

- 1) The definition would change from "non-potentially hazardous food" to "non-potentially hazardous baked goods," a much narrower line of products;
- 2) Foods prepared or packaged for sale by a religious, charitable, or non-profit organization for fund-raising purposes would be exempted from the Act;
- 3) The list of conditions that a home kitchen must meet is changed from "the food is not a potentially hazardous baked food" (of which there are many) to "the food is a non-potentially hazardous baked good" (of which there are many fewer);
- 4) Labeling requirements, including the common name and any allergens (e.g., peanuts);
- 5) The food must be sold directly to the consumer; and
- 6) The food must be stored in the residence where it is produced or packaged.

HB2486 also clarifies the role of local government in regulating the operation of a home kitchen.

Section 4 of FHREA pertains to Cottage Food Operations (CFO), which the law defines as "an operation conducted by a person who produces or packages non-potentially hazardous food in a kitchen located in that person's primary domestic residence or another appropriately designed an equipped residential or commercial-style kitchen on that property for direct sale by the owner or a family member ..."

For additional information, contact:

Ralph Schubert
Director of Public Policy
(217) 522-5687

Brittan Bolin
Lobbyist
(217) 899-8555

HB2486 makes several changes to Cottage Food operations:

- 1) The definition is changed to allow employees of the CFO to sell the food produced there;
- 2) A type of community-supported agricultural arrangement is allowed. Presently, food produced in a CFO can only be sold in a farmers' market. HB2486 would allow "foods that have a locally-grown agricultural product as the main ingredient" to be sold "on the farm where the agricultural product is grown or delivered directly to the consumer." The bill also adds a definition of "main ingredient."
- 3) The Illinois Department of Public Health is given the authority to add foods to the lists of foods that may be produced in a CFO.
- 4) The amount of money that a CFO can earn in a year is increased from \$25,000 to \$36,000.
- 5) The person who prepares or packages the food in a CFO is required to hold a Food Service Sanitation Management Certificate (FSSMC). Presently, the law requires the person who produces and sells the food to have an FSSMC.

House Amendment 2, which was adopted in committee, alters the labeling requirement to allow a "written notice ... provided to the purchaser" as an alternative to a label affixed to the package.

Reasons to Support This Bill

- 1) The bill makes important corrections to the Home Kitchen Operations section of the Act:
 - a) It correctly states the kinds of foods that can be prepared there;
 - b) It adds product labeling requirements; and
 - c) It clarifies local oversight of home kitchens.
- 2) The bill exempts food prepared for fund-raising bake sales from the requirements of the Home Kitchen Operations section of the FHREA.
- 3) The bill allows IDPH to control through regulation the types of foods that can be prepared in a Cottage Food Operation, which is more efficient than controlling them through legislation
- 4) The bill allows a form of community-supported agricultural arrangements.

For additional information, contact:

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In general, the Food Handling Act requires all business establishments to comply with safe food handling procedures. Sections 3.1 (potluck dinners) and 4 (cottage food operations) carve out exceptions to the general rule that the Department of Public Health and local health departments may regulate the handling of food for public consumption. Persons preparing and selling food to the public, therefore, must comply with the Food Handling Act unless they qualify for one of the exceptions.

Questions	Home Kitchen Requirements	Cottage Food Requirements
What food can be sold?	Non-potentially hazardous baked goods. Baked goods include, but are not limited to breads, cookies, cakes, pies and pastries. Pies must use only high-acid fruit and cannot include potentially hazardous fillings or toppings like pumpkin, sweet potato, cheesecake, custard and crèmes.	Non-potentially hazardous baked goods, jam, jelly, preserve, fruit butter, dry herb or blend, or dry tea blend that is intended for end-use only. Baked goods include, but are not limited to breads, cookies, cakes, pies and pastries. Pies must use only high-acid fruit and cannot include potentially hazardous fillings or toppings like pumpkin, sweet potato, cheesecake, custard and crèmes.
Where it can be sold?	For direct sale by the owner or family member, or for sale by a religious, charitable or nonprofit organization, stored in the residence where the food is made.	Only at Farmer's Markets
What a Local Health Department or Municipality must do to make sales legal?	Pass ordinance, specifically allowing direct sales of baked goods.	Nothing, part of Food Handling Act
Annual sales limit?	\$12,000 \$1,000 monthly	\$25,000
Food preparer training requirement?	None	Food Service Sanitation Manager Course/Certificate
Labeling requirement?	"This product was produced in a home kitchen"	Contain the name and address of the cottage food operation, the common name of the product, all ingredients, the date the product was processed, allergen labeling as specified in federal labeling requirements, and the following phrase: "This product was produced in a home kitchen not subject to public health inspection that may also process common food allergens."
Public health inspection/enforcement?	The health department may inspect a home kitchen operation in the event of a complaint or disease outbreak	Allow local health departments that power to require cessation of sales upon receipt of a consumer complaint or when there is reason to believe that an imminent health hazard exists or that a product has been found to be misbranded, adulterated, or not in compliance with Section 4. Also it requires the cottage food operation to agree to grant access to the local health department for inspection purposes; and to make those inspections upon consumer complaint or the outbreak of a food borne illness
LHD authority if not in compliance?	None	Can require cessation of sales upon receipt of a consumer complaint or when there is reason to believe that an imminent health hazard exists or that a product has been found to be misbranded, adulterated, or not in compliance with Section 4
Registration?	None	Annual registration in the County in which the person resides including fee of \$25.00. at the discretion of the individual health dept.