



COMMONWEALTH of VIRGINIA

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July 22, 2016

The Honorable Mark D. Sickles
Member, Virginia House of Delegates
Post Office Box 10628
Franconia, Virginia 22310

Dear Delegate Sickles:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether certain kitchens are subject to inspection under state and local laws and regulations governing food preparation.

Background

You state that a homeless shelter in Arlington County requested that members of a local church prepare food in their private homes or in the kitchen of the church and donate it to the shelter. You ask whether their doing so would subject the church's kitchen, or the members' home kitchens, to health inspection under state and local laws.

Applicable Law and Discussion

The State Health Commissioner (the "Commissioner") has certain authority under statute to enforce the standards for food preparation in the Commonwealth.¹ To carry out this authority, the Commissioner administers licensing requirements for "restaurants" in the Commonwealth.² Section § 35.1-1 of the *Code* defines the term "restaurant" generally to include "[a]ny place where food is prepared for service to the public on or off the premises, or any place where food is served."³ Each

¹ See, e.g., VA. CODE ANN. §§ 35.1-2 (2014); 35.1-5 (2014); 35.1-14 (Supp. 2015); 35.1-18 (2014); 35.1-20 (2014); 35.1-22 (2014).

² Section 35.1-18; 35.1-20; 35.1-22.

³ Section 35.1-1(9) (2014).

restaurant is required to submit to periodic health inspections carried out by the Commissioner or his designee, and failure to pass an inspection may result in the Commissioner revoking or suspending its license.⁴

Although the private kitchens that are the subject of your inquiry prepare food for public consumption at an off-premises location, they are exempt from state regulations governing food preparation and service. Specifically, § 35.1-14.2 provides that “[c]haritable organizations engaged in food distribution programs for needy persons *shall be deemed exempt from state and local regulations and local ordinances that govern food service and preparation.*”⁵ The statute further provides that “such organizations may accept food prepared by their employees or volunteers in private homes or in facilities not otherwise licensed as provided in this chapter.”⁶ A homeless shelter such as the one described in your request is a “charitable organization” for purposes of the statutory exception.⁷ Accordingly, it may accept food prepared by volunteers in private homes, without those private homes being subjected to the licensure and inspection requirements normally applicable to “restaurants” in the Commonwealth.⁸

I note, however, that the Board of Health is authorized to “issue advisory standards for the safe preparation, handling, protection, and preservation of food by the organizations exempted in” § 35.1-14.2(B).⁹ Those guidelines may be beneficial for protecting public health, and, while not mandatory, reasonably should be considered by the persons who operate the kitchens in question.

Regarding application of Arlington County’s Food and Food Handling Code, please be advised that the statute exempting charities from food regulations extends that exemption to “local regulations and local ordinances that govern food preparation”¹⁰ in addition to state regulations.

Conclusion

Accordingly, it is my opinion that a private kitchen in a home or a church is not subject to food preparation and service requirements of the State Health Commissioner or Arlington County when the kitchen is used to prepare food to donate to a charitable organization, where the charitable organization is

⁴ Section § 35.1-22. I note that the Virginia Department of Agriculture and Consumer Services (“VADACS”) also has certain designated authority over food inspections in the Commonwealth, but its authority generally is limited to establishments that process or offer food for retail sale. *See* § 3.2-5102 (2008); 3.2-5130 (Supp. 2015); 2 VA. ADMIN. CODE § 5-585-40 (defining the terms “food establishment” and “food processing plant”). Because the private kitchens in question do not process or offer food for retail sale, they are excluded at the outset from inspection by VADACS.

⁵ Section 35.1-14.2 (2014) (emphasis added).

⁶ *See* VA. CODE ANN. § 35.1-14.2(B) (2011).

⁷ *See id.* (“For the purposes of this subsection, ‘charitable organizations’ shall include nonprofit homeless shelters and hunger prevention programs.”).

⁸ I note, however, that nothing in this Opinion is intended to affect the lawful exercise of the State Health Commissioner’s authority to address health emergencies, or the lawful exercise of VADACS’ authority to enforce laws relative to the adulteration and misbranding of food. *See* §§ 3.2-5100; 3.2-5126; 32.1-13; 35.1-10.

⁹ *See* VA. CODE ANN. § 35.1-14.2(C) (2011). Kitchens preparing food for donation to charitable organizations have additional protection under the Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791.

¹⁰ VA. CODE ANN. § 35.1-14.2(B).

Honorable Mark D. Sickles

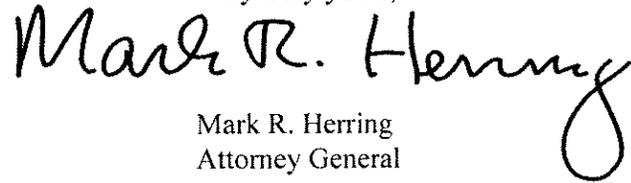
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engaged in a food distribution program for the needy. However, the Board of Health may issue advisory guidelines, which reasonably should be considered by those preparing the food in question.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a long, sweeping tail on the "g".

Mark R. Herring
Attorney General