

**January 17, 2018 Advisory Letter — Opinion Request – Application of the 2013
Food Code to Church Bake Sales**

The Honorable John Arthur Smith
New Mexico State Senate
490 Old Santa Fe Trail
Santa Fe, NM 87501

Re: Opinion Request – Application of the 2013 Food Code to Church Bake Sales

Dear Senator Smith:

You have requested our advice regarding the New Mexico Environment Department's ("Department") jurisdiction to enforce the federal Food and Drug Administration's ("FDA") 2013 Food Code ("Food Code"), over churches conducting temporary events such as a rummage and/or bake sales. We understand the Department adopted the Food Code in March 2016 and it will become effective in March 2018. We further understand that the Food Code does not allow any processing of food to take place outside of a commercial kitchen. As discussed in more detail below, although the Department generally does have jurisdiction to regulate and enforce food safety rules promulgated by the Environmental Improvement Board (the "Board"), the Board by rule has excepted churches offering *home-made* baked goods for sale or service at fundraising functions from having to comply with the Food Code.

As a preliminary matter, the Food Code is a model code and reference document for state, city, county and tribal agencies that regulate operations such as restaurants, retail food stores, food vendors, and foodservice operations in institutions such as schools, hospitals, assisted living, nursing homes and child care centers. The Food Code establishes practical, science-based guidance for mitigating risk factors that are known to cause or contribute to foodborne illness outbreaks associated with retail and foodservice establishments and is an important part of strengthening our nation's food protection system. See https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UC_M374510.pdf.

In New Mexico, the Board and the Department are charged with promulgating, maintaining, developing, and enforcing rules that address, among other things, food protection. NMSA 1978, Sections 74-1-7 and -8. In addition, the Board is charged with executing the provisions of the Food Service Sanitation Act, NMSA 1978, Section 25-1-1 to -15 (1977, and as amended) (the "Act"). Its purpose is to protect the public health by establishing standards and provisions for the regulation of food service establishments and by appropriate delegations of authority to the Board and Department to adopt and enforce regulations covering the environmental health aspects of food service establishments to assure that consumers are not exposed to adverse environmental health conditions arising out of the operations of food service establishments. NMSA 1978, § 25-1-3.

The Act states, in pertinent part:

The [Environmental Improvement] Board shall promulgate procedural and substantive regulations consistent with the provisions of Section 74-1-9 NMSA 1978 for:

- A. requiring food service establishments to prepare and serve food in a manner safe for human consumption, free from adulteration, spoilage, contamination and unwholesomeness, and to accomplish this standard, the following food service establishment operations shall be covered by the regulations: . . .

(3) Food service establishment premises sanitation;

NMSA 1978, § 25-1-4. This provision confers upon the Board broad authority to regulate food service establishments,[1] including what type of facilities fall within its purview. See *Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-42, ¶ 20, 140 N.M. 440 (“Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes”). Hence, in accordance with the Act, the Board adopted and incorporated the Food Code, with certain limited modifications promulgated by rule, for the safe operation of food establishments. See 7.6.2 NMAC.

Among the Board’s modifications to the Code, it defined “food service establishment” to mean “an operation that stores, prepares, packages, serves, or vends food directly to the consumer, or otherwise provides food for human consumption such as a restaurant; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; an institution; or food bank; and relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.” See 7.6.2.7(B)(5) NMAC. And, cognizant of certain limited circumstances where food may be served without special handling or regulatory oversight, the Board excluded from the definition of “food service establishment” sixteen operations, facilities, and events, including:

(iv) a kitchen in a private home **if only baked goods (e.g., cookies, brownies, cakes, fruit pies) that are not time/temperature control for safety foods (“TCS”) food, are prepared for sale or service at a fundraising function (e.g., a religious or charitable organization’s bake sale)** if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the regulatory authority;

Id. (emphasis added).

Therefore, consistent with the rules adopted by the Board excepting religious groups and other charitable organizations from the definition of food service establishment, it appears that the Department does not have jurisdiction to enforce the 2013 Food Code against churches conducting temporary events such as a rummage and/or bake sales, provided the goods do not require time or temperature control for safety and are prepared in a private home kitchen for sale or service at a fundraising function.

Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,

Tania Maestas
Deputy Attorney General for Civil Affairs

[1] Under the Food Service Sanitation Act, "food service establishment" means:

- (1) any fixed or mobile place where food is served and sold for consumption on the premises;
- (2) any fixed or mobile place where food is prepared for sale to or consumption by the general public either on or off the premises, including any place where food is manufactured for ultimate sale in a sealed original package, but "prepared" as used in this paragraph does not include the preparation of raw fruits, vegetables or pure honey for display and sale in a grocery store or similar operation. For purposes of this paragraph, "pure honey" means natural liquid or solid honey, extracted from the combs or in the comb, taken from beehives, with no processing or additional ingredients. "Food service establishment" does not mean a dairy establishment; and
- (3) meat markets, whether or not operated in conjunction with a grocery store. NMSA 1978, §25-1-2(H).