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January 2, 2013

Honorable Mike Gatto  
Room 2114, State Capitol

**COTTAGE FOOD OPERATIONS - #1301208**

Dear Mr. Gatto:

You asked several questions relating to the effect of chapter 415 of the Statutes of 2012 (chapter 415) on the ability of a city<sup>1</sup> or county<sup>2</sup> to regulate, and the responsibility of a city or county toward, a cottage food operation. We will briefly describe how the production of food was regulated in California prior to the enactment of chapter 415 and then separately discuss each of the questions asked.

**BACKGROUND**

Generally, the production of food is regulated by two statutory provisions: the Sherman Food, Drug, and Cosmetic Law<sup>3</sup> (the Sherman Law) and the California Retail Food Code<sup>4</sup> (the Retail Food Code). The Sherman Law regulates, among other things, the sale of any food, which includes the manufacture, production, processing, packing, exhibition, offer, possession, or holding of any food for sale.<sup>5</sup> Similarly, the Retail Food Code regulates the manufacture, processing, distribution, and sale of food by a food facility.<sup>6</sup> The State Department of Public Health generally regulates both the Sherman Law<sup>7</sup> and the Retail Food

<sup>1</sup> We express no opinion on the applicability of chapter 415 to charter cities.

<sup>2</sup> For purposes of this opinion, references to a "city or county" shall include a city, county, or city and county.

<sup>3</sup> Health and Safety Code, division 104, part 5 (§ 109875 et seq.).

<sup>4</sup> Health and Safety Code, division 104, part 7 (§ 113700 et seq.).

<sup>5</sup> Health and Safety Code section 110030.

<sup>6</sup> Health and Safety Code sections 113705 and 113980.

<sup>7</sup> Health and Safety Code sections 109910 and 110045.

Code,<sup>8</sup> but local enforcement agencies have the primary responsibility for enforcing the Retail Food Code.<sup>9</sup>

Under the Retail Food Code, food has to be stored, prepared, packaged, served, vended, or provided at a food facility in order for the food to be sold at retail.<sup>10</sup> A private home is not included in the Retail Food Code definition of a food facility. Accordingly, prior to the enactment of chapter 415, because food prepared in a private home was not prepared at a food facility, that food could not be sold at retail.<sup>11</sup>

Chapter 415 was enacted in order to encourage the growth of community-based food production, including cottage food operations, by allowing foods prepared in a private home to be sold as homemade foods to the public.<sup>12</sup> Chapter 415 exempts cottage food operations from the provisions of the Sherman Law<sup>13</sup> and the Retail Food Code,<sup>14</sup> and defines a cottage food operation as an enterprise operated in a registered or permitted private home that prepares or packages nonpotentially hazardous food<sup>15</sup> for sale to the consumer.<sup>16</sup> Under chapter 415, a cottage food operation may sell its food either directly to the consumer as a Class A cottage food operation<sup>17</sup> or both directly and indirectly to the consumer as a Class B cottage food operation.<sup>18</sup> In order to qualify as a cottage food operation, the enterprise must also comply with certain gross annual sales and employment limitations.<sup>19</sup>

Government Code section 51035, as added by chapter 415, requires a city or county to allow cottage food operations and to either classify a cottage food operation as an authorized use of property zoned as residential or issue permits to engage in a cottage food

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<sup>8</sup> Health and Safety Code sections 113707 and 113763.

<sup>9</sup> Health and Safety Code section 113713.

<sup>10</sup> Health and Safety Code section 113789.

<sup>11</sup> Health and Safety Code section 113789, subdivision (c)(2).

<sup>12</sup> Senate Committee on Health, Report on Assembly Bill No. 1616 (2011-2012 Reg. Sess.) as amended May 3, 2012, page 4.

<sup>13</sup> Health and Safety Code sections 109947 and 110460.

<sup>14</sup> Health and Safety Code section 113789, subdivision (c)(2). Under chapter 415, a cottage food operation is generally exempt from the Retail Food Code but is still required to comply with specified standards relating to hand washing, vermin and animals, and other issues relating to hygiene and safety. (Health & Saf. Code, § 114365.2.)

<sup>15</sup> Health and Safety Code section 114365.5 establishes a list of nonpotentially hazardous foods. The State Public Health Officer may add to or delete foods from that list by complying with certain notice requirements. (Health & Saf. Code, § 114365.5, subd. (c).)

<sup>16</sup> Health and Safety Code section 113758.

<sup>17</sup> Health and Safety Code section 113758, subdivisions (a)(1) and (b)(4).

<sup>18</sup> Health and Safety Code section 113758, subdivisions (a)(2) and (b)(5).

<sup>19</sup> Health and Safety Code section 113758, subdivision (a).

operation.<sup>20</sup> If a city or county issues permits to engage in a cottage food operation, then the cottage food operation must comply with local ordinances prescribing "reasonable standards, restrictions, and requirements" that relate to "spacing and concentration, traffic control, parking, and noise control relating to those homes."<sup>21</sup>

In addition to the regulations described above that apply to cottage food permits, all cottage food operations must comply with certain health and safety standards. A Class A cottage food operation must be registered with the local enforcement agency and complete a self-certification checklist that verifies that the cottage food operation meets certain requirements relating to the health and safety of the food prepared.<sup>22</sup> But the local enforcement agency has no authority to verify that the cottage food operation has met those requirements unless the agency receives a complaint related to adulterated or unsafe food or a violation of specified laws.<sup>23</sup> On the other hand, a Class B cottage food operation is required to obtain a permit from the local enforcement agency and, as a part of the permitting process, to undergo an initial inspection of the premises.<sup>24</sup> The local enforcement agency may also inspect the premises no more than annually, or more often if it receives a complaint related to adulterated or unsafe food or a violation of specified laws.<sup>25</sup>

### QUESTIONS PRESENTED

1. May a city or county prohibit a cottage food operation from selling products directly to the consumer from a private home?

A statute should be interpreted in accordance with its ordinary and usual meaning.<sup>26</sup> Chapter 415 expressly requires a city or county to allow a cottage food operation by either classifying it as a permitted use of property zoned as residential or providing a permitting process for cottage food operations.<sup>27</sup> Moreover, a cottage food operation is specifically authorized to sell its products directly to the consumer.<sup>28</sup> Accordingly, it is our opinion that, under the plain language of chapter 415, a city or county cannot prohibit a

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<sup>20</sup> Government Code section 51035, subdivision (a).

<sup>21</sup> Government Code section 51035, subdivision (a)(2) and (3).

<sup>22</sup> Health and Safety Code section 114365.

<sup>23</sup> Health and Safety Code section 114365, subdivision (a)(1)(C).

<sup>24</sup> Health and Safety Code section 114365, subdivision (a)(2).

<sup>25</sup> Health and Safety Code section 114365, subdivision (a)(2)(C).

<sup>26</sup> *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707.

<sup>27</sup> Government Code section 51035, subdivision (a).

<sup>28</sup> Health and Safety Code section 113758, subdivisions (a) and (b)(4).

cottage food operation from selling its products directly to the consumer out of a private home.<sup>29</sup>

**2. May a city or county condition the granting of a permit to run a cottage food operation on the potential traffic impacts on the neighborhood caused by the cottage food operation?**

If a city or county does not classify cottage food operations as an authorized use of property zoned as residential, then Government Code section 51035 requires the city or county to grant a permit to operate a cottage food operation to a cottage food operation that complies with local ordinances prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control relating to those homes.<sup>30</sup> Traffic control is specifically listed as one of the types of local ordinances with which cottage food operations must comply as a condition of a permit to operate. Because the plain language of the statute requires an operator of a cottage food operation to comply with reasonable local traffic control ordinances as a condition of his or her permit for a cottage food operation, it is our opinion that a city or county may condition the grant of a permit to run a cottage food operation on compliance with reasonable standards relating to traffic control set by the city or county by local ordinance.

**3. May a city or county condition the grant of a permit to run a cottage food operation on other topics not listed in Government Code section 51035?**

Under the doctrine of "expressio unius est exclusio alterius," the expression of one thing in a statute ordinarily implies the exclusion of other things.<sup>31</sup> Pursuant to that doctrine, if a statute grants a person a specific power, it is presumed that the statute prohibits the person from exercising any other power not specified.<sup>32</sup> It follows that, by authorizing a city or county to condition the grant of a permit only on specified grounds, the Legislature is prohibiting that city or county from regulating a cottage food operation on any other grounds. If the Legislature had intended to make the list nonexhaustive, it could have done so by simply adding in the word "including" or the phrase "including, but not limited to."<sup>33</sup> Indeed, the Legislature used the word "include" in several other places in chapter 415 to

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<sup>29</sup> Government Code section 51035, subdivision (a)(2) and (3).

<sup>30</sup> Government Code section 51035, subdivision (a)(2) and (3).

<sup>31</sup> *In re J.W.* (2002) 29 Cal.4th 200, 209; see also *Sutherland Statutes and Statutory Construction* (7th ed. 2007), Vol. 2A, § 47:23, pages 398-421.

<sup>32</sup> *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196; *Kaplan v. Superior Court* (1989) 216 Cal.App.3d 1354, 1359-1360.

<sup>33</sup> *Sutherland Statutes and Statutory Construction*, *supra*, § 47:23, page 417 (the word "include" is generally used to create a nonexhaustive list).

create nonexhaustive lists.<sup>34</sup> The Legislature's decision not to do so in this instance demonstrates that the Legislature intended to create an exhaustive list of the topics that a city or county may regulate.<sup>35</sup> Thus, in our view, the list in Government Code section 51035 is exhaustive, and a city or county may condition a permit to operate a cottage food operation only on compliance with local ordinances pertaining to spacing and concentration, traffic control, parking, and noise control relating to those homes.

It is, therefore, our opinion that a city or county may not condition the grant of a cottage food operation permit on any topics not listed in Government Code section 51035.

**4. May a city or county use an existing study on what constitutes a reasonable amount to charge for a permit fee to fulfill the requirement in Government Code section 51035 that the city or county provide a fee verification statement?**

A city or county may charge fees to an applicant for a permit to operate a cottage food operation.<sup>36</sup> The fees cannot exceed the costs to the city or county of the review and permit process.<sup>37</sup> The applicant may request, and the city or county shall provide, a written breakdown of a verification of the fees.<sup>38</sup> The phrase "verification of fees" is not defined, but the term "verify" generally means to "establish the truth, accuracy, or reality of."<sup>39</sup> Under that definition, a city or county must establish that the amount of fees charged by the city or county is accurate.<sup>40</sup> A city or county is not limited with respect to the type of information that may be employed to meet that requirement. If an existing fee study provides the information accurately, then we see no reason why a city or county could not use it.

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<sup>34</sup> Government Code section 51035, subdivision (b)(1); Health and Safety Code, sections 113758, subdivision (b)(3) and (6), 113789, subdivision (b)(2), and 114365, subdivision (a)(1).

<sup>35</sup> See *In re Ethan C.* (2012) 54 Cal.4th 610, 638, "[w]hen language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful."

<sup>36</sup> Government Code section 51035, subdivision (a)(3).

<sup>37</sup> Government Code section 51035, subdivision (b).

<sup>38</sup> Government Code section 51035, subdivisions (a)(3) and (b)(2).

<sup>39</sup> Webster's 10th Collegiate Dictionary (1995) page 1312. When attempting to ascertain the ordinary, usual meaning of a word, it is appropriate to refer to the dictionary definition of that word. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.)

<sup>40</sup> This duty is consistent with the general requirement that a city or county that charges a fee must prove by a preponderance of the evidence that the fee is reasonable. (Cal. Const., art. XIII C, § 1.)

Therefore, it is our opinion that a city or county may verify the cottage food operation permit fee using any information that would establish that the fee is reasonable, including an existing fee study.

**5. Must a city or county provide to an applicant for a cottage food operation permit a list of all permits, fees, and fee verifications required by other public agencies?**

If requested by an applicant, a city or county must provide "a list of the permits and fees that are required by the city, county, or city and county, including information about other permits that may be required by other departments in the city, county, or city and county, or by other public agencies."<sup>41</sup> Additionally, a city or county, if requested by an applicant, must "provide information about the anticipated length of time for reviewing and processing the permit application"<sup>42</sup> and must provide a verification of the fees paid by the applicant to that city or county.<sup>43</sup> Accordingly, based on a plain reading of the statute, a city or county must, if requested, provide information to an applicant with regard to all fees and permits required by that city or county and must also provide a verification of fees paid to that city or county. In addition, a city or county is required to provide information about other permits that may be required by other public agencies. However, a city or county is not required to provide a list of fees that may be required by other public agencies or to provide a verification of fees required by other public agencies.

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<sup>41</sup> Government code section 51035, subdivision (b)(1).

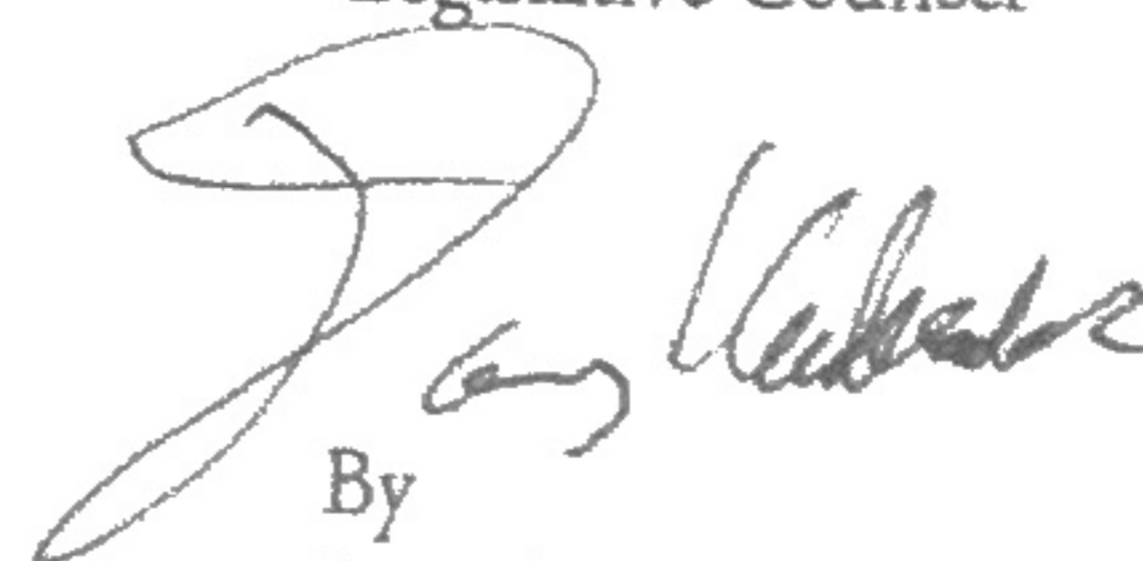
<sup>42</sup> Government Code section 51035, subdivision (b)(1), emphasis added.

<sup>43</sup> Government Code section 51035.

Consequently, it is our opinion that a city or county must provide to an applicant who is applying for a permit to operate cottage food operation information relating to all permits that may be required by other public agencies but is not required to provide information relating to any fees that are required by other public agencies.

Very truly yours,

Diane F. Boyer-Vine  
Legislative Counsel

A handwritten signature in dark ink, appearing to read "Daniel S. Vandekoolwyk", is written over the printed name.

By  
Daniel S. Vandekoolwyk  
Deputy Legislative Counsel

DSV:sjk