



Farm and Ranch Freedom Alliance
P.O. Box 809
Cameron, TX 76520



Homemade Texas
1841 S. Lakeline Blvd.
Ste. 101 Box 192
Cedar Park, TX 78613

October 12, 2022

Anthony Warren
Senior Director of Building and Community Services
Waxahachie Building and Community Services Department
401 S. Rogers
Waxahachie, Texas 75165

Dear Mr. Warren:

Our nonprofits work with cottage food producers across the state, and we were deeply involved in the passage of the bills in 2011, 2013, and 2019 that established the Texas Cottage Food Law. We are writing today because we have become aware of actions by the Waxahachie Health Inspection Division of the Building and Community Services Department that violate state law and the rights of cottage food producers.

Isabel Shrouder is a home baker in the Dallas-Fort Worth metroplex who operates a cottage food business under the name of "Do Goodies". Each month, Ms. Shrouder chooses a person, organization, or family to donate a percentage of her proceeds to. In June of this year, Ms. Shrouder was hoping to participate in several local markets. As part of the application to participate in a Waxahachie-area market, she was required to submit her recipes.

MeLony Jordan, Waxahachie Health Inspector, reviewed her recipes and informed her, "THANK YOU FOR SENDING THE INFORMATION TO REVIEW. However the cottage food law clearly lists (Bakery goods which require any type of refrigeration such as cream, custard or meringue pies and cakes or pastries with cream cheese icings or fillings.) The pH value of 4.6 or less are required for (Acidified canned goods) not baked or TCS items. We will not be able to permit the menu items containing cream cheese nor any TCS items."

Ms. Shrouder also requested justification in writing as to why she would be required to purchase a permit if she were to participate in the market as a cottage food producer. "Also will you please tell me in writing the reasons that you explained to me via phone as to what the purpose of the fee is, you explained it was for the time it took for your office to look over the cottage information I provided such as labels, menus etc." Ms. Jordan responded, "As for the fees and why you are required to pay for a health permit, the city requires a health food permit fee. Please see the above attached application."

These actions directly conflict with the state laws and regulations. A cottage food operation is not required to submit recipes to local health departments or apply or pay for permits from the local health department. Moreover, it is illegal for a health department to issue a permit to an individual to prepare foods in their home. **This has been established law for over a decade, since the passage of the first Texas Cottage Food Law in 2011.**

I. Allowed cottage foods

Ms. Jordan incorrectly states that the cottage food law “clearly lists cream cheese icings” as being unallowed. Ms. Jordan appears to be quoting the state health department’s website, which is not law, and that language does **not** appear in Texas Health and Safety Code. Rather, the statute states: “A time and temperature control for safety food may include a food that contains protein and moisture and is neutral or slightly acidic, such as meat, poultry, fish, and shellfish products, pasteurized and unpasteurized milk and dairy products, raw seed sprouts, **baked goods that require refrigeration, including cream or custard pies or cakes,** and ice products.”¹ “Cream cheese frostings” are not disallowed in the statute.

The question of whether or not a food qualifies as a non-time or temperature control for safety (TCS) food depends on the final food product, rather than an isolated test on the ingredients. As the statute clearly states, a TCS food “does **not** include a food that uses time and temperature control for safety food as ingredients **if the final food product** does not require time or temperature control for safety to limit pathogen growth or toxin production.”² In other words, a food may contain ingredients such as cream cheese and still be non-TCS, and thus allowed under the cottage food law.

It is well known that sugar and salt are ancient methods of inhibiting microbial growth by drawing available water from within the food. “The result is a reduction of the so-called product water activity (A_w), a measure of unbound, free water molecules in the food that is necessary for microbial survival and growth. The A_w necessary to inhibit growth of most bacteria is roughly 0.91.”³

The FDA Model Food Code contains a chart that sets out the pH and A_w necessary for a food to be considered non-TCS. Whether or not a food is TCS depends on its A_w value and pH combined. An A_w of less than 0.88 means the food is non-TCS irrespective of its pH, while an A_w of between 0.88 and 0.90 means the food is non-TCS so long as its pH is 5.0 or lower.⁴

Ms. Jordan’s response to Ms. Shrouder reflects a fundamental misunderstanding of the cottage food law, the Texas Food Establishment Rules, and how they are applied to TCS or non-TCS foods. Ms. Jordan appears to equate the issue of the pH threshold for pickled foods with the issue

¹ See Texas Health & Safety Code § 437.0196(a).

² See Texas Health & Safety Code § 437.0196(b).

³ <https://www.scientificamerican.com/article/how-do-salt-and-sugar-pre/>

⁴ See FDA 2017 Model Food Code, Annex 3, Table B. Available at <https://www.fda.gov/media/110822/download> at p.345.

of whether a food is or is not TCS. That is incorrect both scientifically and legally, and is inconsistent with both the state regulations and the FDA Model Food Code.

Ms. Shrouder provided your department with documentation that one of her products had an A_w of 0.83, and the other had an A_w of 0.90 and a pH of 4.69. Thus, under the FDA's Model Food Code, which has been adopted by the Texas Department of State Health Services, both items are non-TCS and allowed under the Texas Cottage Food Law. The fact that they contain an ingredient such as cream cheese is not a relevant or legal basis for denying her the right to sell them as cottage food items. She has a legal right to prepare these foods and sell them directly to consumers, in accordance with the Cottage Food Law, without any further involvement of the state or local health departments.

II. Approval of recipes

The Texas Cottage Food Law lists the types of foods that can be made and sold in an individual's home kitchen.⁵ **Absent from the statute is any provision for DSHS or local health departments to require the submission and approval of recipes.** There is one very limited exception: DSHS is directed to post approved sources for recipes for pickled, acidified canned, or fermented foods. The absence of any requirement to submit recipes in general, combined with the specific requirement to use recipes from approved sources for pickled foods, makes it abundantly clear that, for most foods, neither DSHS nor the local health departments have any involvement in reviewing a cottage food operator's recipes. Indeed, the statute specifically provides that as long as the cottage food operator is acting within the scope of the law, neither DSHS nor the local health department can require inspections or otherwise regulate their activities (absent an immediate and serious threat to human life or health).⁶

As such, Waxahachie's practice of pre-emptively reviewing the recipes of hopeful cottage food market participants is contrary to the state statute.

III. Requiring a health or food establishment permit of a cottage food operator (CFO)

The 2017 FDA Model Food Code, incorporated by reference into the 2021 Texas Food Establishment Rules, states: "**Private Homes and Living or Sleeping Quarters, Use Prohibition.** A private home, a room used as living or sleeping quarters, or an area directly opening into a room used as living or sleeping quarters may not be used for conducting FOOD ESTABLISHMENT operations." FDA 2017 Food Code 6-202.111.

Texas Health & Safety Code § 437.0191 states: "EXEMPTION FOR COTTAGE FOOD PRODUCTION OPERATIONS. (a) A cottage food production operation is not a food service establishment for purposes of this chapter." Thus, **by definition**, a CFO **cannot** be issued a food establishment permit, temporary or not.

The statute continues: Sec. 437.0192. REGULATION OF COTTAGE FOOD PRODUCTION OPERATIONS BY LOCAL GOVERNMENT AUTHORITIES PROHIBITED; COMPLAINTS.

⁵ See Texas Health & Safety Code § 437.001(2-b).

⁶ Texas Health & Safety Code §§ 437.0191 & 437.0192.

(a) A local government authority, including a local health department, may not regulate the production of food at a cottage food production operation.

The meaning and intent of the law is clear: cottage food operators are not food establishments, and must be allowed to operate free of fees, permits, or other regulations. Requiring a permit of a cottage food operator to participate in an event is a form of regulation.

Yet the Waxahachie Health Department is claiming authority to review the producer's recipes and deny approval of foods even when they are non-TCS, which is regulating the production of the food. The department is also requiring the cottage food producer to apply for the same "temporary food permit" as a regular food manufacturer, and charging the cottage food operators an even higher fee than food manufacturers (see attached Waxahachie Temporary Food Permit Application). Both of these actions violate the state law.

Your department should immediately refund permit fees to any cottage food operators who have been illegally required to purchase permits to sell at events in Waxahachie's jurisdiction.

Additionally, your department should immediately discontinue the practice of requiring cottage food producers to submit recipes for review, as the Texas Legislature has not granted this authority to local health departments or DSHS.

We are very concerned that Waxahachie residents are being deprived of their legal rights under state law. Given this breach of state law and the confusion it has caused for cottage food operations in and around Waxahachie, the City needs to post written clarification that cottage food operations are not required to submit their recipes nor apply for health permits.

Sincerely,

Judith McGeary, Esq.
Executive Director
Farm and Ranch Freedom Alliance

Kelley Masters
President
Homemade Texas

Attachments: Emails between Isabel Shrouder and MeLony Jordan
Waxahachie Temporary Food Permit Application and Submittal Checklist

Cc: State Representative Brian Harrison
State Senator Brian Birdwell
State Senator Lois Kolkhorst

Michael Scott, Waxahachie City Manager
Albert Lawrence, Deputy City Manager
David Hill, Waxahachie Council Member Place 1
Patrick Souter, Waxahachie Council Member Place 2
Chris Wright, Waxahachie Council Member Place 3
Billie Wallace, Waxahachie Council Member Place 4
Travis Smith, Waxahachie Council Member Place 5

Homemade Texas

From: Isabel Shrouder <dogoodiesgiveback@gmail.com>
Sent: Monday, August 22, 2022 1:01 PM
To: Homemade Texas
Subject: Fwd: Do Goodies - Isabel Shrouder
Attachments: image003.jpg

With Gratitude,
Isabel Shrouder
Do Goodies

----- Forwarded message -----

From: Me'Lony Jordan <mjordan@waxahachie.com>
Date: Fri, Jul 29, 2022, 8:36 AM
Subject: RE: Do Goodies - Isabel Shrouder
To: Isabel Shrouder <dogoodiesgiveback@gmail.com>
Cc: Building & Community Services <bcservices@waxahachie.com>

Cream Cheese is not permitted under cottage law. As for questions pertaining to fees. Please contact the Building Dept. I do not set fees. The State sets the baseline and Cities have ordinances that have to meet the base line but may be stricter than not less than.

All permits for health have a required fee.



MeLony Jordan

Health Inspector/CCO

Office: (469) 309-4134

Mobile: (972) 740-6724

From: Isabel Shrouder <dogoodiesgiveback@gmail.com>
Sent: Thursday, July 28, 2022 5:39 PM
To: Me'Lony Jordan <mjordan@waxahachie.com>
Subject: Re: Do Goodies - Isabel Shrouder

I understand number 5 , as TCS foods are not allowed. (I'm not sure what #2 was pertaining to)

My lab results show that my recipe is not in fact TCS, meaning it does not require refrigeration. It falls in the appropriate pH levels and abides by the cottage laws.

Also I understand the fee for the health permit, by law cottage producers can not be charged simply for being a cottage baker. I wanted to make sure I understand the reasoning behind the fee as discussed on the phone as it was not very clear and I wanted to clarify in writing.

I truly do appreciate your time in assisting with this matter.

Isabel

On Thu, Jul 28, 2022, 3:07 PM Me'Lony Jordan <mjordan@waxahachie.com> wrote:

Please see attached page two (2) number five(5). You may remove the items from the menu and re-submit if you like.

As for the fees and why you are required to pay for a health permit, the city requires a health food permit fee. Please see the above attached application.



MeLony Jordan

Health Inspector/CCO

Office: (469) 309-4134

Mobile: (972) 740-6724

From: Isabel Shrouder <dogoodiesgiveback@gmail.com>

Sent: Thursday, July 28, 2022 12:58 PM

To: Me'Lony Jordan <mjordan@waxahachie.com>

Subject: Re: Do Goodies - Isabel Shrouder

Hi Me'Lony,

The recipes I sent in show the appropriate requirements according to Texas state law.

"a baked good that is not a time and temperature control for safety (TCS) food,

candy,

coated and uncoated nuts,

unroasted nut butters,

fruit butters,

a canned jam or jelly,

a fruit pie,

dehydrated fruit or vegetables, including dried beans,

popcorn and popcorn snacks,

cereal, including granola, dry mix,

vinegar, pickled fruit or vegetables, including beets and carrots, that are preserved in vinegar, brine, or similar solution at an equilibrium pH values of 4.6 or less,

mustard,

PHF/TCS is a food that: contains protein, moisture (water activity greater than 0.85), and is neutral to slightly acidic (pH between 4.6 -7.5).

The baked goods are not TCS requiring refrigeration. The results are clearly outlined in accredited lab results with pH levels.

Would you please show me directly where you feel we are not abiding by the cottage laws?

Also will you please tell me in writing the reasons that you explained to me via phone as to what the purpose of the fee is, you explained it was for the time it took for your office to look over the cottage information I provided such as labels, menus etc .

I just need it in writing please.

On Thu, Jul 28, 2022, 8:36 AM Me'Lony Jordan <mjordan@waxahachie.com> wrote:

THANK YOU FOR SENDING THE INFORMATION TO REVIEW. How ever the cottage food law clearly lists (Bakery goods which require any type of refrigeration such as cream, custard or meringue pies and cakes or pastries with cream cheese icings or fillings.)

The pH value of 4.6 or less are required for (Acidified canned goods) not baked or TCS items.

We will not be able to permit the menu items containing cream cheese nor any TCS items.



MeLony Jordan

Health Inspector/CCO

Office: (469) 309-4134

Mobile: (972) 740-6724

From: Isabel Shrouder <dogoodiesgiveback@gmail.com>

Sent: Wednesday, July 27, 2022 4:11 PM

To: Building & Community Services <bcservices@waxahachie.com>

Subject: Do Goodies - Isabel Shrouder

Hey there, I'm sending all documents, recipes with lab tested results. Please let me know if additional information is needed

Thank you,

Isabel Shrouder



TEMPORARY FOOD PERMIT APPLICATION

BUILDING & COMMUNITY SERVICES

Incomplete Applications will not be processed and will be returned

ALL FEES ARE DUE UPON SUBMISSION OF APPLICATION AND ARE NON-REFUNDABLE.
See back for Submittal Checklist

TEMPERATURE CONTROLLED/COTTAGE LAW: \$60

PRE-PACKAGED: \$25

EVENT INFORMATION

EVENT NAME: _____ DATE(S) OF EVENT: _____

LOCATION OF EVENT: _____

HOURS OF OPERATION: _____ BUSINESS NAME _____

APPLICANT INFORMATION

NAME: _____ PHONE# _____

ADDRESS _____ EMAIL: _____

Food Items to be Served and/ or Sold _____

Place of Preparation & Storage: _____

****HOME STORAGE/PREPARATION IS STRICTLY PROHIBITED UNLESS ACTING UNDER COTTAGE LAW****

I certify that all information provided on this application and all documents submitted is correct. I understand that providing false or fictitious information will render this application invalid. I acknowledge reading the City of Waxahachie Temporary Food Establishment guidelines found at Waxahachie.com and agree to comply with all City and State Health and Safety guidelines & codes. I understand I am subject to an inspection at any time during the event.

APPLICANT SIGNATURE: _____ DATE: _____

401 S. ROGERS | P.O. BOX 757 | WAXAHACHIE, TX 75168 | (469)309-4020
www.waxahachie.com | EMAIL: bcservices@waxahachie.com

SUBMITTAL CHECKLIST

Incomplete Applications will not be processed and will be returned

ALL FEES ARE DUE UPON SUBMISSION OF APPLICATION AND ARE NON-REFUNDABLE.
APPLICATION AND FEE MUST BE SUBMITTED AT LEAST 5 BUSINESS DAYS PRIOR TO THE EVENT.

KEEP DOCUMENTATION AND PERMIT ON SITE

TEMPERATURE CONTROLLED

- CURRENT FOOD MANAGERS CERTIFICATE (FOOD MANAGER MUST BE ONSITE DURING EVENT)
- VALID DRIVER'S LICENSE
- COMMISSARY OR CPF KITCHEN FORM W/MOST RECENT HEALTH INSPECTION REPORT
- PERMIT FEE \$60

PRE-PACKAGED FOODS

- ***If selling food items that are packaged by a food manufacturer that does not require additional preparation.***

- VALID DRIVER'S LICENSE
- RECEIPT OF FOOD FROM AN APPROVED SOURCE
- PERMIT FEE \$25

- ***If processing and packaging food items to sell***

- VALID DRIVER'S LICENSE
- TEXAS MANUFACTURES LICENSE
- FOOD MANAGERS CERTIFICATE
- PERMIT FEE \$25

COTTAGE LAW FOODS

- CURRENT FOOD HANDLERS/MANAGERS CERTIFICATE
- VALID DRIVER'S LICENSE
- COPY OF LABELS WITH NAME, ADDRESS OF OPERATION, LIST OF ALLERGENS AND MUST HAVE FOLLOWING STATEMENT "THIS FOOD IS MADE IN A HOME KITCHEN & IS NOT INSPECTED BY THE DEPARTMENT OF STATE HEALTH SERVICES OR A LOCAL HEALTH DEPT."
- PERMIT FEE \$60