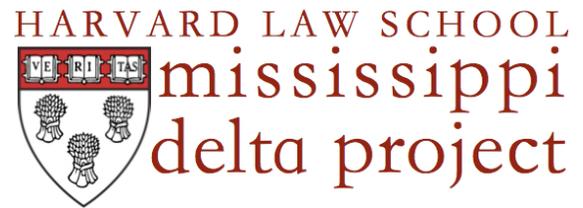


Health Law and Policy Clinic of
Harvard Law School



Creating a More Efficient and Effective Food Safety System in Memphis and Shelby County

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Introduction

The taste of a fresh-picked peach on a warm summer day is one of life's simple joys. A store-bought peach can never truly replicate the experience. But in Memphis, getting that peach from the farmer's tree into the customer's hand is not as simple as one would assume. The fruit cannot be simply picked from the tree and then sold from the back of a produce truck. Instead, someone wanting to sell these fruits from his truck must obtain a permit and conform to outdated rules, such as the requirement for the truck to remain in motion at all times except when making sales. This restriction is just one example of the many unnecessary provisions in the Memphis Food Code that serve as obstacles to economic opportunity and access to healthy food.

The Code was originally created in 1909 to protect Memphis residents from contaminated food. The revelations in Upton Sinclair's recently published book *The Jungle* regarding atrocious conditions for meat processing angered and disgusted people across the country, forcing local, state, and federal governments to respond. Memphis was one of many cities across the country to adopt its own comprehensive food code. But now, more than four decades have passed since the Memphis Food Code's last major revision in 1967 (additional minor revisions were made to the Code in 1985), and scientific understanding of food safety has made significant progress. State and federal laws have been continually updated and revised to keep pace, but the Memphis Food Code has remained largely unchanged. State and federal law are now more than adequate to safeguard the food supply. Consequently, most cities have repealed their comprehensive food codes, leaving behind only a few targeted local ordinances to address their city's unique concerns. Memphis, however, has kept its entire Food Code in place. The Memphis Food Code now stands as an unnecessary relic of the past, imposing duplicative inspections, containing now-unenforceable provisions, causing confusion, and stifling economic activity and the provision of healthy foods in Memphis and throughout Shelby County.

City-level public health concerns have now shifted away from food sanitation and toward food access and better nutrition. Finding healthy foods in low-income urban environments can be a difficult task. Grocery stores have abandoned these areas, leaving behind fast food chains selling processed, fatty foods. The lack of access to healthy food in these "food deserts" is one contributor to an increasingly obese population. Local governments have attempted to address these issues by promoting alternative food delivery methods like farmers markets, community-supported agriculture, and produce trucks. The Memphis Food Code, however, is ill-equipped to address these current concerns. Since it was created to address different problems, the Code is filled with requirements that make it difficult to open new food-related businesses. The Memphis Food Code and the state regulations (created by Tennessee Department of Health and Tennessee Department of Agriculture) often overlap and contradict each other, leaving entrepreneurs attempting to open a new food business guessing at which laws to follow.

This report will argue that while the Memphis Food Code was originally created to protect its citizens, it is now doing them a disservice by creating unnecessary barriers to healthy foods. The code is full of outdated sections that are covered by more detailed state law and unnecessary sections that create barriers to small businesses. The Memphis Food Code should, therefore, be either repealed (with a small set of provisions kept in its place) or substantially amended to reflect state law and the most current food safety science and technology.

Overall Findings

Memphis is the only major metropolitan area in Tennessee with a comprehensive food code, although many local government codes in Tennessee contain a few provisions regulating certain aspects of the food service industry.¹ This report discusses the consequences that flow from the nature of Memphis's comprehensive code and concludes by considering whether eliminating the Memphis Food Ordinance Code (hereinafter referred to as "Memphis Code" or "Memphis Food Code") would benefit Memphis and Shelby County.² After describing the background and setting for the Memphis Food Code, this memorandum will examine four major barriers created by the Memphis Food Code. We will then address the essential role played by Shelby County Health Department (SCHD) and SCHD's concerns that are implicated by elimination of the Code.

Overall Problems with the Memphis Food Code

- A. **Duplication of Efforts:** The Memphis Food Code requires the Shelby County Health Department (SCHD) to conduct inspections of food entities that are independently inspected by the Tennessee Department of Agriculture (TDA), wasting SCHD resources and subjecting Other Food Entities to two separate inspections using two different sets of laws.
- B. **Stifling of Economic Activity and Reduction of Access to Nutritious Food:** The Memphis Food Code can only be applied to Food Service Establishments (FSEs) and Retail Food Stores (RFSs) when it is more restrictive than state law and regulations. Furthermore, the Code requires a permit for the operation of any entity that manufactures, distributes or sells food, even for low-risk entities that typically do not require permits in other cities. As discussed below, this hampers economic activity and reduces access to nutritious foods.
- C. **Stakeholder Confusion and Unenforceable Provisions:** State law and regulations preempt the Code in parts, leaving local stakeholders uncertain as to which provisions of the Code are enforceable. Furthermore, some provisions in the Code leave much to the discretion of the local health department, giving unclear guidance to local food industry entrepreneurs and placing too much discretion in the hands of SCHD.
- D. **Collective Action Problem:** In order to revise the Memphis Code throughout Memphis and Shelby County, the legislative bodies of seven different jurisdictions must act in concert.³ As a result, the Code is rarely updated, leaving key provisions outdated.

The Role of a Local Health Department and the Concerns of the Shelby County Health Department

¹ See, e.g., Knoxville, which has two provisions pertaining to food entities. One regulates pet dogs in outdoor dining areas (allowing pets in these areas pursuant to its authority under state law to pass such local ordinances), while the other mandates that pedestrian food vendors comply with applicable state laws and regulations and adds a few local requirements for these entities. Knoxville, Tenn. Code 5-80, 16-316 *et seq.* (MuniCode 2011). Nashville also has very few provisions that relate to food service establishments, such as a provision permitting pet dogs in outdoor dining areas (pursuant to state law allowing municipalities to pass such ordinances). Nashville, Tenn. Code 8.04.190 (MuniCode 2011). See also "Comparative City Analysis," *infra*, for additional examples of the types of food-related regulations included in the Nashville Code.

² Although referred to as the "Memphis Food Ordinance Code," the code is enforced in all eight jurisdictions of Shelby County.

³ The legislative body of Bartlett would not need to act because its food code is already tied to Shelby County's food ordinances. However, the legislative bodies of Arlington, Collierville, Germantown, Lakeland, Memphis, Millington, and Shelby County must act in order to revise the Code.

- A. **Revenue:** Permitting fees within the Code serve as a revenue source for SCHD. Currently, since the Code is so outdated, some inspections cost more to conduct than the permitting fees that are received by SCHD. SCHD needs to retain permitting fees for the inspections it conducts, but should not continue to conduct inspections in cases where the permitting fee would not cover the cost of the inspection. This means that some entities should no longer be inspected by SCHD (in particular, those that are inspected and permitted by TDA) and that permitting fees should be raised for some of the other entities that SCHD does inspect.
- B. **Right of Entry:** SCHD is concerned that it must maintain a right of entry to food entities located in Memphis and throughout Shelby County, for instance, in case of a food safety emergency or a suspected food safety violation.
- C. **Small-Scale Entities Not Regulated at the State Level:** SCHD is concerned that some small, local food entities are not clearly covered under state law. For some of these entities, SCHD may want to include local ordinances for regulation and permitting. However, it should be noted that such regulations cause a barrier to entry for the food entity and may not be cost-effective for SCHD, so only essential local permits should be kept.

This memorandum analyzes each issue in turn and finds that eliminating the Memphis Food Code would benefit the food industry, increase access to nutritious foods, and improve the efficiency of SCHD. However, there may need to be some additional rules put forth in its place to allow SCHD to adequately enforce state food safety standards and to fill potential regulatory gaps in the current state regime.

Background of the Memphis Food Code

Memphis passed its first set of food ordinances in 1909, and the ordinances that make up the current Memphis Food Code were created in 1967 and subsequently underwent minor amendments in 1985.⁴ When the current Memphis Food Code was created in 1967, it existed as a system of regulations and permitting processes completely separate from those of the state. Any food vendor, processor, or distributor wanting to sell within the limits of Shelby County paid for both county and state permits, and was inspected by both county and state officials on separate timetables and according to separate standards.

Currently, the State of Tennessee divides its oversight of food entities between two departments, the Tennessee Department of Agriculture (TDA) and the Tennessee Department of Health (TDH). TDA regulates “retail food stores” (hereinafter referred to as “RFSs”) and other entities, including food manufacturers, processors, distributors, and warehouses (hereinafter referred to as “Other Food Entities” or “OFEs”).⁵ TDH regulates “food service establishments” (hereinafter referred to as “FSEs”), which includes restaurants, cafeterias, mobile food vendors, and other places where prepared food is served to the public.⁶

Approximately 25 years ago, in an effort to reduce the level of duplication in the permitting and inspections processes, a Tennessee statute was passed that authorized TDH to contract with SCHD to

⁴ See Memphis City Ordinances, Pure Food Regulations, 1909; Memphis, Tenn. Code, (MuniCode 2009).

⁵ Tenn. Code Ann. §§ 53-8-205(3), 53-1-207, 53-7-204 (2010).

⁶ Tenn. Code Ann. § 68-14-303(3) (2010).

inspect and permit FSEs within Memphis and Shelby County on behalf of TDH. SCHD is authorized to keep 95% of the state permitting fees they collect from FSEs for TDH; furthermore, they are barred from charging additional local permitting fees for FSEs.⁷ Under the statute, standards enforced by the county health department must be at least as stringent as state law and regulations for FSEs.⁸ The actual contract between TDH and SCHD notes that SCHD can only apply standards to FSEs that are “identical” with state law and regulations, thus barring SCHD from applying more stringent local laws to FSEs.⁹

A separate state statute authorizes TDA to contract with SCHD so that SCHD can issue permits and conduct inspections of RFSs on behalf of TDA.¹⁰ Under this contract, county health department standards must be at least as stringent as state law and regulations for RFSs.¹¹ SCHD is authorized to retain 100% of the state permitting fees collected from RFSs; SCHD is also allowed to charge additional local permitting fees to RFSs.¹² TDA’s contract with SCHD does not include Other Food Entities, which continue to be inspected by TDA, meaning that currently these entities are inspected separately by both TDA, applying state law, and SCHD, applying the Memphis Code.¹³

Logistically, the amendment process for the Memphis Food Code is quite complex. Since the Food Code was technically passed into law by the Memphis City Council, Memphis should be able to act unilaterally to amend or eliminate the Code. However, since the Code is applied by SCHD throughout Shelby County, the proper amendment process for the Food Code would seem to require approval by seven municipal governments in Shelby County (note that the government of Bartlett need not pass an amendment as its Food Code is tied to the County’s) including towns that were founded after the Code’s original ratification in 1967.

Because of these complications, and because the public health would be fully protected under state and federal law (were the Memphis Food Code to be eliminated), we believe that the Memphis Food Code should be eliminated so as to create a new regime that utilizes SCHD resources more efficiently and imposes fewer burdens on food entities in Memphis and throughout Shelby County. Once the Memphis Food Code is eliminated, municipalities within Shelby County can pass a few specific provisions back into law if they feel those are necessary; however, as noted, state and federal law adequately protect the public health in Memphis and throughout Shelby County.

⁷ Tenn. Code Ann. § 68-14-303(7)(H) (2010). SCHD can collect local permit fees for FSEs; however, these fees are deducted from the reimbursement SCHD receives from TDH. Thus, SCHD has a 95% cap on the fees it can receive from FSEs. Interview with Tyler Zerwekh, Janet Shipman, and Phyllis Moss-McNeill, Shelby County Health Department, Memphis, Tenn. (Mar. 16, 2011).

⁸ Tenn. Code Ann. § 68-14-303(7)(B) (2010).

⁹ Contract between the State of Tennessee Department of Health and Shelby County Government on behalf of the Shelby County Health Department, effective July 1, 2010 (on file with the author).

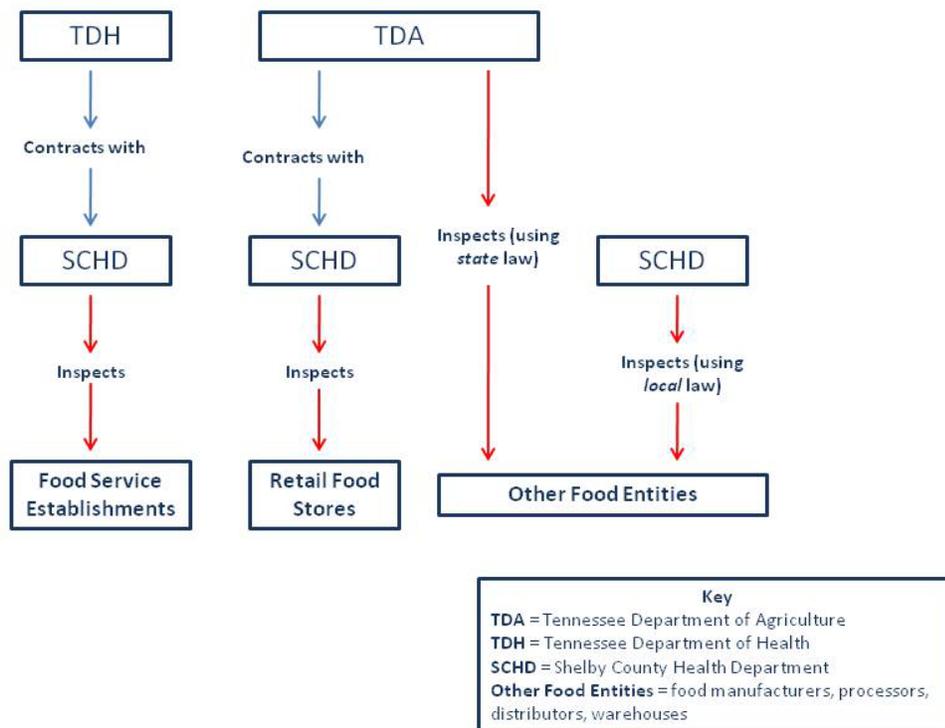
¹⁰ “Retail food store” is defined as “any establishment or a section of an establishment where food and food products are offered to the consumer and intended for off-premise consumption,” with some exceptions. See Tenn. Comp. R. & Regs. 0080-04-09-.01(1)(x) (2011).

¹¹ Tenn. Code Ann. § 53-8-205(7)(B)(i) (2010). Unlike the contract with TDH, the contract with TDA does allow for more stringent regulations at the local level so long as local rules are at least as stringent as state law and regulations.

¹² Tenn. Code Ann. § 53-8-205(7)(A) (2010).

¹³ The Retail Food Store Inspection Act of 1986 only authorizes TDA to contract with local health departments to inspect retail food stores. Tenn. Code Ann. § 53-8-205(7) (2010).

Authority for Food Inspection in Memphis/Shelby County



Overall Problems with the Memphis Food Code

A. Duplication of Effort

One of the major burdens in the current Memphis Food Code is the fact that the current regulatory scheme requires the duplication of efforts, particularly by SCHD and TDA, with regard to permitting and inspections of certain entities. This causes confusion, and therefore stifling of economic activity, among food industry entrepreneurs about who monitors their businesses and what rules they should follow.

As mentioned above, because TDH and TDA contract with SCHD to issue permits and conduct inspections of FSEs and RFSs on their behalf, there is no duplication of efforts with regard to regulating FSEs and RFSs. Still, as discussed below, food businesses and food industry entrepreneurs may be confused as to what laws apply in cases where the Memphis Code is not consistent with state laws and regulations regarding FSEs and RFSs.

The duplication of efforts occurs because TDA does not contract with SCHD to permit and inspect “Other Food Entities,” (OFEs) including food manufacturers, processors, distributors and warehouses. TDA conducts these inspections on its own, meaning that these OFEs are inspected and permitted separately by both TDA (applying state law) and SCHD (applying the Memphis Code). These inspections are conducted on separate dates and impose separate sets of rules and separate permitting fees. The local inspections are required based on the provisions in the Memphis Food Code related to the operations of

these OFEs and on the Memphis Food Code’s overly broad definition of a “food service establishment” that includes “any place . . . in or from which . . . food intended for consumption by human beings is manufactured, kept, stored, or offered for sale.”¹⁴ If the Code were amended so that SCHD were to stop inspecting OFEs, TDA would still conduct these inspections and SCHD would conserve resources. Alternatively, TDA could expand its contract with SCHD to cover these OFEs in addition to RFSs. If the contract were expanded in this way, the Code would still have to be amended to eliminate the local provisions that are in conflict with state law.

The current system places a strain both on the resources of SCHD and on the efficiency with which the food industry operates. For example, several stakeholders said that they spend a lot of their time each year trying to determine how the permitting/inspections process works, to whom they are accountable, and what to expect from their inspections.¹⁵ Similarly, some representatives of SCHD expressed frustration over the volume of businesses it has to regulate¹⁶ and the confusing task of having to interpret and enforce the often vague provisions of the Memphis Code along with existing state laws, which conflict on certain subjects.¹⁷

Some SCHD representatives have indicated a desire to “get out of the business of permitting food distributors, processors, and manufacturers;”¹⁸ however, as mentioned below, their main concern is that if SCHD withdraws from the permitting process for those businesses, it will no longer have a right-of-entry to those facilities in the event of a consumer complaint or emergency that TDA cannot manage as effectively as SCHD, due to the facilities’ location. As discussed below, SCHD should be able to retain its right-of-entry in cases of food safety risks or suspicion of such risks. Therefore, it does not need to duplicate state efforts in regulating OFEs and can concentrate its resources where they are most needed, but can still serve a role with all food entities in the case of an emergency.

B. Stifling of Economic Activity and Access to Nutritious Foods

For a variety of reasons discussed below, the Memphis Food Code stifles economic activity of food entities and limits access to healthy foods in Memphis and throughout Shelby County.¹⁹ The Code’s requirement that a permit be obtained to manufacture, sell, or distribute any food items is one of the main causes of these problems.²⁰ Another reason is that the Code is overly restrictive for FSEs and RFSs, despite comprehensive state regulations for these entities, and is also overly restrictive for small-scale, low-risk food entities operating in Memphis and throughout Shelby County.

¹⁴ Memphis, Tenn. Code 9-52-1 (MuniCode 2009).

¹⁵ Approximately 25 people from the local food industry were interviewed between January 2-22, 2011 and March 14-18, 2011.

¹⁶ For example, food service entities are generally inspected once every four months, but the frequency can vary broadly (up to eight months between inspections) depending on the capacity of SCHD. Interview with Restaurant Stakeholders, Memphis, Tenn. (Jan. 11, 2011).

¹⁷ For example, the Food Code requires food processors to operate out of kitchens that are separate from those used in other retail establishments or restaurants, whereas TDA regulations allow for foods to be processed in retail establishments or restaurants as long as FDA good manufacturing practices (GMPs) are followed. *Compare* Memphis, Tenn. Code 9-52-65 (MuniCode 2009) with Tenn. Comp. R. & Regs. 0080-04-10-.01 (2011).

¹⁸ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

¹⁹ The code affects Memphis and every jurisdiction in Shelby County including incorporated cities and the unincorporated part of Shelby County because, currently, the Memphis Food Code is being used as the applicable law by SCHD in every place within the geographic boundary of Shelby County. The cities within Shelby County do not have their own food safety enforcement programs. Instead, they contract with SCHD to perform inspections and uphold food safety within their jurisdictions.

²⁰ Memphis, Tenn. Code 9-52-3 (MuniCode 2009).

Overly Expansive Permitting Requirement

One aspect of the Code that is particularly problematic is its local permitting requirement. According to the Code, every person engaged in the “manufacture, sale or distribution of any food” requires a permit.²¹ In other words, the default in Shelby County is that a food-related business or activity is not allowed, and the Code offers a set of specific permits that are needed to escape this default. No other cities we researched had such a broad permit requirement.²² For any establishment that does not seem to fit into a category, the health officer may assign it to a category that seems to be the “most reasonable”²³; however, the Code narrowly defines many of these categories, from “coffee bars” to “industrial catering trucks.”²⁴ Also, as mentioned above, SCHD cannot charge separate permitting fees for FSEs,²⁵ which is a fact the Code fails to reflect; however, other entities would need to obtain one of these particular local permits, even those that would be permitted simply as an RFS in other parts of the state.²⁶

This peculiar permitting provision burdens both food entities and SCHD itself. First, many low-risk enterprises, such as a produce stand at a community garden, may not be able to easily fit into the given permit categories. According to our discussion with food industry stakeholders in Memphis and Shelby County, this prevents many potential enterprises from functioning in Shelby County and inhibits access to healthy foods. For instance, one mobile food vendor who successfully operated elsewhere in Tennessee was unable to operate in Shelby County because his business, that of a “mobile seafood vendor,” did not seem to fit into a permitted category.²⁷ One market manager was having difficulty opening an establishment that would function as a retail store and farmers market because SCHD representatives did not know how to permit it.²⁸ Administratively, trying to fit such establishments into narrow categories is often difficult and incurs unnecessary costs. In addition, some local entities are so low-risk that a permit may not be necessary and merely serves to stifle their activity. This is true for entities such as farmers markets, which often are not required to obtain a state or local permit.²⁹

²¹ Memphis, Tenn. Code 9-52-3(a) (MuniCode 2009).

²² Other city and state laws include language that may seem just as broad as Memphis’s permit requirement at first glance. For example, many required a permit for “all food establishments.” However, Memphis’s requirement is broader because those other cities and states first define a category of businesses for which permits will be required, and then require permits from entities that fit in such categories. This leaves room for certain entities (such as low-risk entities like produce stands or farmers markets) by not including them in permit-required categories. Memphis, on the other hand, presumes that all food entities need a permit, and tries to determine the entity’s category *after* the presumption that some kind of a permit is needed, leaving no room for exception. For example, North Carolina regulation stipulates that “[n]o [food] establishment shall commence or continue operation without a permit or transitional permit issued.” 15A N.C. Admin. Code 18A .2600 130A-248(b) (2011). However, it makes exceptions to the permit requirement for certain entities, including “traditional country stores that sell uncooked sandwiches or similar food items that engage in minimal preparation . . .” 15A N.C. Admin. Code 18A .2600 130A-250 (2011).

²³ Memphis, Tenn. Code 9-52-3(b) (MuniCode 2009).

²⁴ For instance, a “coffee bar” is defined as “a retail food service establishment where coffee, hot tea or other hot beverages are sold which do not require any mixing, preparation or handling beyond the combining of a mix or a powder with hot water.” Memphis, Tenn. Code 9-52-1 “Coffee bar” (MuniCode 2009).

²⁵ Tenn. Code Ann. § 68-14-303(7)(H) (2010).

²⁶ For example, a grocery store is an RFS under state definition and would require RFS permit from TDA. It is also a “food service establishment” under the Memphis Code’s extremely broad definition of a “food service establishment” (different from the state definition of an FSE) and would accordingly require a local permit as a grocery store with different permit categories based on size and whether the grocery store has a meat market and/or a bakery. See “Misaligned Definitions,” *infra*.

²⁷ Interview with Mobile Food Vendor, Memphis, Tenn. (Mar. 16, 2011).

²⁸ Interview with Farm Manager, Memphis, Tenn. (Mar. 16, 2011).

²⁹ For example, the city of Austin does not require any permit to operate a farmers market. Indiana, by statute, supports farmers markets by exempting them from the “food establishment” status, which would entail more onerous sanitary and

Regulating low-risk areas of the food economy, like raw produce vendors, is burdensome and time-consuming and does not serve a compelling public health interest.³⁰

For those that easily fall into a permit category, the separate requirements for local permits still add an unnecessary burden. For instance, a grocery store that sells meat would need one state license as an RFS, but it would also need two local licenses, one for a grocery store and one for a meat market.³¹ Such an added requirement again stifles economic activity, making it far more difficult for a small food establishment to operate in Shelby County compared to elsewhere in the state. Also, it contributes little to local revenue and incurs additional administrative costs.

Since SCHD already permits and inspects RFSs and FSEs on behalf of the state, a separate local permitting system is unnecessary to maintain health and safety standards in Shelby County. If particular entities are truly overlooked by the state system, SCHD or local municipal governments can clearly identify those entities and require that they obtain a local permit. However, this does not mean that local governments should have SCHD require a permit for every food entity it can legally permit, as permitting requirements can stifle economic activity. Rather, SCHD should identify the entities that are not covered by state law and are most essential to permit and then work with local governments to pass appropriate permitting requirements and fees for those entities.

Overly Stringent or Confusing Local Laws

The Memphis Food Code is often more stringent than state law regarding FSEs, RFSs, small-scale food entities, and OFEs. In some cases, state and local law are not consistent with one another, making it difficult for food industry entrepreneurs to know which law should be followed.

Overly Stringent Standards for FSEs and RFSs

The Code places FSEs and RFSs in Memphis and throughout Shelby County at a relative disadvantage when the Code imposes standards that are unnecessarily stricter than those included in state law. Because SCHD inspects these institutions on behalf of the state, Tennessee law requires SCHD's standards for FSEs and RFSs to be "at least as stringent as those of the state law and regulations."³² Further, the contract between SCHD and TDH notes that SCHD can *only* apply standards to FSEs that are "identical" with state law, barring SCHD from applying more stringent local laws to FSEs.³³ For one, this renders much of the Memphis Food Code redundant or unenforceable, at least as applied to FSEs and RFSs.³⁴ However, more stringent local requirements that *are* enforceable by SCHD are completely unnecessary because state law does not leave significant gaps or holes that need to be filled by local law. The Provision-by-Provision Analysis, *infra*, shows that Tennessee state law adequately addresses

regulatory requirements, and disallows local governments from making sanitary requirements to the contrary. Ind. Code Ann. §§ 16-42-5-29, 16-42-5-0.5 (West 2011). Similar provision exists in the Ohio statute, which exempts farmers markets from being considered a "retail food establishment" subject to various regulations. Ohio Rev. Code Ann. § 3717.22(B)(1) (2011).

³⁰ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

³¹ See Memphis, Tenn. Code 9-52-1 "Grocery store", "Meat market", 9-52-3 (MuniCode 2009). To make matters worse, if the grocery store contains a bakery in addition to a meat market, it would need an additional license for that operation, requiring a total of three local licenses.

³² Tenn. Code Ann. § 53-8-205 (7)(b)(ii) (2010); Tenn. Code Ann. § 68-14-303 (7)(b) (2010).

³³ Contract between the State of Tennessee Department of Health and Shelby County Government on behalf of the Shelby County Health Department, effective July 1, 2010 (on file with the author).

³⁴ See generally "Provision-by-Provision Analysis," *infra*, which examines each provision of the Code and identifies those standards that are unenforceable, redundant, insignificant, or harmful.

the health and safety concerns implicated by each provision of the Code.³⁵ Secondly, the Comparative City Analysis, *infra*, shows that many cities do not maintain a local food code when state law clearly has a comprehensive food code.³⁶ Both Knoxville and Nashville-Davidson County have similar contracts with the state of Tennessee, and they impose very few local regulations that cover food establishments.³⁷

Not only are the additional requirements unnecessary, they may harm businesses. Some of the provisions impose minute additional requirements that simply contribute to confusion. Others put Shelby County businesses at a notable disadvantage from the rest of the state and stifle the economic activity of Shelby County, whether or not the local provision has a notable impact on the public health. Often, they do so in ways that limit access to healthy foods, such as by reducing access to fresh fruits and vegetables in “food deserts” in Memphis and throughout Shelby County.³⁸ For example, both state and local regulations require that all openings to a building, room or enclosure where food is served or stored be protected by a door or screen; however, state law allows “controlled air currents” as a substitute, which the Code fails to include.³⁹ Also, the Code requires that food establishments obtain approval from a health officer to allow employees to store their personal belongings in lockers in rooms that store packaged foods, although state law does not require prior approval.⁴⁰ Other examples include: mandating that dishes and utensils be washed in 180 degree water rather than the 170 degrees required by state regulation,⁴¹ requiring all FSEs regardless of size to provide a lavatory for their patrons, except for drive-in restaurants,⁴² and requiring that FSEs be completely physically separated from other activities (e.g., processing foods for retail sale).⁴³ None of these differences is crucial additions to state law in ensuring public health and safety and merely makes it more difficult and confusing for a business to operate in Shelby County as opposed to elsewhere in the state.

³⁵ See generally “Provision-by-Provision Analysis,” *infra*.

³⁶ For example, some cities like San Jose and Charlotte do not have any food regulation provisions in their ordinances and defer to state law instead. A few cities have a non-comprehensive set of specific food ordinances that impose sanitary requirements. See, e.g., Jacksonville, Fla. Code 165.102 (MuniCode 2011). Several others have ordinances that predominantly or exclusively pertain to permits and fees. See, e.g., The Code of the Health and Hospital Corporation of Marion County 8-101 *et seq.* (2011) available at http://www.hhcorp.org/brd_code.htm.

³⁷ As noted above, Knoxville has two provisions pertaining to food service establishments. One regulates pet dogs in outdoor dining areas, while the other mandates that pedestrian food vendors comply with applicable state laws and regulations and also adds a few local requirements for these entities. Knoxville, Tenn. Code 5-80, 16-316 *et seq.* (MuniCode 2011). Nashville also has very few provisions that relate to food service establishments, such as a provision permitting pet dogs in outdoor dining areas (pursuant to state law allowing municipalities to pass such ordinances). Nashville, Tenn. Code 8.04.190 (MuniCode 2011). See also “Comparative City Analysis,” *infra*, for additional examples of the types of food-related regulations located in the Nashville Code.

³⁸ According to the manager of one Memphis farmers market, “Our community is located in a food desert and so the farmers market is more than just a novelty; it’s about food security. We want our members to be able to get this food in a way that’s accessible. Some of the rules keep us from doing that. For example, when we first started the market, a lot of the foods we sold, like the unshelled purple hull peas had cultural relevance, so people were excited about buying them in the shell. Grandparents would purchase them and show their grandchildren how to shell the peas, and it was fun for the kids because many of them hadn’t seen or tasted some of the foods before. But the novelty of that wore off pretty quickly, and people started wanting to purchase their peas shelled. We can’t do that under the current rules without shelling them in a commercial kitchen first, which most growers don’t have access to, or shelling them for customers after purchase, which is too time consuming. This creates less of an incentive for the community to purchase the food.” Interview with Farmers Market Stakeholder, Memphis, Tenn. (Jan., 2011).

³⁹ Provision-by-Provision Analysis (“Section 9-52-30 - Doors and Screens”).

⁴⁰ Provision-by-Provision Analysis (“Section 9-52-52 - Dressing rooms and lockers”).

⁴¹ Compare Memphis, Tenn. Code 9-52-38(a) (MuniCode 2009) with Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(c)(7)(i) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(c)(5)(i) (2011).

⁴² Compare Memphis, Tenn. Code 9-52-50 (MuniCode 2009) with Tenn. Comp. R. & Regs. 1200-23-1-.02(10)(n)(2011).

⁴³ Memphis, Tenn. Code 9-52-47 (MuniCode 2009).

In sum, these more stringent requirements serve to discourage the growth of the local food industry and create unnecessary barriers to fresh food access in the areas of the county that need it the most. If it is much more difficult to open a food business in Memphis or throughout Shelby County than it is elsewhere in the state (or in other states), businesses will move elsewhere, to the detriment of those living in Memphis or Shelby County.

Small-scale or low-risk food entities not regulated at the state level

In addition to the stifling of economic activity and reduction of access to healthy foods mentioned above with regard to OFEs, FSEs, and RFSs, the Memphis Code stifles economic activity and healthy food access with regard to various small-scale, low-risk food entities. These are entities that are not heavily regulated at the state level, such as farmers markets, hucksters (mobile produce vendors), and other similar entities.

For instance, the Code requires that farmers markets operate on paved ground and that the sponsoring organization provide bathroom facilities that comply with the Memphis Food Code provisions for FSEs such as restaurants.⁴⁴ None of the 16 cities we researched, or their respective states, appeared to have this “paved ground” requirement; regarding the bathroom requirement, many were silent on the topic or simply required that bathrooms be accessible within a certain number of feet.⁴⁵ Certainly neither of these requirements fulfills a notable food safety purpose with regard to the food sold in these markets. Similarly, in Memphis and throughout Shelby County, produce trucks (called “hucksters” in the Code) are only allowed to sell fruits, vegetables, melons, berries, chestnuts and packaged nuts, they must keep their vehicles “in motion except when making sales,” and, like all food entities in Memphis, they must receive a permit.⁴⁶ Out of the 16 similar cities we researched, none imposed this “in motion” requirement on produce trucks⁴⁷ and some, including Austin, Jacksonville, Indianapolis and Knoxville, did not even require that the produce trucks obtain permits from the department of health. Unlike Memphis, none of the cities placed limits on the specific types of produce that could be sold from these produce trucks.

These stringent regulations clearly operate as a hindrance to entrepreneurs who can and wish to bring in healthy foods to Shelby County. One stakeholder stated that it is very difficult for a produce truck to operate in Memphis.⁴⁸ Another stakeholder expressed frustration at being unable to sell farm products in her local area, which clearly qualified as an impoverished food desert, because the stringent requirements for farmers markets prevented her from opening one and because there appeared to be no other means to legally sell her products in the area.⁴⁹ The local area in question had no accessible grocery store, and the residents simply resorted to purchasing food from corner stores and fast food restaurants.⁵⁰

⁴⁴ Memphis, Tenn. Code 9-52-73 (F), (H) (MuniCode 2009).

⁴⁵ *E.g.*, Cal. Retail Food Code § 114371(c) (2011) (requiring restroom and hand washing facility within 200 feet of the farmers market).

⁴⁶ Memphis, Tenn. Code 9-52-70 (MuniCode 2009).

⁴⁷ Detroit’s Municipal Code was the only one imposing such an “in-motion” requirement on produce trucks. Detroit, Mich. Code 41-2-3(d) (MuniCode 2010). However, Detroit’s local code is no longer followed, as it is preempted by state law. Mich. Comp. Laws § 289.3113 (2011).

⁴⁸ Interview with Farmers Market Stakeholder, Memphis, Tenn. (Mar. 15, 2011).

⁴⁹ Interview with Farmers Market Stakeholder, Memphis, Tenn. (Mar. 15, 2011).

⁵⁰ Interview with Farmers Market Stakeholder, Memphis, Tenn. (Mar. 15, 2011).

In some cases, it is not clear whether SCHD would actually enforce these stringent standards, yet the Code may still serve to discourage businesses. For example, the Code only allows produce, nuts and berries to be sold at farmers markets, prohibiting the sale of animal products.⁵¹ In practice, SCHD seems to allow the sale of meat, eggs, and dairy products at farmers markets, despite this provision, provided that vendors of these items follow federal and state rules regarding permitting and inspections.⁵² However, this is not obvious from looking at the Code,⁵³ leaving vendors of meat, eggs, dairy, jams, jellies, breads and other prepared foods uncertain about their ability to participate in farmers markets. Even if sales of these items are allowed in practice, it causes a potential seller who tries to follow the law to its letter to lose out on his business, and creates a perverse incentive for food industry entrepreneurs to disregard or be ignorant of the law.

Furthermore, under a Tennessee state law passed in 2007 and amended in 2011, individuals are now authorized to sell non-potentially hazardous food items that are prepared in a home kitchen.⁵⁴ This provision clearly applies in Memphis and throughout Shelby County. However, the Memphis Code has not been updated to reflect this new home kitchen permission and there is no way for food industry entrepreneurs in Memphis or Shelby County to know that they are allowed to prepare and sell such food items at farmers markets and other local venues. Along these lines, SCHD recently distributed a “guidance document” of its new inspection rule allowing non-potentially hazardous foods prepared in a home kitchen to be given out as food samples;⁵⁵ however, mentioning that some foods can be used in samples further confuses local food industry entrepreneurs, as it makes it seem that they can *only* be used for samples, when in fact they can be sold as well.

This is one example of a guidance document issued by SCHD in order to clarify how it enforces the Code; however, these guidance documents are difficult to find, and the written Code may still discourage entrepreneurs who do not know where to locate such guidance documents. For example, despite this guidance document regarding food sampling, the language of Code has not been amended, and this on its face it still prohibits food sampling at farmers markets, unless the items to be sampled are prepared and assembled in a commercial kitchen and properly stored before being served at the market.⁵⁶ The guidance document is not located online, so food industry entrepreneurs would have no way to know of the change. If a farmer or food entrepreneur were to read the laws, as we would expect citizens to do, they would be completely confused regarding whether food sampling was indeed allowed or not. Additionally, the Code is silent on the topic of cooking demonstrations, and SCHD’s enforcement

⁵¹ Memphis, Tenn. Code 9-52-1 “Farmers market” (MuniCode 2009); Memphis, Tenn. Code 9-52-73 (C) (MuniCode 2009).

⁵² Separate permits may be obtained for vendors of animal products, although a “farmers market permit” only is valid for the sale of fruits, vegetables, melons, berries, nuts or honey. Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011). In practice, farmers markets in Shelby County clearly offer other products besides produce. The Memphis Farmers Market openly lists meat and other products on its website at <http://www.memphisfarmersmarket.org/vendorproducts>. The Agricenter International Farmers Market similarly lists meat and processed items at <http://www.agricenter.org/FMVendors.htm>. On the other hand, while these products are typically allowed, one stakeholder reported that an inspector told her that it was illegal to sell fish at a farmers market because it is an animal product. Interview with Farmers Market Stakeholder, Memphis, Tenn. (Mar. 15, 2011).

⁵³ “A farmer’s market permit shall be issued for fruits, vegetables, melons, berries or nuts only; and no other types of food may be sold.” Memphis, Tenn. Code 9-52-73 (MuniCode 2009).

⁵⁴ 2011 Tennessee Laws Pub. Ch. 387 (S.B. 1850), amending Tenn. Code Ann. § 53-8-117.

⁵⁵ “Sampling operations located in farmer’s markets, flea markets, and temporary events are exempt from permitting and regulation provided the food products being offered as samples are non potentially hazardous and/or are products prepared in a licensed domestic kitchen regulated by the Tennessee Department of Agriculture.” Shelby County Health Dep’t, General Environmental Health Manual Revision, “food sampling operations.” Rev. 10-4-10. Oct 8, 2010 (on file with the authors, available in the Appendix).

⁵⁶ Memphis, Tenn. Code 9-52-73 (E) (MuniCode 2009).

practice regarding these types of events has varied.⁵⁷ This is just one of many examples where SCHD has had to disseminate further guidance to bring the Code up to date or has had to allow certain food sales that are not permissible under the Code but are permissible under state laws.

Dual Inspection of OFEs & Application of FSE requirements to all food entities

Finally, as mentioned in the Duplication of Efforts section, *supra*, the Code makes it economically difficult for OFEs to operate in Shelby County because they must be inspected twice, once by local authorities and once by state authorities, with two different sets of rules. This results in major barriers to entry for many OFEs and prevents existing businesses from reaching their full economic potential. Neither Knoxville nor Nashville-Davidson County engages in a similar practice, nor do any of the other cities we researched.⁵⁸ This duplicative regulation in Memphis and throughout Shelby County unnecessarily burdens OFEs and puts them at an economic disadvantage when they operate within Shelby County as opposed to operating elsewhere in the state.

Another problem results from the Memphis Food Code applying the term “food service establishment” to all food entities, including OFEs. This means that all the provisions included in Articles 1 and 2 of the Memphis Food Code are intended to apply to all food entities, including those regulated through Article 3. Thus, food entities that typically would not be considered an FSE or regulated as such are regulated as FSEs in the Memphis Food Code. Memphis should define OFEs separately and adopt the state definitions of RFS and FSE, noting that these OFEs do not fit in to those categories, for ease of comparison.

C. Stakeholder Confusion and Unenforceable Provisions

Although the Code imposes some standards that are more stringent than state law, it also includes many standards that are less stringent and that may therefore be a source of serious confusion. Facing two sets of laws and misaligned definitions, business owners cannot easily tell which requirements in the Code apply to them and which provisions fail to include all the applicable state requirements, and they may inadvertently follow the outdated requirements in the Memphis Food Code. This confusion is a serious hindrance to economic development, food access, and even food safety in Memphis and throughout Shelby County.

⁵⁷ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011). As of July 2011, SCHD seems to be permitting cooking demonstrations, but not in the past. Because of the changing enforcement practice over time and a lack of clear Code to guide them, stakeholders often must rely on word-of-mouth to learn the acceptable practice at the time.

⁵⁸ Knox County Health Department only inspects grocery stores, convenience stores, and produce markets in addition to food service facilities. See Knox County Health Department, “Food Protection,” http://www.knoxcounty.org/health/pdfs/food_protection.pdf (last visited July 7, 2011). Similarly, Nashville only inspects “food service establishments” and “retail food stores,” all under contract with TDH and TDA. See Metropolitan Government of Nashville and Davidson County, Tennessee, “Food Inspection Program,” <http://health.nashville.gov/ENV/Food/FoodInspection.htm> (last visited July 7, 2011). In most other states, OFEs are inspected by a state agency, whereas FSEs are inspected by a local enforcement agency. For example, in Atlanta, the Georgia Department of Agriculture inspects food processors while the Fulton County Department of Health and Wellness inspects food service establishments. See Georgia Department of Agriculture, “Processing Plants,” <http://team.georgia.gov/portal/site/AGR/menuitem.2f54fa407984c51e93f35eead03036a0/?vgnextoid=b9ae733860a06210VgnVCM100000bf01020aRCRD> (last visited July 8, 2011); Fulton County Government, “Restaurant/Food Establishment Inspections,” <http://www.fultoncountyga.gov/restaurant-inspections> (last visited July, 2011).

The Code often fails to reflect the applicable state standards

As mentioned above, Tennessee law requires SCHD's standards for FSEs and RFSs to be "at least as stringent as those of the state law and regulations."⁵⁹ Because the Code was last amended long before the state regulations were updated, there are many provisions in the Code related to FSEs and RFSs that impose less stringent standards than state law. Since the more stringent state standards have to govern, these fail to provide the requisite guidance that is needed for FSEs, RFSs, and OFEs to fully comply with the requirements, leading to confusion, inconsistencies, and inadvertent noncompliance.

First, some provisions are simply less specific than the corresponding state law or regulations. For example, while Section 9-52-29 of the Memphis Food Code requires FSEs and RFSs to install and keep clean nonabsorbent floors, walls, and ceilings, state regulations go much further, covering in detail the requirements surrounding floor construction, carpeting, floor drains, floor junctures, wall and ceiling maintenance, wall and ceiling construction, and exposed construction.⁶⁰ Therefore, this group of provisions is essentially invalid, as it imposes less stringent standards on FSEs and RFSs. Furthermore, maintaining these invalid provisions in the Memphis Code causes food entities that rely on the Food Code to unknowingly violate state regulations enforced by SCHD.

Instead of merely being less specific, some provisions cite particular standards that are less stringent than those in state law. For example, while Section 9-52-1 and other similar provisions of the Memphis Food Code states that potentially hazardous foods can be kept at or below 45 degrees Fahrenheit, state regulations require that they be kept at or below 41 degrees Fahrenheit.⁶¹ These provisions are unenforceable and may be extremely misleading to food entities.

Provisions that include both more and less stringent standards than state law are particularly confusing. The Provision-by-Provision Analysis, *infra*, includes many examples of provisions that fall under this category. For example, state regulations require that FSEs and RFSs provide restrooms for patrons of each sex unless the establishment has a seating capacity of 16 or less.⁶² However, the Memphis Code requires that all food entities except for "drive-by" restaurants and "packaged goods stores" provide restrooms, without specifying that they be available to each sex.⁶³ In addition, the state regulations include some requirements for restroom facilities not included in the Code, and the Code includes some requirements for restroom facilities not included in the state regulations.⁶⁴ This makes it particularly difficult to determine which rules govern in the end. Regardless of whether the state or local regulations have the superior set of rules, it is clearly better for businesses to have one standard to follow.

⁵⁹ Tenn. Code Ann. §§ 53-8-205 (7)(b)(ii), 68-14-303 (7)(b) (2010). According to SCHD, because TDH regulations are already considered comprehensive and stringent, SCHD is discouraged from imposing any stricter regulations on Food Service Establishments. Unlike TDH, TDA does not object when SCHD's standards are more stringent than its own because TDA's retail food store regulations are not as specific or comprehensive as TDH's regulations. Thus, SCHD has more leeway regarding standards that cover the retail food stores they regulate under contract with TDA. However, SCHD is still limited to using local regulations that are at least as stringent as those used by TDA, so this still only allows the local authorities to ratchet up the restrictions. This TDH/TDA distinction may not be apparent to individual food vendors operating in Memphis and it even further complicates the application of food safety laws in Memphis.

⁶⁰ See Tenn. Comp. R. & Regs. 0080-04-09-.07(1), (2) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(a), (b) (2011).

⁶¹ Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(b) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b) (2011).

⁶² Tenn. Comp. R. & Regs. 0080-4-9-.06(4)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-1-.02(10)(m) (2011).

⁶³ Memphis, Tenn. Code 9-52-49 (MuniCode 2009).

⁶⁴ See Provision-by-Provision Analysis ("Section 9-52-49"), *infra*.

Redundant Standards

Finally, some provisions in the Memphis Food Code contain the same or similar requirements as state laws and regulations. These provisions are obviously unnecessary as applied to FSEs and RFSs. Furthermore, as many food industry entrepreneurs are not well-versed in law, they may not realize that such local and state laws are redundant; instead, they may be confused and intimidated by the large number of state and local provisions they need to meet. Reducing this burden on food industry entrepreneurs will encourage them to increase their business activity and increase access to healthy foods in Memphis and throughout Shelby County.

Misaligned Definitions

Another serious source of confusion is the fact that the Memphis Code utilizes a different set of definitions from state law. For example, the Code does not define the term “retail food store,” and it defines “food service establishment” very differently than the state.⁶⁵ In fact, RFSs, FSEs (as defined by the state) and OFEs *all* fall under the broad Memphis definition of “food service establishment.” This makes comparison with state standards extremely difficult, likely leading to great uncertainty among food entities about which laws and regulations apply to them.⁶⁶

Furthermore, state law does not define certain entities that are defined in the Code such as “coffee bar,” “industrial caterer,” and “huckster” (or produce truck). The Code still requires that each of these entities receive their respective local permits and follow local provisions specific to them.⁶⁷ This can be a serious source of confusion, since a given food entity must first figure out how it is defined by both state law and the Code in order to meet permitting requirements and to figure out if any special provisions in the Code apply. It then must figure out which law trumps the other. This is particularly complicated when the Code provides special rules and even exceptions for some entities. For instance, state law defines the term “mobile food unit” and subjects it to special rules and some exceptions from some typical FSE requirements.⁶⁸ However, any mobile food operation in Memphis or Shelby County must also fall under a local permit category, the candidates being a “huckster,” “ice cream vendor,” “industrial catering truck” “pedestrian vendor,” or “mobile food preparation vehicle” (the last is a new category added by a 2010 ordinance).⁶⁹ To add to the confusion, some of these entities may or may not fall under the state definition of “mobile food unit,” and some “mobile food units” may or may not fall under the definition of one of these entities.⁷⁰ This makes comparison with state law extremely difficult, and these operations may not know whether a given exception or special rule applies to them. The Provision-by-Provision Analysis attempts to highlight which requirements and exceptions to the requirements are enforceable; however, it is particularly unclear what requirements and rules apply whenever state and

⁶⁵ The Code does not define “retail food store” but defines “food service establishment” as any place where food is “manufactured, kept, stored or offered for sale, disposition or distribution,” although “hucksters” are not considered food service establishments. See Memphis, Tenn. Code 9-52-1 “Food service establishment” (MuniCode 2009).

⁶⁶ See Provision-by-Provision Analysis (“Section 9-52-1”), *infra*.

⁶⁷ Memphis, Tenn. Code 9-52-1 (MuniCode 2009).

⁶⁸ A “mobile food unit” is “a food service establishment designed to be readily movable.” Tenn. Comp. R. & Regs. 1200-23-01-.01(22) (2011).

⁶⁹ See Memphis, Tenn. Code 9-52-1 (MuniCode 2009). See also Provision-By-Provision Analysis (“Mobile Food Preparation Vehicles”), *infra*.

⁷⁰ For instance, some “pedestrian vendors” may not qualify as “food service establishments” and therefore could not qualify as a “mobile food unit.” “Pedestrian vendors” are defined as vendors selling any type of food from a motor vehicle in specified areas on a daily basis, and “mobile food units” are a type of “food service establishment.” See Tenn. Comp. R. & Regs. 1200-23-01-.01(22) (2011); Memphis, Tenn. Code 9-52-1 (MuniCode 2009).

local law utilize separate definitions.

Unclear Guidance or Arbitrary Enforcement

Some provisions in the Memphis Code invoke broad, discretionary language, which fails to provide clear guidance to businesses. An example of such language is the phrase, “as designated by the department of health.” For example, Section 9-52-49 of the Memphis Food Code currently states that “[v]estibules shall be provided as designated by the department of health.” Assuming these requirements are valid, the problem with this type of language is that it gives owners of FSEs, RFSs, and other food industry entrepreneurs no clear answer as to whether and when vestibules are required and also creates arbitrariness in the interpretation and enforcement of the provision by health inspectors. Different health inspectors might interpret the provision differently. This type of broad provision can stifle economic activity through paralysis of food industry entrepreneurs due to their confusion and lack of guidance.

Lack of Clarifying Documents

As articulated by local stakeholders, much of the public knowledge regarding the Memphis Food Code and local regulations is disseminated by word of mouth among business owners and by individual inspectors, who, as many of the food industry stakeholders complained, had differing interpretations of the law. There are no publicly available documents clarifying which provisions of the Food Code are preempted by state law or regulations. The terms of SCHD’s contracts with TDH and TDA are also not readily available. In addition, as mentioned, SCHD uses both formal and informal “work-arounds,” such as the food sampling guidance document mentioned above, which are not recorded as part of the Food Code and thus are not readily available to food industry entrepreneurs.⁷¹

As a result, many local stakeholders may not know that parts of the Code are unenforceable since they are preempted by state law. Even stakeholders who are aware of this fact would find it extremely difficult to learn where state law is more or less stringent. Thus, they may needlessly defer to unenforceable provisions, resulting in a waste of time and money, and may ultimately become discouraged from operating a food entity.

These problems could be remedied if the Code were to be eliminated or if SCHD made clear that it completely deferred to state regulations. If the current scheme remains (contrary to our recommendations), one simple solution to the definitional problem, as well as to the general confusion across the industry, would be to post the regulations for the public with a comprehensive explanation of where each business falls within the scheme, what it should expect from SCHD and from state agencies, and where the business is dually regulated. Indeed, of all of the barriers expressed by the stakeholders, lack of access to clear and comprehensive information was the most common complaint. Representatives of SCHD expressed that it would be amenable to making such information available to the public in an easy-to-use format.⁷² Stakeholders should follow up on making this a reality. Regardless of what becomes of the existing scheme, the overwhelming consensus of the stakeholders was that the regulations and required processes should be readily available to the public in a clear and comprehensive format.

⁷¹ Shelby County Health Dep’t, General Environmental Health Manual Revision, “food sampling operations.” Rev. 10-4-10. Oct 8, 2010 (on file with the authors, available in the Appendix).

⁷² Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

D. Collective Action Problem

Technically the Food Code was originally passed into law by the Memphis City Council, so Memphis should be able to act unilaterally to amend or eliminate the Code. However, since the provisions of the Code are applied by SCHD throughout Shelby County and all the municipalities within Shelby County, the proper amendment process for the Food Code would be immensely cumbersome, requiring approval by seven districts in Shelby County for each amendment (note that the government of Bartlett need not pass an amendment as its Food Code is tied to the County's).⁷³ This makes it difficult to keep the Code current, causing conflicts with state laws and regulations, as state laws and regulations are updated frequently both according to guidance from the Food and Drug Administration (FDA) Food Code and to reflect the most current food safety science and technology. Furthermore, though SCHD enforces the Code throughout Shelby County and the municipalities within Shelby County, the Food Code is only legally enforceable in Memphis and arguably Bartlett, as those are the only governments within Shelby County who have passed the Code into their laws.⁷⁴ A similar Food Code exists as part of the municipal code of Arlington, though it is not identical with the current version of the Memphis Food Code.⁷⁵ Since Arlington has its own complete food code, SCHD should technically apply these separate food regulations in the Town of Arlington, though it is unclear whether this is being done.

The cumbersome and unclear amendment process has made it difficult for the Code to adapt to changes in the food industry, food science, statewide food safety laws and regulations, new food business concepts, and the changing food consumption preferences of its citizens, leaving the Food Code severely outdated. Revising the Food Code may fix this problem temporarily, but it would remain difficult to coordinate further revisions across the multiple municipalities in the future, and the Food Code would likely become outdated again soon. Thus, elimination of the Code would be the easiest solution, as individual provisions could then be passed back into local law. With a smaller set of provisions, it would be easier to keep them up-to-date and streamlined with state law.

The Role of a Local Health Department and the Concerns of the Shelby County Health Department

Every local health department plays a vital role in ensuring the public health of its residents. If the Memphis Food Code is eliminated, SCHD would actually be more effective in playing this role. The Provision-by-Provision Analysis demonstrates that state standards are clearly strict enough to address any concern surrounding health and safety in food entities throughout Shelby County.⁷⁶ By eliminating

⁷³ There are 8 jurisdictions in Shelby County (including the county's unincorporated areas). The seven cities are Arlington, Bartlett, Collierville, Germantown, Lakeland, Memphis, and Millington. The legislative body of Bartlett would not have to act, however, because its Food Ordinances are tied to the County's. Bartlett, Tenn. Code 9-601 (2009). As described below, Arlington includes a Food Code in its municipal ordinances that is quite similar to, though not identical with, the Memphis Food Code. Arlington, Tenn. Code 9-601 *et seq.* (2009). Thus, Arlington would have to act in order to amend its local food rules to be the same as the rest of Shelby County.

⁷⁴ Bartlett, Tenn. Code 9-601 (2009). This is part of a larger legal problem with amending and enforcing the Food Code, since, as written, it is part of the City of Memphis Municipal Code, rather than a set of county ordinances or SCHD regulations.

⁷⁵ Arlington, Tenn. Code 9-601 *et seq.* (2009).

⁷⁶ See generally, Provision-by-Provision Analysis, *infra*.

the Code, SCHD can efficiently apply one clear set of guidelines to RFSs and FSEs, without confusing businesses and inspectors alike with two separate sets of rules. Furthermore, it would save resources by ceasing to duplicate state inspections and permitting of OFEs. This would make it easier for food businesses to operate in Shelby County, for SCHD inspectors to do their job in a clear, consistent manner, and for farmers markets, produce trucks, and other establishments serving nutritious food to flourish in Shelby County.

A. Revenue

One source of concern for SCHD is that revenue from the permitting fees in the Memphis Food Code is not sufficient to cover the full costs of the volume of inspections it conducts every year. According to an SCHD staff member, a typical inspection costs about \$235 and often brings in a mere \$50 of revenue.⁷⁷ The average inspection for one food processor (out of the 40 the department inspects) takes between 45 minutes and 3 hours.⁷⁸ SCHD cannot easily change its permitting fee schedule since the schedule is contained in the Memphis Food Code, and thus, as described above, changes to the fees would require approval from at least the Memphis City Council but, more technically, all jurisdictions within Shelby County. As a result, the SCHD fee schedule remains far below national levels.⁷⁹

In 2009, SCHD made \$44,193 in revenue from permitting food entities other than FSEs in Shelby County (NOTE: data on SCHD permitting revenue from FSEs, which is likely a sizeable portion of the total SCHD revenue, was not publicly available).⁸⁰ SCHD's current revenue is made up of the following:

- 95% of the state permitting fees it collects on behalf of TDH for inspecting FSEs;⁸¹
- 100% of the state permitting fees it collects for inspecting RFSs on behalf of TDA;⁸²
- 100% of the local permitting fees it collects from inspecting RFSs⁸³ (SCHD is not allowed to charge local permitting fees for FSEs)⁸⁴
- 100% of the local permitting fees it collects from inspecting OFEs;⁸⁵
- 100% of the fees it gets from inspecting any entities that are not regulated under state law, such as produce trucks (hucksters), farmers markets, and other low-risk entities.

⁷⁷ Interview with Tyler Zerwekh, Janet Shipman, and Phyllis Moss-McNeill, Shelby County Health Department, Memphis, Tenn. (Mar. 16, 2011).

⁷⁸ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

⁷⁹ Interview with Tyler Zerwekh, Janet Shipman, and Phyllis Moss-McNeill, Shelby County Health Department, Memphis, Tenn. (Mar. 16, 2011). For instance, the Memphis Code prescribes a \$25 annual fee for a restaurant with less than 26 seats. Memphis, Tenn. Code 9-53-3(D) (MuniCode 2011). In comparison, the annual permit fee for a restaurant with one to nine employees in Indianapolis is \$432 as of July 2011. The Code of the Health and Hospital Corporation of Marion County 8-301 (2011) *available at* <http://www.mchd.com/hhcode.htm>. Austin requires a \$310 annual fee for a restaurant of the same scale. City of Austin, "Starting a Food Business," <http://www.ci.austin.tx.us/sbdp/downloads/startfoodbus.pdf> (last visited July 27, 2011). The city of Boston charges an annual fee of \$100 plus \$1 per seat for operating a restaurant. City of Boston, "Common Victualler License," <http://www.cityofboston.gov/licensing/forms/commonvictualler.asp> (last visited July 27, 2011). Note that Boston has periodically raised the fee over time, starting at \$60 plus \$1.00 per seat in July 1, 1982. Boston, Mass. Code 18-1.3(22) (American Legal Publishing Corporation 2011).

⁸⁰ See 2009/2010 SCHD Revenue Worksheet. This figure of \$44,193 was calculated using only permits issued to food entities, and is thus a lower sum than what appears on the revenue form. The revenue form includes both food entities and other entities such as barber shops, trailer court, and hospitals (among others) and states income from permitting fees at \$59,378.

⁸¹ Tenn. Code Ann. § 68-14-303 (H)(i) (2010).

⁸² Tenn. Code Ann. § 53-8-205(7)(A) (2010).

⁸³ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

⁸⁴ Tenn. Code Ann. § 68-14-303 (H)(ii) (2010).

⁸⁵ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

Whether or not the Memphis Food Code is eliminated, there are changes to the permitting structure that should be made. As a first step, we recommend that SCHD cease to issue separate local permits for OFEs, as this change would eliminate unnecessary costs for conducting those inspections, as well as eliminating the problem of duplication of efforts with TDA. TDA continues to inspect and permit these OFEs, thus, any inspection by SCHD at best duplicates this work and at worst forces these entities to follow conflicting laws without significantly improving food safety.⁸⁶ In addition, some SCHD representatives have already expressed that they would like SCHD to “get out of the business of permitting food distributors, processors, and manufacturers.”⁸⁷ Since the permitting fees received by SCHD for OFEs do not even cover the cost of conducting the inspections, ceasing to permit these entities would not lead to a reduction in revenue. Alternatively, SCHD could seek to expand its contract with TDA to cover OFEs, thus setting up a structure where it would inspect OFEs applying state law and keep all or some portion of the state permitting fees. This would be another way to eliminate the duplication of efforts and cover the cost of these inspections for SCHD.

As a result of the broad permit requirement in the Memphis Food Code, which states that “[n]o person shall engage in the manufacture, sale or distribution of any food without a permit from the department of health,”⁸⁸ there are also many low-risk food entities that are required to receive a permit in Memphis and Shelby County that do not require a permit under state law. The Code lists some of these entities and their permitting fees;⁸⁹ however, the list of entities and fee schedule have not been updated in the last 30 years to reflect the rising costs of conducting an inspection or to incorporate new categories of food entities.⁹⁰ For instance, according to the Code, a farmers market must receive a permit in order to operate, but this permit costs only \$7.50, which is well below the cost of conducting such an inspection.⁹¹ All high-risk entities, such as FSEs, RFSs, and OFEs are already sufficiently covered by state law. Rather than requiring a permit for all food entities in Memphis and throughout Shelby County, for those low-risk entities that municipalities in Shelby County wish to regulate, separate permitting ordinances should be passed into law. For any such entities, the permit fees should be raised in order to at least cover the costs of inspection by SCHD. It is important to keep in mind that requiring such permits limits the operation of these food entities, and thus should be done sparingly.

Finally, the Memphis Food Code should be amended to clarify that SCHD can no longer issue local permits for FSEs. Under law, SCHD keeps 95% of the state permitting fees for these FSEs but cannot

⁸⁶ There may be a concern that, if a large portion of SCHD’s inspection cost is fixed cost not linked with the number of inspections performed, ceasing inspection of OFEs will simply result in a decline in revenue without corresponding cost savings. Even in such a case, as the number of OFEs is significantly smaller than FSEs and RFSs inspected in contract with TDH and TDA, the decline in revenue is likely to be insignificant. As noted above, Shelby County or SCHD may wish to increase permit fees for FSEs and RFSs as well as those entities that are only regulated at the local level in order to offset the lost revenue from OFEs and to cover its operating expenses.

⁸⁷ Some SCHD representatives also expressed that they would like the department to get out of the business of regulating produce sold in farmers markets and deal solely with health hazards related to prepared foods that are potentially hazardous. Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

⁸⁸ Memphis, Tenn. Code 9-52-3(a) (MuniCode 2009).

⁸⁹ Memphis, Tenn. Code 9-52-3(d) (MuniCode 2009).

⁹⁰ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

⁹¹ See Memphis, Tenn. Code 9-52-3 (MuniCode 2009). According to SCHD personnel, SCHD should get out of the business of permitting entities that are either low-risk, obsolete, permitted by TDA/TDH only, or have a similar TDA permit but are dually inspected by SCHD and TDA. Examples include Coffee bar; Snack bar; Drive – In-restaurant; Retail bakery; Retail meat market; Package goods store; Food distributor; Food storage warehouse; Wholesale meat plant; Carbonated beverage plant; Mobile frozen dessert vendor; Food packing plant; Wholesale bakery; Food vendor; Food processing plant; Industrial caterer; Food caterer; Food salvager; Huckster; Pedestrian Vendor; Farmers market. Email from SCHD Employee, October 22, 2010 (on file with authors).

collect any local permitting fees.⁹² This fact is not clear in the Memphis Food Code, which still includes information on permitting costs for FSEs. Even though these fees are not assessed, the fact that they are on the books may deter food industry entrepreneurs from opening new FSEs, as it appears that the cost of doing so is greater than it is.

The local permitting system thus is little more than a source of confusion and unnecessary costs borne by SCHD, as SCHD clearly does not obtain a significant amount of revenue through its permits and inspections. Whether the Code is amended or eliminated, we recommend that the permit fees (those that can legally be charged) be changed to be more on par with national or state norms.⁹³ The permitting scheme should be amended to clarify that local FSE permits are not applied, eliminate permitting for OFEs or contract with TDA to conduct such entities, determine which low-risk entities should and should not be regulated at the local level (eliminating from the Code those that should not), and raise the permitting fees, where allowed, for all the entities that SCHD continues to inspect and permit.

B. Right of Entry

Some SCHD representatives expressed a concern that if it no longer issued local permits it would lose its ability to enter food entities to address emergencies, such as foodborne illness outbreaks or other reported safety violations.⁹⁴ This could easily be remedied by including a provision that gives SCHD a right of entry into all food entities where a problem or violation has been reported. The Code already has a provision that SCHD “shall have the right to enter any area where food is manufactured, stored, or sold.”⁹⁵ This provision may be kept (though amended slightly), ensuring that SCHD retains a right to access to all food establishments in the case of a foodborne illness outbreak or other reported problem. The Code could then include a provision that incorporates the applicable state food law, which it would enforce in these emergency cases. This way, SCHD would be able to address emergencies, without having to issue local permits for all of these entities.

If kept, the provision should be amended slightly in order to bring it in line with Tennessee law, which clarifies that regulatory authorities only have a right of access to food entities at reasonable hours.⁹⁶ If the Memphis Food Code is eliminated or substantially cut down, the provision should be amended to note that SCHD has the right to enter food entities to enforce local, state, and federal laws. This way, SCHD would have the clear power to enter if any food safety violation was potentially underway. Finally, the provision could be amended to note that SCHD would only use its right of entry power in the case of a food risk or food safety concern, which would help protect SCHD by clarifying that SCHD was not in charge of permitting all food entities all the time, reducing any political backlash that could be aimed at SCHD in case of a food entity’s noncompliance with state law.

⁹² Tenn. Code Ann. § 68-14-303 (H)(i) -(ii) (2010).

⁹³ The changes could be implemented as ordinances passed in Shelby County and each of the municipalities within the County or potentially as an SCHD regulation that would require notice and comment by all the municipalities in the County before passing into law.

⁹⁴ According to an SCHD representative, one reason for this has to do with a concern that TDA does not have enough capacity to cover the numerous businesses that fall under its jurisdiction. SCHD, therefore, views its role as one of operating as a safety net in the event that TDA is unable to respond to emergencies within Shelby County in a timely manner. Interview with Tyler Zerwekh, Janet Shipman, and Otho Sawyer, Shelby County Health Department, Memphis, Tenn. (Jan. 19, 2011). However, there are no concrete examples of times when this has happened in the past.

⁹⁵ Memphis, Tenn. Code 9-52-20 (MuniCode 2009).

⁹⁶ Tenn. Code Ann. § 53-1-208 (2010).

Looking to other cities, a Fort Worth ordinance gives the health authority the right of entry to premises to “make an inspection to enforce any of the provisions of [the] article or other laws regulating food,” an approach Memphis could adopt to reserve the right of entry to premises that are not locally permitted but may be in violation of state or federal laws.⁹⁷ The Detroit health department generally does not issue separate local permits for food establishments that it already licenses on behalf of the state,⁹⁸ but the local code still reflects that inspectors have the authority to enter any food establishment.⁹⁹ San Jose also grants a broad right of entry to the health authority, not necessarily limited by its permitting authority or in connection with the enforcement of the provisions of local ordinances.¹⁰⁰

C. Small-Scale Entities Not Regulated at the State Level

The final issue of concern to SCHD is the impact the elimination of the current Food Code would have on those sectors of the food industry not covered by state laws. SCHD representatives expressed a serious interest in maintaining some level of regulation over certain small entities that state law seems to overlook. For example, according to SCHD representatives, one category that may not be clearly regulated by the state is that of small care home, such as group day care centers that serve less than eight people.¹⁰¹ It is important to note that the state definitions of FSE and RFS are broad enough that SCHD may be able to regulate small entities through its contracts with TDA and TDH to inspect RFSs and FSEs, even if it appears that the state is not interested in regulating those entities.¹⁰²

In addition, state law excludes some low-risk entities or fails to impose special regulations on such entities. Some of these entities are traditionally regulated at the local level, such as farmers markets (which are often regulated by cities when state law is silent on the topic),¹⁰³ mobile food vendors, or pedestrian vendors. Many cities address mobile food vendors in their city codes to provide more specific requirements regarding the city’s individual concerns, like parking and zoning.¹⁰⁴ Also, some cities create

⁹⁷ Fort Worth, Tex. Code 16-104 (MuniCode 2011). See Provision-by-Provision Analysis (9-52-20), *infra*, for a proposed amendment to the Code incorporating the language of this provision.

⁹⁸ Interview with Scott Withington, Public Health Sanitarian, by phone (June 21, 2011).

⁹⁹ Detroit, Mich. Code 21-3-2 (MuniCode 2010).

¹⁰⁰ San Jose, Cal. Code A18-12 (2009) (“The Public Health Officer, his assistant and his duly authorized representative shall have authority and shall be permitted in the course of their duty to enter into and upon, and to inspect any and all lands, places, buildings, and structures, and the contents thereof, within the corporate limits of the County”) *available at* http://www.sccgov.org/scc_ordinance/.

¹⁰¹ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011). Although the day care centers would seem to fall under the definition of FSEs if they prepared and served food, TDH regulations also define a “group day care home food service establishment” as one that “operates within a licensed child day care facility which receives a minimum of eight (8) and a maximum of twelve (12) children and up to three (3) additional school-age children for less than twenty four (24) hours per day for care outside their own homes.” Tenn. Comp. R. & Regs. 1200-23-1-.01(18) (2011). The apparent purpose of defining this subset of FSEs is to impose certain special requirements and exceptions for these entities. See Tenn. Comp. R. & Regs. 1200-23-01-.02(15) (2011). However, this does not necessarily imply that other day care centers are not subject to the regulations. In fact, the regulations separately note that “the actual preparation and service of food in school and child care facilities must comply with these rules.” Tenn. Comp. R. & Regs. 1200-23-01-.01(17) (2011).

¹⁰² A “food service establishment” is defined generally as an establishment that prepares and offers food, with enumerated exceptions. Small care homes do not fall under any of the exceptions. See Tenn. Comp. R. & Regs. 1200-23-01-.01(16) (2011). A “retail food store” is defined generally as an establishment that offers food intended for off-premise consumption, again with some exceptions. See Tenn. Comp. R. & Regs. 0080-04-09-.01(1)(x) (2011).

¹⁰³ *E.g.*, Texas has few regulations pertaining specifically to farmers markets other than a voluntary certification program, whereas Fort Worth has specific provisions in its ordinances regulating farmers markets. Fort Worth, Tex. Code, 16-135 (MuniCode 2011).

¹⁰⁴ *E.g.*, Baltimore has removed its 300-foot buffer zones around restaurants to allow food trucks to park in any legal parking spot in the city. Richard Gorelick, “City Lifts Food Truck Restrictions for Trial Period,” Baltimore Sun, Jun. 1, 2011,

additional requirements that fill gaps in the state regulations.¹⁰⁵ For this reason, many localities use their local authority to impose additional regulations on these small establishments, even if there are state standards that apply. If municipalities within Shelby County truly wish to specially regulate these entities, it can eliminate the Code and enact specific regulations that clearly identify what types of entities need a local permit and what additional requirements they must meet. However, the Provision-by-Provision Analysis demonstrates that Tennessee law is comprehensive in its regulation of FSEs, RFSs, and OFEs, and it does not appear that Shelby County needs to fill any regulatory gaps for these types of entities.

If municipalities within Shelby County choose to continue imposing local regulations on entities such as mobile food vendors and farmers markets, they should be sure to clarify their requirements and to impose requirements that do not stifle the economic activity of such small businesses or discourage access to healthy foods.

Conclusion

The arguments above largely support the view that the Memphis Food Code, in addition to being outdated and duplicative of state regulations, hinders the economic development of the local food industry and decreases access to fresh food, often in communities with very few healthy food options. This is contrary to most cities and states, which are trying to find ways to attract new business to their areas. If Memphis and Shelby County continue to subscribe to these difficult and conflicting rules, food industry entrepreneurs will continue to be driven from the area and will open their businesses in other parts of Tennessee or in other states that have rules more favorable to the food industry. This will continue to increase barriers to accessing healthy foods in Memphis and throughout Shelby County. Although eliminating the Food Code may require the promulgation of a limited number of new local regulations to ensure that the entire food sector is adequately monitored, it will likely result in a much stronger food economy and ultimately a healthier Shelby County.

Comparative City Analysis

Introduction

In order to provide Memphis and Shelby County officials with some best practices, we reviewed the legal and regulatory structures for food safety in other similarly-situated cities throughout the United States. We selected 16 cities in various parts of the United States for a comparative analysis of food regulation with Memphis. The main criterion for the selection of cities was population. In 2009, Memphis was ranked 19th in the United States in terms of population, and 12 out of the 16 cities we selected for our analysis were those in the range between 10th to 25th in population ranking. These cities

http://articles.baltimoresun.com/2011-06-01/entertainment/bs-ae-food-trucks-parking-20110601_1_food-truck-chowhound-burger-wagon-street-vendors-board (last visited July 7, 2011).

¹⁰⁵ See, e.g., Austin, Tex. Code 10-3-93 (American Legal Publishing Corporation 2011).

were: Austin, Baltimore, Boston, Charlotte, Columbus, Detroit, Fort Worth, Indianapolis, Jacksonville, Nashville, San Francisco, and San Jose. Three other cities with much lower population, namely Knoxville, New Orleans, and Atlanta, were chosen based on their location in the Southern United States and because they were thought to have food environments similar to Memphis. Lastly, Los Angeles was selected upon stakeholder recommendation as an example of food regulatory scheme in a very large, advanced city. The specific topics researched were largely based on inquiries and suggestions from SCHD officials and food industry stakeholders in Memphis. They include the legal structure of food regulation in each city, food safety enforcement, the regulation of low-risk entities like farmers markets, and regulations for food processing, produce trucks, and mobile food vending.

While cities vary in their food regulation structure, there is a pattern that is common to most cities we studied. Generally, state statutes or the state administrative code provide the main governing laws for the food industry. Local city governments typically have few, if any, ordinances on food regulation, and most of those that exist relate to fees, permits, and zoning. One notable exception is San Francisco, which has a relatively comprehensive city/county food code. Food service establishments are usually inspected by the health department of the county surrounding the city rather than by the city's own health department. Some exceptions include Fort Worth and Jacksonville, where enforcement is done at the city level and at the state level, respectively. Food processors, wholesalers, and warehouses are typically regulated and inspected at the state level by a state agency, but in a few cities, such as Austin, this is done by the local health department as well.

City Regulations

Atlanta, Georgia

(Population 540,932 (33rd in the U.S.), Median Family Income \$61,658, Individual Poverty Rate 22.5%)¹⁰⁶

Atlanta is the capital city of Georgia, is located in both Fulton County and DeKalb County, and is the county seat of Fulton County and the business capitol of the Southeast. The city government consists of a mayor and a 15-member Atlanta City Council. The mayor can veto bills passed by the council, but the council can override it with a two-thirds majority.

The main laws governing food service establishments in Atlanta are the state Food Service Rules,¹⁰⁷ promulgated by the Department of Human Services, which are mostly based on the U.S. Food and Drug Administration (FDA) Food Code of 2005.¹⁰⁸ The state has a separate rule governing food processors, promulgated by the Department of Agriculture.¹⁰⁹ Few rules exist at the local level. The Atlanta Code of Ordinances contains essentially no regulations relating to food entities. Fulton County, which by state law has authority to perform functions relating to public health and sanitation in Atlanta, entirely adopts state law for its health and sanitation ordinances.¹¹⁰

In general, the state Department of Human Services regulates food service establishments, and the Department of Agriculture regulates retail food processors and distributors. In practice, there are

¹⁰⁶ U.S. Census Bureau, American Fact Finder, "Atlanta city, Georgia" (2009).

¹⁰⁷ Ga. Comp. R. & Regs. 290-5-14-.01 *et seq.* (2011).

¹⁰⁸ Georgia Department of Community Health, "Interpretation Manual for the Rules and Regulations Food Service Chapter 290-5-14," <http://health.state.ga.us/pdfs/environmental/Food/Rules/FinalFSInterpretationManual.pdf> (last visited July, 7, 2011).

¹⁰⁹ Ga. Comp. R. & Regs. 40-7-1 *et seq.* (2011).

¹¹⁰ Fulton County, Ga. Code 34-151 (MuniCode 2011).

several jurisdictional overlaps and confusion, and an interpretation manual exists to clarify some of the conflicts that arise.¹¹¹ The Department of Agriculture inspects food processing plants, wholesale bakeries, drink processors, and any establishment where food is handled and manufactured.¹¹² Fulton County Department of Health & Wellness conducts food service inspections of restaurants and food service establishments, enforcing the state law.¹¹³

Austin, Texas

(Population 790,593 (15th in the U.S.), Median Family Income \$62,153, Individual Poverty Rate 18.4%)¹¹⁴

Austin is the capital of Texas and the location of the state's flagship university. The majority of the city lies within Travis County, where it serves as the seat of the county's government. Some outlying areas of the city are located in Williamson County and Hays County. Austin is governed by a council-manager government whereby a seven-member city council, including the mayor, appoints a city manager to carry out the administration of the city.

Texas state regulations of food service establishments are codified in the Texas Food Establishment Rules, adopted by the Texas Health and Human Services Commission in 2006.¹¹⁵ Food manufacturers and wholesalers are governed by the state's regulations entitled Current Good Manufacturing Practice and Food Warehousing Practice in Manufacturing, Packing, or Holding Human Food,¹¹⁶ which are promulgated by the same department. The city itself has some of its own ordinances in addition to state regulations. For example, the ordinances specifically require at least one restroom for an establishment of 10 or fewer employees and at least two restrooms for 10 or more employees¹¹⁷ whereas the state Code simply provides that "[a] restroom shall be available for use by employees."¹¹⁸ Other substantive ordinances include requirements for food manager and handler certification, mobile food vending, and vendors to obtain a license to offer samples at farmers markets.

Permitting and enforcement are done at the local level, by the Austin/Travis County Health and Human Services Department (ATCHHSD), which enforces both the state Code and the local ordinances. ATCHHSD issues permits for "food service enterprises" which includes restaurants, grocery stores, mobile vendors, food manufacturers, and food warehouses.¹¹⁹ The Texas Department of Agriculture has jurisdiction over eggs.¹²⁰

¹¹¹ "Rules and Regulations for Food Service – Chapter 290-5-14 Interpretation Manual," <http://health.state.ga.us/pdfs/environmental/Food/Rules/Manual/PART-II/Section%20I%20Collaboration%20with%20Other%20Agencies-01132011.pdf> (last visited July 7, 2011).

¹¹² Georgia Department of Agriculture, "Processing Plants," <http://team.georgia.gov/portal/site/AGR/menuitem.2f54fa407984c51e93f35eead03036a0/?vgnextoid=b9ae733860a06210VgnVCM100000bf01020aRCRD> (last visited July 7, 2011).

¹¹³ Fulton County, GA, "Restaurant/Food Establishment Inspections," <http://www.fultoncountyga.gov/restaurant-inspections> (last visited July 7, 2011).

¹¹⁴ U.S. Census Bureau, American Fact Finder, "Austin city, Texas" (2009).

¹¹⁵ Texas Department of State Health Services, Establishment Rules, "Field Training Manual," <http://www.dshs.state.tx.us/foodestablishments/pdf/TFERFIMSeptember282006.pdf> (last visited July 7, 2011).

¹¹⁶ 25 Tex. Admin. Code § 229.210 *et seq.* (2011).

¹¹⁷ Austin, Tex. Code 10-3-121 (American Legal Publishing Corporation 2011).

¹¹⁸ 25 Tex. Admin. Code § 229.174(a) (2011).

¹¹⁹ City of Austin, "Food Protection," http://www.ci.austin.tx.us/health/commercial_food_protection.htm (last visited July 7, 2011).

¹²⁰ 4 Tex. Admin. Code § 15.1 *et seq.* (2011).

Baltimore, Maryland

(Population 637,418 (21st in the U.S.), Median Family Income \$47,610, Individual Poverty Rate 20.1%)¹²¹

Baltimore is an independent city and does not belong to any county. The city government consists of a mayor and a city council. Laws are passed by the city council after majority vote, which the mayor can veto. The veto can in turn be overturned by three-quarters vote by the council members.¹²²

Food regulation in Baltimore is largely the domain of state law. Maryland has a comprehensive state food code, promulgated by the Department of Health and Mental Hygiene under the authority of Maryland statute,¹²³ which provides food safety requirements for restaurants and food processors, including mobile food establishments. The state code also prescribes the restaurant licensing and inspection scheme. In addition to the state code, the city has a non-comprehensive local food code, which primarily deals with matters such as permits, inspections, and related fees.¹²⁴ Title 6, Subtitle 5 of the city code also contains miscellaneous provisions such as requirements concerning frozen food and foods past their expiration date, as well as a prohibition on trans fat usage.¹²⁵ However, most substantive food safety regulation is done through state law.

The Maryland Department of Agriculture only has jurisdiction over eggs, and issues permits and brings enforcement actions for compliance with the Maryland Egg Law at every level of food processing.¹²⁶ The Baltimore City Health Department licenses and permits both food processing facilities and food service establishments in its jurisdiction under state law.¹²⁷

Boston, Massachusetts

(Population 645,187 (20th in the U.S.), Median Family Income \$33,164, Individual Poverty Rate 16.9%)¹²⁸

Boston is the capital and largest city of Massachusetts. While Boston is the seat of Suffolk County, counties in Massachusetts exist only as geographical divisions and are not political entities. Boston is an important economic and cultural center in the Northeast. The city government consists of a mayor with executive authority and the Boston City Council, a 13-member legislative body. The mayor has power to veto the bill passed by the council, which the council can override with three-quarters vote.¹²⁹

In 2001, Massachusetts adopted the 1999 FDA Food Code to create the Massachusetts Sanitary Code,¹³⁰ which is a comprehensive food code governing food service establishments throughout the state. In

¹²¹ U.S. Census Bureau, American Fact Finder, "Baltimore city, Maryland" (2009).

¹²² Baltimore City Council, "Legislative Process," http://www.baltimorecitycouncil.com/legislative_process.htm (last visited July 7, 2011).

¹²³ Md. Code Ann., Health-Gen. § 18-102, 21-211, 21-234, 21-235, and 21-304 (West 2011); Md. Code Ann., Agric. § 4-311 (West 2011).

¹²⁴ Baltimore Md. Health Code 6-101 *et seq.* (2011), available at

<http://www.baltimorecity.gov/Portals/0/Charter%20and%20Codes/Code/Art%2000%20-%20Health.pdf>.

¹²⁵ Baltimore Md. Health Code 6-501 *et seq.* (2011) available at

<http://www.baltimorecity.gov/Portals/0/Charter%20and%20Codes/Code/Art%2000%20-%20Health.pdf>.

¹²⁶ Maryland Department of Agriculture, "Synopsis of the Maryland Egg Law,"

http://www.mda.state.md.us/pdf/egg_law_synop.pdf (last visited July 7, 2011).

¹²⁷ *Id.*

¹²⁸ U.S. Census Bureau, American Fact Finder, "Boston city, Massachusetts" (2009).

¹²⁹ City of Boston, "City Council Legislative Process," <http://www.cityofboston.gov/citycouncil/councilrefers.asp> (last visited July 7, 2011).

¹³⁰ 105 Mass. Code Regs. 590.000 *et seq.* (2011).

addition to the FDA Food Code provisions, it contains some Massachusetts-specific provisions such as rules regarding permits, examination and embargo of food, and vending machines. The rules for food processing are contained in the Good Manufacturing Practices for Food.¹³¹ There is very little food-related regulation at the local level. Chapter 16-1 of the Boston Municipal Code, for example, only provides restrictions on possession or sales of fish and decayed food, and limitations on items sold at a bakery.¹³² In practice, the state law is the main authority relating to food regulation.

The Massachusetts Department of Public Health is the only state agency regulating food safety in the state. It licenses and inspects all wholesale food business in Massachusetts, including food processors, warehouses, and distribution centers.¹³³ The Division of Health Inspections in Boston's Inspectional Services Department conducts routine inspections of retail food stores and food service establishment within the city.¹³⁴

Charlotte, North Carolina

(Population 704,417 (18th in the U.S.), Median Family Income \$60,798, Individual Poverty Rate 15.3%)¹³⁵

Charlotte is the largest city in North Carolina and the seat of Mecklenburg County. Charlotte is also a major U.S. financial center. Charlotte employs a council-manager form of government.¹³⁶ The mayor is an *ex officio* member of the city council, and only votes in case of a tie. The mayor can also veto bills passed by the council, which can then be overridden by a two-thirds majority vote. The council also appoints a city manager, who is responsible for administration of the city.

North Carolina's state administrative code is the main source for food regulation in Charlotte. North Carolina Rules Governing the Sanitation of Food Service Establishments, promulgated by the North Carolina Department of Environment and Natural Resources, sets the sanitary requirements that food service establishments must follow.¹³⁷ Title 2, Chapter 9 of the North Carolina Administrative Code includes the Code of Good Manufacturing Practices, which applies to food storage and manufacturing.¹³⁸ There are essentially no food regulation provisions in Charlotte's Code of Ordinances, so food regulation in the city is entirely the domain of the state law.

The Mecklenburg County Department of Environmental Health Services inspects and issues permits to food service facilities throughout the area.¹³⁹ Packaged foods for sale to consumers within the state are

¹³¹ 105 Mass. Code Regs. 500.000 *et seq.* (2011).

¹³² Boston, Mass. Code 16-1.1 *et seq.* (American Legal Publishing Corporation 2010).

¹³³ Mass.gov, Health and Human Services, "Food Protection Program," http://www.mass.gov/?pageID=eohhs2terminal&L=5&L0=Home&L1=Government&L2=Departments+and+Divisions&L3=Department+of+Public+Health&L4=Programs+and+Services+A+-+J&sid=Eeohhs2&b=terminalcontent&f=dph_environmental_foodsafety_g_about_foodsafety&csid=Eeohhs2 (last visited July 7, 2011).

¹³⁴ City of Boston, "The Division of Health Inspections," <http://www.cityofboston.gov/isd/health/> (last visited July 7, 2011).

¹³⁵ U.S. Census Bureau, American Fact Finder, "Charlotte city, North Carolina" (2009).

¹³⁶ Charlotte, N.C. Code 4.01 (MuniCode 2010).

¹³⁷ 15A N.C. Admin Code 18A .2600 (2011).

¹³⁸ 2 N.C. Admin Code 9c .0100 *et seq.* (2011).

¹³⁹ Mecklenburg County, NC Environmental Health, "Restaurants/Foodservice Facilities," <http://charmec.org/mecklenburg/county/HealthDepartment/EnvironmentalHealth/Programs-Services/FoodserviceandFacilities/Pages/Default.aspx> (last visited July 7, 2011).

inspected by the North Carolina Department of Agriculture.¹⁴⁰ Meat and poultry that are not shipped out of state are inspected by the North Carolina Department of Agriculture's Meat and Poultry Inspections Branch.¹⁴¹

Columbus, Ohio

(Population 773,021 (16th in the U.S.), Median Family Income \$50,642, Individual Poverty Rate 22.6%)¹⁴²

Columbus is the capital and the largest city in Ohio. Columbus is also home to the state's flagship university, the Ohio State University. It is the seat of Franklin County, but portions of the adjacent Delaware County and Fairfield County have also been annexed and incorporated into the city. Columbus is administered by a mayor and a seven-member city council.

State-level food regulation is done through Chapter 901:3 of the Ohio Administrative Code,¹⁴³ governing food processors and wholesalers, and the Ohio Uniform Safety Code,¹⁴⁴ regulating food service establishments. By state statute, the Ohio Uniform Safety Code must be based on the FDA Food Code and must be updated to reflect the latest changes in the FDA Code.¹⁴⁵ The city does not have a comprehensive food code and there are no provisions in its Health, Sanitation and Safety Code that pertain specifically to the food industry.¹⁴⁶

The Columbus Health Department is responsible for licensing and inspecting retail food businesses within the city, which includes grocery stores, restaurants, vending machines, food carts, and all foods sold at fairs and festivals.¹⁴⁷ The department enforces state food laws, and the licenses are stamped "State of Ohio."¹⁴⁸ Meats are inspected by the Ohio Department of Agriculture.¹⁴⁹

Detroit, Michigan

(Population 910,848 (11th in the U.S.), Median Family Income \$31,017, Individual Poverty Rate 36.4%)¹⁵⁰

Detroit is the county seat of Wayne County and the largest city in the state of Michigan. The city's location on the Detroit River helped establish the city as a manufacturing center and major port city for the Midwest. The city government consists of a mayor and a 9-member city council. The mayor can veto laws passed by the city council, which can be overridden with two-thirds majority vote.

Food regulation in Detroit is done by state law. The Michigan Food Law of 2000¹⁵¹ adopts the 2005 FDA Food Code for food service establishments, and also imposes additional rules on food wholesale and

¹⁴⁰ Department of Food Science, "Who Will Regulate My Food Business?" http://ncsu.edu/foodscience/extension_program/documents/entrepreneurs_who_regulates_food_bus.pdf (last visited July 7, 2011).

¹⁴¹ *Id.*

¹⁴² U.S. Census Bureau, American Fact Finder, "Columbus city, Ohio" (2009).

¹⁴³ Ohio Admin. Code 901-3 (2011).

¹⁴⁴ Ohio Admin. Code 3717-1 (2011).

¹⁴⁵ Ohio Rev. Code Ann. § 3717.05(B)(1) (West 2011).

¹⁴⁶ Columbus, Ohio Code Title 7 (MuniCode 2011).

¹⁴⁷ City of Columbus, "Food Protection Program," <http://publichealth.columbus.gov/food-protection.aspx> (last visited July 8, 2011).

¹⁴⁸ Interview with Christina Wilson, Director of Food Protection Plan, Columbus Department of Health, by phone (June, 2011).

¹⁴⁹ Ohio Admin. Code 901:2-1 *et seq.* (2011).

¹⁵⁰ U.S. Census Bureau, American Fact Finder, "Detroit city, Michigan" (2009).

¹⁵¹ Mich. Comp. Laws Ann. § 289.1100 (West 2011).

processing facilities to which the FDA Code does not apply.¹⁵² Detroit has a code of local food ordinances,¹⁵³ but most of the code, while remaining on the books, is now preempted by state law, excluding licensing regulations.¹⁵⁴ Detroit only enforces a few provisions where the state law is silent.

The state agency regulating food in Michigan is the Department of Agriculture & Rural Development, which promulgates all rules relating to food safety.¹⁵⁵ The Michigan Department of Community Health, unlike its counterparts in most other states, does not participate in food regulation. Restaurants, mobile food trucks, and temporary food service stands are licensed and regulated by local health departments, such as the Detroit Department of Health and Wellness Promotion.¹⁵⁶

Fort Worth, Texas

(Population 731,588 (17th in the U.S.), Median Family Income \$54,404, Individual Poverty Rate 19.0%)¹⁵⁷

Fort Worth is lies in parts of Denton County, Parker County, Wise County and Tarrant County (where it serves at the county seat). The Fort Worth government is run through a council-manager system, with a mayor who is a voting member of the nine-member city council.

Like Austin, Fort Worth’s food safety is governed by the Texas Food Establishment Rules and the Good Manufacturing Practices. Fort Worth’s local ordinances default to state law, but also contain additional provisions of their own, particularly regarding food service establishments. When state law and local law conflict, the more restrictive of the two applies.¹⁵⁸ The Code imposes certain sanitary requirements on meat, poultry, and fish.¹⁵⁹ Similar to Austin, Fort Worth Ordinances govern food manager and handler certification¹⁶⁰ and mobile food vendors.¹⁶¹

Food service establishments are inspected by the Fort Worth Department of Consumer Health.

Indianapolis, Indiana

(Population 807,640 (14th in the U.S.), Median Family Income \$50,546, Individual Poverty Rate 20.2%)¹⁶²

¹⁵² Michigan Department of Agriculture & Rural Development, “Food Service Licensing Details & FAQ,” http://www.mi.gov/mdard/0,1607,7-125-1569_16958_16977-174008--,00.html (last visited July 7, 2011).

¹⁵³ Detroit, Mich. Code (MuniCode 2010).

¹⁵⁴ Mich. Comp. Laws. Ann. § 289.3113 (West 2011) (“A county, city, village, or township shall not regulate those aspects of food service establishments or vending machines which are subject to regulation under this act except to the extent necessary to carry out the responsibility of a local health department to implement licensing provisions of chapter IV. This chapter does not relieve the applicant for a license or a licensee from responsibility for securing a local permit or complying with applicable local codes, regulations, or ordinances not in conflict with this act.”).

¹⁵⁵ Michigan Department of Agriculture & Rural Development, “Determine which agency to contact,” http://www.michigan.gov/mdard/0,1607,7-125-1569_16958_16974-11873--,00.html (last visited July 7, 2011).

¹⁵⁶ City of Detroit, “Food Sanitation,” <http://www.ci.detroit.mi.us/FoodSanitation/tabid/1004/Default.aspx> (last visited July 7, 2011).

¹⁵⁷ U.S. Census Bureau, American Fact Finder, “Fort Worth city, Texas” (2009).

¹⁵⁸ Fort Worth, Tex. Code 16-121 (MuniCode 2011) (“The following regulations adopted by the Texas Board of Health, in their current form and as they may hereafter be amended, are adopted and incorporated into this article as if they were set forth at length herein. If there is a conflict between a rule and any section of this article, the more restrictive provision shall apply.”).

¹⁵⁹ Fort Worth, Tex. Code 16-123 (MuniCode 2011).

¹⁶⁰ Fort Worth, Tex. Code 16-140 *et seq.* (MuniCode 2011).

¹⁶¹ Fort Worth, Tex. Code 16-131 *et seq.* (MuniCode 2011).

¹⁶² U.S. Census Bureau, American Fact Finder, “Indianapolis city (balance), Indiana” (2009).

Indianapolis is the capital and largest city in Indiana. It is located in Marion County, where it serves as the county seat. Indianapolis merged most government services with Marion County in the 1970s, effectively forming a consolidated city-county. The city has a mayor-council form of government.

The governing food regulation laws in Indiana are the Retail Food Establishment Sanitation Requirements¹⁶³ and the Wholesale Food Establishment Sanitation Requirements,¹⁶⁴ both promulgated by the Indiana State Department of Public Health. The role of the local government is limited in food regulation policy due to the explicit limit set by the state statute on local governments imposing sanitary standards.¹⁶⁵ Chapter 8 of the Code of the Health and Hospital Corporation of Marion County covers Food Safety, and exclusively deals with licenses and associated fees.¹⁶⁶ Overall, the only substantive food safety regulations are found in state law.

Food service establishments are inspected by the Marion County Health Department. The inspection criteria to be used by local health departments are standardized by the state.¹⁶⁷

Jacksonville, Florida

(Population 813,518 (13th in the U.S.), Median Family Income \$46,312, Individual Poverty Rate 15.6%)¹⁶⁸

Jacksonville is the county seat of Duval County. Since the late 1960s, the city has been a consolidated city-county with Duval County, and features a mayor-council government with a mayor who has executive authority and power to veto ordinances passed by the city council.

Jacksonville's food regulation is almost entirely performed by the state. The Florida statutes establish various state agencies and outline the general laws. The established agencies promulgate rules under the Florida Administrative Code, which applies to all food-related entities within the state.¹⁶⁹ The city has no extensive food code, and its municipal code contains only a small ordinance that requires restaurant owners to obtain permits from the city council to allow patrons with dogs in outdoor patios of restaurants.¹⁷⁰

Florida has three state agencies involved in food safety within the state: the Department of Agriculture and Consumer Services (regulates retail food stores, food processors, mobile vendors selling pre-packaged food), the Department of Business and Professional Regulation (regulates restaurants and mobile vendors preparing and serving food), and the Department of Health (regulates bars, lounges, schools, nursing facilities).¹⁷¹ All inspections are done by the state. The local health authority, Duval

¹⁶³ 410 Ind. Admin. Code 7-24 (2011).

¹⁶⁴ 410 Ind. Admin. Code 7-21 (2011).

¹⁶⁵ Ind. Code Ann. § 16-42-5-0.5 (West 2011) ("Except as provided in this chapter, a corporation or local health department may not impose any . . . sanitary standards on . . . food handling or food establishments.").

¹⁶⁶ The Code of the Health and Hospital Corporation of Marion County 8-101 *et seq.* (2011), available at http://www.hhcorp.org/brd_code.htm.

¹⁶⁷ 410 Ind. Admin Code 7-24-1 (West 2011).

¹⁶⁸ U.S. Census Bureau, American Fact Finder, "Jacksonville city, Florida" (2009).

¹⁶⁹ Fla. Stat. Ann. § 500.09 (West 2011).

¹⁷⁰ Jacksonville, Fla. Code 165.102(a) (MuniCode 2011).

¹⁷¹ Florida Department of Agriculture and Consumer Services, "Food and Meat Inspection," <http://www.freshfromflorida.com/onestop/fs/foodsafe.html> (last visited July 8, 2011).

County Health Department, is simply a part of the state Department of Health.¹⁷² According to an FDA review, the Florida restaurant inspection program is one of the best in the nation.¹⁷³

Knoxville, Tennessee

(Population 185,106 (125th in the U.S.), Median Family Income \$44,809, Individual Poverty Rate 24.4%)¹⁷⁴

Knoxville is the third largest city in Tennessee and the county seat of Knox County. The city is known for its arts and music and as the location of the main campus of the University of Tennessee. The city government employs a mayor-council form of government with a nine-member City Council and a mayor.

Tennessee law largely covers food regulation in Knoxville. Knoxville is subject to the Food Service Establishment rules¹⁷⁵ promulgated by the Tennessee Department of Health and the Retail Food Sanitation rules¹⁷⁶ by the Tennessee Department of Agriculture. No comprehensive food code exists at the local level, except a provision requiring a permit for the presence of dogs in outdoor portions of restaurants¹⁷⁷ and a provision mandating that pedestrian food vendors comply with applicable state laws and regulations and adding a few local requirements for these entities.¹⁷⁸

The Knox County Health Department inspects food service establishments under contract with TDH, and also inspects RFSs under contract with TDA.¹⁷⁹

Los Angeles, California

(Population 3,831,880 (2nd in the U.S.), Median Family Income \$52,966, Individual Poverty Rate 19.8%)¹⁸⁰

Los Angeles is the county seat of the homonymous Los Angeles County. Los Angeles is the second largest city in the U.S. and a major center of the entertainment industry. The local government is composed of a mayor and a city council. The city is further divided into more than 90 neighborhood councils, which handle local neighborhood issues and can oppose policies of the central city government.¹⁸¹

State law governs food entities in Los Angeles. At the city level, the city of Los Angeles entirely adopted Los Angeles County's Health Code, with the exception of provisions related to lodging and to alcoholic beverage warning signs.¹⁸² The County Code, in turn, regulates food demonstrations done for promotional purposes, wholesale food safety certification, smoking in eating establishments, and food

¹⁷² Duval County Health Department, "About the Duval County Health Department," <http://www.dchd.net/aboutus.htm> (last visited July 8, 2011).

¹⁷³ Florida Department of Business & Professional Regulation, "Florida Restaurant Inspection Program Ranks Top in Nation," <http://www.myfloridalicense.com/dbpr/os/news/FLRestaurnatInspectionProgram.html> (last visited July 8, 2011).

¹⁷⁴ U.S. Census Bureau, American Fact Finder, "Knoxville city, Tennessee" (2009).

¹⁷⁵ Tenn. Comp. R. & Regs. 1200-23-01 (2011).

¹⁷⁶ Tenn. Comp. R. & Regs. 0080-04-09 (2011).

¹⁷⁷ Knoxville, Tenn. Code 5-80 (MuniCode 2011).

¹⁷⁸ Knoxville, Tenn. Code 16-316 *et seq.* (MuniCode 2011).

¹⁷⁹ Knox County Health Department, "Food Protection," http://www.knoxcounty.org/health/pdfs/food_protection.pdf (last visited July 7, 2011).

¹⁸⁰ U.S. Census Bureau, American Fact Finder, "Los Angeles city, California" (2009).

¹⁸¹ Los Angeles, Cal. Code, 22.810.1 (American Legal Publishing Corporation 2011).

¹⁸² Los Angeles, Cal. Code, 31.00 (American Legal Publishing Corporation 2011).

vending machines.¹⁸³ The County Code does not have an extensive food code, instead deferring to state law to regulate most sanitary issues.

The Los Angeles County Department of Health is in charge of inspection and enforcement of the food law in the city as well as the rest of the county. By statute, local enforcement agencies are primarily responsible for enforcing the state food code.¹⁸⁴ The Department inspects food service establishments including restaurants, markets, and mobile food vendors.¹⁸⁵ The California Department of Health Services investigates at least once every three years to determine whether the local enforcement agency is performing satisfactory inspections.¹⁸⁶

Nashville, Tennessee

(Population 605,466 (25th in the U.S.), Median Family Income \$54,193, Individual Poverty Rate 17.3%)¹⁸⁷

Nashville is the capital city of Tennessee and the second most populous city in Tennessee after Memphis. Nashville is the seat of Davidson County and has a consolidated city-county government with the county. The city is further broken into seven distinct municipalities, each typically providing its own police service but depending on the central city government for other services. The government consists of a 40-member legislative council and an executive mayor with veto power.

State law is the only source of substantial food regulation in Nashville. Like Knoxville and Memphis, Nashville is subject to the Food Service Establishment rules¹⁸⁸ and the Retail Food Sanitation rules¹⁸⁹ of Tennessee. There is no comprehensive food code at the local level but a few local ordinances impose additional requirements on food entities the city specifically wishes to address. Nashville's code contains just a few such local rules, including: requiring non-farmer peddlers to obtain a permit to operate and detailing specific restrictions for operating in certain urban areas, establishing operational and administrative standards for dry warehouses that store food, permitting restaurants to allow pet dogs in outdoor dining areas, and establishing standards for food service facilities that operate during an event with 3,000 or more people that lasts for more than twelve hours.¹⁹⁰

Nashville's Metro Public Health Department conducts inspection of food services establishments (under contract with TDH) and retail food stores (under contract with TDA).¹⁹¹ Nashville does not inspect or regulate "Other Food Entities."¹⁹² As in Memphis, the Tennessee Department of Agriculture inspects the OFEs such as food manufacturers, processors, distributors, and warehouses.¹⁹³

New Orleans, Louisiana

¹⁸³ Los Angeles County, Cal. Code, 11.10-11.14 (MuniCode 2011).

¹⁸⁴ Cal. Health & Safety Code § 113713(a) (2011).

¹⁸⁵ County of Los Angeles Public Health, "Retail Food Inspection Guide,"

<http://www.lapublichealth.org/eh/docs/RetailFoodInspectionGuideV2007.pdf> (last visited July 8, 2011).

¹⁸⁶ Cal. Health & Safety Code § 113713(c) (2011).

¹⁸⁷ U.S. Census Bureau, American Fact Finder, "Nashville-Davidson metropolitan government (balance), Tennessee" (2009).

¹⁸⁸ Tenn. Comp. R. & Regs. 1200-23-1 (2011).

¹⁸⁹ Tenn. Comp. R. & Regs. 0080-4-9 (2011).

¹⁹⁰ See *generally*, Nashville, Tenn. Code, (MuniCode 2010).

¹⁹¹ Metropolitan Government of Nashville and Davidson County, Tennessee, "Food Inspection Program,"

<http://health.nashville.gov/ENV/Food/FoodInspection.htm> (last visited July 7, 2011).

¹⁹² Interview with Yvette Park, Metro Public Health Department, Health Inspector, by phone (June 21, 2011).

¹⁹³ The Retail Food Store Inspection Act of 1986 only authorizes TDA to contract with local health departments to inspect retail food stores. Tenn. Code Ann. § 53-8-205(7) (2010).

(Population 354,850 (53rd in the U.S.), Median Family Income \$43,213, Individual Poverty Rate 23.8%)¹⁹⁴

New Orleans is the largest city in Louisiana. The city shares the same boundaries as Orleans Parish (equivalent to a county in most other states), and operates as a merged city-parish government. The government features a mayor-council system, and the mayor can veto bills passed by the council, subject to two-thirds majority overriding.

Food regulation in New Orleans is the domain of the state, and the local health department has a very little or no role in it.¹⁹⁵ The Louisiana Administrative Code contains provisions regulating permits of food establishments, inspections, and sanitary standards.¹⁹⁶ The Louisiana Department of Health and Hospitals regulates almost all food entities, including restaurants, retail food stores, food manufacturers, and food wholesalers.¹⁹⁷ State regulations also encompass mobile food vendors, temporary food establishments, and farmers markets.¹⁹⁸ The Louisiana Department of Agriculture and Forestry regulates meat producers and processors.¹⁹⁹

Inspection is also performed at the state level by the state agencies. Inspection of food service establishments by the Louisiana Department of Health and Hospitals occurs “as often as necessary for the enforcement of [the code].”²⁰⁰ Any producer of meat products must have the facilities inspected by the Department of Agriculture and Forestry.²⁰¹

San Francisco, California

(Population 815,538 12th in the U.S.), Median Family Income \$86,713, Individual Poverty Rate 11.6%)²⁰²

San Francisco is officially known as the City and County of San Francisco due to its status as a consolidated city-county. By city charter, the city government is composed of two co-equal branches: the executive branch (mayor and other civil service officials) and the legislative branch (11-member Board of Supervisors, which passes laws and budgets).

California has a California Retail Food Code, which is a statutory compilation of food laws that apply throughout the state. The Code covers food service establishments, including temporary, mobile, and farmer’s market vendors.²⁰³ The California Department of Agriculture, under the authority of California Food and Agriculture Code,²⁰⁴ regulates entities that store, handle, or process meat and poultry, and also regulates milk and shell eggs.²⁰⁵ San Francisco is a charter city under California state law, giving it

¹⁹⁴ U.S. Census Bureau, American Fact Finder, “New Orleans city, Louisiana” (2009).

¹⁹⁵ Interview with Ms. Bruno, New Orleans Health Department, by phone (June 21, 2011).

¹⁹⁶ La. Admin. Code tit. § 51 (2010).

¹⁹⁷ Louisiana Department of Health and Hospitals, “Program Objectives,” <http://www.dhh.louisiana.gov/offices/?id=216> (last visited July 18, 2011); Louisiana Department of Health and Hospitals, “Food Manufacturing,” <http://www.dhh.louisiana.gov/offices/page.asp?ID=374&Detail=9142> (last visited July 18, 2011).

¹⁹⁸ La. Admin. Code tit. 51 §§ 4501 *et seq.*, 4701 *et seq.* 309 (2010).

¹⁹⁹ Louisiana Department of Health and Hospitals, “Food Manufacturing,” <http://www.dhh.louisiana.gov/offices/page.asp?ID=374&Detail=9142> (last visited July 18, 2011).

²⁰⁰ La. Admin. Code tit. 51 § 4301 (2010).

²⁰¹ Louisiana Department of Agriculture and Forestry, “Applying for Inspection,” <http://www.ladaf.state.la.us/portal/Offices/AnimalHealthandFoodSafety/FederalStateMeatPrograms/ApplyingforInspection/tabid/294/Default.aspx> (last visited July 18, 2011).

²⁰² U.S. Census Bureau, American Fact Finder, “San Francisco city, California” (2009).

²⁰³ Cal. Health & Safety Code §§ 114265, 114294, 114335, 114370 (2011).

²⁰⁴ Cal. Food & Agric. Code § 1 *et seq.* (2011).

²⁰⁵ Cal. Food & Agric. Code §§ 18721, 18732, 18725, 33222, 335011, 32731, 27531 (2011).

the authority to pass and enforce city laws that may conflict with state law, within certain limitations.²⁰⁶ The City Health Code is a comprehensive set of ordinances governing nearly all aspects of food safety in the city, including the manufacture and sale of food, food service establishments, food trucks, and menu labeling.²⁰⁷ While the text of California Retail Food Code seems to suggest that it is intended to preempt local law,²⁰⁸ the city in practice enforces local ordinances as well, in cases where the local law is more stringent than state law.²⁰⁹

Permitting and inspections of food entities are shared between the state and the local governments. The California Department of Agriculture inspects entities that store, handle, or process meat or poultry, and also issues permits for milk producers and distributors.²¹⁰ The California Department of Health is in charge of inspecting and regulating food.²¹¹ Any facility that manufactures, packs, or holds food must register with the Department.²¹² Finally, the San Francisco Department of Public Health issues permits and conducts inspections for food service facilities, including restaurants, farmers markets, and mobile units.²¹³ It enforces the state Retail Food Code as well as local ordinances. One exception is mobile vendors in public properties, which are regulated by San Francisco Department of Public Works.²¹⁴

San Jose, California

(Population 964,679 (10th in the U.S.), Median Family Income \$84,274, Individual Poverty Rate 11.5%)²¹⁵

San Jose is the county seat of Santa Clara County. The city has a high concentration of technology companies, and refers to itself as “the capital of Silicon Valley.”²¹⁶ The city government is composed of a legislative body including an eleven-member city council and a mayor, who has no veto power. City administration is performed by a city manager who is nominated by the mayor and approved by the city council.

Like San Francisco, San Jose is governed by the California Retail Food Code²¹⁷ and Title 3 of the California Code of Regulations.²¹⁸ Other than zoning and general business regulations, the City does not have any food regulations.²¹⁹

²⁰⁶ The California Planners’ Book of Lists, “List of California Charter Cities,” <http://ceres.ca.gov/planning/bol/1999/charter.html> (last visited July 8, 2011); Cal. Const. Art. 11 § 5 *et seq.*

²⁰⁷ San Francisco, Cal. Code 440 *et seq.*, 428 *et seq.*, 451(m), 468.3 (American Legal Publishing Corporation 2011).

²⁰⁸ Cal. Health & Safety Code § 113705 (2011) (“Except as provided in Section 113709, it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities.”)

²⁰⁹ Interview with Stephanie Cushing, Manager, Food Safety Program, San Francisco Department of Public Health, by phone (June 28, 2011).

²¹⁰ *See, e.g.*, Cal. Food & Agric. Code §§ 18721, 18732, 18725, 33222, 335011, 32731 (2011).

²¹¹ Cal. Health & Safety Code §§ 110065, 110140, 110150 (2011).

²¹² Cal. Health & Safety Code §§ 110460, 110461 (2011).

²¹³ San Francisco, Cal. Code 440-446, 451-454 (American Legal Publishing Corporation 2011).

²¹⁴ San Francisco, Cal. Code 184.81 (American Legal Publishing Corporation 2011).

²¹⁵ U.S. Census Bureau, American Fact Finder, “San Jose city, California” (2009).

²¹⁶ City of San Jose, <http://www.sanjoseca.gov/> (last visited July 8, 2011).

²¹⁷ Cal. Health & Safety Code §§ 114265, 114294, 114335, 114370 (2011).

²¹⁸ Cal. Code Regs. tit. 3 §1 *et seq.* (2011).

²¹⁹ San Jose, Cal. Code 6.01 *et seq.*, 20.10 *et seq.* (American Legal Publishing Corporation 2011).

The California Department of Agriculture and the Department of Health operate as in San Francisco. The Santa Clara County Health Department cites and enforces the state law.²²⁰ County ordinances, almost exclusively dealing with permits and fees, apply to entities inspected by the Department as well.²²¹

Farmers Markets

Farmers markets are events where farmers and other vendors of agricultural goods gather to sell their produce directly to consumers. The markets are beneficial to communities, particularly those with food access problems like Memphis, because they allow consumers to purchase fresh, healthy food at low prices. They also allow producers to increase their profit by eliminating links in the supply chain. However, farmers markets in Memphis and throughout Shelby County are often hindered by onerous and often ambiguous regulations placed on them. The Memphis Food Code is especially restrictive in its requirements and restrictions on farmers markets compared to those found in many of the other cities we studied.

The Memphis Food Code defines “farmers’ market” as a “place designated by a sponsoring organization where *only fruits, vegetables, melons, berries, nuts or honey*, produced by the sellers thereof, are kept and offered for retail sale” (emphasis added).²²² In particular, the Code prohibits animal-based products from being sold at a farmers market, including meats, poultry, dairy, and eggs, as well as processed foods like baked goods, jams, and jellies. Almost no other city we studied had such a restrictive list of items to be sold.²²³ Many cities and states explicitly include animal-based products such as meat and eggs in the list of items permitted at a farmers market,²²⁴ or, more commonly, do not enumerate a list of items to be sold that excludes animal-based products.

There should not be a safety concern for sales of animal-based products and processed goods because these products are generally considered potentially hazardous foods and thus subject to more stringent regulations than fresh produce, often requiring inspections by a state agency.²²⁵ The limitation on selling goods other than fresh produce is not only unusual, it also hurts the local community by restricting vendors of animal products and processed or value-added foods from farmers markets and reducing

²²⁰ Interview with Gary McLeod, Santa Clara County Health Department, Code Enforcement Inspector II, by phone (June 17, 2011). See also Cal. Health & Safety Code § 113713(a) (2011).

²²¹ Santa Clara, Cal. County Code B11-21 *et seq.* (2009) available at http://www.sccgov.org/scc_ordinance/TOC056.HTM.

²²² Memphis, Tenn. Code 9-52-1 (MuniCode 2009).

²²³ As a notable exception, Fort Worth prohibits sales of meat products at farmers markets, but there is an action by local stakeholders and the city to revisit the ban. See Sarah Bahari, “Fort Worth to revisit ban on meat sales at farmers market,” Fort Worth Star-Telegram, <http://www.star-telegram.com/2011/06/27/3183665/fort-worth-to-revisit-ban-on-meat.html> (last visited July 18, 2011). See also Fort Worth, Tex. Code 16-135 (MuniCode 2011).

²²⁴ For example, Massachusetts expressly includes fresh eggs in the list of items permitted at farmers markets, and there is no city ordinance to the contrary. Massachusetts Department of Public Health, Food Protection Program Policies, Procedures and Guidelines, “Farmers Markets,” updated Jan. 26, 2011, available at <http://www.mass.gov/agr/markets/farmersmarkets/docs/fpp-policies-procedures-guidelines.pdf>. One of Knoxville’s largest farmers markets specifies in its rules that meat products can be sold, indicating absence of prohibition. Knox County Government, New Harvest Farmers Market Rules, http://www.knoxcounty.org/farmersmarket/pdfs/farmers_market_rules.pdf (last visited July 7, 2011). Similarly, meat products are available in Nashville Farmer’s Market. Nashville Farmers Market, FAQ: Visiting the Market, http://nashvillefarmersmarket.org/faq/faq_visiting_the_market (last visited July 7, 2011).

²²⁵ Note that some processed foods, such as breads, jams, and jellies that are not made with potentially hazardous ingredients, are considered non-potentially hazardous, or low-risk. These food items are allowed to be prepared in a home kitchen and sold at farmers markets in many states, including Tennessee.

choices for consumers at the market.²²⁶ It is important to note that, as written, the Memphis Code has not been amended to clarify that the sale of non-potentially hazardous foods prepared in a home kitchen is allowed, even though these foods are now allowed to be sold in farmers markets throughout Tennessee under a new state law.²²⁷

In addition to the unnecessary restrictions on what can be sold at farmers markets, the Memphis Code also imposes various facility requirements on farmers markets. These facility requirements are unduly demanding and serve to restrict farmers markets from opening. For example, the Memphis Code dictates that farmers markets operate only on paved ground.²²⁸ No other city we researched had a similar requirement for farmers markets. Taken along with the other food safety regulations that already apply to farmers markets in Memphis,²²⁹ the additional paved surface requirement is overly burdensome and creates a barrier to entry for potential farmers market operators. As mentioned previously, farmers markets are a great way to get healthy food into the community and should be encouraged, rather than having barriers placed in their way.

Similarly, the Memphis Code requires toilet facilities at a farmers market.²³⁰ Most of the cities we studied did not have an explicit requirement for toilet facilities, though some required such facilities to be available for market vendors or patrons.²³¹ However, even the states or cities that require toilet facilities typically require only that they be accessible in a place near the market, such as within 200 feet of the market.²³² The language of the Memphis provision suggests that the market manager must provide the toilet facility, as opposed to using another facility that is available close to the market. Furthermore, the Memphis provision requires that the toilets available at the market meet the toilet facility requirements listed in 9-52-49, which are the same requirements applicable to toilet facilities at FSEs.²³³ This means that toilet facilities located in nearby businesses that are not FSEs may not be sufficient.²³⁴ By contrast, the cities we reviewed generally did not have a toilet requirement or included a requirement that was less onerous than that of Memphis. Some cities merely impose a toilet requirement on markets that operate for more than four consecutive hours, thus allowing smaller

²²⁶ Even if the restriction on the sales of these goods at markets in Memphis and throughout Shelby County is not enforced rigorously in practice, such provisions penalize those who attempt to follow the law to its letter and those who are not familiar with SCHD enforcement practice, such as those who are new to Memphis or Shelby County, by discouraging them from vending animal-based products. The provisions also create possibility of future liability by vendors of those items due to some inspectors' idiosyncratic interpretation of the law and enforcement.

²²⁷ 2011 Tennessee Laws Pub. Ch. 387 (S.B. 1850), amending Tenn. Code Ann. § 53-8-117.

²²⁸ Memphis, Tenn. Code 9-52-73(H) (MuniCode 2009).

²²⁹ See, e.g., Memphis, Tenn. Code 9-52-28 (MuniCode 2009) ("All parts of a food establishment and its premises shall be kept clean, neat and free of garbage, litter and rubbish. Cleaning operations shall be conducted in such a manner as to minimize contamination of food and food-contact surfaces.") and Tenn. Comp R. & Regs. 1200-23-01-.02 et seq. (2011) (imposing food sanitation requirements).

²³⁰ Memphis, Tenn. Code 9-52-73(f) (MuniCode 2009) ("Toilet facilities shall be provided by the sponsoring organization and made available to the public, and shall be deemed in compliance with Section 9-52-49.")

²³¹ For example, Atlanta requires location of toilet on the site plan of an outdoor even in application form. Atlanta, Ga. Code 142-51(i) (MuniCode 2011). Boston requires, by state regulation, that toilet facilities be available in farmers markets in the state. Massachusetts Department of Public Health, "Food Protection Program Policies, Procedures and Guidelines," updated Jan. 26, 2011, available at <http://www.mass.gov/agr/markets/farmersmarkets/docs/fpp-policies-procedures-guidelines.pdf>. The California Retail Food Code requires restroom and hand washing facility within 200 feet of the market. Cal. Retail Food Code § 114371(c) (2011).

²³² *Id.*

²³³ Memphis, Tenn. Code 9-52-73 (MuniCode 2009) ("Toilet facilities shall be provided by the sponsoring organization and made available to the public, and shall be deemed in compliance with Section 9-52-49.")

²³⁴ Memphis, Tenn. Code 9-52-73 (MuniCode 2009) ("A farmer's market shall meet all of the applicable requirements of this chapter and shall also meet the following special requirements. . . .")

markets to plan their hours so they can operate without constructing restroom facilities.²³⁵ In addition, it is unclear whether portable toilet facilities would be sufficient to meet the Memphis requirement, once again restricting the location in which it can operate. As it is the Memphis farmers market rules are more difficult to meet than other cities' requirements and serve little practical purpose, this provision should be eliminated, or amended to reduce the requirements and barriers to entry for farmers markets.

Finally, the Memphis Food Code also requires that farmers markets receive a permit in order to operate.²³⁶ The farmers market permit requirement is not unusual throughout the cities we studied but it is by no means universal. About two-thirds of the cities we looked at required a permit of some sort to operate a farmers market.²³⁷ Two states, California²³⁸ (including three cities we researched: San Francisco, San Jose, Los Angeles) and Michigan²³⁹ (Detroit) require farmers market certification or licensure at the state level, while other cities included a farmers market permit ordinance in their municipal codes, in addition to the zoning regulations typical in most cities.²⁴⁰ In Atlanta, farmers markets are classified and treated the same as outdoor festivals, and are considered commercial entities subject to permits and fee requirements.²⁴¹ However, a proposed Georgia law would eliminate state regulation and permitting requirements, other than zoning, for any vendors selling unprocessed foods to consumers, thus making it easier for farmers markets to operate.²⁴² Though some cities include permit requirements for farmers markets, none are as onerous as those found in the Memphis Food Code. Farmers markets generally sell low-risk foods, such as fresh produce, or non-potentially hazardous goods; furthermore, markets provide a benefit to the community and should be encouraged, so permitting for these entities should not be necessary.

Food Processing

Even though state law contains a comprehensive set of regulations covering food processors, the Memphis Food Code still contains additional requirements that these businesses must follow. The Code's additional level of unnecessary laws can discourage entrepreneurs from starting new businesses or expanding existing ones. This section will highlight a few of the Memphis Code's provisions that are too stringent and stifle economic activity for food processing.

²³⁵ Ohio Admin. Code 901:3-6-03(B)(2) (2011). Note that Columbus defers to Ohio law.

²³⁶ Memphis, Tenn. Code 9-52-3 (MuniCode 2009).

²³⁷ Note that the permits discussed here are mandatory permits, and not certifications intended primarily for marketing and promotional purposes, common in many cities and states. Some cities and states impose specific sanitary requirements on farmers markets, in addition to zoning and other applicable regulations, often by classifying the markets as a subset of a regulated category, such as a food service establishment. *See, e.g.* Cal. Health & Safety Code § 114370 (2011) ("Certified farmers' markets shall meet the applicable general sanitation requirements in Section 113980 and as provided in this chapter."). *See also* Fort Worth, Tex. Code 16-135 (e)-(g) (MuniCode 2011) (requiring that toilet and handwashing facilities be made available to farmers market vendors, and imposing sanitary requirements such as proper sewage and trash disposal).

²³⁸ Cal. Code Regs. tit.3 § 1392.1 *et seq.* (2011).

²³⁹ Michigan Department of Agriculture and Rural Development, "Licensing at Farmers Markets," http://michigan.gov/mdard/0,1607,7-125-1568_2387_46671-169359--,00.html (last visited July 7, 2011).

²⁴⁰ For example, Atlanta requires farmers market obtain outdoor event license subject to fees depending on number of attendees. Atlanta, Ga. Code 142-51(h) (MuniCode 2011). Fort Worth includes farmers markets in its list of "fixed food establishments" for permitting purposes, requiring them to obtain a permit in order to operate. Fort Worth, Tex. Code 16-112(b)(1)(e) (MuniCode 2011).

²⁴¹ Meridith Ford Goldman, "AJC Exclusive: Fees, permits surprise city's farmers markets," *The Atlanta Journal-Constitution* (May 21, 2010) available at <http://www.ajc.com/news/atlanta/ajc-exclusive-fees-permits-532919.html>; Ga. Comp. R. & Regs. 40-9-6-.01 (2011).

²⁴² H.R. 12, 151st Gen. Assemb., Reg. Sess. (Ga. 2011).

Prohibition on dual-use kitchens

Memphis is a town famous for its barbeque. Tourists come from across the country to sample the unique dry rubs and sauces served in the city's restaurants. But a local restaurateur wanting to cash in on a popular sauce by bottling extra is out of luck. The Memphis Food Code specifically prohibits a kitchen used to service a restaurant from being used to produce food for retail sale.²⁴³ The Code forces those wanting to produce foods for retail sale to either build a completely separate kitchen or contract with another company to produce the food. According to interviews with local business owners, this adds an unnecessary cost to their operations. The stakeholders said the additional costs of producing food are enough to keep many small, local restaurants from even attempting to bottle their sauces or dry rubs, leaving a potential revenue source untapped.

Of the cities researched for this report, none had a similar law requiring separate facilities. From Boston to Los Angeles, ambitious entrepreneurs were able to use their kitchens to both serve their restaurants and produce retail food. Kitchens that serve two roles are required to meet both the standards that apply to restaurant kitchens and those that apply to commercial kitchens. As long as the kitchen passes both inspections, it will receive two separate licenses and can then sell both ready-to-eat restaurant food and food items for retail sale.

Restrictions on in-home food processing

Memphis food producers are also being stifled by the lack of clarity concerning food produced in a home kitchen. Bakers and producers of low-risk foods across the country have lobbied state legislatures to amend food processing laws to allow for small-scale production of their foods in their home kitchens. State food processing laws, following the model FDA Food Code, usually require all foods to be produced in a licensed commercial kitchen that is separate from living areas. In the past few years, however, several states have begun passing "cottage food laws" that relax the requirements for small-scale, home-based operations. Thirty-two states, Tennessee included, now allow some non-potentially hazardous foods to be prepared in a home kitchen.²⁴⁴ In 2007 Tennessee's legislature passed a law that allows for the sale of non-potentially hazardous foods like baked goods and jams, which are produced in a home kitchen, to be sold at farmers markets.²⁴⁵ The law was amended in June 2011 to further allow these foods to be sold from the home, community events and flea markets.²⁴⁶ The law also allows producers to offer samples of these home-produced, non-potentially hazardous foods.

Yet in the four years since the law first passed, the Memphis Food Code has not been updated to reflect the changes to state law. Bakers wanting to sell a few homemade cakes could not look to the Memphis Code to determine their legal obligations. Based on the Memphis Food Code, all food manufacturers are required to have a permit from the city.²⁴⁷ The Code also includes numerous general sanitation requirements, which on the face of the Code would seem to apply even to small, home-based

²⁴³ Memphis, Tenn. Code 9-52-65 (MuniCode 2009).

²⁴⁴ Harvard Law School Mississippi Delta Project, "Legislative and Regulatory Recommendations to Allow Home-Processing of Low-Risk Foods In Mississippi," *available at* http://deltadirections.org/programs_initiatives/initiative.php?id=32 (last visited July 7, 2011).

²⁴⁵ Tenn. Code. Ann. § 53-8-117 (2010).

²⁴⁶ 2011 Tennessee Laws Pub. Ch. 387 (S.B. 1850), amending Tenn. Code Ann. § 53-8-117.

²⁴⁷ Memphis, Tenn. Code 9-52-3 (MuniCode 2009).

operations.²⁴⁸ A look through the Food Code would not give small producers any indication that state law allows them to sell their products. Furthermore, SCHD's only acknowledgment of the new state law was sharing information with a few local individuals noting that the state's health manual had been revised and that *samples* of non-potentially hazardous foods could now be offered at farmers markets.²⁴⁹ This makes it more confusing for local food industry entrepreneurs because it makes it seem like under the new rules non-potentially hazardous foods made in a home kitchen can now be used as food samples but not sold, when in fact, under state law, they clearly can be sold as well.²⁵⁰

Across the country, cottage food laws similar to Tennessee's are being passed with increasing frequency. Of the cities researched for this project, 11 of the 16 are located in states that have passed laws allowing residents to sell foods produced in home kitchens.²⁵¹ None of the cities has passed a law restricting the state law. The momentum behind cottage food laws also seems to be growing with Florida and Texas, among other states, passing legislation during their 2011 legislative sessions to allow for cottage food production.²⁵² The only states we researched that are still holding out against adopting cottage laws are Georgia, Louisiana and California.

State governments have realized that discouraging fresh, local products from finding their way into the community does not benefit sellers or the general public. Often, small food producers need the extra money they can make from producing some value-added food products in their home kitchen in order to help them make ends meet. Being able to sell their products also allows these producers to continue growing and producing food items that benefit the public. Memphis should do its part to encourage more locally produced non-potentially hazardous products by clarifying its Food Code so that local food industry entrepreneurs know that they are able to produce such foods for sale. Memphis should bring the Food Code in line with state law and explicitly allow the sale of these home-produced goods.

Mobile Food Vending

Food Trucks or Mobile Food Establishments

At lunchtime in cities across the country, food trucks are parked along the curbside serving hot, fresh alternatives to the ever-present fast food chains. Recent years have seen these fully functioning mobile kitchens make their way into many large American cities serving everything from delicious tamales to Southern barbeque. But established local laws are sometimes inadequate to deal with this novel approach to food service. For example, the Memphis Food Code requires all vendors selling food to have a permit, but, until recently, the city did not have a provision for a food truck or mobile food establishment permit.²⁵³ The outdated Code, which required a permit but did not offer one for food

²⁴⁸ See generally, Memphis, Tenn. Code 9-52 (MuniCode 2009).

²⁴⁹ Shelby County Health Dep't, General Environmental Health Manual Revision, "food sampling operations." Rev. 10-4-10. Oct 8, 2010 (on file with the authors, available in the Appendix).

²⁵⁰ 2011 Tennessee Laws Pub. Ch. 387 (S.B. 1850), amending Tenn. Code Ann. § 53-8-117 ("Notwithstanding any law, rule or regulation to the contrary, nonpotentially hazardous foods prepared in a home based kitchen may be sold at farmers' markets located in this state. (emphasis added)).

²⁵¹ See e.g., Ohio Rev. Code Ann. § 3715.025 (West 2011); Mich. Comp. Laws Ann § 289.4102 (West 2011); Md. Code Regs. 10.15.04.18 (2011); Md. Code Regs. 10.15.03.27 (2011); 02 N.C. Admin. Code 09C.0401-0406 (2011); 02 N.C. Admin. Code 09C.0305 (2011); Ind. Code Ann. § 16-42-5-29 (West 2011).

²⁵² H.B 7209, 2011 Leg. Reg. Sess. (Fla. 2011) (signed into law June 21, 2011); S.B. 81, 82nd Leg. Reg. Sess. (Tex. 2011) (signed into law June 17, 2011).

²⁵³ Memphis, Tenn. Code 9-52-3 (MuniCode 2009).

trucks, often left city officials and aspiring food industry entrepreneurs at odds. One food truck operator complained that SCHD inspectors from had repeatedly closed his operation.²⁵⁴ However, when the food truck operator asked the inspectors which laws he was violating, they were unable to point to a specific violation. Also, no specific provisions were made for food trucks in Memphis's zoning laws. Unable to determine which areas of the city food trucks were permitted to operate, one food truck operator eventually began serving his food from a flea market parking space because it was zoned multi-use.²⁵⁵ One local food truck operator said the permitting process seemed "like a dog chasing its tail," and wished for a more straightforward procedure.²⁵⁶

Slowly, city councils are beginning to see food trucks as more than a temporary fad and are starting to revise their city codes to make it easier for food trucks to operate. Many cities have realized that food trucks and mobile food vending are a cheaper way for new food entrepreneurs to open businesses and establish themselves, leading to more economic activity and more food access. In the spring of 2011, the Memphis City Council responded to the need for new food truck laws by passing a comprehensive "Mobile Food Preparation Vehicle" ordinance.²⁵⁷ The ordinance adds several sections to the Memphis Food Code and clarifies the requirements for the city's food trucks. These vehicles will no longer operate in a legal gray area and their operators can be sure of the standards SCHD will impose on them. Since the Memphis Code requires every business selling food to have a permit, the ordinance adds a new mobile food preparation vehicle permit to the Code.²⁵⁸ The new ordinance addresses parking concerns by establishing minimum and maximum parking durations and buffer zones between mobile food preparation vehicles and restaurants.²⁵⁹ Also, zoning ambiguities have been eliminated by listing all the districts in which mobile food preparation vehicles may operate.²⁶⁰

While the ordinance makes good progress in clarifying many details of food truck operations, the same issues that plague the other provisions in the Food Code are also present. The new ordinance has sections establishing food requirements, food handling requirements, equipment standards and vehicle sanitation requirements. However, these sections are almost entirely duplicative of Tennessee state law and are therefore redundant.²⁶¹ Entrepreneurs relying on the Code to determine their legal obligations would likely be overwhelmed by what appear to be extensive local requirements. This could cause them to forgo opening the business. In reality, the majority of the Code's requirements would be covered Tennessee regulations that apply to all FSEs. Memphis should remove these redundant requirements to make operating a mobile food preparation unit more straightforward.

²⁵⁴ Interview with Mobile Food Operator, Memphis, Tenn. (Mar. 16, 2011).

²⁵⁵ Interview with Mobile Food Operator, Memphis, Tenn. (Jan. 18, 2011).

²⁵⁶ *Id.*

²⁵⁷ Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf; *see also* Memphis, Tenn. MuniCode, Supplemental Ordinances, *available at* <http://library.municode.com/index.aspx?clientID=16109&stateID=42&statername=Tennessee>.

²⁵⁸ Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

²⁵⁹ Memphis, Tenn. Code 16-262 (4), (5), Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

²⁶⁰ Memphis, Tenn. Code 16-268, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

²⁶¹ *Compare* Memphis, Tenn. Code 16-263 through 16-266, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf *with* Tenn. Comp. R. & Regs. 1200-23-01-.02 (2011).

Some of the cities studied for this project have also recently revised their food truck laws. In April 2011, the Boston City Council approved an ordinance that streamlines the permitting process for food trucks. Like Memphis, Boston's ordinance sets up a legal framework that clarifies the laws pertaining to food trucks. The ordinance requires food trucks to have a city-issued permit,²⁶² to submit a copy of the food truck's route that details the locations the truck will serve food²⁶³ and to visit a food commissary twice per day.²⁶⁴ But unlike Memphis, Boston does not create a city-level set of sanitation standards. The city simply adopted the standards contained in the Massachusetts State Sanitary Code.²⁶⁵ Using the state sanitation standards would eliminate the redundancy and confusion found in the Memphis ordinance. Food truck operators can be certain which standards apply.

In June 2011, Baltimore revised its food truck policy by implementing a food truck pilot program.²⁶⁶ The program requires food truck operators to have a permit, but it will experiment by removing many of the limitations Memphis has just imposed. For example Baltimore has removed the its 300-foot buffer zones around restaurants to allow food trucks to park in any legal parking spot in the city.²⁶⁷ The pilot program has also created reserved parking areas for food trucks.²⁶⁸ The city will conduct a study during the program to determine whether to make the changes permanent.

Of the other cities researched for this project, Austin, Nashville, San Francisco, San Jose, Los Angeles, Fort Worth, New Orleans, and Atlanta all had city ordinances that covered food trucks. These cities impose various city-level permit and zoning requirements. The section of Austin's city code that relates to food trucks has a section establishing sanitary requirements.²⁶⁹ But, unlike Memphis, Austin does not re-state the numerous applicable state laws. Austin's provision instead has three sections that clearly reiterate that the Texas Food Establishment Rules apply²⁷⁰ and three other sections exercising specific authority granted by the state Food Establishment Rules to local governments.²⁷¹ The city then has a few specific provisions not addressed by the state code concerning restroom and food storage requirements.²⁷²

Knoxville, Jacksonville, Indianapolis, Columbus and Charlotte have all chosen to defer entirely to state law regarding food truck sanitation. Charlotte, however, uses especially restrictive zoning laws to regulate food truck operators, so it is not a good model.²⁷³

²⁶² Boston, Mass. Code 17-10.4(a) (2011), available at <http://www.cityofboston.gov/business/mobile/application.asp>.

²⁶³ Boston, Mass. Code 17-10.5(b)(3)(2011), available at <http://www.cityofboston.gov/business/mobile/application.asp>.

²⁶⁴ Boston, Mass. Code 17-10.8(a)(6) (2011) available at <http://www.cityofboston.gov/business/mobile/application.asp>.

²⁶⁵ Boston, Mass. Code 17-10.8 (b) (2011) available at <http://www.cityofboston.gov/business/mobile/application.asp>.

²⁶⁶ Office of Mayor Stephanie Rawlings-Blake, Baltimore City News and Press Releases, "Mayor Rawlings-Blake Creates New Food Truck Zones," http://www.baltimorecity.gov/OfficeoftheMayor/NewsPressReleases/tabid/66/ID/1263/Mayor_Rawlings-Blake_Creates_New_Food_Truck_Zones.aspx (last visited July 7, 2011).

²⁶⁷ Richard Gorelick, *City Lifts Food Truck Restrictions for Trial Period*, Baltimore Sun, Jun. 1, 2011, http://articles.baltimoresun.com/2011-06-01/entertainment/bs-ae-food-trucks-parking-20110601_1_food-truck-chowhound-burger-wagon-street-vendors-board (last visited July 7, 2011).

²⁶⁸ Office of Mayor Stephanie Rawlings-Blake, Baltimore City News and Press Releases, "Mayor Rawlings-Blake Creates New Food Truck Zones," http://www.baltimorecity.gov/OfficeoftheMayor/NewsPressReleases/tabid/66/ID/1263/Mayor_Rawlings-Blake_Creates_New_Food_Truck_Zones.aspx (last visited July 7, 2011).

²⁶⁹ Austin, Tex. Code 10-3-93 (American Legal Publishing Corporation 2011).

²⁷⁰ Austin, Tex. Code 10-3-93(D)(2), (3), (5) (American Legal Publishing Corporation 2011).

²⁷¹ Austin, Tex. Code 10-3-93(D)(4), (7), (9) (American Legal Publishing Corporation 2011).

²⁷² Austin, Tex. Code 10-3-93 (D)(6), (8) (American Legal Publishing Corporation 2011).

²⁷³ Charlotte, N.C. Code 12.510(1) *et seq.* (MuniCode 2010).

By contrast, Detroit has yet to amend its code to accommodate food trucks and is especially restrictive. The code only allows food trucks to serve hot dogs, non-potentially hazardous foods and beverages.²⁷⁴ Like Memphis, the Detroit code contains numerous provisions concerning food protection and sanitation that are rendered redundant by the state's food standards. The code also places severe limits on food truck operations by requiring them to be in motion at all times²⁷⁵ and prohibiting food trucks from operating in the Central Business District Vending Area or the Cultural Center Vending area.²⁷⁶ However, it is important to note that city officials in Detroit acknowledge that they no longer follow the local food code because it is almost entirely preempted by state law.²⁷⁷

Mobile Produce Vendors

Produce trucks are another type of mobile food vendor that local governments have treated with disdain. In the past, city councils either ignored them completely or imposed harsh restrictions to prevent them from selling their goods. But produce trucks can be an important link between a community and fresh fruits and vegetables. They have the ability to penetrate food deserts and supply them with fresh fruits and vegetables that would otherwise be unavailable. Furthermore, fresh produce is generally the safest food to sell and usually is not heavily regulated in food safety codes (and often no permits are required to sell fresh produce). In Memphis, however, the Food Code imposes many unnecessary burdens on produce trucks offering produce for resale or even on farmers trying to sell their own fresh produce. Unlike Memphis, which devotes a section of its Food Code specifically to those selling fruits, vegetables and nuts, most of the cities researched for this project do not include many local sanitary requirements or permitting rules, instead using local zoning, parking, or business provisions to regulate produce trucks.

As evidence of its contempt for produce trucks, the Memphis Food Code labels those selling fruits and vegetables from the roadside as "hucksters."²⁷⁸ The word carries a negative connotation, bringing to mind a dishonest salesman taking advantage of naïve buyers.²⁷⁹ Among the cities researched for this project, the only ones that continue to use this out-dated term were Nashville, New Orleans, San Francisco and Indianapolis. The remaining cities referred to these vendors using more neutral terms, such as "peddler." Baltimore uses perhaps the most colorful term, calling farmers selling their own produce "country growers."²⁸⁰ The Memphis Food Code should not use overtly negative terms for those operating produce trucks. If the city is intent on maintaining this section of its Food Code, the city should at least adopt a less disparaging label.

In addition to the derogatory title, the Memphis Food Code imposes various obstacles to these produce trucks. Under the current Code, "hucksters" must obtain a permit before selling their produce.²⁸¹ Also,

²⁷⁴ Detroit, Mich. Code 21-10-4 (MuniCode 2010).

²⁷⁵ Detroit, Mich. Code 41-2-3(d) (MuniCode 2010).

²⁷⁶ Detroit, Mich. Code 41-2-3(r) (MuniCode 2010).

²⁷⁷ Interview with Scott Whithington, City of Detroit, Public Health Sanitarian, by phone (June 21, 2011). *See also* Mich. Comp. Laws § 289.3113 (2011) ("A county, city, village, or township shall not regulate those aspects of food service establishments or vending machines which are subject to regulation under this act except to the extent necessary to carry out the responsibility of a local health department to implement licensing provisions of chapter IV. This chapter does not relieve the applicant for a license or a licensee from responsibility for securing a local permit or complying with applicable local codes, regulations, or ordinances not in conflict with this act.")

²⁷⁸ Memphis, Tenn. Code 9-52-70 (MuniCode 2009).

²⁷⁹ Interview with Local Food Stakeholder, Memphis, Tenn. (Jan., 2011).

²⁸⁰ Baltimore, Md., Civil Citations Digest of Laws Art. 15 § 17-18 (2007).

²⁸¹ Memphis, Tenn. Code 9-52-70(a) (MuniCode 2009).

produce trucks must “be kept in motion except when making sales.”²⁸² Hucksters are also limited to selling “fruits, vegetables, melons, berries, chestnuts and packaged nuts only,” whereas they should be allowed to sell any non-potentially hazardous food items in addition to all fruits, vegetables, and nuts, as these can now be made in a home kitchen and sold to the public.

Produce truck vendors are not treated with disdain in every city. Instead of viewing them as a nuisance, some cities have realized that produce trucks pose no real danger to public health and in fact help increase access to healthy foods. Thus, those cities allow produce trucks to operate without a permit or inspections. For example, Austin, Jacksonville, Indianapolis and Knoxville do not require peddlers of any type to have a permit in order to operate.

Few farmers in Memphis currently sell their fruits and vegetables from produce trucks, but changes to the Food Code would encourage more farmers to begin operating them. Nashville, Columbus and Boston have gone out of their way to make it easier for farmers to operate produce trucks. These cities generally require peddlers to have a permit in order to operate.²⁸³ They make an exception to the permit requirement for farmers selling their own produce.²⁸⁴ Nashville and Columbus also allow the direct agents of farmers to operate a produce truck without a permit.²⁸⁵ However, these cities require *non-farmer* produce truck operators to obtain a permit.²⁸⁶ In Baltimore, farmers are also exempt from obtaining a permit as long as they have a “country growers” identification card.²⁸⁷

On the other hand, San Francisco, San Jose, Charlotte, Fort Worth, Atlanta and Detroit require peddlers to obtain a license before they begin selling their products.²⁸⁸ Los Angeles is a little stricter. Produce trucks that operate within the city are not allowed to sell their products from a standard pickup truck. The Los Angeles Municipal Code states that peddlers must sell their fruits and vegetables from a catering truck.²⁸⁹ The city’s definition of a catering truck does not include vehicles “incidentally used for dispensing victuals.”²⁹⁰ Among cities requiring produce trucks to have licenses, Detroit has the most significant produce truck regulations. Like Memphis, Detroit requires vendors to remain in motion when not selling their produce.²⁹¹ Detroit also restricts produce trucks from selling or displaying their goods within the Central Business District Vending Area or Cultural Center Vending Area.²⁹² However, as noted previously, Detroit city officials have acknowledged that their local food code is out of date, and it is no longer followed, as it is preempted by state law.²⁹³

²⁸² Memphis, Tenn. Code 9-52-70(f) (MuniCode 2009).

²⁸³ Boston, Mass. Code 16-2, 1 (American Legal Publishing Corporation 2010); Columbus, Ohio Code 523.02(a) (MuniCode 2010); Nashville, Tenn. Code 6.104.010 (MuniCode 2011).

²⁸⁴ Boston, Mass. Code 16- 2, 1 (American Legal Publishing Corporation 2010); Columbus, Ohio Code 523.03(a)(2) (MuniCode 2010); Nashville, Tenn. Code 6.104.010 (MuniCode 2011).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Baltimore, Md. Code 17-18(a) (2011) *available at* <http://www.baltimorecity.gov/LinkClick.aspx?fileticket=f%2fJHpZjoT1Q%3d&tabid=159>.

²⁸⁸ *See, e.g.*, San Francisco, Cal. Code 184.81 (American Legal Publishing Corporation 2011); San Jose, Cal. Code 6.54.140 (American Legal Publishing Corporation 2011); Charlotte, N.C. Code 6-433 (MuniCode 2010); Fort Worth, Tex. Code 16-112(b)(2)(c) (MuniCode 2011); Fort Worth, Tex. Code 16-111(a) (MuniCode 2011).

²⁸⁹ Los Angeles, Cal. Code 80.73(b) (American Legal Publishing Corporation 2011).

²⁹⁰ *Id.*

²⁹¹ Detroit, Mich. Code 41-2-3(d) (MuniCode 2010).

²⁹² Detroit, Mich. Code 41-2-3(r) (MuniCode 2010).

²⁹³ Mich. Comp. Laws § 289.3113 (2011) (“A county, city, village, or township shall not regulate those aspects of food service establishments or vending machines which are subject to regulation under this act except to the extent necessary to carry out the responsibility of a local health department to implement licensing provisions of chapter IV. This chapter does not relieve the

Memphis should follow the example of Nashville, Columbus and Boston and exempt farmers (and their agents) from the requirement to obtain a permit in order to sell their own produce from a truck. The city could also follow the example of Austin, Jacksonville, Indianapolis and Knoxville and eliminate the permit requirement for all produce trucks, even those manned by resellers of produce. The trucks operated by resellers carry essentially the same fruits and vegetables as those operated by farmers. As mentioned previously, fresh produce is generally considered to be low-risk and thus sanitation requirements can be lowered for these food items. Reducing the hurdles that must be met by any produce vendor goes a long way towards getting healthy food into neighborhoods around Memphis and throughout Shelby County. Local government should do all that it can to promote produce trucks and eliminate unnecessary barriers. Should Memphis continue to require permits for its produce trucks, at the very least it should streamline the process and make sure these permits are affordable and easy to obtain. Memphis should change the name “huckster” to a more neutral equivalent and should also get rid of its limitations on what specific items can be sold by a produce truck, instead allowing all fresh fruits and vegetables and non-potentially hazardous foods to be sold.

Overall Recommendations

1. Eliminate the Memphis Code

A. Memphis could simply eliminate the Memphis Food Code and SCHED could conduct inspections based solely on the state scheme. Tennessee state food laws embodied in statute and administrative regulations are comprehensive and address all types of food entities and how these entities need to operate in order to best protect the public health. In addition to being comprehensive, they are also updated regularly with the best and most current food safety scientific evidence.²⁹⁴ By contrast, the Memphis Food Code is not up-to-date regarding food sanitation requirements, and often conflicts with state law. Further, it often over-regulates smaller, low-risk food entities such as farmers markets or “hucksters” (mobile produce vendors).

The Provision-by-Provision Analysis included below demonstrates that first, with regard to FSEs and RFSs, much of the Memphis Food Code is redundant with or less specific than state law. Furthermore, any additional requirements imposed by the Code make only minimal contributions to public health while seriously stifling the growth of the food industry in Memphis and throughout Shelby County. State law already comprehensively covers FSEs and RFSs, and neither Nashville nor Knoxville, whose county health departments are in identical contractual arrangements with TDA and TDH, find it necessary to impose a similarly comprehensive food code. OFEs are also comprehensively regulated at the state level and are inspected and permitted by TDA. Thus, no local regulations or permits for these entities are necessary. Finally, regarding food entities not covered by state law, most of these are not included in

applicant for a license or a licensee from responsibility for securing a local permit or complying with applicable local codes, regulations, or ordinances not in conflict with this act.”)

²⁹⁴ Tennessee Food Service Establishment rules, for example, are based on the U.S. Food and Drug Administration Food Code, “a model that assists food control jurisdictions at all levels of government by providing them with a scientifically sound technical and legal basis for regulating the retail and food service segment of the industry.” See U.S. Food and Drug Administration, “Real Progress in Food Code Adoptions,” <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm> (last visited July 8, 2011).

state regulations precisely because they are low-risk food entities that provide healthy, fresh foods and thus do not need comprehensive regulations.

Besides being unnecessary, the Food Code provides serious uncertainty to business owners. With two sets of laws and misaligned definitions, business owners cannot easily determine which requirements in the Code apply to them or whether a given provision comprehensively addresses the applicable state requirements. This strongly discourages entrepreneurs from starting a business in the county, because potential food establishment owners must familiarize themselves with two sets of laws and then determine which ones actually apply. Some discretionary language in the Code further contributes to the atmosphere of uncertainty.

For those additional requirements in the Memphis Food Code that are valid, none seem to significantly alleviate any public health concern but merely require more stringent hurdles for food businesses in Memphis and throughout Shelby County, subjecting them to a confusing double standard not present in the rest of the state. As the Provision-by-Provision Analysis makes clear, many provisions invoke minute additional requirements that simply contribute to confusion. Others are clearly detrimental to public health; for instance, the extreme difficulty of operating a produce truck only harms the public health by limiting access to healthy foods.

B. Memphis could eliminate the Food Code entirely and replace it with a much smaller set of regulations covering only the types of low-risk entities not regulated by the state. This approach would streamline the regulations and permitting process for high-risk food entities while giving SCHD the power to intervene in smaller operations when necessary. This would also closely mirror the way local food regulations are done in other cities in Tennessee and around the country. Most cities use state laws and regulations as the background scheme and then implement a few local regulations to fill in the gaps or areas of concern for that municipality.

If the Code is eliminated, we would recommend that Memphis and local municipalities within Shelby County replace it with a much smaller set of targeted regulations.²⁹⁵ For instance, many of the cities included in the Comparative City Analysis did not have a comprehensive food code but imposed some local regulations on entities that are not regulated at the state level, such as mobile food establishments. Fort Worth, for example, follows the Texas state laws regarding mobile food establishments but imposes a few specific regulations that the state code leaves unaddressed, such as requiring mobile food establishment operators to keep a log detailing each commissary visit²⁹⁶ and requiring the vehicles to have access to a restroom onboard the vehicle or within 300 feet, if it operates from the same location all day.²⁹⁷ Knoxville, Nashville and Jacksonville all have a small set of specific

²⁹⁵ Currently, the Memphis Food Code is applied in all municipalities throughout Shelby County. Bartlett has adopted the “Shelby County Food Ordinances” to govern its food establishments (though no such ordinances exist in reality, only the Memphis Food Code). Arlington has actually incorporated a version of the Memphis Food Code into its ordinances, though this is not identical with the current Memphis Food Code. SCHD should not be inspecting food businesses in the Shelby County municipalities that have not adopted the Memphis Code using the standards included in the Memphis Food Code. Only the state regulations should apply in those areas. If Memphis repeals its Code and adopts a smaller set of regulations, any other municipality within Shelby County that wants the new Memphis regulations to apply within their jurisdiction would have to pass the new regulations as well. Alternatively, if it were politically feasible, the municipalities within Shelby County could either empower SCHD with the ability to create its own regulations, subject to notice and comment by all municipalities or the various municipalities could come together and agree on a set of local food ordinances that would apply throughout the service area of SCHD.

²⁹⁶ Fort Worth, Tex. Code 16-131(f) (MuniCode 2011).

²⁹⁷ Fort Worth, Tex. Code 16-131(l) (MuniCode 2011).

local ordinances, including regulating the presence of dogs in outdoor restaurant patios.²⁹⁸ Memphis (and other municipalities within Shelby County) could easily apply these types of targeted provisions if they wish to locally regulate some entities. The city clearly does not need to keep the entire Code in place order to meet these goals.

In addition, if the Code is eliminated, Shelby County and the municipalities located within Shelby County will likely want to retain the right of entry for SCHD into all food entities in the event of a food safety emergency. The provision can be written broadly to allow access to FSEs, RFS, and OFEs, even if it would not regularly inspect the latter. We would recommend using language similar to the following:

In case of a food safety concern or suspicion of a food safety risk, the health officer and all agents or employees of the department of health shall have the right to enter at all reasonable hours any lot, premises, building, factory or place where food is manufactured, stored, sold or offered for sale, to enforce any of the provisions of this title and state and federal laws regulating food and to inspect permits, certificates, and other records required by such laws, and it is unlawful for any person to deny to such officers, agents and employees access to any such place, or to interfere with such officers in the performance of their duties under the provisions of this chapter.

Finally, even if the Code is eliminated, SCHD will still serve an important role in inspecting FSEs and RFSs under its state contracts and in inspecting any entities that Memphis and other municipalities choose to regulate at the local level. To ensure that SCHD has the resources it needs to continue performing inspections, permitting fees for those entities inspected and permitted by SCHD should be raised to at least match the cost of conducting the inspections. This can be done by either increasing the permit fees by ordinance or removing the specific permit fees from the Code and allowing SCHD to update them on a more regular basis, subject to certain boundaries. The permitting scheme should be amended to clarify that local FSE permits are not applied, eliminate permitting for OFEs or contract with TDA to conduct such entities, determine which low-risk entities should and should not be regulated at the local level (eliminating from the Code those that should not), and raise the permitting fees, where allowed, for all the entities that SCHD continues to inspect and permit.

2. Substantially amend Memphis Code to remove unenforceable provisions and update its contents

The Provision-by-Provision Analysis included below suggests various amendments as alternatives to eliminating the Code. The purpose of these amendments is to provide clarity as to which requirements in the Memphis Food Code are in fact enforceable, to eliminate provisions that are unenforceable or unnecessarily restrictive, and to promote better public health. If the Code is not eliminated, as suggested above, serious amendments are needed to make the Code consistent with current state law and make it easier for food industry entrepreneurs in Memphis and Shelby County to follow the law.

These are the main amendments to the Memphis Food Code that we believe are necessary in order to streamline the food safety regime in Memphis and throughout Shelby County:

²⁹⁸ Knoxville, Tenn. Code 5-80 (MuniCode 2011); Nashville, Tenn. Code 8.04.190 (MuniCode 2011); Jacksonville, Fla. Code 165-102 (MuniCode 2011).

A. The requirement that all persons manufacturing, selling or distributing food obtain a permit should be removed.²⁹⁹ Many of the unnecessary requirements that have been imposed on local business owners can trace their existence to this requirement. The overly stringent restrictions concerning the operation of low-risk food operations like produce trucks or farmers markets likely arose from the obligation to issue permits to these businesses. The provision does not improve the city's economic or physical health and instead stifles economic activity and reduces access to healthy foods in Memphis. Eliminating this provision would allow greater access to healthy foods and greater economic opportunities.

B. Unenforceable provisions, such as those that compete with state law regarding FSEs and RFSs, should be eliminated. The Food Code is full of requirements that are simply unenforceable because they have been preempted by more stringent state laws. Yet, these provisions remain on the books. Aspiring food industry entrepreneurs researching their legal obligations would have no way to know these requirements have no legal force. By simply removing unenforceable provisions, the city could go a long way to simplify its cluttered Code. This would remove a lot of the uncertainty involved in opening food-related businesses and would reduce the burden on entrepreneurs seeking to understand the legal regime with which they must comply. Entrepreneurs could then open their businesses more quickly and the citizens of Memphis could have a greater variety of food from which to choose.

C. Overly restrictive local standards should be removed. Some provisions in the Memphis Code impose more stringent standards than the state regulations. In fact, the only local regulations that are enforceable for FSEs and RFSs are those that are *more* stringent than state law. In such cases, either the difference is too insignificant to justify the added confusion of applying a separate regulation, or the additional requirements are unduly harsh and detrimental to business owners. However, as mentioned above, state law is comprehensive and regularly updated, and thus FSEs and RFSs are operating in a safe and healthy way if they are following state law. More stringent restrictions at the local level merely serve to stifle development of business and food access.

D. Redundant local provisions should be eliminated. Local provisions that are merely redundant with state law are enforceable, but they do not serve any purpose and merely confuse local food entities, as food industry entrepreneurs need to read all of state and local law in order to determine what rules need to be followed. As these entrepreneurs are not trained regulators, they may not realize right away that a local ordinance is redundant with state law, and thus they would be overwhelmed by the sheer number of ordinances and regulations that apply to them. These redundant provisions do not serve any purpose and thus should be eliminated.

E. The Memphis Food Code should remove all of the requirements concerning OFEs and should stop inspecting and permitting these entities. These businesses must already follow TDA regulations and they are inspected regularly by TDA. The Tennessee regulations and inspections of these entities are sufficient to provide the city of Memphis with a wholesome and safe food supply. While carrying out inspections of OFEs, SCHD wastes valuable time and resources that could be allocated to inspections that actually benefit the public welfare. Further, these entities are subject to conflicting regulations, which makes it harder for them to open and operate effectively. At the very least, the Memphis Code should be amended to make clear that OFEs are not FSEs and that the requirements for FSEs in the Code do not apply to OFEs (or to any establishments other than FSEs).

²⁹⁹ Memphis, Tenn. Code 9-52-3 (MuniCode 2009).

F. Clarify the legal applicability of the Code and the methods by which the Food Code can be amended.

The Memphis Food Code was originally passed by the Memphis City Council. Even though Bartlett is the only municipality within Shelby County that has adopted the Code (in fact, Bartlett adopted the “Shelby County Food Ordinances,”³⁰⁰ which do not exist; we presume they mean the Memphis Food Code), SCHD applies the Code throughout the entire county including other municipalities and the unincorporated parts of Shelby County. Since the citizens of the other Shelby County municipalities have no representation on the Memphis City Council, they have no say in what goes into the Code and should not be subjected to its requirements. Therefore, it is unclear whether the Code can legally be applied in areas outside of Memphis and Bartlett.

Further, since there is no clear mechanism for the governments of the other municipalities to participate in updating the Code, it is not updated regularly. This causes the Code to be of touch with current food safety regulations and food safety science, and unable to meet the area’s needs.

If Memphis chooses to retain its Food Code, significant changes must occur. First, the Memphis Food Code should only be applied within Memphis and arguably Bartlett (though, as mentioned previously, Arlington also includes a similar set of food regulations in its municipal code and these provisions can be enforced there as well).³⁰¹ The other municipalities within Shelby County should be free to adopt the Memphis Food Code or pass their own food-related ordinances that SCHD would then enforce in that municipality. If the other municipalities choose not to act, then SCHD should only apply the Memphis Food Code in those cities which have integrated the Memphis Code, and only state laws would be applied in other municipalities. Though this approach could also create unnecessary complexity for SCHD, because it would have to enforce several different standards throughout the county, this is the only way for SCHD to legally enforce food ordinances other than state-level laws in these other municipalities.

Allowing each municipality to enact its own food regulations could result in great inconsistencies in the regulatory landscape throughout Shelby County.³⁰² Thus, instead of allowing each municipality to adopt its own ordinances, we recommend crafting a process by which the Code can be amended and allowing all the local municipal governments to have a role in its creation and modification. Having a clear amendment process would allow the Code to be updated more regularly and ensure that it accounted for the concerns of all the regulated municipalities. One possibility would be for the local governments throughout Shelby County to agree to make the Code provisions regulations of SCHD. SCHD could then update the Code’s provisions regularly as separate agency regulations subject to notice and comment from all the local governments within Shelby County that fall under its purview.³⁰³ Another possibility

³⁰⁰ Bartlett, Tenn. Code 9-601 (2009).

³⁰¹ Arlington, Tenn. Code 9-601 *et seq.* (2009).

³⁰² For example, Memphis and Lakeland could both adopt different regulations concerning the maximum temperature at which potentially hazardous foods can be stored. Meanwhile, Collierville and Germantown could decide that the state’s regulations are sufficient and not impose city-level regulations. SCHD would have to inspect the restaurants within these municipalities using three different inspection standards. Other municipalities could adopt still other regulations, leading to a lot of headache for SCHD.

³⁰³ See Tenn. Code Ann. § 68-2-601 (f)(3) (2010). County boards of health are authorized by the state to “adopt rules and regulation as may be necessary or appropriate to protect the general health and safety of the citizens of the county. The regulations shall be at least as stringent as the standard established by a state law or regulation as applicable to the same or similar subject matter. Regulations of a county board of health supersede less stringent or conflicting local ordinances.” This statute appears to give county boards of health the ability to adopt health regulations, which could include food sanitation

would be for the local municipal governments to work together to adopt a uniform set of food ordinances across all the municipalities in Shelby County. Whatever path Shelby County and its municipalities choose, a solution that applies to all the municipalities clearly cannot come from one municipality acting alone. The political leaders of the individual municipalities must work in concert, while taking the best interests of the entire area into consideration.

Another solution to the amendment problem would be to pass municipal ordinances allowing for the Food Code to be automatically amended as laws and regulations are changed at the state level. This would still require an administrative burden of updating the language of the Code to reflect the state laws, but it would at least keep the Code up to date.

We believe that the confusion involved in the amendment process for the current Memphis Food Code is what has caused the Code to become so outdated, as no one seems to understand how it can be overhauled. No matter what solution is forged, as long as municipalities in Shelby County understand how to make changes to the Code it will help the Code to stay updated.

3. Clarify the inspection and permitting process and legal requirements for each type of food entity

Whatever Memphis chooses to do with its Food Code, SCHD should clarify what it expects from food entities and what requirements they must fulfill in order to operate. Since the first place most people turn to conduct their research is the internet, a city without an informative, intuitive website leaves food industry entrepreneurs at a great disadvantage. Therefore, to promote economic activity, and the provision of healthy foods, SCHD should revise its website to clarify and explain the legal requirements for each type of food entity.

A. SCHD should clarify what laws apply to the different categories in a user-friendly guide or website that tells food industry entrepreneurs where they can find applicable regulations in both state and local law. SCHD should produce documents summarizing the main food permitting and inspection requirements for various food entities in an easy-to-read fashion. These guidance documents should clarify what categories an entity may fall into and where they can find the relevant regulations for that type of entity in state and local law. For instance, such guidance could include a description of a “food service establishment” and list the most common entities that fall under this category. The site should then explain the license requirements for FSEs. For businesses that may qualify as more than one type of food entity and need additional permits for those separate activities, the website should clarify that they need both permits in order to operate.

The most useful tool would be a web portal where food industry entrepreneurs can get the most up-to-date information about permitting and inspections. For example, Santa Clara County’s website outlines the requirements for “food vehicles and carts” with separate sections for “produce vehicles,” “ice cream vehicles,” and “mobile food facilities,” in an accessible, straightforward fashion.³⁰⁴ Another city with an

standards. By using the authority granted by this statute, the board of health could create standards that apply throughout the county after listening to input from every Shelby County jurisdiction.

³⁰⁴ Santa Clara Department of Environmental Health, “Food Vehicles and Carts,”

<http://www.sccgov.org/portal/site/deh/agencyarticle?path=%252Fv7%252FEnvironmental%2520Health%252C%2520Department%2520of%2520%2528DEP%2529&contentId=0352a7fe58b34010VgnVCMP230004adc4a92>, (last visited July 7, 2011).

informative website is Boston. The city’s website contains a “Restaurant Roadmap” that is a user-friendly guide to obtaining the necessary permits and licenses to open the business.³⁰⁵ The site also has a more comprehensive guide that gives extensive details of the state’s regulatory requirements. The city of Austin also includes a useful guide for starting a food business on its website, covering nearly all types of food entities.³⁰⁶ Having these resources readily available helps make the complex process of opening a new food establishment more understandable and straightforward, which will ultimately improve Memphis and Shelby County’s economy and food access.

B. SCHD should include a place for food industry entrepreneurs to locate newly-released guidance documents or ordinances related to food. Since legal databases and the Memphis MuniCode are not always updated right away, SCHD should have a location on its site where new ordinances, state laws and regulations, and SCHD rules related to the food industry can easily and quickly be located. Alternatively, Memphis could work with MuniCode to update its version of the Memphis Code more quickly. Most cities have their online codes updated much more regularly than Memphis.

C. Implement a more standardized and structured inspection programs. Many of the stakeholders in Memphis complained that inspection criteria are arbitrary and inspectors often have their own, idiosyncratic interpretation of the law, even when interpreting the same law.³⁰⁷ Some states, such as Indiana, recognize the importance of having uniform, consistent inspection criteria and have implemented inspection standardization throughout the state.³⁰⁸ SCHD should make a standardized inspection form available to the public on its website and require inspectors to adhere to the standards to avoid arbitrariness and confusion among stakeholders.³⁰⁹

4. Improve public health and food access in Memphis and throughout Shelby County

Obesity is a public health issue that touches every city in the nation. Memphis is no exception.³¹⁰ Many of the city’s residents struggle with obesity, but the city’s Food Code has not done them any favors. The Code is outdated and restrictive, barring many innovative food entities from operating in Memphis and throughout Shelby County. Therefore, an entrepreneur who develops a novel concept that would improve access to fresh, healthy foods would likely have the idea defeated by the outdated provisions found in the Memphis Code. Whether or not the Food Code is eliminated or amended, Memphis and other municipalities in Shelby County could still take proactive steps to address some of the area’s food-related problems.

³⁰⁵ City of Boston Restaurant Homepage, <http://www.cityofboston.gov/business/restaurants/>, (last visited Jul. 8, 2011).

³⁰⁶ Austin-Travis County Health & Human Services Department, “Starting a Food Business,” <http://www.ci.austin.tx.us/sbdp/downloads/startfoodbus.pdf> (last visited July 8, 2011).

³⁰⁷ E.g., Interview with Mobile Food Stakeholder, Memphis, Tenn. (Mar. 17, 2011).

³⁰⁸ Indiana State Department of Health, “Standardization Program for Retail Food Inspectors,” <http://www.in.gov/isdh/21562.htm> (last visited July 8, 2011).

³⁰⁹ For example, Knox County Health Department’s inspection form, used by all inspectors, is publicly available online. Knox County Health Department, “Food Service Establishment Inspection Report,” http://www.knoxcounty.org/health/pdfs/restaurant_inspection_form.pdf (last visited July 8, 2011).

³¹⁰ In fact, a 2007 study by Forbes magazine found Memphis to have the highest obesity rate of all cities in the nation. Rebecca Ruiz, Forbes.com, “America’s Most Obese Cities,” http://www.forbes.com/2007/11/14/health-obesity-cities-forbeslife-cx_rr_1114obese.html (last visited July 8, 2011).

A. Appoint a City or County Food Policy Director. One encouraging idea that other cities have adopted is the appointment of a city “Food Policy Director.” The director serves within local government and helps identify methods to improve production of and access to healthy foods. Baltimore, Boston, New York, Los Angeles, and San Francisco have all appointed Food Policy Directors to collaborate with stakeholders and local food policy councils to identify policy changes and funding priorities.³¹¹ In Memphis, such a Food Policy Director could work with the new Memphis and Shelby County Food Policy Working Group to create and promote new food policy initiatives in Shelby County.

B. Adapt bus routes to link low-income neighborhoods and grocery stores. After conducting a study, Austin opened a new bus route to help residents travel to supermarkets.³¹² Memphis and Shelby County could investigate to see if current bus routes help low-income people access grocery stores, and whether bus route adjustments could improve access to grocery stores in food deserts.

C. Offer grants and loans to encourage grocery stores to open in food deserts. Philadelphia and New York City, among other cities and states, have addressed food deserts by offering grants, loans, and tax credits to help encourage grocery stores to open in low-income areas.³¹³ The state of Tennessee has also begun working with the Food Trust to establish a similar program.³¹⁴ Memphis too could begin offering this type of incentive to entice businesses to locate in these areas. The city could then also create similar programs to support opening restaurants or other establishments that offer healthy food choices in food deserts.

D. Promote opportunities for small farmers and producers to sell directly to consumers. Access to fresh fruits and vegetables can also be provided directly from growers. Memphis and Shelby County could follow the example set by Detroit and the State of Michigan to foster produce trucks. The “MI Neighborhood Food Movers project” is designed to encourage the proliferation of produce trucks. The project provides assistance throughout the permitting process and can even provide some vendors with start-up loans.³¹⁵ Michigan has created a step-by-step instruction booklet and has designated certain companies and agencies to assist with each step.³¹⁶ Memphis should not only amend or eliminate the relevant provisions that hinder produce trucks from operating, it should also provide encouragement and assistance to people wanting to establish produce trucks, fruit stands and community gardens.

E. Encourage use of SNAP and WIC benefits at farmers markets by implementing a double benefit voucher program. Most farmers markets in Memphis do not accept Supplemental Nutrition Assistance Program (SNAP) benefits. To better serve low-income customers and promote access to healthy foods, Memphis could assist the markets to purchase wireless EBT machines. Once the machines are in place,

³¹¹ See, e.g., Boston.com, “Chef tapped as city’s 1st food policy director” June 20, 2010, http://articles.boston.com/2010-07-20/news/29302489_1_food-policy-food-czar-healthy-food (last visited July 7, 2011); Baltimore Sun, “Baltimore Names its First Food Czar,” May 11, 2010, http://articles.baltimoresun.com/2010-05-11/health/bs-hs-food-policy-director-20100511_1_food-czar-healthy-ebt-machines (last visited July 7, 2011).

³¹² Pothukuchi K, Joseph H, Burton H, Fisher A, “What’s Cooking in your Food System?: A Guide to Community Food Assessment,” Venice, CA: Community Food Security Coalition 2002, available at www.foodsecurity.org/CFAGuide-whatscookin.pdf.

³¹³ Terry Pristin, “With a Little Help, Greens Come to Low-income Neighborhoods,” The New York Times, June 16, 2009, <http://www.nytimes.com/2009/06/17/business/17supermarkets.html> (last visited July 8, 2011).

³¹⁴ The Food Trust, “Supermarket Campaign,” <http://www.thefoodtrust.org/php/programs/super.market.campaign.php>, (last visited July 21, 2011).

³¹⁵ MI Neighborhood Food Movers, “Fresh Food Delivery Program,” http://www.michigan.gov/documents/foodmovers/MNFM_Manual_290427_7.pdf (last visited July 7, 2011).

³¹⁶ MI Neighborhood Food Movers, “Fresh Food Delivery Program,” http://www.michigan.gov/documents/foodmovers/MNFM_Manual_290427_7.pdf (last visited July 7, 2011).

Memphis could follow Boston’s example and allow residents who use their SNAP benefits at farmers markets to have their benefits matched up to \$10. This allows SNAP users to double the money that they have available to purchase healthy foods.³¹⁷ The program promotes healthy foods, helps SNAP recipients get the most value from their food assistance benefits, and encourages people to shop at farmers markets, thus supporting local food producers. Three farmers markets in Memphis and Shelby County began accepting SNAP benefits this year.³¹⁸ The Memphis and Shelby County Food Policy Working Group is also working with Wholesome Wave to implement a program that would double the value of SNAP benefits for purchases made at farmers markets.

F. Implement a program to provide unmarketable food to those in need. Florida has a program known as the Food Recovery Program, which is a collaborative effort by the Florida Department of Agriculture and Consumer Services, various food entities, and volunteers to provide food to the poor.³¹⁹ The program provides volunteers to collect unmarketable food, through methods such as field gleaning and perishable food salvaging, and sending it directly to those in need. San Francisco’s Public Works Department also has an urban gleaning program that distributes fruits picked from trees in urban areas and parks to local food banks.³²⁰ Memphis could implement a similar program with minimal expense by encouraging volunteers, nonprofit organizations, and businesses to participate in the process contributing to the resolution of food shortage problems in some of the most impoverished neighborhoods in the city.

G. Implement Virtual Supermarkets. Baltimore has started the “Baltimarket” program, which “enables neighborhood residents to place grocery orders at their local library branch or school once a week and receive their groceries the following day at the same place for no delivery cost.”³²¹ Like Memphis, Baltimore has many residents who live in “food deserts,” areas with poor access to healthy foods and grocery stores. The Baltimarket program attempts to remedy the food access issue by allowing residents to order their weekly groceries and then pick them up from their neighborhood library without paying a delivery fee.³²² The customers can also use EBT to pay for their groceries. For residents of food deserts, who would otherwise be forced to eat fast food or other junk food, this program could be a way for them to access better nutrition.

Provision-by-Provision Analysis of the Memphis Food Code

This Provision-by-Provision Analysis examines each provision of the Memphis Food Code.³²³ The language for each provision is provided, followed by a suggestion to eliminate and/or amend that provision, and an explanation for that specific suggestion.

³¹⁷ The Food Project, “Boston Bounty Bucks,” <http://thefoodproject.org/bountybucks> (last visited July 8, 2011).

³¹⁸ Jonathan Devin, *Grant Encourages Food Stamps at Markets*, The Daily News, Mar. 14, 2011, <http://www.memphisdailynews.com/editorial/Article.aspx?id=56971> (last visited Aug. 10, 2011).

³¹⁹ Florida Department of Agriculture and Consumer Services, “Food Recovery Program,” <http://www.florida-agriculture.com/foodprograms/foodrecovery.htm> (last visited July 8, 2011); Fla. Stat. Ann. § 570.0725 *et seq.* (West 2010).

³²⁰ City and County of San Francisco Department of Public Works, “Urban Gleaning Program,” <http://www.sfdpw.org/index.aspx?page=1243> (last visited July 21, 2011).

³²¹ Baltimarket, “FAQ,” http://baltimarket.org/?page_id=150 (last visited July 7, 2011).

³²² Baltimarket, “FAQ,” http://baltimarket.org/?page_id=150 (last visited July 7, 2011).

³²³ Note that the most current version of the Memphis Code included in Memphis MuniCode was updated in 2009.

Our overall recommendation is to eliminate the Memphis Code almost entirely and instead apply only state law and regulations. If the Code is repealed entirely, we recommend that the following handful of provisions be reinstated:

- Memphis, Tenn. Code 9-52-3 “Permit to manufacture, sell or distribute food generally—Required”
- Memphis, Tenn. Code 9-52- 20 “Right of entry into food establishments—Interfering with health department personnel”
- Memphis, Tenn. Code 9-52- 21 “Interpretation of chapter—Policies and standards of health officer”
- Memphis, Tenn. Code 9-52- 22 “Enforcement of chapter—Rules and regulations of health department”
- Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394 “Ordinance to Amend Chapter 16, Article V, of the City of Memphis Code of Ordinances, so as to Allow Self-Contained Mobile Food Preparation Vehicles to Operate in the City of Memphis”

Retaining these provisions would allow SCHD to raise revenue, have the right to enter an establishment to address a food emergency, authorize SCHD to enforce and interpret the provisions, and allow for local regulations for mobile food vending. While these provisions should be retained, they should still be amended as suggested to clarify SCHD’s authority.³²⁴

Despite our overall recommendation, we have also made specific recommendations for each provision in the Code. For many provisions, our recommendation is to eliminate the provision entirely, and we put forth reasons for making this suggestion. However, even for those provisions we recommend eliminating, this Analysis also includes tailored amendments to each provision to clarify the specific changes that we believe are absolutely essential. The purpose of these amendments may be to clarify the enforceable requirements, eliminate provisions that are unduly restrictive or create confusing double standards, or improve public health. The actual language from is provision is written in this font. Amendments are indicated by language that is either ~~struck through~~ (meaning we believe it needs to be removed) or underlined (meaning we believe it needs to be added). These changes are the minimum amendments we believe are absolutely necessary to bring the Code into line with existing state laws or best practices from other cities and states. The majority of the language that is added comes directly from Tennessee state law, though some suggestions come from our Comparative City Research or stakeholder interviews. Also, because eliminating or amending one provision may affect others in unintended ways, it should be noted that such other provisions should be accordingly amended or eliminated to accomplish the specified purpose, even if the recommendations do not comprehensively note these contingencies.

It is also important to note that the version of the Memphis Food Code used is the one available online at Memphis Muni Code (last updated in 2009). This version included amended provisions not available in the hard copy “Food Ordinance Handbook.” However, the numbering of the provisions from Memphis Muni Code is different than those in the Handbook. See Appendix A for a cross-reference chart.

³²⁴ Memphis, Tenn. Code 9-52-3 (MuniCode 2009); Memphis, Tenn. Code 9-52- 20 (MuniCode 2009); Memphis, Tenn. Code 9-52- 21 (MuniCode 2009); Memphis, Tenn. Code 9-52- 22 (MuniCode 2009); Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

For ease of explanation, this Provision-by-Provision Analysis will focus on analyzing most of the Code provisions, particularly those in Article 2 about general sanitary requirements, as they would be applied to FSEs and RFSs, unless the provision is clearly targeted at another type of food entity that is not an FSE or RFS (e.g. an Other Food Entity or food entities that is not regulated at the state level, such as farmers markets, “hucksters,” pedestrian vendors, etc.). However, it is important to note that as written, all provisions of the Code apply to all food entities. Thus, even those regulations in Article 1 and 2 that would seem to be applicable only to a restaurant are technically applied to all food entities in Memphis and throughout Shelby County. This can lead to bizarre results – for example, toilet facilities a farmers market are required to conform to standards for toilet facilities in a restaurant. We believe that a first step would be for the Memphis Code to be amended to clarify that these general sanitary requirements do not apply to all food entities.

There are four overarching reasons why we recommend that specific provisions in the Memphis Food Code should be eliminated and/or amended.

1. *The Memphis Food Code often fails to reflect the more stringent state requirements*

The first type of problematic aspect of the Memphis Food Code is that certain provisions are less specific than state regulations or otherwise impose less stringent requirements. First, some provisions that are in this category are written in language that is more general and imposes requirements that are less specific than the corresponding state law or regulations. This is problematic because the local regulations do not provide the requisite guidance that is needed for FSEs, RFSs, and OFEs to fully comply with the requirements – leading to confusion, inconsistencies, and inadvertent noncompliance. Second, instead of merely being less specific, some provisions cite specific standards that are less stringent than state law and are therefore unenforceable. Such provisions are misleading to food industry entrepreneurs.

2. *The Memphis Food Code is often redundant with state laws and regulations*

Some provisions contain the same or similar requirements as state laws and regulations. As applied to FSEs and RFSs, these provisions are completely unnecessary. Furthermore, food industry entrepreneurs may not realize that such local and state laws are redundant, instead, they may be confused and intimidated by the large number of state and local provisions.

3. *The Memphis Food Code imposes unduly restrictive standards*

Some provisions in the Memphis Code impose more stringent standards than the state regulations. In such cases, either the difference is too insignificant to justify the added confusion of applying a separate regulation, or the additional requirements are unduly harsh and detrimental to business owners.

These unduly restrictive local provisions only serve to put businesses in Memphis or Shelby County at a disadvantage from the rest of the state and discourage entrepreneurs from opening businesses in the area. Also, in the case of establishments such as produce trucks and farmers markets, these unduly restrictive requirements can be detrimental to the public health of the county, since the inevitable but unintended consequence of such restrictions is to constrain entrepreneurial activity and keep healthy foods out of Memphis and Shelby County.

4. *The Memphis Food Code invokes arbitrary language*

Finally, some provisions invoke broad, discretionary language, which fails to provide clear guidance to businesses. An example of such language is the phrase, "as designated by the department of health." Assuming these requirements are valid, the problem with this type of language is that it gives owners of FSEs, RFSs, and OFEs no clear guidance and also creates arbitrariness in the interpretation and enforcement of the provision by health inspectors. Different health inspectors might interpret it differently. This type of broad provision can be affirmatively harmful, stifling economic activity through paralysis of food industry entrepreneurs due to their confusion and lack of guidance.

For these main reasons, as well as others outlined below, we believe the Memphis Food Code is badly in need of amendments, and that much if not all of it should be eliminated.

Article 1: General Provisions

Sec. 9-52-1 - Definitions.

The following definitions shall apply in the interpretation and enforcement of this chapter:

"Adulterated" means the condition of a food:

1. If it bears or contains any poisonous or deleterious substance in a quantity which may render it injurious to health;
2. If it bears or contains any added poisonous or deleterious substance for which no safe tolerance has been established by regulation, or in excess of such tolerance if one has been established;
3. If it consists in whole or in part of any filthy, putrid or decomposed substance;
4. If it has been processed, prepared, packed or held under insanitary conditions, including potentially hazardous food held at room temperature, or thawed at room temperature, as herein set forth, whereby it may have become contaminated with filth, or where it may have been rendered injurious to health;
5. If it is in whole or in part the product of a diseased animal, which has died otherwise than by slaughter;
6. If its container is composed in whole or in part of any poisonous or deleterious substance which may render the contents injurious to health; or
7. If it contains anything other than claimed.

"Approved" means acceptable to the health officer based on his or her determination as to conformance with appropriate standards and good public health practice, as hereinafter set forth.

"Bakery" means a plant where bread, rolls, cakes, doughnuts, pies and similar products are processed, mixed baked, packaged or stored for sale and distribution to retailers.

"Beverage plant" means a plant where beverages are processed, mixed, and packaged in wholesale lots for distribution.

"Coffee bar" means an retail food service establishment where coffee, hot tea or other hot beverages are sold which do not require any mixing, preparation or handling beyond the combining of a mix or a powder with hot water.

"Cold storage warehouse" means a warehouse in which food and food products are stored under refrigeration.

"Drive-by restaurant" means an eating and drinking establishment where refreshments and meals are processed, prepared and offered for sale to customers who remain in their vehicles and take such food off of the premises. Customers are not allowed entrance into such establishments, nor are there any parking spaces for the public where food or drink may be consumed on the property.

"Drive-in restaurant" means an eating and drinking establishment where refreshments and meals are processed, prepared and offered for sale primarily for consumption outside of the establishment in the parking area and/or off the premises.

"Easily cleanable" means readily accessible and of such material and finish and so fabricated that residue may be completely removed by normal cleaning methods.

"Employee" means ~~any person working in a food service establishment who transports food or food containers, who engages in food preparation or service, or who comes in contact with any food utensils or equipment.~~ the permit holder, individuals having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement, or any other person working in a food service establishment or retail food store.

"Equipment" means all stoves, ranges, hoods, meat blocks, tables, counters, refrigerators, sinks, dishwashing machines, steam tables, and similar items, other than utensils, used in the operation of a food service establishment.

"Farmer's market" means a place designated by a sponsoring organization where agricultural and other products ~~only fruits, vegetables, melons, berries, nuts or honey,~~ produced by the sellers thereof, are kept and offered for retail sale. A minimum of 50 percent of the sales area of a farmers market shall be devoted to the sale of fruits and vegetables.

"Food" includes all articles used by humans for food, drink, confectionery or condiments, whether simple, mixed or compound, and all substances or ingredients used in preparation thereof.

"Food catering" is the transporting, serving, or the dispensing of food in any way to parties, meetings and gatherings where the food is prepared in a kitchen at one location and consumed at another location including delivery of food ordered by consumers. This is a temporary arrangement where only one meal is served.

"Food commissary" means an establishment with an eating and drinking classification which prepares food for distribution to an approved retail food establishment owned or operated by the same person who has ownership of the commissary. Adequate equipment must be provided to maintain good sanitation in the preparation and transportation of such food.

"Food distributor" means any person who offers for sale or sells to another food or food products in wholesale lots and does not produce or manufacture the products himself or herself, nor does he or she sell retail to a customer.

"Food environmentalist" is the term designated to include inspectors, sample collectors or any other person employed by the health department and assigned to food control.

"Food packaging plant" means a plant where nonperishable food and products are packaged or repackaged but not processed.

"Food processing" is the manufacture, cooking, mixing, preparation, packaging or handling of food or food products which is to be stored, transported, displayed or offered for sale in wholesale lots for consumption off the premises from which it originates.

"Food processing establishment" means a commercial establishment (other than food services establishments, retail food stores, and commissary operations) in which food is manufactured or packaged for human consumption and which operates in accordance with all applicable laws.

"Food salvage distributor" means a person who engages in the business of distributing, selling or otherwise trafficking in any salvage products enumerated in the definition of "food salvager." No merchandise can be salvaged in any store, display or retail sales area of a food salvage distributor. The salvage products must be received from a food salvager.

"Food salvager" means a person engaged in the business of reconditioning, labeling, relabeling, repackaging, reconditioning, sorting, cleaning, culling or by other means salvaging, and who sells, offers for sale, or distributes for human or animal consumption, any salvaged food, beverage, including beer, wine and distilled spirits, vitamin, food supplement, dentifrice, drug, cosmetic, single-service food container or utensil, soda straws or paper napkins, or any other food product of a similar nature, that has been damaged or

contaminated by fire, water, smoke, chemicals, transit or by any other means.

~~Food service establishment" means any bakery, restaurant, lunch stand, cafe, ice cream plant, public or private market, slaughterhouse, stall, store, storehouse, cold storage plant, cafeteria, tearoom, sandwich shop, soda fountain, delicatessen, tavern, lounge, nightclub, industrial feeding establishment; private, public, or nonprofit organization or institution routinely serving food; catering kitchen, commissary, food processing plant, grocery, fish market, food storage warehouse, package goods food establishment, drive in grocery store, or any other place in or from which meat, fish, or shell family, birds, fowl, vegetables, fruit, milk, ice cream, ices, beverages or any other food intended or consumption by human beings is manufactured, kept, stored or offered for sale, disposition or distribution as food for human beings, with or without charge; provided that a huckster shall not be considered a food service establishment.~~

"Food service establishment" means any establishment, place or location, whether permanent, temporary, seasonal or itinerant, where food is prepared and the public is offered to be served or is served the following, including, but not limited to: foods, vegetables, and/or beverages, not in an original package or container; food and beverages dispensed at soda fountains and delicatessens; and sliced watermelon, ice balls, and/or water mixtures. The term includes any such places regardless of whether there is a charge for the food. The term does not include:

- (a) private homes where food is prepared or served and not offered for sale;
- (b) a retail food store operation other than a delicatessen;
- (c) the location of vending machines; or (d) supply vehicles.

"Food service establishment" shall not include grocery stores which may, incidentally, make infrequent casual sales of uncooked foods for consumption on the premises, or any establishment whose primary business is other than food services, which may, incidentally, make infrequent casual sales of coffee and/or prepackaged foods, for consumption on the premises. For the purposes of the preceding sentence, "infrequent casual sales" means sales not in excess of fifty dollars (\$50.00) per day on any particular day. "Food service establishment" does not include a location from which casual, occasional food sales are conducted solely in connection with youth related amateur athletic or recreational activities or school related clubs by volunteer personnel which are in operation for twenty-four (24) consecutive hours or less. "Food service establishment" does not include a catering business that employs no regular, full-time employees, the food preparation for such business being solely performed within the confines of the principal residence of the proprietor, and such catering business makes only occasional sales during any thirty (30) day period. "Food service establishment" shall

not include educational and training exercises conducted during before and after school care programs, child care programs, or instructional programs such as home economics. Food prepared during these educational and training exercises shall not be offered for sale or consumption to the public, including other students and/or faculty outside of the classroom environment. However, the actual preparation and service of food in school and child care facilities must comply with these rules.

"Food storage warehouse" means a warehouse in which food and food products are stored.

"Food vendor" means a person engaged in the business of distributing and/or servicing vending machines dispensing food and food products.

"Frozen dessert" is any clean frozen or partially frozen combination of two or more of the following: Grade A milk products, manufactured milk or manufactured milk products, eggs or egg products, sugars, water, fruit or fruit juices, candy, nut meats, or other harmless and wholesome food products, flavors, color, or harmless stabilizers, and shall be deemed to include ice cream, ice milk, sherbet, imitation ice cream, novelties, and other similar products.

"Frozen desserts mix" is the unfrozen pasteurized combination of Grade A milk products, manufactured milk, or manufactured milk products used in the manufacturing of frozen desserts, with or without fruits, fruit juices, candy, nut meats, or other harmless and wholesome food products, flavors, colors, and harmless stabilizers and shall be deemed to include ice cream mix, ice milk mix, milkshake mix, and other similar products.

"Grocery store" means a ~~place of business~~ retail food store where food and food products are stored, displayed and offered for sale to retail customers to be prepared or cooked elsewhere. Another type of business such as a meat market, restaurant, or bakery may be incorporated into the grocery store area but will not be included in this definition. A grocery store routinely sells fruits, vegetables or other produce and/or has a meat market.

"Health officer" means the health officer and director of the city and county health department, or his or her designated representative.

"Historical district" means a specific area included on the State Register of Historical Places, as defined by state laws or the Tennessee Historical Commission.

~~"Huckster"~~ "Mobile Produce Vendor" shall be any person who sells or peddles from a vehicle on the streets of the city only fruits, vegetables, melons, berries, ~~chestnuts and packaged~~ nuts. Such products may be produced by him or her or they may be purchased from others for resale.

"Ice cream vendor" means any person who offers for sale or sells to another any frozen desserts while operating from an ice cream cart or truck on the streets of the city or its police jurisdiction.

"Industrial catering" is the transporting, serving, dispensing or offering for sale of food products on a routine daily basis which have been manufactured and prepared in a food processing plant. This type catering is to schools, industrial plants and premises where a contract is entered into by two or more parties for food service.

"Industrial catering stand" means a food service establishment of fifty (50) square feet or less, permanently located in a shopping center or pedestrian mall, where food is stored, displayed and offered for sale in the prepackaged form for consumption outside the stand.

"Industrial catering trucks" are those which dispense prepackaged food products to one or more locations on private or public property under contract.

"Kitchenware" means all multi-use utensils other than tableware used in the storage, preparation conveying or serving of food.

"Labeling" means the marking, designation, or descriptive device on food containers and/or articles of food denoting the name of the product, ingredients thereof; name and address of manufacturer and/or distributor (if name and address of distributor is utilized then the permit number and the permitting agency shall appear on the product); and any other information the health officer may designate.

"Meat market" means a place of business or an area in a grocery store which meat, or meat products, are stored, processed, displayed or offered for sale.

Meat, ~~Vegetable~~ Produce and Fish. The word "meat" includes every part of any land animal and eggs. The word "fish" includes every part of any animal that lives in water, or the flesh of which is not meat. The word "~~vegetable~~ produce" includes every article of human consumption as food which, not being meat, fish or milk, is held or offered, or intended for sale or consumption as food for human beings, at any place in the city.

"Milk" is the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, which contains not less than eight and one-fourth percent milk solids not fat and not less than three and one-fourth percent milkfat. (Milkfat or butterfat is the fat of milk.)

"Milk products" include cream, light cream, coffee cream, table cream, whipping cream, light whipping cream, heavy cream, heavy whipping cream, whipped cream, whipped light cream, whipped coffee cream, whipped table cream, sour cream, cultured sour cream, half and half, sour half and half, cultured half and half, reconstituted or

recombined milk and products, concentrated milk, concentrated milk products, frozen milk concentrates, skim milk, skimmed milk, lowfat milk, fortified milk and milk products, vitamin D milk and milk products, homogenized milk, flavored milk or milk products, buttermilk, cultured buttermilk, cultured milk, cultured whole milk buttermilk, acidified milk and milk products, cottage cheese, creamed cottage cheese and lowfat creamed cottage cheese, yogurt and lowfat yogurt.

This definition is not intended to include such products as sterilized milk and milk products hermetically sealed in a container and so processed either before or after sealing, as to premicrobial spoilage, or evaporated milk, condensed milk, ice and other frozen desserts, butter, dry milk products (as defined herein), or cheese except when they are combined with other substances to produce any pasteurized milk or milk product defined herein.

"Misbranded" means the presence of any written, printed or graphic matter upon or accompanying food or containers of food, which is false or misleading, or which violates any applicable state or local labeling requirements.

"Novelties" means the pure, clean, frozen products made from ice cream, ice milk, sherbert, and with or without added coatings, cake, fruit, nuts and toppings, and similar products as designated by the health authority. The entire operation of removing the pieces, cutting, wrapping, clipping and packaging shall be done with approved equipment and methods.

"Open-air cafe" means a permanent-type restaurant, meeting all of the requirements of this code, which has an outside dining area at the same location, in conjunction with the restaurant with indoor seating.

"Packaged-goods store" means a food establishment in which food is stored, displayed or offered for sale in the packaged form and is intended for consumption off the premises. No meat market is included in the establishment, nor are fruits, vegetables and other produce routinely offered for sale.

"Pedestrian mall" means an open or covered passageway or concourse which provides access to rows of stores and is closed permanently to private motor vehicles, and dedicated or otherwise appropriated to the public for public use, which is under the authority of a mall agent or manager.

"Pedestrian vendor" means a person engaged in the business of dispensing food on a daily basis, from a mobile vehicle which operates within the confines of a public or private pedestrian mall, shopping center, city park or commercially zoned historical district.

"Perishable food" is any food of such type or in such condition as may spoil.

"Person in charge" means the individual present in a food service establishment at the time of inspection. If no individual is the apparent supervisor, then any employee present is the person in charge.

"Potentially hazardous food" means any food that consists in whole or in part of milk or milk products, eggs, ~~including boiled eggs~~, meat, poultry, fish, shellfish, edible crustacea, or other ingredients including synthetic ingredients, in a form capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms. The term does not include ~~clean, whole, uncracked, odorfree, unpeeled, shelled eggs or foods which that~~ have a pH level of 4.6 or below, or a water activity (aw) value of 0.85 or less.

"Reciprocal inspections" shall be the term applied to the act of making inspections, making laboratory analysis and conducting of a sanitation program by a health department or official agency in a shipping area in cooperation with another health department or official agency in a receiving area.

"Restaurant" means an eating and drinking establishment where refreshments and meals are processed, cooked, prepared and offered for sale primarily for consumption on the premises.

"Retail bakery" means a place of business where bread, rolls, cakes, doughnuts, pies and similar products are processed, mixed, baked, packaged and sold to consumers primarily for consumption off the premises.

"Retail food store" means any establishment or a section of an establishment where food and food products are offered to the consumer and intended for off-premise consumption. The term does not include establishments that handle only prepackaged, non-potentially hazardous foods; roadside markets that offer only fresh fruits and fresh vegetables; food and beverage vending machines; or food service establishments not located within a retail food store.

"Safe temperatures," as applied to potentially hazardous food, shall mean temperatures of ~~forty-five (45)~~ forty-one (41) degrees Fahrenheit or below, and one hundred forty (140) degrees Fahrenheit or above, ~~provided that eggs shall be kept at a temperature that is not conducive to spoilage.~~

"Salvageable merchandise" means any item listed under the definition of "food salvager" which can be reconditioned, labeled, relabeled, repackaged, reconditioned, sorted, cleaned, culled or by any other means be salvaged to the satisfaction of the health officer.

"Sanitize" means effective bactericidal treatment of clean surfaces of equipment and utensils by a process which has been approved by the health officer, as provided by the rules and regulations of the health

department, as being effective in destroying microorganisms, including pathogens.

"Shopping center" means a group of two or more commercial establishments that occupies at least thirty thousand (30,000) square feet of gross leasable area, located in a building or buildings that are planned, developed, owned and managed as a unit.

"Single-service articles" means cups, containers, lids or closures; plates, knives, forks, spoons, stirrers, paddles; straws) place mats, napkins, doilies, grocery bags, wrapping materials; and all similar articles which are constructed wholly or in part from paper, paperboard, molded pulp, foil, wood, plastic, synthetic, or other readily destructible materials, and which are intended by the manufacturer and generally recognized by the public as for one usage only, then to be discarded.

"Snack bar" means an eating and drinking area provided in a grocery store or packaged-goods store where refreshments or meals are processed, cooked, prepared and offered for sale primarily for consumption off of the premises.

"Sponsoring organization" means:

1. Any church;
2. Any school; or
3. Any nonprofit organization or association devoting its efforts and property exclusively to the improvement of human rights and/or conditions in the community.

"Tableware" means all multi-use eating and drinking utensils, including flatware (knives, forks and spoons.

"Temporary food service establishment" means any food service establishment which operates at a fixed location for a temporary period of time, not to exceed two weeks.

"Utensil" means any tableware and kitchenware used in the storage, preparation, conveying or serving of food.

"Wholesale meat plant" means a place of business where meat and meat products, fish or poultry are processed, packaged and stored for distribution to retailers.

"Wholesome," when applied to food for human consumption, means in sound condition, clean and free from adulteration.

(Ord. 3432 § 1, 1-29-85; Code 1985 § 16-176; Ord. 3394 §§ 1, 2, 7-31-84; Ord. 3228 § 1(1)-(7), 8-3-82; Ord. 2950 § 1(1)-(5), 12-11-79; Ord. 2968 § 1, 5-1-79; Ord. 2713 § 1, 4-25-78; Ord. 2630 § 1, 8-30-77; Ord. 2520 § 1, 10-26-76; Ord. 2171 § 1, 12-3-74; Code 1967 §§ 18-1, 18-136, 18-184)

Suggestion: Amend this provision to bring all definitions in line with state law. Alternatively, certain key definitions in the Code should be amended to allow more direct comparisons with state law, to remove vague language and to eliminate unnecessary restrictions.

Comments: If the Code is not eliminated, as strongly recommended, this section should be amended to either entirely incorporate state definitions or at least replace certain key definitions with definitions that match state law. While this report does not compare every defined term in this provision with its equivalent state definition, the report did select key definitions as well as a representative sample of other definitions to compare with state law. The overwhelming finding is that the Memphis Food Code's definitions are outdated and contain discrepancies with state law that lead to confusion.

Both TDA and TDH regulations sufficiently define terms relating to the regulation of RFSs and FSEs,³²⁵ as well as OFEs. Inconsistency between the definitions of these key terms at the state and local level can create a great amount of uncertainty. In particular, the current Memphis Food Code does not include a definition of an RFS, even though RFSs are a major type of food entity that have their own set of regulations and inspection under TDA rather than TDH. As mentioned, SCHD inspects FSEs and RFSs on behalf of the state, and local standards are only valid with regard to these entities if they are "at least as stringent" as that of the state,³²⁶ regardless of the set of definitions the Memphis Code applies to these entities. Accordingly, it is necessary to compare local and state standards for FSEs and RFSs, and the Code should therefore use state definitions for ease of comparison. When not inconsistent with state law and regulations, the Code's definitions are redundant and thus unnecessary.

If the Code is amended to reflect state law, as recommended below, state definitions would be comprehensive and sufficient. If it is not largely amended, some terms present in the Memphis Code that are not part of the state definitions may be retained to help clarify the definitions used for local regulations that do not exist at the state level. However, even if the Code is not largely amended, this provision should be amended at a minimum to replace certain key definitions with those contained in the state regulations.

In particular, the Code should use the state's definitions of "FSE" and "RFS," as outlined above.³²⁷ According to state regulations, an RFS is "any establishment or a section of an establishment where food and food products are offered to the consumer and intended for off-premise consumption;"³²⁸ and is regulated by TDA; while an FSE is "any establishment, place or location . . . where food is prepared and the public is offered to be served or is served . . . foods, vegetables, and/or beverages, not in an original package or container . . .";³²⁹ and is regulated by TDH. However, the Memphis Code only defines the term "food service establishment" more broadly, as any place where food is "manufactured, kept, stored or offered for sale, disposition, or distribution as food for human beings," thus including both FSEs and RFSs in its own definition of "food service establishment." Thus, FSEs, RFSs, and OFEs all fall under the Memphis definition of "food service establishment." This makes comparison with state standards extremely difficult. It also confuses local residents and businesses, stifling economic activity and decreasing food access in Memphis and throughout Shelby County.

³²⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.01 (2011); Tenn. Comp. R. & Regs. 1200-23-01-.01 (2011).

³²⁶ Tenn. Code Ann. § 53-8-205 (7)(b)(ii)(2010), 68-14-303(7)(b)(2010).

³²⁷ The terms "RFS" and "FSE" will refer to the state definitions throughout this analysis.

³²⁸ Tenn. Comp. R. & Regs. 0080-04-09-.01(1)(x) (2011).

³²⁹ Tenn. Comp. R. & Regs. 1200-23-01-.01(16) (2011).

The application of the term “food service establishment” in the Memphis Code to include all food entities, including OFEs, is also a problem. As mentioned earlier, SCHD should cease regulating these entities since they are already fully regulated and inspected by TDA under state law. Separate enforcement of local law strains SCHD’s resources, subjects these entities to two sets of regulations and two sets of permitting fees, and confuses business owners where the laws appear to conflict. However, even if it does not cease regulating these entities, as strongly recommended, Memphis should still define OFEs separately and adopt the state definitions of RFS and FSE, noting that these OFEs do not fit in to those categories, for ease of comparison.³³⁰

More generally, the Code should be amended in any instance where a discrepancy with the state definition may cause confusion. One instance of a discrepancy that may cause confusion is the definition of “employee.” The state definition of “employee” includes “any . . . person working in a food service establishment” or “retail food store,”³³¹ and it is therefore broader than the Memphis definition above. Such a discrepancy may make it difficult to compare the stringency of provisions, and definitions such as these should be amended. This is just one example, but there may be other discrepancies that prove this point as well. Thus, Memphis would be best served by adopting state definitions for all terms defined at the state level and only creating new definitions in situations where something is regulated locally that is not regulated at the state level.

In addition to discrepancies between state and local definitions, the Code’s definitions are also out of sync with contemporary technology, standards, and practices. As practices within the food industry change, so do the terms and definitions used by food safety authorities. As discussed throughout the report, the Code is difficult to change and thus is updated much less frequently than the state laws and regulations. The Code’s definition of “safe temperatures” is a particularly important example of this phenomenon. State regulations require potentially hazardous foods to be refrigerated at temperatures at or below forty-one degrees Fahrenheit.³³² According to the Food Code’s definition of “safe temperatures,” however, potentially hazardous foods may be refrigerated at or below forty-five degrees Fahrenheit. As food safety science has developed, best evidence shows us that refrigerated food should be kept below forty-one degrees Fahrenheit, and the Memphis Code has not been updated to respond to best practices in food safety. State law includes eggs as a potentially hazardous food, so they should also be kept below forty-one degrees, thus the last part of the definition can be eliminated.³³³ Similarly, the definition of “potentially hazardous foods” has some inconsistencies with the definition used in state law.³³⁴

Some definitions found in the Code also lead to unnecessarily restrictive outcomes. For example, the provision regarding “farmers market” only allows the sale of produce, nuts and berries at farmers markets.³³⁵ This means that, under the Memphis Code, farmers markets cannot sell meat, dairy, or any baked goods, jellies, or processed foods. State laws and regulations do not define “farmers market” or

³³⁰ This provision-by-provision analysis will assume that the Code adopts the state definitions of RFS and FSE and will replace the Memphis term “food service establishment” with these terms. OFEs are considered “food service establishments” under the Memphis Code, but for ease of comparison, they will not be included unless the provision is specifically applicable to these entities.

³³¹ Tenn. Comp. R. & Regs. 1200-23-1-.01(9) (2011); Tenn. Comp. R. & Regs. 0080-04-09-.01(i) (2011).

³³² Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b) (2011); Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(b) (2011).

³³³ Tenn. Comp. R. & Regs. 0080-04-09-.01(v) (2011).

³³⁴ Tenn. Comp. R. & Regs. 0080-04-09-.01(v) (2011).

³³⁵ As noted, *supra*, SCHD often allows vendors to sell other products despite the ban.

place restrictions on what types of products can be sold at farmers markets.³³⁶ Mandating that only produce, nuts and berries can be sold at farmers markets unnecessarily excludes products sold at successful farmers markets all over the nation, thereby limiting the growth of farmers markets and reducing the availability of nutritious foods in Shelby County.³³⁷ The Memphis Code’s definition of “farmers market” should therefore be eliminated or amended to be more inclusive. Even if the Code is not modified to incorporate state definitions, the Code’s definition of “farmers market” should be eliminated or amended to reflect the definition found in the Memphis and Shelby County Unified Development Code, which only requires that at least fifty percent of a farmers market’s display area be devoted to fresh fruit or vegetables.³³⁸

Finally, TDH and TDA are planning to adopt the most recent version of the United States Food & Drug Administration (FDA) Food Code.³³⁹ The FDA has released six additional model food codes since the original model food code was released in 1993, each one providing updated standards and definitions based on evolving industry and regulatory practices and best available scientific evidence.³⁴⁰ The most recent FDA Food Code was released in 2009. TDH regulations have been amended several times throughout their existence, with the most significant revision occurring when the state adopted a large portion of the 1999 FDA Food Code.³⁴¹ By eliminating the definition section of the Code and adopting state definitions, Memphis and Shelby County will be able to ensure that SCHD and local stakeholders are instantly using up-to-date definitions, simplifying communication and facilitating cooperation between all parties. State definitions will continue to change as new versions of the Food Code are adopted, and it is only by incorporating state law definitions that Memphis and Shelby County can make sure to stay up-to-date.

Note that the above analysis does not include amendments to every definition; rather, amendments are included for the terms that are most problematic or most out of sync with state law. If the Memphis Food Code is not eliminated, the definitions should be changed to more clearly echo state law.

³³⁶ Farmers market vendors, however, must be appropriately licensed or permitted. Tennessee Department of Agriculture, “Info. For Mgmt. and Vendors of Flea Markets, Farmers Markets, Trade Days, Sales & Auctions,” *available at* <http://www.tn.gov/agriculture/publications/regulatory/DOC062909.pdf> (last visited May 22, 2011).

³³⁷ In addition to benefiting consumers and the farmers that sell animal-based products, sales of these products at markets “increase the economic value of the markets for [all] vendors.” Neil Hamilton, NAT’L AGRIC. LAW CENT., *Farmers Markets: Rules, Regulations, and Opportunities* 37 – 38 (2002).

³³⁸ Memphis and Shelby County Unified Development Code, Section 2.6.3.

³³⁹ Interview with Otho Sawyer, Shelby County Health Department, by phone (Oct. 19, 2010).

³⁴⁰ US Food & Drug Administration, “FDA Food Code: Introduction,” <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/default.htm> (last visited July 25, 2011).

³⁴¹ Interview with Lori LeMaster, Tennessee Department of Health, by phone (Aug. 2, 2011).

Sec. 9-52-2 - Approval of plans for construction and alteration of food service establishment.

When a retail food store or food service establishment is constructed or extensively remodeled, or when an existing structure is converted for use as a retail food store or food service establishment, properly prepared plans and specifications for such construction, remodeling or alteration showing layout, arrangement and construction materials of the work area, and the location, size and type of fixed equipment and facilities shall be submitted to the health officer for approval before such work is begun. For non-temporary food service establishments, these plans must be submitted to the health officer at least 15 days before such work is begun. No building permit to construct or remodel a food service establishment or retail food store shall be issued until plans have been approved by the department of health.

(Code 1985 § 16-178; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-6)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law. Alternatively, the provision should be amended to reflect the more stringent state requirements regarding the approval process for construction and remodeling plans of FSEs.

Comments: State law adequately addresses the approval process for construction and remodeling plans, and therefore this provision **can be eliminated**.³⁴² The relevant TDH provision is also more specific with regard to non-temporary FSEs, requiring that plans and specifications for the construction, remodeling, or conversion of a non-temporary FSE be submitted to the agency at least 15 days before construction, remodeling, or conversion is begun.³⁴³ Thus, the state statutes and TDH regulations render the Memphis Code superfluous, as the state law addresses everything that the Memphis Code provision does but does so in a more detailed manner. Alternatively, the provision should be amended so to make clear that plans and specifications for the construction, remodeling, or conversion of a non-temporary FSE must be submitted at least 15 days before any work is begun.³⁴⁴

~~Sec. 9-52-3 - Grocery Store Permit to manufacture, sell or distribute food generally Required.~~

~~A. No person shall engage in the manufacture, sale or distribution of any food without a permit from the department of health.~~

³⁴² See Tenn. Comp. R. & Regs. 1200-23-01-.02(16)(a) (2011); Tenn. Code. Ann. §§ 53-8-219, 68-14-320 (2011).

³⁴³ *Id.*

³⁴⁴ *Id.*

~~B. The health officer shall determine which type of permit each establishment must obtain. If an establishment does not fit into any type of business listed, the health officer shall have the authority to assign it to one of those listed which is in his or her judgment most reasonable.~~

C. The temporary permit shall be issued for a temporary period of time at a fee which is fifty (50) percent of the annual rate, in accordance with the provisions of Section 9-52-11.

D. Permit fees for ~~food establishments~~ grocery stores shall be according to the following schedule:

Type of Establishment	
In Restaurants	
From 1 to 25 seats	\$ 25.00
From 26 to 50 seats	40.00
From 51 to 75 seats	60.00
Over 75 seats	75.00
Grocery Stores	
Under 1,200 square feet:	
For the grocery store	25.00
For the meat market	10.00
With a bakery	10.00
Between 1,200 square feet and 10,000 square feet:	
For the grocery store	37.50
For the meat market	15.00
With a bakery	15.00
Between 10,000 square feet and 20,000 square feet:	
For the grocery store	75.00
For the meat market	30.00
With a bakery	30.00
Over 20,000 square feet:	
For the grocery store	112.50
For the meat market	37.50
With a bakery	37.50
Other	
Coffee bar	7.50
Snack bar	25.00
Drive in restaurant	37.50
Retail bakery	37.50
Retail meat market	37.50
Packaged goods store	22.50
Food distributor	37.50
Food storage warehouse	75.00
Wholesale meat plant	75.00

Carbonated beverage plant	150.00
Mobile frozen dessert vendor:	
Per vending cart, per year	7.50
Per motorized vending truck, per year	22.50
Food packing plant	30.00
Wholesale bakery	150.00
Food vendor	75.00
Food processing plant	150.00
Industrial caterer, per truck, vehicle or stand	30.00
Food caterer	150.00
Food salvager or food salvage distributor	150.00
Huckster	22.50
Pedestrian vendor, per truck or vehicle	22.50
Farmers' market	7.50

(Ord. 3616 § 1, 12-9-96; Code 1985 § 16-178; Ord. 3394 § 3, 7-31-84; Ord. 3228 § 1(8), (9), 8-3-82; Ord. 2950 § 1(6), 12-11-79; Ord. 2713 § 1, 4-25-78; Ord. 2630 § 1, 8-30-77; Ord. 2171 § 1, 12-3-74; Code 1967 §§ 19-7, 19-185)

Suggestion: Amend this provision to eliminate all permitting fees for FSEs and OFEs (as the latter are already permitted by TDA). **Eliminate** the requirement for food entities to obtain a permit for any manufacture, sale, or distribution of food.

Comments: This provision contains permitting requirements that SCHD cannot enforce under state law, as well as requirements for food entities already permitted and inspected by TDA. In addition, the provision requires a permit for the operation of any food entities in Memphis and throughout Shelby County, which is much more stringent than the permitting requirements in state law. This provision **should therefore be amended** regarding the specific permits and the general permit requirement **should be eliminated**.

Part A-B: The requirement that one must have a permit to manufacture, distribute, or sell any food within Shelby County is unusually restrictive and thus **should be eliminated**. Most other cities we researched did not include a permitting requirement as expansive as the one Memphis imposes³⁴⁵ The Memphis Code's requirement that every person who manufactures, distributes or sells food have a permit from the health department leaves no room for exceptions for low-risk entities such as farmers markets. Other city ordinances and state laws typically employ language that requires permit from all "food businesses" or "food establishments," leaving room for exempting low-risk entities by simply not including them in the definition of "food businesses" or "food establishments."³⁴⁶ Innovative programs and entrepreneurial activities, such as urban farm stands, community-supported agriculture, or virtual supermarkets are hindered by this provision because there are no pre-existing permits applicable to their activity. This provision gives SCHD authority to place food establishments that do not neatly fit into an extant permitting category into one of the ones listed in the Food Ordinances. However, SCHD is not required to do so and the process is burdensome and can lead to arbitrary results. For example, one stakeholder who operates an urban farm in Memphis said that when she first sought a permit to sell her

³⁴⁵ *But see* Detroit, Mich. Code 21-3-52 (MuniCode 2011); San Francisco, Cal. Health Code 452 (American Legal Publishing Corporation 2011); Fort Worth, Tex. Code 16-111(a) (MuniCode 2011); New Orleans, La. Code 30-691(a) (MuniCode 2011).

³⁴⁶ *E.g.*, 410 Ind. Admin. Code 7-24-107 (2011) ("A person may not operate a retail food establishment without first having registered with the department as required under IC 16-42-1-6"). *But see* Ind. Code Ann. § 16-42-5-29(b) (West 2011) ("An individual vendor of a farmer's market or roadside stand is not considered to be a food establishment and is exempt from the requirements of this title that apply to food establishments")

products, different SCHD officials categorized her proposal differently.³⁴⁷ As a result, the officials gave her conflicting answers as to what she was allowed to sell and what regulations she had to abide by in order to sell her products.³⁴⁸ Thus, the farm was unable to sell its products to consumers for a long time, even though it was providing a method to increase economic development and offer healthy foods in the Memphis area.

In addition, as mentioned above, some food entities are beneficial to the community because they provide fresh, healthy foods and thus should be encouraged to operate rather than being burdened with a permit requirement. Examples of this would include farmers markets or hucksters (mobile produce vendors). These and other entities do not need any permit to operate at the state level, thus any permit requirements for them are additional burdens created at the local level. Rather than requiring a permit for any sale of any food, the Memphis Food Code should specifically enumerate the activities that require a permit and those that require a permit at the local, rather than state, level.

Part C-D: SCHD cannot charge FSEs the local permitting fees found in the Food Code because state law disallows county health departments from charging local permitting fees when regulating FSEs on behalf of TDH.³⁴⁹ However, SCHD can keep 95% of the state permitting fees for FSEs. Thus, any local permits for FSEs should be eliminated from the Memphis Code, as they are unenforceable. While SCHD may charge local permitting fees to OFEs that are independently inspected by TDA, these permitting fees are so low that they do not cover inspection costs,³⁵⁰ and furthermore, these entities are already inspected by TDA so we recommend that SCHD stop regulating these facilities altogether.³⁵¹ If SCHD were to stop inspecting OFEs, TDA would still conduct inspections of these entities and SCHD and local stakeholders would conserve resources.

State law does allow SCHD to charge local permitting fees to RFSs, even though SCHD inspects RFSs under a contract with TDA.³⁵² In addition to any local permitting fees, SCHD keeps 100% of the state permitting fees for RFSs under this agreement. Under this mechanism, we recommend that permitting fees for grocery stores be retained and perhaps increased due to their importance to SCHD. Since it is difficult to amend the Memphis Food Code, perhaps these permitting fees should be eliminated from the Code and should be set by regulations of SCHD, which can be updated more frequently and thus will continue to reflect the actual cost of inspection.

Finally, regarding entities that are not clearly FSEs, RFSs or OFEs, we recommend that SCHD develop a separate permitting scheme for those that do not fall under any state regulations but which the local governments in Shelby County believe need a separate permit. As noted above, in creating special local permits, Memphis and Shelby County governments should note that these permits are barriers to entry for food industry entrepreneurs and thus should be used sparingly, in cases of food entities that are in fact high-risk. For example, in many other cities, permits are not required for farmers markets, as these are healthy entities that bring fresh produce into the community and are generally low-risk (high risk foods sold at farmers markets need separate permits anyway). Jacksonville, Austin, Boston, and Columbus are some of the cities that do not require any permit to operate a farmers market. North

³⁴⁷ Interview with Farm Manager, Memphis, Tenn. (Mar. 16, 2011).

³⁴⁸ *Id.*

³⁴⁹ Tenn. Code Ann. § 68-14-303(7)(H)(ii) (2010).

³⁵⁰ Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

³⁵¹ Although SCHD should retain the power to enforce state law and regulations pertaining to these facilities in case it needs to intervene on behalf of TDA.

³⁵² Tenn. Code Ann. § 53-8-205(7). (2010)

Carolina and the city of Columbus have government-run farmers markets to provide sales channel to farmers and to provide healthy food to consumers.

Similarly, hucksters (which we recommend calling “Mobile Produce Vendors”) are generally selling fresh produce and are providing a benefit to the community and thus also do not need permits, nor are such entities required to receive permits in other cities. Mobile produce vendors do not need a permit to operate in Austin, Jacksonville, Indianapolis, or Knoxville. Farmers in Baltimore do not need a permit, but they must acquire a “country growers identification card.”³⁵³ Boston and Columbus specifically exempt farmers selling produce from having a peddler’s license.³⁵⁴ Eliminating the permit fee and requirements for entities such as these will be beneficial to Memphis and Shelby County, as it will encourage the operation of such healthy food enterprises.

Sec. 9-52-4 - Permit–Application.

Any person desiring a permit required by Section 9-52-3 shall make written application therefor at the department of health on forms approved by the department. The appropriate fee must be paid at the time the permit application is completed. No permit can be issued until the appropriate fee is paid.

(Code 1985 § 16-179; Ord. 3228 § 1(10), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-8)

Suggestion: Retain this provision, as it is not inconsistent with any state laws and serves an important function. Alternatively, this provision should be eliminated if all local permitting requirements are eliminated, as it would no longer be necessary.

Comments: This provision contains permit application requirements mirroring those found in Tennessee state law for RFSs and FSEs. Both TDA and TDH have provisions that require applicants complete a written application and pay a fee in order to receive a permit.³⁵⁵ This provision only applies to local permits, which may co-exist with state issued permits, and therefore it is not redundant with Tennessee state law. Further, it is not burdensome to food entities and it is a necessary corollary to Section 9-52-3, which provides for a local permitting system. Therefore, it **should be retained** as long as Section 9-52-3 is retained. If Section 9-52-3 were amended as suggested above, this provision would only apply to grocery stores. Alternatively, if Section 9-52-3 were completely eliminated, this provision would serve no function and should be eliminated as well.

Sec. 9-52-5 - Permit–Issuance.

A permit required by Section 9-52-3 shall be granted only after inspection and approval by the health department reveals that the facility is in compliance with this title and zoning regulations and the payment of appropriate fees. ~~Such inspection and approval shall be of the suitability of the location where the food may be manufactured, stored, exposed for sale or sold, and the suitability of the methods to be used in the handling of such food together with the health of the persons engaged in the manufacture, sale or distribution of such food as hereinafter set out in this title and~~

³⁵³ Baltimore, Md., Civil Citations Digest of Laws Art. 15 § 17-18 (2007).

³⁵⁴ Boston, Mass. Code 16- 2.1 (American Legal Publishing Corporation 2010); Columbus, Ohio Code 523.03(a)(2) (MuniCode 2010).

³⁵⁵ Tenn. Code Ann. § 53-8-208(a) (2010); Tenn. Code Ann. § 68-14-306(a)(1) (2010).

~~according to zoning regulations.~~

(Code 1985 § 16-180; Ord. 3228 § 1(11), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-9)

Suggestion: Amend this provision to ensure that the law is not applied arbitrarily. Alternatively, this provision should be eliminated if all local permitting requirements are eliminated, as it would no longer be necessary.

Comments: This provision grants health officers considerable leeway in deciding whether a facility should be issued a permit. In addition to requiring that a facility comply with local regulations, the Code allows health officers to not issue a permit if they find that either the location, the food preparation methods, or the health of the workers lack “suitableness.” State law, however, mandates that FSEs and RFSs should receive a permit if they have paid appropriate fees and their facilities comport with regulations.³⁵⁶ Thus, under local law it is more challenging to get a permit to operate a food business than it is in other parts of the state, driving business away from Shelby County. In addition, for those businesses (FSEs and RFSs) that SCHD inspects on behalf of state agencies, SCHD must give a permit if the business meets the state criteria to receive a permit. Thus, this provision would only apply to OFEs or food businesses that are only regulated at the local level. In addition, the language here is imprecise and unspecific, providing no guidance to food industry entrepreneurs on the requirement; therefore, it is extremely difficult for individuals to know how to comply. The broad discretion given to health officers in this provision discourages experimentation, stifles economic activity, and can lead to arbitrary enforcement of the law. Therefore, this **provision should be amended** to reduce the risk of arbitrary enforcement and to clearly comply with state law. Alternatively, if Section 9-52-3 were completely eliminated, this provision would serve no function and should be eliminated as well.

Sec. 9-52-6 - Permit–Display–Not transferable.

Every permit issued under Section 9-52-5 shall be conspicuously displayed in the establishment where food is manufactured, sold or distributed. No such permit shall be transferable from one location to another or from one person to another, and change of location or ownership shall require issuance of a new permit.

(Code 1985 § 16-181; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-10)

Suggestion: Retain this provision, as it is not inconsistent with any state laws and serves an important function. Alternatively, this provision should be eliminated if all local permitting requirements are eliminated, as it would no longer be necessary.

Comments: There are no provisions in TDA or TDH regulations referring to the display of permits. This provision is not inconsistent with any state laws, however, and is not burdensome to food entities. Further, it is a corollary to Section 9-52-3, which provides for a local permitting system. Therefore, it **may be retained** as long as Section 9-52-3 is retained. If Section 9-52-3 is amended as suggested above, this provision would only apply to grocery stores. Alternatively, if Section 9-52-3 were completely eliminated, this provision would serve no function and should be eliminated as well.

Sec. 9-52-7 - Permit–Revocation or suspension.

A. The health officer shall have the power, and it shall be his or her duty, to suspend or revoke any permit issued under Section 9-52-5,

³⁵⁶ See Tenn. Code Ann. § 53-8-208 (2010); Tenn. Comp. R. & Regs. 1200-23-01-.03(1)(c) (2011).

where it is made to appear that the provisions of this chapter have been violated by the person or persons engaging in the manufacture, sale or distribution of food; provided, however, that the person holding such permit shall be given reasonable notice and an opportunity to be heard as to why such permit should not be revoked or suspended. Such notice may be given by the environmentalist/inspector on his or her regular inspection form or may be in the form of a letter from the health department. The health officer shall develop uniform policies and procedures for the suspension and/or revocation of permits. In the event of a foodborne illness outbreak or the existence of an imminent health hazard in a food service establishment, the health officer may suspend the food permit pending an administrative hearing if the owner/manager agrees to voluntarily close. If the owner/manager refuses to close voluntarily, the health officer shall convene an administrative hearing immediately and rule on the need for permit suspension or permit revocation.

- B. In each violation, where a permit is suspended or revoked, the holder of the permit may appeal the health officer's decision to the board of health whose decision of the matter shall be binding.
(Code 1985 § 16-182; Ord. 3229 § 1(12), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-11)

Suggestion: Retain this provision, as it is not inconsistent with any state laws and serves an important function. Alternatively, this provision should be eliminated if all local permitting requirements are eliminated, as it would no longer be necessary.

Comments: Both TDA and TDH have provisions governing the process for suspending or revoking the permits of RFSs and FSEs that fail to comply with state regulations.³⁵⁷ Unlike this provision, which requires notice or consent prior to the suspension of a permit, TDA and TDH regulations allow for a permit to be suspended immediately without the food entity's consent.³⁵⁸ However, TDA and TDH regulations do require that a hearing be offered prior to revoking a permit.³⁵⁹ Since there are state regulations regarding permit revocation for state level permits, provision 9-52-7 only applies to local permits, which may co-exist with state issued permits, and therefore it is not redundant with Tennessee state law. Further, it is a necessary corollary to Section 9-52-3, which provides for a local permitting system, to have a provision such as this to govern the revocation of any local permits. Therefore, it **may be retained** as long as Section 9-52-3 is retained. If Section 9-52-3 is amended as suggested above, this provision would only apply to grocery stores. Alternatively, if Section 9-52-3 were completely eliminated, this provision would serve no function and should be eliminated as well.

Sec. 9-52-8 - Periodic inspections.

- A. Each food service establishment and retail food store in the city shall be inspected ~~routinely~~, at least every six months, but can be inspected as often as the health department deems necessary. The health officer shall determine the inspection frequency most appropriate for each classification of food service establishment.

³⁵⁷ Tenn. Code Ann. § 53-8-209-210 (2010); Tenn. Code Ann. § 68-14-307-308 (2010).

³⁵⁸ Tenn. Code Ann. § 53-8-209 (2010); Tenn. Code Ann. § 68-14-307 (2010).

³⁵⁹ Tenn. Code Ann. § 53-8-210 (2010); Tenn. Code Ann. § 68-14-308 (2010).

At the time of each inspection, an inspection form will be used by the environmentalist/inspector to indicate the specific deficiencies which may exist. The form will contain items of weighted value, which shall total one hundred (100) points. The total points less the weighted items found deficient shall be the numerical score recorded on the inspection sheet or form. Inspection results for food service establishments and retail food stores shall be recorded on standard departmental forms that summarize the requirements of the law and rules and regulations.

- B. Upon completing the inspection, the environmentalist/inspector shall review his or her findings with the person-in-charge. A copy shall be acknowledged or signed by the person-in-charge, and the same shall be left with the person-in-charge. ~~A grade certificate bearing the grade A, B, C, or probation will be issued for the establishment and left with the person in charge.~~ "Person-in-charge," for the purpose of this section, means that individual employed by an establishment and left-in-charge of the running or operating of the business by a owner or operator.
- C. ~~The letter grade and the inspection sheet~~ An inspection sheet issued to a food service establishment must be prominently displayed where it can be viewed by the public. This grade and The inspection sheet must be located where it is clearly visible to customers upon entering the establishment. Placement of the grade and inspection sheet behind posters, calendars or other items that would obscure visibility is prohibited. An inspection sheet issued to a retail food store or other food entity must be kept available at the facility for public disclosure to any person who requests to view it. More than one letter grade or placard may be displayed simultaneously in an establishment at the request of the person in-charge, provided all such signs are identical and are accurately indicative of the current grade of the establishment. Such grades shall represent conditions found at the time of inspection as follows:
- ~~1. Grade A: shall be awarded to a food service establishment scoring between ninety (90) and one hundred (100).~~
 - ~~2. Grade B: shall be awarded to a food service establishment scoring between eighty (80) and eighty nine (89).~~
 - ~~3. Grade C: shall be awarded to a food service establishment scoring between seventy (70) and seventy nine (79).~~
 - ~~4. Probation: any food service establishment scoring below seventy (70) will receive a probationary certificate. Food service establishments with repeated violations and a long history of sanitation violations may be placed on extended probation by the health officer. In this case, the health officer shall define the terms of probation at an appropriate administrative hearing.~~

~~D. Once a letter grade has been lowered, the owner, manager or person in charge of any food service establishment may at any time request a reinspection for the purpose of regrading the establishment. The reinspection shall be made within seven working days following the request. An establishment will be entitled to one annual recheck associated with the lowering of the letter grade. All subsequent rechecks associated with the A, B, or C grades will take place at the time of routine inspection.~~

~~(Code 1985 § 16-183; Ord. 3228 § 1(11), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-9)~~

Suggestion: Eliminate this entire provision, as it is unnecessary, given the existing Tennessee state regulations. If not entirely eliminated, the provision must be amended so that it is not inconsistent with existing state laws.

Comments: This provision is redundant with and less specific than Tennessee state law and thus **should be eliminated**. Tennessee law directs inspectors to score FSEs and RFSs using a standard departmental form summarizing the requirements of the law and regulations.³⁶⁰ Each requirement is assigned a value ranging from 1 to 5 points, with a maximum score of one hundred points.³⁶¹ While FSEs must display their inspection report in a “conspicuous manner,” RFSs are only required to keep their inspection reports available for “public disclosure.”³⁶² In addition, state law requires FSEs and RFSs to be inspected at least every six months.³⁶³ Thus, the sentence above noting that the “health officer shall determine the inspection frequency most appropriate for each classification of food service establishment” should be amended to note that FSEs and RFSs should be inspected every six months or as often as the health department “deems necessary.”³⁶⁴

If the entire provision is not eliminated, however, then it should be amended to mirror Tennessee state regulations. The state laws and regulations, unlike the provision above, do not assign letter grades to food entities.³⁶⁵ Assigning letter grades conflicts with the state inspection system and is unnecessary. As mentioned above, only FSEs are required to publicly display their inspection reports. Mandating that RFSs publicly display their inspection reports is unnecessarily more restrictive than state law and therefore this requirement should be eliminated.

Sec. 9-52-9 - Sale of food or drinks on streets or from vehicles, vacant lots or temporary stands prohibited, except as authorized.

It is unlawful for any person to sell or offer for sale on any street in the city, or from any vehicle thereon, or from any vacant lot or temporary or improvised stand or structure in the city, ~~any fruits, vegetables, ice cream, or other~~ any food or drinks, except for fruits and vegetables or as provided for in Sections 9-52-11, 9-52-23, 9-52-66~~0~~, 9-52-67~~0~~, 9-52-69~~0~~ and 9-52-70~~0~~.

~~(Ord. 4733 § 1, 2-1-00; Code 1985 § 16-184; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-11)~~

³⁶⁰ Tenn. Code Ann. §§ 53-8-216(a), 68-14-317(a) (2010).

³⁶¹ Tenn. Code Ann. §§ 53-8-216(b)-(c), 68-14-317(b)-(c) (2010).

³⁶² Tenn. Code Ann. §§ 53-8-216(e), 68-14-317(d) (2010).

³⁶³ Tenn. Code Ann. §§ 53-8-205(4), 68-14-303(4) (2010).

³⁶⁴ Tenn. Code Ann. §§ 53-8-205(4)(B), 68-14-303(4) (2010).

³⁶⁵ See Tenn. Code Ann. §§ 53-8-216, 68-14-317 (2010).

Suggestion: Eliminate this entire provision, as it is unnecessarily restrictive. Alternatively, fruits and vegetables could be excluded from the provision’s prohibition, allowing greater access to nutritious food.

Comments: This provision is unnecessarily restrictive and therefore **should be eliminated**. The provision’s basic function is to repeat the prohibition against the sale of any food items without a permit, which is contained in 9-52-3. As mentioned previously, the blanket permit requirement creates barriers for low-risk entities, such as produce stands, hucksters (mobile produce vendors), and farmers markets, and severely limits the sale of food outside of permanent structures. This in turn reduces the ability of local businesses and groups to develop new ways to ways to deliver healthy foods to underserved areas, which stifles economic activity and reduces access to healthy foods. In addition, there are no similar blanket provisions at the state level.

If the entire provision is not eliminated, however, then it should be amended so that it does not apply to fruits and vegetables. The state definition of RFS explicitly does not include “roadside markets that offer only fresh fruits and fresh vegetables.”³⁶⁶ Therefore, these establishments are not only allowed to exist at the state level but are not even subject to the state regulations governing RFSs. In addition, though the provision clearly states an exception for the sale of foods from hucksters, as this is covered in 9-52-70, sale of fresh produce offers a benefit for everyone and thus should be allowed as clearly as possible in the Code. Allowing fruits and vegetables to be sold from temporary stands or produce trucks, without being subject to the restrictions in the referenced sections, would allow innovative programs and entrepreneurial activities to develop, while increasing access to nutritious food.

Sec. 9-52-10 - Food processors and distributors outside county.

- A. Food processors and/or distributors located outside the county may, at the discretion of the health officer, sell potentially hazardous food products in the city under a reciprocal or direct inspection arrangement, after first securing a food permit, as required by this chapter, from the health officer. All food processors and/or distributors located outside the county shall meet the sanitary standards, definitions and requirements of this chapter, and the rules and regulations promulgated by the health officer, or equivalent standards and regulations. The health officer is authorized to establish acceptable reciprocal or direct inspection arrangements between various state, federal and local food inspection authorities, interstate and intrastate.
- B. Before a permit is issued under a reciprocal or direct inspection arrangement, an original inspection may be made by the health officer to determine if the food products are produced, handled and processed under conditions which are similar to this chapter. Subsequent inspections shall be made at intervals which the health officer may deem necessary. Such inspections outside the county shall be paid for by the applicant or the holder of the permit.

(Code 1985 § 16-185; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-13)

³⁶⁶ See Tenn. Comp. R. & Regs 0080-04-09-.01(x) (2011).

Suggestion: Eliminate this entire provision, as it is unnecessary and unduly restrictive.

Comments: This provision is unnecessary and may discourage outside food processors or distributors from operating within the county, and therefore **should be eliminated**. In order to sell food in Shelby County, this section requires food processors and distributors outside of the county to (1) receive a local permit and (2) to meet either the sanitary standards found in the Food Ordinances or equivalent standards. The first requirement will no longer be necessary if SCHD only permits food entities that it is contracted to permit by TDH or TDA, as recommended above. Under this scenario, all food processors and distributors, whether based inside or outside of Shelby County, would no longer be required have local permits. Instead, all food processors and distributors would be permitted only under state law by TDA (currently, all OFEs in the state are inspected by TDA and those within Shelby County are dually inspected by SCHD and TDA). Even if SCHD continues to conduct inspections of OFEs beyond its contractual role, this requirement is unduly restrictive and would discourage outsiders from doing business in Memphis or Shelby County, as an outside entity would have a difficult time understanding the applicable laws in Shelby County and may be hesitant to risk violating these local laws.

The second requirement is even more unnecessary today, after the adoption of statewide food codes. Today, all states use some version of the Model FDA Code to regulate food processors and distributors that are not regulated by federal agencies.³⁶⁷ As a result, all food processing and distribution facilities in the United States are held to sufficiently rigorous standards.

Sec. 9-52-11 - Temporary food service establishments.

A. temporary food service establishment shall comply with all provisions of this chapter which are applicable to its operation, except as otherwise provided by state law. ~~provided that, the health officer may augment such requirements when needed to assure the service of safe food; may prohibit the sale of certain potentially hazardous food; and may relax specific requirements for physical facilities when, in his or her opinion, no imminent health hazard will result and where close supervision of the operation can be provided by the health department.~~

(Code 1985 § 16-186; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-14)

Suggestion: Eliminate this entire provision, as it is redundant with state law in some areas, less specific than state law in some areas, and fails to give clear guidance to food entities in other areas. If not entirely eliminated, the provision must be amended so that it reflects existing state regulations.

Comments: Tennessee state law adequately addresses temporary food service establishments. TDH regulations not only impose the general health and sanitation requirements for FSEs upon temporary FSEs, with certain exceptions, but impose additional requirements on them.³⁶⁸ Because state law governs when it is more stringent than local law, this provision is misleading to business owners by failing to include all the applicable requirements. For instance, state regulations require that such

³⁶⁷ U.S. Food and Drug Administration, "Real Progress in Food Code Adoptions," <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm> (last visited July 25, 2011).

³⁶⁸ Tenn. Comp. R. & Regs 1200-23-01-.01(13) (2011).

establishments must “provide only single-service articles” if they do not have facilities to clean and sanitize tableware,³⁶⁹ a requirement that is not present in the above provision.

Furthermore, the exceptions provided in the state regulations may be important to the practical operation of temporary food service establishments. TDH regulations relax certain requirements pertaining to the construction of temporary facilities, allowing removable platforms to be used as flooring and other practices not allowed in non-temporary FSEs,³⁷⁰ although most sanitary requirements are maintained.³⁷¹ While the Memphis provision allows the health officer to relax (or augment) the requirements, this language is imprecise and unspecific. It allows arbitrary enforcement of the law, and individual business owners have no way of knowing how to comply. Since state law applies, regardless of this provision, repealing this section would provide added clarity to businesses by allowing them to simply look at state laws and regulations. The Memphis Code provision is therefore unnecessary and **should be eliminated**.

Alternatively, this provision at minimum should be amended as outlined above to allow the exceptions and additional requirements of state law to govern.

Sec. 9-52-12 - Collection and analysis of food samples.

- A. It shall be the duty of all environmentalists of the department of health to obtain samples of all substances offered for food, whenever ordered so to do by the health officer, such samples to be delivered to the department of health for analysis and inspection. Proprietors of food service establishments shall furnish the department of health, upon request, food samples without charge for laboratory analysis and examination.
- B. Environmentalists should make collections of food samples in the following manner:
 - 1. Samples of food should be taken in the presence of his or her agent, and numbered.
 - 2. Should the dealer request it, the sample should be taken in duplicate, handled in the manner hereinbefore provided, and one sample delivered to the dealer.
 - 3. The quantity of bulk goods should be in an amount sufficient for proper examination and analysis or as required by the laboratory.
- C. The methods of analysis of food samples should be those prescribed by the director of laboratories or the health officer of the city and county health department.
- D. Whenever, upon analysis or examination, it appears that the foods from which samples have been taken are adulterated or misbranded in

³⁶⁹ Tenn. Comp. R. & Regs 1200-23-01-.01(13) (2011).

³⁷⁰ See Tenn. Comp. R. & Regs 1200-23-01-.02(13) (2011).

³⁷¹ See Tenn. Comp. R. & Regs 1200-23-01-.02(13) (2011).

violation of the provisions of this chapter, or if any other violation of this chapter has occurred, report shall be made promptly to the health officer, who shall take such steps as are necessary to secure the enforcement of this chapter and all lawful rules promulgated hereunder.

(Code 1985 § 16-187; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-15)

Suggestion: Eliminate this provision, as it is unnecessary given existing state law.

Comments: State law already empowers SCHD to collect samples, and it further imposes certain procedural requirements on food that may be contaminated or at risk. For example, state law contains specific requirements for “hold orders” that may be placed on food at an RFS or FSE, barring such food from being sold for a set amount of time.³⁷² Because SCHD must at least follow these state requirements, which adequately allow sampling, the Memphis Code provision is unnecessary and should be eliminated.

Sec. 9-52-13 - Production or sale of adulterated or misbranded food prohibited.

It is unlawful for any person to manufacture for sale, produce, offer, expose or have in his or her possession, charge or control for sale, any article of food within the limits of the city which is adulterated or misbranded.

(Code 1985 § 16-188; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-16)

Suggestion: Eliminate this provision, as it is redundant with state law.

Comments: The prohibition against the manufacture or sale of adulterated or misbranded foods is part of state law in the Tennessee Code. The Tennessee Food, Drug, and Cosmetics Act prohibits the “manufacture, sale, or delivery, holding or offering for sale of any food . . . that is adulterated or misbranded.”³⁷³ This prohibition extends to all persons and food entities, including FSEs and RFSs.³⁷⁴ Thus, the Memphis Code provision is unnecessary and **should be eliminated**. However, because the provision is not in direct conflict with the state provisions, it would not need to be amended if retained.

Sec. 9-52-14 - Report of unwholesome food.

It shall be the duty of every person knowing of any food offered for sale for consumption by human beings, or being in any market, public or private in the city, and not being sound, healthy or wholesome food, to forthwith report such facts and the particulars relating thereto, to the department of health.

(Code 1985 § 16-189; Ord. 2171 § 1, 12-3-74; Code 1967 § 19-17)

Suggestion: Eliminate this provision, as it is unduly restrictive.

Comments: No provision in state law or TDA or TDH regulations requires one to report unwholesome food, and such a provision is unduly restrictive and **should be eliminated**. The broad scope of this requirement is also unusual and would be difficult to enforce. It imposes a burdensome duty upon

³⁷² Tenn. Code Ann. §§ 53-8-218, 68-14-319 (2010).

³⁷³ Tenn. Code Ann. § 53-1-103(a)(1) (2010).

³⁷⁴ See Tenn. Code Ann. § 53-1-103(b) (2010).

customers, who are likely unsure what “unwholesome food” means. Furthermore, requiring them to report “any food offered for sale” that is not “healthy” seems unrealistic. If not eliminated, since this provision does not conflict with state law it can be maintained without any amendment.

Sec. 9-52-15 - Transporting bakery foods.

It is unlawful to transport bread, cakes, doughnuts, pies and other pastries or baked foods from plant to store or from one place to another unless the same are wrapped in dustproof containers.

(Code 1985 § 16-190; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-18)

Suggestion: Eliminate this provision, as it requires SCHD to regulate food entities already inspected by TDA. As the provision is not in direct conflict with any state regulations, if not eliminated, it does not require amending.

Comments: According to TDA and TDH regulations, food must be packaged or enclosed in covered containers while being transported, and the list of exceptions to this rule does not include bakery products.³⁷⁵ State law furthermore imposes applicable food storage and food protection requirements on food that is being transported.³⁷⁶ Because state law adequately addresses the transportation of foods, going beyond this particular requirement for bakery products, this provision can be eliminated.

Sec. 9-52-16 - Manufacturing, mixing or reconstituting prohibited at food establishments.

Milk or milk products may not be manufactured, mixed or reconstituted from milk powder or skim milk powder in cafes, drug stores, sundries, drive-ins, hotels, etc. All such operations must be performed at a milk plant under approved conditions. This section shall not apply to powder used for cooking purposes if it is used directly in the food to be cooked and not mixed as milk or a milk product and stored in bottles and cans or, in the case of food service establishments, if it is used in instant desserts and whipped products.

(Code 1985 § 16-191; Code 1967 § 18-153)

Suggestion: Eliminate this entire provision, as it is confusing and conflicts with Tennessee state law. Alternatively, this provision should be amended so that it is not in conflict with state law.

Comments: This provision is confusing and conflicts with Tennessee state law. State law already requires that “fluid milk and fluid milk products” used or offered for sale [or served] shall comply with Grade A requirements,³⁷⁷ which clearly must apply to reconstituted fluid milk. Furthermore, TDH regulations expressly allow for reconstituted milk to be used for instant desserts and whipped products, in addition to cooking and baking purposes.³⁷⁸ Because FSEs are expressly allowed to use them in this manner, this general prohibition seems to conflict with state regulations. In addition, there is no prohibition against the use of milk powder in state regulations. Thus, this piece of the provision is more stringent than state law. It may be kept in the local Code if necessary, but it creates confusion. Accordingly, this provision at minimum should be amended so that it does not conflict with TDH regulations.

³⁷⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.02(6)(a), 1200-23-01-.02(6)(a) (2011).

³⁷⁶ Tenn. Comp. R. & Regs. 0080-04-09-.02(6)(a), 1200-23-01-.02(6)(a) (2011).

³⁷⁷ Tenn. Comp. R. & Regs. 0080-04-09-.02(1)(b)(1), 1200-23-01-.02(1)(b)(1) (2011).

³⁷⁸ Tenn. Comp. R. & Regs. 1200-23-1-.02(4)(iv)(7) (2011).

Sec. 9-52-17 - Frozen desserts—Permits to sell, produce and distribute.

Every mobile frozen dessert vendor shall pay to the health department seven dollars and fifty cents (\$7.50) per year for each and every vending cart which he or she operates. He or she shall pay to the health department twenty-two dollars and fifty cents (\$22.50) per year for each and every motorized vending truck which he or she operates. (Code 1985 § 16-192; Ord. 2593 § 1, 12-11-79; Ord. 1070 § 1, 10-5-71; Ord. 421 § 1, 3-25-69; Code 1967 § 18-185)

Suggestion: Eliminate this entire provision, as its language differs from similar state law, which leads to unnecessary confusion. Alternatively, this provision should be amended to match state terminology.

Comments: Memphis should adopt state definitions of food entities for ease of comparison. Similar to other provisions in the Memphis Code, this provision highlights a glaring problem of misaligned definitions, since, under state law, a frozen dessert vendor/producer/distributor as defined here can count as an RFS, an FSE, or a food processing establishment, based on the situation. As argued throughout this Provision-by-Provision analysis, state law already adequately addresses the various health and safety concerns pertinent to each of these entities. Because state law is sufficiently comprehensive, and because of the extreme difficulty in comparing state law with a provision that uses a misaligned definition, this provision should be eliminated.

If SCHD wishes and is able to keep any requirements in this section, it should amend this section accordingly, utilizing state definitions and adding any additional requirements that are viewed as essential at the local level. Note that once again, such local requirements must be more stringent than state law and thus will likely stifle economic activity.

Under the Memphis Code, a “frozen dessert” is defined as “any clean frozen or partially frozen combination of two or more of the following: Grade A milk products, manufactured milk or manufactured milk products, eggs or egg products, sugars, water, fruit or fruit juices, candy, nut meats, or other harmless and wholesome food products, flavors, color, or harmless stabilizers, and shall be deemed to include ice cream, ice milk, sherbet, imitation ice cream, novelties, and other similar products.”³⁷⁹ By contrast, Tennessee state law defines frozen desserts using the FDA definitions, which are much more detailed, and include various subcategories of frozen desserts.³⁸⁰ TDA defines “frozen dessert retail establishments,” as “any place or premises including retail stores, stands, hotels, restaurants and vehicles or mobile units where frozen desserts are frozen or partially frozen and/or dispensed for sale at retail.”³⁸¹ Clearly this would cover both stationary and mobile frozen dessert vendors. The Memphis Code, by contrast, does not define a frozen dessert vendor but instead uses the confusing term “ice cream vendor,” defined as “any person who offers for sale or sells to another any frozen desserts while operating from an ice cream cart or truck on the streets of the city or its police jurisdiction.”³⁸² Clearly this term is not comprehensive, as frozen dessert vendors sellers may sell other frozen desserts.

³⁷⁹ Memphis, Tenn. Code 9-52-1, “Frozen dessert” (MuniCode 2009).

³⁸⁰ Tenn. Comp. R. & Regs. 0080-03-01-.01(h) - (k), (2011).

³⁸¹ Tenn. Comp. R. & Regs. 0080-03-01-.01(n) (2011).

³⁸² Memphis, Tenn. Code 9-52-1, “Ice cream vendor” (MuniCode 2009).

This provision should be eliminated, as state law adequately regulates frozen dessert retail establishments and thus local regulation and inspections are not necessary. If not eliminated, the provision should be amended to clarify to whom the requirements apply and to use terminology consistent with state definitions to avoid confusion. Additionally, the provision is about vending, not producing, frozen desserts, which the title should make clear.

Sec. 9-52-18 - Frozen desserts—Transferring and dispensing.

No person shall transfer frozen desserts mix or frozen desserts from one container to another or package or freeze or manufacture the same on the street or in any vehicle or in any place except a sanitary room under approved conditions.

(Code 1985 § 16-193; Ord. 421 § 1, 3-25-69; Code 1967 § 18-194)

Suggestion: Eliminate this provision to allow state law to solely govern. Alternatively, amend this provision to clarify what entities this provision applies to.

Comments: As mentioned above, Memphis should adopt state definitions of food entities for ease of comparison. Similar to other provisions in the Memphis Code, this provision highlights a glaring problem of misaligned definitions, since, under state law, a frozen dessert vendor/producer/distributor as defined here can count as an RFS, an FSE, or a food processing establishment, based on the situation. As argued throughout this Provision-by-Provision analysis, state law already adequately addresses the various health and safety concerns pertinent to each of these entities. Because state law is sufficiently comprehensive, and because of the extreme difficulty in comparing state law with a provision that uses a misaligned definition, this provision should be eliminated.

If SCHD wishes and is able to keep any requirements in this section, it should amend this section accordingly, utilizing state definitions and adding any additional requirements that are viewed as essential at the local level. Note that once again, such local requirements must be more stringent than state law and thus will likely stifle economic activity.

TDA has a comprehensive set of regulations governing the storage, production and distribution of frozen desserts.³⁸³ Tennessee generally includes ice cream and ice sherbet as “dairy products.”³⁸⁴ The state requires “dairy processing plants” that “manufacture[e] or package[e] frozen desserts” to be licensed as a frozen dessert manufacturers.³⁸⁵ TDA’s regulations governing frozen desserts apply to manufacturers and distributors, which are currently inspected and permitted by both TDA and SCHD. As discussed previously, we recommend that SCHD discontinue inspecting OFEs (food entities other than FSEs and RFSs), such as manufacturers and distributors, in order to conserve resources and reduce waste. TDA has sufficient regulations for production of frozen desserts.³⁸⁶ Because state law is sufficiently comprehensive, this provision **can be eliminated**.

Alternatively, the provision could be amended to be clearer in terms of which food entities it applies to. This provision is overly broad, as it mandates that “no person” can transfer, package, or freeze frozen

³⁸³ See Tenn. Comp. R. & Regs. 0080-03-01-.01 (2011).

³⁸⁴ Tenn. Code Ann. § 53-3-103(2) (2010).

³⁸⁵ Tenn. Code Ann. § 53-3-106(a)(1) (2010).

³⁸⁶ See Tenn. Comp. R. & Regs. 0080-03-01-.01 (2011).

desserts except in “a sanitary room under approved conditions.” If the intent was to only regulate manufacturers, this provision should be amended to specify that goal.

Sec. 9-52-19 - Frozen desserts—Mobile vendors.

A. No person shall sell, offer for sale, or give away any frozen desserts on city streets, vacant lots or premises without a permit issued by the health department; ~~provided that, a mobile frozen desserts vendor may sell novelties which have been manufactured and packaged at a frozen desserts plant.~~

B. A mobile frozen desserts vendor's permit shall not be issued to a person unless the following conditions are met:

1. The vending vehicle must be specially designed as a vending vehicle and be approved by the health authority. Automobile or passenger conveyance vehicles shall not be used to transport or dispense frozen desserts.

2. The vending vehicle must be constructed so as to be easily cleaned and shall be kept clean.

3. The vending vehicle must be constructed so as to protect the frozen desserts from contamination.

4. The vending vehicle shall have a separate compartment for the storage of boxes and paper.

5. The vending vehicle shall be labeled with the name and address of the distributor on both sides of the vehicle in size and shape of letters as designated by the health authority.

6. Only frozen desserts ~~novelties~~ shall be sold, offered for sale, or given away in a mobile frozen desserts vendor's vehicle.

7. Vehicles shall be loaded and operated only from an establishment which meets the requirements of the ordinances of the city, and which has a permit from the health authority.

8. Vehicles shall be parked only in a location which coincides with the zoning ordinances of the city.

(Code 1985 § 16-194; Ord. 421 § 1, 3-25-69; Code 1967 § 18-195)

Suggestion: Eliminate this provision to allow state law to solely govern. Alternatively, amend this provision to streamline Part A and eliminate provisions in Part B that are covered by state law.

Comments: As mentioned above, Memphis should adopt state definitions of food entities for ease of comparison. Similar to other provisions in the Memphis Code, this provision highlights a glaring problem of misaligned definitions, since, under state law, a frozen dessert vendor/producer/distributor as defined here can count as an RFS, an FSE, or a food processing establishment, based on the situation. As argued throughout this Provision-by-Provision analysis, state law already adequately addresses the

various health and safety concerns pertinent to each of these entities. Because state law is sufficiently comprehensive, and because of the extreme difficulty comparing state law with a provision that uses a misaligned definition, this provision should be eliminated.

This provision **should be eliminated**, as state law already requires “frozen dessert retail establishments” to meet sanitary standards.³⁸⁷ These laws are sufficient to protect safety. Because this definition includes mobile vendors, TDA already requires frozen dessert retail establishments be kept clean and designed to prevent contamination. The provision should be rewritten to include only aspects not covered by the state code like vehicle labeling and parking locations. SCHD can include additional restrictions for frozen dessert retail establishments in addition to the state law provisions, but these additional restrictions stifle economic activity and inhibit food industry entrepreneurs from operating their businesses.

If not eliminated, this provision should be amended as follows:

Part A: This provision is difficult to interpret. The language of the provision makes it hard to understand the relationship between the clauses. Part B already says that novelties are the only type of frozen desserts that can be sold from mobile units. This part of Part A should therefore be eliminated to avoid confusion. Instead Part A should state only that a permit is required. Alternatively, the provision can be written to say a permit is required and only novelties may be sold more clearly.

Part B: This provision is more restrictive than state law because Part B(6) only allows frozen dessert novelties, or prepackaged frozen desserts. However, Tennessee law allows frozen dessert retail establishments to sell other kinds of frozen desserts. Thus, this language should be eliminated.

Sec. 9-52-20 - Right of entry into food establishments— Interfering with health department personnel.

In case of a food safety concern or suspicion of a food safety risk, the health officer and all agents or employees of the department of health shall have the right to enter at all reasonable hours any lot, premises, building, factory or place where food is manufactured, stored, sold or offered for sale, to enforce any of the provisions of this title and state and federal laws regulating food and to inspect permits, certificates, and other records required by such laws, and it is unlawful for any person to deny to such officers, agents and employees access to any such place, or to interfere with such officers in the performance of their duties under the provisions of this chapter.

(Code 1985 § 16-195; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-19)

Suggestion: Amend this provision so that it is not inconsistent with Tennessee Law.

³⁸⁷ Tenn. Comp. R. & Regs. 0080-03-01-.01 (2011). Note that the new “mobile food preparation unit” ordinance contains a definition for “mobile food preparation vehicles” that says vehicles that sell ice cream and other frozen non-potentially hazardous foods do not fall within the meaning of a mobile food preparation vehicle. Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf; therefore, mobile frozen dessert vehicles are not covered by the new ordinance.

Comments: This provision should be maintained, as it is important for SCHD to maintain its right to access the premises of food entities throughout Shelby County in order to best protect public health in cases of a food emergency. However, this provision as currently worded is inconsistent with Tennessee law and grants SCHD unnecessarily broad right of entry powers. It should therefore **be amended** to follow Tennessee law, which only grants regulatory authorities access to food entities at reasonable hours.³⁸⁸ In addition, in line with our recommendations that the Memphis Food Code be eliminated or amended to reduce the comprehensive nature of its inspection and permitting requirements, this “right of entry” provision should be amended as well in order to note that SCHD will only use its right of entry power in the case of a food risk or food safety concern. This will help protect SCHD by clarifying that SCHD is not entering all food entities at all times, rather, it is entering those entities which it inspects and all other entities only in a time of emergency. The proposed amendment also grants authority to SCHD to enter premises to inspect for violations of state and federal laws, so that even if the rest of the Code is eliminated, SCHD would have legal grounds to enter premises on which it has a probable cause to believe that a violation of any food regulation law exists.

Sec. 9-52-21 - Interpretation of chapter—Policies and standards of health officer.

The interpretation of the provisions of this chapter shall be made by the health officer and he or she shall adopt written policies and standards approved by the board of health in carrying out the provisions of this chapter. The health officer may not adopt policies or standards that conflict with state law or regulations.

(Code 1985 § 16-196; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-20)

Suggestion: Amend this provision to ensure that SCHD policies and standards do not conflict with state policies and standards.

Comments: SCHD is required by state law and regulations to enforce TDH’s standards for FSEs³⁸⁹ and to enforce TDA’s standards for RFSSs.³⁹⁰ As a result, SCHD’s policies and standards relating to FSEs and RFSSs cannot conflict with state standards and policies. While SCHD’s policies and standards relating to OFEs can conflict with state policies and standards, SCHD should ensure that they do not in order to reduce confusion and minimize red tape. Thus, this provision **should be amended** to specify that SCHD’s policies and standards should not conflict with state policies and standards. Alternatively, if most of the Memphis Code provisions are eliminated, as we highly recommend, this provision can be eliminated as well.

Sec. 9-52-22 - Enforcement of chapter—Rules and regulations of health department.

It shall be the duty of the department of health to enforce this chapter and to adopt ~~minimum standards for all classes of foods including fat content of meat products, defining specific adulterations and declaring methods of collecting and examining food, and regulations with reference to the purity, wholesomeness and~~

³⁸⁸ Tenn. Code Ann. § 53-1-208 (2010).

³⁸⁹ Tenn. Code Ann. § 68-14-303(7)(B) (2010); Telephone Interview with Otho Sawyer, Shelby County Health Department (Oct. 29, 2010).

³⁹⁰ Tenn. Code Ann. § 53-8-205 (7)(b)(ii) (2010); Telephone Interview with Otho Sawyer, Shelby County Health Department (Oct. 29, 2010).

~~fitness for food of all articles, compounds and substances coming within the provisions of this chapter; and such other written rules and regulations as may be recommended by the health officer and approved by the board of health. The health officer shall not approve rules or regulations that conflict with state law or state rules and regulations. Nothing in this section shall be so construed as permitting the alteration of a standard which is specifically stated in this chapter.~~

(Code 1985 § 16-197; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-21)

Suggestion: Amend this provision to eliminate duties already performed by state and federal agencies.

Comments: If a substantial portion of the Memphis Code is kept, this provision should be maintained, as SCHD may need to adopt new rules and regulations as food safety science and technology change and new risks arise. However, the provision contains duties already performed by state and federal agencies and allows for SCHD to promulgate rules and regulations that conflict with state rules and regulations. State agencies are already empowered to impose standards for meat and poultry,³⁹¹ to promulgate regulations to enforce the Tennessee Food Drug & Cosmetic Act,³⁹² etc. Federal agencies also already set minimum food standards for foods that will be sold in interstate commerce, and it is unnecessary for SCHD to replicate tasks performed by federal agencies with greater resources and expertise.³⁹³ This provision **should therefore be amended** to both eliminate duties already performed by other agencies and to state that SCHD shall not adopt rules and regulations that conflict with state rules and regulations. The rest of the provision may be retained, however, as there may be situations when SCHD may need to supplement state regulations with its own.

Sec. 9-52-23 - Mobile coffee/cappuccino bars.

Mobile coffee/cappuccino bars shall be allowed to operate within the city limits if the mobile units are in compliance with the following standards, and if the mobile units are operated in compliance with applicable health department regulations and any other applicable city ordinances, including any applicable zoning provisions. Mobile coffee/cappuccino bars shall be allowed to sell any permitted and approved coffee drinks and any permitted and approved coffee drink derivatives. "Cappuccino" is defined as steamed coffee mixed with steamed milk.

- A. Mobile unit plans must be submitted to and approved by the health department and by code enforcement.
- B. Mobile units must operate from a commissary or a food processing plant and shall use this facility for cleaning and sanitizing equipment and for storage of supplies. The commissary must be approved by the health department and must hold a retail food establishment license.

³⁹¹ Tenn. Code Ann. § 53-7-213 (2010).

³⁹² Tenn. Code Ann. § 53-1-270 (2010).

³⁹³ The USDA sets standards for meat and poultry products, while the FDA sets standards for all other foods. Some products, such as eggs, are regulated by both agencies. *See, e.g.,* Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C.A. §§ 341, 457, 607 (2011) (granting the FDA and USDA authority over food standards of identity and composition).

- C. All mobile units must report to a commissary at least once a day to re-supply and to be cleaned and serviced. Commissary equipment requirements shall be dependent on equipment provided on the mobile unit. A warewashing sink and/or dishmachine, handsink(s), adequate refrigeration, food preparation equipment and mop sink may be necessary at the commissary.
- D. Mobile unit operators must submit to the health department a letter from the owner of the commissary stating that the mobile unit operator has permission to use the commissary facilities. This letter should also include the time of day when the mobile unit will report to the commissary. A new letter must be submitted each year.
- E. All mobile food units shall be identified by a sign or lettering indicating the name and address of the owner, the operator and the permit number. The mobile food unit's permit, or a copy thereof, and the current inspection report must be displayed for public view and protected from inclement weather.
- F. Mobile units must protect food contents from adverse weather. Such protection shall be provided by either the construction and design of the mobile unit itself or by the location of the mobile unit during inclement weather.
- G. Mobile units must have a properly protected and adequate hot and cold water supply system under pressure. Liquid waste (water) shall be stored in a separate, permanently installed retention tank that is of at least fifteen (15) percent larger capacity than the water supply tank. The waste connection shall be lower than the water inlet connection to preclude contamination of the potable water system. All liquid waste shall be discharged to a sewage disposal system in accordance with local plumbing regulations.
- H. Mobile units must be equipped with a handwashing sink supplied with hot and cold water under pressure. A three-compartment sink is required for utensil washing. The three-compartment sink must be equipped with drain boards and supplied with hot and cold water under pressure.
- I. Food shall be dispensed only from locations approved by both the health department and code enforcement. Mobile units must dispense food from private property only. Mobile unit operators must have a written agreement regarding the dispensing of food with the owner of each of the approved locations. Mobile units shall be parked only in locations which comply with the zoning ordinances of the city. Mobile units shall submit to the health department, in writing, a list of all stops and approximate time of arrival at each stop.
- J. Potentially hazardous food shall be transported, stored and served only in containers and equipment which is designed and thermostatically controlled to maintain the food at or above one hundred forty (140) degrees Fahrenheit (hot) or at or below ~~forty~~

~~five (45)~~ forty-one (41) degrees Fahrenheit (cold).

- K. A menu shall be submitted to and reviewed by the health department to make sure that all food is from an approved source and that all equipment is adequate to safely handle and prepare food. The health department may impose additional requirements to protect against health hazards related to the serving of food from mobile units, and may prohibit the sale of some or all potentially hazardous food. In addition, the health department may restrict the type(s) of food sold or provided based on equipment limitations, adverse climatic conditions, or upon any other condition that, in the sole opinion and discretion of the health department, poses a hazard to public health.
- L. Coffee drinks and coffee drink derivatives must be sold in single-service containers. Such drinks can also be sold in approved, properly sanitized bulk containers for consumption at a site away from the mobile unit if each approved bulk container is filled only once daily, and if each approved bulk container is sanitized at the commissary on a daily basis after each use.
- M. All food dispensed from mobile units other than permitted and approved coffee drinks and permitted and approved coffee drink derivatives must be prepackaged, individually-wrapped single-service articles for use by the consumer. All such food must be properly labeled. Notwithstanding the preceding provision, prepackaged, individually wrapped bagels may, upon request by the consumer, be toasted and served to the consumer. Toasting of the bagels shall be done in an approved electrical device.

(Ord. 4733 § 1, 2-1-00; Code 1985 § 16-198)

Suggestion: Eliminate this provision as it is mainly redundant with state law and contains outdated temperature standards.

Comments: This provision is unnecessary. Mobile coffee/cappuccino bars are low-risk facilities that do not warrant additional regulations beyond those supplied by TDH, and therefore this provision **should be eliminated**.³⁹⁴ SCHD is mainly concerned with regulating what it perceives to be high-risk food industries, such as food processors and manufacturers, FSEs, and RFSs.³⁹⁵ Regulating low-risk food entities is burdensome and time-consuming, and stifles economic activity. TDH regulations contain special provisions for “mobile food units,” which are defined as FSEs “designed to be readily mobile.”³⁹⁶ Mobile coffee/cappuccino bars that serve food must abide by TDH regulations pertaining to FSEs, with the exception of rules that are only applicable to permanent structures, such as those governing the construction of walls and ceilings.³⁹⁷ State regulations also govern the servicing and supply of mobile food units by commissaries and contain water and waste system specifications for mobile food units.³⁹⁸

³⁹⁴ Email from Otho Sawyer to Nathan Rosenberg (Oct. 22 2010) (on file with author).

³⁹⁵ Telephone Interview with Otho Sawyer (Oct. 19, 2010); Interview with Otho Sawyer and Janet Shipman, Shelby County Health Department, Memphis, Tenn. (Jan. 7, 2011).

³⁹⁶ Tenn. Comp. R. & Regs. 1200-23-01-.01(22) (2011).

³⁹⁷ Tenn. Comp. R. & Regs. 1200-23-01-.02(12)(b)(2)(i)(III) (2011).

³⁹⁸ Tenn. Comp. R. & Regs. 1200-23-01-.02(12) (2011).

In addition, this ordinance conflicts with the recently-passed mobile food preparation vehicle ordinance. The new ordinance's definition of a mobile food preparation vehicle specifically excludes pushcarts and vehicles selling ice cream and other frozen non-hazardous foods.³⁹⁹ Therefore, mobile coffee/cappuccino bars would fall within the definition of a mobile food preparation vehicle as long as it has a kitchen for preparing food.

There are several areas of conflict between the older mobile coffee bar provision included in the Memphis Code and the new mobile food preparation vehicle ordinance. One such conflict involves determining where food can be dispensed. The new ordinance does not require SCHD to pre-approve the site.⁴⁰⁰ The new ordinance also does not require mobile food preparation vehicles to submit their estimated arrival times for all the vehicles' stops. The new ordinance gives the vehicles much more freedom to operate. Mobile food preparation vehicles can operate in both public and private locations, provided they are not within a certain distance of a restaurant.⁴⁰¹ This is in direct conflict with section I, above, which only allows mobile coffee/cappuccino bars to operate on private property.

The temperature requirement in this provision is outdated. Instead of requiring refrigerated food to be kept at or below 41 degrees Fahrenheit per TDH regulations and contemporary standards, the provision allows refrigerated food to be kept at temperatures up to 45 degrees Fahrenheit.⁴⁰² If this provision is maintained, the temperature standards need to be updated to reflect the more stringent state requirement. Furthermore, this is an area of conflict between the Memphis Code and the new mobile food preparation vehicle ordinance. Under the older coffee bar provision, potentially hazardous foods like milk only have to be stored at forty-five degrees. But according to the new ordinance, milk must be stored at 41 degrees until sold.⁴⁰³

Much of the ambiguity that exists between the two ordinances exists because the mobile coffee/cappuccino bar ordinance allows potentially hazardous foods to be prepared and served. To eliminate this ambiguity, the mobile coffee/cappuccino bar ordinance should be removed entirely to allow low-risk facilities that are only serving non-potentially hazardous foods to operate without burdensome permitting and inspection requirements. If the mobile coffee/cappuccino vendors decide to serve potentially hazardous foods from their vehicles, then the same requirements that cover other mobile food preparation vehicles would apply. This would remove the ambiguity and provide mobile coffee bars with greater opportunity to sell their products.

Article 2: General Sanitary Requirements

Section 9-52-24 - Application of Article.

The provisions of this article shall be the rules and regulations governing the sanitary conditions of food service establishments and retail food stores.

³⁹⁹ Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

⁴⁰⁰ Memphis, Tenn. Code 16-262(1), Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

⁴⁰¹ Memphis, Tenn. Code 16-262(5), Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

⁴⁰² Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b) (2011).

⁴⁰³ Memphis, Tenn. Code 16-263(3), Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

Suggestion: Amend this provision to replace the undefined term “food establishment” with the terms “retail food stores” and “food service establishment,” as defined by the state.

Comments: The Code does not define the term “food establishment” (used here) but only “food service establishment.” As argued earlier, Memphis should adopt the state definitions of RFS and FSE and replace the term “food service establishment,” as defined by the Code, with the terms “retail food store” and “food service establishment,” as defined by the state. Similarly, the term “food establishment,” which includes FSEs and RFSs, should be replaced by the state-defined terms wherever it appears in the Code.⁴⁰⁴

In a few Article 2 provisions, the Code uses the term “food service establishments” instead of “food establishments,” possibly attempting to target some of its provisions to one type of establishment versus others, but because the distinction between the two types of entities is never made clear, and because for the majority of provisions the more general term is used, it is unclear whether these few provisions were simply written that way in error. No clear or consistent attempt by the Code’s drafters to distinguish between “food service establishments” and “food establishments” can be discerned.

Section 9-52-25 - Cleanliness of Employees.

- A. No person maintaining or operating any food service establishment or retail food store shall allow any employee handling or coming in contact with food to be or remain in an unsanitary, filthy, or dirty condition either as to person or clothing while so employed.
- B. ~~Each employee shall keep his fingernails clean and neatly trimmed and shall wear no jewelry which may contaminate the food.~~ All employees shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to approved hygienic practices while on duty. They shall wash their hands thoroughly with soap and warm water in an approved handwashing facility before starting work and as often as may be necessary to remove soil and contamination. No employee shall resume work after visiting the toilet room without first washing his or her hands.

~~Food establishment owner/operators shall post a sign in a prominent place in employee restrooms and in the hand washing sink area(s) at least five inches high and ten (10) inches wide which reads:~~

~~FOR GOOD HEALTH~~

~~PLEASE WASH YOUR HANDS~~

- C. ~~Hairnets, caps, surgical caps, or other approved hair restraints,~~ Effective hair restraints shall be used by employees engaged in the preparation and serving of food to keep their hair from food and

⁴⁰⁴ See Provision-by-Provision Analysis (9-52-1), *supra*. This section will similarly assume that Memphis adopts the state definition of FSE and RFS and will replace the term “food establishment” with the state terms.

food-contact surfaces. Hair spray does not constitute an effective restraint

- D. Employees shall not use tobacco in any form while engaged in food preparation or service, or while in equipment and utensil washing of food preparation areas.

(Ord. 4328, 5-16-95; Code 1985 § 16-202; Ord. 3228 § 1(13), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-27)

Suggestion: Eliminate this entire provision, as it is largely redundant with Tennessee state law while imposing additional restrictions that make it unduly restrictive. Alternatively, this provision should be simplified so that it is not unduly restrictive.

Comments: Both TDA and TDH have provisions that sufficiently address the cleanliness and hygiene requirements of employees in FSEs and RFSs and therefore this provision **should be eliminated**.⁴⁰⁵ Alternatively, if the provision is kept in the Memphis Code, it should be simplified so that it does not place additional, unnecessary restrictions on personnel. First, subsection (b) can be simplified by eliminating the first sentence, which is unnecessary given the rest of the subsection. The second sentence of that subsection, requiring “a high degree of personal cleanliness, and conform[ing] to approved hygienic practices,” implies clean fingernails and appropriate jewelry. Subsection (b) can further be simplified by eliminating the signage requirement, which is not required by state regulations and therefore imposes an additional unnecessary requirement. Second, the requirement of subsection (c) can be simplified by replacing the current hair restraint specifications with a more general “effective hair restraints” requirement. The more general “effective hair restraints,” which is utilized in both TDA and TDH state regulations, enables employers and employees choice and flexibility, while still complying with cleanliness regulations. Thus, in making such amendments, the Memphis Code will align directly with state requirements and not be unduly restrictive.

Section 9-52-26 - Health of Employees.

- A. No employer shall knowingly require, permit or suffer any person who is infected with any contagious, communicable or infectious disease to work or remain in or around any food service establishment or retail food store. The same shall apply to all persons exposed to a reportable disease unless the person so exposed has a permit from the department of health to engage in such work. All persons so employed shall procure a health certificate showing that the person is free from disease or diseases transmissible through food.
- B. No person, while affected with any disease in a communicable form, or while a carrier of such disease, or while afflicted with boils, infected wounds, sores, or an acute respiratory infection, shall work in any area of a food service establishment in any capacity in which there is a likelihood of such person contaminating foods or food-contact surfaces with pathogenic organisms, or transmitting disease to other individuals, and no person known or suspected by being affected with any such disease or condition shall be employed in such an area or capacity. If the manager or person in charge of

⁴⁰⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.03(2) -(4) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(7)(c)-(h) (2011).

the establishment has reason to suspect that any employee has contracted any disease in a communicable form or has become a carrier of such disease, he or she shall notify the health officer immediately and exclude the employee from the food service establishment or retail food store.

(Code 1985 § 16-203; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-28)

Suggestion: Eliminate this entire provision, as it is largely redundant with Tennessee state law while imposing additional restrictions that make it unduly restrictive. Alternatively, if the entire provision is not eliminated, subsection (a) should be eliminated.

Comments: Both TDA and TDH have provisions that sufficiently address the health restrictions on employees at RFSs and FSEs; therefore, this provision **should be eliminated**.⁴⁰⁶ The state regulations prohibit any person with a communicable disease in any form to work in a food service establishment or retail food store when there is any likelihood that the person may contaminate food or food-contact surfaces.⁴⁰⁷ Thus the state regulations address the exact content of the current Memphis Code provision, except for the requirement in subsection (b) requiring a manager to notify a health officer and exclude the employee if he/she suspects the employee is sick.

Tennessee statutory law further covers the same ground as subsection (a), imposing almost identical requirements on the part of the employer.⁴⁰⁸ The state statute does not restrict the responsibility of the employer only in cases of “knowing” of the illness. Instead, state law says that the employer shall not require the sick employee to work, whether or not the employer knows. Thus, state law supersedes the local ordinance on this point because it imposes a more stringent requirement. The statute further provides that, prior to returning to work, the employee must procure a health certificate signed by a licensed physician that indicates he or she is free from the communicable disease.⁴⁰⁹ Therefore, the state statute and regulations not only cover all the essential portions of the above ordinance, they impose additional requirements that local enforcement agencies must uphold. Thus, the local provision should be eliminated to ensure that RFSs and FSEs follow the state requirements, which must be met.

Section 9-52-27 - General requirements as to food.

All food in food service establishments and retail food stores shall be from sources ~~approved and considered satisfactory by the health officer that comply with all laws relating to food and food labeling~~ and shall be clean, wholesome, free from spoilage, free from adulteration and misbranding, properly labeled and safe for human consumption. No hermetically sealed, nonacid or low-acid food which has been processed in a place other than an approved commercial food processing establishment shall be used in a food service establishment.

(Code 1985 § 16-204; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-30)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law. If it is not eliminated, then the provision should be amended in the above-indicated manner, so it aligns with state requirements.

⁴⁰⁶ See Tenn. Comp. R. & Regs. 0080-04-09-.03(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(7)(a)-(b) (2011).

⁴⁰⁷ See Tenn. Comp. R. & Regs. 0080-04-09-.03(1)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(7)(a) (2011).

⁴⁰⁸ See Tenn. Code Ann. § 53-8-111(a) (2010).

⁴⁰⁹ Tenn. Code Ann. § 53-8-111 (2010).

Comments: Both TDA and TDH have provisions that sufficiently address the general cleanliness and safety requirements of food sold in RFSs and FSEs, and therefore this provision **can be eliminated**.⁴¹⁰ The state regulations provide that food must be free from spoilage and filth, safe for human consumption, and obtained from sources that comply with applicable food safety laws, including labeling laws. Further, TDA and TDH regulations are both more specific than the Memphis Code provisions, detailing specific requirements for fluid milk and milk products, fresh and frozen shucked shellfish, eggs, and ice, thus providing more helpful guidance for food entities than the Memphis Code. Therefore, the Memphis provision is misleading in failing to reflect the more stringent state requirements that must be followed.

However, the Code imposes some additional requirements that are harmful and unnecessary. Therefore, if not eliminated, the provision **should be amended** as indicated above. The Memphis provision requires that the sources be “considered satisfactory by the health officer,” while TDA and TDH regulations only require that they comply with the relevant laws.⁴¹¹ Memphis should accordingly replace this language, since it adds a significant level of uncertainty to individuals. This type of regulatory language further leaves too much discretion in the hands of individual health department officials, leading to differential and arbitrary interpretation and enforcement.

The provision should also be amended to apply the hermetically sealed requirement only to FSEs. Tennessee regulations only mention the prohibition on use of hermetically sealed products not processed in a food processing establishment with regard to RFSs.⁴¹²

Section 9-52-28 - Maintenance of premises.

A. All parts of a food service establishment or retail food store and its premises shall be kept clean, neat and free of garbage, litter and rubbish. Cleaning operations shall be conducted in such a manner as to minimize contamination of food and food-contact surfaces.

B. The surroundings of food service establishments and retail food stores, including parking areas and all sheds and all outbuildings, shall present a neat and orderly appearance and shall be kept clean, painted, free from accumulation of garbage, manure, ashes, rubbish, tall grasses or weeds, or any filth in which flies may breed, or standing water in which mosquitoes may breed.

(Code 1985 § 16-205; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-31)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH regulations sufficiently address the general maintenance of premises and impose more stringent requirements; therefore, this provision **can be eliminated**.⁴¹³ The state regulations cover in detail, for example, the cleaning of physical facilities, the care required for the general premises, the upkeep of the surrounding exterior area upkeep, and the appropriate use of the premises. The Memphis Code provision does not go into as much detail as these state provisions and

⁴¹⁰ See Tenn. Comp. R. & Regs. 0080-04-09-.02(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(1) (2011).

⁴¹¹ Tenn. Comp. R. & Regs. 0080-04-09-.02(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(1) (2011).

⁴¹² See Tenn. Comp. R. & Regs. 0080-04-09-.02(1) (2011); Tenn. Comp. R. & Regs. 1200-23-1-.02(1) (2011).

⁴¹³ See Tenn. Comp. R. & Regs. 0080-04-09-.07(3), (8)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(c), (h) (2011).

thus imposes less stringent requirements. Therefore, this provision should be eliminated in order to avoid misleading these establishments.

Section 9-52-29 - Floors, walls and ceilings.

- A. Floors shall be installed in kitchens and in all other rooms and areas in which food is stored or prepared and in which utensils are washed, and in walk-in refrigerators, dressing or locker rooms and toilet rooms, and shall be of smooth, nonabsorbent materials, and so constructed as to be easily cleanable. All floors shall be kept clean and in good repair. Floor drains shall be provided in all rooms where floors are subjected to flooding-type cleaning or where normal operations release or discharge water or other waste on the floor. All exterior areas where food is served shall be kept clean and properly drained, and surfaces in such areas shall be finished so as to facilitate maintenance and minimize dust. Sawdust or wood shavings shall be used on the floors only as permitted by the health department. On new construction, floors in food preparation areas shall be hard tile, brick, terrazzo, or similar materials.
- B. The walls and ceilings of all rooms shall be kept clean and in good repair. Walls shall be installed in all areas in which food is stored, prepared, or utensils or hands washed. Walls shall be smooth, light-colored and shall have washable surfaces.
- C. Approved ceilings shall be installed in all areas of food service establishments and retail food stores where food is prepared. Such ceilings shall be constructed of smooth, nonabsorbent, washable, approved materials. Light fixtures, decorative material and similar equipment and material attached to walls, floors and ceilings shall be kept clean and in good repair.

(Code 1985 § 16-206; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-32)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have much more detailed provisions that sufficiently address the requirements pertaining to floors, walls, and ceilings, and therefore this provision **can be eliminated**.⁴¹⁴ The state regulations cover in detail, for example, requirements surrounding floor construction, carpeting, floor drains, floor junctures, walls and ceiling maintenance, walls and ceiling construction, and exposed construction. The Memphis Code provision imposes less stringent requirements and is therefore preempted with regard to FSEs and RFSs. Therefore, this provision should be eliminated in order to avoid misleading these establishments.

Section 9-52-30 - Doors and screens.

- A. Except as provided in sections 9-52-11, 9-52-660, 9-52-670, 9-52-690 and 9-52-700, it shall be unlawful to sell, keep, serve or expose for sale in the city or within its police jurisdiction any article of food or drink for human beings except within a building, store,

⁴¹⁴ See Tenn. Comp. R. & Regs. 0080-04-09-.07(1), (2) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(a), (b) (2011).

room or other enclosure, the openings into which are effectively provided and equipped with doors, screens or coverings so as to exclude flies, insects and vermin of every description. All such places shall at all times be kept free from flies, insects and vermin. All openings used as passages into or from such building, store, room or enclosure shall be provided and equipped with doors, screens, shutters, ~~or coverings, controlled air currents, or other means which are equipped with self-closing devices.~~ All such doors, screens, shutters and coverings shall be self-closing and kept closed at all times except during the course of necessary passage throughout or ordinary use of such openings.

~~B. In cases where mechanical equipment is used and these effectively prevent the entrance of flies, insects and vermin, screens may be omitted.~~

(Code 1985 § 16-207; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-33)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law. Alternatively, the provision should be amended to reflect state regulations regarding the physical covering of passages.

Comments: Both TDA and TDH have provisions that address the door and screen requirements for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴¹⁵ The state provisions require that effective measures be taken to control the presence of rodents, flies, and insects; that outside openings be protected against insects in one of several acceptable means; that such screens be self-closing and tight-fitting; and that screening material must be at least sixteen mesh to the inch.⁴¹⁶ Thus, TDA and TDH regulations render the Memphis Code superfluous. Alternatively, the provision should be amended to clarify that the use of controlled air currents or other protection in place of screens or doors is an acceptable means to protect passages. The current Memphis provision refers to “mechanical equipment” in subsection (b) as an alternative means to prevent the entrance of flies, insects and the like, while current state regulations list “controlled air currents” as an approved means of protection.⁴¹⁷ State regulations have been updated much more recently so they likely include the best evidence and best mechanisms. Furthermore, a minor difference such as this from the standards of the rest of the state only serves to confuse entrepreneurs, who may be uncertain whether controlled air currents are acceptable, and put Shelby County business owners at a disadvantage. The Memphis Code therefore should be amended to make clear that controlled air currents or other effective and approved means are acceptable.

Section 9-52-31 - Water supply, sewage disposal and plumbing.

A. The water supply shall be adequate, of a safe, sanitary quality and from an approved source. Hot and cold running water under pressure shall be provided in all areas where food is prepared, or equipment, utensils or containers are washed.

⁴¹⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.06(7)(a), (b) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(p)(1), (2) (2011).

⁴¹⁶ *Id.*

⁴¹⁷ See Tenn. Comp. R. & Regs. 0080-04-09-.06(7)(b) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(p)(2) (2011).

- B. Ice used for any purpose, shall be made from water which comes from an approved source, and shall be used only if it has been manufactured, stored, transported and handled in a sanitary manner, as provided by the rules and regulations of the health department. Ice used for drinking purposes shall be stored in a clean, covered container free from contamination. Food products shall not be stored in ice used for drinking purposes.
- C. All sewage shall be disposed of in a public sewerage system.
- D. Plumbing shall be sized, installed, and maintained in accordance with applicable plumbing laws, so as to carry adequate quantities of water to require locations throughout the establishment; as to prevent contamination of the water supply; as to properly convey sewage and liquid wastes from the establishment to the sewage system; and so that it does not constitute a source of contamination of food, equipment or utensils, or create an insanitary condition or nuisance.

(Code 1985 § 16-208; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-34)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have much more detailed provisions that address the water supply, sewage disposal, and plumbing requirements for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴¹⁸ For example, while the Memphis Code requires broadly that the water supply “shall be adequate, of a safe, sanitary quality and from an approved source,” state regulations require that water be from an “approved public water supply” and if from any other source, shall have a bacteriological test annually at least.⁴¹⁹ Further, while the Memphis Code only requires that ice for consumer use shall be handled in a “sanitary manner” and stored “in a clean, covered container free from contamination,” TDH regulations contain more specific regulations surrounding the means to dispense such ice (“with scoops, tongs, or other ice dispensing utensils or through automatic self-service, ice-dispensing equipment”), where and how those utensils shall be stored (“on a clean surface on in the ice with dispensing utensils handle extended out of the ice”), and drainage requirements (“[i]ce storage bins shall be drained through an air gap”).⁴²⁰ Thus, the Memphis Code provision imposes less stringent requirements and is therefore preempted with regard to FSEs and RFSs. Therefore, this provision should be eliminated in order to avoid misleading these establishments.

Section 9-52-32 - Lighting.

All areas in which food is prepared, served or stored or utensils are washed, hand-washing areas, dressing or locker rooms, toilet rooms and garbage and rubbish storage areas shall be well lighted. Lighting fixtures in kitchens, dishwashing areas, service areas, etc., where unwrapped foods are stored, handled, processed or served shall be of such design to prevent glass from contaminating foods. During all

⁴¹⁸ See Tenn. Comp. R. & Regs. 0080-04-09-.06(1) – (3), .02(3)(b)(4) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(a) – (l), (3)(b)(4), (5)(h) (2011).

⁴¹⁹ Tenn. Comp. R. & Regs. 0080-04-09-.06(1) – (3) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(a) (2011).

⁴²⁰ Tenn. Comp. R. & Regs. 1200-23-01-.02(5)(h) (2011).

clean-up activities, adequate light shall be provided in the area being cleaned, and upon or around equipment being cleaned.
(Code 1985 § 16-209; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-35)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have more detailed provisions that concern lighting requirements for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴²¹ For example, both TDA and TDH specify that permanent fixed artificial light sources shall be installed so as to provide at least twenty foot candles of light on all food preparation surfaces,⁴²² whereas the Memphis Code only requires that food preparation areas be “well lighted.” Therefore, this provision should be eliminated.

Section 9-52-33 - Ventilation.

All rooms in which food is prepared, served, stored, or utensils are washed, dressing or locker rooms, toilet rooms, and garbage and rubbish storage areas shall be well ventilated. ~~Ventilation hoods and devices shall be required over all cooking equipment and shall be designed to prevent grease or condensate from dripping into food or onto food preparation surfaces. Filters, where used, shall be readily removable for cleaning or replacement.~~ Ventilation systems shall comply with applicable fire prevention requirements and shall, when vented to the outside air, discharge in such a manner as not to create a nuisance. ~~Ventilation systems are required for cooking equipment such as grills, deep friers, griddles, ovens, convection ovens, steam kettles, and similar equipment.~~

(Ord. 3432 § 2, 1-29-85; Code 1985 § 16-210; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-36)

Suggestion: Eliminate this entire provision, as it is redundant with Tennessee state law. Alternatively, eliminate language from the provision mandating ventilation hoods and devices specifically over cooking equipment, as that requirement is more stringent than necessary.

Comments: Both TDA and TDH contain provisions that detail the ventilation requirements for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴²³ The Memphis Code, however, differs by specifically mandating ventilation hoods. This additional requirement is unnecessary because the first sentence of the provision already requires that all rooms in which significant activity occurs are “well ventilated” and therefore implies that ventilation hoods must be installed in cases where they are necessary. Further, state regulations require that “[a]ll rooms . . . have sufficient ventilation to keep them free of excessive heat, steam, condensation, vapors, obnoxious odors, smoke and fumes.”⁴²⁴ In any instance when a ventilation hood is truly necessary, SCHD can and should enforce the state standard, and a specific requirement for “ventilation hoods” only adds to confusion and creates double standards within the state. Protection from grease and other drippings into food is similarly implicit in “sufficient ventilation” protection; therefore, the Memphis specification is redundant and unnecessary.

⁴²¹ See Tenn. Comp. R. & Regs. 0080-04-09-.07(4) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(d) (2011).

⁴²² *Id.*

⁴²³ See Tenn. Comp. R. & Regs. 0080-04-09-.07(5) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(e) (2011).

⁴²⁴ *Id.*

If not eliminated, the Memphis Code provision should alternatively be amended to discard the unnecessarily restrictive mandate of ventilation hoods.

Section 9-52-34 - Maintenance of fixtures.

All counters, shelves, drawers, bins, tables, showcases and other fixtures shall be kept clean and free from accumulations of dirt. Counters, tables and the like shall be free from cracks in which dirt may accumulate.

(Code 1985 § 16-211; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-37)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have more detailed provisions that concern the maintenance of fixtures for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴²⁵ Although tackling these requirements under the designation of “equipment and utensils,” and not “maintenance of fixtures,” the state regulations address the upkeep of counters, tables, shelves, etc. The state regulations are also more specific, addressing these types of fixtures as either food-contact surfaces or non-food-contact surfaces, with specific requirements for each of the two types. For each type of surface, the state regulations encompass the basic Memphis Code requirements of cleanliness, freedom from dirt, and freedom from cracks, but also mandate additional cleanliness requirements, such as requiring surfaces to be free from difficult-to-clean internal corners and crevices, mandating threads be designed for cleaning, and prohibiting “V” type threads in food-contact surfaces.⁴²⁶ The Memphis provision imposes less stringent requirements and is therefore preempted with regards to FSEs and RFSs.

Section 9-52-35 - Refrigerators, iceboxes, cold storage rooms, and air conditions.

Refrigerators, iceboxes, cold storage rooms, and air conditioning equipment shall be kept clean and free from foul and unpleasant odors, fungus growths, mold, and slime. Refrigerators and cold storage rooms shall be properly ventilated. ~~Drips from walk in refrigerators and air conditioning equipment shall drain in a closed system which shall be connected to the sanitary sewer. The floor or each walk in refrigerator shall be graded to a drain. This drain shall flow to the outside of the cooler through a waste pipe, doorway, or other opening, or equipped with a floor drain as provided by local plumbing codes. No potentially hazardous food can be stored in a metered coin operated refrigerator, or metered coin operated freezer in a food service establishment which operates under a regular food permit.~~

(Code 1985 § 16-212; Ord. 3228 § 1(15), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-38)

Suggestion: Eliminate this entire provision, as it is unnecessary, given the existing Tennessee state regulations. If not entirely eliminated, then the second part of the provision should be eliminated, as it is unnecessarily restrictive.

⁴²⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.04(2)(a)(1), 2(e) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(8)(b)(1)(i), (b)(6) (2011).

⁴²⁶ *Id.*

Comments: This provision is redundant with and less specific than Tennessee state law and thus **should be eliminated**. Refrigerators, iceboxes, cold storage rooms, or air conditioners fall under the definition of “equipment,”⁴²⁷ and TDA and TDH both impose restrictions on equipment that are much more detailed than simply requiring that they be kept clean and free from mold. For example, state regulations stipulate the type of materials from which the equipment must be constructed;⁴²⁸ the specific location in which the equipment must be placed for accessibility purposes;⁴²⁹ and the cleaning frequency and manner for the specific types of equipment.⁴³⁰ They also specify that the walls of walk-in refrigeration units must be “smooth, nonabsorbent and easily cleanable.”⁴³¹ Because state regulations impose adequate and more detailed requirements regarding this type of equipment, this provision is unnecessary and fails to reflect the more stringent state requirements.

If the entire provision is not eliminated, however, the second portion of the provision at a minimum should be eliminated because it adds unnecessary and unduly restrictive requirements. The state regulations do not include the exact specifications in the Memphis Food Code regarding drainage and drainage flow in a walk-in refrigerator, but they require that floors that receive discharges of water have “properly installed trapped” drains,⁴³² and, in the case of FSEs, that any equipment designed for in-place cleaning be “self-draining or capable of being completely evacuated.”⁴³³ Mandating any additional requirements only serves to create a confusing double standard that is not necessary to address any safety concern, since SCHD is already empowered to enforce the general language in state regulations regarding the adequate cleaning and maintenance of such equipment. Therefore, this section should be eliminated.

Section 9-52-36 - Utensils and equipment generally.

- A. Utensils and equipment used in mixing, preparing or manufacturing food shall be constructed of nonabsorbent, nonpoisonous material, free from rust, and must be cleaned after each time they are used, and after cleaning shall be protected from flies and dust.
- B. Knives, forks, spoons, plates, dishes, glasses and other wares used in preparing, in handling or in serving food shall be cleansed with hot water and soap after each usage, rinsed and sterilized as provided in Section 9-52-38. The use of broken, cracked or chipped glassware or china, and broken or rusty utensils is forbidden and when found shall be condemned.
- C. All kitchenware and food-contact surfaces of equipment, exclusive of cooking surfaces of equipment, used in the preparation of serving of food or drink, and all food storage utensils shall be thoroughly cleaned after each use. Cooking surfaces of equipment shall be cleaned at least once a day. All utensils and food-contact surfaces of equipment used in the preparation, service, display or storage of potentially hazardous food shall be thoroughly cleaned and sanitized

⁴²⁷ See Tenn. Comp. R. & Regs. 0080-04-09-.01(j) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.01(11) (2011) (for the definition of “equipment”).

⁴²⁸ Tenn. Comp. R. & Regs. 0080-04-09-.04(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(8)(a) (2011).

⁴²⁹ Tenn. Comp. R. & Regs. 0080-04-09-.04(2)(b), (3) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(8)(b) (2011).

⁴³⁰ Tenn. Comp. R. & Regs. 0080-04-09-.05 (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(9) (2011).

⁴³¹ Tenn. Comp. R. & Regs. 0080-4-9-.07(2)(b) (2011); Tenn. Comp. R. & Regs. 1200-23-1-.02(11)(b)(2) (2011).

⁴³² Tenn. Comp. R. & Regs. 0080-4-9-.07(1)(a)(2) (2011); Tenn. Comp. R. & Regs. 1200-23-1-.02(11)(a)(4) (2011).

⁴³³ Tenn. Comp. R. & Regs. 1200-23-1-.02(8)(b)(3) (2011).

prior to such use. Non-food-contact surfaces of equipment shall be cleaned at such intervals as to keep them in a clean and sanitary condition.

- D. After cleaning and until use, all food-contact surfaces of equipment and utensils shall be so stored and handled as to be protected from contamination.
- E. All single-service articles shall be stored, handled and dispensed in a sanitary manner, and shall be used only once.
- F. Food service establishments which do not have adequate and effective facilities for cleaning and sanitizing utensils shall use only single-serve articles.

(Code 1985 § 16-213; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-39)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have much more detailed provisions addressing utensils and equipment for RFSs and FSEs and therefore this provision **can be eliminated**.⁴³⁴ For example, the state regulations not only impose general requirements but stipulate different requirements based on the type of material used for the utensil or equipment – i.e. different requirements for wood, plastics, rubbers, cutting surfaces, solders, etc.⁴³⁵ The Memphis Code simply requires “nonabsorbent, nonpoisonous material.” Further, the state regulations contain detailed stipulations on design, fabrication, accessibility, and location of equipment, and base the cleaning requirements on those differences.⁴³⁶ The Memphis Code, on the other hand, simply requires all kitchenware, food-contact surfaces, and food storage utensils be “thoroughly cleaned.” It therefore imposes less stringent requirements than state law and should be eliminated.

Section 9-52-37 - Sanitary design, construction, and installation of equipment and utensils.

- A. All equipment and utensils shall be so designed and of such material and workmanship as to be smooth, easily cleanable, and durable, and shall be in good repair. The food-contact surfaces of such equipment and utensils shall, in addition, be easily accessible for cleaning, non-toxic, corrosion resistant and relatively nonabsorbent; provided that, when approved by the health officer, exceptions may be made to the above material requirements for equipment such as cutting boards, blocks and bakers’ tables.
- B. All equipment shall be so installed and maintained as to facilitate the cleaning thereof and of all adjacent areas.

⁴³⁴ See Tenn. Comp. R. & Regs. 0080-04-09-.04(1) – (2), .02(3)(b)(4) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(5)(i), (8)-(9) (2011).

⁴³⁵ *Id.*

⁴³⁶ *Id.*

C. Cutting blocks and boards and baker's tables may be of hard maple or equivalent material which is nontoxic, smooth and free of cracks, crevices and open seams.

(Code 1985 § 16-214; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-40)

Suggestion: Eliminate this entire provision, as it is redundant with and less comprehensive than existing state regulations.

Comments: Both TDA and TDH have much more detailed and specific provisions that address sanitary design, construction, and installation of equipment and utensils for retail food stores and food service establishments, as referenced above, and therefore this provision **can be eliminated**.⁴³⁷ For example, while the Memphis Code broadly requires that equipment be installed to "facilitate . . . cleaning," state regulations detail exactly how accessible specifically-designed equipment be for cleaning – i.e. that non-in-place food-contact surface equipment be accessible for cleaning without being disassembled, or by disassembling without the use of tools, or by easy disassembling with the use of specified simple tools, and that in-place cleaning surfaces be designed so that sanitizing solutions can be circulated through a fixed system, contacting all interior food-contact surfaces, and that the system be self-draining or capable of being completely evacuated.⁴³⁸ Thus the state regulations in this example, as well in other related provisions, provide more stringent requirements on the sanitary design, construction, and installation of equipment, rendering the Memphis Code unnecessary and misleading.

Section 9-52-38 - Disinfecting and sanitizing facilities; dishes and utensils.

~~When manual dishwashing is employed, a sink with not fewer than three (3) compartments is required. Except for fixed equipment and utensils too large to be cleaned in sink compartments, manual washing, rinsing, and sanitizing shall be conducted in the following sequence: (1) Sinks shall be cleaned prior to use; (2) Equipment and utensils shall be thoroughly cleaned in the first compartment with a hot detergent solution that is kept clean; (3) Equipment and utensils shall be rinsed free of detergent and abrasives with clean water in the second compartment; and (4) Equipment and utensils shall be sanitized in the third compartment according to equipment and utensils shall be thoroughly washed in a detergent solution which is kept reasonably clean, and then shall be rinsed free of such solution. All eating and drinking utensils and, where required, the food contact surfaces of all other equipment and utensils shall be sanitized by one of the following methods:~~

- A. ~~Immersion for at least one-half (1/2) minute in clean hot water at a temperature of at least one hundred eighty (180) seventy (170) degrees Fahrenheit;~~ or
- B. Immersion for a period of at least one minute in a sanitizing solution containing:
 - 1. At least fifty (50) ppm of available chlorine at a temperature not less than seventy-five (75) degrees Fahrenheit; or

⁴³⁷ See Tenn. Comp. R. & Regs. 0080-04-09-.03(2)-(3) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(8) – (9) (2011).

⁴³⁸ *Id.*

2. At least twelve and five-tenths (12.5) ppm of available iodine in a solution having a pH not higher than 5.0 and a temperature of not less than seventy-five (75) degrees Fahrenheit; or
3. Any other chemical sanitizing agent which has been demonstrated to the satisfaction of the health authority to be effective and nontoxic under use conditions, and for which a suitable field test is available. Such sanitizing agents, in use solutions, shall provide the equivalent bactericidal effect of a solution containing at least fifty (50) ppm of available chlorine at a temperature not less than seventy-five (75) degree Fahrenheit.

C. Equipment too large to treat by methods (a) and (b) above may be treated:

1. With live steam from a hose, in the case of equipment in which steam can be confined; or
2. By rinsing with boiling water; or
3. By spraying or swabbing with a chemical sanitizing solution of at least twice the minimum strength required for the particular sanitizing solution when used for immersion sanitation.

(Code 1985 § 16-215; Ord. 3228 § 1(16), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-49)

Suggestion: Eliminate this entire provision, as Tennessee state law adequately addresses sanitizing facilities and utensils. If not entirely eliminated, the provision should be amended so that it aligns with existing state regulations.

Comments: Both TDA and TDH have detailed provisions addressing manual cleaning and sanitizing for utensils and equipment, both fixed and moveable, for RFSs and FSEs.⁴³⁹ Thus because the Memphis Code provision is unnecessary and fails to include certain requirements that the state imposes, it **should be eliminated**.

Alternatively, if not entirely eliminated, the provision requires, at a minimum, updating as indicated above to reflect current state regulations. First, Tennessee state regulations specifically require that when manual dishwashing is utilized, FSEs and RFSs have a sink with a minimum of three-compartments, so as to divide the following three ordered actions: cleaning with detergent, the rinsing of that detergent, and the sanitizing of the utensils and equipment.⁴⁴⁰ The current Memphis Code contains no such requirements, despite the fact that SCHD must enforce those requirements for FSEs and RFSs, thus making the Memphis Code a misleading source. Second, TDA and TDH only require a hot water temperature of one hundred seventy degrees Fahrenheit when sanitizing via immersion for thirty seconds in clean, hot water.⁴⁴¹ The Memphis Code unnecessarily departs from state law in requiring that the water temperature reach one hundred and eighty degrees. In addition, the state food safety regulations are updated more frequently and have been updated much more recently, meaning that they reflect the most up-to-date food safety science. Because the Memphis Code does not add any

⁴³⁹ See Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(a), (c) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(c), (15)(d) (2011) (group day care home food service).

⁴⁴⁰ Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(c)(1), (5) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(c)(1), (4) (2011).

⁴⁴¹ Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(c)(7)(i) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(c)(5)(i) (2011).

requirement that significantly improves the safety of food establishments, this provision at minimum should be amended in the indicated ways so that it is in line with state regulations.

It should also be noted that the Memphis Food Code does not contain any provisions addressing mechanical cleaning and sanitizing, only the current provision addressing manual cleaning. Both TDA and TDH have detailed regulations that address the mechanical cleaning process and specific requirements for that.⁴⁴² In not addressing mechanical processes, the Memphis Food Code does not make it clear that such processes are allowed. Thus, food industry entrepreneurs must turn to state regulations to learn how to safely use such processes. Therefore, this provision should be eliminated so that the entrepreneurs do not need to analyze both state and local laws.

Section 9-52-39 - Paper vessels and straws.

- A. Paper vessels may be used in place of glassware in the serving of food, ices, beverages or drinks, but such paper vessels shall be used only once and then disposed of in a sanitary manner. All paper vessels furnished to customers shall be kept in covered dustproof and flyproof containers.

- B. It shall be unlawful to serve, provide or furnish straws, quills, or other similar devices through which drinks, beverages or other liquids may be drawn in connection with the sale or dispensing of such drinks, liquids, or beverages unless previously sterilized and contained in a sealed envelope or other outside covering to be broken or opened by the user only or by use of an approved dispensing device.

(Code 1985 § 16-216; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-42)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have much more detailed provisions that address the use of paper vessels and straws for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴⁴³ The Memphis Code allows the use of paper vessels and straws and requires just that they be used only once and that they be sterilized and wrapped prior to use by the customer. Tennessee state regulations, however, refers to these types of vessels as “single-service articles” and goes much further in their regulation. The regulations not only require that these articles be clean, sanitary, wrapped, and used only once, but also specify, for instance, that they be stored at least six inches above the floor in closed cartons or containers and not placed under exposed sewer lines or non-potable water lines.⁴⁴⁴ This type of more detailed state regulation that must be followed renders the Memphis Code superfluous in its regulation of paper vessels and straws and thus this provision should be eliminated.

Section 9-52-40 - Stoves, ranges and hoods.

Stoves, ranges and hoods shall be kept clean and free from grease and odor.

⁴⁴² See Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(d) (2011) (referencing Section 5-104 of the Model Food Service Sanitation Ordinance); Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(d) (2011).

⁴⁴³ See Tenn. Comp. R. & Regs. 0080-04-09-.04(1)(a), (f), .05(2)(c) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(8)(a), (9)(h), (12)(a)(2), 13(d) (2011).

⁴⁴⁴ Tenn. Comp. R. & Regs. 0080-04-09-.05(2)(c)(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(h)(1) (2011).

(Code 1985 § 16-217; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-43)

Suggestion: Eliminate this provision, as it is redundant with Tennessee state law. As the provision is not in direct conflict with any state regulations, if not eliminated, it does not require amending.

Comments: Both TDA and TDH have sufficiently detailed provisions that address the cleanliness of stoves, ranges, and hoods for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴⁴⁵ The Memphis Code simply requires that stoves, ranges, and hoods be kept clean. Tennessee regulations, however, address these same requirements when addressing all equipment and utensil cleaning and sanitizing and do so in a much more detailed manner. The state regulations specify, for instance, how such equipment will be kept clean (i.e. with a sanitizing solution of a specific concentration) and when such cleaning shall occur (i.e. at least once a day or after each use).⁴⁴⁶ Thus, this provision is unnecessary.

Section 9-52-41 - Milk or food in bottles.

Milk or food in bottles or containers shall not be submerged in water.
(Code 1985 § 16-218; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-44)

Suggestion: Eliminate this provision, as it is redundant with Tennessee state law.

Comments: This provision is redundant with Tennessee state law and thus **should be eliminated**. Both TDA and TDH have provisions that sufficiently address storage in water; each set of regulations provide that “[p]ackaged food shall not be stored in contact with water or undrained ice.”⁴⁴⁷ Tennessee state law thus sufficiently addresses this storage in water concern, rendering the Memphis Code provision unnecessary.

Section 9-52-42 - Wrapping foods.

The use of newspapers or any unclean paper for the purpose of wrapping food is forbidden.

(Code 1985 § 16-219; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-45)

Suggestion: Eliminate this provision, as it is unnecessary given the existing state regulations.

Comments: While there is no provision in TDA or TDH regulations that refer specifically to the use of newspapers or unclean paper for wrapping food, the general state food storage regulations sufficiently address this concern, and therefore the Memphis Code provision is unnecessary and **should be eliminated**. Both TDA and TDH regulations require that if food is removed from its original container or package, whether raw or prepared, it must be stored in a “clean, covered container” that is impervious and nonabsorbent.⁴⁴⁸ The only exceptions to this rule are for solid cuts of meat (which may be hung uncovered) in RFSs and FSEs;⁴⁴⁹ in RFSs, for whole and unprocessed fresh raw vegetables and fruits;⁴⁵⁰ and in FSEs for bread or roll containers, which may be kept in containers with linens or napkins used for

⁴⁴⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(c) (2011).

⁴⁴⁶ *Id.*

⁴⁴⁷ Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(a)(3) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(a)(5) (2011).

⁴⁴⁸ Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(a)(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(a)(1) (2011).

⁴⁴⁹ *Id.*

⁴⁵⁰ Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(a)(1) (2011).

lining.⁴⁵¹ Thus, implicit in the state regulations is a prohibition on the use of newspapers or other unclean paper for wrapping food and therefore this provision should be eliminated.

~~Section 9-52-43 - Common drinking cups.~~

~~The use of common drinking cups in food establishments are forbidden.
(Code 1985 § 16-220; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-46)~~

Suggestion: Eliminate this provision, as it is redundant with state regulations.

Comments: This provision is redundant with, and unnecessarily more restrictive than, Tennessee state law. TDH and TDA regulations do not specifically address the use of “common drinking cups” (in fact, this term is not defined in the Memphis Food Code or in state law, leading to confusion).⁴⁵² Rather, the state regulations address “equipment and utensils,” with the definition of utensils including drinking cups, and generally require that FSEs and RFSs utilize utensils that are constructed using safe materials; that are corrosion resistant, nonabsorbent, smooth, easily cleanable, and durable; and which do not impart any color, odor or other contamination.⁴⁵³ Because this regulation of utensils is sufficient to address any safety concerns related to drinking cups, the state regulations do not contain a specific prohibition against the use of common drinking cups and the Memphis Code need not either. Therefore, because this provision is unduly restrictive, it **should be eliminated** from the Memphis Code.

Section 9-52-44 - Shelf or counter coverings.

The use of newspapers or any unclean paper for covering shelves or counters is forbidden.

(Code 1985 § 16-221; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-47)

Suggestion: Eliminate this provision, as it is unnecessary given the existing state regulations.

Comments: While there is no provision in TDA or TDH regulations that refer specifically to the use of newspapers or unclean paper for covering shelves or counters, the state level design and fabrication regulations regarding equipment and utensils sufficiently address this concern; therefore, the Memphis Code provision is unwarranted and **should be eliminated**. The state regulations generally require that food contact surfaces should be easily cleanable, smooth, and free of breaks or seams, and that non-food-contact surfaces be smooth, washable, free of unnecessary ledges or crevices, easily cleanable, and made of material that is easy to repair and clean.⁴⁵⁴ Implicit in the state regulations, therefore, is a prohibition on the use of newspapers or other unclean paper for lining shelves or counters, and thus this provision should be eliminated.

Section 9-52-45 - Storage and disposal of garbage and rubbish.

A. All garbage and rubbish containing food waste shall, prior to disposal, be kept in leakproof, nonabsorbent approved containers which shall be covered with tight-fitting lids when filled or

⁴⁵¹ Tenn. Comp. R. & Regs. 1200-23-1-.02(3)(a)(1) (2011).

⁴⁵² While the Code itself does not define “common drinking cups,” it appears to mean a drinking cup available to several individuals without adequate cleansing. See Wash. Admin. Code § 246-203-210 (2011); Portland, Or. Code 8.48.010 (2011) available at <http://www.portlandonline.com/auditor/index.cfm?c=28148>. Such practice is almost universally considered unacceptable today and is certainly regulated by Tennessee state law.

⁴⁵³ See Tenn. Comp. R. & Regs. 0080-04-09-.02(8)(a)(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.04(1)(a) (2011).

⁴⁵⁴ See Tenn. Comp. R. & Regs. 0080-04-09-.04(2)(a)(1), (e) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(8)(b)(1)(i), (6) (2011).

stored, or not in continuous use. All other rubbish shall be stored in containers, rooms, or areas in an approved manner as required by this code. The rooms, enclosures, areas and containers used shall be adequate for the storage for all food waste and rubbish accumulating on the premises. Adequate cleaning facilities shall be provided, and each container, room or area shall be thoroughly cleaned after the emptying or removal of garbage and rubbish.

- B. Food grinders, if used, shall be used with sufficient frequency and in such a manner as to prevent a nuisance. Throwing, placing, or allowing to accumulate garbage, trash, sweepings, or rubbish upon the ground is forbidden. All liners shall be tied before placing in a storage container for disposal. Separate containers and separate storage facilities are required for the disposal of discarded grease.

(Code 1985 § 16-222; Ord. 3228 § 1(17), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-48)

Suggestion: Eliminate this provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have more detailed provisions addressing the garbage container, storage, and disposal requirements for retail food stores and food service establishments, and therefore this provision **can be eliminated**.⁴⁵⁵ The Memphis Code generally requires that garbage be stored in approved, leakproof containers and stored in areas that are “adequate” for that use. Tennessee regulations, however, further specify how often the area and containers should be cleaned, the requirements for the material of the containers, and requirements based on where the garbage will be stored.⁴⁵⁶ Thus, the Memphis Code is unnecessary here as state regulations not only adequately address the concern of this provision but impose more stringent requirements.

Section 9-52-46 - Birds and animals prohibited; exception.

No live birds or animals shall be allowed in any area used for the conduct of food service establishment operations or sections adjacent to such areas; provided that, guide dogs service animals accompanying blind disabled patrons may be permitted., and further, provided that, ~~trained mallard ducks and caged birds are excluded from that classification of live birds and animals prohibited by this section.~~

(Code 1985 § 16-223; Ord. 3226 § 1, 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-49)

Suggestion: Eliminate this provision, as it conflicts with the Americans with Disabilities Act. Alternatively, this provision should be amended so that it is consistent with existing federal law.

Comments: The Memphis Code provision should be amended so that it is aligned with existing Tennessee and Federal regulations. First, the Memphis Code should be amended to reflect the state requirement that live animals are not only prohibited from entering the operational premises but also any area adjacent to such premises.⁴⁵⁷ Second, this provision is more restrictive than the Americans with

⁴⁵⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.06(3)(e), (6) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(k), (o) (2011).

⁴⁵⁶ *Id.*

⁴⁵⁷ See Tenn. Comp. R. & Regs. 0080-04-09-.07(8)(f) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(p(3) (2011).

Disabilities Act and is therefore unenforceable. Under the federal regulation promulgated by the Department of Justice, a “service animal” is “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.”⁴⁵⁸ Since the Memphis provision only makes an exception for guide dogs for the blind, it does not allow disabled patrons to bring other types of service animals into food service establishments. Examples of other types of service animals include dogs that alert deaf individuals to sounds or assist during a seizure.⁴⁵⁹ To bring the Memphis provision in line with the Americans with Disabilities Act, the provision needs to be amended to include all types of service animals covered by the Act or eliminated entirely.

Also, the current exception for trained mallard ducks and caged birds is inconsistent with state law. Neither TDA nor TDH allow birds of any type in the operational or adjacent areas of an FSE or RFS. This exception may be intended for the ducks that live in the Peabody Hotel in Memphis, as they are a historic tourist attraction. However, the exception is technically unenforceable because the provision is not as stringent as the state standard, and it therefore may mislead business owners as to the appropriate standard, unless Memphis has specific authorization from the state government to allow this.

~~Section 9-52-47 – Separation of unrelated activities generally.~~

~~Food service establishments shall be physically separated by complete, tight-fitting partitions, from any other activity not related to food establishments.~~

~~(Code 1985 § 16-224; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-50)~~

Suggestion: Eliminate this provision, as it is unnecessarily more restrictive than state regulations.

Comments: This provision is unnecessarily more restrictive than Tennessee state law. TDH regulations only require that FSEs be separated from living or sleeping areas (by complete and solid, self-closing doors), which the Memphis Code addresses in the provision immediately following this one.⁴⁶⁰ Otherwise, the state regulations do not contain a similar general requirement. Not only does this provision fail to provide any guidance as to what “other activities” means, it does not appear to usefully improve the health and safety conditions of Shelby County and may discourage entrepreneurs with certain business models from operating in Shelby County. Because this provision is both unduly restrictive for FSEs and unclear, it **should be eliminated** from the Memphis Code.

Section 9-52-48 – Sleeping quarters: accumulation of unnecessary articles.

No person shall be permitted to sleep on a regular and continuing basis in any food service establishment or retail food store in the area where food is prepared, cooked or served or an area otherwise used for food service establishment or retail food store operations. Bedrooms or living rooms shall be separated by a complete tight-fitting partition. Wearing apparel, books, shoes, or any other personal effect, or any other unnecessary articles such as used automobile parts, grease or gasoline, shall not be kept or allowed to

⁴⁵⁸ 28 C.F.R. § 36.140 (2011).

⁴⁵⁹ 28 C.F.R. app. A to Part 36 (2011).

⁴⁶⁰ See Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(h)(2) (2011).

accumulate in any kitchen or room where foodstuffs are kept or handled.

(Code 1985 § 16-225; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-51)

Suggestion: Eliminate this provision, as it is redundant with state regulations. If not eliminated, however, the provision requires slight amending.

Comments: This provision is unnecessary as Tennessee state law sufficiently addresses the separation of sleeping areas and the prohibition on accumulation of unnecessary articles in RFSs and FSEs; therefore this provision **should be eliminated**. As referenced above, TDA and TDH regulations both contain provisions that prohibit sleeping or living quarters within the food service or retail food operations, requiring solid and self-closing doors as a partition.⁴⁶¹ TDH regulations also require that only articles necessary to an FSE be stored on the premises, and TDA regulations require that the premises of an RFS be “reasonably free” of unnecessary articles.⁴⁶² Accordingly, because state regulations sufficiently address the prohibition against sleeping and storing unnecessary items in RFSs and FSEs, this provision should be eliminated from the Memphis Code. If not eliminated, the above amendments should be made to reflect the more stringent state standard, which says that no area that is used for RFS or FSE operations may be used as living or sleeping quarters.

Section 9-52-49 - Toilet facilities.

- A. With the exception of packaged goods stores and drive-by restaurants, each food service establishment and retail food store shall be provided with adequate, conveniently located toilet facilities for its employees and patrons. Toilet facilities shall be conveniently located and the public shall have entrance to the toilet facilities other than through food processing, food preparation, storage, warehousing, or other isolated areas. Toilet facilities shall be accessible to the employees and patrons at all times. ~~Vestibules shall be provided as designated by the department of health and such vestibules shall be kept in a clean condition and in good repair.~~ Toilets and vestibules shall be lighted and ventilated in an approved manner. Toilet facilities, including rooms and fixtures, shall be kept in clean conditions and in good repair. The doors of all toilet rooms shall be self-closing. Toilet tissue shall be provided. Easily cleanable receptacles shall be provided for waste materials and such receptacles in toilet rooms of women shall be covered. ~~In new construction, all toilets shall have floor drains with same connected to the sanitary sewer provided for floors in toilets that are to be water flushed when cleaning. Such floors shall be graded to the drain. Toilet doors or stall doors shall not be locked when unoccupied except as approved by the health department. Approval from the health department must be in writing.~~
- B. ~~Packaged goods stores shall provided one (1) water closet and one (1) hand washing lavatory which shall meet the foregoing requirements.~~ Establishments constructed or extensively altered after August, 2002 shall provide toilet facilities for patrons of each sex, except that establishments with a seating capacity of

⁴⁶¹ See Tenn. Comp. R. & Regs. 0080-0-09-.07(8)(b) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(h)(2) (2011).

⁴⁶² See Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(h)(1)(iii) (2011); Tenn. Comp. R. & Regs. 0080-0-09-.07(8)(a)(1) (2011).

sixteen (16) or less are exempt from this requirement, unless otherwise required by state law.

~~C. Drive-by restaurants shall be required only to provide toilet facilities for employees, as required above and not for patrons or the public.~~

~~(Ord. 3432 § 3, 1-29-85; Code 1985 § 16-226; Ord. 3228 § 1(18), 8-3-82; Ord. 2712 §§ 1, 2, 4-25-78; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-52)~~

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law. If not eliminated, the provision should be amended in the above-indicated ways.

Comments: Both TDA and TDH have detailed provisions that more specifically address the toilet facility requirements for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴⁶³ For example, the state regulations stipulate that toilet facilities for patrons should be provided for each sex (whereas the Memphis Code says nothing about this), and they specify the number of toilets that need to be provided (whereas the Memphis Code only requires “adequate” toilet facilities).⁴⁶⁴ Thus, the Memphis Code provision does not reflect the more stringent state regulations.

If not completely eliminated, however, the provision should be amended in the above-indicated manner, eliminating the reference to vestibules and the final portion of subsection (a). There are two main problems with the requirement that vestibules be provided “as designated by the department of health.” First, current state regulations do not require RFSs or FSEs to provide vestibules in connection with their toilet facilities, and there is no independent need for that requirement, making that requirement unnecessary.⁴⁶⁵ Second, the language “as designated by the department of health” is problematic, as it is imprecise and unspecific, providing no guidance to food industry entrepreneurs on the requirement and therefore making it extremely difficult for individuals to know how to comply. Further, this type of regulatory language leaves too much discretion in the hands of individual health department officials, leading to differential and arbitrary interpretation. The final segment of subsection (a) should be eliminated also, as it is unnecessarily specific. The state regulations do not require any particular drainage system with respect to toilets and do not require that toilets be unlocked when unoccupied.⁴⁶⁶ If SCHD is concerned that a given restroom is unsanitary because of inadequate drainage, it may cite state regulations that call for adequate drainage for floors that are to be water flushed, such as the type of floor mentioned here.⁴⁶⁷ Therefore, this subsection does not create a more sanitary environment than state regulations, but instead establishes additional standards that may confuse business owners in Shelby County.

Furthermore, the exception for drive-by restaurants and packaged goods stores is not aligned with state standards. First, state regulations require restrooms for patrons unless the establishment has a seating capacity of 16 or less, an exception that applies to more establishments than drive-by restaurants.⁴⁶⁸ This more stringent Memphis standard only serves to put Shelby County businesses at a clear disadvantage by imposing a requirement for restrooms at small establishments, an unnecessary requirement that does not exist in the rest of the state. Second, the section covering “packaged good

⁴⁶³ See Tenn. Comp. R. & Regs. 0080-04-09-.06(4) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(m) (2011).

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ See Tenn. Comp. R. & Regs. 0080-4-9-.07(1)(a)(2) (2011); Tenn. Comp. R. & Regs. 1200-23-1-.02(11)(a)(4) (2011).

⁴⁶⁸ Tenn. Comp. R. & Regs. 0080-4-9-.06(4)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-1-.02(10)(m) (2011).

stores” may impose more stringent requirements than state law. Stores that only sell “prepackaged, non-potentially hazardous foods” do not qualify as RFSs⁴⁶⁹ and therefore are not subject to the state regulations for RFSs, but any “packaged good store” selling potentially hazardous foods must follow state standards for toilet facilities. Because the state standard must apply if it is more stringent, this confusing double standard may leave business owners uncertain about the applicable requirement. Therefore, this language should be eliminated or amended to reflect state standards.

Section 9-52-50 - Hand washing facilities.

- A. With the exception of drive-by restaurants, each food service establishment and retail food store shall be provided with adequate conveniently located hand-washing facilities for its employees and patrons. Lavatories shall be equipped with hot and cold or tempered running water, hand cleansing soap or detergent, and approved sanitary towels or other approved hand-drying device. Such facilities shall be kept clean and in good repair.
- B. Lavatories shall be adequate in size and number and shall be so located as to permit convenient and expeditious use by all employees and patrons. One or more lavatories shall be required in each food preparation area.
- C. Drive-by restaurants shall be required only to provide hand washing facilities for employees, as required above, and not for patrons or the public.

(Ord. 3432 § 4, 1-29-85; Code 1985 § 16-227; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-53)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have detailed provisions that adequately address hand washing facility requirements for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴⁷⁰ These state provisions address everything covered by the Memphis Code hand washing provision, but also include more stringent requirements. For example, the state regulations specify where lavatory facilities should be located, that the same sink may not be used for hand washing and food preparation or washing equipment or utensils, and the specific type of faucet that must be installed.⁴⁷¹ Because local regulations are only valid if they are at least as stringent as state regulations, the Memphis code is misleading and should be eliminated. On the other hand, state regulations do not contain the Memphis requirement that hand washing facilities be made available to the public in all but drive-by restaurants.⁴⁷² Again, this only serves to put Shelby County businesses at a clear disadvantage by unnecessarily imposing this requirement on small establishments with minimal seating capacity. Therefore, the entire provision should be eliminated or amended to reflect state law.

Section 9-52-51 - Basements.

⁴⁶⁹ See Tenn. Comp. R. & Regs. 0080-04-09-.01(2011).

⁴⁷⁰ See Tenn. Comp. R. & Regs. 0080-04-09-.06(5) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(n) (2011).

⁴⁷¹ *Id.*

⁴⁷² *Id.*

Basements shall be kept clean, free from accumulations of rubbish, and free from moisture and unpleasant odors, and shall be well lighted, and ventilated. If mechanical lighting and ventilation are required, they shall be installed.

(Code 1985 § 16-228; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-54)

Suggestion: Eliminate this provision, as it is redundant with state regulations.

Comments: This provision is redundant with Tennessee state law and thus **should be eliminated**. Although TDH and TDA regulations do not specifically address basements within their provisions, the requirements that apply to “premises” more generally also apply to basements and therefore the Memphis Code provision is unnecessary. The state regulations mandate that FSEs and RFSs “and all parts of property used in connection with [their] operations” be kept free of litter and unnecessary articles.⁴⁷³ The state regulations furthermore include specific lighting and ventilation requirements in all areas.⁴⁷⁴ TDA and TDH thus require that basements of these entities must also be kept clean and orderly, not unduly cluttered, and adequately lit and ventilated, rendering the Memphis Code provision unnecessary.

Section 9-52-52 - Dressing rooms and lockers.

Adequate facilities shall be provided for the orderly storage of employees’ clothing and personal belongings. Where employees routinely change clothes within the establishment, one or more dressing rooms or designated areas shall be provided for this purpose. Such designated areas shall be located outside of the food-preparation, storage and serving areas, and the utensil-washing and storage areas; provided that, ~~when approved by the health officer,~~ such an area may be located in a storage room where only completed packaged food is stored. Designated areas shall be equipped with adequate lockers, and lockers or other suitable facilities shall be provided in dressing rooms. Dressing rooms and lockers shall be kept clean.

(Code 1985 § 16-229; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-55)

Suggestion: Eliminate this provision, as it is redundant with state regulations.

Comments: TDA and TDH regulations both contain provisions that require dressing rooms if employees routinely change clothes on the premises; stipulate that dressing rooms must not be the same area as used for food preparation, storage or service; require that lockers must be provided for employee storage; and allow lockers to be located in dressing rooms or in food storage areas only containing completely packaged food.⁴⁷⁵ Accordingly, because state regulations sufficiently address the regulation of dressing rooms and lockers in RFSs and FSEs, this provision **should be eliminated** from the Memphis Code. If not eliminated, the only amendment that must be made to the current Memphis provision is to eliminate the requirement of approval by the health office to locate lockers in food storage areas. State provisions allow food service entities to locate lockers in such food storage areas without separate approval. This additional restriction in the Memphis Code is unduly restrictive and open to arbitrary enforcement.

⁴⁷³ Tenn. Comp. R. & Regs. 0080-04-09-.07(8)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(h)(1) (2011).

⁴⁷⁴ See Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(d),(e) (2011); Tenn. Comp. R. & Regs. 0080-04-09-.07(4),(5) (2011).

⁴⁷⁵ See Tenn. Comp. R. & Regs. 0080-04-09-.07(6) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11) (2011).

Section 9-52-53 - Storage of soiled linens, coats and aprons.

Soiled linens, coats and aprons shall be kept in containers until removed for laundering.

(Code 1985 § 16-230; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-56)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have provisions that include more stringent requirements regarding the storage of soiled linens, coats, and aprons for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴⁷⁶ For example, the state regulations specify that the soiled linens should be stored in nonabsorbent containers, not just “containers,” as in the Memphis Code. The state regulations further enable food entities the option to use washable laundry bags, instead of nonabsorbent containers, and also specify where clean clothes and linens should be stored, something not addressed by the Memphis Code. Thus, the Memphis Code provision fails to fully reflect the applicable standards and should be eliminated.

Section 9-52-54 - Display, storage and service of food generally.

- A. All foodstuffs which are displayed or stored shall have full protection from flies, dust, dirt and insects by glass cases, or other modern methods approved by the department of health.
- B. Where unwrapped food is placed on display in all types of foodservice operations, including smorgasbords, buffets and cafeterias, it shall be protected against contamination from customers and other sources by effective, easily cleanable, counter-protector devices, cabinets, display cases, containers, or other similar type of protective equipment. Self-service openings in counter guards shall be so designed and arranged as to protect food from manual contact by customers.
- C. Tongs, forks, spoons, picks, spatulas, scoops, and other suitable utensils shall be provided and shall be used by employees to reduce manual contact to a minimum. For self-service by customers similar implements shall be provided.
- D. Dispensing scoops, spoons and dippers, used in serving frozen desserts, shall be stored between users in an approved running-water dipper well.
- E. Sugar and all condiments shall be provided only in closed dispensers or in individual packages.
- F. Individual portions of food once served to a customer shall not be served again, provided that, wrapped food, other than potentially

⁴⁷⁶ See Tenn. Comp. R. & Regs. 0080-04-09-.07(8)(d) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(h)(4) (2011).

hazardous food, which is still wholesome and has not been unwrapped, may be reserved.

(Code 1985 § 16-231; Ord. 3228 § 1(19), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-57)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have provisions that adequately address, and often in more detail, the display, storage and service of food for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴⁷⁷ For example, the state regulations require that any food on display must be protected from contamination via packaging, display cases, covered containers or other protective equipment; must be displayed above the floor; and hot or cold food units must be kept at specified temperatures.⁴⁷⁸ The Memphis Code only requires more general protection of foodstuffs to protect against contamination. Further, the state regulations require that between services, all dispensing utensils must be stored in the food containers with the food that they are being used to serve, stored clean and dry, or stored in running water.⁴⁷⁹ The Memphis Code only sets a utensil requirement as to those used for frozen desserts and only stipulates that storage in a running water dipper well is allowed. Thus, due to these as well as the other existing state regulations of food display, storage and service of food, the Memphis Code provision fails to fully reflect the applicable standards and should be eliminated.

Both TDH and TDA have detailed provisions that describe the requirements surrounding food preparation generally and specific ways FSEs and RFSs must prepare raw fruits and vegetables, eggs, fish, meat, poultry, and the like.⁴⁸⁰ These provisions lay out specific steps that must be taken, specific instructions for different cooking methods (i.e. a convection oven, a still dry oven, a microwave etc.), and specific temperatures and cooking times.⁴⁸¹ The state regulations therefore provide much needed guidance on food preparation, something the Memphis Code does not do at all, again demonstrating how the Memphis Code is misleading in failing to reflect the true standards and should be eliminated.

Section 9-52-55 - Storage of potentially hazardous food.

Potentially hazardous food shall be kept at ~~forty five (45)~~ forty-one (41) degrees Fahrenheit or less and/or one hundred forty (140) degrees Fahrenheit or more. All potentially hazardous food stored ~~at one hundred forty (140) degrees Fahrenheit or more~~ shall be in equipment which is thermostatically controlled, with a numerically scaled indicating thermometer or recording thermometer, accurate to +/-three (3) degrees Fahrenheit and potentially hazardous foods shall not be transferred from hot storage to refrigeration more than one time; eggs shall be kept at a temperature which is not conducive to spoilage. Frozen food shall be kept frozen and/or shall be stored at a temperature of zero (0) degrees Fahrenheit or below.

(Code 1985 § 16-232; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-58)

⁴⁷⁷ See Tenn. Comp. R. & Regs. 0080-04-09-.02(3), (5) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3), (5) (2011).

⁴⁷⁸ See Tenn. Comp. R. & Regs. 0080-04-09-.02(5)(c) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(5)(k) (2011).

⁴⁷⁹ See Tenn. Comp. R. & Regs. 0080-04-09-.02(5)(d) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(5)(i) (2011).

⁴⁸⁰ See Tenn. Comp. R. & Regs. 0080-04-09-.02(4)(b) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(4) (2011).

⁴⁸¹ *Id.*

Suggestion: Eliminate this entire provision, as it is redundant with Tennessee state law, which adequately addresses sanitizing facilities and utensils.

Comments: Both TDA and TDH have more detailed provisions addressing the storage of potentially hazardous food, for both hot and cold storage, for RFSs and FSEs.⁴⁸² Thus because the Memphis Code provision is unnecessary and redundant, it **should be eliminated**.

Alternatively, if not entirely eliminated, the provision requires at a minimum, updating as indicated above so that it reflects current state requirements. First, Tennessee state regulations require that for refrigerated storage, potentially hazardous foods should be rapidly cooled to an internal temperature of at least forty-one degrees Fahrenheit,⁴⁸³ and SCHD must follow the more stringent state requirement. Second, the Memphis provision currently only requires that the hot storage items be stored in equipment that is controlled by a thermostat, with no specifications as to that thermostat. The provision should be amended so that both hot storage and cold storage items are required to be in equipment controlled by a thermometer that is accurate to a specific degree (+/- 3 degrees Fahrenheit).⁴⁸⁴ These amendments would bring the equipment storage requirements up to date with current state regulations. Finally, the Memphis Code does not contain any requirements with respect to frozen food. State regulations require that frozen food be stored at or below a temperature of zero degrees Fahrenheit,⁴⁸⁵ and the Memphis Code should contain the same specification.

Section 9-52-56 - Coffee creamers and refrigerated cream dispensers.

Individual coffee creamers with approved tops or lids and/or automatic or manually operated refrigerated cream dispensers dispensing portioned servings and operated only by food service personnel shall be utilized in food service establishments.

(Code 1985 § 16-233; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-59)

Suggestion: Eliminate this provision, as it is redundant with state regulations.

Comments: This provision is unnecessary as state regulations sufficiently address the dispensing of creamers in FSEs, and therefore this provision **should be eliminated**. TDH regulations contain a provision that requires creamers to be distributed through individual service containers, a protected pour pitcher, or taken from a specifically designed refrigerated dispenser.⁴⁸⁶ Accordingly, because state regulations sufficiently address the regulation of creamers, this provision in the Memphis Code is superfluous.

Section 9-52-57 - Presetting of tables.

The presetting of tables in a food service establishment with china, silver, glassware, etc., is forbidden except when a reasonable time between the setting of the table or tables and the serving of food and drink is maintained is allowed so long as all unprotected, unused, preset tableware is washed and sanitized after every meal period and

⁴⁸² See Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(b), (c) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b), (c) (2011).

⁴⁸³ Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(b)(2) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b)(2) (2011).

⁴⁸⁴ Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(b)(1), (c)(1) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b)(1), (c)(1) (2011).

⁴⁸⁵ Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(b)(3) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b)(3) (2011).

⁴⁸⁶ See Tenn. Comp. R. & Regs. 1200-23-01-.02(5)(c) (2011).

~~after any place at a table is occupied. Tables shall not be set in an open air dining room until the customer has been seated.~~
(Code 1985 § 16-234; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-60)

Suggestion: Eliminate this entire provision, as it is unduly restrictive. Alternatively, the provision should be amended to clearly allow controlled presetting.

Comments: TDH regulations allow an FSE to preset tables if adequate cleaning of unprotected, unused tableware is practiced after each meal period and after each time the table is occupied.⁴⁸⁷ The state regulations that allow FSEs to preset are both more efficient (in enabling presetting) and more transparent (in setting out exact requirements if a FSE does engage in presetting). The Memphis Code provision, on the other hand, mandates a default of no presetting of tables, which may be less efficient for FSEs and also gives no clear guideline as to what a “reasonable time” is. In fact, stakeholders have highlighted this regulatory imprecision as problematic because it is interpreted differently by health inspectors, with some inspectors allowing presetting and some not, causing confusion and frustration.⁴⁸⁸ If the provision is not eliminated, then it should be amended so as to clearly allow presetting of tables in defined situations. It should also be amended so that it is clear that the provision is only applicable to FSEs, and not relevant for RFSs.

Section 9-52-58 -Transportation of food to or from food establishments.

- A. All perishable food products requiring refrigeration, including meat products, eggs, bakery items, etc. shall be transported from the point of origin and/or processing plant to the food service establishment or retail food store from which such food products are sold or offered for sale, in refrigerated vehicles.
- B. The requirements for storage, display, and general protection against contamination, as contained in this division, shall apply in the transporting of food from a food service establishment to another location for service or catering operations, and all potentially hazardous food shall be kept at ~~forty five (45)~~ forty-one (41) degrees Fahrenheit or below, or one hundred forty (140) degree Fahrenheit or above, during transportation. During the transportation of food from a food service establishment or retail food store, all food shall be in covered dustproof containers or completely wrapped or packaged so as to be protected from contamination.

(Code 1985 § 16-235; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-61)

Suggestion: Eliminate this entire provision, as it is redundant with Tennessee state law. Alternatively, the provision should be amended to align with existing state regulations.

Comments: Both TDA and TDH have detailed provisions that sufficiently address requirements surrounding the transportation of food for RFSs and FSEs, and therefore this provision **can be eliminated**.⁴⁸⁹ For example, state regulations require that food can only be transported in covered

⁴⁸⁷ See Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(g)(4) (2011).

⁴⁸⁸ Interview with Restaurant Owner, Memphis, Tenn. (Jan. 11, 2011).

⁴⁸⁹ See Tenn. Comp. R. & Regs. 0080-04-09-.02(6) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(6) (2011).

containers or while completely wrapped, with certain exceptions. The regulations also impose applicable food protection and food storage requirements on food items while such food is in transit.⁴⁹⁰ Thus, the Memphis Code is unnecessary as state regulations are sufficient. Alternatively, if the provision is not eliminated, it should be amended so that its temperature requirements are not in conflict with the state regulations. Specifically, the maximum temperature allowed for cold storage should be amended to forty-one,⁴⁹¹ from forty-five, degrees Fahrenheit.

Section 9-52-59 - Use and storage of poisonous and toxic materials.

Only such poisonous and toxic materials as are required to maintain sanitary conditions may be used or stored in food service establishments and in retail food stores. All containers of poisonous and toxic materials shall be prominently and distinctively marked or labeled for easy identification as to contents. When not in use, poisonous and toxic compounds shall be stored in cabinets which are used for no other purpose, or in a place which is outside the food storage, food preparation, food service, and cleaned equipment and utensil storage areas. Poisonous materials shall not be used in any way as to contaminate food, equipment, or utensils or to constitute other hazards to employees or patrons.

(Code 1985 § 16-236; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-62)

Suggestion: Eliminate this entire provision, as it is redundant with and less specific than Tennessee state law.

Comments: Both TDA and TDH have much more detailed provisions that regulate the use and storage of poisonous or toxic materials for RFSs and FSEs.⁴⁹² For example, state regulations specify two different categories of poisonous or toxic materials and require that each of the two categories be stored in physically separate locations. The state regulations also require that these items be stored in cabinets that are used for no other purpose or that are located outside of any area involving food, and they specifically prohibit the storage of these items above any food, food equipment, utensils, or single-service articles. The Memphis Code contains no such provision. Thus, the Memphis Code is redundant and misleading, since the more stringent state requirements govern.

Article 3: Requirements for Specific Types of Establishments and Hucksters

Sec. 9-52-60 - Application of article

The provisions of this article shall apply to the specific food establishments and ~~hucksters~~ mobile produce vendors named herein and shall be additions to and/or deletions from other requirements of this chapter.

(Code 1985 § 16-246; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-67)

⁴⁹⁰ *Id.*

⁴⁹¹ See Tenn. Comp. R. & Regs. 0080-04-09-.02(3)(b)(2) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b)(2) (2011).

⁴⁹² See Tenn. Comp. R. & Regs. 0080-04-09-.07(7)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(g) (2011).

Suggestion: Replace the word “huckster” with “mobile produce vendor” or “produce trucks” or something to that effect.

Comment: Many of our contacts in the Memphis area felt that “huckster” was a derogatory term.⁴⁹³

Sec. 9-52-61 - Lounges and bars

In lounges and bars, a three-compartment sink or equivalent shall be provided for washing, rinsing and sanitizing of glasses and other bar utensils in the bar area. A lavatory shall be installed in the bar area for personnel to wash their hands. A floor drain shall be installed and connected to the sanitary sewer in new construction. (Code 1985 § 16-247; Ord. 3228 § 1(20), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-68)

Suggestion: Eliminate this provision, as it is redundant with and less specific than state law and is outdated with regard to technology for sinks or cleaning equipment.

Comment: Lounges and bars are FSEs, and TDH adequately and more specifically addresses the manual cleaning and sanitizing of utensils and equipment for FSEs than the Memphis Code does.⁴⁹⁴ As mentioned earlier, state regulations impose more stringent requirements on dishwashing than the Memphis Code.⁴⁹⁵ The additional requirement for a 3-compartment sink here adds nothing, as state law already demands it for an FSE that manually cleans or sanitizes equipment.⁴⁹⁶ Also, as discussed earlier, the Memphis Code is silent on the topic of automatic dishwashers,⁴⁹⁷ while TDH regulations permit the alternative of mechanical dishwashing and imposes detailed standards on such usage.⁴⁹⁸ Thus, food industry entrepreneurs would need to look at state law in order to find out how to properly use mechanical dishwashing.

State law already requires that FSEs must have an accessible and conveniently-located lavatory for employee use in food preparation and utensil washing areas.⁴⁹⁹ It also adequately addresses the need for floor drains, as FSEs must have properly installed, trapped floor drains in “floors that are water-flushed for cleaning or that receive discharges of water or other fluid waste from equipment.”⁵⁰⁰ Additionally, “all sewage, including liquid waste, shall be disposed of by a public sewerage system or by a sewage disposal system constructed and operated according to law.”⁵⁰¹ Thus, this provision is unnecessary and **should be eliminated**, given state law.

Sec. 9-52-62 - Grocery stores—Generally (EDITED)

A sink, with a minimum of three compartments, and a lavatory shall be installed in the meat processing room of grocery stores. ~~There shall be no processing or mixing of food which does not require cooking before consuming in a meat processing or meat cutting area; such as~~

⁴⁹³ Interview with Local Food Stakeholder, Memphis, Tenn. (Jan., 2011).

⁴⁹⁴ Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(c)(1) (2011).

⁴⁹⁵ See Provision-by-Provision Analysis (9-52-38).

⁴⁹⁶ Tenn. Comp. R. & Regs. 1200-23-01-.02(9)(c)(1) (2011).

⁴⁹⁷ See Memphis, Tenn. Code 9-52-38 (MuniCode 2009).

⁴⁹⁸ Tenn. Comp. R. & Regs. 1200-23-01.02(9)(d)(1) (2011); see also “Provision-by-Provision Analysis (9-52-38).

⁴⁹⁹ Tenn. Comp. R. & Regs. 1200-23-01.02(10)(n)(1).

⁵⁰⁰ Tenn. Comp. R. & Regs. 1200-23-01.02(11)(a)(4) (2011).

⁵⁰¹ Tenn. Comp. R. & Regs. 1200-23-01.02(10)(f) (2011).

~~salads, sandwiches, bakery items, slaw, etc.~~ An additional sink, with a minimum of two compartments, shall be installed in the vegetable preparation area of grocery stores. Adequate and conveniently located floor drains shall be installed in such stores, and a lavatory shall be installed in the bakery department if other than wrapped bakery items are displayed and sold. A service sink shall be provided for cleanup purposes.

(Code 1985 § 16-248; Ord. 3228 § 1(21), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-69)

Suggestions: Eliminate this entire provision, as it is largely redundant with state law and imposes some additional restrictions that are not found in state law and are overly restrictive.

Comment: The Memphis Food Code includes grocery stores in its definition of FSEs.⁵⁰² This means that in Memphis and Shelby County, grocery stores are subject not only to the specific regulations laid out in Article 3, but are also subject to all of the requirements of Articles 1 and 2 of the Memphis Food Code, which apply to FSEs. This is unlike state law, which, as mentioned previously, has a separate set of rules and regulations for RFSs and does not apply all FSE rules to them.

Under TDA state regulations, grocery stores are considered RFSs. An RFS is required to have a three-compartment immersion sink if it chooses to manually clean and sanitize equipment and utensils,⁵⁰³ but it may otherwise employ appropriate mechanical cleaning equipment.⁵⁰⁴ In addition, if an RFS lacks appropriate facilities for cleaning and sanitizing utensils and equipment, then it is prohibited from preparing or packaging food or dispensing unpackaged food other than raw fruits and vegetables.⁵⁰⁵ Therefore under TDA rules, a grocery store would not be allowed to have meat processing, vegetable preparation, or a bakery department if it lacked the proper cleaning and sanitizing facilities.

State law does not appear to similarly prohibit food that does not require cooking to be processed in the same area in which meat is processed. First, such a requirement may be unduly restrictive for small grocery stores that may have only a one-room kitchen, and it may discourage them from preparing healthy uncooked foods, such as salads. Second, it is not clear what a “meat cutting area” exactly is, and grocery stores may be uncertain whether they are in compliance with the rule. Third, TDA already requires food to be protected from cross-contamination between foods and from unclean equipment and utensils at all times.⁵⁰⁶ Cross-contamination, as understood by TDA includes the “act or process of rendering unfit or potentially rendering unfit the use of food as a result of the introduction of pathogens, adulteration, or improper handling.”⁵⁰⁷ Therefore, in cases where cross-contamination is a concern, state law would adequately address this problem, as SCHD would be able to enforce this concern in its inspections and in cases where it is not a concern, this requirement would serve no function.

As for lavatories, TDA regulations require hand washing facilities that are conveniently located and accessible to employees in food preparation and warewashing areas. Sinks used for food preparation or

⁵⁰² Memphis Code 9-52-1, “Food Service Establishment” (MuniCode 2009).

⁵⁰³ Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(c) (2011).

⁵⁰⁴ Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(d) (2011).

⁵⁰⁵ Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(f) (2011).

⁵⁰⁶ Tenn. Comp. R. & Regs. 0080-04-09-.02(2)(a)(1) (2011).

⁵⁰⁷ Tenn. Comp. R. & Regs. 0080-04-09-.01(1)(g) (2011).

for warewashing may not be used as hand washing facilities.⁵⁰⁸ State law also adequately addresses the need for floor drains, since RFSs must have properly installed, trapped floor drains in “[f]loors which are water flushed or which receive discharges of water or other fluid wastes or are in areas where pressure spray methods for cleaning are used.”⁵⁰⁹ Therefore, the Memphis Food Code regulation is unnecessary since state law sufficiently addresses any health or safety concern implicated by this section.

Sec. 9-52-63 - Grocery stores—Facilities for cleaning in connection with sale of ice drinks (EDITED)

If a grocery store processes, packages, dispenses or sells food products other than regular grocery items, such as ice drinks, sandwiches, dip ice cream or similar items, the proper facilities shall be provided for cleaning equipment and production of the food as required by this chapter, ~~and proper permit secured.~~

(Code 1985 § 16-249; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-70)

Suggestions: Eliminate this provision, as state law already adequately addresses any concern about the sanitation of processing foods within RFSs.

Comment: An RFS that engages in some food preparation is still regulated by TDA.⁵¹⁰ Under TDA regulations, if an RFS lacks facilities for proper cleaning and sanitizing utensils and equipment, then it is prohibited from preparing or packaging food or dispensing unpackaged food other than raw fruits and vegetables.⁵¹¹ Therefore, a grocery store without cleaning facilities would not be allowed to dispense the items described in this provision. Furthermore, the “proper permit” requirement is confusing and is more restrictive than state law. Under TDA regulations, if an RFS contains a food service establishment, it will have to pay a higher permit fee in accordance with state law.⁵¹² There is not separate permit to be obtained. The Memphis provision does not explain what the permit is and there is no corresponding permit listed in the permit section of the Memphis Food Code in 9-52-3. Thus, this requirement is more restrictive than state law and is likely to stifle economic activity and access to healthy foods in Memphis.

The Memphis regulation is redundant with state law and should be eliminated. If it is not eliminated, the provision should be amended to remove the language requiring a separate permit for a grocery store undertaking these activities.

Sec. 9-52-64 - Candy counters (EDITED)

A lavatory shall be installed in the candy counter area of a food service establishment or retail food store if other than prepackaged candy is displayed and sold.

⁵⁰⁸ Tenn. Comp. R. & Regs. 0080-04-09-.06(5)(a) (2011).

⁵⁰⁹ Tenn. Comp. R. & Regs. 0080-04-09-.07 (2011).

⁵¹⁰ An RFS that contains an FSE-like operation still counts as an RFS. State law provides for a higher permit fee if an RFS contains an FSE that sells potentially hazardous foods, implying the whole establishment still counts as an RFS. See Tenn. Code Ann. § 53-8-214 (2010). However, a comparison of the definitions does not intuitively lead to this conclusion. FSEs explicitly do not include “grocery stores which may, incidentally, make infrequent casual sales of uncooked foods for consumption on the premises.” See Tenn. Comp. R. & Regs. 1200-23-01-.01(1)(16) (2011). The precise specification for “infrequent casual sales of uncooked foods” implies the establishment would otherwise qualify as an FSE; however, the definition of “retail food store” explicitly does not include “food service establishments *not* located within a retail food store” (*italics added*), implying that FSEs located within an RFS count as RFSs rather than FSEs. See Tenn. Comp. R. & Regs. 0080-04-09-.01(1)(x) (2011). See also interview with Ron Murphy, Tennessee Department of Agriculture, by phone (July 28, 2011).

⁵¹¹ Tenn. Comp. R. & Regs. 0080-04-09-.05(1)(f) (2011).

⁵¹² Tenn. Code Ann. § 53-8-214 (2010).

(Code 1985 § 16-250; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-71)

Suggestions: Eliminate this entire provision, as it is redundant with and less specific than state law.

Comment: TDA and TDH regulations already require that hand washing facilities be conveniently located and accessible to employees in food preparation areas.⁵¹³ Whatever a “candy counter area” may be, there can be no value in separately requiring that hand washing facilities be installed in a “candy counter area,” when state law already requires that an adequate number of hand washing facilities be available for employee use in all food preparation areas.⁵¹⁴ Furthermore, the regulations impose more stringent requirements on these hand washing facilities. For example, the state regulations specify where lavatory facilities should be located, that the same sink may not be used for hand washing and food preparation or washing equipment or utensils, and the specific type of faucet that must be installed.⁵¹⁵ Because local regulations are only valid if they are at least as stringent as state regulations, the Memphis code is misleading and should be eliminated. For more detailed information regarding the requirements for hand washing facilities, see the Comment accompanying “Section 9-52-50”.⁵¹⁶

Sec. 9-52-65 - Food processing plant (EDITED)

A food processing plant shall meet all of the applicable requirements of this title and shall also meet the following special requirements:

- ~~A. A food processing plant and all of the activities thereof shall be separate from a restaurant or other retail establishment.~~
- B. All necessary equipment and facilities for the manufacture, cooking, mixing, preparation and packaging of processed foods shall be provided and utilized so as to protect the food from contamination and to produce a food product which meets the physical and bacteriological guidelines set by the health officer.
- C. Packages shall be of a design and material so as to protect the contents from contamination.
- D. Processed food shall be labeled so as to inform the consumer of the contents, manufacturer's name and address, ~~and in the case of highly perishable foods, the date of manufacture.~~

(Code 1985 § 16-251; Ord. 3228 § 1(22), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-72)

Suggestions: Eliminate this provision, since TDA adequately regulates these entities and because it is unduly restrictive.

Comment: TDA contracts with SCHD only to inspect RFSs. Other entities that fall under TDA’s purview, such as food processing/manufacturing plants are inspected by *both* TDA and SCHD. TDA inspects food processing plants (FPPs) according to the general Good Manufacturing Practices (GMPs) established by

⁵¹³ Tenn. Comp. R. & Regs. 0080-04-09-.06(5)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(n) (2011).

⁵¹⁴ See Tenn. Comp. R. & Regs. 0080-04-09-.06(5)(a) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(n) (2011).

⁵¹⁵ *Id.*

⁵¹⁶ Provision-by-Provision Analysis (9-52-50).

the Food and Drug Administration.⁵¹⁷ Thus, FPPs are inspected by both TDA and SCHD using different rules and regulations, which results in a duplication of resources (in areas where TDA and Memphis Food Code regulations overlap) and a substantial burden for businesses attempting to comply with both sets of regulations, especially where the state and local regulations differ or conflict. Moreover, FDA updated its GMPs in 2004,⁵¹⁸ rendering the Memphis Food Code's food processing regulations outdated by a minimum of 20 years. Therefore, SCHD should **eliminate provisions such as these that regulate food processing/manufacturing** and should cede authority over food processing plants to TDA. Alternatively, SCHD could seek to contract with TDA to inspect FPPs, similar to its contract regarding RFSs. In this case, we would still recommend elimination of the Memphis Food Code provisions relating to FPPs, as they are not the same those applied under state law, which leads to confusion among food industry entrepreneurs and stifling of economic activity.

Even if SCHD continues to regulate OFEs, this particular provision should be eliminated for the following reasons.

Part A: This subsection **should be eliminated**. If a restaurant must have entirely separate facilities for processing food and for preparing food to serve in the restaurant, this creates a large burden on business owners in Memphis and throughout Shelby County. Many business owners that we spoke with named this as one of their biggest hurdles and sources of foregone revenue, since they are unable to offer consumers prepackaged versions of their products to enjoy at home unless the business has a separate kitchen solely dedicated to food processing.⁵¹⁹

If the restaurant's food service kitchen meets the applicable state requirements to operate as an FSE, that kitchen should also be suitable to prepare food for retail sale. Right now, some businesses are forced to contract with a dedicated food processing company to process and distribute their branded products, which introduces an unnecessary middleman and cuts into their profits. Small businesses that would like to offer their food for retail may not have the financial resources to outsource. As long as the business's kitchen can meet TDA's requirements for a food processing plant, it is an unnecessary burden to require the business to construct another kitchen or outsource their food processing operations.⁵²⁰

Furthermore, in looking at comparable cities, no other city requires a completely separate kitchen for food processing that is separate from an approved commercial kitchen used in a restaurant. In cities across the country, restaurant owners are allowed to produce food for retail sale within their restaurant kitchens. In many cities, the restaurant kitchen is required to get separate permits for its restaurant activity and its food processing activity, but these activities are generally allowed. For example, in Atlanta, the kitchen must undergo separate inspections to receive a permit for each operation, but there is no prohibition against operating both from the same location.⁵²¹ None of the other cities researched for this project explicitly prohibit food processing operations from being conducted in the same kitchen as the restaurant kitchen. Thus, this subsection should be eliminated.

⁵¹⁷ 21 C.F.R. § 110 (2011); Tenn. Comp. R. & Regs. 0080-04-10.01 (2011).

⁵¹⁸ See US Food and Drug Administration, "Good Manufacturing Practices (GMPs) for the 21st Century - Food Processing," Aug 9, 2004, <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/CurrentGoodManufacturingPracticesCGMPs/ucm110877.htm>. (last visited July 25, 2011).

⁵¹⁹ Interview with Restaurant Owner, Memphis, Tenn. (Mar. 16, 2011).

⁵²⁰ See Tenn. Comp. R. & Regs. 0080-04-10.01 (2011); 21 C.F.R. § 110 (2011).

⁵²¹ Interview with Natalie Adan, Georgia Department of Agriculture, Consumer Protection Division, Food Processing Manager, by phone (June 21, 2011).

Part B: The Food and Drug Administration has established general GMPs for food products.⁵²² TDA inspects food processing establishments according to these GMPs.⁵²³ These guidelines are up-to-date and are based on the best evidence available to the FDA, thus, these should be used, rather than “the physical and bacteriological guidelines set by the health officer,” as referenced in this provision. Guidelines set by the health officer are not written down and thus are not useful guidance for new and established business owners. Moreover, we have heard from multiple stakeholders that different health officers apply different standards in their inspections when issues are left up to the health officer’s discretion.⁵²⁴ Because of the confusion created by lack of uniformity and the potential for abuse of discretion, SCHD should only inspect food processing plants according to FDA’s uniform GMPs. Therefore, this provision should be eliminated.

Part C: Again, TDA inspects food processing establishments according to the GMPs established by the FDA.⁵²⁵ The GMPs are far more detailed and comprehensive regarding packaging of food items than this basic requirement that the package be of a design and material to prevent contamination. Therefore, this provision is entirely unnecessary and should be eliminated.

Part D: Tennessee has adopted the Food, Drug and Cosmetics Act, which contains provisions that cover food labeling.⁵²⁶ The Act requires food labels to contain the name and location of the manufacturer.⁵²⁷ This makes the first part of the section redundant and therefore unnecessary. The second part of the Memphis provision requires the labels of “highly-perishable” foods to contain the date the food was manufactured. The Memphis provision does not define which foods qualify as “highly perishable” and creates unnecessary ambiguity. Also, hiding the provision within an otherwise redundant provision makes the provision difficult for food processors to follow. Tennessee state law does not impose this restriction. Memphis should repeal this requirement and follow state law. Furthermore, if a food is involved in interstate commerce, it must provide this information, as per FDA labeling requirements.⁵²⁸ A product is involved in interstate commerce when any part of the product (e.g., an ingredient, container and package) or any part of the product’s marketing (e.g., warehousing, distribution and sale) crosses a state line.⁵²⁹ It is highly likely that the food processing plant’s products will be involved in interstate commerce; therefore the Memphis Food Code regulation is superfluous. For products that will not be involved in interstate commerce, the Food Code regulation is overly restrictive. Therefore, this provision should be eliminated.

Sec. 9-52-66 - Caterers generally (EDITED)

A food caterer shall meet all of the applicable requirements of this chapter and shall also meet the following special requirements:

- A. Food distributed or served by a caterer shall be prepared in a food processing plant; provided that, a caterer's permit may be issued to

⁵²² 21 CFR § 110 (2011).

⁵²³ Tenn. Comp. R. & Regs. 0080-04-10.01 (2011).

⁵²⁴ Interview with Restaurant Owner, Memphis, Tenn. (Jan. 11, 2011); Interview with Farmers Market Stakeholders, Memphis, Tenn. (Jan. 13, 2011); Interview with Farm Manager, Memphis, Tenn. (Mar. 16, 2011).

⁵²⁵ 21 C.F.R. 110 (2011); Tenn. Comp. R. & Regs. 0080-04-10.01 (2011).

⁵²⁶ Tenn. Code Ann. § 53-1-105 (West 2011).

⁵²⁷ Tenn. Code Ann. § 53-1-105(5)(a) (West 2011).

⁵²⁸ 21 C.F.R. 101.2(b),(d) (2011).

⁵²⁹ Anne Dalton et al., “Adding Value to Tennessee Agriculture Through Commercial Food-Processing Enterprises 12 (2002)”, <http://www.wcmorris.com/gmp/files/pb1710.pdf> (last visited Apr. 29, 2011).

a restaurant which has adequate facilities and the catering activities will not interfere with the normal operation of the restaurant.

- B. Vehicles used for transportation of food shall be checked by the health officer to see if they are suitable, before they are used. Vehicles must be labeled on both sides with the name and address of the owner.
- C. Food shall be transported in containers which will keep the food above one hundred forty (140) degrees Fahrenheit or below ~~forty-five (45)~~ forty-one (41) degrees Fahrenheit and have been approved by the health officer.
- D. If hand-washing facilities are not available at the place where the food is to be served, the caterer shall provide such facilities for his or her employees.
- E. The caterer shall dispense food to consumers only in a place where the food can be protected from contamination.
(Code 1985 § 16-252; Ord. 3228 § 1(23), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-73)

Suggestions: This provision **should be eliminated**, as it is largely superfluous, restating TDH requirements for caterers.

Comment:

Part A: Caterers are considered FSEs by TDH regulations unless the catering business employs no regular full-time employees, the food preparation is performed solely within the caterer's residence, and the business makes only occasional sales during a 30-day period, in which case they are not regulated by TDH.⁵³⁰ If SCHD finds it to be an essential entity to regulate, it could step in to regulate the small caterers that are not covered as FSEs under state law; however, they seem to be very low-risk and not habitual caterers. Similarly, mention of the separate "caterer's permit" is confusing. Since SCHD inspects FSEs on behalf of TDH, it must provide the permits for FSEs as authorized under state law. SCHD cannot collect any additional local permits for FSEs; therefore, this permit is invalid for at least most caterers.⁵³¹ This provision also provides unclear guidance as to the situations in which a restaurant kitchen may be used for catering. The provisions note that a restaurant kitchen may be used for catering if the facilities are "adequate" and the catering "will not interfere" with the "normal" operation of the restaurant. This language is difficult for food industry entrepreneurs to follow and thus stifles economic activity. Since caterers are already adequately regulated by TDH, the Food Code's ordinances only serve to confuse business owners, this provision should either be clarified or eliminated.

Part B: All food, including food that will be transported, must meet applicable TDH safety standards.⁵³² Thus, besides being unnecessary, this provision is vague and does not offer guidance to food industry entrepreneurs, as it says merely that the transportation must be "suitable," but fails to define the

⁵³⁰ Tenn. Comp. R. & Regs. 1200-23-01-.01(17) (2011).

⁵³¹ Tenn. Code Ann. § 68-14-303(7)(H) (1985).

⁵³² Tenn. Comp. R. & Regs. 1200-23-01-.02(2)-(3) (2011).

suitability criteria under which the vehicle will be judged. If the provision is not eliminated, the suitability criteria should at least be explicitly stated.

Part C: All food, including food that will be transported, must meet applicable TDH safety standards.⁵³³ With respect to food temperatures, the Memphis Food Code specification for the maximum temperature for cold foods is outdated. Current TDH regulations require food to be kept at below 41 degrees (as compared to 45 degrees under the Food Code).⁵³⁴ Since TDH standard is the one that SCHD must enforce, this provision should be eliminated.

Part D: Under TDH regulations, employees are to wash their hands and arms during stated intervals,⁵³⁵ and lavatories must be provided for convenient use by employees.⁵³⁶ Since caterers must comply with TDH regulations for FSEs, which would require them to provide hand washing facilities for employees, this ordinance is superfluous and should be eliminated.

Part E: TDH requires that food be protected from potential contamination at all times, including during service and transportation.⁵³⁷ Therefore, this provision is redundant and should be eliminated.

Sec. 9-52-67 - Industrial caterers (EDITED)

Industrial caterers shall meet all the applicable requirements of this chapter and shall also meet the following special requirements:

- A. Bulk food shall be dispensed only from buildings where toilets and hand-washing facilities are available and any additional facilities deemed necessary by the health officer.
- B. Food shall be dispensed only from premises which have been checked and found suitable by the health officer in accordance with standards set in this chapter.
- C. Perishable food shall be transported, stored and served only in containers and equipment which is designed and thermostatically controlled to keep the food above one hundred forty (140) degrees Fahrenheit or below ~~forty-five (45)~~ forty-one (41) degrees Fahrenheit.
- D. An industrial caterer shall dispense only food which has been processed at a food processing plant.
- E. Industrial catering trucks shall be based at or operated from a premises in an area other than residential where storage facilities are available for food producers and where cleaning facilities are available.

⁵³³ Tenn. Comp. R. & Regs. 1200-23-01-.02(2)-(3) (2011).

⁵³⁴ Tenn. Comp. R. & Regs. 1200-23-01-.02(2)(b)(1) (2011). Note that the regulations do allow for food service establishments to keep food below 45 degrees if the equipment is already in place, but only if the equipment will be updated within 5 years of the effective date of the rules. The rules became effective in 1987, so that grace period has passed. Tenn. Comp. R. & Regs. 1200-23-01-.02(2)(b)(2) (2011).

⁵³⁵ Tenn. Comp. R. & Regs. 1200-23-1.02(7)(c) (2011).

⁵³⁶ Tenn. Comp. R. & Regs. 1200-23-1.02(10)(n) (2011).

⁵³⁷ Tenn. Comp. R. & Regs. 1200-23-1.02(2)(a) (2011).

F. Industrial catering stands shall be operated and supplied by food processors or industrial caterers.

G. Toilet facilities provided by the shopping center or pedestrian mall and made accessible to the operator and the public shall be deemed in compliance with Section 9-52-49.

H. No patrons of the industrial catering stand shall be permitted to come within the confines of the stand.

I. Hand-washing facilities shall be provided for the operator of the stand within the confines of the stand.

(Code 1985 § 16-253; Ord. 3228 § 1(24), 8-3-82; Ord. 2713 § 1, 4-25-78; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-74)

Suggestions: Eliminate this entire provision, as it is unnecessarily confusing and it is unclear how it matches up with state law.

Comment: The relevant Tennessee statutes and regulations do not define the term “industrial caterer.” The Code defines “industrial catering” as the “transporting, serving, dispensing or offering for sale of food products on a routine daily basis which have been manufactured and prepared in a food processing plant . . . to schools, industrial plants and premises where a contract is entered into by two or more parties for food service.”⁵³⁸ This provision highlights a glaring problem of misaligned definitions, since, under state law, an industrial caterer as defined here can count as a mobile food unit, a supply vehicle, an FSE or RFS, or a food processing establishment, based on the situation. As argued throughout this Provision-by-Provision analysis, state law already adequately addresses the various health and safety concerns pertinent to each of these entities. Because state law is sufficiently comprehensive, and because of the extreme difficulty comparing state law with a provision that uses a misaligned definition, this provision should be eliminated.

Alternatively, this provision should be amended to clarify which entities under state law fall under these requirements. As mentioned, the Code should utilize state definitions for ease of comparison with state law, and this provision should then be amended to highlight any particular requirement it wishes and is able to keep. Otherwise, it is too difficult for a relevant business to compare the two sets of laws and understand where it falls. The language of the current Food Code regulations makes it difficult for industrial caterers to know which set of regulations they are subject to, thus stifling economic activity. Therefore, this provision **should be eliminated**.

In addition, the provision should at the very least be amended to reflect the proper temperature for storage of cold foods. State regulations require cold foods to be stored below forty-one degrees Fahrenheit, not below forty-five degrees.⁵³⁹ Since the state regulations are more stringent, this provision should be eliminated.

Sec. 9-52-68 - Salvage foods establishment.

⁵³⁸ Memphis, Tenn. Code 9-52-1 “Industrial catering” (MuniCode 2009).

⁵³⁹ Tenn. Comp. R. & Regs. 1200-23-01-.02(2)(b) (2011); See comment, *supra*, note 521.

A salvage foods establishment shall meet all of the applicable requirements for this title and shall also meet the following special requirements:

- A. No person shall engage in the sale, warehousing or storage of any salvage foods and/or salvage food products without first receiving a permit from the health department.
- B. A lavatory with hot and cold running water, soap and individual towels or hand drying devices shall be installed in the salvage operation area.
- C. Toilet facilities shall be installed for the employees, male and female, if a retail establishment.
- D. A food salvager, be it retail or wholesale, shall install a three-compartment sink, with hot and cold running water, in the salvage operation area and such sink shall be utilized for the proper washing, rinsing and sanitizing of applicable salvage food products.
- E. All vehicles used in the transportation of salvage goods shall be kept clean and free from rodents, insects, accumulation of dirt, spillage, etc.
- F. All salvage goods sold or offered for sale shall be properly labeled; provided, however, that government surplus commodities in the original containers which are labeled on the outside of the case may be acceptable.
- G. All salvage foods such as flour, sugar, meal or any other food or food products which have been burst, torn, spilled, or damaged in any way, and swellers and leakers, shall not be resacked, refilled, or sold or offered for sale for human consumption and such salvage food products shall be stamped or labeled "NOT FOR HUMAN CONSUMPTION."
- H. Salvage operations shall be performed in buildings and structures and with facilities, equipment and procedures which meet the requirements of this title and chapter and/or as directed by the health officer. The food salvager shall be responsible for compliance with this title.
- I. Items which cannot be salvaged must be denatured and disposed of in a manner approved by the health officer.
- J. No merchandise will be moved intrastate without prior approval of the health officer. No interstate movement of goods will be made without the prior approval of the health officer, and the food and drug control agency in the state receiving the merchandise, and the federal Food and Drug Administration.

K. The permit holder will immediately notify the health officer of any salvage operation which is anticipated. Notification will be made prior to the beginning of any salvage operation.

(Code 1985 § 16-254; Ord. 3228 § 1(25), 8-3-82; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-75)

Suggestions: Eliminate this entire provision, as it is unnecessarily confusing and it is unclear how it matches up with state law.

Comment: State law does not define the terms “food salvage distributor” or “food salvager.” Under the Code, a “food salvage distributor” is someone who distributes or sells damaged or contaminated food that has been reconditioned by a food salvager.⁵⁴⁰ A “food salvager” is one who salvages and “sells, offers for sale, or distributes . . . [any] food product . . . that has been damaged or contaminated . . .”⁵⁴¹ Because the list of “food products” includes food, cosmetics, napkins, drugs, and soda straws, a food salvager can fall under a number of state definitions. A food salvager may operate a food salvage establishment but cannot recondition the food in a display or retail sales area.⁵⁴²

Similar to other provisions in the Memphis Code, this provision highlights a glaring problem of misaligned definitions, since, under state law, a food salvager or food salvage distributor as defined here can count as an RFS or a food processing establishment, based on the situation. As argued throughout this Provision-by-Provision analysis, state law already adequately addresses the various health and safety concerns pertinent to each of these entities. Because state law is sufficiently comprehensive, and because of the extreme difficulty comparing state law with a provision that uses a misaligned definition, this provision should be eliminated.

Alternatively, this provision should be amended to clarify which entities defined under state law fall under these requirements. As mentioned, the Code should utilize state definitions for ease of comparison with state law, and this provision should then be amended to highlight any particular requirement it wishes and is able to keep. Otherwise, it is too difficult for a relevant business to compare the two sets of laws and understand where it falls. The language of the current Food Code regulations makes it difficult for food salvagers or food salvage distributors to know which set of regulations they are subject to, thus stifling economic activity. Therefore, this provision **should be eliminated**.

Sec. 9-52-69 - Open air cafe.

An open air cafe shall meet all of the requirements of this code except that certain exceptions as listed in this section may be made. These exceptions, and certain special requirements for open air cafes are as follows:

- A. An outside dining area may be provided where food and drink may be served by restaurant employees to patrons.
- B. A permanent type kitchen and/or food preparation area shall be provided which meets all the requirements of this code.

⁵⁴⁰ Memphis, Tenn. Code 9-52-1, “Food salvage distributor” (MuniCode 2009).

⁵⁴¹ Memphis, Tenn. Code 9-52-1, “Food salvager” (MuniCode 2009).

⁵⁴² Memphis, Tenn. Code 9-52-1, “Food salvage distributor” (MuniCode 2009).

- ~~C. A permanent type dining room shall be provided where plate lunches or dinners are served or where exposed food is served; however, the serving of this type food shall not be limited to the permanent dining room.~~
- D. Section 9-52-29 (floors, walls and ceilings) will not apply to an open air dining area; however, the following special provisions shall be required:
1. The open air dining area shall be provided with a hard-surface floor which can be easily cleaned and kept in good repair. If drains are required the floors shall be drained to the sanitary sewer or the storm sewer in a manner as required by the city plumbing code and the office of city engineer and copies of the physical plan filed with both the plumbing department and the city engineer's office.
 2. ~~If walls are present, they shall be of a cleanable material and shall be kept clean and in good repair.~~
 3. If a cover or ceiling is to be provided, it must be easily cleanable, kept clean, and in good repair.
- E. Section 9-52-30 (doors and screens) will not apply to an open air dining area; however, dust, flies and insects shall be controlled at all times. An open air cafe shall not be permitted in an area where the food and the patrons cannot be reasonably protected from dust and insects. This section shall not be construed to impose any greater requirements for insect and rodent control than provided by state law.
- F. Section 9-52-49 (toilet facilities) will apply to an open air dining area. Existing toilet facilities in a restaurant shall be acceptable providing they are adequate and conveniently located.
- ~~G. Windows that open and close may be open in a permanent type dining room, in which case the restaurant would then become an open air cafe, and it would be required to comply with the same conditions.~~
- H. All of the operations of an open air cafe, except parking, shall be conducted on private property or on property which has been leased from an agency of the city for a specific purpose.
- ~~I. If an open air cafe is altered so that the dining area becomes a permanent year round dining room, then the dining room must meet all of the requirements of this code for a permanent dining area.~~
- J. No food shall be prepared in open dining areas; however, the mixing and serving of drinks will be permissible provided all necessary sanitary conditions are observed as would otherwise be required.

K. Nothing in this section shall delete, supersede or override any section applicable to air pollution under Chapter 9-12 or Chapter 9-68, Noise.

(Code 1985 § 16-255; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-76)

Suggestions: Eliminate this provision, since it is largely redundant with state law. Alternatively, amend this provision to clarify its requirements and to avoid being unduly restrictive.

Comment: Similar to the Memphis Food Code, TDH regulations impose the general requirements for FSEs on open air cafes, subject to specified exceptions and special requirements.⁵⁴³

Part A: To avoid confusion, eliminate this section or amend it to clarify that an outside dining room “may” be provided. This would align it with state law.⁵⁴⁴

Part B: State law already requires that an open air café have a permanent kitchen or food preparation area that meets state requirements.⁵⁴⁵ Thus, this provision is unnecessary and can be eliminated.

Part C: This provision appears to require that the location cannot be a stand-alone open air café and must also have a permanent dining room, which seems to imply that it also must include indoor dining. According to the Memphis Code definition, an “open-air café” must have indoor seating.⁵⁴⁶ State law does not define “open-air café,” nor does it require indoor seating. If a proprietor wishes to open an open-air only café with a permanent kitchen, it is unclear why they should not be able to do so. No apparent health or safety rationale can justify creating this confusing, double standard compared to the rest of the state. Therefore, this provision should be eliminated.

Part D: This section is redundant with state law. State law already makes an exception for open-air cafes to the rules regarding floors, walls, and ceiling, and it similarly specifies that floors be “of a hard surface, shall be easily cleanable, kept clean and in good repair, and, if drains are provided, the floor shall be graded to drain.”⁵⁴⁷ It also specifies that both walls and ceilings, “if any, shall be constructed of an easily cleanable material and shall be kept clean and in good repair.”⁵⁴⁸

Part E: State law makes an exception to the regulations regarding insect and rodent control in Rule 1200-23-1-.02(10)(p) to the outdoor area of an open-air cafe.⁵⁴⁹ If this section truly requires that flies be “controlled at all times,” this provision creates an unduly restrictive and perhaps unrealistic requirement on any open-air cafes that do not have screens or netting, putting these businesses at a disadvantage from the rest of the state. If not eliminated, this section should be amended to clarify that it does not impose more stringent requirements than that of state law.

⁵⁴³ Tenn. Comp. R. & Regs. 1200-23-01-.02(14) (2011).

⁵⁴⁴ See Tenn. Comp. R. & Regs. 1200-23-01-.02(14)(a)(1) (2011).

⁵⁴⁵ Tenn. Comp. R. & Regs. 1200-23-01-.02(14)(a)(2) (2011).

⁵⁴⁶ See Memphis, Tenn. Code 9-52-1 “Open-air café” (MuniCode 2009) (defining an “open-air café” as a permanent-type restaurant, which has an outside dining area at the same location, in conjunction with the restaurant with indoor seating).

⁵⁴⁷ Tenn. Comp. R. & Regs. 1200-23-01-.02(14)(a)(3) (2011).

⁵⁴⁸ Tenn. Comp. R. & Regs. 1200-23-01-.02(14)(a)(3) (2011).

⁵⁴⁹ Tenn. Comp. R. & Regs. 1200-23-1-.02(14)(a)(4) (2011).

Part F: This section is essentially redundant with state law, since state law provides that open-air cafes are subject to all requirements besides the specified exceptions, and the requirement for toilet facilities is not listed among the exceptions.⁵⁵⁰ Therefore, this section may be eliminated.

Part G: According to state law, the interior of a permanent dining room must always be protected by “tight-fitting, self-closing doors, closed windows, screening, controlled air currents, or other means.”⁵⁵¹ Although state law makes an exception to this rule for open air cafés,⁵⁵² the state code does not similarly note that suddenly the establishment becomes an open air café once the windows are opened and thereby subject to the exception. If not eliminated, this section should be amended to clarify that if the windows are opened, the inside must be protected by “other means,” in accordance with state law.

Part H: No comment.

Part I: This provision is unnecessary and confusing, and thus should be eliminated.

Part J: Again, this provision echoes a general ban in SCHD regulations on food being prepared in an outdoor area. State regulations already prohibit food preparation in an outdoor dining area, while providing an exception for mixing drinks.⁵⁵³ Therefore, the provision is redundant with state law and should be removed to clean the Food Code of unnecessary provisions.

Part K: No comment.

Sec. 9-52-70 - ~~Hucksters~~ Mobile Produce Vendors - Generally.

A ~~huckster~~ mobile produce vendor shall meet all of the applicable requirements of this chapter and shall also meet the following special requirements:

- A. No person shall engage in the business as a ~~huckster~~ mobile produce vendor without first having obtained a permit from the health department and having paid the appropriate fee as required in Sections 9-52-3 and 9-52-5 of this code.
- B. A written application must be made at the health department by the person requesting the permit.
- C. ~~Huckster~~ Mobile produce vendor permits shall be issued for fruits, vegetables, melons, berries, chestnuts and packaged nuts only, and no other types of food shall be sold from the huckster's vehicle.
- D. A ~~huckster's~~ mobile produce vendor's permit may be suspended or revoked for violating the applicable provisions of this chapter as required in Section 9-52-7.

⁵⁵⁰ Tenn. Comp. R. & Regs. 1200-23-01-.02(14)(a) (2011).

⁵⁵¹ Tenn. Comp. R. & Regs. 1200-23-01-.02(10)(p)(3) (2011).

⁵⁵² Tenn. Comp. R. & Regs. 1200-23-01-.02(14)(a)(4) (2011).

⁵⁵³ See Tenn. Comp. R. & Regs. 1200-23-01-.02(14) (2011) (noting that open dining areas are exempt from FSE requirements regarding walls and floors but not including the kitchen area in this exemption).

- E. A ~~huckster's~~ mobile produce vendor's vehicle shall be identified on both sides by the name and address of the person holding the permit and by the health department permit number. Letters shall be at least two inches high and shall be legible.
- ~~F. A huckster's vehicle shall be kept in motion except when making sales, and its movement shall be timed and executed so as to cause a minimum interference with traffic.~~
- G. When not in use, a ~~huckster's~~ mobile produce vendor's vehicle which contains fruits, vegetables, melons, chestnuts, packaged nuts and berries shall be stored in such a place and condition so as to prevent contamination of food from dust, flies, insects, rodents and animals.
- H. ~~Huckster~~ Mobile produce vendor vehicles must carry waste containers and this waste must be properly disposed of as required in Section 9-56-7.
- I. Fruits, including cantaloupes and watermelons, shall be sold whole and shall not be cut or sliced while in the possession of the ~~huckster~~ mobile produce vendor.
- ~~J. The business of huckstering is prohibited between sundown and sunrise.~~
- K. Every ~~huckster~~ mobile produce vendor shall, at all times while engaged in his or her business, carry the permit required by this chapter with him or her.

(Code 1985 § 16-256; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-77)

Suggestions: Eliminate this entire provision, as it is more restrictive than state law and severely restricts the ability of mobile produce vendors from operating, stifling economic activity and the provision of healthy foods in Memphis and throughout Shelby County.

Comment: If the Memphis Code is not eliminated, Memphis should at least adopt state definitions of food entities for ease of comparison. If it then wishes and is able to keep any requirements in this section, it should amend this section accordingly, utilizing state definitions and adding any additional requirements that are viewed as essential at the local level. Note that once again, such local requirements must be more stringent than state law and thus will likely stifle economic activity.

The Code defines "huckster" as anyone "who sells or peddles from a vehicle on the streets of the city only fruits, vegetables, melons, berries, chestnuts and packaged nuts."⁵⁵⁴ No matter what amendments are made to this section, the name "huckster" should be changed to "mobile produce vendor" or something similar, as "huckster" has a derogatory connotation.⁵⁵⁵ State law does not similarly define "huckster," nor does it have a comparable definition. "Hucksters" do not seem to fall under the state

⁵⁵⁴ Memphis, Tenn. Code 9-52-1 "Huckster" (MuniCode 2009).

⁵⁵⁵ Interview with Local Food Stakeholder, Memphis, Tenn. (Jan., 2011).

definition of “mobile food unit,” since they likely do not qualify as FSEs.⁵⁵⁶ Thus, it seems that “hucksters” are not regulated at the state level, as the sale of such produce is not a high-risk activity. In fact, in most cities and states, the sale of fresh produce is not highly regulated. For example, Columbus and Boston require general street vendors to have a permit. But in recognition of the health and economic benefits produce trucks provide, these cities specifically exempt farmers selling produce from having a permit.⁵⁵⁷

One reason that Memphis may have created specific regulations for “hucksters” or “mobile produce vendors” is because the Memphis Food Code requires a permit for the “manufacture, sale or distribution of any food.”⁵⁵⁸ Thus, even sales of low-risk food items, which typically are allowed without regulation, need set regulations and permit requirements. As mentioned previously, this stifles economic activity and access to food in Memphis and throughout Shelby County and also decreases the opportunity for innovation in the provision of food items. Regulating such low-risk food items is also a waste of SCHD time and resources.

Furthermore, the restrictions included in this provision make it incredibly difficult for mobile produce vendors to operate their businesses. Restrictions such as not requiring the vehicles to remain in motion, restricting the specific food types that they can sell, and not allowing them to sell between sundown and sunrise all make it difficult to operate a mobile produce vending operation and are unnecessary.

Part A: As mentioned above, we think that mobile produce vendors should not need a separate permit, as they are selling healthy, fresh foods that are low-risk. Mobile produce vendors in other cities generally are not required to obtain permits for this activity.

Part B: If a permit is required, then the permit application should be available online in order to reduce burdens and administrative costs.

Part C: The kinds of foods sold by mobile food vendors should not be limited, so long as the vendor has access to adequate sanitation facilities. In order to maintain a distinction between “mobile produce vendors” and “mobile food preparation vehicles” (recently authorized by Memphis in Section 16-262 of the Memphis Food Code), it may be necessary to clarify which food items are allowed under which provision, but it is still possible to broaden this list to allow the sale of any non-potentially hazardous foods from mobile produce vendors. In addition, state law now allows the sale at farmers markets of non-potentially hazardous foods made in a home-based kitchen, and such food should also be allowed to be sold from a mobile produce truck as well, as a mobile produce truck is similar to a mobile farmers market.⁵⁵⁹

Part D: This provision seems unnecessary, as suspension or revocation is a typical sanction for a permit violation. If this is the case, then this language is not needed here as it is not included in any other provision of the Memphis Food Code. If this is not the typical sanction for a permit violation, then it is unclear why SCHD should be more punitive against mobile vendors

⁵⁵⁶ A “mobile food unit” is a “food service establishment designed to be readily moveable.” Tenn. Comp. R. & Regs. 1200-23-01-.01(22) (2011).

⁵⁵⁷ Boston, Mass. Code 16-2.1 (American Legal Publishing Corporation 2010); Columbus, Ohio Code 523.03(a)(2) (MuniCode 2010).

⁵⁵⁸ Memphis, Tenn. Code 9-52-3 (MuniCode 2009).

⁵⁵⁹ Tenn. Code Ann. § 53-8-117 (2010).

Part E: This provision may be helpful to allow the public to report unsanitary practices or to contact the vendor directly. However, state law does not have a similar requirement.

Part F: This requirement is confusing and unnecessarily restricts economic activity and the sale of healthy foods. It is unclear how long a vendor may stop to make sales. The recently passed ordinance allows “mobile food preparation vehicles” to remain in one place for up to 6 hours and to provide food service there for up to 4 hours at a time. Section 16-262(1).⁵⁶⁰ This creates a strange double standard, where a food preparation vehicle may park to sell hot dogs, but a mobile produce vendor is prohibited from parking to sell produce. Further, though some other cities we researched contained regulations for mobile produce vendors, other cities generally did not require these entities to remain in constant motion.⁵⁶¹ Encouraging mobile produce vendors can provide both an economic benefit to the vendors and improve the general health of Shelby County. If the provision is not eliminated, this section should be amended to allow vendors to park for extended periods of time.

Part G: No comment.

Part H: No comment.

Part I: This provision should be eliminated. As long as the vendor can slice and package the fruit in a sanitary manner, he or she should be able to cut the fruits at the request of the customer. Additionally, vendors should be able to serve portions of fruit as samples. This also conflicts with a recent revision to SCHD Environmental Health Manual permitting food sampling at farmers markets of foods that are non-potentially hazardous and/or prepared in a licensed domestic kitchen.⁵⁶² One of our stakeholders’ biggest complaints was that they are unable to serve samples of their produce to customers. Customers are more likely to spend more money on local organic produce or to try new type of food if they are able to taste the product first.

Part J: This provision is unnecessarily restrictive, and there is no information about why this restriction is necessary. There is no matching restriction in state law, and thus this is unnecessarily stringent. If a mobile food vendor wants to sell his wares at night and can make money doing so without endangering public safety, this should be allowed as it helps with economic development and improving access to healthy foods.

Part K: No comment.

Sec. 9-52-71 – ~~Hucksters~~ Mobile Produce Vendors – Operating on public property.

⁵⁶⁰ Note that since this ordinance was recently passed, the numbering is still not available in Memphis Muni Code using the same numerals as the rest of the Memphis Code, as of July 25, 2011.

⁵⁶¹ Detroit was the only other city that required these entities to remain in motion while making sales. Detroit, Mich. Code 41-2-3(d) (MuniCode 2010). However, Detroit has a local food code similar to the Memphis Food Code but this Code is no longer enforced in its entirety since it conflicts with state law. Mich. Comp. Laws § 289.3113 (2011) (“A county, city, village, or township shall not regulate those aspects of food service establishments or vending machines which are subject to regulation under this act except to the extent necessary to carry out the responsibility of a local health department to implement licensing provisions of chapter IV. This chapter does not relieve the applicant for a license or a licensee from responsibility for securing a local permit or complying with applicable local codes, regulations, or ordinances not in conflict with this act.”)

⁵⁶² Shelby County Health Dep’t, General Environmental Health Manual Revision, “food sampling operations.” Rev. 10-4-10. Oct 8, 2010 (on file with the authors, available in the Appendix).

A. This section shall not apply wherever ~~huckstering~~ mobile produce vending is otherwise regulated in specific chapters or sections of this code.

~~B. Violations of the provisions of this section are deemed to be a misdemeanor, and each day of violation shall constitute a separate offense. Conviction of a misdemeanor is punishable as provided in Section 1-24-1 of this code.~~

(Code 1985 § 16-257; Ord. 3227 § 1, 12-7-82; Code 1967 § 22-41.1)

Suggestions: Eliminate this provision entirely, as it is unclear and seems unduly punitive.

Comment: As mentioned above, the term “huckster” should be eliminated, and instead these should be considered “mobile produce vendors” and subject to the state level regulations and to any additional local regulations that are considered essential. As sales of fresh produce are a benefit to Shelby County, mobile produce vending should be encouraged and the regulations applicable to this type of vending should be clear and easy to follow.

Additionally, this provision seems unduly punitive by making its violation a misdemeanor for each day that a vendor is in violation of a provision. Thus, this provision **should be eliminated**.

Sec. 9-52-72 - Pedestrian vendors.

Pedestrian vendors shall meet all the applicable requirements of this chapter and shall also meet the following special requirements. The health officer shall adopt written rules and regulations for pedestrian vendors for the purpose of interpretations of this chapter.

- A. Any agent, manager, superintendent, or director in charge of a mall, pedestrian mall, shopping center, historical district, or city park, shall secure a food permit for all pedestrian vendors operating within the mall, pedestrian mall, shopping center, historical district, or city park, and shall pay the appropriate fee as required in Section 9-52-3. Such agent, manager, superintendent, or director, shall be directly responsible for the operation or activities of such vendor.
- B. All food to be served and sold by a pedestrian vendor shall be processed under the proper and sanitary facilities as required by the health officer.
- C. All pedestrian vendors shall have a home base where the food is prepared and/or stored when the vehicle is not in use and cleaning facilities are available.
- D. Pedestrian vendors shall have facilities where perishable food can be kept below ~~forty five (45)~~ forty-one (41) degrees Fahrenheit and/or above one hundred forty (140) degrees Fahrenheit in a controlled container.

- E. Mobile units shall be especially designed for food distribution and shall be made from material that can be kept clean and well maintained.
- F. Operators shall periodically wash their hands and keep their hands clean.
- G. Operators shall wear clean outer garments at all times.
- H. Toilet facilities provided by the mall and made accessible to the public shall be deemed in compliance with Section 9-52-49.
(Code 1985 § 16-258; Ord. 3394 § 4, 7-31-84; Ord. 2171 § 1, 12-3-74; Code 1967 § 18-78)

Suggestions: Eliminate this entire provision, because it is more restrictive than state law and limits the ability of pedestrian vendors to operate, stifling economic activity and the provision of healthy foods in Memphis and throughout Shelby County.

Comment: Memphis should adopt state definitions of food entities for ease of comparison. If it then wishes and is able to keep any requirements in this section, it should amend this section accordingly, utilizing state definitions and adding any additional requirements that are viewed as essential at the local level. Note that once again, such local requirements must be more stringent than state law and thus will likely stifle economic activity.

One reason that Memphis may have created specific regulations for pedestrian vendors is because the Memphis Food Code requires a permit for the “manufacture, sale or distribution of any food.”⁵⁶³ Thus, even sales of low-risk food items, which typically are allowed without regulation, need regulations and permit requirements. As mentioned previously, this stifles economic activity and access to food in Memphis and throughout Shelby County and also decreases the opportunity for innovation in the provision of food items. Regulating such low-risk food items is also a waste of SCHD time and resources.

At a minimum, this provision should be amended to utilize state definitions and clarify what it wishes and is able to keep. The Memphis definition of “pedestrian vendor” is a “person engaged in the business of dispensing food on a daily basis, from a mobile vehicle which operates within the confines of a public or private pedestrian mall, shopping center, city park or commercially zoned historical district.”⁵⁶⁴ State law does not similarly define the term “pedestrian vendor.” However, as long as the “pedestrian vendor” qualifies as an FSE, it should qualify as a “mobile food unit” and would thereby be subject to TDH regulations for mobile food units.⁵⁶⁵

A subset of these “pedestrian vendors” may now fall under the new definition of “mobile food preparation vehicle,” which is one that “includes a self-contained or attached trailer kitchen,” with certain exceptions.⁵⁶⁶ For those “pedestrian vendors” that now fall under the new definition of “mobile

⁵⁶³ Memphis, Tenn. Code 9-52-3 (MuniCode 2009).

⁵⁶⁴ Memphis, Tenn. Code 9-52-1 (MuniCode 2009).

⁵⁶⁵ See Tenn. Comp. R. & Regs. 1200-23-10-.02(12) (2011).

⁵⁶⁶ Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, available at http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

food preparation vehicle” in the Code, this section is unnecessary because the ordinance outlines in detail the requirements for these establishments.⁵⁶⁷

Even if the Memphis Food Code utilizes state definitions and amends this provision accordingly, it does not add any useful health or sanitation requirements in addition to state law. Since SCHD must enforce all of these requirements, as applicable, this less-detailed provision is unnecessary and thus **should be eliminated**.

If another purpose of this provision is to limit mobile food operations to the narrow list of locations present in the definition of “pedestrian vendor,” this provision should be eliminated for different reasons. First, the new ordinance that covers “mobile food preparation vehicles” explicitly recognizes the value in allowing mobile operations to provide “street food.”⁵⁶⁸ The strange combination of that ordinance with this provision for “pedestrian vendors” is that “mobile food preparation vehicles,” which are mobile food establishments with a kitchen, can operate on the streets but those without a kitchen, or “pedestrian vendors,” cannot. This provision should either be amended to allow operation on the street at least to the level of “mobile food preparation vehicles.”

In short, the provisions regarding “pedestrian vendors” and “hucksters” should be eliminated to allow state law to govern, provided that such “mobile food units” would still be able to operate in Shelby County. State law adequately addresses any health and safety concerns, and these local regulations are overly restrictive.

Part A: No comment.

Part B: This provision should be eliminated. Pedestrian food vendors are already subject to Article 2’s General Sanitation Requirements and to the state-level TDH regulations.⁵⁶⁹ This provision raises the problem of the level of discretion given to the health officer to decide what sort of facilities may be necessary, which may vary between health officers. In interviews with local stakeholders, many noted that they were given differing inspection requirements from different local SCHD health officers. Language like this leads to increased risk that health officers will interpret the provision differently, causing confusion amongst food industry entrepreneurs and stifling economic enterprise.

Parts C – G: These requirements are duplicative of state law. TDH regulations already cover in greater detail the health and sanitation requirements for “mobile food units.”⁵⁷⁰ For instance, all mobile food units must operate from a commissary or fixed food service establishment,⁵⁷¹ rendering the requirement for a home base duplicative. Furthermore, TDH regulations impose specific requirements on the type of material used for service areas and for water systems, depending on whether or not the mobile food unit prepares food.⁵⁷² Most of these requirements are duplicative of TDH regulations, which would be applied by SCHD when it inspects local FSEs anyway under its contract with TDH.⁵⁷³

⁵⁶⁷ Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

⁵⁶⁸ Memphis, Tenn. Code 16-261 *et seq.*, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf

⁵⁶⁹ See Tenn. Comp. R. & Regs. 1200-23-01-.02 (2011).

⁵⁷⁰ See Tenn. Comp. R. & Regs. 1200-23-10-.02(12) (2011).

⁵⁷¹ See Tenn. Comp. R. & Regs. 1200-23-10-.02(12) (2011).

⁵⁷² See Tenn. Comp. R. & Regs. 1200-23-10-.02(12) (2011).

⁵⁷³ See Tenn. Comp. R. & Regs. 1200-23-10-.02(12) (2011).

Part H: No comment.

Sec. 9-52-73 - Farmer's market.

A farmer's market shall meet all of the applicable requirements of this chapter and shall also meet the following special requirements:

- A. The agent, manager, or director of the sponsoring organization of a farmer's market shall secure a farmer's market permit from the health department and shall pay the appropriate fee as required in Section 9-52-3. This permit shall cover all sellers operating within the market, and the agent, manager or director thereof shall be directly responsible for the operation of each seller.
- B. A written application must be made at the health department or online at the health department website by the person requesting the permit.
- C. ~~A farmer's market permit shall be issued for fruits, vegetables, melons, berries or nuts only; and no other types of food may be sold.~~
- D. A farmer's market permit may be suspended or revoked for violating the applicable provisions of this chapter, as required in Section 9-52-7.
- E. ~~Fruits, including cantaloupe and watermelon, shall be sold whole and shall not be cut or sliced while on the premises of the market.~~
- F. ~~Toilet facilities shall be provided by the sponsoring organization and made available to the public, and shall be deemed in compliance with Section 9-52-49.~~
- G. ~~A separate permit must be obtained for each farmer's market site; this permit shall not be transferable from site to site.~~
- H. ~~The farmer's market must be completely contained on a paved surface.~~

(Code 1985 § 16-259; Ord. 2630 § 2, 8-30-77; Code 1967 § 16-259)

Suggestions: Eliminate this provision entirely or revise it in order to encourage the development of farmers markets.

Comment: Farmers markets are great avenues of economic opportunity for small farmers and producers to sell their products and also to help get local, fresh, healthy food into various communities. They are a net benefit for the community and thus should be encouraged rather than restricted.

The restrictions placed on farmers markets are stricter than those found in statewide regulations or in most other cities in Tennessee. For example, in Nashville, there are no local ordinances restricting farmers markets, and according to the Nashville farmers market rules, vendors can sell all food products

except for alcohol and un-inspected meat.⁵⁷⁴ Knoxville similarly has no local ordinances regulating farmers markets, and the local market permits the sale of fruits, vegetables, fresh eggs, meat, plants, herbs, flowers, and honey, as well as baked goods, jams, jellies, sauces, cider, and meats that have been prepared in facilities that have been licensed and inspected by USDA or TDA.⁵⁷⁵

In particular, the provision should be revised to allow for more robust offerings (e.g., meat, cheese, fish, baked goods, jams and jellies). Most states and localities do not limit the offerings at farmers markets in this way. In addition, Tennessee state law allows for non-potentially hazardous foods prepared in a home kitchen to be sold at farmers markets in the state. Therefore, the Memphis Food Code should be amended to place it in line with contemporary practices and Tennessee regulations.⁵⁷⁶ The Code should also make it clear that vendors are allowed to provide customers with samples of food or food produced in cooking demonstrations. This is a common practice at farmers markets in other cities in Tennessee and in other states as well. Further, this restriction conflicts with a recent revision to SCHD Environmental Health Manual allowing for food sampling at farmers markets of foods that are non-potentially hazardous and prepared in a licensed domestic kitchen.⁵⁷⁷

Finally, there does not appear to be an adequate food safety reason for requiring the farmers market to be held on a paved surface, and this is uncommon based on other cities we have researched. In addition, there does not seem to be an adequate reason why farmers markets must provide toilet facilities, although we have seen this requirement in a small number of other cities. In certain parts of the Memphis, these requirements can pose significant challenges, and thus limit the ability for farmers markets to operate.

Part A: The requirement to get a farmers market permit adds another barrier to establishing farmers markets that does not exist in other parts of the state. Requiring a permit poses a financial and organizational burden to farmers markets that can hinder their ability to provide local healthy food to the public. Additionally, many other cities and states do not require permits for farmers markets. For example, opening a farmers market in Jacksonville does not require any permit, either at the city or state level. Farmers markets in Austin can obtain the state's certification, but it is entirely voluntary. Therefore, this provision should be eliminated.

Part B: See comment above for subsection (A). If SCHD must keep the permitting requirement, the permits should be available online as well as in-person.

⁵⁷⁴ Nashville, Tenn. Code 13-36-020 (MuniCode 2011) ("The privilege of using the curb market or the auxiliary curb market for selling, offering for sale or exposing for sale, vegetables, fruits, berries, nuts, butter, eggs, fresh meats, salt meats, cured meats, sausage, condiments, live poultry, dressed poultry, tobacco and any other product of farm or garden, other than live animals, subject to the laws and regulations of the state, of the federal government, of the metropolitan government and the regulations contained in this chapter, is extended to the bona fide farmers, truck growers, fruit growers and horticulturists who are citizens and residents of the state . . ."). This provision applies only to a particular curb market in the Public Square, which is today's Nashville Farmers Market. The city code does not have provisions that apply to farmers markets in general, but it can be assumed that since no local rules restrict what can be sold at farmers markets, other products are allowed to be sold.

⁵⁷⁵ Knox County Government, "New Harvest Farmers Market Rules," http://www.knoxcounty.org/farmersmarket/pdfs/farmers_market_rules.pdf (last visited May 3, 2011). Additionally, another farmers market in the city states on vendor application form that meats are allowed. Knoxville Market Square Farmers Market, "Farm and Garden Application," <http://knoxvillemarketsquare.com/msda/wp-content/uploads/2010/03/Farm-Application-20111.pdf> (last visited July 25, 2011).

⁵⁷⁶ 2011 Tennessee Laws Pub. Ch. 387 (S.B. 1850), amending Tenn. Code Ann. § 53-8-117).

⁵⁷⁷ Shelby County Health Dep't, General Environmental Health Manual Revision, "food sampling operations." Rev. 10-4-10. Oct 8, 2010 (on file with the authors, available in the Appendix).

Part C: This provision should be eliminated, as it is overly restrictive. There are no legitimate food safety reasons for limiting the foods sold to those listed. As long as the vendors have satisfied all the state's requirements for producing other food items, such as meat, cheese, processed goods, there should be no restrictions on what they can sell. Most states and localities do not limit the offerings at farmer's markets in this way, especially if vendors are able to ensure that the food is kept safe. For example, in Charlotte's state-sponsored farmers market, meat, cheese, and jams are prominently advertised and sold.⁵⁷⁸

In addition, Tennessee state law allows for non-potentially hazardous foods prepared in a home kitchen to be sold at farmers markets and in other local venues in the state; thus, the provision should at the very least be amended to include these items.⁵⁷⁹

Part D: This provision seems to be unnecessary, as it should be clear that a permit can be revoked if the rules are not followed. Therefore, it should be eliminated.

Part E: This provision should be eliminated. As long as the vendor can slice and package the fruit in a sanitary manner, he or she should be able to cut the fruits once they have been purchased at the request of the customer. Additionally, vendors should be able to serve portions of fruit and other foods as samples. This is a common practice at farmers markets in some cities in Tennessee and in other states as well. Additionally, this restriction conflicts with a recent revision to Tennessee Environmental Health Manual, which now permits food sampling at farmers markets of foods that are non-potentially hazardous and/or prepared in a licensed domestic kitchen.⁵⁸⁰ Many stakeholders complained that this prohibition hinders their ability to introduce potential customers to new and unfamiliar foodstuffs.

Part F: This restriction is overly burdensome and is unlike farmers market rules from other parts of Tennessee and other states. Most of the cities we studied did not have toilet facility requirements, except Atlanta,⁵⁸¹ Boston,⁵⁸² Columbus,⁵⁸³ and three California cities⁵⁸⁴ all governed by the state law (San Jose, San Francisco, Los Angeles). Even then, most of these cities have much less stringent requirements than Memphis. For example, most merely require that toilet facilities be accessible near the market, rather than being on the market ground and provided by the market management, as the

⁵⁷⁸ North Carolina Department of Agriculture and Consumer Services, "Charlotte Farmers Market," <http://www.ncagr.gov/markets/facilities/markets/charlotte/> (last visited July 6, 2011) (showing that meats are allowed at the Charlotte market).

⁵⁷⁹ 2011 Tennessee Laws Pub. Ch. 387 (S.B. 1850), amending Tenn. Code Ann. § 53-8-117 ("*Notwithstanding any law, rule or regulation to the contrary*, nonpotentially hazardous foods prepared in a home based kitchen may be sold at . . . farmer's markets located in this state.")

⁵⁸⁰ Shelby County Health Dep't, General Environmental Health Manual Revision, "food sampling operations." Rev. 10-4-10. Oct 8, 2010 (on file with the authors, available in the Appendix).

⁵⁸¹ Atlanta, Ga. Code 142-51(i) (MuniCode 2011) (requiring that outdoor event organizer include location of toilet facilities in the site plan of the event). Though the Atlanta provision for outdoor events does not seem to apply to farmers markets, in practice it has been applied in this way. See also Meridith Ford Goldman, "AJC Exclusive: Fees, permits surprise city's farmers markets," *The Atlanta Journal-Constitution* (May 21, 2010) available at <http://www.ajc.com/news/atlanta/ajc-exclusive-fees-permits-532919.html>; Ga. Comp. R. & Regs. 40-9-6-.01 (2011).

⁵⁸² Massachusetts Department of Public Health, Food Protection Program Policies, Procedures and Guidelines, "Farmers Markets," updated Jan. 26, 2011, available at <http://www.mass.gov/agr/markets/farmersmarkets/docs/fpp-policies-procedures-guidelines.pdf> (requiring farmers markets to provide vendors with portable washrooms and hand washing facilities if there is none accessible nearby).

⁵⁸³ Ohio Admin. Code 901:3-6-03(B)(2) (2011) (requiring that toilet facilities be readily accessible to farmers market personnel when the farmers market is open more than four consecutive hours).

⁵⁸⁴ Cal. Retail Food Code § 114371(c) (2011) ("*Approved toilet and hand washing facilities shall be available within 200 feet travel distance of the premises of the certified farmers' market or as approved by the enforcement officer.*")

Memphis provision seems to suggest. Others, like Columbus only require toilet facilities at a farmers markets open for more than four continuous hours.⁵⁸⁵ Because this provision requires the toilet facilities to comply with the requirements listed in Memphis Food Code 9-52-49, SCHED inspectors require the toilet facilities to be the same as those that would be required in an FSE, which is quite burdensome for farmers markets.⁵⁸⁶

There should not be a requirement that farmers markets provide access to toilet facilities in order for them to receive operating permits. While the Memphis zoning code requires farmers markets to have toilet facilities, the zoning requirement was created after the Food Code.⁵⁸⁷ The zoning code's requirement that farmers markets have toilet facilities may simply be a reflection of the Food Code's provision. If the requirement was removed from the Food Code, it could then be removed from the zoning code. The provision limits economic opportunity and the provision of fresh, healthy foods by limiting the locations in which farmers markets may be held.

However, if this provision is kept, the Code should clarify that portable toilets could be considered sufficient if the market operates on a temporary basis, as provided in the zoning code.⁵⁸⁸ Though this is still a limitation to operating farmers markets, it makes the requirement much easier to meet.

Part G: See comment above for subsection (A). Additionally, this requirement makes it more expensive for a farmers market association to test out farmers markets in new areas.

Part H: It is unclear why the farmers market must be on a paved surface. This does not serve any food safety purpose and solely limits economic opportunity and the sale of fresh, healthy foods.

Sec. 9-52-74 - Coffee bars.

Coffee bars shall meet all the applicable requirements of this title and chapter and shall also meet the following special requirements:

- ~~A. Items must be sold in single service containers only.~~
- B. A one-compartment sink shall be provided for the cleaning of equipment used to heat the water.
- ~~C. Water must come from an approved source.~~
- D. In packaged goods establishments, the hand sink in the toilet room will be considered adequate for hand washing purposes.
- E. No mixing, preparation of, or combining of raw ingredients is permissible other than the combining of hot water with ground coffee, and/or an instant mix in a single service container.
(Code 1985 § 16-260; Ord. 3228 § 1(26), 8-3-82; Code 1967 § 18-80)

⁵⁸⁵ Ohio Admin. Code 901:3-6-03(B)(2) (2011).

⁵⁸⁶ See also Memphis, Tenn. Code 9-52-73 (MuniCode 2009) ("A farmer's market shall meet all of the applicable requirements of this chapter and shall also meet the following special requirements. . . .")

⁵⁸⁷ Memphis and Shelby County Unified Development Code art. 2.6.3 (Q)(4) (2010).

⁵⁸⁸ *Id.*

Suggestions: Eliminate this entire provision, as it is unnecessary and adequately covered by state regulations.

Comment: State law does not define “coffee bar,” which the Code narrowly defines as a “retail food service establishment where coffee, hot tea, or other hot beverages are sold which do not require any mixing, preparation, or handling beyond the combining of a mix or a powder with hot water.”⁵⁸⁹ These establishments are already subject to state-level regulations, as coffee bars would likely be treated as FSEs.⁵⁹⁰

This section requires that the coffee bar only mix powder and water within a “single service container” and only serve the drinks in these containers.⁵⁹¹ Therefore, what this section essentially states is that an FSE that only sells hot drinks in this manner is subject to all applicable requirements, except it only needs a one-compartment sink for washing and, “in the case of packaged goods establishments, the hand sink in the toilet room will be considered adequate for hand washing purposes.”

First, Memphis cannot impose less stringent requirements for FSEs than state law demands. Therefore, the only way it could impose additional requirements would be if the coffee bar is not an FSE or part of an FSE,⁵⁹² or if the coffee bar qualifies as a “mobile food unit” and only sells “beverages that are not potentially hazardous and are dispensed from covered urns or other protected equipment.”⁵⁹³ Otherwise, it is subject to state requirements, either as a regular FSE or a mobile food unit that is not subject to the exceptions.

Again, state law governs when it is more stringent, and it is not clear that any important objective is served by separately defining a “coffee bar” and subjecting it to special requirements that may or may not be enforceable, depending on the type of “coffee bar.” This provision only serves to create a confusing, double standard within the state that may be misleading in cases where it is not enforceable. Because state law adequately addresses the health and sanitation requirements of FSEs, including coffee bars, this provision should be eliminated.

Alternatively, this provision should be amended to highlight any requirement that SCHD wishes and is able to keep, utilizing state definitions. This would provide a clear standard for businesses.

Article 4: Meat and Meat Products

Suggestions: Eliminate this entire article as it is outdated and inconsistent with state and federal law.

⁵⁸⁹ Memphis, Tenn. Code 9-52-1 (MuniCode 2009).

⁵⁹⁰ “Food service establishments” are establishments where food is prepared and include those which sell beverages “not in an original package or container.” See Tenn. Comp. R. & Regs. 1200-23-01(16) (2011). However, not all coffee bars, or institutions with coffee bars inside them, would necessarily qualify, as an “establishment whose primary business is other than food service, which may, incidentally, make infrequent, casual sales of coffee or prepackaged foods, or both, for consumption on the premises” does not qualify. See *id.*

⁵⁹¹ A “single-service article” is one made of “readily destructible materials, and which are intended by the manufacturer and generally recognized by the public as for one usage only, then to be discarded.” Memphis, Tenn. Code 9-52-1 (MuniCode 2009).

⁵⁹² Establishments with “coffee bars” inside them may not qualify as FSEs, which explicitly does not include “establishment[s] whose primary business is other than food service, which may, incidentally, make infrequent, casual sales of coffee or prepackaged foods, or both, for consumption on the premises.” See Tenn. Comp. R. & Regs. 1200-23-01(16) (2011).

⁵⁹³ See Tenn. Comp. R. & Regs. 1200-23-01-.02(12) (2011). Mobile food units serving only “beverages that are not potentially hazardous and are dispensed from covered urns or other protected equipment,” are among those subject to the exceptions for the requirements for

Comment: The Federal Meat Inspection Act requires federal inspection of all meat sold in interstate commerce, and federal or equally rigorous inspection of all meat sold within state borders.⁵⁹⁴ Tennessee has implemented its own state laws through the Tennessee Meat and Poultry Inspection Act.⁵⁹⁵ For the most part, these laws mirror federal regulation, particularly as the Federal Meat Inspection Act requires an equally rigorous state program.⁵⁹⁶

TDA does not contract with SCHD to conduct meat inspections. As noted above, all meat processing needs to undergo federal inspection if it is to enter interstate commerce and state inspection if it is to be sold intrastate. Thus, there is no need for SCHD to inspect and permit meat processing operations, as this would be duplicative of the existing system. Based on discussions with SCHD personnel, it is unclear whether SCHD inspectors indeed inspect meat processing operations using the requirements in Article 4 or whether they use state law.⁵⁹⁷ However, it is possible that individual inspectors may apply this Article during their inspections. For the most part, SCHD provisions do not differ significantly from federal and state requirements, but they are less comprehensive and very outdated (for example, they reference meat that has been inspected by the Bureau of Animal Industry of the United States, a federal organization that has not existed since the 1950s). In addition, any provisions that give the health officer discretion (e.g., 9-52-75, 9-52-82) may be potentially enforced in inconsistent ways.

Given the confusion surrounding this Article and the fact that all meat is already inspected through federal or state inspections anyway, this **article should be eliminated in its entirety.**

~~Sec. 9-52-75 - Purpose and construction of article.~~

~~This article is for the purpose of promoting the public health, safety and general welfare by preventing unsound, unhealthful, unwholesome or otherwise unsatisfactory meat and meat food products for human consumption from being manufactured, sold, offered, displayed or kept for sale within the city, and for purposes incidental thereto. This article being remedial in nature, the powers granted shall be liberally construed to effectuate the purpose hereof, and to this end the department of health shall have power to do all things necessary or convenient to carry out the purposes hereof, in addition to the powers expressly conferred in this article.~~

~~(Code 1985 § 16-276; Code 1967 § 18-214)~~

~~Sec. 9-52-76 - Sale of uninspected meat and meat products.~~

~~No meat, meat product or meat food product of cattle, swine, sheep or goats, intended for human consumption, shall be sold, offered for sale, or displayed or kept for sale, or used in the manufacture of meat products or meat food products intended for human consumption, within the city, unless the same has been inspected and approved for human consumption by the health department and bears the proper inspection legend. Nothing contained in this section shall apply to~~

⁵⁹⁴ 21 U.S.C.A. §§ 601-695 (2010).

⁵⁹⁵ Tenn. Code Ann. § 53-7-201 (2010) *et seq.*

⁵⁹⁶ 21 U.S.C.A. §§ 601-695 (2010).

⁵⁹⁷ Interview with Tyler Zerwekh, Janet Shipman, and Phyllis Moss-McNeill, Shelby County Health Department, Memphis, Tenn. (Mar. 16, 2011).

~~any such meat, meat product, meat food product which bears the proper legend of, and shall have been duly inspected and approved for human consumption by, the Bureau of Animal Industry of the United States, pursuant to the Meat Inspection Act of June 30, 1906, or other relevant meat inspection laws of the United States. Nothing contained in this section shall apply to any such meat, meat product or meat food product which bears the proper legend of, and shall have been inspected and approved for human consumption by, the duly authorized sanitarians of any state or other municipality, whose standard of meat inspection is recognized by the health officer to equal to the standard of meat inspection of this city, but any person desiring the benefit of this exemption shall first make written application to the department of health for recognition by the health officer of the meat inspection standard of such state or other municipality, which recognition shall be granted in the event the health officer, after proper investigation, shall find that the meat inspection standard of such state or other municipality is equal to the city's standard.~~
(Code 1985 § 16-277; Code 1967 § 18-207)

~~Sec. 9-52-77 - Offenses in connection with inspection marks and stamps.~~

~~It shall be a misdemeanor for any person to forge, counterfeit, simulate, or falsely represent, or without proper authority to use, to use, or detach, or knowingly or wrongfully alter, deface, or destroy, or to fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices used by the health department on any carcass, part of carcass, or the food product or containers thereof, or any certificate in relation thereto.~~
(Code 1985 § 16-278; Code 1967 § 18-208)

~~Sec. 9-52-78 - Sale of unfit meat and meat products.~~

~~No meat, meat product or meat food product intended for human consumption shall be sold, offered for sale, displayed or kept for sale, or used in the manufacture of meat products or meat food products, unless it is sound, healthful, wholesome and fit for human food.~~
(Code 1985 § 16-279; Code 1967 § 18-209)

~~Sec. 9-52-79 - Report of unfit meat and meat products.~~

~~Health department employees shall report, in such form and manner as the department shall prescribe, any meat or meat product which bears, or the container which bears, the inspection legend or any other mark prescribed by the department, discovered by them outside of abattoirs and which is unsound, unhealthful, unwholesome, or in any way unfit for human food, so that criminal proceedings, or other proceedings, may be instituted, as the facts may warrant.~~
(Code 1985 § 16-280; Code 1967 § 18-210)

~~Sec. 9-52-80 - Dyes and preservatives in meat and meat products.~~

~~No meat or product shall contain any substance which impairs its wholesomeness, nor contain any dye, preservative, or added chemical, except such as may be permitted under the United States Department of Agriculture regulations governing the inspection of meat.~~

~~(Code 1985 § 16-281; Code 1967 § 18-211)~~

~~**Sec. 9-52-81 -- Transportation.**~~

~~Meat shall be properly covered to protect it from dirt, dust, and insects and shall be transported from the packing house or from one place to another in closed refrigerated vehicles.~~

~~(Code 1985 § 16-282; Code 1967 § 18-212)~~

~~**Sec. 9-52-82 -- Regulations of health officer.**~~

~~The health officer may make such regulations, not inconsistent with this article or with the constitution or laws of the state, as may from time to time be necessary to carry out the purpose of this article, and in making any such regulations he or she shall be guided, insofar as the same may be applicable, by the United States Department of Agriculture regulations governing the inspection of meats.~~

~~(Code 1985 § 16-283; Code 1967 § 18-213)~~

~~**Sec. 9-52-83 -- Enforcement of article.**~~

~~The department of health is vested with the power and charged with the duty of administering and enforcing this article and the duties of such department of health in enforcing this article may be performed, and its powers exercised, by the bureau of sanitary engineering of such department, under the general supervision and control of the health officer.~~

~~(Code 1985 § 16-284; Code 1967 § 18-215)~~

Mobile Food Preparation Vehicles (Ordinance 5394)

ORDINANCE TO AMEND CHAPTER 16, ARTICLE V, OF THE CITY OF MEMPHIS, CODE OF ORDINANCES, SO AS TO ALLOW SELF-CONTAINED ~~MOBILE FOOD PREPARATION VEHICLES~~ MOBILE FOOD UNITS TO OPERATE IN THE CITY OF MEMPHIS

Comment: The title of this ordinance specifically addresses only the city of Memphis. Like the other provisions in the Memphis Food Code, this provision was passed only by the Memphis City Council. Despite this fact, provisions in the Memphis Food Code are applied by SCHD in municipalities throughout Shelby County, as well as the unincorporated parts of Shelby County. Since the title of the ordinance only mentions Memphis, it appears that the new regulations would only apply within the city limits. This creates an ambiguity as to whether the new ordinance's provisions will be imposed throughout Shelby County. If not, the mobile food preparation vehicles operating in other areas of Shelby County would be required to operate under the previous, oppressive restrictions. But, if the provisions are applied county-wide, other municipalities will be governed by laws that were passed without their input or representation. This is a problem with the Memphis Food Code generally, and

should be addressed whether the Food Code is eliminated or amended.

WHEREAS, cities across the country have enjoyed the popularity of street food and that popularity has increased over the past few years; and

WHEREAS, citizens in this community have expressed an interest in the opportunity to establish a mobile food operation venture while others have expressed the desire to have these additional food and location choices; and

WHEREAS, the Council deems it in the best interest of the citizens of Memphis that such mobile food operations be locally regulated as a matter of health and public safety, and for the general welfare of the people.

NOW, THEREFORE,

SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that **Section 16-176**. Definitions, is hereby amended to include the following terms and definitions:

Commissary - ~~means any State of Tennessee licensed stationary food establishment that serves mobile food dispensers, mobile food facilities, vending machines or other food dispensing operations where (i) food, containers or supplies are stored; (ii) food is prepared or prepackaged for sale or service at other locations; (iii) utensils are cleaned; or (iv) liquid and solid wastes are disposed of or potable water is obtained. any place, premise or establishment in which pasteurized mix, ingredients, containers, or supplies are prepared or stored for the servicing of one or more mobile units and where facilities are provided for the cleaning of the vehicle and the cleaning and bactericidal treatment of equipment and utensils.~~⁵⁹⁸

~~*Mobile food preparation vehicle*~~ *Mobile food unit*- a food service establishment designed to be readily movable. — ~~A mobile food preparation vehicle is any motorized vehicle that includes a self-contained or attached trailer kitchen in which food is prepared, processed or stored and used to sell and dispense food to the ultimate consumer. Mobile units must be mobile at all times during operation. The unit must be on wheels (excluding boats) at all times. Any mobile food unit that removes such wheels or becomes stationary must meet Tennessee Department of Health Regulations 1200-23-1 et. seq. in their entirety. This definition does not include pushcarts as regulated by city codes and prohibited from selling potentially hazardous foods by the Tennessee Department of Health, nor vehicles from which only ice cream and other frozen nonhazardous food products are sold, nor vehicles operating under a special event permit.~~

Menu change - means a modification of a food establishment's menu that

⁵⁹⁸ Tenn. Comp. R. & Regs. 0080-03-01-.01(2)(d) (2011).

requires a change in the food establishment's food preparation equipment, storage equipment or storage capacity previously approved by the Health Department. The term "menu change" shall include, but is not limited to, the addition of potentially hazardous food to a menu, installation of new food preparation or storage equipment, or increasing storage capacity.

Servicing Area - A mobile food unit servicing area shall be provided and shall include at least overhead protection for any supplying, leaning, or servicing operation. Within this servicing area, there shall be a location provided for the flushing and drainage of liquid wastes separate from the location provided for water servicing and for the loading and unloading of food and related supplies.

Suggestion: Amend this section to adopt the state definitions.

Comments: This section should be amended to bring its terms in line with state definitions. Using the term "mobile food preparation vehicle" creates an unnecessary diversion from state law. State law calls these businesses "mobile food units" and defines them more broadly than the Memphis ordinance.⁵⁹⁹ The state definition covers all mobile FSEs while the Memphis ordinance does not. This variation between the terms and definitions causes confusion over which type of business falls within each definition. In the interest of clarity, the Memphis ordinance should be amended to adopt the state title and definition. Also, instead of adopting its own definition for a "commissary," the ordinance should use the one that has already been adopted by TDA.⁶⁰⁰ Since the two definitions do not contain any substantive differences, there is no need to use different definitions.

SECTION 2. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Section 16-187 is hereby amended to add "16-261" at the end of the section.

SECTION 3. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 16 Section 16-178 is hereby amended to add ~~Mobile Food Preparation Vehicles~~ Mobile Food Unit to the list of Food Establishments with an annual local permit fee of \$150.00 per mobile food unit vehicle.

Suggestion: Retain this provision, as it is common for local governments to establish a permitting process for entities that are not comprehensively regulated by the state government.

Comment: Businesses like mobile food preparation vehicles are not yet highly regulated by most state governments and thus regulations and permitting requirements for these entities exist at the local level. Therefore, establishing a permitting procedure for these businesses does not impose too much of an additional burden on mobile food preparation vehicle operators in Memphis and throughout Shelby County versus in other cities. However, Memphis's government should be mindful that each additional requirement has the possibility of decreasing economic activity. The requirements the city imposes to obtain the permit should only be those that are essential to uphold public health and food safety.

⁵⁹⁹ Tenn. Comp. R. & Regs. 1200-23-01-.01(22) (2011).

⁶⁰⁰ Tenn. Comp. R. & Regs. 0080-03-01-.01(2)(d) (2011).

Also, SCHD can already charge and collect fees for permitting FSEs on behalf of TDH.⁶⁰¹ Any additional local fees that SCHD collects are deducted from the amount the state reimburses the department, which is capped at 95% of the state permit fee.⁶⁰² Therefore, it is unclear whether imposing a local permit fee on mobile food preparation vehicles actually increases SCHD's revenue.

SECTION 4. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 16 Section 16-257 (a) is hereby amended and replaced to read as follows: "This section shall not apply wherever huckstering or ~~mobile food preparation vehicles~~ mobile food units are otherwise regulated in specific chapters or sections of this Code."

SECTION 5. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 16 is hereby amended to add Section 16-261 which shall read as follows:

Section 16-261. ~~Mobile food preparation vehicles~~ Mobile Food Units.

~~Mobile food preparation vehicles~~ Mobile food units shall meet all applicable requirements of this article in addition to the requirements outlined as follows:

(1) No person shall engage in the business of a ~~mobile food preparation vehicle~~ mobile food unit within the municipal limits without first having obtained a permit required by section 16-178 of the City Code of Ordinances and the State of Tennessee.

(2) A ~~mobile food preparation vehicle~~ mobile food unit license, as authorized by the State of the Tennessee and local ordinances, will not be issued to a person unless the following conditions are met:

(a) The vehicle must be specially designed as defined as a ~~mobile food preparation vehicle~~ mobile food unit and be approved by the health authority in addition to meeting the standards as set forth in section 16-208 of the City Code of Ordinances.

(b) No person shall engage in the business of a ~~mobile food preparation vehicle~~ mobile food unit without first having obtained a commissary license or having a written commissary agreement, ~~if required by the health authority.~~

(c) Each ~~mobile food preparation vehicle~~ mobile food unit must display ~~number~~ its business name and state and local permit numbers, with letters and numbers at least three (3) inches in height, in a prominent and visible location on the vehicle.

(d) The driver of the truck must have a current Tennessee Driver's License, current auto insurance (including liability insurance) and current vehicle registration as required by

⁶⁰¹ Tenn. Code Ann. § 68-14-303(7)(H) (2011).

⁶⁰² Tenn. Code Ann. § 68-14-303(7)(H) (2011).

Tennessee law and enforced by law enforcement authorities.

(e) The vehicle can only operate in locations where the operation of motorized vehicles is permitted under local zoning ordinances and enforced by local Code Enforcement authorities

(f) All current permits must be posted in a conspicuous manner, in compliance with T.C.A. 68-14-305.

(3) The health officer shall adopt written rules and regulations for ~~mobile food preparation vehicles~~ mobile food unit for the purpose of interpretations of this article.

Suggestion: Amend this provision to remove the ambiguous language.

Comment: "If required by the health authority" does not give food industry entrepreneurs any guidance about what their obligations are. This language can also lead to arbitrary enforcement by different health inspectors. This provision should be amended to firmly establish whether a mobile food preparation vehicle operator is required to have a written agreement with a commissary. This language can also lead to arbitrary enforcement by different health inspectors. Eliminating this ambiguity would then benefit those operating mobile food preparation vehicles and commissaries and would reduce the chance of arbitrary enforcement.

SECTION 6. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 16 is hereby amended to add Section 16 - 262 which shall read as follows:

Section 16-262. Operational requirements.

(1) When legally parked on a city street, alley and other public thoroughfares in an allowed zoning district, ~~mobile food preparation vehicles~~ mobile food units shall park for no less than 30 minutes and shall not exceed a total of six hours in anyone block, with food service available for no more than four hours of that time. The mobile food vendor must then provide a minimum break from that location of one hour.

(2) When parked on private property with the permission of the property owner, a ~~mobile food preparation vehicle~~ mobile food unit may operate at the times and for the duration provided in its permission by the property owner.

(3) No ~~mobile food preparation vehicle~~ mobile food unit shall be equipped with any external electronic sound-amplifying device.

(4) No operator of such vehicle shall park or stand such vehicle within 300 feet of a school or school playground in a residential district while school is in session, unless an agreement is established with such school.

(5) When legally parked on a city street, alley and other public thoroughfare in an allowed zoning district, no such vehicle shall park or stand within 300 feet of any principal customer entrance to a

permanent food service establishment, including but not limited to restaurants, bars and coffee shops, restaurant outside of the Central Business Improvement District (CBID) during its posted hours of operation, unless a signed waiver, with a stated duration, has been obtained from all which are within a 300 foot radius of that parking location.

(a) For any permanent food service establishment within the CBID, this distance shall be 50 feet, unless a similar waiver is obtained from all permanent food service establishments ~~restaurants~~ within that lesser distance. ~~Restaurant, for purposes of this section, means any public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink are prepared and served to the public for consumption on or off the premises pursuant to the required licenses. Such establishments include, but are not limited to, restaurants, bars, lounges, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms and sandwich shops.~~

(b) All measured distances and distance requirements addressed in this regulation shall be distances measured in a straight line from the nearest edge of the mobile vehicle or trailer to the nearest edge of the object from which the mobile vehicle or trailer is to be distant.

(c) When legally parked on private property, the distance requirements established above shall still be applicable if a restaurant is present on adjacent or abutting property, unless a signed waiver, with a stated duration, has been obtained from all restaurants on adjacent or abutting property which are within a 300 foot radius of that parking location on private property.

(d) For any restaurant within the CBID, this distance restriction shall be 50 feet, unless a similar waiver is obtained from all restaurants within that distance located on adjacent or abutting property.

(6) When legally parked on a city street, alley and other public thoroughfares in an allowed zoning district, no sale shall be made from such vehicle except from the curb side.

(7) Cooking must not be conducted while the vehicle is in motion.

(8) ~~Mobile food preparation vehicle~~ Mobile food units shall be parked overnight only at its commissary or any other location approved by the Health Department that does not violate an applicable city ordinance.

(9) No detached signs are permitted. All signs used must be permanently affixed to, or painted on, the ~~mobile food preparation vehicle~~ mobile food unit and shall extend no more than six inches from the vehicle.

(a) No sign shall flash, cause interference with radio, telephone, television or other communication transmissions; produce or reflect motion pictures; emit visible smoke, vapor, particles, or odor; be animated or produce any rotation, motion or movement.

(b) A sign on which the message is changed electronically not more than one time per eight seconds shall not be considered to be an animated sign or a sign with movement, but is classified as a changeable copy sign.

(c) Changeable copy signs shall be permitted, but the total area of such signs on the vehicle, when parked and the vehicle is set up to operate, must not exceed 30 square feet.

(1) Any message on a changeable copy sign shall have an instantaneous change of message with no fading, fly-in, dissolve or other feature used. The change of message rate on digital signs shall be limited to no more than once every 8 seconds.

(d) No sign shall utilize any exposed incandescent lamp with a wattage of more than forty (40) watts, any revolving beacon light; or a luminance in excess of three hundred fifty (350) foot lamberts measured at the sign face.

(10) Vendor must provide for the sanitary collection of all refuse, litter and garbage generated by the patrons using that service and remove all such waste materials from the location before the vehicle departs. This includes physically inspecting the general area for such items prior to the vehicle's departure.

Suggestion: Amend this section to remove unnecessary restrictions on mobile food preparation vehicles.

Comments: The operational requirements created by the new ordinance are the types of laws that the city should be creating to address local issues and to fill gaps in state law for low-risk entities such as mobile food units. These provisions relate to city-level issues that would not fall within the laws already enacted by the state government. While some of these laws seem unduly burdensome to mobile food preparation vehicles, like the buffer zones that are required even when a vehicle is located on private property, they provide an adequate, comprehensive set of requirements for these vehicles. Vehicle operators can now look in one place and find all the applicable operational requirements.

One revision that should be made is to remove the term "restaurant" from provision five and replace it with "food service establishment." As mentioned previously, the Memphis Code's definition of an FSE is much broader than the state's definition, leading to confusion among food industry entrepreneurs.⁶⁰³ The Memphis Code's definition should be removed and the state's adopted for clarity and uniformity. Defining the term "restaurant" within the provision makes it long and unwieldy.

⁶⁰³ Memphis, Tenn. Code 9-51-1 (MuniCode 2009).

SECTION 7. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-263 to read as follows:

Section 16-263 Food requirements

~~(1) All food shall be protected from contamination and the elements while being stored, prepared, displayed or sold at a mobile food preparation vehicle mobile food unit and during transportation to or between such establishments or vending machine locations, and so shall all food equipment, containers, utensils, food contact surfaces and devices and vehicles, in accordance with the provisions of this chapter and the rules and regulations of the Health Department.~~

~~(2) All foods to be used, prepared, cooked, displayed, sold, served, offered for sale or stored in a food establishment, or during transportation to or between locations shall be from sources approved by the health authorities of the point of origin and must be clean, wholesome, free from spoilage, adulteration, contamination or misbranding and safe for human consumption.~~ The standards for judging wholesomeness for human food shall be those promulgated and amended from time to time by the United States Food and Drug Administration, United States Department of Agriculture, the Tennessee Department of Health and the Tennessee Department of Agriculture and published in the United States Code of Federal Regulations and the Tennessee Code Annotated or the Tennessee Rules and Regulations. Such laws will be adopted by reference when approved and deemed effective as of the date designated by the above government agencies or the appropriate legislative body approving such changes.

~~(3) The only milk or milk products which may be used as food ingredients shall be pasteurized Grade A milk or milk products from sources approved by the Health Department. All pasteurized milk and fluid milk products shall be sold in the individual original containers in which they were received from distributor and shall be stored at a temperature of 41 degrees Fahrenheit or less until sold.~~

(4) Raw shellfish, including oysters, clams and mussels, with the exception of properly prepared fish for sushi, shall not be sold or distributed, unless such item has received specific authorization from the Tennessee Department of Agriculture and the Shelby County Health Department.

(5) All meats, meat food products, poultry and poultry products used in cooking, offered for sale, sold or prepared shall be from sources inspected and approved by the United States Department of Agriculture, the State of Tennessee Department of Agriculture or the state or local department of health and shall be plainly marked, tagged or stamped to indicate the source, and the inspection and approval.

(6) All hermetically sealed foods shall have been processed in

approved food processing establishments. The use, preparation, display, sale or storage of home-canned foods is prohibited and no other foods which have been processed in a private home or other than in an approved food-processing establishment shall be stored, used, kept for sale or served in a food establishment or automatic food-vending machine.

(7) The use of newspaper or any unclean paper for the purpose of wrapping food is forbidden.

(8) The Health Officer may augment such requirements when needed to assure the service of safe food and may prohibit the sale of certain potentially hazardous food.

Suggestion: Eliminate this entire provision, as it is mostly redundant with TDH regulations.

Comment:

Part 1: This is unnecessary and should be removed. TDH's sanitary regulations explicitly require mobile food units, which would include mobile food preparation vehicles, to comply with all the food sanitation rules that apply to food service establishments.⁶⁰⁴ The only exceptions concern rules related to commissaries and the vehicle's water system.⁶⁰⁵ Food service establishments are already required by the state to protect food "at all times" from "potential contamination, including dust, insects, rodents, unclean equipment and utensils, unnecessary handling, coughs and sneezes, flooding, drainage, and overhead leakage or overhead drippage from condensation."⁶⁰⁶ While the state statute is not written to address specific contamination issues that could be an issue for mobile food preparation vehicles, the statute is broad enough to apply to them. The state statute also requires that equipment, utensils, and single service articles "not impart odors, color, or taste, nor contribute to the contamination of food."⁶⁰⁷

Part 2: No Comment.

Part 3: This provision actually contains three separate requirements. Two of the requirements are entirely redundant with TDH regulations, and the other is an additional requirement that is unnecessary. TDH regulations already require FSEs to serve only pasteurized, Grade A milk, making the first requirement completely redundant.⁶⁰⁸ State law also requires potentially hazardous foods, such as milk, to be stored at 41 degrees or less.⁶⁰⁹

The only section of the provision that is not covered by state law is the additional requirement to sell milk in its original container. TDH regulations give the option of selling in individual cartons or dispensing from refrigerated bulk milk dispensers.⁶¹⁰ TDH regulations also allow milk to be poured directly from containers not more than 1 gallon in size.⁶¹¹ While the Memphis statute is not unenforceable, it does create unnecessary uncertainty concerning how milk can be dispensed. Also, the Memphis requirement

⁶⁰⁴ Tenn. Comp. R. & Regs. 1200-23-01-.02(12)(a) (2011).

⁶⁰⁵ Tenn. Comp. R. & Regs. 1200-23-01-.02(12)(a)(2),(3),(4) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(12)(b) (2011).

⁶⁰⁶ Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(a) (2011).

⁶⁰⁷ Tenn. Comp. R. & Regs. 1200-23-01-.02(8)(a) (2011).

⁶⁰⁸ Tenn. Comp. R. & Regs. 1200-23-01-.02(b)(1) (2011).

⁶⁰⁹ Tenn. Comp. R. & Regs. 1200-23-01-.02(2)(b)(2); Tenn. Comp. R. & Regs. 1200-23-01-.02(3)(b)(2) (2011).

⁶¹⁰ Tenn. Comp. R. & Regs. 1200-23-01-.02(5)(b) (2011).

⁶¹¹ *Id.*

does not increase public safety in any significant way. Therefore this provision should also be removed. If the provision is not removed, it should at least be separated into its own provision to alert mobile food vehicle operators to the additional requirement that does not mirror state law. Sandwiching the requirement between two redundant ones makes it difficult to notice and could lead to inadvertent code violations.

Part 4: This provision is ambiguous and should be either repealed or amended. The provision requires specific authorization from SCHD to sell “raw shellfish including oysters, clams and mussels.” The provision makes an exception to allow prepared fish for sushi. But raw fish in general would not fall within the scope of the provision anyway because the provision is addressing raw shellfish. Therefore the exception is unnecessary, unless the provision applies to both raw fish as well as raw shellfish. We recommend removing the requirement and instead using TDH and TDA regulations regarding the sale and storage of raw shellfish.⁶¹² At the very least, the provision should be amended to clarify exactly which types of seafood need special permission from the health department.

Finally, the provision leaves the ultimate decision of whether to allow raw shellfish to SCHD. Allowing SCHD discretion causes mobile food preparation vehicle operators a great amount of unnecessary uncertainty. The provision also de-legitimizes SCHD’s ultimate adjudication by exposing the department to claims of bias or arbitrariness. Instead of determining on a case-by-case basis, standards should be established and made available to the public. This will allow potential business owners to know their obligations and remove doubts about the whether the decision has a legitimate basis.

Part 5: This provision is slightly more detailed than TDH regulations, but in practice there would not be a difference. The state’s regulations require that “[a]ll meat and meat products, as well as poultry and poultry products, shall have been inspected and passed for wholesomeness under an official governmental regulatory program.”⁶¹³ The Memphis provision differs in that it lists the different governmental agencies doing the inspection. The “governmental regulatory programs” mentioned in the TDH regulation would be administered by the either the USDA or TDA. Therefore, this section is unnecessary and can be eliminated.

Part 6: This provision contains two separate requirements. First, the provision requires all hermetically sealed foods to be processed in approved food processing establishments. This is redundant with TDH regulations and should be repealed. TDH regulations specifically prohibit FSEs from using hermetically sealed foods that do not come from a food processing establishment.⁶¹⁴ Since TDH requires a food processing establishment to operate “in accordance with all applicable laws,” the processing facility would have to be approved by state regulators.⁶¹⁵ While the state regulations are not laid out as clearly as the Memphis provision, state law would not permit hermetically sealed foods that did not come from an approved food processing establishment. Therefore the provision is unnecessary and only clutters the ordinance.

The second part of the provision restricting home-processed food is also unnecessary and should be eliminated. The provision says that the food sold in a mobile food preparation vehicle cannot have been processed in a home kitchen. But Tennessee state law only allows non-potentially hazardous foods

⁶¹² Tenn. Comp. R. & Regs. 1200-23-01-.02(1)(b)(2) (2011); Tenn. Comp. R. & Regs. 1200-23-01-.02(4)(a)(4) (2011). *See also* Tenn. Comp. R. & Regs. 0080-04-09-.02(1)(b)(2) (2011).

⁶¹³ Tenn. Comp. R. & Regs. 1200-23-01-.02 (1)(b)(4) (2011).

⁶¹⁴ Tenn. Comp. R. & Regs. 1200-23-01-.02 (1)(a) (2011).

⁶¹⁵ Tenn. Comp. R. & Regs. 1200-23-01-.02 (15) (2011).

produced in a home kitchen to be sold from specific locations: “a person's personal residence, a community or social event, including church bazaars and festivals, flea markets, or at farmer's markets.”⁶¹⁶ Since the Tennessee has not made an exception allowing these products to be sold from mobile food preparation units, the Memphis ordinance is unnecessary.

SECTION 8. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-264 to read as follows:

Section 16-264 Food handler requirements

All food handlers shall meet the standards as set forth in T.C.A. § 53-8-108, Tennessee Department of Health Rules and Regulations, ~~and City Code of Ordinance Chapter 16, Article 1, Division II, section 16-201 through section 16-203.~~

Suggestion: Eliminate the provision or amend it to remove the references to redundant or unnecessary sections of the Memphis food code.

Comment: TDH regulations concerning food handler requirements should be the only ones that apply. The reference to the Memphis Food Code only complicates what requirements mobile food unit operators must follow. As analyzed in another section of this report, these requirements are redundant with state regulations and should be eliminated.⁶¹⁷ This provision should be eliminated and requirements for food handlers should follow state regulations. If the section is retained, the references to these outdated provisions should be removed, leaving only references to Tennessee state law.

SECTION 9. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-265 to read as follows:

Section 16-265 Equipment standards.

All ~~mobile food preparation vehicles~~ mobile food units shall meet the standards as set forth in Tennessee Department of Health Rules and Regulations, ~~and City of Memphis Code of Ordinance Chapter 16, Article 1, Division II, section 16-213, 16-214, 16-215 and 16-216.~~

Suggestion: Eliminate this entire provision, as it is redundant with Tennessee state regulations. If not entirely eliminated, the provision should be amended to remove the references to other ordinances in the Memphis Food Code.

Comment: TDH regulations are sufficient to provide adequate equipment standards to mobile food unit operators. Pointing mobile food unit operators to them in the ordinance can help to clarify what requirements apply. But forcing operators to look to both TDH and the Memphis Food Code to determine the requirements creates unnecessary complexity and confusion. As analyzed above in the Provision-by-Provision Analysis, these sections of the Memphis Code are mostly redundant or

⁶¹⁶ 2011 Tennessee Laws Pub. Ch. 387 (S.B. 1850), amending Tenn. Code Ann. § 53-8-117.

⁶¹⁷ See generally, Provision-by-Provision Analysis.

unnecessary because state law already covers them with more specific provisions.⁶¹⁸ Therefore, at the very least, references to the Memphis Food Code should be removed.

SECTION 10. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-266 to read as follows:

Section 16-266 Maintenance of premises.

All ~~Mobile food preparation vehicles~~ mobile food units shall meet the standards as set forth in T.C.A. § 53- 8-102, T.C.A. § 53-8-103, Tennessee Department of Health Rules and Regulations, and ~~City of Memphis Code of Ordinance, Article 1, Division II, section 16-205, 16-206, 16-207, 16-209, 16-210, 16-211 and 16-212.~~

Suggestion: Eliminate this entire provision, as it is redundant with Tennessee state regulations. If not entirely eliminated, the provision should be amended to remove the references to other ordinances in the Memphis Food Code.

Comment: The only purpose this section serves is to refer potential mobile food unit operators to the applicable laws. As discussed in other sections of this analysis, the Memphis provisions referenced in this section are all either redundant or unnecessary.⁶¹⁹ To provide food industry entrepreneurs with clear information, the section should either point only to Tennessee state laws and regulations or be eliminated entirely. The mobile food unit operator would then look to the Tennessee laws and regulations to determine what requirements are applicable.

SECTION 11. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-267 to read as follows:

Section 16-267 Vehicle sanitation requirements.

(1) ~~Each vehicle shall be constructed so that the portions of the vehicle containing food shall be covered so that no dust or dirt will settle on the food; and s~~Such portions of the vehicles which are designed to contain food shall be at least 18 inches above the surface of the public way while the vehicle is being used for the conveyance of food.

(2) ~~The food storage areas of each vehicle shall be kept free from rats, mice, flies and other insects and vermin. No living animals, birds, fowl, reptiles or amphibians shall be permitted in any area where food is stored and~~

(3) Hazardous non-food items such as detergents, insecticides, rodenticides, plants, paint and paint products that are poisonous or toxic in nature shall not be stored in the food area of the vehicle.

⁶¹⁸ See generally, Provision-by-Provision Analysis.

⁶¹⁹ See generally, Provision-by-Provision Analysis.

(4) The vehicle shall be enclosed with tops and sides.

(5) The vehicle shall not be used for any purpose other than for the purpose described in this chapter.

Suggestion: Amend this provision to eliminate portions that are redundant with Tennessee state regulations. Retain only those portions that are not addressed by TDH regulations.

Comment:

Part 1: The requirement to keep portions of the vehicle containing food free from dust is already addressed by TDH regulations. TDH regulations state “[a]t all times, including while being stored, prepared, displayed, served, or transported, food shall be protected from potential contamination” and includes dust as a potential contaminant.⁶²⁰ TDH regulations do not cover the second half of this provision, regarding keeping parts of the vehicle that contain food at least 18 inches above the ground. Placing this new requirement after an unnecessary one makes it more difficult for business owners to notice the additional requirement. The latter requirement should have its own provision to make it stand out.

Part 2: TDH regulations already prohibit stored food from being contaminated by rodents and insects.⁶²¹ While the first half of the provision gives more examples of potential contaminants, none of the examples fall outside of what TDH regulations already cover. Therefore, this part of the provision is unnecessary and should be removed to improve clarity. The second half of the provision, restricting animals from the areas where food is stored, is also covered by a broader TDH regulation that prohibits live animals from “food operational premises and adjacent areas.”⁶²² The only difference between the Memphis provision and the TDH regulation is that the TDH regulation contains an exception in the case that proper ventilation has been installed. Since this TDH regulation contains such similar requirements, the Memphis provision should be repealed to provide clarity.

Part 3: This provision is more detailed than the state regulation. The state requires that all poisonous or toxic materials be stored in cabinets or in a similar physically separate place used for no other purpose.⁶²³ The Memphis provision requires the storage space to be to be entirely separate from the food preparation area. This provision should be retained because it addresses a mobile food unit issue that state law does not address. When transporting chemicals in a truck, they need to be separated further from food areas because the motion could cause them to spill and contaminate the food. The Memphis ordinance adds an additional requirement to reduce the chances of contamination.

Part 4: This mobile food unit-specific provision should be retained. State regulations do not directly address the physical requirements for mobile food preparation vehicles.

Part 5: No Comment.

SECTION 12. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-268 to

⁶²⁰ Tenn. Comp. R. & Regs. 1200-23-01-.02 (2)(a).

⁶²¹ Tenn. Comp. R. & Regs. 1200-23-01-.02(2)(a); Tenn. Comp. R. & Regs. 1200-23-1-.02(10)(p).

⁶²² Tenn. Comp. R. & Regs. 1200-23-1-.02(10)(p)(3).

⁶²³ Tenn. Comp. R. & Regs. 1200-23-01-.02(11)(g)(3)(ii)(I).

read as follows:

Section 16-268 Zoning Districts

(1) ~~Mobile food preparation vehicles~~ Mobile food units are allowed to operate on sites and city streets, alleys and other public thoroughfares within the Office General (OG); Commercial Mixed Use 1, 2 and 3 (CMU-1, CMU-2 and CMU-3); Central Business (CBD); Campus Master Plan -1 and -2 (CMP-1 and CMP-2); Employment (EMP); Warehouse and Distribution (WD) and Heavy Industrial (IH) zoning districts; the South Central Business Improvement Special Purpose District (SCBID) and the Mixed Use (MU), Neighborhood Center Overlay (NC), Uptown Hospital (UH) and Uptown Light Industrial (ULI) districts of the Uptown Special Purpose District. In addition, ~~mobile food preparation vehicles~~ mobile food units are allowed to operate on public and private school sites within residential zoning districts with written authorization from the school.

(2) ~~Mobile food preparation vehicles~~ Mobile food units must operate at least 1,000 feet from permitted special events locations and permitted Farmer's Market locations and the ~~mobile food preparation vehicle~~ mobile food unit shall not operate within 2 hours before or after a scheduled, permitted event or Farmer's Market, unless the vendor has received specific authority to operate from the event or Farmer's Market officials. ~~Mobile food preparation vehicles~~ Mobile food units may not operate within 300 feet of FedEx Forum or Autozone Park when events are being conducted or within two (2) hours before or after such event.

(3) Approval to operate a ~~mobile food preparation vehicle~~ mobile food unit within all residential and residential work districts, or parks, except as provided below, shall require approval of a special use permit from the Land Use Control Board and the legislative body, subject to the provisions of Chapter 9.6 of the Memphis and Shelby County Unified Development Code.

a. Mobile Food Vendors shall be authorized to operate in any park under a management agreement with the City or County Government under terms and conditions established by those entities authorized by the City or County for such park management activities as to the times and locations within the park and additional fees charged for such vendors.

b. Written authorization for activities within such parks by the management group shall be provided by the food vendor upon request by local or state authorities.

(4) Regulation of this section shall be performed by law enforcement and Shelby County Code Enforcement

Suggestion: Retain this provision, as it removes ambiguity by clarifying where mobile food preparation

vehicles may operate.

Comment: Before this mobile food preparation vehicle provision was created, one of the main complaints of food industry stakeholders interested in operating mobile food units was the lack of clarity concerning where they could operate.⁶²⁴ This section adequately addresses these issues by clearly defining which areas of the city are available to operate food trucks. The zoning regulations are a good example of the type of concerns that should be addressed at the local, rather than state, level. These new zoning regulations remove much of the uncertainty and therefore promote economic development and food access. Even if the Memphis Food Code is repealed, this provision should be retained to ensure that mobile food unit operators can continue operating their businesses.

SECTION 13. BE IT FURTHER ORDAINED, That the provisions of this Ordinance are hereby severable. If any of these sections, provisions, sentences, clauses, phrases or arts are held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect.

SECTION 14. BE IT FURTHER ORDAINED, That this Ordinance shall take effect from and after the date it shall have been passed by the Council, signed by the Chairman of the Council, certified and delivered to the office of the Mayor in writing by the Comptroller, and become effective as otherwise provided by law.

⁶²⁴ Interview with Mobile Food Preparation Vehicle Operator, by phone (Jan. 18, 2011).

Glossary

FDA: United States Food and Drug Administration

Food Service Establishment (FSE): Defined by Tennessee as, “Any establishment, place or location, whether permanent, temporary, seasonal or itinerant, where food is prepared and the public is offered to be served, or is served, food, including, but not limited to, foods, vegetables, or beverages not in an original package or container, food and beverages dispensed at soda fountains and delicatessens, sliced watermelon, ice balls, or water mixtures.”⁶²⁵

Good Manufacturing Practices (GMP): Manufacturing practices promulgated at the federal level by the Food and Drug Administration, followed by many states as rules for food manufacturing.

Memphis Food Code: Code of food ordinances enacted by the City of Memphis and implemented by the Shelby County Health Department in its food entity inspections in Memphis and Shelby County

Mobile Food Preparation Vehicle: The term Memphis applies to entities commonly called "food trucks." Memphis has defined "mobile food preparation" vehicles as “any motorized vehicle that includes a self-contained or attached trailer kitchen in which food is prepared, processed or stored and used to sell and dispense food to the ultimate consumer.”⁶²⁶

Other Food Entities (OFEs): Food entities that do not qualify as “retail food stores” or “food service establishments,” including food manufacturers, processors, distributors, and warehouses.

Retail Food Stores (RFS): Defined by the state as, “Any establishment or section of an establishment where food and food products are offered to the consumer and intended for off-premise consumption,” not including “establishments that handle only prepackaged, nonpotentially hazardous foods; roadside markets that offer only fresh fruits and fresh vegetables; . . . vending machines or food service establishments not located within a retail food store; or a person who makes infrequent casual sales of honey or who packs or sells less than one hundred fifty gallons . . . of honey per year.”⁶²⁷

SCHD: Shelby County Health Department

Temporary Food Service Establishment: Defined by the Tennessee Department of Health as “a food service establishment that operates at a fixed location for a period of time not more than 14 consecutive days. Establishments that operate 24 consecutive hours or less including preparation time, are not required to obtain a permit.”⁶²⁸

TDA: Tennessee Department of Agriculture

TDH: Tennessee Department of Health

⁶²⁵ See Tenn. Code Ann. § 68-14-302(6) for the full definition.

⁶²⁶ Memphis, Tenn. Code 16-176, Ordinance 5394, passed into law April 19, 2011, *available at* http://www.cityofmemphis.org/pdf_forms/ordinances/5394_FoodTruckOrdinance.pdf.

⁶²⁷ Tenn. Code Ann. § 53-8-203(7) (2010).

⁶²⁸ Tenn. Comp. R. & Regs. 1200-23-01-.01(39) (2011).

Appendices

Appendix A: Memphis Food Code Provision Numbering – MuniCode and Food Ordinances

Food Ordinance Section Number	Memphis Municipal Code Number	Title (NOTE these titles accord with the Memphis municipal code, not the food ordinance handbook)
Article 1: General Provisions		
16-176	9-52-1	Definitions
16-177	9-52-2	Approval of plans for construction and alteration of food service establishment.
16-178	9-52-3	Permit to manufacture, sell or distribute food generally—Required.
16-179	9-52-4	Permit-Application
16-180	9-52-5	Permit—Issuance.
16-181	9-52-6	Permit—Display—Not transferable.
16-182	9-52-7	Permit—Revocation or suspension.
16-183	9-52-8	Periodic inspections
16-184	9-52-9	Sale of food or drinks on streets or from vehicles, vacant lots or temporary stands prohibited, except as authorized.
16-185	9-52-10	Food processors and distributors outside county.
16-186	9-52-11	Temporary food service establishments
16-187	9-52-12	Collection and analysis of food samples
16-188	9-52-13	Production or sale of adulterated or misbranded food prohibited
16-189	9-52-14	Report of unwholesome food.
16-190	9-52-15	Transporting bakery foods.
	9-52-16	Manufacturing, mixing or reconstituting prohibited at food establishments.
16-192	9-52-17	Frozen desserts—Permits to sell, produce and distribute.
16-193	9-52-18	Frozen desserts—Transferring and dispensing.
16-194	9-52-19	Frozen desserts—Mobile vendors.
16-195	9-52-20	Right of entry into food establishments—Interfering with health department personnel.
16-196	9-52-21	Interpretation of chapter—Policies and standards of health officer.
16-197	9-52-22	Enforcement of chapter—Rules and regulations of health department.
	9-52-23	Mobile coffee/cappuccino bars.
Article 2: General sanitary requirements		
16-201	9-52-24	Application of Article
16-202	9-52-25	Cleanliness of employees
16-203	9-52-26	Health of employees
16-204	9-52-27	General requirements as to food
16-205	9-52-28	Maintenance of premises
16-206	9-52-29	Floors, walls, and ceilings
16-207	9-52-30	Doors and screens
16-208	9-52-31	Water supply, sewage disposal and plumbing
16-209	9-52-32	Lighting

16-210	9-52-33	Ventilation
16-211	9-52-34	Maintenance of fixtures
16-212	9-52-35	Refrigerators, iceboxes, cold storage rooms, and air conditioners
16-213	9-52-36	Utensils and equipment generally
16-214	9-52-37	Sanitary design, construction, and installation of equipment and utensils
16-215	9-52-38	Disinfecting and sanitizing facilities; dishes and utensils
16-216	9-52-39	Paper vessels and straws
16-217	9-52-40	Stoves, ranges and hoods
16-218	9-52-41	Milk or food in bottles
16-219	9-52-42	Wrapping foods
16-220	9-52-43	Common drinking cups
16-221	9-52-44	Shelf or counter coverings
16-222	9-52-45	Storage and disposal of garbage and rubbish
16-223	9-52-46	Birds and animals prohibited—Exception.
16-224	9-52-47	Separation of unrelated activities generally
16-225	9-52-48	Sleeping quarters; accumulation of unnecessary articles
16-226	9-52-49	Toilet facilities
16-227	9-52-50	Hand washing facilities
16-228	9-52-51	Basements
16-229	9-52-52	Dressing rooms and lockers
16-230	9-52-53	Storage of soiled linens, coats and aprons
16-231	9-52-54	Display, storage and service of food generally
16-232	9-52-55	Storage of potentially hazardous foods
16-233	9-52-56	Coffee creamers and refrigerated cream dispensers
16-234	9-52-57	Presetting of tables
16-235	9-52-58	Transportation of food to or from food establishments
16-236	9-52-59	Use and storage of poisonous and toxic materials

Article 3: Requirements for Specific Types of Establishments and Hucksters

16-246	9-52-60	Application of article
16-247	9-52-61	Lounges and bars
16-248	9-52-62	Grocery stores-generally
16-249	9-52-63	Grocery stores—Facilities for cleaning in connection with sale of ice drinks.
16-250	9-52-64	Candy counters
16-251	9-52-65	Food processing plant
16-252	9-52-66	Caterers generally
16-253	9-52-67	Industrial caterers
16-254	9-52-68	Salvage food establishments
16-255	9-52-69	Open air café
16-256	9-52-70	Hucksters - generally
16-257	9-52-71	Hucksters - operating on public property
16-258	9-52-72	Pedestrian vendors
16-259	9-52-73	Farmer's market
16-260	9-52-74	Coffee bars
16-261		Mobile food preparation vehicles
16-262		Operational requirements
16-263		Food requirements

16-264	Food handler requirements
16-265	Equipment standards
16-266	Maintenance of premises
16-267	Vehicle sanitation requirements
16-268	Zoning districts
Article 4: Meat and Meat Products	
9-52-75	Purpose and construction of article.
9-52-76	Sale of uninspected meat and meat products.
9-52-77	Offenses in connection with inspection marks and stamps.
9-52-78	Sale of unfit meat and meat products.
9-52-79	Report of unfit meat and meat products.
9-52-80	Dyes and preservatives in meat and meat products.
9-52-81	Transportation.
9-52-82	Regulations of health officer.
9-52-83	Enforcement of article.

**Appendix B: Shelby County Health Dep't, General
Environmental Health Manual Revision, "food sampling
operations." Rev. 10-4-10**

GENERAL ENVIRONMENTAL HEALTH MANUAL REVISION

DATE 10/8/2010

TO: All General Environmental Health Environmentalists

FROM: Hugh Atkins

SUBJECT: MANUAL REVISION 174: Food Program; Permitting
Food Program;

INSTRUCTIONS:

I Remove: Current Food Field Guide, pages 3-4

II Add: Revised Food Field Guide, pages 3-4

III REASON: To provide guidance and division policy on **sampling operations** involving foods from a licensed domestic kitchen as well as fruits and vegetables at farmer's markets, flea markets, and temporary events.

DISTRIBUTION: All General Environmental Health Environmentalists, Supervisors, and Managers.

4. When determining the seating capacity of an establishment the following shall apply:
 - A. Count all seats inside the establishment.
 - B. Count highchairs. Do not count booster seats.
 - C. Count all seats in an open-air café. An open-air café is the part of a permanent food service establishment that provides an outside dining area where food is served to the patrons. See regulations 1200-23-1-02 (14), Open Air Cafes, page 29.
 - D. Do not count seats in a common area used by patrons of more than one establishment.
 - E. Enter the exact number of seats on the permit application and on the inspection report.

Note: If this method of counting seats requires additional restroom facilities for a currently permitted establishment, allow correction by July 1, 2002. Document on the supplemental sheet.

5. Permit all operations within-state correctional institutions under one permit.
6. Responsibility for doughnut shops.
 - A. Operation: wholesale and retail: Department of Agriculture Regulations
 - B. Operation: wholesale marketing: Department of Agriculture Regulations
 - C. Retail only: Division of General Environmental Health
7. Sampling operations in farmer's markets, flea markets, and temporary events.

Sampling operations located in farmer's markets, flea markets, and temporary events are exempt from permitting and regulation provided the food products being offered as samples are non potentially hazardous and/or are products prepared in a licensed domestic kitchen regulated by the Tennessee Department of Agriculture. **Rev. 10-4-10**

Appendix C: Mobile Food Preparation Vehicle Ordinances

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Ord. # 5394

**ORDINANCE TO AMEND CHAPTER 16, ARTICLE V, OF THE CITY OF
MEMPHIS, CODE OF ORDINANCES, SO AS TO ALLOW SELF-CONTAINED
MOBILE FOOD PREPARATION VEHICLES TO OPERATE IN THE CITY OF
MEMPHIS**

WHEREAS, cities across the country have enjoyed the popularity of street food and that popularity has increased over the past few years; and

WHEREAS, citizens in this community have expressed an interest in the opportunity to establish a mobile food operation venture while others have expressed the desire to have these additional food and location choices; and

WHEREAS, the Council deems it in the best interest of the citizens of Memphis that such mobile food operations be locally regulated as a matter of health and public safety, and for the general welfare of the people.



safety, and for the general welfare of the people.

NOW, THEREFORE,

**SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF
MEMPHIS, that Section 16-176. Definitions, is hereby amended to include the
following terms and definitions:**

Commissary - means any State of Tennessee licensed stationary food establishment that serves mobile food dispensers, mobile food facilities, vending machines or other food dispensing operations where (i) food, containers or supplies are stored; (ii) food is prepared or prepackaged for sale or service at other locations; (iii) utensils are cleaned; or (iv) liquid and solid wastes are disposed of or potable water is obtained.

Mobile food preparation vehicle - A mobile food preparation vehicle is any motorized vehicle that includes a self-contained or attached trailer kitchen in which food is prepared, processed or stored and used to sell and dispense food to the ultimate consumer. Mobile units must be mobile at all times during operation. The unit must be on wheels (excluding boats) at all times. Any mobile food unit that removes such wheels o

menu, installation of new food preparation or storage equipment, or increasing storage capacity.

Servicing Area – A mobile food unit servicing area shall be provided and shall include at least overhead protection for any supplying, cleaning, or servicing operation. Within this servicing area, there shall be a location provided for the flushing and drainage of liquid wastes separate from the location provided for water servicing and for the loading and unloading of food and related supplies.

SECTION 2. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Section 16-187 is hereby amended to add “16-261” at the end of the section.

SECTION 3. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 16 Section 16-178 is hereby amended to add Mobile Food Preparation Vehicles to the list of Food Establishments with an annual local permit fee of \$150.00 per mobile food unit vehicle.



0.00 per mobile food unit vehicle.

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SECTION 4. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 16 Section 16-257 (a) is hereby amended and shall read as follows:

SE
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replaced to

“This section shall not apply wherever huckstering or mobile food preparation vehicles are otherwise regulated in specific chapters or sections of this article.”

preparatio
Code.”

SECTION 5. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 16 is hereby amended to add Section 16-261 which shall read as follows:

SE
CITY OF
shall read

Section 16-261. Mobile food preparation vehicles.

Se

Mobile food preparation vehicles shall meet all applicable requirements of this article in addition to the requirements of this section.

Mobile fo

- (a) The vehicle must be specially designed as defined as a mobile food preparation vehicle and be approved by the health authority in addition to meeting the standards as set forth in section 16-208 of the City Code of Ordinances.
- (b) No person shall engage in the business of a mobile food preparation vehicle without first having obtained a commissary license or having a written commissary agreement, if required by the health authority.
- (c) Each mobile food preparation vehicle must display number its business name and state and local permit numbers, with letters and numbers at least three (3) inches in height, in a prominent and visible location on the vehicle.
- (d) The driver of the truck must have a current Tennessee Driver's License, current auto insurance (including liability insurance) and current vehicle registration as required by Tennessee law and enforced by law enforcement authorities.
- (e) The vehicle can only operate in locations where the operation of motorized vehicles is permitted under local zoning ordinances and enforced by local Code Enforcement authorities.



- (f) All current permits must be posted in a conspicuous manner, in compliance with T.C.A. 68-14-305.

(3) The health officer shall adopt written rules and regulations for mobile food preparation vehicles for the purpose of interpretations of this article.

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SECTION 6. BE IT FURTHER ORDAINED BY THE COUNCIL OF CITY OF MEMPHIS, that Chapter 16 is hereby amended to add Section 16 -26: shall read as follows:

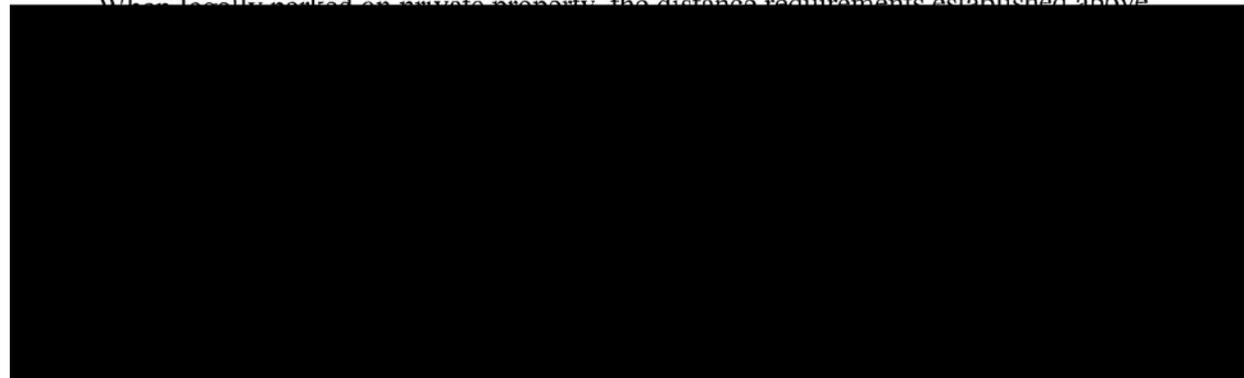
Section 16-262. Operational requirements.

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(1) When legally parked on a city street, alley and other public thoroughfares in an allowed zoning district, mobile food preparation vehicles shall park for no less than 15 minutes and shall not exceed a total of six hours in any one block, with food service available for no more than four hours of that time. The mobile food vendor must provide a minimum break from that location of one hour.

(5) When legally parked on a city street, alley and other public thoroughfare in an allowed zoning district, no such vehicle shall park or stand within 300 feet of any principal customer entrance to a restaurant outside of the Central Business Improvement District (CBID) during its posted hours of operation, unless a signed waiver, with a stated duration, has been obtained from all restaurants which are within a 300 foot radius of that parking location. For any restaurant within the CBID, this distance shall be 50 feet, unless a similar waiver is obtained from all restaurants within that lesser distance. Restaurant, for purposes of this section, means any public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink are prepared and served to the public for consumption on or off the premises pursuant to the required licenses. Such establishments include, but are not limited to, restaurants, bars, lounges, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms and sandwich shops. All measured distances and distance requirements addressed in this regulation shall be distances measured in a straight line from the nearest edge of the mobile vehicle or trailer to the nearest edge of the object from which the mobile vehicle or trailer is to be distant.\

When legally parked on private property, the distance requirements established above



When legally parked on private property, the distance requirements established above shall still be applicable if a restaurant is present on adjacent or abutting property, unless a signed waiver, with a stated duration, has been obtained from all restaurants on adjacent or abutting property which are within a 300 foot radius of that parking location on private property. For any restaurant within the CBID, this distance restriction shall be 50 feet, unless a similar waiver is obtained from all restaurants within that distance located on adjacent or abutting property.

-) When legally parked on a city street, alley and other public thoroughfares in an allowed zoning district, no sale shall be made from such vehicle except from the curb side. (6)
-) Cooking must not be conducted while the vehicle is in motion. (7)
-) Mobile food preparation vehicle shall be parked only at its commissary or any other location approved by the Health Department that does not violate an applicable city ordinance. (8)
-) No detached signs are permitted. All signs used must be permanently affixed to, or painted on, the mobile food preparation vehicle and shall extend no more than six feet above the vehicle. (9)

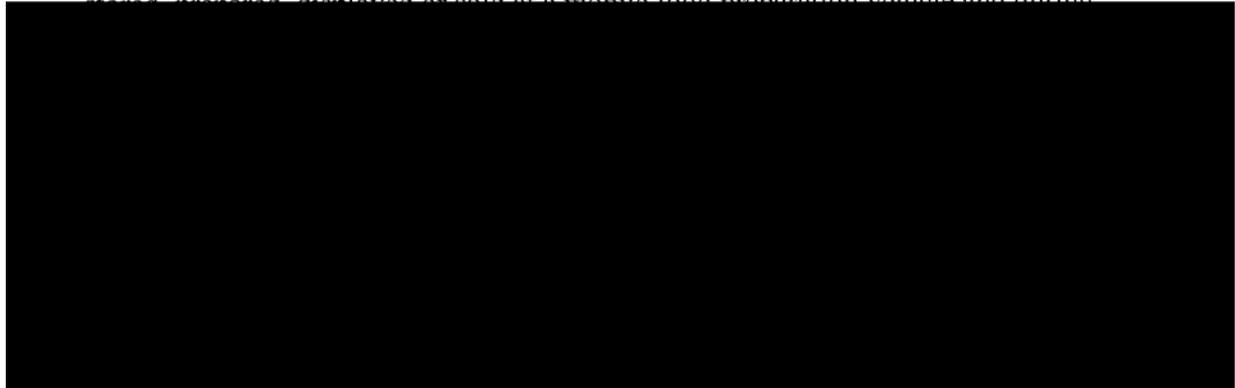
other feature used. The change of message rate on digital signs shall be limited to no more than once every 8 seconds. No sign shall utilize any exposed incandescent lamp with a wattage of more than forty (40) watts, any revolving beacon light; or a luminance in excess of three hundred fifty (350) foot lamberts measured at the sign face.

(10) Vendor must provide for the sanitary collection of all refuse, litter and garbage generated by the patrons using that service and remove all such waste materials from the location before the vehicle departs. This includes physically inspecting the general area for such items prior to the vehicle's departure.

SECTION 7. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-263 to read as follows:

Section 16-263 Food requirements

(1) All food shall be protected from contamination and the elements while being stored, prepared, displayed or sold at a mobile food preparation vehicle and during



here and during
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e rules and regulations

stored, prepared, displayed or sold at a mobile food preparation v
transportation to or between such establishments or vending mach
shall all food equipment, containers, utensils, food-contact surfac
vehicles, in accordance with the provisions of this chapter and the
of the Health Department.

rved, offered for sale or
reen locations shall be
igin and must be clean,
isbranding and safe for
or human food shall be
States Food and Drug
nessee Department of
ed in the United States
or the Tennessee Rules
proved and deemed
cies or the appropriate

(2) All foods to be used, prepared, cooked, displayed, sold, se
stored in a food establishment, or during transportation to or betw
from sources approved by the health authorities of the point of or
wholesome, free from spoilage, adulteration, contamination or m
human consumption. The standards for judging wholesomeness f
those promulgated and amended from time to time by the United
Administration, United States Department of Agriculture, the Ter
Health and the Tennessee Department of Agriculture and publish
Code of Federal Regulations and the Tennessee Code Annotated
and Regulations. Such laws will be adopted by reference when a
effective as of the date designated by the above government agen
legislative body approving such changes.

(5) All meats, meat food products, poultry and poultry products used in cooking, offered for sale, sold or prepared shall be from sources inspected and approved by the United States Department of Agriculture, the State of Tennessee Department of Agriculture or the state or local department of health and shall be plainly marked, tagged or stamped to indicate the source, and the inspection and approval.

(6) All hermetically sealed foods shall have been processed in approved food-processing establishments. The use, preparation, display, sale or storage of home-canned foods is prohibited and no other foods which have been processed in a private home or other than in an approved food-processing establishment shall be stored, used, kept for sale or served in a food establishment or automatic food-vending machine.

(7) The use of newspaper or any unclean paper for the purpose of wrapping food is forbidden.

(8) The Health Officer may augment such requirements when needed to assure the service of safe food and may prohibit the sale of certain potentially hazardous food.



ORDAINED BY THE COUNCIL OF THE CITY
by amended to add section 16-264 to read as

SECTION 8. BE IT FURTHER ORDI
OF MEMPHIS that Chapter 16 is here
follows:

Food handler requirements

Section 16-264 Food handlers

shall meet the standards as set forth in T.C.A. § 53-8-108, Tennessee
regulations, and City Code of Ordinance Chapter 16,
through section 16-203.

All food handlers shall meet the standards set forth in the
Department of Health Rules and Regulations, Chapter 16-201,
Article 1, Division II, section 16-201.

ORDAINED BY THE COUNCIL OF THE CITY
reby amended to add section 16-265 to read as

SECTION 9. BE IT FURTHER ORDI
OF MEMPHIS that Chapter 16 is here
follows:

Mobile food preparation standards.

Section 16-265 Equipment

shall meet the standards as set forth in Tennessee

All mobile food preparation vehicles shall

SECTION 11. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Chapter 16 is hereby amended to add section 16-267 to read as follows:

Section 16-267 Vehicle sanitation requirements.

(1) Each vehicle shall be constructed so that the portions of the vehicle containing food shall be covered so that no dust or dirt will settle on the food; and such portions of the vehicles which are designed to contain food shall be at least 18 inches above the surface of the public way while the vehicle is being used for the conveyance of food.

(2) The food storage areas of each vehicle shall be kept free from rats, mice, flies and other insects and vermin. No living animals, birds, fowl, reptiles or amphibians shall be permitted in any area where food is stored and



insecticides, rodenticides, plants, nature shall not be stored in the

ies.

other than for the purpose described

THE COUNCIL OF THE CITY
add section 16-268 to read as

to operate on sites and city streets,
e General (OG); Commercial

(3) Hazardous non-food items such as detergents, paint and paint products that are poisonous or toxic in food area of the vehicle.

(4) The vehicle shall be enclosed with tops and sides

(5) The vehicle shall not be used for any purpose in this chapter.

SECTION 12. BE IT FURTHER ORDAINED BY OF MEMPHIS that Chapter 16 is hereby amended to read as follows:

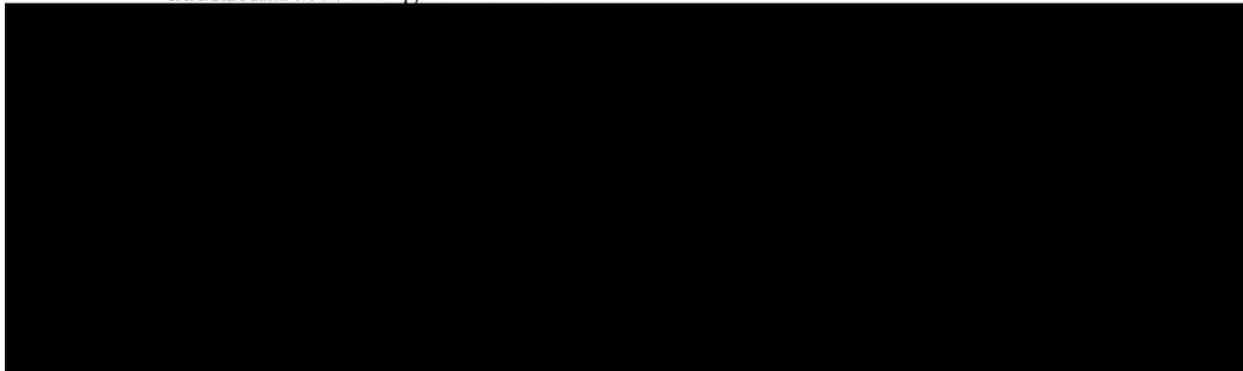
Section 16-268 Zoning Districts

(1) Mobile food preparation vehicles are allowed on alleys and other public thoroughfares within the Office

preparation vehicle shall not operate within 2 hours before or after a scheduled, permitted event or Farmer's Market, unless the vendor has received specific authority to operate from the event or Farmer's Market officials. Mobile food preparation vehicles may not operate within 300 feet of FedEx Forum or Autozone Park when events are being conducted or within two (2) hours before or after such event.

(3) Approval to operate a mobile food preparation vehicle within all residential and residential work districts, or parks, except as provided below, shall require approval of a special use permit from the Land Use Control Board and the legislative body, subject to the provisions of Chapter 9.6 of the Memphis and Shelby County Unified Development Code.

a. Mobile Food Vendors shall be authorized to operate in any park under a management agreement with the City or County Government under terms and conditions established by those entities authorized by the City or County for such park management activities as to the times and locations within the park and additional fees charged for such vendors.



on for activities within such parks by the management
the food vendor upon request by local or state

b. Written authorizati
group shall be provided by
authorities.

shall be performed by law enforcement and Shelby

(4) Regulation of this section s
County Code Enforcement

OTHER ORDAINED, That the provisions of this
f any of these sections, provisions, sentences, clauses,
ditional or void, the remainder of this Ordinance shall

SECTION 13. BE IT FU
Ordinance are hereby severable. I
phrases or parts are held unconstit
continue in full force and effect.

OTHER ORDAINED, That this Ordinance shall take
shall have been passed by the Council, signed by the
l and delivered to the office of the Mayor in writing by
ative as otherwise provided by law.

SECTION 14. BE IT FU
effect from and after the date it
Chairman of the Council, certified
the Comptroller, and become effec

PASSED | | | | |
Council | | | | |
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Appendix D: SCHD 2010 Revenue Worksheet

ESTABLISHMENT TYPE	# OF EST	2009 CURRENT REVENUE		2010 PROJECTED REVENUE		INCREASE
Personal C/Homes – FS *	95	50	\$4,750	100	\$9,500	\$4750.00
Food Distributor #	52	37.50	\$1,950	75	\$3,900	\$1950.00
Food Storage Warehouse #	79	75	\$5,925	150	\$11,850	\$5925.00
Wholesale Meat Plant #	8	75	\$600	150	\$1,200	\$600.00
Carbonated Beverage Plant #	5	150	\$750	300	\$1,500	\$750.00
Food Packing Plant #	5	30	\$150	60	\$300	\$150.00
Institution – FS *	97	75	\$7,275	150	\$14,550	\$7275.00
Food Processing Plant #	40	150	\$6,000	300	\$12,000	\$6000.00
Nursing Homes – FS #	22	75	\$1,650	150	\$3,300	\$1650.00
Vending Machine Company #	26	75	\$1,950	150	\$3,900	\$1950.00
Coffee Bar +	36	7.50	\$270	15	\$540	\$270.00
Packaged Good Stores +	385	22.50	\$8,663	45	\$17,325	\$8662.00
Wholesale Bakery #	6	150	\$900	300	\$1,800	\$900.00
Industrial Caterer +	19	30	\$570	60	\$1,140	\$570.00
Food Salvage #	6	150	\$900	300	\$1,800	\$900.00
Farmers' Markets +	2	7.50	\$15	50	\$100	\$85.00
Hospitals – FS #	15	75	\$1,125	150	\$2,250	\$1125.00
Wholesale Produce 10,000 – 20,000 #	10	75	\$750	150	\$1,500	\$750.00
Trailer Court – in County +	11	None		300	\$3,300	\$3300.00
Trailer Court – in City +	14	150	\$2,100	300	\$4,200	\$2100.00
Barber Shops #	202	15	\$3,030	50	\$10,100	\$7070.00
Coin-ops +	527	15	\$7,905	50	\$26,350	\$18445.00
Funeral Homes #	43	50	\$2,150	100	\$4,300	\$2150.00
NUMER OF ESTABLISHMENTS	1,702					
TOTAL REVENUE			\$59,378.00		\$136,705.00	\$77,327.00

Note: # indicates that **all** of these establishments are being permitted and inspected by another governmental agency as well as MSCHD.

Note: * indicates that **most** of these establishments are being permitted and inspected by another governmental agency as well as MSCHD. Some of them are being permitted and inspected **only** by MSCHD.

Note: + indicates that all of these establishments are **only** being permitted and inspected by MSCHD.