

OPINION NO. 2011-003**Syllabus:**

2011-003

1. A church or school that acts as a host site for an organization that sells food “stores, processes, prepares, manufactures, or otherwise holds or handles food for retail sale” for purposes of the definition of a “retail food establishment” in R.C. 3717.01(C) if the host site: (1) participates in the sale of food to individual customers and (2) keeps or maintains food at a certain temperature, keeps food at its site before distribution, assembles individual customer orders from food delivered in larger boxes or pallets, distributes individual orders to customers, or has possession of the food prior to distribution. Whether a host site stores, processes, prepares, manufactures, or otherwise holds or handles food is a question of fact that a retail food establishment licensor must answer on a case-by-case basis.
2. A church or school that acts as a host site for an organization that sells food is not excluded from the definition of retail food establishment pursuant to R.C. 3717.22(A) if the host site is not: (1) a food

service operation licensed under R.C. 3717.41-.99, (2) an entity exempt from licensure as a food service operation pursuant to R.C. 3717.42(B), or (3) a business regulated by the federal government or the Department of Agriculture as a food manufacturing or food processing business. Whether a particular host site meets these exclusions is a question of fact that a retail food establishment licensor must answer on a case-by-case basis.

3. A church or school that acts as a host site for an organization that sells food is not exempted from licensure pursuant to R.C. 3717.22(B)(2)-(3), (6)-(12), or (14)-(16). A host site is not exempt from licensure pursuant to the remaining provisions of R.C. 3717.22(B) if the host site: (1) sells food that is not commercially prepackaged, food that is potentially hazardous, or food that is not contained in a display smaller than two hundred cubic feet (R.C. 3717.22(B)(1) and (13)); (2) sells food that is not in a display smaller than five hundred square feet or if the site cannot be classified as risk level one (R.C. 3717.22(B)(5)); and (3) is not tax exempt under section 501(c)(3) of the Internal Revenue Code or sells food that is potentially hazardous (R.C. 3717.22(B)(4)). Whether a host site qualifies for one of these exemptions is a question of fact that a retail food establishment licensor must answer on a case-by-case basis.

To: James J. Zehringer, Director, Department of Agriculture, Reynoldsburg, Ohio

By: Michael DeWine, Ohio Attorney General, February 13, 2011

Your predecessor requested an opinion regarding the meaning of the term “retail food establishment” as used in R.C. Chapter 3717. Specifically, we were asked to address whether a church or school that acts as a “host site” for an organization that sells food products is a “[r]etail food establishment” as defined by R.C. 3717.01(C) such that the church or school must be licensed pursuant to R.C. 3717.21. Your predecessor’s opinion request letter specifically mentions Angel Food Ministries, a non-profit organization, as an example of an organization that sells food products. Angel Food Ministries provides food relief throughout the country by selling “boxes” of food at discount prices, including packaged, fresh, frozen, and refrigerated foods such as fruits, vegetables, and meats.

According to its website, a church or community organization may act as a “host site” for Angel Food Ministries. A host site collects customer orders during the first part of the month or customers place their orders online directly with Angel Food Ministries. After orders are placed, the food is shipped by Angel Food Ministries to the host site. Volunteers at the host site divide the food into individual orders, which are picked up at the host site by the customers who placed the orders. Payments are either collected by the host site or are made directly to Angel Food

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Ministries if a customer makes the purchase online. Angel Food Ministries donates one dollar to a host site for each box of food delivered to a customer.

Angel Food Ministries, as pointed out in the opinion request, is not the only organization that sells food using this type of model. Other fundraisers, such as Market Day, similarly rely on schools or other host sites to collect orders and payments and to distribute the food. Those host sites also may receive some donation or portion of the purchase price.

Overview of R.C. Chapter 3717

As a general matter, any facility that falls within the statutory definition of “retail food establishment” is governed by R.C. Chapter 3717 and the regulations set forth at 3A Ohio Admin. Code Chapter 901:3-4. The Department of Agriculture (Department) is charged with regulating these establishments. R.C. 3717.01(O)(2); R.C. 3717.04; R.C. 3717.33. The Department and boards of health, collectively defined by R.C. 3717.01(O) as “licensors,” are responsible for licensure and inspection of retail food establishments. R.C. 3717.01(O); R.C. 3717.23; R.C. 3717.25-.28; 3A Ohio Admin. Code 901:3-4-01(C); 3A Ohio Admin. Code 901:3-4-03 to 901:3-4-10; 3A Ohio Admin. Code 901:3-4-12 to 901:3-4-15. Licensors also are responsible for enforcing the requirements of R.C. Chapter 3717 and any rules adopted pursuant to that Chapter. R.C. 3717.29-.32; 3A Ohio Admin. Code 901:3-4-11. The Department also is charged with adopting rules “establishing standards for safe food handling and sanitation in retail food establishments.” R.C. 3717.05(A). These rules are known as the Ohio uniform food safety code. 6 Ohio Admin. Code Chapter 3717-1.

A “[r]etail food establishment” is defined as “a premises or part of a premises where food is stored, processed, prepared, manufactured, or otherwise held or handled for retail sale.” R.C. 3717.01(C). Pursuant to R.C. 3717.21, “no person or government entity shall operate a retail food establishment without a license” unless otherwise excluded or exempted by R.C. 3717.22.

R.C. 3717.22(A) sets forth several exclusions from the definition of a retail food establishment. Entities licensed as a food service operation under R.C. Chapter 3717 or exempted from the licensing requirements for a food service operation are not retail food establishments. R.C. 3717.22(A)(1)-(2). Likewise, businesses regulated by the federal government or the Department as food manufacturing or food processing businesses also are not retail food establishments. R.C. 3717.22(A)(3). R.C. 3717.22(B) also includes numerous exemptions from the licensure requirements for certain types of entities. Thus, the licensure requirements of R.C. 3717.21 do not extend to those entities that have been excluded from the definition of retail food establishment under R.C. 3717.22(A) or to those entities that have been exempted from licensure under R.C. 3717.22(B).

In addition, the Ohio Administrative Code further defines a “*noncommercial* retail food establishment” as a retail food establishment conducted by “an agency of the government, a *church*, *school*, non-profit youth group . . . or an organization which is described in subsection 501(c)(3) and is tax exempt under subsec-

tion 501(a) of the Internal Revenue Code.” Rule 901:3-4-01(L) (emphasis added). Licensors may establish reduced license fees for noncommercial retail food establishments. Other than paying a reduced license fee, noncommercial retail food establishments are subject to the same regulations, including licensure, as other retail food establishments. Rule 901:3-4-03(B)(1); *see also* Chapter 901:3-4.

Based on the statutory scheme for retail food establishments, we must first determine whether a church or school acting as a host site is considered a retail food establishment as defined by R.C. 3717.01(C). If so, we must then determine whether such a host site is excluded or exempted from licensure pursuant to R.C. 3717.22.

Host Site as a “Retail Food Establishment” under R.C. 3717.01(C)

In order to be considered a retail food establishment for purposes of R.C. Chapter 3717, a host site must (1) store, process, prepare, manufacture, or otherwise hold or handle food, (2) for retail sale. R.C. 3717.01(C). To determine whether a host site meets the first part of this definition, we must consider what it means to “store,” “process,” “prepare,” “manufacture,” or “otherwise hold or handle” food. R.C. 3717.01(C)(2) defines “[p]repared” as “any action that affects a food, including receiving and maintaining it at the temperature at which it was received.” If a host site is required to keep food, such as meat and other refrigerated or frozen foods, at a certain temperature, the host site “prepares” food as defined by R.C. 3717.01(C)(2).

The remaining terms used in R.C. 3717.01(C) are not defined in R.C. Chapter 3717. In the absence of an express statutory definition, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42. “Store” means “to place or leave in a location . . . for preservation or later use or disposal” or “to provide storage room for.” *Merriam-Webster’s Collegiate Dictionary* 1230 (11th ed. 2005). Accordingly, if a host site keeps food at the host site’s premises before distribution, a host site “stores” food for purposes of R.C. 3717.01(C).

“Processed” can mean “to subject to or handle through an established usu-[ually] routine set of procedures.” *Merriam-Webster’s Collegiate Dictionary* at 990. It is conceivable that a host site “processes” food insofar as a host site uses a set of procedures to handle the food. Based on this definition, it reasonably follows that a host site “processes” the customers’ food by, for example, assembling the customers’ individual boxes from food delivered in larger boxes or pallets.

“Manufacture” is the process of making something, generally from raw materials. *Merriam-Webster’s Collegiate Dictionary* at 757. Based upon the facts of which we are aware, it does not appear that a host site makes any of the food that is ordered or distributed. Rather, a host site is responsible for distributing a product that is delivered to the site already made. Accordingly, a host site does not “manufacture” food.

The final term used in R.C. 3717.01(C) is to “otherwise hold or handle food.” To “hold” food means having possession of the food. *Merriam-Webster’s*

Collegiate Dictionary at 592. A host site has possession of the food prior to distributing it to the individual customers and therefore “holds” food for purposes of R.C. 3717.01(C). To “handle” can mean to “perform a required function with regard to,” *i.e.*, to “[handle] the day’s mail.” *Id.* at 565. A host site may be considered to “handle” food in a manner akin to “handling the day’s mail” when it assembles food into individual orders and then distributes those orders to the individual customers. To “handle” also can mean to “engage in the buying, selling, or distributing of a commodity.” *Id.* (emphasis added). “Distribute” is defined as “to divide among several or many” or “to give out or deliver.” *Id.* at 364. Because a host site assembles food into individual orders and distributes orders to individual customers, it is reasonable to conclude that a host site “handles” food.

Based upon these definitions, we conclude that a host site stores, processes, prepares or otherwise holds or handles food if it does any of the following: maintains food at a certain temperature; keeps food at its site before distribution; assembles individual customer orders from food delivered in larger boxes or pallets; distributes individual orders to customers; or has possession of the food prior to distribution. Whether a particular host site stores, processes, prepares, manufactures, or otherwise holds or handles food is a question of fact that a retail food establishment licensor must answer on a case-by-case basis. *See* 1990 Op. Att’y Gen. No. 90-020, at 2-78 (“it is inappropriate to use the opinion-rendering function of the Attorney General as a means for making findings of fact”).

Although a retail food establishment licensor may determine that a host site stores, processes, prepares, manufactures, or otherwise holds or handles food, a host site is not a “retail food establishment” unless these activities are done “for retail sale.” R.C. 3717.01(C). “Retail” is defined as “the sale of food to a person who is the ultimate consumer.” R.C. 3717.01(C)(1).

First, an individual who orders food that is delivered through a host site is the “ultimate consumer.” The term “ultimate” is not statutorily defined but is commonly defined to mean “[a]t last, finally, or at the end. The last in the train of progression or sequence . . . ; final.” *Black’s Law Dictionary* 1522 (6th ed. 1990). “Consumer” is defined in the Ohio uniform food safety code as “a person who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food service operation, retail food establishment or food processing plant, and does not offer the food for resale.” 6 Ohio Admin. Code 3717-1-01(B)(18). Similarly, *Black’s Law Dictionary* 311 (7th ed. 1999) defines a “consumer” as “[a] person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes.” Based on these definitions, the individuals who order food through a host site are ultimate consumers.

Next, the definition of “retail” requires the sale of food. R.C. 3717.01(C)(1). Here, there is a sale of food. Although a host site acts as a “middle man” in the sale and is not the “ultimate” seller of the food—an organization such as Angel Food Ministries is the final organization involved in the transaction—this does not matter for purposes of determining whether there is a “retail” sale as defined by R.C.

3717.01(C)(1). Notably, R.C. 3717.01(C)(1) limits the definition of “retail” to sales involving the “ultimate consumer” and imposes no similar restriction with respect to the origination of the sale. That is to say, the statute does not limit the definition to only a sale between the “ultimate consumer” and the “ultimate seller.” If the General Assembly intended to further limit or define the person or entity making the sale and thereby limit which entities may be considered retail food establishments, it could have done so with appropriate language. *See, e.g., Lake Shore Elec. Ry. Co. v. P.U.C.O.*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the legislature intended a particular meaning, “it would not have been difficult to find language which would express that purpose” having used that language in other provisions); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 69, 110 N.E. 627 (1915) (if the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). Instead, the definition simply requires a sale to the ultimate consumer. In light of R.C. 3717.01(C)(1)’s definition of “retail,” it reasonably follows that a church or school that acts as a host site for an organization that sells food does so “for retail sale.”

Accordingly, we conclude that a church or school that acts as a host site for an organization that sells food “stores, processes, prepares, manufactures, or otherwise holds or handles food for retail sale” for purposes of the definition of a “retail food establishment” in R.C. 3717.01(C) if the host site: (1) participates in the sale of food to individual customers and (2) keeps or maintains food at a certain temperature, keeps food at its site before distribution, assembles individual customer orders from food delivered in larger boxes or pallets, distributes individual orders to customers, or has possession of the food prior to distribution.

Exclusions and Exemptions from Licensure under R.C. 3717.22

Although a host site qualifies as a retail food establishment as defined by R.C. 3717.01(C) that is subject to licensure, we must next determine whether a host site is excluded or exempted from the licensure requirement pursuant to R.C. 3717.22. The licensure requirement of R.C. 3717.21 does not extend to entities that are specifically excluded from the definition of retail food establishment pursuant to R.C. 3717.22(A) or to entities that are exempted from licensure pursuant to R.C. 3717.22(B).

A church or school acting as a host site is not excluded from the definition of retail food establishment pursuant to R.C. 3717.22(A). That provision states that the following entities are not retail food establishments: food service operations licensed under R.C. 3717.41-.99,¹ entities exempt from licensure as food service

¹ A food service operation is defined as “a place, location, site, or separate area where food intended to be served in individual portions is prepared or served for a charge or required donation.” R.C. 3717.01(F). This definition does not include a host site as described in the opinion request.

operations pursuant to R.C. 3717.42(B),² or businesses regulated by the federal government or the Department as food manufacturing or food processing businesses.³ R.C. 3717.22(A). In our opinion, none of these exclusions apply to a host site as defined by the opinion request. Accordingly, such a host site is not excluded from the definition of retail food establishment pursuant to R.C. 3717.22(A). Of course, whether a particular host site meets these exclusions is a question of fact that must be determined on a case-by-case basis by the retail food establishment licensor. If the licensor determines that a host site is a food processing operation, any entity exempt from licensure as a food service operation, or a food manufacturing or food processing business, a host site may then be excluded from the definition of retail food establishment pursuant to R.C. 3717.22(A) and is not subject to licensure.

Next, we must determine whether a host site may be exempted from licensure pursuant to any of the sixteen exemptions listed in R.C. 3717.22(B). Twelve of the exemptions clearly are not applicable to a church or school that acts as a host site. R.C. 3717.22(B)(2)-(3), (6)-(12), (14)-(16). We also conclude that the remaining four exemptions (R.C. 3717.22(B)(1), (4), (5), or (13)) do not apply to a host site that functions in the manner described in the opinion request.

R.C. 3717.22(B)(1) and (13) exempt from licensure establishments that offer commercially prepackaged food that is not potentially hazardous and that is contained in displays smaller than 200 cubic feet.⁴ Generally, the Ohio uniform food safety code defines “potentially hazardous” as a food that requires temperature control because it is capable of supporting infectious or toxic diseases. Rule 3717-1-01(B)(70). Even if a host site limits its sales to commercially prepackaged food, it appears that a host site as described in the opinion request likely offers potentially hazardous food (*i.e.*, meat, seafood, or eggs) and does not contain food being sold in displays smaller than 200 cubic feet. If, in fact, a host site does sell potentially hazardous foods or does not contain food being sold in displays smaller than 200 cubic feet, such a host site is not exempted from licensure pursuant to R.C. 3717.22(B)(1) or (13).

Similarly, R.C. 3717.22(B)(5) exempts establishments that sell food

² A host site as described in the opinion request does not constitute a food service operation for the purpose of the exemptions included in R.C. 3717.42(B)(1)-(14).

³ The terms “food manufacturing business” and “food processing business” are not statutorily defined. Based on the previously discussed definition of “manufacture,” a host site is not a food manufacturing business. Additionally, a host site does not meet the definition of a “business”—“[e]mployment, occupation, profession, or commercial activity engaged in for gain or livelihood”—and therefore is neither a food processing nor food manufacturing business. *Black’s Law Dictionary* 198 (6th ed. 1990).

⁴ R.C. 3717.22(B)(13) also exempts establishments that offer only alcoholic beverages or prepackaged beverages that are not potentially hazardous. Because a host site sells food and does not limit its sales to beverages, these exemptions do not apply.

contained in displays of less than 500 square feet and that would be classified as “risk level one” if licensed and if the food is sold for no more than six months per year. R.C. 3717.22(B)(5). Again, it appears that a host site as described in the opinion request likely does not maintain the food being sold in a display. And as discussed below, a host site will not be classified as risk level one if the host site sells potentially hazardous food and is required to hold the potentially hazardous food at a certain holding temperature.

Risk level one establishments pose “potential risk” based on sanitation, food labeling, sources of food, storage practices, or expiration dates. 3A Ohio Admin. Code 901:3-4-05(A). Risk level two establishments pose “a higher potential risk” and their activities include holding for sale potentially hazardous food at the same holding temperature at which it was received. Rule 901:3-4-05(B). A host site as described likely is required to hold potentially hazardous food at a certain holding temperature and therefore will be classified as risk level two rather than risk level one. Accordingly, if a host site does not contain the food it sells in a display of less than 500 square feet or if the host site cannot be classified as risk level one, a host site is not exempted from licensure pursuant to R.C. 3717.22(B)(5).

The final exemption, R.C. 3717.22(B)(4), applies to “a nonprofit organization exempt from federal income taxation under section 501(c)(3) of the ‘Internal Revenue Code of 1986,’ 100 Stat. 2085, 26 U.S.C.A. 1, as amended, that raises funds by selling foods that are not potentially hazardous for not more than seven consecutive days or more than fifty-two separate days during a licensing period.” Although a church or school acting as a host site may be tax-exempt pursuant to section 501(c)(3) of the Internal Revenue Code, if a host site handles potentially hazardous food (food that requires temperature control because it is capable of supporting infectious or toxic diseases), then R.C. 3717.22(B)(4) does not apply. Rule 3717-1-01(B)(70).

In sum, we conclude that a church or school that acts as a host site as described in the opinion request is not excluded from the definition of retail food establishment pursuant to R.C. 3717.22(A) if the host site is not: (1) a food service operation licensed under R.C. 3717.41-99, (2) an entity exempt from licensure as a food service operation pursuant to R.C. 3717.42(B), or (3) a business regulated by the federal government or the Department of Agriculture as a food manufacturing or food processing business. We further conclude that a church or school that acts as a host site for an organization that sells food is not exempted from licensure pursuant to R.C. 3717.22(B) if the host site: (1) sells food that is not commercially prepackaged, food that is potentially hazardous, or food that is not contained in a display smaller than two hundred cubic feet (R.C. 3717.22(B)(1) and (13)); (2) sells food that is not in a display smaller than five hundred square feet or if the site cannot be classified as risk level one (R.C. 3717.22(B)(5)); and (3) is not tax exempt under section 501(c)(3) of the Internal Revenue Code or sells food that is potentially hazardous (R.C. 3717.22(B)(4)). Ultimately, whether a particular host site is excluded or qualifies for an exemption is a question of fact that must be determined by the retail food establishment licenser. A host site that is not excluded or exempted pursuant to R.C. 3717.22 is required to obtain a license. R.C. 3717.21.

The conclusion that a host site qualifies as a retail food establishment and is not excluded or exempted from licensure is supported by the regulations governing retail food establishments. *See* Chapter 901:3-4. The regulations include a definition of a *noncommercial* retail food establishment, which includes a church or school that is considered a retail food establishment. Rule 901:3-4-01(L). This demonstrates that the regulations contemplate that a church or school that sells food can be considered a retail food establishment and that such an establishment, even though operated by a church or school, is subject to licensure. *See* Rule 901:3-4-03(B)(1). Other than reduced licensing fees, noncommercial retail food establishments are treated the same as other retail food establishments. *See* Chapter 901:3-4.

Finally, it is important to bear in mind that the General Assembly enacted R.C. Chapter 3717 to ensure the health of persons purchasing and consuming food. *See* 1990 Op. Att’y Gen. No. 90-080, at 2-344 (discussing regulation of food service operations). The consequences of exempting host sites support my conclusions. Under a contrary interpretation, host sites would be exempted from the licensure and inspection requirements that provide for the safety of food and, therefore, for the safety of the public. But when host sites are subject to the requirements of R.C. Chapter 3717, consumers receive the protection that licensure and inspection provide.

Conclusions

In sum, it is my opinion, and you are hereby advised as follows:

1. A church or school that acts as a host site for an organization that sells food “stores, processes, prepares, manufactures, or otherwise holds or handles food for retail sale” for purposes of the definition of a “retail food establishment” in R.C. 3717.01(C) if the host site: (1) participates in the sale of food to individual customers and (2) keeps or maintains food at a certain temperature, keeps food at its site before distribution, assembles individual customer orders from food delivered in larger boxes or pallets, distributes individual orders to customers, or has possession of the food prior to distribution. Whether a host site stores, processes, prepares, manufactures, or otherwise holds or handles food is a question of fact that a retail food establishment licensor must answer on a case-by-case basis.
2. A church or school that acts as a host site for an organization that sells food is not excluded from the definition of retail food establishment pursuant to R.C. 3717.22(A) if the host site is not: (1) a food service operation licensed under R.C. 3717.41-.99, (2) an entity exempt from licensure as a food service operation pursuant to R.C. 3717.42(B), or (3) a business regulated by the federal government or the Department of Agriculture as a food manufacturing or food processing business. Whether a particular host site meets these exclusions is a question of fact that a retail food establishment licensor must answer on a case-by-case basis.

3. A church or school that acts as a host site for an organization that sells food is not exempted from licensure pursuant to R.C. 3717.22(B)(2)-(3), (6)-(12), or (14)-(16). A host site is not exempt from licensure pursuant to the remaining provisions of R.C. 3717.22(B) if the host site: (1) sells food that is not commercially prepackaged, food that is potentially hazardous, or food that is not contained in a display smaller than two hundred cubic feet (R.C. 3717.22(B)(1) and (13)); (2) sells food that is not in a display smaller than five hundred square feet or if the site cannot be classified as risk level one (R.C. 3717.22(B)(5)); and (3) is not tax exempt under section 501(c)(3) of the Internal Revenue Code or sells food that is potentially hazardous (R.C. 3717.22(B)(4)). Whether a host site qualifies for one of these exemptions is a question of fact that a retail food establishment licensor must answer on a case-by-case basis.