



INSTITUTE FOR JUSTICE

May 24, 2022

VIA ELECTRONIC MAIL

Dennis Sullivan
Mayor of Somerville
Borough Hall
25 West End Ave
Somerville, NJ 08876
dsullivan@somervillenj.org

Borough Council of Somerville
Borough Hall
25 West End Ave
Somerville, NJ 08876
gbrady@somervillenj.org
tmitchell@somervillenj.org
rpitts@somervillenj.org
fwied@somervillenj.org
rvroom@somervillenj.org
gstravic@somervillenj.org

RE: Somerville's Home Occupation Law and Cottage Food Producers

Dear Mayor Sullivan and Borough Council Members of Somerville:

My name is Rob Peccola and I am an attorney at the Institute for Justice (IJ). I am writing about the Borough's home occupation laws, specifically regarding resident Maria Winter. Maria wishes to open a home business selling her delicious baked goods made in her home kitchen with a Cottage Food Operator Permit issued by the New Jersey Department of Health. Maria proactively went to Somerville seeking a \$25 home business zoning permit. Rather than rewarding her for trying to do the right thing, Somerville denied Ms. Winter's request and demanded a full-blown zoning hearing—and \$5,000 deposited with the Borough just to get things started. Somerville's financial barriers to opening a home business are prohibitively burdensome and out of step with the New Jersey Health Department's new rules about home food businesses. They also arbitrarily allow some Somerville residents to obtain Cottage Food Operator Permits while withholding them from above-board citizens like Maria.

People should not have to pay thousands of dollars just to ask permission to sell baked goods to their community. We urge Somerville to allow Ms. Winter to open her home business without having to abide by these burdensome, expensive—and very likely unconstitutional—

application requirements. We also urge Somerville to reform its policies so that other residents can more easily open harmless home businesses that would have no ill effect on their neighbors.

About the Institute for Justice

The Institute for Justice is a national nonprofit law firm that fights against laws that irrationally burden people's right to pursue their chosen livelihood. One of our areas of expertise is homemade food law, also known as "cottage food" law. We assist legislatures and local municipalities that are considering changes to their cottage-food laws and have helped over 20 states and municipalities reform their laws. When necessary, we litigate cottage-food issues. We have successfully sued Minnesota (*Astramecki v. Department of Agriculture*), North Dakota (*Mickelson v. Department of Health*), Wisconsin (*Kivirist v. Department of Agriculture*), and Lincoln, Nebraska (*Harper v. City of Lincoln*) to protect the rights of cottage food producers.¹

Most recently, we concluded our lawsuit against New Jersey (*Russinko v. Department of Health*), which was the last state to have a complete ban on selling cottage foods. In response to our lawsuit, the New Jersey Department of Health promulgated rules allowing the sale of cottage foods across the state starting October 2021. *See* 53 N.J.R. 1711(a).

IJ also has expertise in zoning laws, including home occupation laws. We are litigating cases against Nashville, Tennessee and Lakeway, Texas due to their unreasonable restrictions on home occupations (also known as home businesses).² Our firm also recently released a study on how zoning laws are impeding home businesses, called "~~Work~~ Entrepreneur from Home." The survey shows that home-based businesses provide flexibility and opportunity for their owners and are an overall benefit to communities.

Somerville's Barriers to Ms. Winter's Cottage Food Business

Ms. Winter hopes that she can become one of these home-based business owners. However, Somerville's requirements are getting in the way. Although New Jersey recently legalized home baking businesses—in home kitchens, as opposed to commercial kitchens—across the state, Community Development Director John Muselli was unaware of this new rule, telling Ms. Winter by email on January 18, 2022 that before she could apply to open her home business selling baked goods, she "most likely" would need "site plan application to the planning board for modifications to the kitchen, that would be required for a *commercial kitchen*."³ (Emphasis added.) Ms. Winter patiently explained to Mr. Muselli that the new rule no longer requires a commercial kitchen, and she filed a zoning permit application along with the \$25 fee as a miscellaneous business service.

On February 1, 2022, however, Mr. Muselli denied this application, stating that "miscellaneous business services are a prohibited use in the R-2 zone district." Mr. Muselli emailed Ms. Winter stating that anything other than a home office is banned in Somerville and that she needs to comply with extremely burdensome application for a Zoning Board of

¹ You can read more about these cases on our website here: <https://ij.org/issues/food-freedom/>.

² You can read more about these cases on our website here: <https://ij.org/case/texas-home-daycare/>; <https://ij.org/case/nashville-home-based-business/>.

³ Mr. Muselli made these statements to Ms. Winter via email. We would be happy to provide you with these emails.

Adjustment hearing to bake from home. The requirements for this process would cost thousands of dollars. Again, quoting Mr. Muselli's email:

Assuming the use variance is all that is proposed, the application fee is \$1,000.00 and the escrow deposit is \$4,000.00 and the list of properties within 200 feet is \$10.00. Please submit three copies of the application and pertinent information to this office to determine completeness. Once determined complete, an additional 13 (thirteen) copies will be required for the hearing.

This process, typically conducted with the assistance of an attorney, is not just expensive, it is prohibitively burdensome. For example, Ms. Winter must also publish notice in the *Courier News* and notify all property owners on the within 200 feet of her property by certified mail at least ten days prior to the date of the hearing.⁴

As discussed below, these requirements: (1) conflict with the New Jersey's new rules about cottage food businesses; (2) conflict with Ms. Winter's constitutional rights; and (3) are bad public policy.

First, as an initial matter, these requirements are out of step with the state's new rules about cottage food businesses. In response to our lawsuit, the New Jersey Department of Health promulgated rules allowing the sale of cottage foods across the state starting October 2021. *See* 53 N.J.R. 1711(a). The rules require a state license to sell cottage foods, and that is it. They do not contemplate additional regulation at the local level.

Second, Somerville's de facto ban on home baking businesses would likely be unconstitutional under the state and federal constitution. People have a right to use their property in ordinary ways and they also have a right to run their own businesses. Local governments cannot impose requirements on these rights that are irrational and overly burdensome. *See, e.g., Moyant v. Borough of Paramus*, 154 A.2d 9, 20 (N.J. 1959) (invalidating municipal license requirements for solicitors and canvassers that required payment of a \$25 licensing fee and maintenance of a \$1,000 surety bond as "unduly oppressive and ... unreasonable"). Here, the Borough is being unduly oppressive and unreasonable by imposing these requirements before allowing residents to apply to open a home business—especially a home business as harmless as selling cookies. Most residents cannot afford to pay thousands of dollars to hire an attorney or even a \$1,000 escrow fee. And no one should have to pay thousands of dollars before they can apply to open a harmless home business.

Finally, these restrictions are bad policy because they inhibit entrepreneurship and economic self-sufficiency. As "~~Work~~ Entrepreneur from Home" shows, home-based businesses can be a tremendous benefit to the community, especially for women, low-income families, and racial and ethnic minorities. For example, while women make up about one-third of the total population of small-business owners, the survey shows they make up about 55% of home-based business owners. The survey also shows that home-based businesses benefit those who need flexibility to work from home, including those with disabilities and those who take care of small

⁴ https://www.somervillenj.org/filestorage/4100/4102/4153/4958/4962/Variance_Application_or_Appeals.pdf.

Mr. Dennis Sullivan
May 24, 2022
Page 4 of 4

children or elderly relatives. In the wake of the pandemic and during these difficult economic times, allowing such opportunity and flexibility is more important than ever.

Yet the Borough's policies make applying to open a home-based business almost impossible. Surely, if the Borough's application process is so complicated that it requires a land use attorney and \$5,000, then the Borough should make the process simpler.

Conclusion

We ask that you allow Ms. Winter to open her home business without having to satisfy the above requirements. We also ask that you reform your code so that other residents do not have to abide by the above requirements. All home businesses should be allowed as long as they are not a nuisance to neighbors. We would be happy to work with the Borough on suggestions for how to simply the application process and make it easier to navigate for residents and Borough officials alike. We have provided this service to several other local governments. We look forward to hearing from you soon.

Sincerely,



Robert Peccola
Attorney
INSTITUTE FOR JUSTICE

cc: Maria Winter
(via email: mvwinter27@gmail.com)
John Muselli, Community Development Director
(via email: jmuselli@somervillenj.org)