



Underground foodies: Legal renegades or Robin Hoods?

A look at the of legal implications and identifiable solutions to the underground food movement

BY SHEILA YAZDI

Many of you may have heard or read about the burgeoning underground food movement; Restaurants in homes or warehouses, farmers' markets with pre-registration requisites, and mobile food carts using Twitter as their locational beacon. These avant garde operations are exciting ways to be exposed to cutting edge food and up and coming chefs. Like anything though, there are legal implications – both in operating them and in terms of potential claims against them.

To begin, I must say that I fancy myself a semi-expert in the area of the underground food movement. I also happen to be an attorney. I don't believe these are mutually exclusive and have found a way to marry these two passions into a burgeoning career.

I will address the issues of the underground food scene by first, loosely defining what exactly is both an underground restaurant and underground farmers' market, including a short history of both movements. I will then discuss the legal implications of running an underground dinner and farmer's market, possible causes of action in the event of illness or injury, and solutions that have kept city authorities at bay.

Is that dinner party really an underground restaurant?

The underground restaurant, "is an eating establishment operated out of someone's home, generally (though not invariably) bypassing local zoning and health-code regulations. They are, in effect, paying dinner parties. They are usually advertised by word of mouth or guerilla advertising, often on Facebook,

and may require references to make a reservation."¹

Numerous Web sites are devoted to fans of underground restaurants, including at least one social networking site, The Ghetto Gourmet. Within the Bay Area there are at least 20 fully running underground restaurants at any given time.

The attraction of the underground restaurant for the customer is the opportunity to sample new food, often at low cost outside the traditional restaurant experience, which can be expensive and disappointing – underground restaurants have been described as "anti-restaurants." They also generally provide a more intimate, dinner party style experience. For the host, the benefit is to make some money and experiment with cooking without being required to invest in a restaurant proper. "It's literally like



playing restaurant,” one host told the San Francisco Chronicle, “you can create the event, and then it’s over.”²

Origins of underground restaurants

It is a widely held belief that the underground scene found its origins in the cosmopolitan streets of Buenos Aires, Argentina. Underground restaurants are popular in Latin America, where they’re known as either a paladar or a restaurante de puertas cerradas (closed door restaurant). Depending on local licensing laws, the restaurants may or may not be illegal, but nonetheless, they have been built into the culture for decades, and often have higher standards than many licensed establishments.³

A huge number of these establishments in Buenos Aires appeared on the scene after the disastrous economic crash of 2001, when numerous home cooks and unemployed restaurant employees tried their hand at the underground restaurant.

Underground farmers’ market defined

The Underground Market is a seemingly distant relative to the Underground Restaurant. Underground Markets are seen as providers of foodstuffs that have been produced by home bakers, canners, pasta makers, meat curers, and foragers, to name a few. These products are primarily created in individual’s backyards and home kitchens.⁴

Most Underground Markets start in private homes or warehouses, again without the authorization of local Health Departments or City Officials. Vendors are encouraged to sell their wares without the usual licenses and/or permits required by “above-ground” farmers’ markets.

As Philadelphia based Gigabiting states, “For the producers, it’s an opportunity to get a foot in the door in the food industry. Many of them have been turned away or turned off by farmer’s markets with their waiting lists, vendor fees, and stringent health code and licensing requirements. The underground

markets allow the producers to indulge a penchant for creative cooking, connect with a passionate base of customers, and reap the full benefit of retail sales.”⁵

On the flip side, consumers see the market as a refreshing break from conventional markets. They feel closer to the growers and producers and partake in what feels like a food movement.

Origins of underground farmers’ markets

Underground Farmers’ Markets appear to be a new phenomenon, attributed to the burgeoning “Do It Yourself Movement,” coupled with our sluggish unemployment rate and the flash-fire effects of social media. Yesterday’s home canner is today’s jam superstar.

San Francisco appears to be the birthplace of the Underground Farmers’ Market. The first market in 2009 had an unexpected visit from the San Francisco Health Department, who surprisingly enough, tipped off the event coordinator that by requiring market-goers to sign up for a free membership the market would be considered more of a private event hosted by a club.

To date, further markets have sprung up in New York, Amsterdam and London.

Legal implications of running an underground restaurant

The San Francisco Department of Public Health sets forth that “A person or persons who wish to operate any kind of food facility: restaurants, bars, markets, farmers’ market, concession stands, food pushcarts, mobile food units, licensed health care facilities, and temporary events, must obtain a *Permit to Operate* from the Department of Public Health Environmental Health Section.”⁶

Furthermore, it sets forth, “Through regular inspections and reinspections, Health Inspectors ensure that food handling practices are followed, and are in compliance with applicable health codes, at all food establishments throughout San Francisco. This includes temporary events (e.g., street fairs, concerts, etc.).”⁷

There is also a Food Safety Certification under California Food Safety Law requiring “at least one employee at each retail food facility be certified as a food safety person by passing an approved examination. The certified person can be the owner, manager, chef, cook or any employee responsible for safe food handling and who may insure that other employees use proper food handling techniques.

Certificate must be renewed every five years.”⁸

Lastly, it is required that, “food preparation shall be conducted within a fully enclosed food facility.”⁹ All prospective restaurateurs have to also go through a permitting process with the Health Department. Anyone, “proposing to build or remodel a food facility shall submit complete, easily readable plans drawn to scale, and specifications to the enforcement agency for review, and shall receive plan approval before starting any new construction or remodeling of any facility for use as a retail food facility.”¹⁰ The penalty for operating without a permit is, “closure of the food facility and a penalty not to exceed three times the cost of the permit.”¹¹

This is not the end of the hoops that a prospective restaurateur must jump through. The Fire Department also requires permits. For example, the San Francisco Fire Department sets forth the following conditions to acquiring and maintaining a permit:

- **Expiration.** A permit shall continue until revoked or for such a period of time as designed at the time of issuance. Permits shall not be transferable and any change in use, occupancy, operation, or ownership shall require a new permit.
- **Inspection Required.** Before a permit is issued, the Bureau of Fire Prevention shall inspect and approve the receptacles, vehicles, buildings, devices, premises, storage spaces or areas to be used. In instances where laws or regulations are also enforced by other departments, a joint approval shall be obtained from all departments concerned.



• **Retention of Permits.** Permits shall be kept on the premises at all times and shall be posted in a conspicuous location on the premises. Permits shall be subject to inspection at all times by an officer or the fire or police departments or any persons authorized by the Chief.

• **Revocation of Permits.** The chief is authorized to suspend or revoke a permit when it is determined after a hearing by the Chief.¹²

Finally, there is the issue of forming a business entity for the restaurant. Once this has been obtained by the State of California, one must register for a Business Tax Registration Certificate and most likely a Business Property Statement, reporting all equipment, fixtures, supplies, and leasehold improvements.¹³

It is a widely held belief that underground dining is seen as an “unregulated and largely untraceable industry.”¹⁴ Specifically, that city officials “worry that those who offer underground dining are putting their customers at risk.” It is common for these ventures to go unlicensed and ignore fire codes. “Further, such events, where thousands of dollars can change hands, do not contribute to the tax base.”¹⁵

One chef in Boston admitted that he had as of yet to take a commercial food safety class or food handler’s test. Furthermore, he had not obtained a business license and was therefore, not reporting his retail sales for tax purposes. The locations where the events are held are all private residences, which had not been inspected by the fire department. In addition, fees had not been paid to the fire department for an approved fire escape plan or fire code inspection certificate.¹⁶

These underground restaurants run the risk of being shut down with the first visit of a city Health or Fire Department official.

Legal implications of running an underground farmers’ market

As stated above, the exact same Health Department requirements apply

to Farmers’ Markets as they would with any other business handling foodstuffs.

Additionally, Health and Safety Code sections 114370-114373 are applicable to farmers’ markets. These sections set forth the specific requirements for any operator of a farmers’ market, including such specifics as, “All food shall be stored at least six inches off the floor or ground or under any other conditions that are approved,” and “Potentially hazardous food samples shall be maintained at or below 45°F and shall be disposed of within two hours after cutting.”¹⁷

The Underground Market Vendor is a typical home crafter or forager turned entrepreneur, but “because of costs, [and] because of access, many underground food producers do not cook in commercially licensed kitchens as required by mainstream distribution channels. That then bars them from purchasing sales permits and liability insurance.”¹⁸

Another hot topic is the issue of food safety. Because the vendors are typically skirting the commercial kitchen requirement or in another vein, foraging for foods, these activities are outside the regulatory arm of the local Health Department. Some states have started working with these producers by relaxing certain regulations. Many Underground Markets have difficulty staying under the regulatory radar and given their own success find themselves scrutinized by the local authorities. These markets must then comply with the regulations or shut down.

Possible claims against underground chefs, managers and/or vendors

When participating in anything that is not fully sanctioned by the authorities, it would seem that the legal implications for the coordinators would be much higher. This is true in regards to the city, county, and state that the underground operation is working in, but when it comes to the consumer, the claims are very similar to those one would bring if

injured or made sick from dining at a regular restaurant or consuming a spoiled farmers’ market good. The difference in this context is that there is almost always no liability insurance involved. This means that the individual sued will have to cough up the award monies out of their own pocket. The problem for the injured party is this may mean they never see even a small percentage of their full damages given the financial situation of many of the chefs, managers and vendors.

It is a “buyer beware” environment in the underground scene. People in a sense, assume a bit of the risk of what may happen when consuming food that is not prepared in a commercial kitchen. This assumption of the risk defense would be something a potential litigator would need to also take into account.

There is no case law on this subject, therefore, anyone taking a client with injuries or illness stemming from an underground operation would be forging ahead with little to guide them aside from relevant precedent relating to conventional restaurants or farmers markets. I would recommend using these cases as guideposts in formulating a litigation strategy.

Legal solutions and benefits to running an underground dinner

There are a number of ways that a chef interested in running an underground dinner can limit liability. The first popular solution is to host a pop-up restaurant. The pop-up restaurant runs out of an inspected, commercially licensed kitchen, with the requisite cooking equipment, seating and tableware, and ideally a liquor license.

The pop up can be described as the union of an underground restaurant with a legitimate licensed restaurant. “Pop ups have both the indie cachet *and* the Health Department’s blessing.”

There are usually two takes on the pop-up restaurant. One is where a chef borrows an existing kitchen, such as a coffee shop with a commercial kitchen at



night when they would typically be closed. The other option is when a restaurant offers a unique menu or service for the night with a guest chef.¹⁹

In entrepreneurially spirited cities such as San Francisco, the pop-up restaurant is a viable solution for some of the underground chefs. There are a number of coffee shops and small restaurants that are willing to share a night and reap a bit of revenue. As stated above, it also solves the Health and Fire Department dilemmas.

Another important step towards legality is to make sure the underground chef determines an avenue to report income earned. An appointment with a tax professional should solve most of these issues.

It is important to note that many underground chefs work in the underground sphere in the hopes of one day owning a fully licensed restaurant. The restaurant start-up costs, coupled with a lack of lending from the banks has virtually foreclosed many individuals from realizing their dream of owning their own restaurant. The underground restaurant is a great avenue of gaining some following, as well as the capital to move forward. An example is Portland, Oregon chef Michael Heberoy who started Family Supper in 2001. After a year in their bungalow, Heberoy and his wife opened their own full-fledged restaurant.²⁰

Some chefs use their intermittent dinners to advertise their legitimate catering businesses. One chef interviewed noted that he was hoping his catering business would supersede his underground dinner, still allowing him creative freedom, but free from the liability facing his underground venture.²¹

Legal solutions and benefits to running an underground farmers' market

Underground Farmers' Markets face some of the same hurdles as their restaurant cousins, but many cities have found

ways to work with the organizers of these events.

In San Francisco, the Health Department was reported to have attended the first Underground Farmers' Market of its kind. They did not shut down the market as many feared, but instead informed the organizer that the market would need to become a private club event open only to members. This "membership" status has allowed the San Francisco Market to run free and clear of the Health Department. Furthermore, the market is now housed in fully operational commercial spaces that have already received Fire Department approval.

The next issue is one of food safety and quality. Many markets already employ quality controls through the selection process for vendors. This is enough for most market-goers, however, not enough for some. The organizers of the markets leave it up to the vendors to acquire their own licenses, but vendors with licenses are not the norm. In order to obtain the proper liability insurance and permits would make selling one's goods at a profit financially impossible. Some states are working on creating multi-use permits, where many people can work under the umbrella of one permit.

An example of one state working with the Markets was recently reported in the New York Times regarding the Greenpoint Food Market in Brooklyn, New York. Unfortunately, the press the market received from the Times in a prior article is the reason it was shut down by Health officials. It is already precedent in New York State that baked goods, candy, jams, spices, and snack foods are exempt from the commercial kitchen requirement.²²

As one vendor, Rich Awn, the producer of Mombucha kombucha, at the Brooklyn market stated, "As many restrictions, regulations, and safety guidelines our federal legislative bodies can dream up, people are still dying from *salmonella*

from processed meat or tainted vegetables. As responsible makers of healthy food, we know better than to serve a product that's 'unsafe'. We're making it in the same way we'd make it for ourselves, our friends, and our families and in the spirit of fellowship, we want to share it and sustain the process."²³

Much like the underground restaurant chefs, many underground farmers' market vendors see this as a means to an end. The underground community serves as a catalyst for full market distribution, including all the permits and licenses that go along with it.

After the city shut it down, Greenpoint vendors met with officials from the New York State Department of Agriculture & Markets and NYC Health Department. An idea was developed to turn a 2,500 sq. foot space into an incubator kitchen for approximately 30 cooks. The intent is to keep the costs low in order to make production and use financially feasible.²⁴

Another solution has taken root in San Francisco in the Bernal Heights neighborhood. 331 Cortland serves as a marketplace for numerous food vendors that, before its inception, were home-based businesses. Debra Resnik is the building's owner and had to personally deal with the city for all relevant permits and licenses. I met with her recently and found out that this was the first of its kind in San Francisco. Before the store was able to open, there were many meetings with the Health Department and City Planning offices. In the end, a negotiation was made and it was required that each vendor in the space carry their own personal permits in order to sell at 331 Cortland. For her part, Resnik had to comply with the requirements of the Fire Department and Health Department, which means that currently there are no hot food sales allowed. Resnik has hopefully paved the way for future ventures of this kind. She relayed to me that her hope is that this



will give food entrepreneurs the space to grow and leave when they are able to go solo.

Conclusion

The Underground Food Movement is currently taking shape. As people grow tired of the conventional restaurant or farmers' market, they turn to the alternative, something more exciting, covert, and personal.

As a member of the legal community it is a hazard of the profession to scrutinize all the legal pitfalls facing a prospective underground entrepreneur, but it is also my duty as a food law attorney to try and counsel these people on ways to work towards legitimacy. It is my hope that cities will work, on a grassroots level with these people to try and come to a mutually beneficial agreement. Until then, the gray area will persist.



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End Notes:

- ¹ http://en.wikipedia.org/wiki/Underground_restaurant
- ² <http://www.guardian.co.uk/lifeandstyle/wordofmouth/2008/apr/17/undergroundrestaurants>
- ³ <http://www.guardian.co.uk/lifeandstyle/wordofmouth/2009/may/29/underground-restaurants-msmarmitelover-harddeep>
- ⁴ http://gigabiting.com/?page_id=2.
- ⁵ See 4.
- ⁶ Health and Safety Code section 114381(a), also See

<http://www.sfdph.org/dph/EH/Food/default.asp>.

⁷ Health and Safety Code section 110140.

⁸ Health and Safety Code section 113947.1(a),(h).

⁹ Health and Safety Code section 113984(b).

¹⁰ Health and Safety Code section 114380(a).

¹¹ Health and Safety Code section 114387.

¹² <http://www.sf-fire.org/index.aspx?page=1006#typeof>.

¹³ <http://www.calgold.ca.gov/Results1.asp?TYPE=5812&CNTY=38&CITY=354>.

¹⁴ <http://www.nrn.com/article/underground-dining-scene-undermines-legit-restaurants'-hold-dining-out-dollars>.

¹⁵ See 13.

¹⁶ http://blogs.browardpalmbeach.com/cleanplatecharlie/2010/05/rogue_restaurant_in_fort_lauderdale_part_2.php.

¹⁷ Health and Safety Code section 114371(a),(b)(6).

¹⁸ See 4.

¹⁹ [HTTP://GIGABITING.COM/?P=2057](http://GIGABITING.COM/?P=2057).

²⁰ [HTTP://BLOGS.BROWARDPALMBEACH.COM/CLEANPLATECHARLIE/2010/05/ROGUE_RESTAURANT_IN_FORT_LAUDERDALE_PART_2.PHP](http://BLOGS.BROWARDPALMBEACH.COM/CLEANPLATECHARLIE/2010/05/ROGUE_RESTAURANT_IN_FORT_LAUDERDALE_PART_2.PHP).

²¹ <http://www.vancouverun.com/life/Foodies+congregate+surreptitious+sippers/2447112/story.html#ixzz14FRs36aW>.

²² [HTTP://CIVILEATS.COM/2010/06/30/UNDERGROUND-FOOD-MARKET-GOES-LEGAL/#MORE-8565](http://CIVILEATS.COM/2010/06/30/UNDERGROUND-FOOD-MARKET-GOES-LEGAL/#MORE-8565).

²³ See 20.

²⁴ See 20.