

Dreaming Tree Farms, LLC is a USDA Recognized Farm and Manufacturing Agribusiness located in King William County, Virginia that prepares a weekly prepackaged, multi-serving salad branded Farm-To-Salad.

This document summarizes the basis for which the Farm-To-Salad Product is not applicable for the Virginia Food and Beverage Tax.





Dreaming Tree Farms v. King William County

Appeal of Local Tax Assessment

April 29, 2020

Additional supporting materials have been provided in a separate document.

Federal and State Governing Bodies Establish the Foundational Set of Guidelines, Definitions, and Regulations Used in This Appeal

Topic	Federal and State Agencies		Relevant Law and Reference
Federal Food Laws and Regulations		United States Food And Drug Administration (FDA)	FDA regulations: 21 CFR, Food and Drugs establishes food nutritional and labeling standards and the definition of serving size for various food types in the Recommended Amounts Customarily Consumed (RACC) Tables
Food Safety		Virginia Department of Health (VDH)	Code of Virginia §§35.1-1 and 35.1-5 give VDH responsibility for inspecting restaurants, including any place where food is served to the public, whether on or off premises, and any place where food is prepared.
		Virginia Department of Agriculture and Consumer Services (VDACS)	Code of Virginia §3.2-5100 establishes VDACS's authority and responsibility for inspecting all establishments which manufacture, sell, expose, or offer food and drink products for sale.
Food Tax		Code of Virginia	§ 58.1-3833. County food and beverage tax. Establishes county's right to establish an ordinance based on the definition of restaurant and defined taxable foods Rulings of the Tax Commissioner Document Number 05-78 establishes basis for computation of food tax.
		King William Code of Ordinances	Chapter 70- Taxation ARTICLE VIII. - MEALS TAX Establishes tax rate and administration at local (King William County) level.

Dreaming Tree Farms, LLC Business Profile

Dreaming Tree Farms, LLC (DTF)



- Virginia farm registered with the United States Department of Agriculture (USDA) Farm Service Agency (FSA) growing specialty produce and producing value added products.
- Files a Schedule F with the Internal Revenue Service (IRS) since 2016
- Virginia Department of Agriculture and Consumer Services (VDACS) recognizes DTF as a Food Manufacturing business with an onsite commercial kitchen since 2017
- Not open to the public for service
- Primary products sold and delivered by the farm to the end consumer are Grocery Items
 - e.g. Staple and Accessory Food Items & Cold Prepared Foods:
 - Bulk Salad Greens, Bottles of Farm Made Dressing, Local Produce, Finishing Salts, Farm-To-Salad Prepackaged Salad, Sweet & Tangy 3 Bean Salad, Asian Inspired Rice
- Customers are largely subscribing customers for a weekly farm delivery service

Farm-To-Salad (F2S) Product Produced by Dreaming Tree Farms, LLC



- Farm-To-Salad is one of several products offered by Dreaming Tree Farms since 2018.
- Multi-serving (15-17oz) cold prepared food pre-packaged for home consumption consisting of vegetables, grains, dairy, nuts, oils, vinegars, spices, herbs, fruit, egg, etc.
- Individual components are separated and layered for easy portioning and preparation from the container by the end consumer
- Salads are labeled according to FDA and VDACS labeling standards
 - e.g. Product Name, Net Weight, Sell By Date, Ingredients, Allergens, and Place of Manufacturing
- Salads are not prepared to order or customized for individual subscribers or ordered from a menu
- All salads made each week are identical, with different versions only for food allergies (e.g. No Nuts, No Dairy)
- Salads are not altered once prepackaged and sealed in the commercial kitchen located on the farm
- Each week a different combination of ingredients are used based on seasonal availability of locally grown Virginia produce and all subscribers receive the same salad

Federal Food Laws and Regulations: FDA Standards for Food Labeling and Serving Size of a Salad

FDA Reference #1

Get the Facts on Serving Size

Start With Serving Information

First, look at the serving size and the number of servings per container, which are at the top of the label. The serving size is shown as a common household measure that is appropriate to the food (such as cup, tablespoon, piece, slice, or jar), followed by the metric amount in grams (g).

The nutrition information listed on the Nutrition Facts label is usually based on one serving of the food; however, some containers may also have information displayed per package.

Understand Serving Sizes

Some serving sizes have changed on the new Nutrition Facts label. By law, serving sizes must be based on the amount of food people typically consume, rather than how much they *should* consume. Serving sizes have been updated to reflect the amount people typically eat and drink today. For example, based on the review of relevant information such as nationwide surveys of the amounts of foods Americans eat, the serving size for soda has changed from 8 ounces to 12 ounces.

Here are a few other things about serving sizes to keep in mind:

- The serving size is not a recommendation of how much to eat or drink.
- One package of food may contain more than one serving.
- Some containers may also have a label with two columns—one column listing the amount of calories and nutrients in one serving and the other column listing this information for the entire package. Packages with “dual-column” labels let you know how many calories and nutrients you are getting if you eat or drink the entire package at one time.



Sample Label for Frozen Lasagna

Nutrition Facts	
4 servings per container	
Serving size 1 cup (227g)	
Amount per serving	
Calories 280	
Total Fat 5g	% Daily Value*
Saturated Fat 4.5g	23%
Trans Fat 0g	
Cholesterol 35mg	12%
Sodium 850mg	37%
Total Carbohydrate 34g	12%
Dietary Fiber 4g	14%
Total Sugars 6g	
Includes 0g Added Sugars	0%
Protein 15g	
Vitamin D 0mcg	0%
Calcium 300mg	25%
Iron 1.6mg	8%
Potassium 510mg	10%

*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.



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FDA Reference #2



Reference Amounts Customarily Consumed: List of Products for Each Product Category: Guidance for Industry

U.S. Department of Health and Human Services
Food and Drug Administration
Center for Food Safety and Applied Nutrition

February 2018

II. Background

The Federal Food, Drug, and Cosmetic Act (FD&C Act) gives us the authority to require nutrition labeling on most packaged foods we regulate. Specifically, section 403(q)(1)(A)(i) of the FD&C Act (21 U.S.C. 343(q)(1)(A)(i)) requires, with certain exceptions, that food that is intended for human consumption and offered for sale bear nutrition information that provides a serving size that reflects the amount of food customarily consumed and is expressed in a common household measure that is appropriate to the food. Our regulations, at 21 CFR 101.12(b), establish RACCs for specified product categories that manufacturers can use to determine the required label serving size. In a final rule published in the *Federal Register* of May 27, 2016, “Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed At One Eating Occasion; Dual-Column Labeling; Updating, Modifying, and Establishing Certain Reference Amounts Customarily Consumed; Serving Size for Breath Mints; and Technical Amendments” (81 FR 34000; “2016 final rule”), we amended 21 CFR 101.12(b) to update or modify certain pre-existing RACCs and to establish RACCs for new product categories.

To comply with the requirements of section 403(q)(1)(A)(i) of the FD&C Act, food manufacturers should determine the food category into which specific products belong and label the food products with the appropriate label serving size based on the reference amount of the product customarily consumed.² Food product categories are listed in the RACC tables in 21 CFR 101.12(b). The categories in the RACC tables are generally considered to be broad descriptions of the types of products that are assigned to the applicable RACC. This guidance provides additional examples of products that belong in each of the product categories for which a RACC has been established in 21 CFR 101.12(b). The tables in this guidance are not meant to be an all-inclusive list of products that are available on the market for each product category.³

PRODUCT CATEGORY	REFERENCE AMOUNT	LABEL STATEMENT	EXAMPLES OF PRODUCTS ⁴
All other salads, e.g., egg, fish, shellfish, bean, fruit, or vegetable salads	100 g	_ cup(s) (_ g)	All other salads, including egg, fish (e.g., tuna salad), shellfish (e.g., shrimp salad), bean, fruit, and vegetable salads. NOTE: The reference amount for vegetable salads includes dressing. Canned fruits labeled as “fruit salad” that resemble fruit cocktail belongs to the “All other fruits (except those listed as separate categories), fresh, canned, or frozen” product category.

Conclusion:

The United States FDA clearly establishes guidelines and standards that define serving sizes for all food items.


A single (one) serving of a vegetable-based salad is 100g (3.5oz) (1 US Cup)

Source: <https://www.fda.gov/media/135305/download>

Source: <https://www.fda.gov/media/102587/download>

Market Comparison: Single Serving and Multi-Serving Salads

Example #1



Nutrition Facts

Serving Size 1 Salad (170g)
Servings Per Container 1

Amount Per Serving	
Calories 260	Calories from Fat 160
% Daily Value*	
Total Fat 17g	26%
Saturated Fat 2g	10%
Trans Fat 0g	
Cholesterol 15mg	5%
Sodium 520mg	22%
Total Carbohydrate 19g	6%
Dietary Fiber 5g	20%
Sugars 8g	
Protein 9g	
Vitamin A 70%	Vitamin C 45%
Calcium 8%	Iron 8%

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

	Calories: 2,000	2,500
Total Fat	Less than 65g	80g
Saturated Fat	Less than 20g	25g
Cholesterol	Less than 300mg	300mg
Sodium	Less than 2,400mg	2,400mg
Total Carbohydrate	Less than 300g	375g
Dietary Fiber	25g	30g

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

Example #2



Nutrition Facts

About 3.5 servings per container
Serving size 1 Cup (100g)

Amount per serving	
Calories	160
% Daily Value*	
Total Fat 11g	14%
Saturated Fat 1.5g	8%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 360mg	16%
Total Carbohydrate 14g	5%
Dietary Fiber 3g	11%
Total Sugars 6g	
Includes 4g Added Sugars	8%
Protein 3g	
Vitamin D 0mcg	0%
Calcium 42mg	4%
Iron 1mg	6%
Potassium 210mg	4%

*The % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

Conclusion:

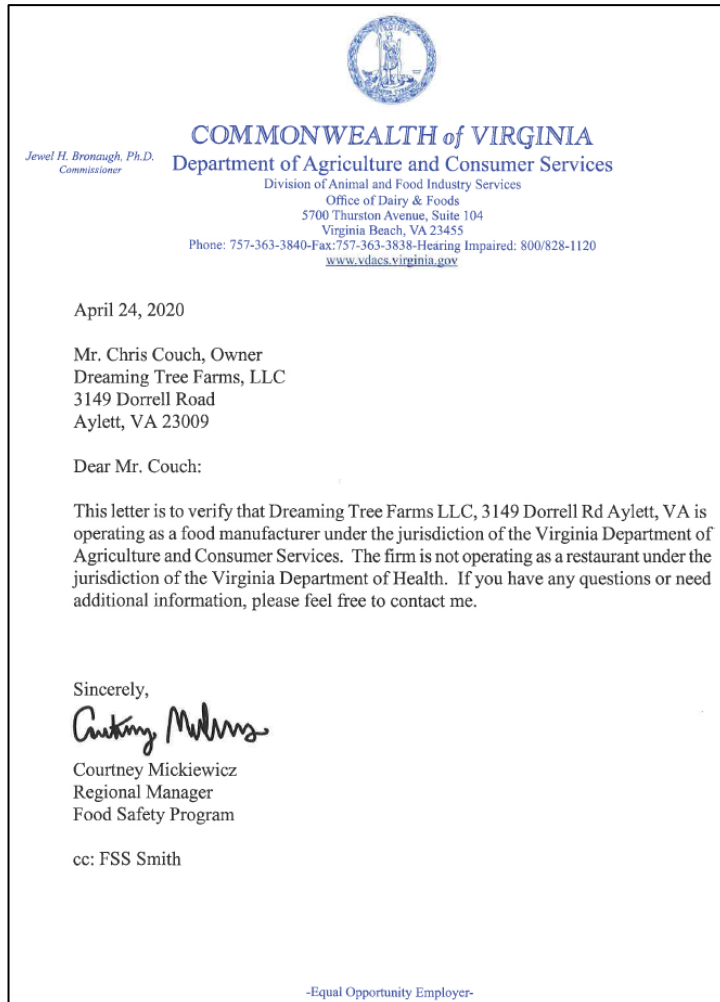
There is a difference between a single serving and a multi-serving salad based on clearly defined FDA serving size guidelines. These guidelines are well established in the Food Manufacturing Industry for all food sold in the United States.

Note:

Dreaming Tree Farms, LLC is not required to label its Farm-To-Salad product with a Nutrition Facts label because it is a small manufacturing business with less than 10 employees and less than 10,000 products sold in each year.

Food Safety: Dreaming Tree Farms, LLC is Monitored by VDACS as a Food Manufacturing Business

Commonwealth of Virginia recognition of Dreaming Tree Farms as a manufacturing business.





VIRGINIA DEPARTMENT OF HEALTH



VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

The Virginia Department of Health (VDH) Office of Environmental Health Services (OEHS) and the **Virginia Department of Agriculture & Consumer Services (VDACS)** work together to maintain the highest level of public health protection in food operations to keep citizens of the Commonwealth safe from foodborne illness. Code of Virginia **§3.2-5100** establishes VDACS's authority and responsibility for inspecting all establishments which manufacture, sell, expose, or offer food and drink products for sale. Code of Virginia **§§35.1-1** and **35.1-5** give VDH responsibility for inspecting restaurants, including any place where food is served to the public, whether on or off premises, and any place where food is prepared.

VDH and VDACS frequently work together not only to administer regulatory programs that keep food safe but also to coordinate activities such as offering marketing, educational, and resource materials/programs; organizing trainings and conferences for agency staff; and collaborating on Virginia's Rapid Response Team to address foodborne illness outbreaks.

Memorandums of Understanding

In areas where the inspection authority of VDH and VDACS overlap, Memorandums of Understanding (MOUs) delineate the responsibilities of each agency and eliminate, to the greatest extent possible, duplicate inspections among establishments, including:

- Restaurants
- Retail Food Stores (grocery stores, convenience stores, gas stations, farmers' markets, etc.)
- Processing & distribution facilities for the consumption of milk, milk products, imitation milk, fruit juices, fruit beverages, tea and bottled water, and frozen desserts
- Processing & distribution of frozen desserts at retail establishments
- Temporary Food Establishments
- Farmers Markets
- Breweries, Microbreweries, and Distilleries
- Wineries, Meaderies, and Cideries

NOTE: Cottage food manufacturers and home-based kitchen processors fall under the jurisdiction of the **Virginia Department of Agriculture and Consumer Services**. If you would like to prepare, package, and sell food products made in your home or have questions regarding the "cottage food laws," please see the VDACS website. Catering operations are not permitted from a home-based kitchen.

Conclusion:

Consistent with VDACS recognition, Dreaming Tree Farms, LLC is not a restaurant. DTF is a food manufacturing business with oversight from state agencies governing food safety and labeling laws of Virginia.

Food Tax - State Code of Virginia: Definition of Restaurant Excludes the Manufacturing of Packaged Foods and the Food & Beverage Tax Excludes Multi-Serving Salads.

§ 58.1-3833. County Food and Beverage Tax: Any county is hereby authorized to levy a tax on food and beverages sold, for human consumption, by a restaurant, as such term is defined in § 35.1-1

§ 35.1-1

"Restaurant" means:

1. Any place where food is prepared for service to the public on or off the premises, or any place where food is served, including lunchrooms, short order places, cafeterias, coffee shops, cafes, taverns, delicatessens, dining accommodations of public or private clubs, kitchen facilities of hospitals and nursing homes, dining accommodations of public and private schools and institutions of higher education, and kitchen areas of local correctional facilities subject to standards adopted under § 53.1-68.
2. Any place or operation that prepares or stores food for distribution to persons of the same business operation or of a related business operation for service to the public, including operations preparing or storing food for catering services, push cart operations, hotdog stands, and other mobile points of service.
3. Mobile points of service to which food is distributed by a place or operation described in subdivision 2 unless the point of service and of consumption is in a private residence.

"Restaurant" does not include any place manufacturing packaged or canned foods that are distributed to grocery stores or other similar retailers for sale to the public.

All official documents provided by King William County opted only to include points 1,2,3 verbatim and issue a determination of the type of business that is different from the one issued by the Virginia Department of Agriculture and Consumer Services.

§ 58.1-3833

E. Notwithstanding any other provision of this section, no locality shall levy any tax under this section upon (i) that portion of the amount paid by the purchaser as a discretionary gratuity in addition to the sales price; (ii) that portion of the amount paid by the purchaser as a mandatory gratuity or service charge added by the restaurant in addition to the sales price, but only to the extent that such mandatory gratuity or service charge does not exceed 20 percent of the sales price; or (iii) alcoholic beverages sold in factory sealed containers and purchased for off-premises consumption or food purchased for human consumption as "food" is defined in the Food Stamp Act of 1977, 7 U.S.C. § 2012, as amended, and federal regulations adopted pursuant to that act, except for the following items: sandwiches, salad bar items sold from a salad bar, **prepackaged single-serving salads consisting primarily of an assortment of vegetables** and nonfactory sealed beverages.

The King William County Attorney's Memorandum failed to address multi-serving salads that are exempt from the Code of Virginia County Food and Beverage Tax.

The King William County Commissioner of Revenue's response to DTF's appeal provided an ad hoc determination that is prohibited by Virginia law (Volkswagen v. Smit, 279 Va. 327, 337, 689 S.E.2d 679 (2010))

Comparison of Grocery Store Salads and Farm-To-Salad

Product	Taylor Farms Single Serve	Taylor Farms Chopped Salad Kit	Dreaming Tree Farms Farm-To-Salad
Net Weight	4 ½ oz – 6 oz	10 oz – 13 oz	15 oz – 17 oz
Serving Size based on FDA RACC	100 grams	100 grams	100 grams
Number of Servings Included	1	3+	4+
Packaging type	Small Bowl	Bag	Large Bowl
Labeled based on FDA standards	Yes	Yes	Yes
Multiple Ingredients (cheese, crunch) included and packaged separately in container	Yes	Yes	Yes
Salad Dressing Included	Yes	Yes	Yes
Lettuce Washed and Ready to Eat	Yes	Yes	Yes
Salad Greens Time from Harvest to Consumer	1+ weeks	1+ weeks	Typically 48-72 Hours
Produce Grown In	California	California	Virginia

As you can see from the table above, the product that most closely identifies with the Farm-To-Salad is the Taylor Farms Salad Kit. The differences between these two are:

- Farm-To-Salad is nearly an entire serving size larger than the multi-serving kit
- Farm-To-Salad is produced using Virginia grown lettuce greens and as a result is a higher quality, fresher product
- Farm-To-Salad is packaged in a bowl, not a bag, but each include similar types of ingredients in addition to lettuce greens that are washed and ready to eat

Conclusion:

The Farm-To-Salad product manufactured by Dreaming Tree Farms is not a “Single Serving” based on comparable products and FDA serving size guidelines.

Food Tax: Food Establishments listed in the King William County Meals Tax Ordinance

Specifically mentioned in the King William ordinance

- restaurants
- lunch rooms
- short order places
- cafeterias
- coffee shops
- cafes
- taverns
- delicatessens
- dining accommodations of public or private corporations
- dining accommodations of public and private schools and colleges vendors
- mobile points of food service such as push cart operations, hot dog stands and similar operations
- and grocery stores and convenience stores selling prepared foods ready for human consumption at a delicatessen counter.

Not listed and in business at the time the code was written

- Community Supported Agriculture (CSA) subscription and delivery services
- Farm Store
- Food Manufacturing
- Farm Direct-to-Consumer
- Cottage food manufacturers
- Home-based kitchen processors
- Specialty Meat and Produce Stores
- Mail Order Companies
- Produce Stand
- Farmer's Markets

The primary differences between the establishments listed in the King William Meals Tax Ordinance and Dreaming Tree Farms, LLC are:

- Those establishments are ALL brick and mortar locations where the public are served
- Products sold by these establishments are primarily custom made to order from a set menu
- Products sold from these establishments are not individually labeled according to prepackaged food labeling standards set forth by the FDA, USDA, and VDACS for home consumption
- The food safety oversight body for these establishments is the Department of Health and not VDACS.

Conclusion:

Dreaming Tree Farms does not share similarities with any of the establishments listed in the King William County Meals Tax Ordinance and is not a Restaurant, it is a Manufacturing business.