



CITY OF POMONA COUNCIL REPORT

December 3, 2018

To: Honorable Mayor and Members of the City Council

From: Linda Lowry, City Manager

Submitted by: Christi Hogin, Interim City Attorney

Subject: **Discussion of Elements to Be Included in a Draft Ordinance to Regulate Sidewalk Vending in Light of Senate Bill 946 (SB946)**

OVERVIEW

Recommendation –That the City Council review and discuss proposed elements of an ordinance to regulate sidewalk vending to preserve public health and safety while conforming to new State Law (SB946) which becomes effective January 1, 2019.

Fiscal Impact – Like all materials prepared for a Council agenda there has been an administrative cost and in this case Attorney fees expended. A draft ordinance is in progress but shall be modified based upon public discussion this evening and any future community meetings which may occur.

Previous Related Action – In June 2018 the City Council directect City staff to cease Code Enforcement on unlicensed Sidewalk Vendors while the City Ordinance prohibiting Sidewalk Vending is reviewed. On November 7, 2018, the City Council directed the City Attorney and staff to hold a community meeting on November 26, 2018, to receive input on local concerns regarding new state regulations for sidewalk vending (SB 946) and return with potential local regulations to address such concerns. An additional community meeting with the Mayor and various City staff was held December 7, 2018 and questions from this meeting are addressed in this report.

EXECUTIVE SUMMARY

Sidewalk vending is currently prohibited in the City. However, at Council direction the prohibition is not currently being enforced. Starting January 1, 2019, the City's law prohibiting all sidewalk vending cannot be enforced because it does not comply with a new State law. The

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purpose of the new State law is to decriminalize sidewalk vending and restrict the manner in which cities and counties may regulate sidewalk vending. The future decision for the City Council to discuss this evening is how to amend the City's current ordinance to comply with new State law and to the extent possible continue to promote community health and safety by regulating the "time, place, and manner" of this commercial activity.

BACKGROUND

The State Legislature enacted SB 946 to promote entrepreneurship and support immigrant and low-income communities. The Legislature found that sidewalk vending provides important economic development opportunities to residents. California has a long history with street vending and the Legislature found that sidewalk vending increases access to desired goods (such as culturally significant food and merchandise) and that sidewalk vending contributes to safe and dynamic public spaces. Based on these findings, the Legislature sought to encourage local authorities to support and properly regulate sidewalk vending and to prohibit criminal penalties for violations of sidewalk vending ordinances and regulations. While the decriminalization of street vending has been the subject of public discussion for a long time, the federal government's recent escalation of deportations added urgency to the Legislature's action. Last year activists were galvanized when a woman in Rancho Cucamonga was arrested for selling corn on the cob and detained by immigration authorities. Consequently, the central feature of SB 946 is the decriminalization of sidewalk vending.

SB 946 limits local governments to regulating "sidewalk vendors" only in accordance with the provisions of SB 946 (codified as Government Code Sections 51036-51039). A city is required to adopt a new program to regulate sidewalk vendors, if the city's existing regulatory scheme does not substantially comply with the requirements of SB 946. The City's existing regulations prohibit persons selling food or merchandise from any pushcart in the public right-of-way and are inconsistent with SB 946. The City has not enforced this prohibition since June 2018 when the City Council directed Code Compliance to halt enforcement pending review of the ordinance.

DISCUSSION

History of Regulating Pushcart Vending in Pomona¹

The City has a significant history in regulating push cart vending, beginning with Ordinance No. 3085 adopted by the City Council on October 5, 1981, which prohibited the sale of food or beverage from non-motorized pushcarts. That ordinance was the subject of a legal challenge in *Amezcuca v. City of Pomona* (1985) 170 Cal. App. 3d 305. The Court of Appeal upheld the City's ban on the sale of food or beverages from nonmotorized pushcarts by finding that the City's

¹This section of this report are based on research and analysis previously prepared by former assistant city attorneys Andrew L. Jared and Vanessa Ibarra

concern for safety of street and sidewalk users as well as pushcart operators constituted rational basis for the ordinance. On March 16, 1992, at the urging of residents, the City Council adopted Ordinance No. 3640, which created a permitting scheme for foot and pushcart vendors and set regulations under which they could operate. The process of licensing and enforcement of regulations on pushcart vendors did not achieve anticipated results; therefore, on November 18, 1996, the City Council adopted Ordinance No. 3834, which prohibited the sale of food, beverages or any product from a pushcart. The City's existing regulations of foot and pushcart vendors were recodified in 2004 and are now found in sections 30-671 - 30-710 of Article X (Foot and Pushcart Vendors) of Chapter 30 (Licenses, Permits, and Miscellaneous Regulations) of the Pomona Municipal Code, which prohibit a person from selling or offering to sell food or merchandise from any pushcart in the public right-of-way.

Senate Bill 946

After SB 946 goes into effect on January 1, 2019, the City cannot prohibit sidewalk vending, although it may establish regulations to protect valid health, safety and welfare concerns. The new state law defines a "sidewalk vendor" as a "person who sells food or merchandise from a pushcart, stand, display, pedal driven cart, wagon, showcase, rack, or other nonmotorized conveyance, or from one's person, upon a public sidewalk or other pedestrian path."² A sidewalk vendor can be roaming or stationary.

SB 946 imposes the following rules on regulating street vending:

- the City may not require a sidewalk vendor to operate within specific parts of the public right-of-way, except when that restriction is directly related to objective health, safety, or welfare concerns.³
- the City may not restrict the overall number of sidewalk vendors permitted to operate within City, unless the restriction is directly related to objective health, safety, or welfare concerns.⁴
- the City may not require sidewalk vendors to operate only in a designated neighborhood or area, except when that restriction is directly related to objective health, safety, or welfare concerns;⁵ however, stationary sidewalk vendors (as opposed to roaming sidewalk vendors) may be prohibited in exclusively residential zones.
- The City may adopt additional requirements regulating the time, place, and manner of sidewalk vending if the requirements are directly related to objective health, safety, or welfare concerns.⁶

²Government Code Section 51036 (a),

³Government Code Section 51038 (b)(1).

⁴Government Code Section 51038 (b)(5).

⁵Government Code Section 51038 (b)(4)(A).

⁶Government Code Section 51038 (c).

- the City may not impose criminal penalties for violations of sidewalk vending ordinances and regulations. SB 946 imposes administrative fines for violations of sidewalk vending regulations.⁷

City regulations must be consistent with Government Code Sections 51038 and 51039.⁸

Community Meetings

On November 29, 2018, the City staff hosted a community meeting at Washington Park community center. Proper notice was provided and there were approximately 35 people in attendance. A briefing was provided by the Office of the City Attorney regarding SB 946 and current regulations in the City of Pomona. Concerns voiced by the community included the affordability and practicality of licensing, various County Health regulations, placement of carts, types of vending, fines, and in general how to protect small vendor businesses from over-regulation.

At the subsequent community meeting held on December 5, 2018, the following questions were raised; the responses follow the questions below.

- Can the hours of operation be flexible based on the time of year? Longer during summer, shorter during winter?

Yes, the City may impose seasonal hours of operation for roaming vendors within residential zones. Within nonresidential areas, local restrictions on the hours of sidewalk vending cannot be more restrictive than the restrictions on hours of operation imposed on other businesses or uses on the same street. In exclusively residential zones, stationary sidewalk vendors may be prohibited outright.

- Will the City issue citations after the allowed hours of operation?

Administrative citations may be issued for any violation of local regulations that comply with state law.

- Cost of citations: Can the revenues of the business be considered? Can the fines be stiff so vendors fix the issues?

No, the schedule of administrative fines is set forth in State law and local jurisdictions have no authority to assess any additional penalties. Business revenues would be considered in this context only for the purpose of reducing or waiving the State fines (assessments are subject to a mandatory ability-to-pay determination and municipalities have discretion to waive fines or assess in lieu community service).

⁷Government Code Section 51039.

⁸Government Code Section 51037 (a).

- Can the citation fees be tiered?

Yes, but only if the City is considering tiering within a very low dollar range. The State fee schedule is worded in terms of dollar amounts that a local authority may "not exceed." For example, violations of a local vending regulation may be punished by an administrative fine.

1. Not exceeding \$100 for a first violation.
2. Not exceeding \$200 for a second violation within one (1) year of the first violation.
3. Not exceeding \$500 for each additional violation within one (1) year of the first violation.
4. A permit may be revoked for its term upon the fourth or subsequent violations.

- Will permits be required on January 1, 2019?

The City may continue with its current policy to give vendors a fair chance to get any permits that will be required. That is up to the Council to decide when to phase-in enforcement. Until the City adopts new regulations that substantially comply with State law, the State rules will apply -- potentially allowing for unregulated sidewalk vending on the public right of way and within public parks.

- What kind of carts will be allowed?

The new State law applies to any "non-motorized conveyance," including a pushcart, stand, display, pedal-driven cart, wagon, showcase, and rack. As with any permissible local restriction on sidewalk vending, a city may regulate the size or type of vending carts allowed for reasons "directly related to objective health, safety, or welfare concerns."

- Can the vendors be educated and trained on the requirements and ordinance?

The City may certainly offer training. It may require reasonable training related to health and safety protections.

- What can be done to prevent competition for permanent businesses?

State law expressly states that "perceived community animus or economic competition does not constitute an objective health, safety, or welfare concern" to justify regulation of sidewalk vending. The City cannot require a sidewalk vendor to obtain the consent or approval of any nongovernmental entity or individual (including local business owners) before beginning operations. Under the new state law, the effect on local businesses cannot justify any restriction on sidewalk vending.

- Can the City prevent vendors from blocking traffic and patrons coming and going?

A city may adopt regulations that restrict vendors from blocking building or parking lot entrances, that prohibit vending on vehicular streets, and that require vendors to maintain a minimum 4 foot clearance for pedestrian traffic on any sidewalk or other pedestrian path. These are examples of regulations based on objective concerns for the public safety and welfare (e.g., the four-foot clearance is mandated by ADA standards for a public right of way).

- Will areas and locations be restricted from sidewalk vendors?

The City may impose some location restrictions.

1. Residential zones. Stationary sidewalk vendors may be prohibited outright in residential zones.
2. Public right of way. Restrictions must be justified as directly related to objective health, safety, or welfare concerns. For example, vending may be prohibited from the median or within the street.
3. Temporary events. Vending may be prohibited within “the immediate vicinity” of events held pursuant to a temporary/special event permit, including a certified farmers’ market and a permitted swap meet, for the limited duration of the permitted event.
4. Public parks (including recreational facilities). Stationary sidewalk vendors may be prohibited outright from operating in any park for which the city has entered an exclusive concessionaire agreement. Otherwise, vendors may be subject to any of the following types of restrictions:
 - Directly related to objective health, safety, or welfare concerns;
 - Necessary to ensure the public’s use and enjoyment of natural resources and recreational opportunities; or
 - Necessary to prevent an undue concentration of commercial activity that unreasonably interferes with the scenic and natural character of the park.

- Will the number of sidewalk vendors in certain areas be restricted? Will distances between vendors be set?

The previous answer applies here. Generally, the number of vendors and distances between vendors is more readily justified for vending within public parks.

- Can permits be restricted to Pomona Residents only?

No.

- Can permits be site specific to ensure priority?

Yes.

- Can vendors set up near City parades or events?

Sidewalk vending may be prohibited within “the immediate vicinity” of events held pursuant to a temporary/special event permit, including a certified farmers’ market and a permitted swap meet, for the limited duration of the permitted event. Some cities thus prohibit vending within a block of any such event or a specific number of feet.

- Can a vendor have open flames, gas, and hot oil on the sidewalks?

A city may restrict this type of vending in the interests of the public health and safety. Food vendors are also subject to county health permits and other food safety and public health laws.

- Can the vendor sale from a car? Only non motorized vendors.

The new law enacted by SB 946 only applies to non-motorized vending. Vending from food trucks and other motor vehicles are regulated pursuant to the California Vehicle Code.

Proposed City Code Amendment Related to Sidewalk Vendors

If unregulated, sidewalk vending potentially creates negative impacts on the health, safety and welfare of the residents and traffic patterns. A Municipal Code amendment could establish a regulatory and permitting scheme to avoid such impacts to the City sidewalks and public rights of way. Additionally, the proposed Code amendment could address the following objective health, safety, and welfare concerns:

- Reducing the potential danger to the public from exposure to food-borne disease as a result of contamination from improperly packaged and/or stored food products, which may be offered for sale by unregulated sidewalk vendors;
- Providing residents a mechanism to ensure sidewalk vendors sell food and beverages according to Los Angeles County Department of Public Health requirements;
- Preventing unsanitary conditions on City sidewalks;
- Ensuring the removal of trash and debris resulting from sidewalk vending;
- Avoiding the obstruction of visual lines of site from City streets;
- Avoiding the overcrowding of sidewalks and other pedestrian paths;
- Safeguarding pedestrian movement on sidewalks and other pedestrian paths;
- Ensuring sidewalks don’t become overcrowded, forcing pedestrians onto the streets;
- Ensuring compliance with federal Americans with Disabilities Act of 1990 on sidewalks and other pedestrian paths;

- Protecting the public safety by requiring identification and property licensure by state and county agencies prior to authorizing sidewalk vending activities.
- Protecting residents' quality of life in late evening and early morning hours.

General Prohibitions

A Municipal Code amendment could address the above-referenced health, safety, and welfare concerns by prohibiting the following:

- Selling food that is not packaged at a pre-approved facility (designated by the county health department) unless otherwise permitted to do so by health department;
- Two (2) or more sidewalk vendors to assemble, gather, collect or otherwise join for any purpose within twenty (20) feet of each other per city block;
- Engaging in vending within three hundred (300) feet of any school property or church;
- Creating unreasonable obstruction to the normal flow of vehicular or pedestrian access, within ten (10) feet of any intersection, driveway, or building entrance, in any space designated for vehicular travel, manholes, utility access and vents;
- Vending before 9:00 a.m., or later than 6:00 p.m. during periods of standard time, or later than 8:00 p.m. during periods of day light savings time in areas zoned exclusively for residential;
- Vending as a stationary sidewalk vendor in city areas zoned exclusively for residential;
- Vending as a stationary sidewalk vendor in public parks in which the City has entered into an exclusive agreement for concessions;
- Vending within the immediate vicinity of a permitted certified farmers market, swap meet, or area designated for a special event permit;
- Engaging in the act of sidewalk vending with a motorized conveyance;
- Engaging in the act of sidewalk vending with a nonmotorized conveyance with dimensions larger than 48 inches in width, 96 inches in height, and 96 inches in height;
- Vending under shaded structures, awnings, gazebos, and bandshell in city parks, except as authorized by a franchise;
- Taking a nonmotorized conveyance off non-concrete surfaces in city parks.

Licensing and Permitting

The Municipal Code amendment could impose sidewalk vending standards, which (1) provides residents of the City a simple way to confirm the sale of food and beverages according to Los Angeles County Department of Public Health requirements, (2) prevents unsanitary conditions, (3) protects residents' quality of life in late evening and early morning hours, and (4) safeguards pedestrian movement on city sidewalks. Also, the proposed Code amendment requires sidewalk

vendors to obtain a City business license and a sidewalk vendor permit.⁹ Said requirements are intended to protect the public safety by requiring identification and proper licensure by state and county agencies prior to sidewalk vending in the City.

Penalties

The Municipal Code amendment could impose administrative fines permitted by SB 946 for violations of sidewalk vending regulations. To comply with SB 946, City staff would be required to notify persons of their ability to request an ability-to-pay determination, which if the person meets the criteria of Government Code Section 6862, the City shall accept, in full satisfaction, 20% of the administrative fine imposed, or allow completion of community service in lieu of paying total administrative fine.

Urgency

SB 946 goes into effect January 1, 2019. After that date, a city may not cite, fine, or prosecute a sidewalk vendor for a violation of any rule or regulation that is inconsistent with SB 946. The City's existing regulations of foot and pushcart vendors prohibit a person from selling or offering to sell food or merchandise from any pushcart in the public right-of-way, which is inconsistent with SB 946 and unenforceable as of January 1, 2019. The City has suspended enforcement while considering new regulations in anticipation of SB 946 going into effect. Nevertheless, it is possible that commencing January 1, 2019, with the effectiveness of SB 946, the City will see an immediate increase in sidewalk vending. If the City Council finds that unregulated sidewalk vending threatens to create current and immediate negative impacts on the health, safety and welfare of the residents, the City Council can adopt an urgency ordinance that would take effect immediately if approved with four-fifths vote of the City Council (6 affirmative votes).

Given that the City has already suspended enforcement of the ban, however, the Council may find it unnecessary to rush determining the exact method by which the City will regulate street vending.

⁹Government Code Section 51038(c)(4)