



CITY OF POMONA

COUNCIL REPORT

August 5, 2019

To: Honorable Mayor and Members of the City Council

From: Linda Lowry, City Manager

Submitted By: Kathy Shin, Interim Deputy City Attorney
Mark Gluba, Deputy City Manager

**SUBJECT: REVIEW AND DISCUSSION OF A DRAFT ORDINANCE
PERTAINING TO SIDEWALK VENDING REGULATIONS**

RECOMMENDATION:

It is recommended that the City Council review the attached Draft Ordinance and Draft Resolution (Attachments 1 & 2) regarding proposed amendments to the City Code Sections pertaining to sidewalk vending, solicit community input on the proposed ordinance and regulations, and provide staff direction on any desired changes to the ordinance or regulations as proposed.

EXECUTIVE SUMMARY:

Sidewalk vending is currently prohibited in the City. However, at Council direction, the prohibition is not currently enforced. Since January 1, 2019, the City's ordinance prohibiting sidewalk vending has been unenforceable because it conflicts with the law enacted by Senate Bill 946 ("SB 946"). The new State law provides that local sidewalk vending violations may not be subject to criminal sanctions (i.e., an infraction or misdemeanor) and also precludes cities from prohibiting sidewalk vending outright while encouraging reasonable regulations. In presenting this item prior to official introduction and first reading of the proposed Ordinance, staff is seeking Council direction and community input regarding the general parameters of the Ordinance, as drafted, in addition to direction on discretionary matters such as cart size limitations, insurance requirements, minimum distance requirements from restricted vending locations, etc.

FISCAL IMPACT: None.

PREVIOUS RELATED ACTION:

In June 2018, the City Council directed staff to cease code enforcement on illegal sidewalk vendors while it reviewed the City's ban on sidewalk vending. In November 2018, the City Attorney and City staff, at the Council's direction, met with members of the community to discuss the potential impact of SB 946, and in December 2018, the Mayor led a community roundtable discussion to further hear from stakeholders about anticipated regulations. On December 12, 2018, in a study

session on the issue, the Council discussed the core concerns surrounding sidewalk vending voiced by the community. During the discussion, members of the Council requested that the Interim City Attorney examine the sidewalk vending ordinance adopted by the City of Los Angeles to determine whether it could serve as a model for Pomona’s own regulatory program. On July 24, 2019, the Mayor convened another roundtable discussion with community members to receive additional input and to address any outstanding questions from stakeholders as the Interim City Attorney’s Office and staff finalized an ordinance.

ENVIRONMENTAL IMPACT: The proposed ordinance establishing a licensing program for sidewalk vending is not subject to environmental review under the California Environmental Quality Act (“CEQA”). Requiring a business license and a permit for ambulatory vending activities otherwise permitted under state law will not have a significant effect on the environment. Therefore, under section 15378 of Title 14 of the California Code of Regulations (“the CEQA Guidelines”), the proposed ordinance is not a “project” subject to CEQA.

DISCUSSION:

Senate Bill No. 946

Effective January 1 of this year, SB 946 made the regulation and criminalization of sidewalk vending a matter of statewide concern. (This means the law’s restrictions on local regulation apply to charter cities and general law cities alike.) SB 946 was enacted to promote entrepreneurship and to provide economic opportunities for immigrant and low-income communities. The Legislature found that sidewalk vending increases access to desired goods (such as culturally significant food and merchandise) and contributes to safe and dynamic public spaces. State lawmakers also sought to take a stand against aggressive federal immigration policies that prioritized the deportation of persons charged with minor offenses, including violation of local street vending ordinances. Accordingly, SB 946 was enacted to decriminalize sidewalk vending and to encourage local authorities to properly regulate the activity.

In brief, a city or county may no longer prohibit or regulate sidewalk vending in the public right-of-way or in public parks except in accordance with California Government Code sections 51038 and 51039. Absent local regulations that substantially comply with these statutes, a city may not cite, fine, or prosecute a person for sidewalk vending in violation of a local ordinance. However, irrespective of city laws, sidewalk vendors of food remain subject to state health and sanitation requirements. SB 946 expressly provides that sidewalk vendors are not exempt from food safety standards and the requirements for a health permit under the California Retail Food Code.¹

Scope of sidewalk vending

SB 946 is limited to the local regulation of “sidewalk vendors,” which is defined as “a person who **sells food or merchandise** from a pushcart, stand, display, pedal-driven cart, wagon, showcase, rack or other **non-motorized conveyance**, or from one’s person, **upon a public sidewalk or other**

¹ Gov. Code, § 51037, subd. (b).

pedestrian path.² While sidewalk and pedestrian path are not defined in the statute, the locations generally designate the public right of way and public parks.

Accordingly, food trucks and other forms of vending from motor vehicles fall outside the scope of the new law. Ambulatory vending along roadways or other places not designated for pedestrian travel and vending on private property are also not sidewalk vending within the meaning of SB 946.

For example, outdoor food stands operated by brick-and-mortar restaurants and groceries (in parking lots or other open space adjacent to the permanent place of business) are typically operating on private property. If so, the stands are not sidewalk vending.

Enforcement

Legalizing sidewalk vending is one of the central features of SB 946. To avoid state complicity in the federal deportation of individuals for infractions and misdemeanors, the law prohibits California cities from criminalizing sidewalk vending violations. Rather, an administrative fine is the only permissible penalty for local vending violations and only in amounts set forth in statute:

- A. If the City requires sidewalk vendors to obtain a permit, vending without a permit is subject to a fine not to exceed the following amounts:
 - 1. \$250 for a first violation.
 - 2. \$500 for a second violation within one year of the first violation.
 - 3. \$1,000 for each additional violation within one year of the first violation.
 - 4. Upon proof of a valid permit issued by the City, the administrative fine assessed under this paragraph will be reduced to the corresponding administrative fine set forth in paragraph (B).
- B. Any other violations of a City's sidewalk vending program is subject to a fine not to exceed the following amounts:
 - 1. \$100 for a first violation.
 - 2. \$200 for a second violation within one year of the first violation.
 - 3. \$500 for each additional violation within one year of the first violation.
 - 4. The City may revoke a sidewalk vending permit for the remainder of the permit's term upon the fourth or subsequent violations.³

The law also requires cities to consider a person's ability to pay when assessing fines. Local authorities have a duty to notify vendors of their right to request an ability-to-pay determination and to furnish individuals with instructions or other materials about the process.

Local Regulation

² Gov. Code, § 51036, subd. (a).

³ Gov. Code, § 51039, subd. (a).

In addition to decriminalizing the activity, SB 946 restricts a city's authority to prohibit sidewalk vending outright. State law now recognizes sidewalk vending as a legitimate way of earning a living and cities are limited to reasonable time, place, and manner regulations, as specified.

In general, a city may not restrict sidewalk vending in the public right-of-way ("ROW") or restrict the overall number of vendors permitted to operate within the city unless the restriction is "directly related to objective health, safety, or welfare concerns."⁴ For example, a city may restrict vending at a location that could not accommodate both the activity and the minimum pedestrian clearance required by objective state and federal disability access standards.

"Perceived community animus" and "economic competition" do not constitute an objective public concern and cannot be grounds for restricting sidewalk vending.⁵ The City also cannot require sidewalk vendors to obtain the consent or approval of residents or local businesses before being permitted to operate.⁶

Despite this general limitation on restrictions in the ROW, SB 946 identifies distinct regions in a city wherein sidewalk vending may occur and specifies the permitted level of regulation therein as follows:

- ✓ *Residential zones.* Stationary vendors may be prohibited outright in residential zones, but roaming vendors may only be restricted for objective health, safety, or welfare reasons (e.g., reasonable restrictions on hours of operation would be permissible).⁷
- ✓ *Permitted temporary events.* Cities may prohibit vending within the "immediate vicinity" of a certified farmers' market, specified swap meet, or other permitted events that require the temporary use of, or encroachment on, the sidewalk or other public area, *during the limited hours of the event.*⁸
- ✓ *Public parks* (including recreational facilities). Stationary vendors may be prohibited outright from operating in a park for which the city has entered an exclusive concessionaire agreement. Otherwise, vendors may be restricted in a park owned or operated by the City, if the requirements are any of the following:
 - 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.⁹

⁴ Gov. Code, § 51038, subd. (b).

⁵ Gov. Code, § 51038, subd. (e).

⁶ Gov. Code, § 51038, subd. (b)(3).

⁷ Gov. Code, § 51038, subd. (b)(4)(B).

⁸ Gov. Code, § 51038, subd. (d).

⁹ Gov. Code, § 51038, subd. (b)(2).

- ✓ *The public right of way.* The default rule is objective health, safety, and welfare concerns and SB 946 sets forth examples of what suffices as an objective public regulation:
 - limitations on hours of operation in commercial areas that are no more restrictive than the restrictions imposed on brick-and-mortar businesses on the same street;
 - requirements to maintain sanitary conditions;
 - requirements to ensure compliance with disability access laws;
 - requiring compliance with other generally applicable laws; or
 - requiring a vending permit or business license.¹⁰

As these regulatory tools are expressly permitted by statute, a city may readily adopt them by ordinance or resolution. To be clear, the time, place, and manner regulations set forth in subdivision (c) of Government Code section 51038 above do not constitute an exhaustive list of permissible regulations (they are examples). However, other regulations may require more justification to show the City's objective reasons for the restriction. Such reasons may be set forth in the recitals of an implementing ordinance or resolution.

Summary of Proposed Ordinance and Resolution

The draft ordinance ("Attachment No. 1") would amend the Pomona City Code to repeal the existing ban on sidewalk vending and to adopt a regulatory scheme consistent with state law. While the ordinance establishes the structural provisions of the City's regulatory program, the proposed resolution ("Attachment No. 2") sets forth the detailed rules and regulations critical to enforcement. The regulations are adopted by resolution in order to facilitate any future additions and amendments to the program.

Licensing and permitting program

As proposed, the regulation of sidewalk vending in Pomona is limited to a business licensing and permitting program administered by the Finance Department and Code Enforcement. All owners of vending carts are required to obtain a business license and all vendors are required to obtain a vendor permit (similar to the owner/operator licenses and driver permits used to regulate taxicabs). Carts will be required to display a business license number during operations while individual vendors will be required to keep permits on their person.

Applicants for a license or a permit will be issued an informational handout summarizing the operating requirements set forth in the Rules and Regulations. Licensees and permittees will have signed an acknowledgement of and intent to comply with these requirements. Staff will not engage in cart inspections. Rather, vendors violating any applicable location, placement, or operating requirements may be subject to citation.

Cost barriers to entry

¹⁰ See generally, Gov. Code, § 51038, subd. (c).

While SB 946 removed many of the legal barriers to sidewalk vending, members of the community have expressed concerns that regulatory fees can still be prohibitive. The greatest potential cost barriers are insurance and health permits.

- Insurance requirements. The sale of food and merchandise to the public in the public right of way inevitably creates the possibility of personal injury or damage to property arising from the activity. The City is thus exposed to the risk of liability. While vendors are required to sign agreements to indemnify and defend the City against any claim of damage from third-parties injured by vending operations (for example, a pedestrian injured by a moving cart or a consumer alleging food poisoning), a vendor without insurance is unlikely to be able to fulfill indemnity obligations in case of an accident. For this reason, the City, as advised by the City Risk Manager, typically requires licensed vendors to obtain standard commercial general liability insurance, naming the City as an additional insured. This is common. Staff has not determined what the premiums for such a liability policy may be, but depending on the vendor, it may or may not be prohibitive.¹¹ Whether the City should require sidewalk vendors to obtain insurance, and if so, what level of insurance, comes down to a policy determination of whether the potential risks will be a cost of doing business for the vendor or for the City.
- Health permits. The State establishes uniform health and sanitation standards for any retail food facility (defined as “an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level”), including food carts.¹² The County environmental health department is in charge of enforcing these standards through health permits issued after conducting cart inspections. Members of the community have indicated that the costs of obtaining a health permit for a food cart can be prohibitive. (The costs of acquiring a cart that complies with state requirements alone, including the requirement for a hand-washing sink, may be beyond most vendors means.¹³) Again, SB 946 leaves the administration and enforcement of food safety regulations to county health officials. The City is not aware of any complaints or reports of food-related illnesses arising from the sale of snow cones, tamales, or other types of food vending occurring in the City. Therefore, staff recommends leaving the matter of health permits to the experts at County health.

Health and sanitation

Separate from food facility permits, State law also requires all food handlers to receive basic training in topics such as foodborne illnesses, preventing food contamination in all stages of food handling, and sanitizing equipment. Training and passing a related exam results in a food handler’s card. In the effort to advance public health, State law requires that the food handler’s card be affordable (\$15).¹⁴ Given this practical effort to protect consumers and train food vendors, staff recommends requiring all sidewalk vendors of food to obtain a food handler’s card.

¹¹ Some insurance agents have quoted a \$ 570 annual premium for the standard \$ 1 million commercial general liability policy for a hypothetical hot dog vendor.

¹² Health & Saf. Code, § 113789.

¹³ See Health & Saf. Code, § 114311.

¹⁴ See Health & Saf. Code, § 113948, subd. (g).

To address larger concerns about trash and sanitation, the Rules and Regulations (a component of the Draft Resolution) also require all vendors to operate with trash receptacles and to take responsibility for removal of litter or trash generated by their vending operations, as specified.

Restricted vending locations

At this time, in addition to the general restrictions respecting residential zones and the placement of carts in the right of way, staff has identified the following venues as areas in which vending should be restricted:

- (1) The Pomona Arts Colony during the hours of the 2nd Saturday Artwalk;
- (2) Sidewalks within 500 feet of the Fox Theater from 6:00 p.m. to 6:00 a.m. on event days;
- (3) Sidewalks within 500 feet of the Fairplex every day of the Los Angeles County Fair; and
- (4) Sidewalks within 500 feet any public or private kindergarten, elementary, or secondary (K-12) school from 6:00 a.m. to 6:00 p.m. on days that school is open to students

Vending in parks is also restricted to paved pedestrian paths so as to protect the community's use and enjoyment of grassy open space, ballfields, and the City's other recreational resources.

Size limits on carts

As requested by Councilmembers at the December 12th Study Session, staff has examined the sidewalk vending ordinance and regulations adopted by the City of Los Angeles. While Los Angeles adopted an ordinance and general regulations in 2018, the City is still in the process of developing its licensing and permitting program. Questions relating to insurance requirements and maximum size limitations on carts have yet to be determined by Los Angeles, and staff requests the Council's direction on these matters.

The restrictions on the placement of carts in the right of way (set forth in Section 2 of the Rules and Regulations) effectively provide that carts may have a depth of no greater than 3.5 feet. Staff is examining reasonable height and length restrictions. For reference, the City of Claremont recently adapted the City of Newport Beach's sidewalk vending ordinance for its own regulatory program. Whereas Newport Beach set height, width, and length limitations on carts at 4 feet x 4 feet x 4 feet; Claremont has adopted cart limitations of 3 feet x 3 feet x 3 feet.

ATTACHMENTS:

Attachment No. 1 – Draft Ordinance
Attachment No. 2 – Draft Resolution

