



CITY COUNCIL AGENDA REPORT

MEETING DATE: OCTOBER 15, 2019 ITEM NUMBER: PH-2

SUBJECT: INTRODUCTION OF AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COSTA MESA AMENDING SECTIONS 9-125 (BUSINESSES, PROFESSIONS, TRADES AND OCCUPATIONS REQUIRING A PERMIT UNDER THE PROVISIONS OF THIS CHAPTER) AND 9-128 (BUSINESSES WHERE THE DIRECTOR OF FINANCE MAY ISSUE PERMITS IN CASE OF NO OBJECTION) OF ARTICLE 1 (GENERALLY) AND ARTICLE 9 (PUSHCART AND OTHER SIDEWALK VENDORS), OF CHAPTER II (REGULATION OF CERTAIN BUSINESSES) OF TITLE 9 (LICENSES AND BUSINESS REGULATION) OF THE COSTA MESA MUNICIPAL CODE, RELATING TO SIDEWALK VENDING

DATE: OCTOBER 7, 2019

FROM: FINANCE DEPARTMENT/CITY ATTORNEY'S OFFICE

PRESENTATION BY: TARQUIN PREZIOSI, ASSISTANT CITY ATTORNEY

FOR FURTHER INFORMATION CONTACT: JENNIFER KING, ASSISTANT FINANCE DIRECTOR, (714) 754-5219

RECOMMENDATION:

Staff recommends that the City Council:

1. Find that the adoption of this Ordinance is not a "project" under the California Environmental Quality Act (CEQA) pursuant to Public Resources Code Section 21065, and that it is exempt from the provisions of CEQA pursuant to CEQA Guidelines (14 Cal. Code. Regs. § 15000, et seq.) Section 15061(b)(3) (because it can be seen with certainty that the adoption of this Ordinance will not have an effect on the environment) such that no environmental review under CEQA is required.
2. Introduce for first reading, by title only, proposed Ordinance No. 19-xx amending Sections 9-125 (Businesses, Professions, Trades and Occupations Requiring a Permit Under the Provisions of this Chapter) and 9-128 (Businesses Where the Director of Finance May Issue Permits in Case of No Objection) of Article 1 (Generally) and the provisions of Article 9 (Pushcart and Other Sidewalk Vendors) of Chapter II (Regulation of Certain Businesses) of Title 9 (Licenses and Business Regulation) of the Costa Mesa Municipal Code, relating to Sidewalk Vending.

BACKGROUND:

Effective January 1, 2019, Senate Bill 946 (“SB 946”) adds Chapter 6.2 to the portion of the Government Code applicable to the government of cities and counties. By its own terms, it applies to both general law and charter cities¹ and defines a “sidewalk vendor” as someone who “sells food or merchandise,” on a sidewalk or pedestrian path, with or without a pushcart, stand or other conveyance.² It prohibits³ local agencies from regulating sidewalk vendors except in accordance with Government Code Sections 51038 and 51039, and provides that existing ordinances regulating sidewalk vendors remain valid so long as they substantially comply with SB 946.⁴

According to its authors, SB 946 was intended to increase economic opportunities to low-income and immigrant communities, increase access to culturally significant food and merchandise. To contribute to safe and dynamic public spaces, SB 946 limits local authority to regulate sidewalk vendors. Any local regulations on sidewalk vendors must comply with newly enacted state laws that generally limit local authority to impose regulations that are directly related to “objective health, safety or welfare concerns.” SB 946 also limits penalties for violating local regulations to administrative fines, but does allow cities to enact a permitting scheme and prohibit sidewalk vending near farmer’s markets, swap meets, and other events.

If a local agency adopts sidewalk vendor regulations, these regulations must comply with the following standards:

- The regulations cannot require the sidewalk vendor to only operate within specific parts of the public right of way except when the restriction is directly related to objective health, safety or welfare concerns.⁵
- The regulations cannot prohibit sidewalk vendors from operating in a public park, but the regulations can prohibit stationary sidewalk vending where the city already has an agreement with a third party for exclusive concessions inside the park. A city can also adopt reasonable time, manner and place restrictions inside public parks if the restrictions are directly related to objective health, safety or welfare concerns, when necessary to ensure the public’s use and enjoyment of the park, or necessary to prevent an undue concentration of commercial activity that unreasonably interferes with the character of the park.⁶
- The regulations cannot require a sidewalk vendor to obtain the approval of a non-governmental entity before selling food or merchandise.⁷
- The regulations cannot restrict sidewalk vendors to operate only in designated neighborhoods except when the restriction is directly related to objective health, safety or welfare concerns. Cities can prohibit *stationary* sidewalk vendors from operating in residential zones, but cannot prohibit roaming sidewalk vendors.⁸

¹ Cal. Gov. Code § 51036(d).

² Cal. Gov. Code § 51036(a).

³ Cal. Gov. Code § 51037(a).

⁴ Cal. Gov. Code § 51037(c).

⁵ Cal. Gov. Code § 51038(b)(1).

⁶ Cal. Gov. Code § 51038(b)(2).

⁷ Cal. Gov. Code § 51038(b)(3).

⁸ Cal. Gov. Code § 51038(b)(4).

- The regulations cannot restrict the overall number of sidewalk vendors permitted to operate within a jurisdiction, unless the restriction is directly related to objective health, safety or welfare concerns.⁹
- The regulations can limit the hours of operation for sidewalk vendors so long as they are not unduly restrictive. In commercial areas, these restrictions cannot be more restrictive than any limitations on other businesses on the same street.¹⁰
- The regulations can impose sanitary conditions and requirements to comply with disabled access standards.¹¹
- The regulations can require sidewalk vendors to obtain a permit or business license, so long as the regulations do not require a social security number from the perspective permittee.¹²
- The regulations can require sidewalk vendors to submit information to the city regarding their operations, including a mailing address, a description of merchandise, and other information.¹³
- The regulations can prohibit sidewalk vendors from operating near farmers' markets, swap meets, and other events subject to a special permit.¹⁴

SB 946 makes clear that perceived community animus and economic competition do not constitute objective health, safety or welfare concerns.¹⁵ The new law also limits penalties for violating local regulations on sidewalk vendors to administrative citations, the amounts of which range from \$100-\$500 for most violations and fines ranging from \$250-\$1,000 for vending without a permit.¹⁶ Criminal penalties and arrest are not available to cities as enforcement tools.¹⁷ Finally, cities are required to give notice to a cited individual that he/she has the right to request an ability-to-pay determination before the administrative fine adjudicator.¹⁸

ANALYSIS:

Article 9 of Chapter II of Title 9 of the CMMC (Section 9-191 et seq.) generally prohibits sidewalk vendors in most areas of the City. As such, the current regulations as applied to public property do not “substantially comply” with SB 946. The proposed ordinance repeals and replaces Article 9. Under the proposed ordinance, sidewalk vendors, as defined, are required to obtain both a regular City business license and a Sidewalk Vendor Permit (“Permit”) from the Finance Director. The fee for the Permit is to be established by resolution of the City Council. The specific requirements for issuance of the Permit are set forth in Sections 9-191.2 and 191.3. Significant requirements include an agreement to defend, indemnify and hold the City harmless from any liability for damages to persons or property that might result the sidewalk vendor’s activities in the public rights of way; and maintaining liability insurance of not less than \$1,000,000.00 that names the City as an additional insured. Liability insurance and/or indemnity agreements are commonly required under the CMMC for various permitted activities in the public rights of way, including special events,¹⁹

⁹ Cal. Gov. Code § 51038(b)(5).

¹⁰ Cal. Gov. Code § 51038(c)(1).

¹¹ Cal. Gov. Code § 51038(c)(2)-(3).

¹² Cal. Gov. Code § 51038(c)(4).

¹³ Cal. Gov. Code § 51038(c)(8).

¹⁴ Cal. Gov. Code § 51038(d).

¹⁵ Cal. Gov. Code § 51038(e).

¹⁶ Cal. Gov. Code § 51039(a).

¹⁷ Cal. Gov. Code § 51039(d).

¹⁸ Cal. Gov. Code § 51039(f).

¹⁹ Section 9-208.10

filming,²⁰ construction work,²¹ placement of vending machines,²² block parties,²³ and similar activities.

The detailed operational requirements for sidewalk vendors are set forth in Section 9-191.4. These requirements are designed to maintain safe access to all persons using the public right of way, to minimize impacts related to noise, trash and visual distractions, and to ensure that sidewalk vending receptacles are attended at all time. Certain activities set forth in Section 9-191.5 subsection (c) are specifically prohibited; these include disruptive behavior, interfering with sporting events at park, and other activities that affect the public's safe use, passage and enjoyment of City parks and rights of way. Hours of operation citywide are limited to 7 a.m. and 11:00 p.m. daily, unless the sidewalk vendor is operating within five hundred (500) feet of another business open to the public that is legally operating during those hours, in which case sidewalk vendors may operate during the hours in which the adjacent business is legally open to the public. In residentially zoned areas, the hours of operation are between 9:00 a.m. and 5:00 p.m. daily, and are limited to mobile sidewalk vendors only. For parks, sidewalk vending is limited to the hours when parks are open, which is generally from dawn to dusk.

Specific locational restrictions are included in Section 9-191.5 subsection (d). These (as well as the general operational and activity restrictions elsewhere in the ordinance) are directly related to the objective health, safety and/or welfare concerns related to the interference with the flow of pedestrian or vehicular traffic, including ingress into or from, residences, businesses, or public buildings, or from the street to the sidewalk, by persons exiting or entering parked or standing vehicles; allowing for the effective performance of police, firefighter and emergency medical personnel services in the public right of way; ensuring that sidewalk vending activities occur only in locations where such activities would not restrict the use and enjoyment of sidewalks and pathways by persons with disabilities; providing for reasonable access to the use and maintenance of sidewalks, pathways, poles, posts, traffic signs or signals, hydrants, firefighting apparatus, mailboxes, as well as access to locations used for public transportation services; maximizing public access to all of the City's natural resources; and reducing injuries in and exposure to the City for personal injury or property damage claims and litigation that may be caused in whole or in part by the activities of sidewalk vending in the public right of way.

In addition, restrictions against vending at the Civic Center, which contains the City's emergency operation center, the headquarters for the Police Department, Fire Department and other critical infrastructure, are necessary to ensure that police and fire equipment and personnel are easily accessible and critical infrastructure is maintained and accessible at all times. Restrictions on sidewalk vending at and around other capital facilities are also necessary to ensure that these facilities are easily accessible to City personnel, vehicles and equipment. Restrictions against vending within Fairview Park (unless approved pursuant to a special events permit) are also included; Fairview Park provides unique passive recreational opportunities and experiences. Use of these resources would be impeded by the operation of sidewalk vendors within the park. In addition, Fairview Park lacks hardscape or other paved areas suitable for sidewalk vending, such that such restrictions are necessary to protect the natural resources and

²⁰ Section 9-479

²¹ Section 15-17.1

²² Section 11-105

²³ Section 9-208.19

recreational opportunities, as well as scenic and natural character of this park. Many of the City's other parks are heavily used for active sporting and recreational activities, such that restrictions on specified behavior of sidewalk vendors are necessary to protect the health, safety and welfare of persons engaged in active sports and/or recreational activities as well as spectators of sporting activities. Many of the sidewalks and pathways in the City are under eight feet wide and stationary sidewalk vending in these areas would unreasonably interfere with the flow of pedestrians and disrupt access for persons with disabilities. Finally, sidewalks immediately adjacent of the Orange County Fairgrounds become heavily impacted when the Orange County Fair and related events are operating, such that restrictions thereon are necessary to protect the health, safety and welfare of persons attending the Fairgrounds and utilizing those sidewalks.

The penalty provisions of Section 9-191.6 and appeal provisions of 9-191.7 utilize the City's existing civil citation procedure, as modified to conform to the requirements of SB 946. Appeals of the decision of the Finance Director to deny, rescind and/or revoke a permit are subject to the existing procedures of Section 9-121.

In addition to the amendments to Article 9 of Chapter II of Title 9, the proposed Ordinance also makes conforming changes to Sections 9-125 and 9-128 of Article 1 of Chapter II of Title 9 as follows:

9-125. Businesses, professions, trades and occupations requiring a permit under the provisions of this chapter.

(p) *Sidewalk sales and parking lot sales.* The terms *sidewalk sales and parking lot sales* shall mean the sale of merchandise from a retail establishment located in a permanent structure directly adjacent to the sidewalk or parking lot used for the sale ~~and does not include pushcart vending prohibited by section 9-191.~~

(r) Sidewalk vending.

9-128. Business where the director of finance may issue permits in case of no objection.

(i) *Sidewalk sales and parking lot sales.* The term *sidewalk sales and parking lot sales* shall mean the sale of merchandise from a retail establishment located in a permanent structure directly adjacent to the sidewalk or parking lot used for the salesale ~~and does not include pushcart vending prohibited by section 9-191.~~

(j) Sidewalk vending.

ALTERNATIVES CONSIDERED:

The City Council could decide not to substantively regulate sidewalk vendors at all, other than to require a regular business license. In that case, the Council may consider repealing the existing prohibitions in Article 9 of Chapter II of Title 9 that conflict with SB 946. In addition, the City Council could propose different or additional requirements for sidewalk vending that are consistent with the requirements of SB 946.

FISCAL REVIEW:

The proposed Ordinance allows the City to regulate sidewalk vending activity in accordance with State laws. Subject to the City Council's introduction and first reading of Ordinance No. 19-xx, staff will return to the City Council for adoption of a resolution establishing the proposed sidewalk vendor permit fees at full cost recovery.

LEGAL REVIEW:

The City Attorney's Office has reviewed and approved this report and has prepared the attached Ordinance.

CITY COUNCIL GOALS & PRIORITIES:

This item is administrative in nature.

CONCLUSION:

Staff recommends the City Council, by separate motions:

1. Find that that adoption of this Ordinance is not a "project" under the California Environmental Quality Act (CEQA) pursuant to Public Resources Code Section 21065, and that each is exempt from the provisions of CEQA pursuant to CEQA Guidelines (14 Cal. Code. Regs. § 15000, et seq.) Section 15061(b)(3) (because it can be seen with certainty that the adoption of this Ordinance will not have an effect on the environment) such that no environmental review under CEQA is required.
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City Attorney

ATTACHMENT: 1. [Proposed Ordinance No. 19-XX](#)
 2. [CMMC Title 9 Chapter II Article 9 \(current\)](#)

