



STAFF REPORT

September 28, 2022

File Number 0670-30

SUBJECT

LEGAL UPDATE ON SAFE SIDEWALK VENDING ACT (AB 946) AND CONSIDERATION OF LOCAL REGULATIONS

DEPARTMENT

City Attorney

RECOMMENDATION

Request that the City Council receive and file report and give direction to staff on future actions, if any.

Staff Recommendation: Provide Direction (City Attorney: Michael R. McGuinness)

Presenter: Michael R. McGuinness, City Attorney

FISCAL ANALYSIS

Adoption of a local ordinance regulating sidewalk vending may have additional costs depending on the amount of administrative regulation adopted, number of ability-to-pay hearings held, and enforcement activity conducted. Given the potential limitations on the ability to collect fines and penalties, it is not known whether such administrative costs will be offset by any enforcement revenues.

PREVIOUS ACTION

None.

BACKGROUND

Periodically, the City Council has received complaints from individuals regarding the presence of persons setting up pop up tents, tables, push carts and other equipment to sell merchandise or food along City streets and public sidewalks. On August 10, 2022, Councilmember Morasco requested an update on the laws relating to such commercial activity.

A. Safe Sidewalk Vending Act.

In 2018, the California legislature passed and the Governor signed Senate Bill 946, also known as the Safe Sidewalk Vending Act ("Act"). The Act added Government Code sections 51036 through 51039 to



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California law. In its stated effort to promote and support low-income and immigrant communities, the legislature made the following findings and declarations in the Act:

- Sidewalk vending provides important entrepreneurship and economic development opportunities to low-income and immigrant communities.
- Sidewalk vending increases access to desired goods, such as culturally significant food and merchandise.
- Sidewalk vending contributes to a safe and dynamic public space.
- The safety and welfare of the general public is promoted by encouraging local authorities to support and properly regulate sidewalk vending.
- The safety and welfare of the general public is promoted by prohibiting criminal penalties for violations of sidewalk vending ordinances and regulations.

The legislature made other findings that criminal penalties, locally-imposed barriers to entrepreneurship, and an interest in ensuring the appropriate regulation and flow of traffic for pedestrians are matters of statewide concern and this legislation would be applied to charter cities as well as general law cities such as the City of Escondido. As such, all local jurisdictions in the state are subject to the Act and any conflicting local ordinances are unenforceable.

Under the Act, which went into effect January 1, 2019, sidewalk vendors may not be *prohibited* by way of local ordinances but a certain level of control may still be exercised over these operators. The touchstone of local control over these operations primarily relate to objective health, safety and welfare concerns. In general, the Act addresses sidewalk vending in four contexts: (1) generally, (2) in parks, (3) within the vicinity of farmers' markets and swap meets, and (4) within temporary special permit areas. (Discussed in detail below.)

The statute defines "sidewalk vendors" as "persons 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 pedestrian path." A sidewalk vendor can be roaming or stationary.

B. Opportunities for Local Ordinances and Control.

As noted above, the legislature desired to promote entrepreneurship and limit local control over such activities. As a result, under the Act, local jurisdictions may not do the following:

1. Require a sidewalk vendor to operate within specific parts of the public right-of-way, except when directly related to "objective health, safety, or welfare concerns."



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2. Prohibit a sidewalk vendor from selling food or merchandise in a park owned or operated by the local authority.
3. Restrict sidewalk vendors to operate only in a designated neighborhood or area, except when the restriction is directly related to objective health, safety, or welfare concerns. However, stationary sidewalk vendors (as opposed to roaming sidewalk vendors) may be prohibited in areas zoned exclusively residential.
4. Restrict the overall number of sidewalk vendors permitted to operate within the local authority's jurisdiction, unless the restriction is directly related to objective health, safety, or welfare concerns.
5. Require a sidewalk vendor to first obtain the consent or approval of any non-governmental entity or individual (private business or property owners) before he or she can sell food or merchandise.

Under the law, a local municipality may adopt certain objective requirements regulating the time, place, and manner of sidewalk vending if the requirements are directly related to objective health, safety, or welfare concerns,¹ including, but not limited to, any of the following:

1. Limitations on hours of operation (provided they are not unduly restrictive).
2. Requirements to maintain sanitary conditions.
3. Requirements necessary to ensure compliance with the federal Americans with Disabilities Act and other disability access standards.
4. Requiring the sidewalk vendor to obtain a permit for sidewalk vending and a valid business license.
5. Requiring the sidewalk vendor to possess a valid California Department of Tax and Fee Administration (CDTFA) seller's permit.
6. Prohibiting stationary sidewalk vendors, but not roaming vendors, in areas zoned exclusively residential.
7. Prohibiting stationary sidewalk vendors (as opposed to roaming sidewalk vendors) from vending in a City park if an operator in the park has signed an agreement for concessions that exclusively permits the sale of food or merchandise by the concessionaire.
8. Prohibiting sidewalk vendors in areas located within the immediate vicinity of a permitted certified farmers' market or a permitted swap meet during the limited operating hours of that certified farmers' market or swap meet. The statute additionally provides definitions of "certified farmers' market" in accordance with the Food and Agricultural Code and "swap meet" in accordance with the Business and Professions Code.

¹ Objective health, safety, or welfare concerns" are not defined in the Act. However, SB 946 makes clear that "perceived community animus or economic competition does not constitute an objective health, safety, or welfare concern."



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9. In City parks, prohibiting activity to ensure the public's use and enjoyment of natural resources and recreational opportunities and necessary to prevent an undue concentration of commercial activity that unreasonably interferes with the scenic and natural character of the park.
10. Prohibiting sidewalk vendors within the immediate vicinity of an area designated for a temporary special permit for the duration of the temporary special permit. A temporary special permit is "a permit issued by the local authority for the temporary use of, or encroachment on, the sidewalk or other public area, including, but not limited to, an encroachment permit, special event permit, or temporary event permit" for purposes such as parades and outdoor concerts.
11. Requiring a sidewalk vendor to submit certain information on his or her operations (e.g. name of vendor; type of merchandise; CDTFA permit number; if seller is agent of another, the name of the principal, etc.)
12. Requiring compliance with other generally applicable laws.

C. Enforcement.

Criminal penalties for sidewalk vending are prohibited. Instead, a violation of a local ordinance may only be enforced through an administrative fine and pursuant to an "ability-to-pay determination." The fine tiers for a violation of the agency's program cannot exceed: \$100/first violation; \$200/second violation within one year of first violation; and \$500/all additional violations within one year of first violation.

Failure to pay the administrative fine is not punishable as an infraction or misdemeanor and additional fines, fees, assessments, or any other financial conditions may not be imposed. Despite the lack of "teeth" to enforcement through such fines, a local authority may rescind a permit issued to a sidewalk vendor for the term of that permit upon the fourth violation and any subsequent violations. If the seller continues to violate the local ordinance by selling without a permit, the agency may then institute another fine schedule not exceeding the following: \$250/first violation; \$500/second violation; and \$1000/third and subsequent violations.

In the event a vendor is cited, the City must provide notice to the violator that he or she has the right to request an ability-to-pay determination and make instructions available for such a hearing. As a part of that process, the City must accept payment of 20% in full satisfaction of the fine(s) if the violator earns less than 125% of the federal poverty line or receives certain means-tested government benefits as described in Government Code section 68632(a) and (b) (SSI or SSP, CalWORKS, Tribal TANF, SNAP, etc.). Alternatively, the local authority may allow the person to complete community service in lieu of paying the total administrative fine, may waive the fine, or may offer an alternative disposition.

There is insufficient data to know the anticipated percentage of violators who would qualify for this reduction and the fact-finding necessary to investigate and make that type of determination may be



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substantial. Further, the costs to administer allowable alternative community service programs in lieu of fines are also an unknown at this time.

CONCLUSION

The Act was admittedly designed to promote the opportunity for both stationary and roaming sidewalk vending by establishing a comprehensive set of restrictions on local agencies in the regulation of these microbusinesses. The City Council may establish a local program to restrict, in certain limited ways, the operations and conduct of sidewalk vendors. However, the burden on staff in the administration and enforcement of a local program, including conducting ability-to-pay hearings, in relation to the benefits to residents and businesses, should be considered in identifying an effective program.