



CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

January 8, 2019
PUBLIC HEARINGS

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| TO: | Honorable Mayor and City Council Members |
| SUBMITTED BY: | Marc Wiener - Community Planning & Building Director |
| APPROVED BY: | Chip Rerig, City Administrator |
| SUBJECT: | Urgency Ordinance No. 2018-006 of the City of Carmel-by-the-Sea creating a program to regulate and permit sidewalk vending pursuant to California Senate Bill 946. |

RECOMMENDATION:

Waive the first reading and adopt Urgency Ordinance 2018-006 creating a program to regulate and permit sidewalk vending pursuant to California Senate Bill 946.

BACKGROUND/SUMMARY:

BACKGROUND:

On September 17, 2018, Governor Jerry Brown signed Senate Bill 946 (SB 946), which establishes statewide governance of vending in the public right-of-way and parks. The purpose of this bill is to create entrepreneurial and economic development opportunities for certain individuals, by removing barriers to selling food and merchandise on public sidewalks and in parks. The bill went into effect on January 1, 2019.

The new law requires that cities allow sidewalk vending, and restrictions may only be imposed when directly related to objective public health, safety, or welfare concerns. Local jurisdictions that wish to regulate sidewalk vending are required to first adopt a program with rules and regulations consistent with SB 946.

The City has historically not allowed vendor activities in the right-of-way and the Municipal Code (CMC) does not explicitly regulate sidewalk vending. In order to be in compliance with SB 946 and retain local control, staff has drafted an Urgency Ordinance establishing a program to permit and regulate sidewalk vendors. The Urgency Ordinance will go into effect immediately and is valid for 45 days after adoption. After the 45 days the City Council may choose to extend the Urgency Ordinance an additional 10 months and 15 days, or may adopt a permanent ordinance.

ANALYSIS:

Upon passage of SB 946, the Community Planning and Building Department began reviewing changes the new Government Code and identifying required amendments to the City's current Municipal Code to comply with State requirements. Staff reviewed several model ordinances used by cities throughout the State and evaluated strategies for compliance with the provisions of SB 946, while retaining local control to the extent feasible.

The provisions of SB 946 require local governments to adopt a program regulating sidewalk vending, if a local authority did not already have a program in place that complied with provisions of SB 946. The law identifies two categories of sidewalk vendors; roaming sidewalk vendors who move from place to place and only stop to complete a transaction, and stationary sidewalk vendors who vend from fixed locations. Table 1 describes the most significant provisions of SB 946 that impact how the City can regulate vending in the right-of-way

Table 1.

| Subject | Description |
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| Areas of Operation | Cities cannot outright prohibit vending in commercial zones. In |

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| Areas of Operation | Cities cannot outright prohibit vending in commercial zones. In residential areas, only stationary vendors can be prohibited. Restrictions can be imposed if related to public health, safety or welfare. |
| City-owned Parks | Cities cannot prohibit roaming vendors from operating in City-owned parks, but may prohibit stationary vendors, if under contract with a concessionaire. Restrictions can be imposed if related to public health, safety or welfare. |
| Hours of Operation | In commercial zones, hours cannot be more restrictive than other businesses. More restrictive hours are permitted in the residential zones. |
| Limit on Number of Vendors | Cities cannot limit the number of vendors or restrict them to certain areas of the City, unless restrictions are necessary to ensure public health, safety or welfare standards are met. |
| Storefront Businesses | Cities cannot require a sidewalk vendor to obtain permission from any business to operate near them. Cities do not have the authority to restrict a vendor from operating on the sidewalk due to conflicting business uses. |

DISCUSSION:

The draft ordinance establishes CMC Chapter 12.46 as the Sidewalk Vending Program (hereinafter 'program'). The proposed program is consistent with SB 946 in that it establishes a permitting system for sidewalk vending, while recognizing the importance of regulation and enforcement of sidewalk vendor activities to promote the health, safety, and welfare of the public. The following sections provide an overview of some of the key regulations and restrictions established by the City's new program.

Permitting Requirements

Government Code (GOV) Section 51038(C)(4) allows a local authority to require a sidewalk vendor to obtain a permit, subject to certain limitations. The proposed program would require an individual to obtain a vendor permit to engage in any sidewalk vendor activities. A permit enables the City to effectively regulate individuals who are engaging in sidewalk vending activities, and will ensure that vendors are complying with the rules and regulations set forth by the program. Because the program is being considering an urgency ordinance and not a permanent ordinance, staff recommends that the first permits be granted for a period of no longer than six (6) months.

The Community Planning and Building Department will issue a permit to a sidewalk vendor when the application requirements set forth in the program are satisfied. Permit administration costs will be recovered through the permit fees. A fee resolution for the vendor permit will be brought to City Council in the near future, once staff has had the opportunity to fully evaluate the potential permit cost, and the fee noticing and publication requirements have been satisfied.

Staff anticipates that the time involved to review and condition a sidewalk vending permit application will be comparable to a Track One Design Study, which has an application fee of \$425. For this initial Urgency Ordinance, staff recommends a sidewalk vending permit fee of \$425. The applicant would also be required to submit a business license application, which has an application fee of \$379. The total cost to obtain a street vending permit and business license will be \$804.

Limitation on Number of Permits

Government Code (GOV) Section 51038(b)(5) states that a local authority shall not restrict the overall number of sidewalk vendors permitted to operate within the jurisdiction of the local authority, unless the restriction is directly related to objective health, safety, or welfare concerns. Based on a random sample obtain through a sidewalk study (see Attachment 3), approximately 29% of the sidewalks in the City's Commercial District are less than 10 feet wide. The sample also identifies that many segments of the sidewalk are less than 5 feet wide when factoring in tree wells and other amenities. An excessive number of sidewalk vendors would unreasonably interfere with the flow of pedestrians and disrupt access for person with disabilities. Additionally, the majority of the Residential District does not contain sidewalks and pedestrian access is limited to the roadway. For these reasons, a limit on the number of permits issued is necessary to protect public health, safety and welfare. Staff recommends a limit of ten (10) total permits to operate in both the Commercial and Residential Districts. The program would allow that no more than one permit be issued to an individual sidewalk vendor and only one vending receptacle is allowed per permit. Permits shall be issued in the order that they are received and deemed

Vendor and only one vending receptacle is allowed per permit. Permits shall be issued in the order that they are received and deemed complete.

In addition to limiting the number of permits to operate in the Commercial and Residential Districts, the program would also allow a total of three (3) separate permits to operate in Devendorf Park. Government Code (GOV) Section 51038(b)(2)(A) states that a local authority shall not outright prohibit a sidewalk vendor from selling food or merchandise in a park owned or operated by the local authority; but may regulate the time, place, and manner of sidewalk vending in a park when necessary to ensure the public's use and enjoyment of natural resources and to prevent an undue concentration of commercial activity that unreasonably interferes with the scenic and natural character of the park. Devendorf Park is only .60 acres in size, and allowing a total of three (3) permits is necessary to prevent an undue concentration of commercial activity and protect the character of the park.

Prohibited Locations

The proposed program would not allow sidewalk vending on Carmel Beach, the adjacent Scenic Pathway, or within 100 feet of the Del Mar Parking Lot. The beach is not defined as a park, but is rather a coastal resource, and the City is not required by State law to allow sidewalk vending in this area. On important note is that other coastal cities throughout California are also prohibiting vending on their beaches and adjacent boardwalks and pathways. The program would also prohibit vending in the Mission Trail Nature Preserve, which is a nature preserve and is classified as an environmentally sensitive habitat area, and is not a recreational park for which SB 946 intends to allow sidewalk vending.

The program prohibits sidewalk vending along any portion of sidewalk that is less than ten (10) feet wide. Among other limitations, the program also prohibits sidewalk vending within two-hundred (200) feet of the police station, fire station, a permitted farmers' market, or in an area that has been permitted by the City for special event, during the duration of the event.

Limitation on Hours of Operation

GOV Section 51038(C)(1) allows a local authority to place limitations on hours of operation that are not unduly restrictive. In nonresidential areas, any limitations on the hours of operation for sidewalk vending shall not be more restrictive than any limitations imposed on other businesses or uses on the same street. In nonresidential areas, the proposed program would limit hours of operation for sidewalk vending from 8:00 a.m. to 9 p.m., daily, which is consistent with most business operations throughout the City.

In residential areas, hours of operation would be limited to between 9:00 a.m. and 6:00 p.m., daily. These areas tend to be more sensitive to noise and traffic impacts and, therefore, warrant a smaller operational window.

Enforcement, Penalties, and Appeals

GOV Section 51039 outlines limitations on punishing sidewalk vendors for violating parameters of the City's program and establishes maximum fines. Violations may not be prosecuted as infractions or misdemeanors, and may only be punished by an administrative citation or permit revocation. The appeals framework provides due process for individuals who are in disagreement with an issued citation or permit revocation, and will be in accordance with procedures set forth in CMC 18.04 Enforcement.

STAFF SUMMARY:

SB 946 went into effect on January 1, 2019. For this reason, staff recommends that the City Council adopt the attached Urgency Ordinance, which will go into effect immediately and can be extended up to one year. The benefit of this Urgency Ordinance is that it provides flexibility to make changes to the program over the next year as we continue to study this issue and learn from the program.

ENVIRONMENTAL REVIEW:

The proposed Zoning Ordinance Amendment is not subject to the California Environmental Quality Act (CEQA) pursuant to the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, sections: 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment); 15060(c)(3) (the activity is not a project as defined in Section 15378); and 15061(b)(3), because the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. The proposed ordinance maintains the status quo and prevents changes in the environment. Because there is no possibility that this ordinance may have a significant adverse effect on the environment, the adoption of this ordinance is exempt from CEQA.

FISCAL IMPACT:

There is no direct fiscal impact related to this item. There may be indirect costs associated with additional enforcement. Costs associated with issuance and administration of a sidewalk vendor permit are proposed to be recovered through a fee. A fee resolution for the vendor permit will be brought to City Council in the near future, once staff has had the opportunity to fully evaluate the potential permit cost, and the fee noticing and publication requirements have been satisfied.

PRIOR CITY COUNCIL ACTION:

None.

ATTACHMENTS:

Attachment #1 - Sidewalk Vending Urgency Ordinance

Attachment #2 - SB 946

Attachment #3 - Sidewalk Study



CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

February 5, 2019
PUBLIC HEARINGS

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| TO: | Honorable Mayor and City Council Members |
| SUBMITTED BY: | Marc Wiener, AICP - Director, Planning & Building |
| APPROVED BY: | Chip Rerig, City Administrator |
| SUBJECT: | Extension of Urgency Ordinance 2019-006, for a period of 10 months and 15 days, establishing a program to regulate and permit sidewalk vending pursuant to California Senate Bill 946. |

RECOMMENDATION:

Extend Urgency Ordinance 2019-006 for a period of 10 months and 15 days.

BACKGROUND/SUMMARY:

BACKGROUND:

On September 17, 2018, Governor Jerry Brown signed Senate Bill 946 (SB 946), which establishes statewide governance of vending in the public right-of-way and parks. The purpose of this bill is to create entrepreneurial and economic development opportunities for certain individuals, by removing barriers to selling food and merchandise on public sidewalks and in parks. The bill went into effect on January 1, 2019.

The new law requires that cities allow sidewalk vending, and restrictions may only be imposed when directly related to objective public health, safety, or welfare concerns. Local jurisdictions that wish to regulate sidewalk vending are required to first adopt a program with rules and regulations consistent with SB 946. On January 8, 2019, the City Council adopted Urgency Ordinance 2019-006, establishing the Sidewalk Vending Program. The Urgency Ordinance went into effect immediately and is valid for 45 days after adoption. Staff is recommending that the City Council extend the Urgency Ordinance an additional 10 months and 15 days, as authorized by Government Code (GOV) Section 65858(a) with a four-fifths vote of the City Council.

Since the Urgency Ordinance was adopted, the Community Planning and Building Department has issued 13 sidewalk vendor permits; 10 commercial/residential and 3 Devendorf Park. The majority of the applications were submitted the day after the Ordinance was adopted. Most of the applicants are local business owners, primarily restaurateurs. The City has not been accepting any additional applications because we are at the allowed cap.

STAFF ANALYSIS:

Program Modifications

Staff made several modifications to the program in response to feedback from the first draft. The following is a list of the most significant modifications:

- Modified so that the permits expire with the Urgency Ordinance, in 10 months 15 days, rather than 6 months.
- Added a requirement that sidewalk vendors operate a minimum of 40 hours per month, weather permitting.
- Modified so that the 10-foot wide sidewalk requirement only applies to the Commercial Districts and recognizes that the sidewalk vendor must 'pass through' narrower portions of a sidewalk in order to reach their destination.
- Added a new definition of City parks and defines Devendorf Park as the park grounds excluding the surrounding sidewalks.
- Modified the allowed dimensions by reducing the width from 36 inches to 32 inches, and included an allowance for an umbrella or cover no larger than what is required by the Monterey County Health Department (see Attachment 5 for cart dimensions).
- Modified to allow the use of propane for heating food.
- Added a requirement that sidewalk vendors comply with CMC 8.96, which prohibits the use of polystyrene packaging and plastic straws and utensils.
- Added a prohibition on noise making devices, such as megaphones, bells, whistles, and the like.
- Modified to allow a maximum of one sign per vendor.

- Modified to allow a maximum of one sign per receptacle.
- Modified and simplified the setback standards. Among other things, staff added a 25-foot setback from the monuments in Devendorf Park, eliminated the 200-foot setback standard from the Police and Fire Departments, reduced the setback between the vendors from 100 to 50 feet, and included provisions that the sidewalk vendor not obstruct a business entrance, Police or Fire Department entrance or driveway, trashcan, etc., rather than prescribing a defined setback standard.

Initial Permit Life

The Sidewalk Vending Program currently places a numerical cap (total 13) on the number of allowed permits and states that they are to be approved in the order they are received. All 13 permits have been approved and issued. Sidewalk vendors must make an initial investment, that includes paying the City's permit and business license fees, purchasing a cart, obtaining a Health Department Permit, and obtaining general commercial liability insurance with a limit of one-million dollars per occurrence and two-million dollars in aggregate with the City named as an additional insured. In the original version of the program the permits were set to expire in 6 months, however, staff is now recommending that the first round of permits expire with the Urgency Ordinance, in 10 months and 15 days to give the permit holder a sufficient amount of time to operate and receive a return on their investment. The City Council may consider granting additional time to the original 13 permit holders, as several permit holders have indicated to staff that the approximate 11-month time-frame is not sufficient to offset the initial investment, which could range from \$7,000-10,000.

Permitting Issuance

Because there is a numerical cap on the allowed number of permits, staff is seeking direction from the City Council on how to equitably issue permits once the first batch expire. Below is a list of potential options for issuing sidewalk vendor permits with a staff analysis. The permits under any of these systems could be issued with an expiration date, which staff would recommend be 1-5 years. Placing an expiration date on the permits would help ensure that there is equal opportunity for individuals wishing to operate in the City. A waiting list would be maintained should one of the permit holder choose not to operate or should the permit be revoked. One of the permit issuing systems identified below would be incorporated into the permanent ordinance, which will be considered at a future date in the next 10 months.

Permit Re-issuance – Under this scenario, the first 13 permit holders would have their permits re-issued upon expiration of the Urgency Ordinance, and continually thereafter. While this is the simplest system of issuing future permits, and includes the benefit of continuity, staff is concerned with the equity of granting the permits to the original 13 permit holders in perpetuity.

Permit Lottery – Under this scenario, permits would be issued based a lottery draw. This is staff's preferred option, as it would be fairest way of allocating permits. As an example, staff has included a section from the Pacific Grove Municipal Code that establishes a lottery system for short-term rental permits (see Attachment 6).

Criteria Based System – With this system the City would establish criteria and approve applications based on a score of how well they meet the criteria. While this system provides the benefit of allowing the City to screen and make discretionary decisions on permits, it would involve considerable staff time and resources to screen applications, and could lead to the perception of impropriety.

Order Received – The first batch of permits were issued in the order received. Staff has concerns regarding the fairness of this system. It can lead to a disorderly process as applicants compete to be the first to submit an application.

Permit Ownership

The City Council requested that staff research whether a permit decision could be based on ownership. Staff has identified several court cases establishing that a land-use decision cannot be based on ownership. Additionally, using such criteria would be a violation of both the fourth and fourteenth amendments to the Constitution as a denial of "Due Process". While the City cannot approve or deny an application based on ownership status, it could potentially require that the owner, or principal in the case of a corporation or company, be the operator. If the Council is in support of this provision, then it should direct staff to incorporate this into the permanent ordinance.

Additional Sidewalk Study

At the January 2019 City Council meeting, staff presented a sidewalk study that included 24 sidewalk width measurements, primarily along Ocean Avenue. Based on this study, it was determined that the average sidewalk width is 6' 8", with only 29% of the sidewalks being 10 feet or wider. This data was used to support the recommendation that there be a limit of 10 permits issued for the Commercial District.

Since the first meeting, staff has collected an additional 32 sidewalk width measurements, primarily along the Ocean Avenue side streets in the downtown (see Attachment 4). The measurements from the second data set are consistent with the first. When factoring in the additional measurements, the study indicates that the average sidewalk width is approximately 6'9", with 32% being 10 feet or wider.

POLICY CONSIDERATIONS:

The Sidewalk Vending Program has been modified to address several of the issues identified in the first draft. Staff recommends that the City Council extend Urgency Ordinance 2019-006, for an additional 10 months and 15 days. However, staff is seeking guidance from the City Council on the following policy questions:

- Should the original 13 permit holder be granted more than 1 year to operate?
- How should future permits be issued, once the original permits have expired?
- Should the program be amended to require that the owner or principal also be the operator?

ENVIRONMENTAL REVIEW:

The proposed Zoning Ordinance Amendment is not subject to the California Environmental Quality Act (CEQA) pursuant to the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, sections: 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment); 15060(c)(3) (the activity is not a project as defined in Section 15378); and 15061(b)(3), because the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. The proposed ordinance maintains the status quo and prevents changes in the environment. Because there is no possibility that this ordinance may have a significant adverse effect on the environment, the adoption of this ordinance is exempt from CEQA.

FISCAL IMPACT:

There is no direct fiscal impact related to this item. There may be indirect costs associated with additional enforcement. Costs associated with issuance and administration of a sidewalk vendor permit are proposed to be recovered through a fee. A fee resolution for the vendor permit will be brought to City Council in the near future, once staff has had the opportunity to fully evaluate the potential permit cost, and the fee noticing and publication requirements have been satisfied.

PRIOR CITY COUNCIL ACTION:

On January 8, 2019, the City Council adopted Urgency Ordinance 2019-006 establishing a Sidewalk Vendor Program.

ATTACHMENTS:

- Attachment 1 - Ordinance 2019-006
- Attachment 2 - Ordinance 2019-006 Red-Line Version
- Attachment 3 - SB 946
- Attachment 4 - Sidewalk Measurements
- Attachment 5 - Vending Carts
- Attachment 6 - Lottery Example