



The City of San Diego

Staff Report

DATE ISSUED: 9/29/2023

TO: Honorable Committee Members

FROM: Council District 2

SUBJECT: Framework For Municipal Code Amendments to Address Concerns With Sidewalk Vending And Expressive Activities

Primary Contact: Venus Molina Phone: (619) 236-6622

Secondary Contact: Liezl Gloria Phone: (619) 236-6622

Council District(s): Citywide

**OVERVIEW:**

In this past year, we recognized the need to revisit and amend the San Diego Municipal Code to address concerns with sidewalk vending activities and to accommodate expressive activities while ensuring proper enforcement. We have developed a comprehensive framework that addresses the First Amendment, sidewalk vending impounding procedures and enforcement mechanisms, as well as some necessary clean-up language.

**PROPOSED ACTIONS:**

Request District 2 staff work with the Mayor and City Attorney to draft municipal code amendments to address concerns with sidewalk vending and expressive activities.

**DISCUSSION OF ITEM:**

**Expressive Activity Regulations**

The primary goal of such amendments is to strike a balance between protecting First Amendment rights on the one hand and maintaining public safety, order, and accessibility on sidewalks, parks and beaches on the other. This brief overview highlights the key considerations and steps involved in amending the Municipal Code for expressive activities. The proposal includes amending the sidewalk vending ordinance to no longer exempt people engaged in expressive activities, but instead establish reasonable rules and regulations for people engaged in expressive activities to balance between protecting constitutional rights and maintaining public order. A well-crafted ordinance will provide clear guidelines and prioritize the protections of First Amendment rights, while ensuring that sidewalks remain accessible and vibrant spaces for expression and commerce.

The fullest extent of First Amendment protections apply to what courts consider "pure speech", such as:

- People who are speaking, proselytizing, or expressing religious, political, philosophical, or ideological messages, including handing out brochures that are not commercial ads

- Artistic performances
- Vendors of inherently expressive items (i.e. books, newspapers) and art created by the vendor work).
- Vendors of merchandise that is “inextricably intertwined” with a statement carrying a religious, political, philosophical, or ideological message (for example, a nonprofit environmental group selling shirts and buttons with messages about climate change).
- Examples of “pure speech”
  - Clothing, stuffed animals etc. sold as a fundraiser by a nonprofit.
  - Original art sold by the artist.
  - Sale of books, music, paintings, photographs, sculpture or CDs or recordings created by the vendor.
- Examples of activities that are not considered “pure speech” by the courts include sales of handcrafts, including jewelry, pottery, shea butter, incense and incense burners.
  - A vendor just saying the handcraft is expressive isn’t enough to make the conduct expressive for purposes of First Amendment protections.
  - But sales of these items may be protected “pure speech” if the totality of the facts suggest the vendor’s sales are inextricably intertwined with expression of a religious, political, philosophical, or ideological message.

In drafting proposed amendments, we looked at regulations recently adopted by the San Diego Port and are considering definitions for expressive activity, handcrafts, and visual art drawing from the language used by the San Diego Port. The Port’s definition of “expressive activity” states:

“Expressive Activity”— Expressive Activity includes all forms of speech and expressive conduct, including but not limited to (1) the distribution of non-commercial information, (2) solicitation of funds, donations, subscriptions and/or signatures for a charity, religious organization, non-profit, or government entity, and (3) the sale of or performing artwork, speeches, and/or performances that are inherently communicative in nature and have only nominal value or purpose apart from its communication. Such items include but are not limited to the following: newspapers, leaflets, pamphlets, bumper stickers, buttons, books, audio, video, compact discs, video discs, records, sculptures, paintings and photographs, including prints of paintings and photographs, political campaigning activity, including the distribution of literature, stickers, shirts, cups or other promotional material such as signs and campaign messages, and any other similar item that is inherently communicative and has only nominal value or purpose apart from its communication. Expressive Activity shall not include (a) the provision of personal services such as hair weaving or massage, (b) the application of substances or Handcrafts to others' skin or body parts including but not limited to piercings, or ink, paints or dyes applied with a needle or machine (non-Henna tattoos), (c) the creation of Visual Art which is mass produced or produced with limited variation, or (d) the creation of Handcrafts. This list of exclusions is not intended to be exhaustive.

In addition, the proposed regulations would include general time, place, and manner rules that would apply to anyone engaged in protected First Amendment speech on City property. For example, the proposed regulations would likely include a space limit similar to the 24 square foot limit applicable to sidewalk vendors. Proposed regulations would prohibit using or attaching equipment to City property, including City utilities and could include provisions to ensure sidewalks and walkways are passable and

safe for all people to use and moving along. Proposed regulations may address the use of amplification, umbrellas and other shade structures, and other equipment.

The proposed regulations would also allow the City to identify certain speech locations in designated areas within parks, plazas, and other high-traffic areas where there’s a need and to set specific rules within the First Amendment framework for those areas. If the City established speech areas in a specific park, the proposed regulations would require speakers to use those areas only and would be available on a first-come, first-served basis. First Amendment areas would be limited to expressive activity and could not be used for sidewalk vending or other non-speech activities. The proposed regulations could also allow the appropriate departments to establish specific regulations if needed to protect sensitive environments and use of available space.

Expressive Activity regulations would apply to performers/buskers, First Amendment vendors, protestors, and any other speakers engaged in protected speech. Anyone who is not engaged in protected speech activities but is selling items on public property is a sidewalk vendor and must comply with the SVO. Amendments to the SVO and language in the proposed new Division would make this distinction clear.

**Impounding of Sidewalk Vending Equipment**

The need for impounding procedures and increased enforcement measures arises from the challenges posed by rogue vendors who often disregard existing regulations and operate in a manner that disrupts public order and safety. These individuals have engaged in activities that obstruct sidewalks and create unsanitary conditions. Impounding provides a vital tool to swiftly address such issues by temporarily removing uncompliant vendors’ equipment or goods. These measures aim to strike a fair balance between safeguarding the rights of legitimate vendors and maintaining the integrity of public spaces. Currently, the Sidewalk Vending Ordinance requires progressive enforcement as set forth by SB 946.

Violations associated with any part of the ordinance have been subject to escalating fines as set forth in the table below:

<b>Administrative Citations</b>		
<b>(Violations within one year)</b>	<b>With Permit</b>	<b>Without a Permit</b>
<b>First Violation</b>	written administrative warning and referral	written administrative warning and referral
<b>Second Violation</b>	\$200	\$500
<b>Third Violation</b>	\$500	\$1,000
<b>Fourth Violation</b>	\$500 and/or impoundment	\$1,000 and/or impoundment

The proposed amendments would remove the initial warning and replace it with a \$100 for permitted vendors and \$250 for unpermitted vendors.

Since the Sidewalk Vending Ordinance came into effect, City enforcement teams have encountered groups of rogue vendors who exhibit a complete unwillingness to provide information or adhere to the established regulations. In response, we are proposing the adoption of the impounding mechanism currently employed by the City of Orange that would allow immediate impound of a vendor’s equipment or goods if the vending poses certain public health and safety concerns, including vending food without a valid health permit. (See attachment 1)

This tool would grant enforcement officers the opportunity to immediately impound the vendor’s equipment and product if they are found in violation of any of the impounding codes.

Enforcement will be conducted primarily by the San Diego Police Department in addition to City of San Diego Park Rangers on a proactive and responsive basis to areas of high concern for public health, safety and welfare.

City of San Diego Strategic Plan:

Goal #2: Work in partnership with all of our communities to achieve safe and livable neighborhoods.

Objective #1: Protect lives, property, and the environment through timely and effective response in all communities.

Goal #3: Create and sustain a resilient and economically prosperous City.

Objective #1: Diversity and growth of the local economy.

Fiscal Considerations:

The cost to administer amendments has not yet been determined. City staff is currently determining the cost associated with the implementation.

Charter Section 225 Disclosure of Business Interests:

N/A; there is no contract associated with this action.

Environmental Impact:

This action, the preparation of a framework for amendments to the Sidewalk Vending Ordinance to address concerns with sidewalk vending and expressive activities, is not a project pursuant to CEQA Guidelines Section 15378(b)(5) as it is an administrative or organizational activity of government that will not result in direct or reasonably foreseeable indirect physical changes in the environment. As such, this activity is not subject to CEQA pursuant to CEQA Guidelines Section 15060(c)(3).

Climate Action Plan Implementation:

N/a

Equal Opportunity Contracting Information (if applicable):

N/a

Previous Council and/or Committee Actions:

N/a

Planning Commission Action:

N/a

Key Stakeholders and Community Outreach Efforts:

N/a

Venus Molina

---

Chief of Staff