



**Date:** January 11, 2019

**To:** Chief of Police  
Director of Parks & Recreation

**From:** John Belisle, Deputy City Attorney

**Subject:** SB 946 Sidewalk Vendors

**Question Presented**

What effect does the legislature's passage of SB 946 have on the enforcement of City Code sections regarding sidewalks and public rights of way, including in Chapters 8.10, 5.05, and 3.40?

**Short Answer**

SB 946 both (a) restricts the time, place and manner of regulations targeting individuals who sell food or merchandise on public sidewalks in and in parks, and (b) decriminalizes all violations, which has the following consequences:

1. Select sections of City Code must be revised, including sections restricting the time, place and manner of peddler/solicitor's activities on public rights-of-way and in parks, and those sections authorizing criminal enforcement and amounts of fines (See chart below).
2. The Police Department can no longer cite sidewalk vendors under Chapter 5.05 for infractions and misdemeanors. The City's enforcement is limited to administrative penalties.
3. The City must seek dismissal of all pending applicable criminal prosecutions, if any are pending.

**Background**

**a. Description of the New Law**

SB 946 decriminalizes and establishes requirements for local agencies to regulate sidewalk vendors. The general legislative intent is to "to promote entrepreneurship and support immigrant and low-income communities," and to respond to federal procedures for enforcing immigration laws against those convicted of a crime. A sidewalk vendor is defined as a person who "sells food or merchandise" upon a "public sidewalk or other pedestrian path," by "non-motorized conveyance or from their person," including while "roaming" and/or "stationary." It was chaptered on September 17, 2018, and is codified as Government Code sections 51036 – 51039.

Under Section 51038, a city cannot:

- 1) Specify where within a public right of way a vendor can operate, unless it is related to health, safety or welfare ("HSW") concerns. ((b)(1))
- 2) Prohibit a vendor from operating within a city park, unless the vendor is stationary and the city has granted an exclusive permit to a concessionaire. ((b)(2)(A).) But, the city can regulate time, place and manner of sales, if the regulations are related to HSW, the use and enjoyment of the park, and/or to prevent undue concentration of commercial activity. ((b)(2)(B).)
- 3) Require a vendor to obtain consent or approval from a nongovernmental entity (i.e., nearby restaurant) before the vendor operates. ((b)(3).)

- 4) Restrict vendors from operating in certain neighborhoods, except if restricting is related to HSW. ((b)(4)(A).) But, for neighborhoods zoned as exclusively residential, cities can prohibit stationary vendors from operating. ((b)(4)(B).)
- 5) Limit the number of vendors in the city, unless related to HSW. ((b)(5).)

Subject to the foregoing prohibitions, a city can:

- 1) Enact local laws related to objective HSW concerns that regulate time, place and manner, including requirements for sanitation, permitting, compliance with government (incl. health) inspections, licensing and taxation. (§ 51038(c).)
- 2) Restrict vendors from operating in immediate vicinity of: (§ 51038(d)
  - a. Permitted certified farmers' markets.
  - b. Permitted swap meets.
  - c. Public areas designated for "temporary special permits." (including for parades, outdoor concerts).

In regulating sidewalk vendors, objective concerns of HSW cannot include "perceived community animus or economic competition." (§ 51038(e).) Moreover, the law does not affect the applicability of the California Retail Food Code (Health & Saf. Code § 113700, et seq.), which addresses food safety and inspections, including for mobile food facilities and farmers markets. (§ 51037.)

SB 946 broadly decriminalizes sidewalk vending, prohibits cities from punishing violations of related local ordinances as criminal infractions or misdemeanors, and reduces enforcement power. (§ 51039.) A person cannot be arrested, penalties are restricted to administrative fines, and the statute specifies fine amounts and maximums. A person's ability to pay must be considered "when assessing an administrative fine." ((f)(1).) Furthermore, a person's failure to pay an administrative fee cannot be punished by a criminal charge, nor can they be assessed any further "fines, fees, assessments, or any other financial conditions" beyond permit rescission. ((a)(2);(c).)

The new statute is retroactive for previous offenses. Individuals cited for previous violations of local ordinances affected by SB 946 "shall" have their pending charges dismissed, and prosecutions that have reached judgment may be petitioned for dismissal as well. (§ 51039(e)&(g).)

#### **b. Santa Clara City Code**

In different places, the City Code directly regulates the same type of activity targeted by SB 946:

- Chapter 5.05 ("Solicitors and Peddlers") regulates door-to-door and place-to-place peddling and solicitation. The City Code makes a distinction between sales for immediate delivery (peddling) and for future delivery (solicitation), but SB 946 does not. Under City Code, Peddlers are individuals who "sells and makes immediate delivery or offers for sale...any goods, ware, merchandise or thing in the possession of the seller, at any place in the City other than at a fixed place of business." (§ 5.05.010(j).) Peddling is defined to include "traveling" and "selling or vending...on any street, sidewalk, right-of-way, park or other public place," including by mobile units (which includes a "trailer, push cart, wagon, bicycle, dray, conveyance or structure on wheels"). ((h),(k).) Because SB 946 does not distinguish between the time of delivery of the good for sale, it may apply to solicitors as defined by City Code: "any person who goes from place to place in the City, not having been invited by the occupant thereof, carrying or transporting goods, wares, merchandise or personal property of any nature and offers property of any nature for future delivery." ((p).)

- Under Article I, and subject to exceptions, peddlers and solicitors must obtain a permit from the Police Department for “peddling activities.” (§ 5.05.020.)
  - Applicants are required to submit an application signed under penalty of perjury with biographical details, a description of their peddling, and a statement about their criminal history, in addition to submitting fingerprints and paying fees for a background investigation. (§ 5.05.040.)
    - The Application requires a social security number from the applicant, and also reserves the right to deny applications if information is omitted.
  - The terms of the permit require inter alia County health inspections and proof thereof for mobile units; operating hours between 10:00 a.m. and one-half hour after sunset, except if by “licensed catering vehicles” selling food at/near industrial establishments; wearing identification; and upon request, that the peddler providing his or her name, organizational information, and a copy of their signature. (§5.05.170.)
- Article II regulates solicitation from vehicles and mobile units.
  - Solicitors are prohibited “while standing in any portion of the public right-of-way, including ... sidewalks and driveways, to solicit, or attempt to solicit... business ...from any person traveling in a vehicle along a public right-of-way.” (§ 5.05.210(a).) It also prohibits solicitation to and from vehicles when the buyer or seller is in a public right-of-way. ((b), (c).)
  - Mobile unit peddlers (incl. pushcarts and wagons) are prohibited from:
    - Standing or stopping “for peddling purposes, at any place on any public street, sidewalk, right-of-way, public park or other public place, for a total period of time exceeding ten minutes within any two-hour period” or “stopping” for a sale on any public right-of-way within 500 feet of a school property. (§ 5.05.230.)
    - Stopping to peddle within 200 feet of another mobile unit. (§ 5.05.240.)
    - Peddling from an unapproved location, which is restricted as: (§ 5.05.260(a).)
      - Peddling is permitted only for the street-side of a sidewalk. ((3).)
      - Sidewalks must be a minimum width of 8 feet, with 3 feet for passage of pedestrian traffic. ((4).)
      - The dimensions of the mobile unit cannot exceed 8-feet high by 5-feet wide by 6-feet long, and must be parked to minimize use of the sidewalk and not obstruct it. ((5), (7).)
      - Peddlers cannot have more than their approved mobile unit, single stool and 33-gallon maximum trash container. ((6).)
      - Peddlers must carry general liability insurance. ((8).)
      - Permits will not be issued for specific locations, including: (§ 5.05.270.)
        - Immediately adjacent to residentially zoned property. (a)
        - Within 20-feet of a restricted parking/loading space. (b)
        - Within 20-feet of the entrance to any building, merchandise display, or crosswalk. ((c) – (e).)
        - Where it impedes traffic or is dangerous. ((f) – (h).)
    - Selling or peddling any articles, or to station any stand or cart for sale of any article or thing, in any park or adjacent public park, unless they are an approved concessionaire. (§ 5.05.280.)

- Chapter 8.10 (“Food and Food Establishments”) regulates the sale of food, food establishments and restaurants, and requires individuals selling food to be permitted, to follow State and local health laws and regulations, and to submit to inspections. (§§ 8.10.020 – 8.10.130.) Food establishments are places where food is “kept, held, sold, prepared or compounded or offered for sale for human consumption,” “not a public eating or drinking establishment,” including grocery stores, fruit and vegetable stands, and markets or “other premises” where meat is kept, stored, handled, or offered for sale. (§ 8.10.010(b).) Restaurants are places, including “sandwich stands” and cafes, where “food or drink is prepared on the premises for sale or distribution elsewhere. (*Id.*, at (c).) The City’s Health Officer, or duly-authorized representative are “authorized and directed to seize and destroy or denature any tainted, diseased, decayed or partially decayed or unwholesome meat, fish, shell fish, fowl, fruits, vegetables or other unwholesome food found within the city.” (§ 8.10.110.)
- Chapter 3.40 (Business Tax) requires operators of businesses to pay taxes to the City. It requires that “parade vendors” (\$15 per parade), “itinerant merchants” (\$225 per 190 days), and peddlers (\$ 113) each pay a business tax to the City.

The City Code also indirectly regulates sidewalks in parts that may be useful for further enforcing the health, welfare and safety thereon:

- Chapter 12.05 restricts a person from obstructing sidewalks from the free passage of pedestrians, including doing so by annoying or molesting persons passing by. (§ 12.05.010.) It does not provide any exception for those selling, or attempting to sell, food or merchandise.
- Title 9 (“Public Peace, Morals and Welfare”) prohibits individuals from bringing into “any portion of the parking areas” around the Stadium, and “perimeter sidewalk,” any food, goods or merchandise “for the purposes of sale or barter.” (§ 9.05.165 (m).)

Lastly, the City Code contains sections addressing enforcement, including the discretion to prosecute violation of code with civil, criminal or administrative penalties (§§ 1.05.070, 5.100.010), which are specifically preempted by SB 946.

### **c. Permit practices and procedures**

The Permits Unit of the Police Department manages all permitting for peddler activity, including receiving applications, granting or denying permits, and maintaining information with the HDL business license software. The Permits Unit does not maintain any internal written guidelines for its decision-making regarding granting and denying applications, and endeavors to only strictly follow and enforce the language of the City Code.

### **Analysis**

SB 946 allows cities to require permits for sidewalk vending and to also restrict the time, place and manner (“TPM”) of sidewalk vending, if it is done for objective health, safety and welfare (“HSW”) reasons, or to address other specific concerns in parks and residential neighborhoods. Many of the restrictions in the Santa Clara City Code have an apparent relationship to HSW, such as to prevent obstruction of traffic. Thus, SB 946’s new requirements and restrictions facially preempt only select sections of the City Code dealing with the permitting of peddlers and solicitors where restrictions do not have an obvious and justifiable reason, such as HSW. The restrictions that do not have legally-justifiable reasons will be subject to legal challenge when the new law takes effect on January 1, 2019.

Furthermore, sections of City Code regarding enforcement of code and prosecution of code violators are entirely preempted by SB 946's decriminalization of sidewalk vending.

City Code		Enforceability Under SB 946	Limitations Under SB 946	Action/Revisions Required for Code or Policies
§	Description			
5.05.020	Peddlers & Solicitors must be permitted	Enforceable	City cannot restrict specific locations unless for HSW	No action required
5.05.040	Required information for permit	Enforceable <i>in part</i>	Cannot require SSN	None for Code; Remove SSN field from SCPD Application
5.05.210	Solicitors cannot stand in public right-of-way and solicit to vehicles traveling on streets	Enforceable	City cannot restrict specific locations unless for HSW	No action required
5.05.230 (a)(1)	Mobile Unit Peddler (MUP) cannot stand or stop for "peddling purposes" in public right-of-way ... for longer than total 10-mins within 2-hr period	<i>Likely Enforceable IF for HSW</i>	City cannot restrict specific locations unless for HSW	Articulate reasoning
5.05.230 (a)(1)	MUP cannot stand or stop for "peddling purposes" in public right of way ... <u>park</u> for longer than total 10-mins within 2-hr period	<i>Likely Enforceable IF for HSW</i>	City cannot prohibit roaming vendors within parks, but may restrict if for HSW reasons or <i>use/enjoyment of park or to prevent undue concent. of comm. activity</i>	Articulate reasoning
5.05.230 (a)(2)	MUP cannot stand or stop for "peddling purposes" with 500-ft of <u>school</u> property	<i>Likely Enforceable IF for HSW</i>	City cannot restrict specific locations unless for HSW	Articulate reasoning
5.05.240	MUP cannot stop to peddle with 200-ft of other stopped MUP	<u>Not</u> Enforceable, unless for HSW	City cannot restrict specific locations unless for HSW	Articulate reasoning; Revise to remove or to narrow restriction

City Code		Enforceability Under SB 946	Limitations Under SB 946	Action/Revisions Required for Code or Policies
§	Description			
5.05.260	Permit locations and conditions			
(a)(2)	"issued only for a specific approved location which is stated on the permit."	<u>Not</u> Enforceable, unless for HSW	City cannot restrict specific locations unless for HSW, or to restrict stationary vendors from neighborhoods exclusively zoned as residential	Articulate reasoning; Revise to remove or to narrow restriction
(a)(3)	Only for street side of sidewalk portion	<i>Likely Enforceable IF for HSW</i>	City can restrict TPM of permits for HSW	Articulate reasoning
(a)(4)	Only for sidewalks of 8-ft width with 3-ft of passage for peds	<i>Likely Enforceable IF for HSW</i>	City can restrict TPM of permits for HSW	Articulate reasoning

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(a)(5)	MUP/temp structure dimensions are less than 4'Hx5'Wx6'L	<i>Likely Enforceable IF for HSW</i>	City can restrict TPM of permits for HSW	Articulate reasoning
(a)(6)	Limited to (i) 1 approved MUP/temp structure, (ii) 1 stool, and (iii) 1 garage can	<i>Likely Enforceable IF for HSW</i>	City can restrict TPM of permits for HSW	Articulate reasoning
5.05.270	Prohibited Locations			
(a)	Immediately adjacent to residentially zoned property	<u>Not</u> Enforceable, unless for HSW	City "shall not restrict sidewalk vendors to operate only in a designated neighborhood or area, except" for HSW, or to restrict "stationary" vendors from neighborhoods exclusively zoned as residential	Articulate reasoning; Revise to remove or to narrow restriction
(b)	Within 20-ft of no-parking zone, handicapped parking space or driveway	<i>Likely Enforceable IF for HSW</i>	City can restrict TPM of permits for HSW	Articulate reasoning
(c)	Within 20-ft of entrance to buildings	<u>Not</u> Enforceable, unless for HSW	City "shall not restrict sidewalk vendors to operate only in a designated ... area, except" for HSW, or to restrict "stationary" vendors from neighborhoods exclusively zoned as residential	Articulate reasoning; Revise to remove or to narrow restriction (e.g. types of buildings)
(d)	Within 20-ft of merchandise display window	<u>Not</u> Enforceable	City "shall not restrict sidewalk vendors to operate only in a designated ...area, except" for HSW; "economic competition does <u>not</u> constitute" HSW reason	Revise to remove or to narrow restriction
(e)	Within 20-ft of crosswalk	<i>Likely Enforceable IF for HSW</i>	City can restrict TPM of permits for HSW	Articulate reasoning
(f) – (h)	Impedes traffic or is hazardous	Enforceable	City can restrict TPM of permits for HSW	No action required
5.05.280	Peddling is prohibited in parks and adjacent parking unless as an approved concessionaire	<u>Not</u> enforceable	City cannot prohibit vendors within parks, unless for HSW reasons or use/enjoyment of park or to prevent undue concent. of comm. activity; <i>or if the peddler is stationary and the city has already granted an exclusive concessionaire permit</i>	Revise to remove or to narrow restriction distance

City Code		Enforceability Under SB 946	Limitations Under SB 946	Action/Revisions Required for Code or Policies
§	Description			
1.05.070	City has discretion to criminally prosecute <u>any</u> violations of Code; recover costs of enforcement	Not Enforceable	Sidewalk vendors cannot be criminally cited	Specify penalties in amended ordinance Gov. Code § 51039
3.40.330	Peddlers are subject to City Business Tax	Enforceable	No specific restrictions on local taxations	No action required
8.10.020 - .130	Food Safety sections, including the right to seize/destroy tainted foods (§ 8.10.110)	Enforceable	None	No action required
12.05.010	Sidewalks: Individuals are prohibited from obstructing free passage of pedestrians on sidewalk	<u>Not</u> Enforceable	City cannot restrict specific locations unless for HSW	Articulate reasons; Revise to narrow and provide exception for sidewalk vendors/peddlers
12.05.040	Obstructing sidewalk without prior permission deemed guilty of infractions and \$500 fine	<u>Not</u> Enforceable	Sidewalk vendors cannot be criminally cited for unpermitted vending	Revise and narrow: sidewalk vendors are subject only to specific administrative penalties IAW Gov. Code § 51039
9.05.165(m)	Stadium: prohibits individuals from bringing food and merchandise for sale onto parking areas and "perimeter" sidewalk	<u>Not</u> Enforceable	City "shall not restrict sidewalk vendors to operate only in a designated ...area, except" for HSW; "economic competition does <u>not</u> constitute" HSW reason	Articulate reasons; Revise to remove or to narrow restriction

cc: City Manager's Office