

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: January 28, 2014
TO: Robert A. Vacchi, Director, Development Services Department
FROM: City Attorney
SUBJECT: Legality of Proposed Food Truck Regulations

INTRODUCTION

The San Diego Municipal Code (Municipal Code) currently prohibits food trucks from operating on private property throughout most of the City of San Diego.¹ Before mobile food trucks can legally operate, the Municipal Code must be amended to establish a use category along with corresponding zones of operation and any applicable regulations.

Despite the current prohibition, mobile food trucks have increased in popularity and frequency. City staff has been asked to amend the Municipal Code to provide clear regulations for food truck operators, properties hosting food trucks, neighboring business owners, potential food truck customers, and the community as a whole.

Questions have arisen regarding whether the City legally may restrict parking of food trucks within 75 feet of restaurant entrances, and require food trucks to pay a fee to Business Improvement Districts (BIDs) to compensate for the benefits provided by the BIDs. This Memorandum answers these questions, and provides an overview of the applicable law.

¹ Mobile food trucks are allowed in parts of the Centre City Planned District as long as they receive a Conditional Use Permit (CUP).

QUESTIONS PRESENTED

1. What is the scope of the City's authority to regulate food trucks?
2. Would an ordinance prohibiting food trucks from parking within 75 feet of restaurants withstand legal challenge?
3. May the City require food trucks to pay a fee to BIDs?

SHORT ANSWERS

1. The City may ban or regulate food trucks within a given zone as long as the regulation is reasonably related to a legitimate government purpose. Further, the City may regulate (but not ban) food trucks on public streets for the purpose of public safety, by regulating the time, place, and manner under which they operate.
2. An ordinance prohibiting food trucks from parking within 75 feet of restaurants would only withstand legal challenge if the City could establish that such a regulation was related to public safety.
3. The City cannot require food trucks to pay a fee to BIDs unless certain legal requirements are met, including evidence that a food truck is located and operating within a specific BID.

ANALYSIS

I. THE CITY MAY REGULATE FOOD TRUCKS, AS LONG AS IT MEETS CERTAIN LEGAL STANDARDS.

A. The City May Ban or Regulate Food Trucks Within a Given Zone as Long as the Regulation is Reasonably Related to a Legitimate Government Purpose.

A city's land use and zoning powers stem from its broad power to protect the public health, safety, and welfare; this is known as the "police power." Cal. Const. art. XI, § 7. While the Legislature can limit the police power -- even for charter cities -- by preempting an area of statewide concern, the Legislature allows cities to "exercise the maximum degree of control over local zoning matters." Cal. Const. art. XI, §§ 5, 7; Cal. Gov't Code § 65800; *DeVita v. County of Napa*, 9 Cal. 4th 763, 782 (1995). The exercise of police power must also be reasonably related to a legitimate government purpose, and a city must have a reasonable basis in fact to support the regulation's wisdom and necessity. *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 609 (1976); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 522 (1962). Therefore, the City may regulate food trucks within a given zone as long as the applicable legal standards are met.

B. The City May Regulate (but not Entirely Ban) Food Trucks on Public Streets, as Long as The Regulation is Related to Public Safety, and Addresses the Time, Place, and Manner Under which Food Trucks Operate.

Unlike the regulation of land use and zoning, parking and traffic control are matters of statewide concern, and the Legislature has preempted those fields. Cal. Veh. Code § 21. Unless expressly authorized by the Legislature, even charter cities have no police power over parking and traffic control. *Rumford v. City of Berkeley*, 31 Cal. 3d 545, 550 (1982) (barriers on city streets not authorized by Vehicle Code); *County of Los Angeles v. City of Alhambra*, 27 Cal. 3d 184, 192 (1980), superseded on other grounds as stated in *County of Alameda v. City of Oakland*, 193 Cal. App. 3d 858, 863 (1987) (parking meter regulation is a form of traffic control as to which state statutes supersede even ordinances authorized by charter); *Zack's, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1183 (2008) (finding that the field of traffic control is preempted by the state).

The California Vehicle Code authorizes cities to regulate in limited areas relating to parking and traffic control, such as: prohibiting or restricting parking on state highways within a city as long as there is approval from the Department of Transportation (§ 22506); establishing parking meter zones and white-lined designated parking spaces within which a vehicle must park (§ 22508); requiring blocked wheels on hills in business or residential districts (§ 22509); designating special parking for disabled persons (§§ 22511.7-22511.8); reducing the state's 15-foot prohibited distance from fire hydrants (§ 22514); establishing programs and procedures for abatement and removal – as public nuisances – of abandoned, wrecked, and inoperable vehicles (§§ 22660-22661, 22671); prohibiting or restricting vehicles near intersections (§ 22507); prohibiting or restricting parking of commercial vehicles over 10,000 pounds in residential areas (§ 22507.5); regulating height, weight, routes, and parking of certain trucks as long as the regulations are not arbitrary, unreasonable, or confiscatory (§§ 21101(c), 22507, 35701); and imposing public safety regulations on vehicles vending on city streets, including regulating the type of vending and the time, place, and manner of vending (§ 22455).

Vehicle Code section 22455 allows cities to regulate the zones in which food trucks operate by providing that cities may adopt public safety requirements regulating the type of vending and the time, place, and manner of vending upon any street.² Because cities may limit food truck operation in certain zones under their authority to regulate the use of private property, they may limit food truck operation on the streets within those zones under their authority to regulate the time, place, and manner of vending operations. Such regulation allows cities to comprehensively protect the character and public safety in certain areas of the city, rather than providing only a partial tool of regulating private property in underlying zones but not the streets that run through

² Section 22455 provides: “(a) The driver of any commercial vehicle engaged in vending upon a street may vend products on a street in a residence district only after bringing the vehicle to a complete stop and lawfully parking adjacent to the curb, consistent with the [stopping, standing, and parking requirements of the Vehicle Code] and local ordinances adopted pursuant thereto. (b) Notwithstanding [health and sanitation regulation] or any other provision of law, a local authority may, by ordinance or resolution, adopt additional requirements for the public safety regulating the type of vending and the time, place, and manner of vending from vehicles upon any street.”

them. This would especially frustrate a city's attempt at regulation of mobile vehicle vending, which by nature occurs on streets as well as private property.

Section 22455 does not, however, authorize cities to ban vending on all public streets. In 1985, the section was amended to remove a provision authorizing such bans, and as one court has noted, "[e]ffective January 1, 1986, cities lost the authority to ban vending from vehicles parked on streets." *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1817 (1993) (invalidating an ordinance enacted by a charter city to ban vending from vehicles parked on public streets in residential areas). Therefore, cities cannot ban vehicles from vending on all public streets, but they may regulate the time, place, and manner of such activity for the purpose of public safety.³

II. AN ORDINANCE PROHIBITING FOOD TRUCKS FROM PARKING WITHIN 75 FEET OF RESTAURANTS WOULD ONLY WITHSTAND LEGAL CHALLENGE IF THE CITY COULD ESTABLISH THAT SUCH A REGULATION WAS RELATED TO PUBLIC SAFETY.

Pursuant to Vehicle Code section 22455, any prohibition on parking must be related to public safety. The proposed ordinance states that it is intended to protect the public health and safety, and the following would likely be found by a court to be legitimate government purposes: allowing pedestrians to move unobstructed on sidewalks and streets; reducing obstacles to vehicular traffic; and ensuring that parking remains available on busy streets. *See, e.g. Roulette v. City of Seattle*, 97 F. 3d 300, 316 (9th Cir. 1996) (finding that an ordinance prohibiting sitting on sidewalks was a valid exercise of police power); *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 362 (2000) (upholding an ordinance regulating panhandling and solicitation on sidewalks); *Jobson v. City of Huntington Beach*, 462 F. Supp. 774, 777 (C.D. Cal. 1978) (finding that an ordinance prohibiting loitering or lying upon a sidewalk in a way that unreasonably hinders or obstructs pedestrian traffic was a valid exercise of police power); *Ex parte Bodkin*, 86 Cal. App. 2d 208, 211 (1948) (finding that an ordinance protecting public streets from obstructions was a valid exercise of the police power); *Dennis v. Gonzales*, 91 Cal. App. 2d 203, 205 (1949) (finding that an ordinance designed to protect against idlers and obstructions by prohibiting standing or parking other than parallel to or within eighteen inches of the curb was a valid exercise of police power).

However, a 75-foot prohibition must be supported by substantial evidence that it is reasonably related to public safety purposes. For example, the City does not prohibit sidewalk cafes or other obstructions within 75 feet of restaurants,⁴ and does not prohibit food trucks within 75 feet of gas stations, schools, movie theaters, or other uses. Without further justification, the 75-foot prohibition could be viewed as protecting brick-and-mortar restaurants or other businesses from competition from food trucks. At least one court has found that a 100-foot distance required

³ It is unclear what "public safety" and "place" mean in the context of California Vehicle Code section 22455. Beyond *Barajas*, there are no interpretive cases, Attorney General opinions, or other sources suggesting how these terms should be defined; a dictionary definition would likely apply.

⁴ Section 141.0621(a)(1)(G) of the Municipal Code requires sidewalk cafes to locate at least 8 feet from the entrance to a ground floor commercial use.

between catering trucks and restaurants was a “naked restraint of trade” and without reason, even in the face of a finding by the city council that the regulation was intended to protect pedestrians and prevent traffic hazards, where the city did not explain “how a catering truck is more of a traffic hazard within 100 feet of the entrance to a restaurant than it is within 100 feet of the entrance to a gas station or other commercial enterprise.” *People v. Ala Carte Catering Co.*, 98 Cal. App. 3d Supp. 1, 8-9 (1979). The Ninth Circuit has also found that “economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.” *Merrifield v. Lockyer*, 547 F. 3d 978, 991 n.15 (9th Cir. 2008) (finding that the irrational singling out of three types of vertebrate pests from all other vertebrate animals for purpose of state licensing scheme regarding pest control was “designed to favor economically certain constituents at the expense of others similarly situated”). Unless the City can establish that a prohibition of food trucks within 75 feet of restaurants is a regulation of time, place, and manner for the purpose of public safety, any such ordinance would likely be found by a court to be preempted by state law.

III. THE CITY CANNOT REQUIRE FOOD TRUCKS TO PAY A FEE TO BIDS UNLESS CERTAIN LEGAL REQUIREMENTS ARE MET.

BIDs are City-designated geographically-based areas where business owners are assessed annually to fund activities and improvements to promote that business district. The assessment is premised upon a person’s operation of a business within the district, and is based on the estimated benefit to the businesses within the district.⁵ This Office has issued numerous memoranda analyzing how Proposition 26 may apply to BIDs. *See, e.g.*, Op. City Att’y 2012-21 (July 27, 2012).

No specific proposal has been provided to this Office regarding food trucks and BIDs. Any such proposal should be evaluated by this Office before implementation, because there are legal and practical obstacles to charging a fee to food trucks that is passed to BIDs. Specifically, there must be evidence that the food truck is located and operating within the BID.⁶ Evidence justifying an assessment could include data showing where a food truck intends to operate, where a food truck actually operated, and whether a food truck already paid a BID assessment because of the address associated with its business tax certificate. This Office is available to further consult with City staff on these issues, upon request.

⁵ Because the City does not know how the fee would be collected or how it would relate to existing BID assessments, it is also possible that the fee could trigger the voter approval requirements of Proposition 26 (Cal. Const. art. XI, § 7, subd. (e)).

⁶ City BIDs are based upon the Parking and Business Improvement Area Law of 1989 (California Streets and Highways Code § 35500 *et seq.*). That law applies to “businesses located and operating in a business district of a city.” (§§ 36501, 36502, 36506, 36513, 36551.) The term “located and operating” is not defined.

CONCLUSION

The City may ban or regulate food trucks within a given zone as long as the regulation is reasonably related to a legitimate government purpose. Also, the City may regulate (but not ban) food trucks on public streets for the purpose of public safety, by regulating the time, place, and manner under which they operate. An ordinance prohibiting food trucks from parking within 75 feet of restaurants would only withstand legal challenge if the City could establish that such a regulation was intended to protect the public safety. Finally, the City cannot require food trucks to pay a fee to BIDs, unless certain legal requirements are met. This Office is available to provide further consultation and analysis, upon request.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ _____
Inga B. Lintvedt
Deputy City Attorney

IBL:mcm

cc: Andrea Tevlin, Independent Budget Analyst
Adrian Granda, Council Representative, District 3

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