

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: May 9, 2019
TO: Honorable City Councilmembers
FROM: City Attorney
SUBJECT: Vehicle Habitation Ordinance

INTRODUCTION

This memorandum is in response to the April 25, 2019, memorandum from Councilmembers Ward, Montgomery, and Sherman (Memo) concerning the proposed Vehicle Habitation Ordinance (Ordinance).

As you know, the Office of the City Attorney drafts legislation at the direction of the San Diego City Council (Council) as the City's legislative body. This direction may be given by the Council, as a whole, or by its Committees. The Committee process is a public process intended to provide opportunities for robust "study and consideration," discussion, and debate before an ordinance is forwarded to the full Council for action. *See* San Diego Municipal Code (SDMC or Municipal Code) § 22.0101, Rule 2.9.1 and Rule 6. We have prepared an ordinance for Council's consideration that is substantially identical to the version presented to the Public Safety and Livable Neighborhoods Committee on April 17, 2019, as it was forwarded by that Committee to the Council without any recommended changes. SDMC § 22.0101, Rule 6.9.1.

If the Council now wishes to make changes to the Ordinance, this must be done in a noticed and public meeting. Some changes may be made by interlineation at the first reading of the Ordinance. Others may require additional legal review, more detailed policy direction, or may be beyond the scope of what is noticed on the agenda under the Ralph M. Brown Act (Brown Act). Some proposals may also be adopted or implemented by the Mayor's Office without the need to change the Ordinance.

We provide some guidance below on the types of changes proposed in the Memo that may be made by interlineation at the first reading of the Ordinance, and the types of changes that will require additional work before action may be taken. While a majority of Councilmembers may not discuss these matters amongst themselves prior to the Council meeting under the Brown Act, nothing prohibits the Councilmembers from individually seeking guidance or asking our Office questions prior to the meeting about what other changes (i.e., those not addressed by the Memo) may be permissible at the first reading. The Office of the City Attorney stands ready to assist the

Mayor and the Council in their efforts to enact policies and legislation that will address this important issue.

ANALYSIS

I. PROPOSED CHANGES TO THE ORDINANCE

The following is a summary of the proposals in the Memo and an explanation of whether the proposals can be incorporated into the Ordinance by interlineation at the first reading.

A. Safe Parking and Proposed Permit System

The Memo proposes expansion of safe parking through development of a permit system, using input from individuals with lived experience. The proposed permits would be issued by service providers operating in the City. The Councilmembers recommend coordination with the regional homeless information system and the creation of resource maps.

As a preliminary matter, the Mayor may implement a permit system without any changes to the proposed Ordinance.¹ If the Council wishes to codify a permit system, our Office would require more specific direction and time to prepare appropriate language. This is something that also could be referred to Committee for further development.

The Memo also requests that parking infractions incurred by individuals who enroll in safe parking or a permit system be expunged. This proposal would require substantial legal analysis and further policy consideration of eligibility and of the types of parking infractions that would be subject to expungement.² This could not be added to the Ordinance by interlineation at the first reading; however, our Office can provide additional research on this issue if the Council requests it.

B. Implementation and Review

The Memo requests the Council receive regular updates on enforcement data related to the Ordinance. The Council could request a commitment from the Mayor's Office and San Diego Police Department to periodically report back on enforcement. This request could be included in the Council's motion without the need to amend the Ordinance. Adding specific reporting language to the Ordinance itself may require additional legal review.

The Memo also requests this Office provide updates to Council on pending litigation and the state of the law relating to similar ordinances regulating vehicular habitation. This Office will continue to update the Council on these matters in individual briefings or closed session, as appropriate.

¹ The proposed ordinance states: "It is unlawful for any person to use a vehicle for human habitation on any street or public property, *unless the street or public property is specifically authorized for such use by the City Manager. . .*" (Emphasis added.)

² California Penal Code sections 1203.4 and 1203.4a generally establish the expungement process for misdemeanors and infractions. Application of this process to certain offenders and for certain offenses would need further legal review.

C. Enforcement

The Memo proposes a change to the Ordinance to adjust the enforcement start time from 6:00 p.m. to 9:00 p.m.³ This amendment is a policy decision and may be made by interlineation at the first reading of the Ordinance.

The Memo further proposes the addition of a statement that offenders of the Ordinance would be eligible for referral to a prosecutorial-led diversion program. As discussed in the uncodified language of the Ordinance, if the Ordinance is adopted it would be enforced in accordance with Chapter 1 of the Municipal Code.⁴ *See* SDMC § 12.0201. The uncodified language further states that offenders may be eligible for referral to diversion programs when appropriate. The San Diego Police Department and this Office's Criminal Division use diversion programs for a variety of offenses not referenced in the applicable ordinances. No language needs to be added to the operative portion of the Ordinance to allow offenders to participate in diversion or to allow law enforcement and this Office to use diversion programs.

Finally, the Memo suggests the Ordinance contain language to ensure the City's ability to fine individuals renting out vehicles for short-term habitation, instead of the individuals who occupy those vehicles. We understand that the Mayor's Office has been working with online rental platforms to remove listings of vehicles offered for rent for habitation on City streets or property, instead of private property. Any proposed amendment to the Ordinance to impose fines on the owners of these vehicles would require legal analysis and could not be made by interlineation at the first reading of the Ordinance.

II. COUNCIL OPTIONS

According to the Rules of Council and based on the discussion above, the Council has several options with respect to adoption and amendment of the Ordinance:

- Option 1: The Council may adopt the Ordinance in its current form and bring amendments back for later consideration. Amendments requiring significant policy discussion and legal analysis, including a permit system, could be referred to Committee for further discussion.
- Option 2: The Council may, by interlineation, change the proposed start time for enforcement (from 6:00 p.m. to 9:00 p.m.).

³ It is our understanding from City staff that the proposed enforcement timeframe is based on the operating hours of the City's current safe parking lots, helping to ensure individuals can access safe parking if approached by law enforcement.

⁴ An ordinance amending the Municipal Code generally contain recitals and uncodified paragraphs that are not incorporated into the actual Municipal Code. These sections can be used to establish the legislative history, explain why an ordinance is proposed, establish legal findings or effective dates, define the basis for certain City Charter requirements, and other things. By contrast, the codified paragraphs contain the language amending the actual Municipal Code. *See* San Diego Charter § 20.

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Option 3: The Council may, instead of adopting the Ordinance, refer it back to Committee or send it back to City staff to address specific concerns or for further development.

Option 4: The Council may choose not to adopt the Ordinance.

CONCLUSION

The Ordinance will be presented to Council in substantially the same version that was considered by the Public Safety and Livable Neighborhoods Committee. While some of the proposals in the Memo may not be added to the Ordinance at its first reading, the Council has several methods to make changes to the Ordinance and direct other actions to address vehicular habitation.

The Council may amend the Ordinance by interlineation at the first reading if the changes do not require legal review or detailed policy direction and are within the scope of what is noticed under the Brown Act. As previously discussed, other changes may be implemented administratively, without the need to amend the Ordinance. If the Council would like substantive changes to the Ordinance, Council may adopt the Ordinance and direct amendments be brought back to either Committee or to the full Council, or the Council may decline to adopt the Ordinance altogether or refer it back to Committee or City staff for further development.

MARA W. ELLIOTT, CITY ATTORNEY

By/s/ *Heather M. Ferbert*

Heather M. Ferbert

Deputy City Attorney

HMF:als:ccm

MS-2019-14

Doc. No.: 1996081_5

cc: Hon. Mayor Kevin Faulconer
Aimee Faucett, Chief of Staff, Mayor Kevin Faulconer
Robert Vacchi, Deputy Chief Operating Officer