



**DATE:** October 3, 2017

**CATEGORY:** New Business

**DEPT.:** City Attorney's Office

**TITLE:** **Ordinance Repealing Mountain View City Code Section Related to Loitering in the Median Strip Within a City Street and Amending Mountain View City Code Sections Related to the Centralized Purchasing System, Mobile Vending Permits, Solicitation Prohibited in the Public Right-of-Way, and Encroachment on City Property**

### **RECOMMENDATION**

Introduce an Ordinance Repealing Article I of Chapter 21, Section 21.1 of the Mountain View City Code Related to Loitering in the Median Strip Within a City Street and Amending the Mountain View City Code as follows: Articles VI and XIII of Chapter 2, Sections 2.76, 2.83, 2.204, and 2.211 Related to the Centralized Purchasing System; Article II of Chapter 15, Section 15.15 Related to Mobile Vending Permits; Article I of Chapter 21, Section 21.28 Related to Solicitation Prohibited in the Public Right-of-Way; and Article I of Chapter 27, Section 27.17 Related to Encroachment on City Property, to be read in title only, further reading waived, and set a second reading for October 24, 2017 (Attachment 1 to the Council report).

### **BACKGROUND**

The proposed ordinance amends several City Code sections, which require revision or repeal due to recent case law and/or the need for clarification. Each of the proposed revisions is discussed in greater detail below.

### **ANALYSIS**

#### **Amendments to Chapter 2, Article VI, Centralized Purchasing System Code Sections**

An amendment to Chapter 2, Article VI, Sections 2.76 and 2.83, and Article XIII, Sections 2.204 and 2.211, is proposed to clarify the authority of the Purchasing Agent. Often in acquiring equipment, materials, and supplies, certain professional and specialized services are bundled by the vendor and are necessary to place the

equipment into service. Examples include, but are not limited to, training, technical, or consultant services which, if provided separately and alone, would be considered professional services but if they are specific to the product and required to place the product into service, the Purchasing Agent will be authorized to approve. See Pages 1 through 4 of Attachment 1 for proposed revisions to these code sections.

#### Amendments to City Code Section 15.15, Mobile Vending Permits

The City Code currently requires all mobile vendors selling from their person on the public street or sidewalk, or selling from a cart or vehicle anywhere, to obtain a vending permit. This requirement applies to mobile vendors engaged in vending items that are intertwined with speech such that the item would be considered speech under the law (e.g., a CD or painting made by the vendor). Staff recommends adding the proposed exemptions for speech items due to First Amendment protections. The proposed revisions are similar to exceptions adopted by other cities. See Page 1 of Attachment 1.

#### Repeal of City Code Section 21.1, Loitering in the Median

In light of recent case law, staff recommends repealing City Code Section 21.1, which prohibits loitering in the median. This code section may involve First Amendment speech activity, which is subject to protection under State and Federal law, as was involved in a recent criminal prosecution for violation of this section when the person was standing in the median displaying a sign to oncoming traffic and distributing handbills. The Santa Clara County Superior Court held City Code Section 21.1 was unconstitutional under the First Amendment, free speech.

Recent case law has imposed an evidentiary requirement on cities defending regulations entailing free speech, requiring that cities present evidence in support of the regulation. During the City's recent criminal prosecution for violation of this code section, the superior court raised similar concerns.

Historically, the Police Department has enforced this code section on a complaint basis and has received few calls for service per year. Based on the City's experience in the recent criminal prosecution, the Police Department suspended enforcement of City Code Section 21.1 in November 2016. Since this time, no incidents or accidents involving pedestrians in the median have arisen. Furthermore, the Police Department is not aware of any particular issues or problematic locations. For these reasons, staff recommends repealing City Code Section 21.1. See Pages 5 and 6 of Attachment 1.

Amendments to City Code Section 21.28, Solicitation in the Right-of-Way

Several amendments to City Code Section 21.28 are recommended regarding solicitation. Staff recommends repealing subsections (a)(2) and (a)(3), definitions of “median strip” and “public right-of-way,” to remove definitions not utilized in the current code section. When City Code Section 21.28 was last amended in 2002, several then-existing provisions were eliminated. However, it appears these definitions, which were only used in the deleted sections, were not removed at that time.

Staff further recommends repealing City Code Section 21.28(b), which prohibits solicitation in public parking lots or structures, in light of free speech First Amendment concerns. Solicitation laws are currently in a state of transition due to recent case law that calls into question the City’s ability to regulate solicitation, which is considered speech under the law.

In addition, the City does not have particular locations that are problematic or evidence of public safety incidents at public parking lots and structures. Current enforcement of City Code Section 21.28 is primarily limited to the Police Department’s response to complaints. The Police Department does not recall calls for service for violation of this code section. An administrative citation was issued in 2017 based upon an on-duty officer’s observations of a solicitor soliciting money in a parking lot.

The Police Department suspended enforcement of this section in February 2017 based upon free speech concerns. No issues or accidents with solicitors have arisen since then.

Finally, staff recommends repealing City Code Section 21.28(d) as the exception would not apply if the proposed amendments are adopted. See Pages 6 and 7 of Attachment 1 for proposed revisions to this code section.

Amendments to City Code Section 27.17, Encroachment on City Property

City Code Section 27.17 prohibits the placement of structures and objects on City property, such as City streets and sidewalks. This section further requires the adjacent property owner to obtain a permit to place structures or objects on City property, such as temporary scaffolding placed on the sidewalk during construction or dumpsters on the street during remodeling. Staff recommends City Code Section 27.17 be amended to specify those areas of the City Code where encroachment is addressed by other code sections, namely sidewalk café operations and encroachments in City parks.

In addition, although this provision is arguably not subject to First Amendment analysis because the regulation concerns encroachment of objects and structures on City

property due to public health, safety, or convenience considerations, language has been modified to update the section to conform to applicable case law under the First Amendment. The code section sets forth criteria for the Public Works Director's determination of whether to grant or deny a permit. Public Works currently determines whether to grant or deny a permit based upon public health, safety, or convenience considerations and the proposed revisions would not affect their review.

Finally, an amendment is proposed to modify the language referring to a plat and legal description of the encroachment to a detailed drawing of the encroachment to reflect current practice. See Page 7 of Attachment 1 for proposed revisions to this code section.

**FISCAL IMPACT** – None.

**ALTERNATIVES**

1. Do not introduce the proposed ordinance.
2. Provide other direction to staff.

**PUBLIC NOTICING** – Agenda posting.

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Attachment: 1. Proposed Ordinance