



Council Meeting: December 4, 2012

SUBJECT: Introduce Ordinance to Amend Chapter 9.56 of the Sunnyvale Municipal Code (Solicitation)

REPORT IN BRIEF

The Office of the City Attorney recommends that Chapter 9.56 of the Sunnyvale Municipal Code related to solicitation be amended. In particular, the proposed amendments will make it unlawful:

- (1) To stand in the roadway and solicit drivers or occupants of unparked vehicles, and visa versa. The proposed amendments eliminate current restrictions on soliciting to/from the sidewalk.
- (2) To solicit in commercial parking areas in locations used for vehicular traffic or in other areas in the lot, if appropriate signage is posted. The proposed amendments will eliminate the current requirement that commercial property owners submit a written solicitation policy to the City.
- (3) To solicit from a person in a parking lot who is entering or exiting a vehicle.
- (4) To solicit before 9:00 a.m. or after 9:00 p.m. The current ordinance prohibits solicitation before sunrise or after sunset.

BACKGROUND

Sunnyvale adopted Chapter 9.56 of the Municipal Code in 1997 in response to a Council study issue on panhandling. (RTC 97-187.) The resulting ordinance addressed four main topics: loitering on median strips (§ 9.56.030); solicitation in public rights-of-way and parking lots (commonly known as “vehicle-based solicitation”) (§ 9.56.040); solicitation in commercial parking areas (§ 9.56.050); and restrictions on the time, place, and manner of solicitation (§ 9.56.020(1) and § 9.56.060).

Chapter 9.56 has not been amended since its enactment in 1997. As a result of developments in the law which have occurred over the past 15 years, the Office of the City Attorney is now recommending several amendments to ensure that the City’s regulatory scheme will be constitutional and enforceable. The amendments will provide appropriate tools for addressing public safety issues

related to solicitation in a manner that is consistent with the exercise of First Amendment rights.

EXISTING POLICY

Public Safety

Goal 4.1A. Provide a safe and secure environment for people and property in the community.

Socio-Economic

Goal 5.1A. Preserve and enhance the physical and social environment and facilitate positive relations and sense of well-being among all community members, including residents, workers, and businesses.

Policy 5.1A.5. Maintain City neighborhoods as safe, healthy places to live.

DISCUSSION

A. Section 9.56.040 (Vehicle-Based Solicitation)

Sunnyvale enacted Section 9.56.040 in 1997 in response to concerns about “day workers” and other persons who engage in solicitation activities in streets, sidewalks and parking lots. Because solicitation is a form of free speech, Section 9.56.040 was formulated as a traffic safety regulation that focuses on the behavior of soliciting to or from drivers in passing vehicles, rather than simply the act of soliciting per se. In the late 1990’s, many jurisdictions adopted similar “vehicle-based solicitation” ordinances. In the ensuing years, however, advocates for day workers have successfully challenged these types of ordinances in several cities. Los Altos and Mountain View were both sued in the early 2000’s and ultimately amended or repealed their vehicle-based solicitation ordinances. The cities of Los Angeles and Glendale also lost cases involving vehicle-based solicitation. Last year, the Ninth Circuit Court of Appeals overturned a Redondo Beach ordinance that was the original model for many vehicle-based solicitation ordinances throughout the state, including Sunnyvale’s. (*Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (en banc).) As a result of these legal developments, Sunnyvale § 9.56.040 needs to be amended in order to remain enforceable.

There are currently two locations in Sunnyvale frequented by day workers. For the past several years, based on observations by Public Safety and other City staff, the Home Depot on Kifer Road has been the primary site of day worker activity. Until about 2 years ago, up to 80 day workers would be assembled in the Home Depot parking lot on any given day. The City received periodic complaints related to public urination, littering, and alcohol use. However, Home Depot stopped allowing day workers to congregate in the parking lot, which reduced the number of workers gathering there. Currently, up to 20 or so day workers can typically be found waiting for work on the sidewalks

around Home Depot on Kifer and Hendy. Public Safety received 6 calls for service related to issues with day workers at Home Depot in 2010, representing about one-quarter of all calls for service at the store that year. Since then, DPS has received no calls for service related to day workers at Home Depot in 2011 or 2012.

A second location currently used by day workers is the U-Haul Store at 939 East El Camino Real. Although there are apparently only a handful of day workers who frequent the U-Haul store, a number of complaints have come from residents of the neighboring apartment complex who observe day laborers trespassing on residential property or flagging down drivers in traffic.

Location	Year	All Calls	Calls related to day laborers	% related to day laborers
Home Depot, 680 Kifer	2009	4	0	0
	2010	21	6	29%
	2011	9	0	0
	2012	3	0	0
Lowes, 811 E. Arques	2009	30	0	0
	2010	41	0	0
	2011	38	0	0
	2012	18	0	0
U-Haul, 939 E. ECR	2009	18	10	56%
	2010	34	12	35%
	2011	67	50	75%
	2012	24	16	67%

Due to the legal uncertainty over the constitutionality of vehicle-based solicitation, the City of Sunnyvale is currently not actively enforcing Municipal Code Section 9.56.040. Given the outcome in the Redondo Beach case, the Office of the City Attorney recommends that Section 9.56.040 be replaced with a more limited provision that prohibits solicitation in public parking lots and by/between the driver or occupants of unparked vehicles and persons standing in the roadway. This change will make it possible for Public Safety to address the most problematic behavior by day laborers and solicitors, such as walking into the street to approach vehicles.

Note, soliciting from median strips is unlawful under Section 9.56.030 and no changes are recommended to that section. Public Safety can also utilize other laws to address particular issues in appropriate cases, such as trespassing (Penal Code §602(o), §602.1), blocking traffic (Vehicle Code §21954), littering (Penal Code §374.4), public intoxication (Penal Code §647(f)), double parking (Vehicle Code §22400), and use of temporary, portable, or readerboard signage (SMC Ch. 19.44).

B. SMC § 9.56.050 (Solicitation in Parking Areas)

Sunnyvale Municipal Code Section 9.56.050 currently provides in subsection (a), “It is unlawful for any person to solicit or attempt to solicit employment, business or contributions of money or other property, from a location within a commercial parking area used for vehicular traffic. It is also unlawful to solicit in a location not authorized in advance by the property owner, or the property owner’s representative, for such solicitations.” Subsection (b) provides that, in order for the City to enforce these restrictions, the property owner must establish “a written policy which provide(s) areas for the lawful solicitation”, submit that policy to the City, and post required signage.

Subsection (b) of Section 9.56.050 was written to ensure that private property owners would not violate the civil rights of solicitors engaged in free speech activities on their property. Over the years, however, it has become clear that the ordinance puts Public Safety officers and other City staff in a difficult position of trying to determine whether or not a private shopping center’s solicitation policy is legally adequate under a complex and rapidly evolving body of legal case law. At the same time, a legal distinction can probably be drawn between solicitation in parking lots, which a property owner can appropriately restrict due to safety issues, and solicitation in other areas of private property open to the public, such as plazas and walkways, where greater First Amendment protections may apply.

The City Attorney recommends repealing the requirement in SMC § 9.56.050(b) that the owner submit a solicitation policy, and simply require that an owner who wishes to prohibit solicitation in the parking lot post appropriate signage. The City Attorney also recommends revising the second sentence of the first paragraph of § 9.56.050 (“It is also unlawful to solicit in a location not authorized in advance by the property owner, or the property owner’s representative, for such solicitations”) because this sentence is ambiguous in the context of the ordinance, which appears to be aimed at parking areas only. This sentence has created confusion about whether the City can enforce a private shopping center’s solicitation policy against solicitors anywhere on the property, not just in the parking lot.

The City Attorney does not recommend creating an ordinance that would require the City to enforce a property owner’s solicitation policy with regard to areas outside the parking lot, such as private sidewalks and walkways, because such restrictions may or may not be enforceable depending on the circumstances. The property owner’s best option in such cases is to seek an injunction or restraining order against the solicitors, so that a court can determine the extent of the solicitors’ free speech rights in that location. Public Safety would then be able to arrest the solicitors for violating a court order. In addition, Public Safety always has the ability to arrest solicitors who engage in any conduct that is a violation of the Penal Code or other applicable city codes.

C. SMC § 9.56.060(c) (Time of Day Restrictions)

Section 9.56.060(c) provides that it is unlawful to solicit “after sunset or before sunrise.” Many cities have ordinances that restrict solicitation during certain hours. Courts have held that the government has the power to regulate the activities of solicitors in order to prevent crime and protect residents from annoyance. However, regulations must be balanced against the solicitors’ First Amendment rights. The U.S. Supreme Court has never expressly considered the constitutionality of time-of-day restrictions on solicitation. However, several federal circuit courts have considered the question and found that it is unconstitutional to prohibit door-to-door solicitation “after sunset” or earlier than 9:00 p.m. in the evening.

The Office of the City Attorney recommends amending Section 9.56.060(c) to prohibit solicitation “before 9:00 a.m. or after 9:00 p.m.”

D. New SMC § 9.56.060(e) (Soliciting from Persons Entering or Exiting a Vehicle)

Section 9.56.060 makes it unlawful to solicit in certain locations where doing so may be threatening or abusive to the person being solicited, such as within 10 feet of an ATM. The City Attorney recommends adding another section which provides “It is unlawful to solicit or attempt to solicit any person entering or exiting any vehicle, so as to impede that person's movement, when such vehicle is located within a public street, private driveway leading to a public street, public or private parking lot or structure.”

E. Penalty

Violations of the solicitation restrictions in Chapter 9.56 are currently categorized as misdemeanors, which are prosecuted in the Superior Court. Indigent defendants charged with a misdemeanor have a right to a Public Defender and may demand a jury trial, no matter how small the potential fine. Conviction goes on the person’s record as a misdemeanor. Many defendants in these matters have little incentive to reach a plea agreement, either because they have no money to pay a fine, or they do not want to cease their solicitation activities. Infractions, by contrast, are akin to parking or traffic tickets. There is no right to a public defender, and cases are decided by judges in the Traffic Court.

Classifying minor violations of city codes as infractions rather than misdemeanors is often what best serves the purposes of deterrence and punishment. In determining what level of punishment is appropriate for a given violation, policymakers should consider factors such as the seriousness of the violation, how it compares to other types of violations, and how best to utilize city and court resources.

The City Attorney recommends that violations of Chapter 9.56 should be deemed infractions, similar to other quality-of-life code violations such as creating a nuisance (Ch. 9.26), smoking in a park (Ch. 9.28), loitering in a closed parking lot (Ch. 9.52), unlawful distribution of advertising and printed matter (Ch. 9.60), and violations of park rules (Ch. 9.62). The experience of many cities has shown that harsher punishments and larger fines do not address the root causes of either the day labor economy or chronic homelessness and panhandling.

The proposed amendment will give the City discretion to charge a defendant with a misdemeanor if he or she has been convicted five or more times for violating Chapter 9.56 within a three year period.

FISCAL IMPACT

None.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

ALTERNATIVES

1. Approve the amendments as presented.
2. Approve the amendments as revised by Council.
3. Do not approve the amendments.
4. Other direction as provided by Council.

RECOMMENDATION

Staff recommends Alternative 1: Introduce Ordinance to Amend Chapter 9.56 of the Sunnyvale Municipal Code (Solicitation)

Reviewed and Approved by:

Michael D. Martello
Interim City Attorney
Prepared by: Rebecca L. Moon, Assistant City Attorney

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY
OF SUNNYVALE TO AMEND CHAPTER 9.56 OF THE
SUNNYVALE MUNICIPAL CODE RELATING TO
SOLICITATION**

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

SECTION 1. SECTION AMENDED. Section 9.56.020 of Chapter 9.56 (Solicitation of Employment, Business or Contributions of Money or Other Property) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.56.020. Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

(1) – (6) [Text unchanged.]

(7) “Roadway” means that portion of a public street that is improved, designed or ordinarily used for vehicular travel. “Roadway” does not include sidewalks or parkway strips.

~~(7)~~ (8) “Solicit” means making any oral or written request, offer or enticement, or taking any action which indicates the availability of a person for employment or availability to provide services for compensation or which seeks to purchase or secure services or goods; the purchase or sale of goods; or a request for money or other property; or a contribution of money or other property. A solicitation shall be deemed complete when made whether or not an actual employment relationship is created, a transaction is completed, or an exchange of money or other property takes place.

SECTION 2. SECTION AMENDED. Section 9.56.040 of Chapter 9.56 (Solicitation of Employment, Business or Contributions of Money or Other Property) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

**9.56.040. Solicitation in public rights-of-way ~~or public parking lots.~~
~~prohibited.~~**

~~(a) — It is unlawful for any person, while standing in any portion of the public right of way, including but not limited to public streets, highways, median strips, sidewalks and driveways, to solicit, or attempt to solicit, employment, business, or contributions of money or other property from any person traveling in a vehicle along a public right of way, including, but not limited to public streets, highways or driveways.~~

~~(b) — It is unlawful for any person, while the occupant of any vehicle, to solicit, or attempt to solicit, employment, business or contributions of money or other property from a person who is within the public right of way, including but not limited to a public street, highway, sidewalk or driveway. This provision does not apply to services rendered in connection with emergency repairs requested by the operator or passenger of a vehicle.~~

~~(c) — It is unlawful for any person to solicit or attempt to solicit, employment, business or contributions of money or other property from any occupant of a vehicle, or from any person getting into or out of a vehicle within any parking lot or structure open to the public, where such parking lot is posted with a sign prohibiting such activity.~~

~~(d) — Individuals with a permit issued pursuant to Title 19 of this code are exempt from the limitations of this section.~~

~~(a) No person shall stand in a roadway and solicit from the driver or occupant of any unparked vehicle, or from any vehicle that is stopped in, or blocking, a lane of traffic.~~

~~(b) No person, while the driver or occupant of an unparked vehicle or a vehicle that is stopped in, or blocking, a lane of traffic, shall solicit from any person who is standing in a roadway.~~

SECTION 3. SECTION AMENDED. Section 9.56.050 of Chapter 9.56 (Solicitation of Employment, Business or Contributions of Money or Other Property) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.56.050. Solicitation in unauthorized locations within commercial parking areas prohibited.

(a) It is unlawful for any person to solicit or attempt to solicit employment, business or contributions of money or other property, from a location within a commercial parking area used for vehicular traffic. It is also unlawful to solicit in ~~a~~ any other location within the commercial parking area not authorized in advance by the property owner, or the property owner's representative, for such solicitations.

(b) The prohibition against solicitation ~~shall only apply to~~ in commercial parking areas ~~shall only apply if where all of the following occur:~~

~~(1) — The owner or person in lawful possession establishes a written policy which provides area(s) for the lawful solicitation of employment, business, or contributions of money or other property in locations which are accessible to the public and do not interfere with the normal business operations of the commercial premises;~~

~~(2) — A copy of such policy is submitted to the chief of public safety to be maintained in public safety department files;~~

~~(3) — The owner or person in lawful possession has caused a notice to be posted in a conspicuous place at each entrance to such ~~commercial~~ parking area. This notice shall not be less than eighteen by twenty-four inches (18" x 24") in size with lettering not less than one inch in height, and the notice shall not exceed, in total area, six square feet. The notice shall read substantially as follows:~~

~~“It is a misdemeanor to engage in the solicitation of employment, business or contributions of money or other property in areas of this commercial parking lot which are not approved for such activity by the property owner. It is unlawful to solicit in areas of this parking lot not approved for such activity by the property owner. SMC 9.56.050”~~

SECTION 4. SECTION AMENDED. Section 9.56.060 of Chapter 9.56 (Solicitation of Employment, Business or Contributions of Money or Other Property) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.56.060. Restrictions on time, place and manner of solicitation.

(a) – (b) [Text unchanged.]

(c) It is unlawful to solicit ~~after sunset or before sunrise.~~ before 9:00 a.m. or after 9:00 p.m.

(d) It is unlawful to solicit at any bus stop.

(e) It is unlawful to or attempt to solicit any person entering or exiting any vehicle, so as to impede that person's movement, when such vehicle is located within a public street, private driveway leading to a public street, public or private parking lot or structure.

SECTION 5. SECTION AMENDED. Section 9.56.070 of Chapter 9.56 (Solicitation of Employment, Business or Contributions of Money or Other Property) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.56.070. Penalty.

Every violation of this chapter is ~~a misdemeanor.~~ an infraction, except that a violation may be charged as a misdemeanor after five (5) or more convictions for violation of any provision of this Chapter within a thirty-six (36) month period.

SECTION 6. EXEMPTION FROM CEQA. The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

SECTION 7. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such decision or decisions shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 8. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 9. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication once in The Sun, the official publication of legal notices of the City of Sunnyvale, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2012, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2012, by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST:

APPROVED:

City Clerk
Date of Attestation: _____

Mayor

SEAL

APPROVED AS TO FORM AND LEGALITY:

Michael D. Martello, Interim City Attorney