



# City and Borough of Sitka

100 Lincoln Street • Sitka, Alaska 99835

*Coast Guard City, USA*

## MEMORANDUM

To: Chair Spivey and Members of the Planning Commission

From: Planning and Community Development Department Staff

Subject: Temporary and Mobile Vending: Code Interpretation and Administration

Date: June 1, 2019

With the onset of the summer season, there has been an increased number of requests coming through the Planning Department for food trucks, food carts, food stands, and other general street vending (particularly in the downtown area). The zoning code regarding this type of activity is ambiguous. Given the lack of a Planning Director, Staff is asking the Commission for guidance and direction on administration of this code section.

There are two parts of the Sitka General Code (SGC) that regulate this type of business – Title 6 Business Licenses and Regulations, and Title 22 Zoning.

Title 6 regulates sales on public property and is administered through Harrigan Centennial Hall and the Police Department. Retail and solicitation for services is generally prohibited on public property in the CBD zone, public use zone, and in the harbors with the exceptions of: sales of items made/collected by juveniles and sold by the juveniles, some Alaska Native/local handicrafts, artwork, jewelry, and books, arts and crafts made and sold by senior citizens for charitable purposes, and sales of items benefitting youth programs.

This means that our primary concern is with sales on private property. Footnote 8 of Table 22.16.015-6 Retail and Business Uses states “Kiosks, outdoor restaurants, portable structures such as food stands and other temporary structures that are clearly incidental to the primary use on the lot are permitted uses. Mobile food carts on wheels are permitted uses on private property. Kiosks, outdoor restaurants, portable structures such as food stands and other temporary structures that are not clearly incidental to the primary use on the lot are conditional uses.”

Staff believes that successful administration of this code requires clarification on three points:

1. How do we delineate between “kiosks, outdoor restaurants, portable structures such as food stands and other temporary structures”, and “mobile food carts on wheels”?

2. What separates a “mobile food carts on wheels” from a food truck/trailer, or a “portable structure”? And should food trucks/trailers be regulated as portable structures, and therefore potentially subject to conditional use permit review?
3. Kiosks, outdoor restaurants, portable structures such as food stands and other temporary structures are permitted when “clearly incidental to the primary use on the lot” and a conditional use when they are “not clearly incidental to the primary use on the lot”. What standards do we apply to judge if something is or is not “clearly incidental”?

### **Question One: Delineating between the different types of temporary, outdoor, and mobile vending**

Title 22 Zoning does not provide definitions of these vending structures. Referring to the American Planning Association Glossary of Zoning, Development, and Planning Terms, these are the following definitions:

**Kiosk:** A temporary or semi-permanent structure having one or more open air sides, operating on either private property or public rights-of-way and plazas, generally no larger than six feet wide by 10 feet wide long. Operated for the purpose of vending food, drink, or retail goods.

**Outdoor restaurant:** A dining area with seats and/or tables located outdoors of a restaurant, coffee shop, or other food service establishment, and which is (a) located entirely outside the walls of the subject building (b) enclosed on two sides or less by walls of the subject building with or without a solid roof cover, or (c) enclosed on three sides by walls of the building without a solid roof cover. This seating may be in addition to the indoor seating or it may be the only seating available for the restaurant.

**Temporary structure:** A structure without any foundation or footing and removed when the designated time period, activity, or use for which the temporary structure was erected has ceased.

A “portable structure” or “food stand” was not defined by our zoning code, or APA – which necessitates the next question.

### **Question Two: Mobile food cart on wheels vs. a food truck or trailer**

Neither our zoning code nor the APA Glossary had a definition for portable structures, food stands, mobile food carts, mobile food trucks/trailers, or what the differences between the listed uses are. Staff was able to find a concise definition from the Tri-County Health Department of Adams, Arapahoe, and Douglas Counties in Colorado. They delineate between food trailers/trucks and push carts:

**Food trucks and trailers:** “A retail food establishment that is a wheeled vehicle or trailer that is readily moveable and designed for the service of food from the interior of the unit.”

**Push cart:** “A retail food establishment that is non-motorized unit designed so foods are served from the exterior of the unit and require very little preparation.”

This distinction is further substantiated by the State of Alaska Fire Marshal code which makes a clear distinction from structures that one climbs into to operate versus standing on the ground behind the cart to operate (the Fire Marshal regulates the former, not the latter).

Staff posits that the intent of the code to allow all “mobile food carts on wheels” is more in line with the type of business done by what is defined above as a push cart. A food truck or trailer, being a larger, more self-contained unit subject to fire marshal review seems more appropriate to be regulated as a portable structure and therefore potentially subject to a conditional use permit review after determining its incidental use.

Requiring food trucks/trailers to obtain a conditional use permit also balances the desire to expand temporary/mobile business with community concerns about such activity, and provides a mechanism for oversight and conflict resolution. Previous hearings for these types of businesses have been an avenue to address neighborhood disturbances from late night operation and noise complaints. The conditional use permit process can also mitigate congestion/over-crowding.

### **Question Three: Determining incidental use**

In common usage, incidental usually means “accompanying, but not a major use” or “a minor consequence of”.

In land use and zoning, the phrase “customarily incidental” is often used to determine if accessory uses are appropriate. Staff found a helpful analysis of this phrase in The Albemarle County (Virginia) Land Use Law Handbook, 2016. The Handbook sites several court cases that have tested the idea of customarily incidental, which essentially “implies that the use flows from, naturally derives or follows as a logical consequence of, or is a normal and expected offshoot from the primary use.” Further, “the term incidental incorporates the concept of a reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of ‘incidental’ would be to permit any use which is not primary, no matter how unrelated it is to the primary use”.

For example, take a baseball field such as Moller Field. A long-standing, customarily incidental use at the field has been a concession stand. The concession stand provides a service to the spectators and a fundraising opportunity for youth programs; both of these purposes naturally derive from the area’s primary use as a place to facilitate youth and community sports and would fit as a customarily incidental activity. Therefore, per the Zoning code we would not require the operator of the concession stand to obtain a conditional use permit. However, if someone wanted to set up a kiosk or temporary structure at the ballfield for an unrelated retail business, say a camera and electronics kiosk to take advantage of the potential spectator business, that is not a clearly “customarily incidental” to the primary use of the ballfield.

The Handbook lists five common factors to consider in determining whether a use is customary: the size of the parcel, the nature of the primary use of the parcel, the use made of the adjacent parcels, the economic structure of the area, and whether the proposed use is customary within the locality/region.

Some in land-use/zoning professions warn against using “customarily incidental” as a standard for determining permissible accessory uses because it encourages the status quo and can be stifling to innovation/technology. However, the use of “customarily incidental” in this case would not preclude new or unrelated accessory activity from taking place, it would just trigger further review via a conditional use permit.

If the Planning Commission agrees, Staff will use this standard in determining whether a proposed use of a temporary, outdoor, and mobile vending structure is incidental to the primary use on the lot.

### **Conclusions/Recommendations**

1. Temporary and/or mobile vending on public property in the Central Business District, Public Use District, and Harbors is regulated by Title 6 which is administered by Harrigan Centennial Staff and the Police Department. Requests falling within these parameters are not in the purview of Planning Commission review unless otherwise requested by Centennial or SPD staff.
2. A mobile food cart on wheels will be interpreted as “A retail food establishment that is non-motorized unit designed so foods are served from the exterior of the unit and require very little preparation.” These are permitted on private property and do not require a conditional use permit.
3. Food trucks and trailers (retail food establishments that are wheeled vehicles or trailers that are readily moveable and designed for the service of food from the interior of the unit) will be interpreted as portable structures, and may therefore require a conditional use permit to operate.
4. The standard of “customarily incidental” will be applied to requests for kiosks, outdoor restaurant, portable structures such as food stands and other temporary structures to determine whether or not the use is permitted, or requires a conditional use permit.

### **Attachments:**

Attachment A: SGC 6.16 and Table 22.16.015-6

Attachment B: Tri-County Health Department Food Truck vs Push Cart

Attachment C: The Albemarle County Land Use Law Handbook, Jan. 2016

Attachment D: APA Planning for Food Trucks