

PAUL E. COOPER  
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA  
ASSISTANT CITY ATTORNEY

CARRIE L. GLEESON  
DEPUTY CITY ATTORNEY

OFFICE OF

# THE CITY ATTORNEY

CITY OF SAN DIEGO

JAN I. GOLDSMITH

CITY ATTORNEY

CIVIL ADVISORY DIVISION  
1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

## MEMORANDUM OF LAW

**DATE:** January 29, 2015

**TO:** Natasha Collura, Director of Corporate Partnerships and Development

**FROM:** City Attorney

**SUBJECT:** Car Sharing: Review of Legal Issues

### INTRODUCTION

The City is currently party to a contract with car2go N.A., LLC (“car2go”) to operate an all-electric car sharing network as a pilot program. Based on the information and experience gained during the pilot, the City is now considering initiating a car sharing program as a corporate partnership under the City’s Corporate Partnership Program (the CPP). You have asked for a review and update of the legal issues related to car sharing, and analysis of any legal issues presented by establishing a car sharing program as a corporate partnership.

### QUESTIONS AND ANSWERS PRESENTED

1. Does San Diego Charter (Charter) section 103, Franchises, require that the City grant a franchise to a car sharing company to operate as part of a City car sharing initiative?

No, the City may but is not required to treat car sharing as a franchise.

2. Does Charter section 103.1, Regulation of Public Utilities, require a car sharing business to obtain City authorization by ordinance to carry on its business?

No, car sharing is not a “service of a public utility nature” within the meaning of section 103.1.

3. Does Charter section 106, Revocable Permits, require that any parking permits necessary for car sharing be authorized by an ordinance adopted after a public hearing and by a two-thirds vote of the City Council?

No, the regulation of parking for car sharing is not a “utility purpose” subject to the requirements of section 106. As such, section 106 would not apply to an action by the City

Council to establish a permit procedure for car sharing vehicles, or to an ordinance to amend the City's parking regulations for car sharing, or to a specific Council action to approve a specific car sharing agreement.

4. Does the City's selection of one or more corporate partners for car sharing require an open and competitive process?

Yes, Council Policy 000-40 (Marketing Partnerships) provides for the use of a competitive process to select corporate partnerships. That competitive process includes advertising the Request for Sponsorship, analyzing the submissions, and making an award. Use of an open and competitive process is important for a program that includes benefits and privileges that are not otherwise available.

5. Does the implementation of a car sharing program require amendments to the San Diego Municipal Code (SDMC or Municipal Code), and if so, which sections require amendment?

Yes, as part of the implementation of a car sharing program, the City must address affected parking regulations. The City can exempt car sharing vehicles from certain parking regulations by uncodified ordinance or by amendment of the code. Amending the code will provide the public with an available statement of the regulations that apply to car sharing. Depending upon the features of the program, the City should amend its regulations relating to metered parking and time-restricted parking (SDMC Ch. 8, Art. 6, Div. 1), and residential permit parking (SDMC Ch. 8, Art. 6, Div. 20), and add new language to create dedicated on-street parking spaces.

## **BACKGROUND**

The City entered into an "Agreement for car2go All-Electric Car Share Program" (Agreement) on October 24, 2011, to operate an all-electric car sharing network as a pilot program for the City. San Diego Resolution R-307015 (Sept. 28, 2011). The City extended the Agreement in 2013 and again in 2014 to provide staff additional time to propose a car sharing program based on the information gathered from the pilot. San Diego Ordinance O-20433 (Nov. 25, 2014). The car2go Agreement now expires on October 24, 2015, or the date upon which a new program becomes effective, whichever is earlier.

According to the City's Economic Development Department (EDD), as of April 2014, the program has more than 27,000 members making an average of 7,000 trips per week using 385 car2go vehicles within a 33 square-mile service area. Members can park the cars on the street in any legal (metered or unmetered) parking space within the service area. Members are not limited to using specially marked spaces or stations.

The City's EDD Staff administered and evaluated the pilot program. They concluded:

- The program helps the City reduce green house gas (GHG) emissions;
- The program provides City residents, employees and visitors with an affordable transportation option;

- The program was well received with good ridership and demonstrated demand for an on-going program; and
- car2go has sufficient electric charger infrastructure to accommodate an expanded electric car sharing program.

Based on the City's experience with the pilot, EDD recommends several changes to the program going forward, including:

- For metered spaces, restricting parking to meters with parking limits of two or more hours;
- Maintaining the prohibition on parking in spaces during hours restricted for street sweeping;
- Requiring some dedicated off-street parking spaces; and
- Allowing parking in residential permit parking areas.

Also, the CPP recently issued a request for information to car sharing companies seeking input for the City's proposed program. The suggestions made by the responding companies include: having providers with different car share models; providing a mix of size and type of vehicle; creating dedicated on-street parking spaces in addition to allowing the use of metered parking; and allowing parking in residential permit parking areas. *See Executive Summary and Attachment A, Council Docket Item 330, Jan. 13, 2015.*

## ANALYSIS

### I. THE CITY IS NOT REQUIRED TO AUTHORIZE CAR SHARING AS A FRANCHISE UNDER CHARTER SECTION 103

Charter section 103 gives the City Council the power to grant a "franchise" to a third party for the use of public property within the City.<sup>1</sup> Whether the City must exercise that power and grant a franchise depends upon the nature of the agreement and the services to be provided.

The term "franchise" is not defined in the Charter or the City's Municipal Code, but is discussed in two cases: *Copt-Air, Inc. v. City of San Diego*, 15 Cal. App. 3d 984 (1971), in which a competing company challenged the issuance of a permit authorizing the use of City property for helicopter rides; and *Saathoff v. City of San Diego*, 35 Cal. App. 4th 697 (1995), in which a labor union challenged the award of an exclusive contract for ambulance services. In both cases, the plaintiffs argued that the permission to use City property should have been granted by franchise, and not by permit or contract.

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<sup>1</sup> Charter section 103 reads as follows: "Franchises. The Council shall have power to grant to any person, firm or corporation, franchises, and all renewals, extensions and amendments thereof, for the use of any public property under the jurisdiction of the City. Such grants shall be made by ordinance adopted by vote of two-thirds (2/3) of the members of the Council and only after recommendations thereon have been made by the Manager and an opportunity for free and open competition and for public hearings have been given. No ordinance granting a franchise or a renewal, extension or amendment of an existing franchise shall be effective until thirty days after its passage, during which time it shall be subject to the referendum provisions of this Charter. No franchises shall be transferable except with the approval of the Council expressed by ordinance."

In each case, the court discussed the scope of the City's power to grant a franchise under Charter section 103, and distinguished between authorizing the use of public property for a traditional utility that requires a franchise (e.g., water, sewer, electrical, gas, railroad) and authorizing the use of public property for other purposes that may or may not rise to that level of importance (e.g., ambulance services, trash collection, cable television). Section 103 empowers the City Council to consider the grant of a franchise for such non-traditional uses, but the City is not required to use a franchise unless the use has all the elements of a traditional franchise. In that case, the City must grant the right via the special procedures for establishing a franchise because those procedures allow for additional public scrutiny. *See Copt-Air*, 15 Cal. App. 3d at 986; *Saathoff*, 35 Cal. App. 4th at 699, 706.

Thus, although the City *may* grant a franchise for more than just the traditional utility uses, the City *must* authorize the use of public property through the grant of a franchise if all of the following are true:

- The privilege involves a vital public service;
- The grant is of a right or privilege essential to the performance of the general function or purpose of the private party;
- The right or privilege can be granted by the government alone; and
- The grant involves some degree of permanence and stability.

34 A Cal. Jur. 3d *Franchises from Governmental Bodies* § 2 (2012); *Copt-Air*, 15 Cal. App. 3d at 987-88; *Saathoff*, 35 Cal. App. 4th at 705-06.

In both the *Copt-Air* and *Saathoff* cases, the court determined that the City was not required to treat its grant of permission to use public property as a franchise. While “a city *may* set up franchises not only regarding the traditional utilities, but also pertaining to other services needed by the public, such as ambulance services, garbage collection, and television cable services,” a city is not required to do so. *Saathoff*, 35 Cal. App. 4th at 704 (emphasis added).

#### **A. Is Car Sharing a Vital Public Service?**

In *Copt-Air*, the court defined “franchise” as “a special privilege” granted by government in the context of permitting a private entity to bring services and functions to the public that government would otherwise be obligated to provide. 15 Cal. App. 3d at 987. As such, the delivery of these “vital public services” is a public concern, and the grant of a franchise for them must be carefully considered. *Id.* at 988-89. For that reason, Charter section 103 requires public hearings, a two-thirds vote of the Council, and an ordinance subject to referendum. These precautions indicate “an intent to confine the meaning of ‘franchise’ to contracts and agreements which are concerned with vital public services.” *Id.* at 989. Conducting helicopter rides was “not a matter of sufficient public concern to be included within the meaning of ‘franchise’ as the term is used in the San Diego City Charter.” *Id.* at 988-89.

In contrast, in *Saathoff*, the court had no difficulty finding that the “contracting out of emergency 911 ambulance services involves vital public services.” 35 Cal. App. 4th at 706. But, this one factor is not dispositive. As with garbage collection, “a municipality can perform the function by its own employees or can farm the job out under contract” and the City decides

whether to do so by contract or franchise. *Id.* at 703 (citing *Finney v. Estes*, 130 Colo. 115 (1954)).

For the proposed car sharing contract, the service is providing the public with ready and convenient access to cars for short term rentals.<sup>2</sup> Until the recent pilot, car sharing was not a service available in most cities including San Diego. In San Diego, car sharing is available in the downtown area, and is used by a small percentage of the City's population. It is not a critical emergency service like ambulance services, nor has it become an important service for the health and safety of the City's residents, like water, sewer, electricity, gas, and communications. Based on these facts, the City Council could reasonably determine that car sharing has not yet risen to the level of importance of a traditional utility such that a franchise *is required* for the City to authorize its operation, and a court would likely uphold such a determination.<sup>3</sup>

### **B. Is the City's Permission Essential to Operating a Car Sharing Service?**

The second element to requiring a franchise is that the right or privilege granted by the government is essential to performance of the general function or purpose of the private party. The government's grant of a non-essential right or privilege is likely a license, not a franchise. *Copt-Air*, 15 Cal. App. 3d at 987 (citations omitted). For example, a gas utility cannot deliver service without gas pipes. The right to place pipes under the streets to carry gas is essential to the utility's ability to operate.

In *Saathoff*, the court noted that under the terms of the City's contract, the paramedic company would use the City's equipment, including ambulances and the 911 communications center, to provide emergency services. 35 Cal. App. 4th at 700. Although the court did not discuss this element specifically, the use of this equipment could be considered essential to providing emergency services. In *Copt-Air*, on the other hand, the court easily determined that granting Sea World the right to conduct helicopter rides from its Mission Bay leasehold was not essential to Sea World's function as a marine amusement park. 15 Cal. App. 3d at 988.

The City is proposing to conduct a competitive process and select one or more car sharing companies to provide car sharing within the City. It is not clear whether the City will include the right to use metered or time-restricted spaces as part of the contract opportunity. Car sharing systems can and do operate without that feature. For example, ZipCar currently operates in San Diego and several other cities using private off-street parking.<sup>4</sup> Cars must be returned to

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<sup>2</sup> See the definition of a car sharing vehicle in California Vehicle Code section 22507.1(d): "A motor vehicle that is operated as part of a regional fleet by a public or private car sharing company or organization and provides hourly or daily service."

<sup>3</sup> The court's power to overturn a legislative act of an elected body is limited to avoid interfering with the powers of an equal branch of government. 8 Witkin, California Procedure, *Writs* § 93 (5<sup>th</sup> ed. 2008). For that reason, the court's review is highly deferential to the legislative decision, and the court will not overturn the decision unless "the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law." *Carrancho v. Cal. Air Res. Bd.*, 111 Cal. App. 4th 1255, 1265 (2003); *Cal. High-Speed Rail Auth. v. Super. Ct.*, 228 Cal. App. 4th 676, 699 (2014).

<sup>4</sup> Zipcar: Where Do Zipcars Live?, <http://www.zipcar.com/sandiego/find-cars> (last visited Dec. 12, 2014).

the pick-up location.<sup>5</sup> ZipCar patrons are responsible for paying to park at a parking meter, like any other car. ZipCar's current operations do not require any special permission from the City.<sup>6</sup>

Thus, while the ability to use metered and time-restricted parking for car sharing will facilitate one-waytrips and enhance accessibility, that feature is not essential to providing a car-sharing service. The City could choose to not permit the special use of restricted parking for car sharing, and car sharing businesses still could (and do) operate within the City.

**C. Is the City Granting a Right or Privilege that Can Only Be Granted by Government?**

In *Copt-Air*, the court distinguished between permission granted by the City acting as a landowner, versus permission granted by the City in its governmental capacity. Although the City was granting a special privilege when it granted Sea World a permit to conduct helicopter flights on its leasehold, the City was acting in its capacity as landowner. 15 Cal. App. 3d at 988. For a franchise, the City must be acting in a governmental, not a proprietary, capacity. *Id.* at 987-88.

For car sharing, if the City enters into one or more corporate partnership agreements with car sharing operators, the City will be acting like a private entity to secure certain benefits for the City in exchange for sponsorship and marketing benefits. As in *Copt-Air*, the car sharing companies remain subject to all existing laws and regulations.

If, however, as part of the marketing partnership agreement, the City grants the car sharing partner the right to park in spaces dedicated to car sharing, or the right to park in metered or permit restricted parking areas, then the City is acting in its governmental capacity. The City must act, through the Council and Mayor, to allow that use, by amending the City's parking regulations or exempting the City's car sharing partners from certain parking regulations. In granting an exemption from existing regulations, the City would be acting in its governmental capacity. In that case, this one of the four required franchise elements would be present.

**D. Does the Grant of Permission by the City Involve Some Degree of Permanence and Stability?**

The concept of a franchise requires some degree of "permanence and stability." *Copt-Air*, 15 Cal. App. 3d at 989. A franchise grants a possessory interest for long term possession, similar to an easement. *Saathoff*, 35 Cal. App. 4th at 705-06 (citing *Santa Barbara County Taxpayer Ass'n. v. Bd. of Supervisors*, 209 Cal. App. 3d 940, 949 (1989)). In *Copt-Air* and *Saathoff*, permanence and stability are measured in two ways: the length of the contract, and the intrusion created by the use of public property.

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<sup>5</sup> Zipcar: How to Zip, <http://www.zipcar.com/how#faqs> (last visited Dec. 12, 2014).

<sup>6</sup> *Id.* Also, DriveNow began operations in San Francisco in 2012 using a station model, and expanded to street parking in certain areas in 2014 (<http://www.engadget.com/2012/08/22/bmw-drivenow-ev-car-sharing-comes-to-san-francisco-bay-area> and <https://us.drive-now.com/#!/carsharing/sanfrancisco> (last visited Dec. 12, 2014)) and Enterprise uses a station-based model (<http://www.enterprise-carshare.com/about/how-it-works> (last visited Dec. 12, 2014)).

In *Saathoff*, the court considered the four-year initial term and the lack of in-street infrastructure in finding that a long-term interest had not been created. 35 Cal. App. 4th at 706. The use of the City's equipment and streets was not the kind of "permanent intrusion into public property comparable to the installation of poles, wires, pipes, etc. utilized for the provision of other public services." *Id.*

In *Copt-Air*, the court found that the revocable permit lacked permanence and stability and was more akin to a license than a franchise. The degree of permanence and stability needed for a franchise was "not achieved by an arrangement which is revocable by the City, without cause, upon 10 days notice." 15 Cal. App. 3d at 989.

Likewise, this criteria for a franchise is not met in the context of a car sharing program. Car sharing does not require the kind of capital investment in in-street infrastructure that necessitates a long-term contract.<sup>7</sup> While the cars will be driven on the City's streets (like the ambulance services in *Saathoff*), providing the service does not require the installation of tracks, pipes, poles, cable, or other significant infrastructure investment in or across the City's streets or right of ways. *See Saathoff*, 35 Cal. App. 4th at 703-04. As such, it is not the kind of "permanent intrusion into public property" that is contemplated by a franchise. *Id.* at 706.

As stated in both *Copt-Air* and *Saathoff*, the City is required to treat an agreement with a third-party as a franchise only if *all* of the criteria for a franchise are present. *Copt-Air*, 15 Cal. App. 3d at 987-88; *Saathoff*, 35 Cal. App. 4th at 705-06. In *Saathoff*, for example, the court focused on the lack of a "permanent intrusion into public property" and, because that was lacking, did not analyze the other criteria. The carsharing agreements contemplated by the City also appear to be lacking that criteria, and for that reason alone, would not have to be treated as franchises.

Charter section 105 is consistent with this analysis.<sup>8</sup> That section provides that the City controls use of the City's streets and public places, and the City "may" grant franchises for use of the City's streets and require payment for the granting of a franchise. It does not require that the City grant a franchise for use of the City's streets.

## **II. CHARTER SECTIONS RELATING TO UTILITY USES DO NOT APPLY TO CAR SHARING**

### **A. Charter Section 103.1 Requires an Ordinance for "Services of a Public Utility Nature" and Does Not Apply to Car Sharing**

Charter section 103.1 requires authorization by ordinance for a business to build the infrastructure and supply certain public utility services to City residents. Section 103.1 mentions infrastructure needed to supply "light, water, power, heat, transportation, telephone service, or

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<sup>7</sup> *See, e.g.*, the City's initial contract with car2go for two years with a one-year option to renew, and the car sharing agreements for Sacramento (2 years with 3-one-year options to renew) and San Jose (agreements as part of an 18-month pilot).

<sup>8</sup> Charter section 105 reads, in pertinent part: "Plenary control overall primary and secondary uses of its streets and other public places, is rested in the City. Franchises may be granted upon such terms, conditions, restrictions or limitations as may be prescribed by ordinance."

other means of communication,” or to carry on a business to “furnish services of a public utility nature” to the City’s residents. This ordinance requirement would apply to car sharing if car sharing is a business furnishing “services of a public utility nature.”<sup>9</sup>

Section 103.1’s reference to “transportation” is in the context of a “person, firm, or corporation” establishing and operating “works” for supplying the City’s residents with “transportation,” and appears to contemplate the type of infrastructure like the installation of poles, wires, and pipes discussed above. In this respect, section 103.1 may be preempted by State law that provides the California Public Utilities Commission (CPUC) with broad authority over how public utilities and related businesses may conduct business within the State, and preempts much of the regulatory authority of municipalities over these businesses. Cal. Pub. Util. Code § 701; 2012 City Att’y Report 313 (2012-11; May 11, 2012) (City retains some authority over how utility companies install equipment in the public rights-of-way as part of its police powers and as long as enacted restrictions are consistent with state law).<sup>10</sup> However, the next clause of the sentence is quite broad and may apply here: “or establish and carry on any business within said City which is designed to or does furnish *services of a public utility nature* to the inhabitants of said City.” Charter § 103.1 (emphasis added).

The Charter does not define “public utility.” State law defines “public utilities” in Article XII, section 3 of the California Constitution to include common carriers and private businesses that operate a “system for the transportation of people or property,” subject to control by the state legislature.<sup>11</sup> In the Public Utilities Code, the definitions of “transportation of persons” and “common carrier” reference the transport and delivery of a person. Cal. Pub. Util. Code §§ 208, 211. Car sharing, which offers the use of a car but does not provide a driver, is not currently regulated by the CPUC as a utility or related business and does not appear to fall within the definition of common carrier.<sup>12</sup>

Based on the State law definitions and the nature of car sharing, it does not appear that car sharing is a “service of a public utility nature” within the meaning of section 103.1. Unlike buses, taxicabs, or limousine services, the service provided by car sharing does not include “transporting” the customer as that term is defined in the California Public Utilities Code; rather, car sharing provides a membership system that provides its users with convenient and direct

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<sup>9</sup> Charter section 103.1 reads: “No person, firm or corporation shall establish and operate works for supplying the inhabitants of The City of San Diego with light, water, power, heat, transportation, telephone service, or other means of communication, or establish and carry on any business within said City which is designed to or does furnish services of a public utility nature to the inhabitants of said City, without the consent of said City manifested by ordinance of the Council. The Council shall have power to provide reasonable terms and conditions under which said businesses may be carried on and conducted within The City of San Diego.”

<sup>10</sup> For example, under the Digital Infrastructure and Video Competition Act of 2006, cable and video service providers can unilaterally terminate local franchise agreements and enter into a statewide franchise. 2012 City Att’y Report 313.

<sup>11</sup> Although not expressly stated therein, the California Constitution requires a dedication to public use to transform a private business into a public utility. 53 Cal. Jur. 3d *Public Utilities* § 1 (Nov. 2014); *Indep. Energy Producers Ass’n, Inc. v. State Bd. of Equalization*, 125 Cal. App. 4th 425, 442-43 (2004).

<sup>12</sup> The State Legislature and the CPUC recently imposed insurance requirements on “transportation network companies,” defined as companies that use an on-line enabled application to connect with passengers. Cal. Pub. Util. Code § 5431(a) and CPUC Rulemaking 12-12-011 (filed Dec. 20, 2012) and decisions therein. These rules affect companies like Uber, Lyft, and SideCar, that provide an alternative to taxis.

access to vehicles, and enables the customer to transport her or himself.

**B. Charter Section 106 Requirements for a General Utility Permitting Ordinance Do Not Apply to a Permit Program for Car Sharing**

Charter section 106 requires that a “general ordinance” allowing the issuance of permits for minor or temporary utility purposes be adopted using the same procedures required to adopt a franchise ordinance, *i.e.*, a public hearing and two-thirds vote of the Council.<sup>13</sup> Charter section 106 distinguishes between franchises, which are used to grant a long-term right for a vital public service, and permits issued under a general ordinance for the use of public property for “minor or temporary utility purposes and privileges.” Such permits “shall not be deemed to be franchises.” *Id.*

Each of the Charter sections relating to utilities creates additional opportunity for input and scrutiny by the public and the decision makers because utilities are traditionally important and dangerous operations. *See Copt-Air*, 15 Cal. App. 3d at 986; *Saathoff*, 35 Cal. App. 4th at 699, 706. By requiring a public hearing and two-thirds vote for an ordinance authorizing permits for temporary utility operations, section 106 acknowledges that such “minor or temporary” use may be critical to the delivery of vital public services, and may also be dangerous or disruptive to the regular use of the right-of-way.

As discussed earlier, car sharing is not a public utility, and the parking of car sharing vehicles in parking spaces in the public rights-of-way is not a utility purpose. For that reason, section 106—which governs permits for minor or temporary utility uses—would not apply to the adoption of an ordinance to establish a permit procedure for car sharing vehicles, or to an ordinance to approve specific amendments to the City’s parking regulations for car sharing, or to a specific Council action to approve a specific car sharing agreement.

**III. COMPETITIVE PROCUREMENT OF CAR SHARING SERVICES**

As a pilot program, the City selected car2go without a competitive process. One of the purposes of the pilot program was to collect data to determine if a car sharing program would benefit the City. If determined to be beneficial, the City would then be in a position to determine the best path forward, and to implement a competitive process for the selection of a vendor, if appropriate.

Currently, the City is considering use of a corporate partnership model. A corporate partnership is substantially different from a typical procurement for services. The Corporate Partnership Program (CPP) was created by the City to develop opportunities for partnering with corporations to generate revenue and other benefits for the City. Council Policy 000-40. Instead of the City paying for and services being delivered to the City, in a corporate partnership opportunity, the City provides access to the commercial marketing potential associated with the

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<sup>13</sup> Charter section 106 reads: “Revocable Permits. Permits revocable at will of the Council for such minor or temporary utility purposes and privileges as may be specified by general ordinance may be granted or revoked by the Council from time to time in accordance with the terms and conditions prescribed thereby and such permits shall not be deemed to be franchises as the term is used in this Charter. Such general ordinance, however, shall be subject to the same procedure as an ordinance granting a franchise and shall not be passed as an emergency measure.”

City in exchange for cash or in-kind services provided to the City, and in some instances, sponsorship of a City program. Council Policy 000-40. Council Policy 000-40 requires an open and competitive process for the City's selection of a corporate partner. Depending upon the value of the partnership, the policy requires the CPP issue a Request for Sponsorships (RFS) and obtain the Council's approval of the contract.

The CPP intends to issue an RFS for one or more car sharing partners to operate in the City. Consistent with Council Policy 000-40, the RFS would include the City's program requirements, proposed marketing opportunities for the corporate partner, and an indication of the City's expectations for revenue sharing or other benefits to the City. The CPP intends to notify car sharing companies, advertise the opportunity, use a selection committee to analyze submitted proposals and select one or more potential partners, negotiate proposed agreements, and make recommendations to Council.

This competitive process is legally sufficient for a corporate partnership. A corporate partnership is not a contract to provide goods or services to the City, and is not subject to the City's procedures for those contracts. *See* SDMC §§ 22.3001-22.3019. The CPP can look to these and other provisions in the City's Administrative Code for guidance in implementing the competitive process called for in Council Policy 000-40, but is not required to follow the specific procedures set forth in those sections for a corporate partnership agreement.

The CPP's use of an open and competitive process is important for corporate partnership agreements that grant benefits or privileges that are otherwise not available. Advertising the opportunity and allowing any interested party to submit a proposal, gives all qualified proposers the opportunity to compete for the offered benefits, and gives the City the benefit of the competition while selecting the proposal that best meets its needs. To ensure a fair competition, we recommend the CPP include in the RFS a clear statement of the process it will follow, as well as a statement of the benefits the City may provide.

#### **IV. MUNICIPAL CODE AMENDMENTS TO ACCOMMODATE CAR SHARING**

The City's contract and ordinance authorizing the current program with car2go exempts vehicles and their drivers from certain parking regulations, including feeding parking meters and parking at expired meters. For the pilot car sharing program, these exemptions are included in the uncodified ordinance adopted by the Council, and not as codified amendments to the Municipal Code. San Diego Ordinance O-20433 (Nov. 25, 2014).

If the City intends to allow car sharing on an ongoing basis by one or more car sharing providers, we recommend the Council amend the Municipal Code to provide the public with a clear statement of Council's policy to exempt car sharing vehicles from certain parking restrictions and the adopted rules. The amendments needed depend upon the program's features, but may include amendments to the regulations for:

- Expired Meters (Chap. 8, Art. 6, Div. 1)
  - § 86.0123 Parking Meter Rates—Authority
  - § 86.0126 Parking Meter—Overtime
  - § 86.0127 Parking Meter—Extra Time Prohibited

§ 86.0137 Prohibition of Use of Streets for Storage, Service or Sale of  
Vehicles or for Habitation

- Time Restricted Spaces (Chap. 8, Art. 6, Div. 1)
  - § 86.0106 Parking Time Limit
  - § 86.0112 Standing or Parking in Specified Places Prohibited
- Parking in Residential Zones (Chap. 8, Art. 6, Div. 20)
  - § 86.2003 Definitions
  - § 86.2008 Issuance of Permits

In addition, the City may wish to set aside on-street parking for use by car sharing vehicles. California Vehicle Code section 22507.1 specifically authorizes cities and counties to make this accommodation for car sharing companies. This provision was adopted in response to a request from the City of Los Angeles for clear authority to allow this type of parking for car sharing vehicles,<sup>14</sup> in addition to the language already contained in California Vehicle Code section 22507 giving cities the right to regulate parking in their own jurisdiction, including the types of vehicles and the times of day. *Homes on Wheels v. City of Santa Barbara*, 119 Cal. App. 4th 1173, 1177-78 (2004).

The specific provision for car sharing parking went into effect in 2007, and gives the City leeway to establish the criteria for a car sharing program and the use of such spaces. Under California Vehicle Code section 22507.1, if the City chooses to create on-street parking for exclusive use by vehicles participating in a car sharing program, the City must, by ordinance or resolution, establish the criteria for participation in the program, may limit the types of vehicles included, and must assign permits to the car sharing vehicles allowed to park in the designated parking areas. Cal. Veh. Code § 22507.1(a). The criteria selected by the City may include “provisions that are reasonable and necessary to ensure the effectiveness” of the program. Cal. Veh. Code § 22507.1(c).

Generally, parking regulations may not be arbitrary and must support a governmental objective or purpose. *Homes on Wheels*, 119 Cal. App. 4th at 1177. Those purposes can include social and environmental objectives, such as reducing air pollution or enhancing the quality of life for a community by reducing noise, traffic hazards, and litter. 7A McQuillin Mun. Corp. § 24:655 (3d ed. 1990); *People v. Housman*, 163 Cal. App. 3d Supp. 43, 50 (1984) (citing *Arlington Cnty. Bd. Of Arlington Cnty., v. Richards*, 434 U.S. 5, 7 (1977)). If a parking regulation gives a preference to some over others, e.g., to residents over non-residents, but does not violate a fundamental right, then the distinction must rationally promote the regulation’s objectives. *Housman*, 163 Cal. App. 3d Supp. at 50 (citing *Arlington*, 434 U.S. at 7). Otherwise the distinction is subject to strict scrutiny, and must be necessary to promote a compelling governmental interest. *Housman*, 163 Cal. App. 3d Supp. at 49.

For example, in *Housman*, the city’s residential permit parking regulations allowed for the designation of preferential parking zones in favor of residents if findings were made that

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<sup>14</sup> See Ass. Comm. on Transp., Analysis of Assem. Bill 2154 (2005-2006 Reg. Sess.) May 11, 2006.

restricting commuter parking would protect residents' quality of life, provide residents with convenient parking, and encourage the use of carpooling and mass transit. *Housman*, 163 Cal. App. 3d Supp. at 45. Following the Supreme Court's ruling in *Arlington*, the *Housman* court held that the right to park is not a fundamental right under the federal or state constitutions, and that the regulations were not subject to the higher strict scrutiny standard. 163 Cal. App. 3d Supp. at 52.

Regulations establishing dedicated on-street parking for car sharing create a similar distinction supported by similar objectives. By requiring that the Council establish criteria for participation in a car sharing program and use of the restricted spaces, the State Legislature ensures that the local legislative body establishes a rational basis for the parking restriction. The Council's criteria should, therefore, reflect the City's objectives and, as stated in the statute, be reasonable and necessary to ensure the effectiveness of the program.

For example, San Francisco included its criteria in its municipal code as part of its permit process for on-street car share vehicle parking. S.F. Transp. Code § 911(b). The San Francisco Municipal Transit Authority must issue permits to companies that meet the criteria and other requirements (including payment of fees), but has the right to limit the number of companies that can participate. S.F. Transp. Code § 911(a). Santa Monica limits participation in its program to companies selected through a competitive bidding process, based on but not limited to criteria listed in its code. Santa Monica Mun. Code § 3.06.050. Similarly, Hermosa Beach adopted an ordinance allowing it to issue parking permits for companies "participating in a car sharing program approved by the City Council." Hermosa Beach Mun. Code § 10.32.350. Currently, the city's program includes car2go only.<sup>15</sup>

We understand that the RFS will include the criteria for selection to participate in the City's program. We recommend that the RFS also state the types of parking that may be available to participating companies. Any dedicated on-street parking should be created through a Council-approved ordinance based on the program criteria.

## CONCLUSION

Charter section 103 authorizes the City to grant a franchise for the use of City property, but does not require that the City do so in every instance. The City is not required to treat car sharing as a franchise. Car sharing provides its members with ready access to cars for short trips, but does not provide a driver. As such, it is not a common carrier that transports individuals, is not regulated as a public utility by the State, and does not provide utility-type services. Because car sharing is not a utility or utility-type service, Charter sections 103.1 relating to persons and businesses providing "service of a public utility nature" and 106 relating to permits for "minor or temporary utility purposes and privileges," do not apply to car sharing.

If the City establishes a car sharing program as a corporate partnership, the City should, consistent with Council Policy 000-40, use a competitive process to select qualified partners.

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<sup>15</sup> Hermosa Beach issued car2go a three-year permit in June 2014. City of Hermosa Beach Adjourned City Council Meeting of Nov. 25, 2014, Item (d) Update on Roll-Out of car2go Carsharing Program, Memorandum from Community Development Director Ken Robertson dated Nov. 18, 2014. Car2go also operates in neighboring cities. *Id.*

The City should also amend the Municipal Code to accommodate the program, which could include amendments to the City's parking restrictions for metered, time restricted spaces, and residential permit parking, as well as establishing dedicated on-street parking spaces for car sharing vehicles.

JAN I. GOLDSMITH, CITY ATTORNEY

By           /s/ Carrie L. Gleeson            
Carrie L. Gleeson  
Deputy City Attorney

CLG:jdf  
ML-2015-1

cc: Honorable Mayor and City Council  
Scott Chadwick, Chief Operating Officer  
Andrea Tevlin, Independent Budget Analyst