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REPORT TO ACTIVE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

REGULATION OF SHARED MOBILITY DEVICE RENTAL COMPANIES

INTRODUCTION

On February 20, 2019, the San Diego City Council's Active Transportation and Infrastructure Committee will consider the proposed Shared Mobility Device Ordinance, which regulates businesses deploying bicycles, electric bicycles, and motorized scooters (Shared Mobility Devices or SMDs) on City streets and sidewalks. The proposed ordinance would regulate the business activities of SMD rental companies. It would not create "rules of the road"¹ for SMD riders because operation of bicycles and motorized scooters is generally governed by the California Vehicle Code (Vehicle Code). This Report is intended to provide information on the rules in the Vehicle Code and establish the parameters within which the Council may regulate SMD rental companies.

BACKGROUND

The proposed ordinance establishes a permit requirement for companies offering SMDs for rent in the City. If adopted, SMD rental companies would be required to provide rider education through their mobile phone applications, label their SMDs, and share trip data with the City. Rental companies would be required to geofence² certain locations to slow the speed of SMDs and provide rider notifications. The proposed ordinance also establishes staging rules prohibiting large groups of SMDs from being parked together and prohibits parking SMDs within specified distances of transit stops, hospitals, and schools. To obtain a permit, SMD rental companies would have to pay fees and agree to permit conditions, including insurance and indemnification requirements to protect the City from damages resulting from their activities.

¹ The "rules of road" refers to Division 11 of the Vehicle Code, which sets forth the traffic rules applicable to cars, bicycles, motorized scooters and other methods of transportation used in the public right-of-way.

² Geofencing refers to the creation of a virtual geographic boundaries, defined by Global Position System (GPS), radio-frequency identification (RFID), or other technology, that enables the rental companies to cause certain actions when a SMD enters or leaves an area.

ANALYSIS

I. VEHICLE CODE PREEMPTION OF LOCAL REGULATION

Generally, a local ordinance may not conflict with a state law. Cal. Const. art. XI, § 7. A conflict may exist if the local ordinance is duplicative of a state law, contradicts a state law, or regulates a subject matter fully occupied by state law. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993). As a charter city, the City may enforce regulations that conflict with general state laws, but only if the subject of the regulation is a “municipal affair”³ and not one of “statewide” concern. *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1813 (1993). If a municipal regulation conflicts with a state statute and the subject of the regulation is of statewide concern, the regulation is preempted by the state law. *Id.*; 2009 City Att’y Report 506 (2009-20; Aug. 28, 2009).

By its own terms, the Vehicle Code is a matter of statewide concern. Vehicle Code section 21(a) reads:

Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the state and in all counties and municipalities therein, and a local authority shall not enact or enforce any ordinance or resolution on the matters covered by this code, including ordinances or resolutions that establish regulations or procedures for, or assess a fine, penalty, assessment, or fee for a violation of, matters covered by this code, unless expressly authorized by this code.

Cal. Veh. Code § 21(a).

Therefore, the state has preempted local legislative action related to any provision of the Vehicle Code, except when the Vehicle Code specifically authorizes local regulations. *Barajas*, 15 Cal. App. 4th at 1818. In the context of regulating SMDs, preemption means cities may only regulate aspects of their operation on public streets and highways when expressly authorized by the Vehicle Code.

II. STATE LAW APPLICABLE TO SHARED MOBILITY DEVICES

State law regulates the rules of the road applicable to bicycle and motorized scooter riders, such as license requirements, speed limits, and other traffic safety rules. Cal. Veh. Code §§ 21220-21235 (operation of motorized scooters); Cal. Veh. Code §§ 21200-21213 (operation of bicycles). A violation of any of these provisions constitutes an infraction. Cal. Veh. Code § 40000.1; San Diego Municipal Code (Municipal Code) § 12.0201.

³ “Municipal affair” generally refers to matters of local concern over which a charter city has exclusive power to legislate. See *Isaac v. City of Los Angeles*, 66 Cal. App. 4th 586, 600-01 (1998). Whether a matter is a municipal affair or an issue of statewide concern is determined on the facts, and the concept may change over time. *Id.*

A. Bicycles and Electric Bicycles

The Vehicle Code defines “bicycle” as a device with one or more wheels “upon which [a] person may ride, propelled exclusively by human power through a belt, chain, or gears.” Cal. Veh. Code § 231. An electric bicycle is “a bicycle equipped with fully operable pedals and an electric motor of less than 750 watts.”⁴ Cal. Veh. Code § 312.5(a).

Every person operating a bicycle or electric bicycle on a street or highway has the same rights and is subject to the same rules as a driver of a car.⁵ Cal. Veh. Code §§ 312.5(b); 21200. Riders under 18 years of age must wear a helmet. Cal. Veh. Code § 21212(a). A bicycle rider may not carry a passenger unless there is a separate attached seat for the passenger. Cal. Veh. Code § 21204(b). A rider may not carry any object that prevents the rider from holding the handlebar with at least one hand. Cal. Veh. Code § 21205. A bicycle may not be left lying on its side on a sidewalk and may not be parked in a manner that impedes pedestrian traffic. Cal. Veh. Code § 21210.

B. Motorized Scooters

A motorized scooter is “any two-wheeled device that has handlebars, has a floorboard that is designed to be stood upon when riding, and is powered by an electric motor” or by a source other than electrical power. Cal. Veh. Code § 407.5(a) and (b). It may also have a driver seat that does not interfere with the ability of the rider to stand and ride, and may also be designed to be powered by human propulsion. *Id.* Most motorized scooters deployed as SMDs in the City meet this definition.

Every person operating a motorized scooter on a street or highway has the same rights and is subject to the same rules as a driver of a car. Cal. Veh. Code § 21221. Motorized scooters are subject to a maximum speed limit of 15 miles per hour. Cal. Veh. Code § 22411. Motorized scooters may only be used on streets with a speed limit of less than 25 miles per hour, unless operated in a bike lane or separated bikeway.⁶ Cal. Veh. Code § 21235(b); *see* Cal. Sts. & High. Code § 890.4 (defining Class II and Class IV bikeways). The Vehicle Code prohibits riding a motorized scooter on the sidewalk, except to enter or leave adjacent property. Cal. Veh. Code § 21235(g). Riders must have a valid driver’s license or instruction permit and riders under 18 years of age must wear a helmet. Cal. Veh. Code § 21235(c) and (d). Scooters may not be used to carry more than one person and the rider may not carry any object that prevents the rider from holding the handlebar with at least one hand. Cal. Veh. Code § 21235(e) and (f). Motorized scooters may not be left lying on their sides on a sidewalk or parked in a manner that impedes pedestrian traffic. Cal. Veh. Code § 21235(i).

⁴ There are three types of electric bicycles defined in the Vehicle Code, but the distinction is not relevant to the discussion in this Report.

⁵ The same principles apply to bicycles operated in a Class I Bikeway, defined as a bike path or shared use path “which provide a completely separated right-of-way designated for the exclusive use of bicycles and pedestrians with crossflows by motorists minimized.” Cal. Veh. Code §§ 231.5; 21200(b); Cal. Sts. & High. Code § 890.4.

⁶ The City may, by ordinance, authorize operation of scooters outside of a bike lane on streets with a speed limit of up to 35 miles per hour. Cal. Veh. Code § 21235(b).

III. LIMITATIONS ON LOCAL REGULATION

Under its police power, the City may regulate the *business* operations of SMD rental companies if the regulations are reasonably related to a proper legislative purpose. *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 456 (1936); *see* 2009 City Att’y Report 506 (2009-20; Aug. 28, 2009). Any adopted regulations may not be arbitrary or discriminatory. *Id.* Most of the permit requirements in the proposed ordinance regulate the business operations of SMD rental companies, such as the insurance, indemnity, data-sharing, and geofencing requirements,⁷ and are therefore permissible under this general authority.

By contrast, the City may only regulate *rider use and operation* of bicycles and motorized scooters - whether available for rent as SMDs or not - when expressly authorized in the Vehicle Code. For example, the Vehicle Code expressly authorizes municipalities to regulate registration, parking, and operation of bicycles and motorized scooters on pedestrian and bicycle facilities, streets, and highways, if not in conflict with the Vehicle Code. Cal. Veh. Code §§ 21206; 21225. Therefore, the City can impose its own parking and staging requirements for electric bicycles and motorized scooters, provided they do not conflict with the Vehicle Code. The Vehicle Code also expressly allows the City to prohibit use of electric bicycles or motorized scooters on specifically identified bicycle paths, trails, and recreational trails. Cal. Veh. Code §§ 21207.5(b); 21230.

Unless expressly authorized, the Vehicle Code prohibits local ordinances on matters covered by the Vehicle Code or that establish a violation for the same or similar conduct already prohibited in the Vehicle Code. Cal. Veh. Code §§ 21; 21100(o)(1). For example, the City may not adopt an ordinance prohibiting operation of motorized scooters on City sidewalks because that conduct is already prohibited in the Vehicle Code.⁸ Similarly, the City may not require helmets for SMD riders over the age of 18 in the ordinance or in the corresponding permit because the Vehicle Code expressly does not require helmets for adults. Cal. Veh. Code § 21235(c).

Changes to state legislation are required if the Council wishes to legislate in areas preempted by state law. For example, the Council could pursue state legislation that allows local governments to require helmets for adults or that adds bicycle and motorized scooter training to driver’s licensing education requirements to ensure all riders know the applicable rules of the road. Those changes to state law may be pursued through the City’s legislative consultant.

⁷ Geofencing to regulate the speed of SMDs is not the same as a speed limit. It is a technology requirement imposed on an SMD rental company to reduce the maximum speed an SMD can reach in a geofenced areas. By contrast, a speed limit is enforced directly against riders and requires the riders to adjust their speed accordingly.

⁸ Unlike scooters, the Vehicle Code does not prohibit bicycles on sidewalks. However, the Vehicle Code expressly allows municipalities to adopt local laws prohibiting bicycles on sidewalks. Cal. Veh. Code § 21100(h). The Council may consider amending Municipal Code section 84.09(a) to address bicycle riding on sidewalks at some point in the future.

The proposed SMD ordinance does not attempt to regulate the conduct of SMD riders or change the rules of the road applicable to bicycles and motorized scooters. Instead, the proposed ordinance would regulate SMD rental businesses operating in the City and how those businesses use City property as authorized by the Vehicle Code. Although there are no cases directly addressing the regulation of SMDs, the proposed ordinance is defensible against a preemption challenge.

IV. PROPOSED FEES

Along with the proposed ordinance, City Council will consider adoption of certain fees. When a local government agency imposes a new charge, the burden is on that agency to prove that the charge is not a tax. Cal. Const. art. XIIC, § 1 (commonly referred to as Proposition 26); *see* 2011 City Att’y MOL 46 (2011-3; Mar. 4, 2011) (discussing the impact of Proposition 26 on City fees and charges). The California Constitution prohibits local governments from imposing, extending, or increasing a special tax unless approved by a two-thirds vote. Cal. Const. art. XIIC, § 2(d). “Special tax” is defined as “any levy, charge, or exaction of any kind imposed for specific purposes, which is placed in the general fund” but there are several exceptions. Cal. Const. art. XIIC, § 1(d).

Fees imposed for a special benefit conferred on the payor and regulatory fees imposed to cover the City’s cost to administer a permit or license are excepted from the definition of special tax. Cal. Const. art. XIIC, § 1(e). These fees must not “exceed the reasonable cost to the local government” to provide services necessary for the activity for which the fee is charged and for carrying out the purpose of the regulation. *Id.* Additionally, fees charged for the “use of local government property, or the purchase, rental, or lease of government property” are also excepted from the definition of special tax. *Id.* Notably, the City is not required to limit fees charged for the use of City property to a reasonable cost. *Id.*; *see* 2011 City Att’y MOL 46 (2011-3; Mar. 4, 2011).

The proposed permit application fees and impound fees are based on the anticipated cost to administer the program, including City staff time to process applications, ensure compliance, and enforcement measures. These fees will not exceed the costs to the City for program administration. The proposed per-SMD charge to compensate the City for rental companies’ use of City property is not limited to the cost incurred by the City, and instead, is based on a reasonable determination of the value of City property used by an SMD when staged by a rental company. Therefore, these fees are permissible under Proposition 26.

CONCLUSION

The Vehicle Code establishes the rules of the road applicable to riders of bicycles and motorized scooters available for rent as SMDs. The Council may adopt reasonable regulations on SMD rental companies operating within the City provided these regulations are not

discriminatory or arbitrary and do not regulate in areas preempted by the Vehicle Code. If the Council wishes to regulate in areas addressed by the Vehicle Code, changes to state legislation would be required. The City may also impose fees, such as a permit fee, impound fee, and per-device fee, so long as they comply with Proposition 26.

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