

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: May 10, 2016

TO: Councilmember Lorie Zapf, Council District 2

FROM: City Attorney

SUBJECT: DecoBike, LLC Bikesharing Stations on Boardwalk

INTRODUCTION

On July 23, 2013, the San Diego City Council (City Council) adopted San Diego Ordinance O-20279 (Jul. 30, 2013), authorizing the City of San Diego to enter into a corporate partnership with DecoBike, LLC, to provide a bikesharing system in the City. As part of its action, the City Council approved an agreement with DecoBike for the financing, implementation, management, and operation of the self-service bikesharing system (Agreement). The Agreement sets forth the responsibilities of each party, and includes provisions for City approval of the locations for bikesharing stations. Implementation of the Agreement has included locating some bikesharing stations on the boardwalk in Pacific Beach. Community members have expressed concern about the boardwalk locations and the purpose of the bikesharing system. Councilmember Zapf has asked this Office for legal guidance on the location of bikesharing stations on the boardwalk under the Agreement.

QUESTIONS PRESENTED

1. Does the San Diego Municipal Code (Municipal Code or SDMC) prohibit private commerce on the public boardwalk?
2. Can the current DecoBike, LLC (DecoBike) Agreement be amended to prohibit future installation of stations on the public boardwalk?

SHORT ANSWERS

1. Potentially, but the prohibitions do not apply in this case. Commercial activities are prohibited in a beach area, as defined in Municipal Code section 63.20, unless the activity is conducted under the terms of a formal agreement with the City. The Municipal Code also prohibits solicitation in public plazas, parks or beach areas unless authorized by the Mayor. In this case, the City Council adopted an ordinance approved by the Mayor specifically providing for the DecoBike operations in areas approved by the City under the Agreement.

2. Yes. The City and DecoBike could agree to amend the Agreement to prohibit bikesharing stations to be placed in certain areas. An amendment to the Agreement would require mutual agreement between the City and DecoBike and approval by ordinance of the City Council.

BACKGROUND

The Agreement with DecoBike was entered into under the City's Corporate Partnership Program, which allows for corporations to provide cash or in-kind goods or services to the City in exchange for access to the commercial marketing potential associated with the City. In this case, the City sought to partner with a bikesharing company to provide the City with a bikesharing system in support of various elements of the City's General Plan, including the Mobility Element, and SANDAG's 2010 Regional Bicycle Plan, at little or no cost to the City. After an open proposal and selection process, the City selected DecoBike as its partner for this project.

The bikesharing system, as provided in the Agreement, is designed to serve both residents and visitors.¹ Among the goals cited by the City in its request for proposals soliciting partners for the bikesharing program were: (1) providing alternative transportation for residents, commuters, and visitors; (2) making bicycle travel available to people without bikes or with no place to store them (this would include visitors); and (3) promoting commerce by providing access to businesses, shopping, dining, and entertainment venues. The Agreement, by its terms, contemplates sites in various locations, including parks, beaches, and public right of way. Agreement, § 5.

The Agreement contemplates an Implementation Plan developed by DecoBike and approved by the City. Agreement, §§ 5.4 and 6. The Agreement reflects the concept of the system as a network, with strategically spaced stations to allow one-way trips with convenient locations for the pick-up and drop-off of bicycles. See generally Agreement, § 5, and e.g., § 5.6, allowing stations to be located on private property, if necessary, "to make the program available to as many residents, visitors and areas as possible and to effectuate regional mobility and connectivity." It further includes provisions for relocation or addition of stations with the City's consent to maintain the system's connectivity. Agreement, §§ 7.7 and 8.1-8.4.

ANALYSIS

I. COMMERCIAL ACTIVITIES ON THE "PUBLIC BOARDWALK"

There are several Municipal Code sections that may affect activity on the boardwalk. However, none of the provisions preclude the bikesharing stations provided by DecoBike to the City under the Agreement.

¹ "Bikesharing System" is defined in the Agreement to mean "an automated system in which bicycles are made available for shared use via membership subscriptions or short term rentals to individuals who do not own them."

The Municipal Code does not explicitly address commercial activities on public boardwalks.² Municipal Code prohibitions directed specifically to the boardwalk include prohibition of alcoholic beverage consumption (SDMC § 56.54), no smoking and vaping (SDMC § 43.1002), and an 8 miles per hour speed limit (SDMC § 63.0109).

The Municipal Code does prohibit commercial activities in “beach areas” with an exception for commercial operations that are the subject of an agreement with the City. SDMC § 63.20.20. That section states:

It is unlawful for any person, firm or corporation to attempt to carry on or to carry on any commercial operation, to rent or sell merchandise of any kind, or to beach or moor any vessel for the purpose of displaying it for rental or sale, in any beach area, as defined in Section 63.20, including Mission Bay Park, unless licensed or otherwise specifically permitted to do so by the Director. This is specifically intended to include a commercial operation which involves delivering merchandise, a rental item, or a service to a beach area whether or not a financial transaction takes place within the beach area. *Lessees and others who carry on a commercial operation under the terms of a formal agreement with the City are exempt from this section.* Commercial fishers are permitted to use beach areas provided that their activity does not interfere with recreation.

SDMC § 63.20.20 (emphasis added). Similarly, Municipal Code section § 63.0102(b) prohibits solicitation in any public park, plaza, or beach areas without the consent of the Mayor. Accordingly, a commercial operation conducted in a beach area under the terms of an agreement with the City and with the Mayor’s approval, is not prohibited.

The City’s Corporate Partnership Agreement with DecoBike for a city-wide bikesharing system is both a “formal agreement with the City,” authorized by ordinance adopted by the City Council and approved by the Mayor, and therefore permitted under section 63.20.20. Likewise, the Mayor has given consent under section 63.0102 by approving Ordinance O-20279 and has further authorized the boardwalk locations by approving them during implementation of the Agreement.

II. THE AGREEMENT CAN BE AMENDED BY AGREEMENT OF THE PARTIES.

As with any contract, the terms of the Agreement can be amended by mutual agreement of the parties. Typically, an amendment that changes a material term or adversely affects a party, will be subject to negotiation. Under the City’s Council-Mayor form of government, the City Council, acting as a body, is given legislative authority – Charter sections 11, 15, 270 – while the

² There are multiple public boardwalks in the City. Because the request is related to DecoBike locations, this memorandum focuses on the Ocean Front Walk in Pacific Beach, where two bikesharing stations have been approved under the Agreement.

Mayor serves as the chief executive officer, responsible for execution and enforcement of City laws, ordinances, and policies. San Diego Charter § 265. The Mayor is further charged with administering the affairs of the City, authority previously vested in the City Manager. San Diego Charter § 260. Contract negotiation is among those administrative affairs within the Mayor's purview.³ In this case, because the Agreement was approved by ordinance of the City Council, any amendment would also require approval by ordinance of the City Council.

CONCLUSION

The Municipal Code prohibits commercial activity in beach areas. Assuming the Ocean Front Walk is part of the beach area, the operation of the bikesharing system, including bikesharing stations, are not prohibited because they were approved by the Mayor and City Council by ordinance and agreement with DecoBike, and the locations have been approved by the City as part of the Implementation Plan. The Agreement could be amended to preclude any future boardwalk locations if both parties agree and the City Council approves the amendment by ordinance.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/Prescilla Dugard
Prescilla Dugard
Chief Deputy City Attorney

PMD:cm

MS-2016-12

Doc. No.: 1272957

cc: Honorable Mayor Kevin Faulconer

San Diego City Councilmembers

Natasha Collura, Director, Corporate Partnerships and Development

³ See 1986 Op. City Att'y 54 (86-7; Nov. 26, 1986) for a detailed discussion of the role of the City Council versus the City Manager, whose functions are now under the purview of the Mayor.