

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: January 24, 2018
TO: Councilmember David Alvarez, Council District 8
FROM: City Attorney
SUBJECT: Exclusivity of City's Agreement with Deco Bike, LLC

INTRODUCTION

You have asked the Office of the City Attorney for legal guidance regarding the exclusivity provisions in the Corporate Partnership Agreement (Agreement) between the City of San Diego and Deco Bike, LLC (Deco Bike), a bike share company. Specifically, you asked whether alternative bike share programs may operate within City limits. Because your list of questions does not reference a specific proposal from an alternative bike share company, we address your questions under basic contracting principles. This Office can provide a more targeted analysis if we are presented with a specific proposal.

QUESTIONS PRESENTED

You have asked the following questions in your memorandum to the City Attorney:

1. What exclusive rights does Deco Bike have under its agreement with the City?
2. Can an alternative bike program that is not promoted by the City exist within the City without violating the Agreement?
3. Would allowing an alternative bike sharing company to operate in the City be considered 'cooperating' in violation of the Agreement? ¹
4. What conditions/situations would be considered 'cooperating' with an alternative program and would that present issues with the current Agreement?
5. How is a disagreement between the City and Deco Bike on the interpretation of certain Agreement terms resolved?

¹ For purposes of this memorandum, we interpret "cooperating" consistent with section 10.6 of the Agreement, titled "City's Cooperative Support."

SHORT ANSWERS

1. Under the Agreement with the City, Deco Bike is the City's exclusive corporate partner as a bike sharing company. Deco Bike enjoys benefits and privileges in exchange for developing and implementing a bike sharing program.
2. City conduct that is inconsistent with the Agreement could expose the City to liability for breach of contract. A bike sharing program run by the City would likely be inconsistent with the Agreement. A program run by a third party with no City support or participation, other than legally required reviews and approvals, is not.
3. The City is not "cooperating" in violation of the Agreement if it is only acting in a regulatory capacity. If the City contracts with another bike sharing program in a manner that infringes on Deco Bike's benefits and privileges, as described in the Agreement, the City would likely be in breach of the Agreement.
4. Specific facts are needed in order to analyze whether the City's conduct in connection with another bike sharing program operating in the City would be inconsistent with the Agreement.
5. The Agreement contains a procedure for resolving disputes that includes informal negotiation and mediation.

FACTUAL BACKGROUND

In order to address traffic congestion, noise, and air pollution in the City, and to provide an alternative to motorized public transportation, the City sought to design and implement a bike sharing program. Pursuant to Council Policy 000-40, in September 2012, the City issued a Request for Sponsorship (Request) for a bike sharing company to develop, install, market, and maintain a privately funded bike sharing program throughout the City (Program). Three companies responded to the Request, and the City selected Deco Bike to be its partner. On July 30, 2013, the San Diego City Council (Council) approved an ordinance authorizing a City-wide, ten-year Agreement with Deco Bike.² San Diego Ordinance O-20279 (July 30, 2013).

In exchange for the development, installation, marketing, and maintenance of the Program, the City agreed to provide Deco Bike with certain marketing rights and partnership benefits, including the exclusive right to be designated and referred to as the "Official Bike Sharing Provider of the City of San Diego." The City agreed to "work with and support Deco Bike's efforts to market and increase ridership of the Bike Sharing System," and to provide other rights and benefits, including City support of the Program, access to City employees, and a presence on the City's website. Agreement §10.

² According to a staff report to Council dated June 26, 2013, the lengthy term of the Agreement was necessary for the financial viability of the Program since the Agreement does not include City subsidies and Deco Bike will make a substantial capital investment in Program infrastructure.

ANALYSIS

I. GENERAL CONTRACTING PRINCIPLES

When a contract is entered into, it gives rise to a legal duty on the part of each party to the contract to do or not to do a certain thing. Cal. Civ. Code § 1549; 1 Witkin, Summary of California Law, *Contracts* §1 (11th ed. 2017); 17A Am. Jur. 2d *Contracts* § 5. In addition, in every contract, the law imposes a duty of good faith and fair dealing that “not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.” *Harm v. Frasher*, 181 Cal. App. 2d 405, 417 (1960), citing *Bewick v. Mecham*, 26 Cal. 2d 92, 99 (1945); Restatement (Second) of *Contracts* § 205 (Am. Law Inst. 2017). If one party fails to do what it promised to do under the contract, unless excused from performance, that party is in breach of the contract and the law allows for remedies for the injured party. *Id.*

As with any party to a private agreement, the City must act in good faith to fulfill its contractual obligations. Section 10.6 of the Agreement, titled “City’s Cooperative Support,” states that the City “shall work with and support Deco Bike’s efforts to market and increase ridership of the Bike Sharing System.” If the City were to act in an inconsistent manner with this term in the Agreement, it could be in breach of an express term of the Agreement, and of the covenant of good faith and fair dealing. For example, if the City assisted a different bike sharing company in its marketing efforts and in its attempts to increase ridership, Deco Bike could argue that the City was acting contrary to the purpose of the Agreement, thus exposing the City to liability for breach of contract.

II. THE CITY’S ROLE AS REGULATOR

Separate and apart from its duties under the Agreement, the City has a role as a regulator of business activity within City limits³. As a government entity, the City is authorized to “make and enforce all laws and regulations in respect to municipal affairs” commonly referred to as the City’s police power. California Constitution article XI, § 7, San Diego Charter (Charter) § 2. This regulatory function encompasses issuing entitlement permits or regulating businesses within City boundaries as authorized by the San Diego Municipal Code (Municipal Code or SDMC). Charter § 2. The Agreement does not, and cannot, limit the City’s exercise of its regulatory authority. As a municipality, the City cannot contract away its police power. 45 Cal. Jur. 3d *Municipalities* § 243 (2017).

³ “The City [acts] like a private entity to secure certain benefits for the City in exchange for sponsorship and marketing benefits” when entering into corporate partnership agreements. City Att’y MOL 2015-1 (Jan.29, 2015). When a government acts in its proprietary capacity, it is generally subject to the same law governing contracts that applies to private parties. *See id.*; *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1148 (2004).

We are available to review specific facts regarding the City's activities with respect to another bike sharing company to determine whether the actions would be purely regulatory in nature and therefore permissible.

III. RESPONSES TO SPECIFIC QUESTIONS

A. What exclusive rights does Deco Bike have under its agreement with the City?

Deco Bike enjoys the exclusive right to be designated and referred to as the "Official Bikesharing Provider of the City of San Diego." *See* Agreement § 10.1. Importantly, Section 10.6 of the Agreement expressly obligates the City to support Deco Bike's efforts to market and increase Program ridership. There are no exceptions to this obligation. Additional marketing rights and partnership benefits to Deco Bike are outlined in Section 10 of the Agreement. For example, the City agrees to work with Deco Bike to develop marketing materials, such as press releases about the Program, subject to City review and approval. *Id.* In addition, the Corporate Partnership Program's page on the City's website contains a link to Deco Bike's webpage.

B. Can an alternative bike program that is not promoted by the City exist within the City without violating the Agreement?

A bike sharing program run by the City, and a bike sharing program "supported" by the City as discussed above, would be inconsistent with the Agreement. In the case of an independent operator running a bike sharing system, if the City's involvement did not go beyond issuing approvals in its regulatory capacity, as discussed above, the City would not be acting inconsistently with the Agreement even if the effect were that a competitor could operate in the City. The Deco Bike Agreement does not insulate Deco Bike from competition.

Nothing prevents the City from renegotiating and amending its Agreement with Deco Bike to expressly address what actions the City may or may not take with respect to competitors.

C. Would allowing an alternative bike sharing company to operate in the City be considered 'cooperating' in violation of the Agreement?

It depends on the specific City actions. If the alternative program required regulatory approvals, such as a business license or land use permit, the City's exercise of its regulatory authority in issuing the permits would not violate the Agreement. However, if an alternative program requiring City actions, such as a lease, may be inconsistent with the Agreement.

D. What conditions/situations would be considered 'cooperating' with an alternative program and would that present issues with the Agreement?

Please see our responses in paragraphs B and C. We can provide a more detailed analysis depending on the specific facts of the proposal in question.

E. How is a disagreement between the City and Deco Bike on the interpretation of certain Agreement terms resolved?

The Agreement contains standard contract terms governing default, dispute resolution, and termination. If there is a disagreement between the City and Deco Bike with respect to any facet of the Agreement, the Agreement provides a dispute resolution procedure should the party's informal negotiations fail to resolve it. *See* Agreement § 15.3.⁴

CONCLUSION

Under its Agreement with Deco Bike, the City has a duty to comply with the express contract terms, support the purpose of the Agreement, and to act consistently with the purpose of the Agreement under the covenant of good faith and fair dealing. The obligations described in the Agreement do not impair the City's responsibility to take certain actions in its governmental capacity, such as issuing regulatory permits.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Catherine C. Morrison
Catherine C. Morrison
Deputy City Attorney

CCM:jvg

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Doc. No.: 1662565_6

cc: Natasha Collura, Director of Corporate Partnerships and Development

⁴ The parties also have the option to mutually agree to amend the contract terms.