



# **SCOOTER WARS: CHALLENGES AND OPPORTUNITIES IN LOCAL REGULATION OF SHARED MOBILITY DEVICES**

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# SCOOTER WARS: CHALLENGES AND OPPORTUNITIES IN LOCAL REGULATION OF SHARED MOBILITY DEVICES

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## I. Introduction and Shared Mobility Device (“SMD”) Landscape Overview

In late 2017, seemingly overnight, electric scooters appeared on the streets and sidewalks of the City of Santa Monica, and soon became ubiquitous throughout several Los Angeles neighborhoods and the Bay Area. The scooters—dockless, accessed via a smartphone app, able to reach speeds of fifteen miles per hour, usually operated on the sidewalk by riders without helmets, and often haphazardly parked or tossed in the public right-of-way—are despised by some and loved by others. Cities, concerned that the scooters pose safety hazards to pedestrians, riders, and drivers, and frustrated by the unsightly scattering of vehicles not in use, have taken various approaches toward regulating these new “shared mobility devices.” This paper will explore several of those specific approaches and address the most significant challenges faced by cities in designing and implementing shared mobility device (“SMD”) regulation, namely, potential conflicts with the California Vehicle Code, enforcement capability, compliance with the California Environmental Quality Act (“CEQA”), liability for personal injuries, and compliance with the Americans with Disabilities Act (“ADA”).

Since the advent of SMDs in California about one and a half years ago, the landscape has evolved from being dominated by two companies (Bird, and, to a lesser extent, Lime) to being crowded with competitors. Some SMD companies are already big, well-funded players in the “disruptive” transportation technology scene, such as Uber, owner of Jump, and Lyft, which launched Lyft Scooters. Others are bankrolled by traditional behemoths; Spin, for example, is owned by Ford. Some companies, most notably Bird, are aggressive: known to place their devices on city streets without seeking permission, let alone offering a warning to the receiving jurisdiction, then apologize (and/or sue) later. In the wake of the disruption wrought by this approach, other companies have sought to distinguish themselves as conscientious citizens sensitive to cities’ needs and desires.

What all SMD companies have in common is the type of service they offer to the public: wheeled electric mobility devices that may be accessed via a smartphone app and a credit card, and picked up or dropped off anywhere—no “dock” or stationary storefront necessary. The dockless nature of SMDs is primarily what makes them more convenient and appealing than existing city bicycle programs or traditional rental businesses. SMDs are all powered by electric motors, but may be bicycles, sit-down scooters, or stand-up scooters. However, the particular kind of SMD that is most ubiquitous and vexing to cities is the stand-up, or “kick” scooter.

The level of angst caused by the arrival—and instant popularity—of SMDs is owing to two genuine, conflicting concerns. Most, if not all, California cities struggle to meet the mobility needs of residents, workers, and tourists, and SMDs provide a fun and convenient solution for some. On the other hand, SMDs pose real safety hazards to riders and pedestrians, especially—but not exclusively—to those who are not young or able-bodied. In addition to the legal complexities associated with regulating any new technology, cities will have to grapple with this fundamental tension as they develop SMD policies that best serve their communities.

## II. Local Approaches

The section below provides a brief survey of how some cities have responded to the presence of SMDs in their jurisdictions. A number of cities have banned SMDs. Other cities have regulated SMDs with permit systems and by establishing pilot programs. Other cities have taken a more laissez-faire approach and have decided to not independently regulate SMDs, relying instead on state law to control SMDs in their jurisdictions.

### A. Santa Monica

Santa Monica has been labelled “Scooter City,”<sup>1</sup> and can be considered ground zero for the interaction between local government regulation and SMD use and innovation. SMDs first appeared in Santa Monica in 2017. The relationship between scooter deployment and regulation started off rocky. In December 2018, the Santa Monica city attorney’s office filed a misdemeanor criminal complaint against Bird, alleging that: (1) Bird began operated devices in the city without approval, and that (2) Bird ignored citations asking the company to obtain proper licenses and remove the scooters from sidewalks.<sup>2</sup> Bird pleaded no contest and agreed to pay more than \$300,000 in fines and secure proper business licenses.<sup>3</sup>

Subsequently the Santa Monica City Council approved a 16-month pilot plan for SMDs. The pilot program began in September 2018 and runs through December 30, 2019. Companies were chosen for permits based on a selection process is process outlined in Santa Monica Municipal Code Chapter 3.21. These companies were evaluated according to objective criteria outlined in the Code, with review of the shared mobility service providers' experience, operations, ability to launch, education strategies, compliance record, financial viability and

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<sup>1</sup> Patrick Sisson, *Scooter City: How Santa Monica, the birthplace of dockless electric scooters, is shaping the multibillion-dollar industry*, CURBED.COM (Dec. 7, 2018, 3:40 PM), <https://www.curbed.com/2018/12/7/18130247/santa-monica-uber-lyft-bird-lime-scooter-bike-app>. (last visited Mar. 27, 2019).

<sup>2</sup> Melissa Etehad, *Bird scooter firm settles legal fight with Santa Monica*, L.A. TIMES (Dec. 15, 2018, 6:55 PM), <https://www.latimes.com/local/lanow/la-me-ln-bird-scooters-20180215-story.html>. (last visited Mar. 27, 2019).

<sup>3</sup> *Id.*

safety compliance. A selection committee recommended granting permits to Jump and Lyft.<sup>4</sup> The Director of Planning and Community Development also selected Bird and Lime.<sup>5</sup>

Under the permit program, each provider was allowed to deploy 750 devices, though the number may increase. The SMD Companies paid \$20,000 for the right to operate, \$130 per device, and \$1 per device per day for the privilege of parking on the public sidewalk.<sup>6</sup> With a permit, SMD companies may provide scooters in the City. But, certain areas of the city are subject to geo-speed reduction zones (device speeds are automatically slowed upon entering a designated area) and no ride or deployment zones, such as the Santa Monica Pier, Third Street Promenade, Ocean Front Walk or in municipal parks like Palisades Park.<sup>7</sup>

Device operators are required to secure and maintain insurance coverages, indemnify the city, meet device safety and technology requirements, meet certain maintenance and customer service standards, educate users about safety, share data with the city, and work cooperatively with existing transportation systems.<sup>8</sup>

## **B. Beverly Hills**

By the summer of 2018, Santa Monica's scooter problems had metastasized into other parts of Los Angeles, including Beverly Hills. In response to residents' complaints and evidence that the scooters posed a public health hazard, in late July 2018 the city enacted an urgency ordinance that prohibited SMDs from being placed in, operated on, or offered for use in any of the city's public rights-of-way. The ordinance's definition of an SMD is broad enough to encompass both motorized scooters and bicycles.<sup>9</sup> The ordinance contained a sunset clause providing that it would expire in six months unless the city council took action to renew it. In December 2018, a regular ordinance was enacted to extend the prohibition on SMDs for another year.

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<sup>4</sup> Laura Newberry, *Santa Monica selects Bird and Lime after all for its electric scooter pilot program*, L.A. TIMES (Aug. 30, 2018 7:15 PM), <https://www.latimes.com/local/lanow/la-me-ln-santa-monica-scooter-selection-20180830-story.html>. (last visited Mar. 27, 2019).

<sup>5</sup> City of Santa Monica Final Administrative Decision, Shared Mobility Device Pilot Program Operator Selection and Device Allocation (Aug. 30, 2018), <https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/Shared%20Mobility%20Device%20Pilot%20Program.pdf>. (last visited Mar. 27, 2019).

<sup>6</sup> City of Santa Monica Shared Mobility Device Pilot Program Administrative Regulations (March 5, 2019), [https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/SM-AdminGuidelines\\_03-05-2019\\_Final.pdf](https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/SM-AdminGuidelines_03-05-2019_Final.pdf) [hereafter "Santa Monica Administrative Regulations"]. (last visited Mar. 27, 2019).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The ordinance's definition of an SMD includes "any wheeled device, other than an automobile or motorcycle, that is powered by a motor; is accessed via an on-demand portal, whether a smartphone application, membership card, or similar method; is operated by a private entity that owns, manages, and maintains devices for shared use by members of the public; and is available to members of the public in unstaffed, self-service locations, except for those locations which are designated by the City." BEVERLY HILLS MUNICIPAL CODE § 7-6-2.

Beverly Hills thus became the first city in the state to enact a comprehensive ban on SMDs.<sup>10</sup> But the city invited SMD companies to propose a solution to its concerns. The response from SMD companies has varied. Bird objected to the validity of the ordinance on multiple grounds, and continues to challenge each and every scooter impound performed by the city. In the fall of 2018, Bird filed a lawsuit against the city alleging, among other things, that the ordinance is preempted by the Vehicle Code, the city failed to comply with CEQA, and the city's impounding practices are unconstitutional. Meanwhile, other SMD companies have sought to convince Beverly Hills to partner with them on a pilot project to bring regulated SMDs to the city. The lawsuit, as well as the discussions with SMD companies regarding a possible pilot project, are ongoing as of the time of this paper's writing.

### **C. Goleta**

In addition to larger cities and tourist locations, SMDs have proliferated across areas surrounding colleges and universities. In 2018 SMDs from at least two SMD companies were deployed without permits in Goleta, neighboring the University of California, Santa Barbara. The Goleta City Council voted unanimously to pass an urgency ordinance to ban SMDs in Goleta on December 4, 2018.<sup>11</sup> Prior to the meeting, the city received more than 200 public comments on the item, the most ever received on a single topic.<sup>12</sup> Goleta's ban makes it unlawful to "provide, place, offer for use or operate a shared on-demand motorized scooter, or to operate as a shared on-demand motorized scooter operator in any street or public right-of-way, or other public place within the City in which the public has the right of travel."<sup>13</sup> The ban also authorizes the impound of SMDs, with an impound fee set by resolution.

### **D. San Francisco**

San Francisco, like Santa Monica, faced an early wave of SMD deployment. In March 2018, Bird, Lime and Spin unloaded hundreds of scooters across San Francisco. This sparked a wave of concerns, and between April 11 and May 23 the city received nearly 1,900 complaints and impounded more than 500 scooters. In response, the Board of Supervisors unanimously passed an ordinance on April 24, 2018, requiring that any company operating shared, powered scooters in San Francisco have a permit from the San Francisco Municipal Transportation

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<sup>10</sup> San Francisco prohibited the parking of shared scooters (not SMDs generally) without a permit from the city in late April 2018, and soon thereafter announced the intention to create a pilot program to permit approved scooter companies to operate in the city. See Ben Jose, *SFMTA Offers Two Permits for One-Year Powered Scooter Pilot*, SFMTA Blog (Aug. 30, 2018), <https://www.sfmta.com/blog/sfmta-offers-two-permits-one-year-powered-scooter-pilot>. (last visited Mar. 22, 2019).

<sup>11</sup> Joshua Molina, *Goleta City Council Votes Unanimously to Ban Motorized Scooters*, NOOZHAWK (Dec. 4, 2018, 11:40 PM), <http://www.goletamonarchpress.com/2018/12/motorized-scooters-banned-in-goleta/>. (last visited Mar. 27, 2019). The ordinance was codified as Chapter 10.05 of the Goleta Municipal Code.

<sup>12</sup> *Id.*

<sup>13</sup> GOLETA MUNICIPAL CODE § 10.05.030 (2018).

Agency (“SFMTA”) to park their scooters on sidewalks or other public spaces. The law took effect on June 4, 2018 and Bird, Lime, and Spin removed their scooters from the city.<sup>14</sup>

The city thereafter established a permitting program and selected Scoot and Skip to participate in a one-year pilot program.<sup>15</sup> Several SMD companies appealed this decision with the SFMTA, but no additional permits were granted for phase one of the program.<sup>16</sup> Lime sought a temporary restraining order to block to program, but was denied.<sup>17</sup>

San Francisco’s permit program includes a \$25,000 annual permit fee and a \$10,000 endowment per permittee to cover city costs associated with property repair and maintenance. The SFMTA has also implemented an initial \$5,000 application fee.<sup>18</sup> There is no per-device fee.

Device operators are required to secure and maintain insurance coverages, indemnify the city, meet device safety and technology requirements, meet certain maintenance and customer service standards, educate users about safety, share data with the city, and meet certain equitable service requirements.<sup>19</sup>

#### **E. San Jose**

The City of San Jose, months after scooters arrived, passed an ordinance regulating SMDs. To operate in the city, SMD companies must pay an annual permit application fee of \$2,500, a \$10,000 property repair and maintenance deposit, and \$124 per device each year.<sup>20</sup>

The program places various limits and requirements on the devices and SMD companies. For example, downtown speeds are capped at twelve miles per hour.<sup>21</sup> Also, by June 2019, all scooters permitted in the City must have technology that prevents the use the scooters on public sidewalks.<sup>22</sup> There are also equity requirements: twenty percent of an operator’s

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<sup>14</sup> Jose, *supra* note 2.

<sup>15</sup> Pilot Powered Scooter Share Permit Program (Aug. 28, 2018), [https://www.sfmta.com/sites/default/files/reports-and-documents/2018/08/scooter\\_policy\\_directive\\_08.28.2018.pdf](https://www.sfmta.com/sites/default/files/reports-and-documents/2018/08/scooter_policy_directive_08.28.2018.pdf). (last visited Mar. 27, 2019).

<sup>16</sup> Megan Rose Dickey, *Lime loses appeal to operate electric scooters in SF*, TECHCRUNCH (Feb. 13, 2009), <https://techcrunch.com/2019/02/13/lime-loses-appeal-to-operate-electric-scooters-in-sf/>. (last visited Mar. 27, 2019).

<sup>17</sup> Carolyn Said, *Lime’s move to squeeze SF scooter rivals pulped by court*, S.F. CHRONICLE (Oct. 12, 2018, 5:55 PM), [https://www.sfchronicle.com/business/article/Lime-s-move-to-squeeze-SF-scooter-rivals-pulped-13303689.php?utm\\_campaign=twitter-premium&utm\\_source=CMS%20Sharing%20Button&utm\\_medium=social](https://www.sfchronicle.com/business/article/Lime-s-move-to-squeeze-SF-scooter-rivals-pulped-13303689.php?utm_campaign=twitter-premium&utm_source=CMS%20Sharing%20Button&utm_medium=social). (last visited Mar. 27, 2019).

<sup>18</sup> Jose, *supra* note 2.

<sup>19</sup> *Id.*

<sup>20</sup> San Jose Municipal Code § 11.92.100(B); Emily Deruy, *San Jose imposes new scooter regulations*, MERCURY TIMES (Dec. 20, 2018 6:00 AM), <https://www.mercurynews.com/2018/12/19/san-jose-imposes-new-scooter-regulations/>. (last visited Mar. 27, 2019).

<sup>21</sup> San Jose Shared Micro Mobility Permit Administrative Regulations, <http://www.sanjoseca.gov/DocumentCenter/View/82493>. (last visited Mar. 27, 2019).

<sup>22</sup> *Id.*

operation must occur in a “Community of Concern” and operator must establish low-income discount programs for individuals at or below 200% of the federal poverty level.<sup>23</sup>

Device operators are also required to secure and maintain insurance coverages, indemnify the city, meet device safety and technology requirements, meet certain maintenance and customer service standards, educate users about safety, and share data with the city.<sup>24</sup>

#### **F. Santa Cruz**

In September 2018, Bird released scooters across Santa Cruz. Bird sent the City an e-mail the day of the drop, but had not previously contacted the city regarding the release of the devices.<sup>25</sup> The city issued a cease and desist order to Bird. City staff impounded about 175 devices, with impounding fees at \$181 per device, totaling \$32,000.<sup>26</sup>

Santa Cruz imposed an immediate, temporary moratorium on SMD programs on September 25, 2018.<sup>27</sup> The moratorium will last “until the city issues new ordinances governing” SMDs. The moratorium expressly exempts Social Bicycles, a shared bike operator previously authorized by the city. During the moratorium, the city is authorized to remove and impound SMD devices found within the city. Thus far no regulations have been adopted.

#### **G. San Diego**

Unlike other city’s that rushed to approve regulations on SMDs, San Diego has not yet adopted specific regulations concerning shared mobility devices or established a pilot program for SMDs. The following companies are and have been operating motorized scooters and or e-bikes in San Diego: Lime, Bird, Razor, Wheels, Jump, and Lyft. In May 2018, the San Diego City Council rejected a proposed emergency ban that would have prohibited scooters from the city’s boardwalks.<sup>28</sup> Recently, however, the city has taken steps toward regulation. In October 2018, the Mayor proposed regulations, and on February 20, 2019 the City Council’s Active Transportation and Infrastructure Committee voted to send a set of regulations on dockless electric scooters and bicycles to the full council.<sup>29</sup> As of the writing of this paper, no regulations have been adopted or implemented.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*; SAN JOSE MUNICIPAL CODE CH. 11.92.

<sup>25</sup> SANTA CRUZ ORDINANCE No. 2018-12 (Sep. 25, 2018), <https://www.cityofsantacruz.com/home/showdocument?id=73313>. (last visited Mar. 27, 2019).

<sup>26</sup> Robyn Sidersky, *Cities to Bird: Pay Up if You Want Your Scooters Back*, VIRGINIAN-PILOT (Nov. 12, 2018), <https://www.govtech.com/fs/transportation/Cities-to-Bird-Pay-Up-if-You-Want-Your-Scooters-Back.html>. (last visited Mar. 27, 2019).

<sup>27</sup> SANTA CRUZ ORDINANCE No. 2018-12 (Sep. 25, 2018) (codified as Santa Cruz Municipal Code, Chapter 10.70).

<sup>28</sup> *San Diego City Council rejects boardwalk scooter ban*, CWSAN DIEGO.COM (May 22, 2018 5:31 PM), <http://www.thecwsandiego.com/story/38252157/san-diego-city-council-weighing-options-on-motorized-scooters-on-boardwalks?removecgbypass&clienttype=smartdevice>. (last visited Mar. 27, 2019).

<sup>29</sup> *Id.*



The city's proposed regulations are similar to those in other cities, but do contain some unique conditions.<sup>30</sup> The proposed regulations would implement different speed requirements, based on geofencing<sup>31</sup> requirements. The current speed of SMDs is fifteen miles per hour, but some zones would have reduced speed limits of eight miles per hour, and some zones would feature a further restricted speed limit of two miles per hour.<sup>32</sup> The City also plans to impose certain no park zones. The proposed regulations would establish a six month permit with fees to be established by the city council. The mayor has proposed \$253 a permit and up to \$150 per device annually.<sup>33</sup> The proposed regulations would also require operators to indemnify the city from liability claims and carry insurance policies, like other cities that have established pilot programs.

Absent local regulations, San Diego police have relied on Vehicle Code provisions to regulate scooter use.<sup>34</sup> The City has been sued by individuals injured by SMDs. The allegations against the City fault the City in part for a failure to adopt regulations, resulting in injuries and ADA violations.<sup>35</sup> Recently San Diego experienced its first fatality resulting from a scooter crash.<sup>36</sup>

## H. South Lake Tahoe

In the summer of 2018, Lime introduced scooters to South Lake Tahoe. The devices followed Lime's bikes that were deployed as a part of a pilot program in the city the previous summer. South Lake Tahoe is a much smaller city than most cities where SMDs have been deployed. Additionally, SMDs are only deployed in the city during the summer tourist season, unlike most other cities where devices are available year-round. In April 2019 the City entered into a license agreement with Lime to operate scooters, but not bikes, in the city for one year. The agreement provides for a cap on the scooter fleet at 550 devices and establishes a 5 cent

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<sup>30</sup> City of San Diego Staff Report, Regulation of Shared Dockless Mobility Devices (Feb. 2, 2019), [https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/Staff%20Report%20for%20for%20%20%20\(\).pdf?meetingId=1488&documentType=Agenda&itemId=33275&publishId=152805&isSection=false](https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/Staff%20Report%20for%20for%20%20%20().pdf?meetingId=1488&documentType=Agenda&itemId=33275&publishId=152805&isSection=false). (last visited Mar. 27, 2019).

<sup>31</sup> Geofencing is the practice of using global positioning (GPS) or radio frequency identification (RFID) to define a geographic boundary to create a "virtual barrier."

<sup>32</sup> Joshua Emerson Smith, *San Diego Releases Draft Bike, Scooter Regulations*, SAN DIEGO UNION-TRIBUNE (Feb. 15, 2019), <http://www.govtech.com/fs/transportation/San-Diego-Releases-Draft-Bike-Scooter-Regulations.html>. (last visited Mar. 27, 2019).

<sup>33</sup> *Id.*

<sup>34</sup> For example, 551 citations issued to people for riding a scooter on the sidewalk in 2018. The city has posted a list of Rules and Regulations on its internet website: <https://www.sandiego.gov/bicycling/bicycle-and-scooter-sharing/rules>. (last visited Mar. 27, 2019).

<sup>35</sup> Greg Moran, *Disabled man sues scooter maker and San Diego over injuries from boardwalk crash*, SAN DIEGO UNION-TRIBUNE (Mar. 5, 2019 11:40 AM), <https://www.latimes.com/local/lanow/la-me-ln-scooter-lawsuit-san-diego-20190305-story.html>. (last visited Mar. 27, 2019).

<sup>36</sup> Karen Kucher, *Man dies 2 days after crashing scooter into tree in San Diego's first such fatality*, L.A. TIMES (Mar. 18, 2019 4:45 PM), <https://www.latimes.com/local/lanow/la-me-ln-san-diego-scooter-death-20190318-story.html>. (last visited Mar. 27, 2019).

per trip fee that will be remitted to the City for enforcement efforts.<sup>37</sup> The agreement also requires a driver’s license to unlock the scooters in order to discourage use by individuals under the age of 18, and limits the maximum speed to 15 mph. Further, the agreement promotes the use of geo-fencing in high pedestrian use areas, promotes responsible parking of scooters, requires Lime to remove improperly parked scooters within four hours, and enables the City to remove scooters parked in unsafe locations and recover City costs.

### III. Issues in Designing and Implementing Local Regulation

#### A. Electric Scooters and the California Vehicle Code

##### 1. Preemption Concerns

Section 21 of the California Vehicle Code expressly preempts local regulation in the field of motor vehicle traffic: “[L]ocal authority shall not enact or enforce any ordinance or resolution on the matters covered by this code [...] unless expressly authorized by this code.” The Vehicle Code regulates motorized scooters<sup>38</sup>, therefore cities may not regulate motorized scooters unless a provision of the Vehicle Code expressly grants them the authority to do so. The Vehicle Code does in fact authorize some local regulation of scooters: Section 21230 allows local governments to “prohibit” the operation of scooters on bicycle paths, trails, and bikeways, while Section 21225 allows cities to “regulat[e] the registration of motorized scooters and the parking and operation of motorized scooters on pedestrian or bicycle facilities and local streets and highways, if that regulation is not in conflict with this code.”

Because the Vehicle Code uses the term “regulate” rather than “prohibit” in Section 21225, there is an argument that it does not allow cities to entirely prohibit the parking and operation of electric scooters in local streets and highways. Courts have repeatedly held that “the delegation to local authorities of power to make vehicular traffic rules and regulations will be strictly construed—such authority must be expressly (not impliedly) declared by the Legislature.”<sup>39</sup> In *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1815 (1993), the court applied this principle to hold that a local ordinance banning vending from a parked vehicle was preempted by the Vehicle Code, which merely granted local authorities the power to “regulate” vending from parked vehicles: “The Vehicle Code is replete with instances in which the Legislature has given local authorities the power to ‘prohibit’[,] ‘prohibit or restrict’[,] ‘regulat[e] or prohibit’[,] ‘license and regulate’[,] or simply ‘regulate’[.] Thus, we assume the Legislature knows whatever words it employs to delegate power to local authorities in the

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<sup>37</sup> Ryan Hoffman, *City Council approves agreement to allow Lime scooters in South Lake Tahoe*, TAHOE DAILY TRIBUNE (Apr. 17, 2019), <https://www.tahodailytribune.com/news/local/city-council-approves-agreement-to-allow-lime-scooters-in-south-lake-tahoe/>. (last visited Apr. 17, 2019); City of South Lake Tahoe Report to the City Council, Lime Scooter License Agreement (Apr. 16, 2019).

<sup>38</sup> See Veh. Code §§ 21220 - 21235.

<sup>39</sup> *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1815 (1993).

Vehicle Code will be accorded their plain meaning and the courts will not imply a broader grant of authority than that expressly given.”<sup>40</sup>

However, the Vehicle Code does not include a definition of an SMD (or a category of vehicles readily identified as such), let alone regulate such a category as a whole. A city could therefore persuasively argue that a comprehensive ban on SMDs—which would encompass not just scooters but also bicycles, and only those that are involved in a particular kind of business—constitutes a permissible regulation of scooters, rather than a prohibition. Indeed, a prohibition on SMDs would not include privately owned or leased scooters, or scooters rented as a traditional rental vehicle.

Moreover, the Vehicle Code expressly allows cities to restrict or prohibit “electrically motorized boards” from operating on local streets and sidewalks.<sup>41</sup> An electrically motorized board is defined as “any wheeled device that has a floorboard designed to be stood upon when riding that is not greater than 60 inches deep and 18 inches wide, is designed to transport only one person, and has an electric propulsion system averaging less than 1,000 watts, the maximum speed of which, when powered solely by a propulsion system on a paved level surface, is no more than 20 miles per hour.”<sup>42</sup> This definition applies to the scooters currently offered by Bird and other SMD companies. However, confusingly, this definition overlaps with that of a “motorized scooter,” defined as “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. This device 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.”<sup>43</sup> The area of overlap between these two definitions encompasses exactly the type of SMD that is currently causing challenges for California cities. At this time there is no case law to help clarify the situation.

The Vehicle Code as currently written clearly does not contemplate SMDs, leaving cities to reconcile and apply statutes in a new context as best they can. However, the combined authority to regulate motorized scooters and prohibit electrically motorized boards likely gives cities the power to prohibit SMDs on local streets and sidewalks, or institute a permitting scheme that limits which SMD companies are allowed to operate.

## 2. Impound Authority

Designing valid local regulation is merely the initial challenge faced by a city looking to tackle a current or looming SMD problem; a policy is of little use or effect unless it can be enforced. Cities’ clearly have the authority to cite SMD riders for violating the Vehicle Code (for, say, riding a motorized scooter on a sidewalk as prohibited by Section 21235(g)) or for violating a valid local ordinance that prohibits the parking or operation of SMDs on city streets. However,

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<sup>40</sup> *Id.* at 1817.

<sup>41</sup> Veh. Code § 21967.

<sup>42</sup> Veh. Code § 313.5.

<sup>43</sup> Veh. Code § 407.5.

writing tickets to individual riders is time consuming and does nothing to incentivize SMD companies to either comply with local law or encourage riders to do so. Moreover, an SMD company can strategically place its devices just outside of a city's legal borders every morning and be in full technical compliance with that city's prohibition of SMDs. As a result, cities may turn to impounding as a useful tool for encouraging SMD companies to respect the spirit as well as the letter of local regulation.

Vehicles may only be impounded pursuant to the Vehicle Code.<sup>44</sup> This point bears emphasizing—a city may not impound an SMD or any other vehicle solely pursuant to a local ordinance, it must rely on specific authorization in the Vehicle Code. The Vehicle Code authorizes “peace officers” as well as any “regularly employed and salaried employee [...] engaged in directing traffic or enforcing parking laws and regulations” for a city to impound vehicles located in that city.<sup>45</sup> A police officer or traffic control officer may impound a vehicle in the following situations:

- i. When an SMD is placed on a street or sidewalk<sup>46</sup> in a manner that creates a hazard to or obstructs the normal movement of vehicle or pedestrian traffic. (Vehicle Code § 22651(b)).

Depending on the width and condition of the sidewalk, even an SMD that is neatly placed near the side of the sidewalk could potentially be impounded under this provision, if there is not adequate room for a stroller or a wheelchair to maneuver past (see Part D below for a detailed discussion of compliance with disability laws).

- ii. When an SMD is illegally parked and there are no license plates or other evidence of registration displayed. (Vehicle Code § 22651(j)).

Note that motorized scooters are exempt from registration and license plate requirements pursuant to Section 21224. In its lawsuit against Beverly Hills, Bird asserts that this provision is therefore inapplicable to its scooters. However, the Vehicle Code section 22651(j) does not distinguish between vehicles that unlawfully fail to display evidence of registration and those that do so lawfully. So, there is an argument that it does indeed apply to scooters. A court has yet to endorse either interpretation.

Additionally, this provision seems to apply whether the SMD is illegally parked according to the Vehicle Code or a local ordinance. Vehicle Code Section 22500 prohibits vehicles from parking

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<sup>44</sup> Veh. Code § 22651.

<sup>45</sup> *Id.*

<sup>46</sup> The statute uses the word “highway” rather than “sidewalk,” but the Vehicle Code states that a sidewalk is encompassed within the term “highway”: “[A] ‘Sidewalk’ is that portion of a highway, other than the roadway, set apart by curbs, barriers, markings or other delineation for pedestrian travel.” Veh. Code § 555. See also *In re Devon C.* (2000) 79 Cal. App. 4th 929, in which the court held that, for purposes of the Vehicle Code, a boy riding his bicycle in the sidewalk was riding in the highway.

on a sidewalk. This is convenient for those cities that have banned SMDs and wish to impound as many found within their jurisdiction as possible, and awkward for those that have instituted franchise systems that allow certain SMDs and prohibit others.

- iii. When a police officer has reason to believe that the SMD has been abandoned. (Vehicle Code § 22669).

Unfortunately, there is no definition provided in the Vehicle Code for the term “abandoned,” leaving both sides with arguments to support their positions on whether or not this provision would apply to SMDs. Further discouraging a city’s use of this provision is the fact that if a traffic control officer—as opposed to a police officer—impounds pursuant to this authority, he or she must first mail or personally deliver a written report to the nearest California Highway Patrol office.<sup>47</sup> This is impractical, as abandoned SMDs are typically picked up to be recharged every evening by individuals hired by SMD companies.

This is not an exhaustive list of all scenarios in which vehicles, including shared mobility devices, may be impounded. These are, however, the main grounds that common sense suggests will apply to shared mobility devices the vast majority of the time. For the full list of circumstances under which vehicles may be impounded see Vehicle Code § 22651.

Finally, cities should be aware that there are constitutional as well as statutory limits to their impounding authority. The impoundment of a vehicle is a seizure under the Fourth Amendment and must therefore meet the constitutional standard of “reasonable.”<sup>48</sup> A seizure conducted without a warrant is per se unreasonable, so a warrantless impound must fall under the “community caretaking” exception established by the U.S. Supreme Court.<sup>49</sup> A warrantless impound undertaken solely pursuant to the Vehicle Code that does not also serve a community caretaking function is therefore an unreasonable seizure in violation of the Fourth Amendment.<sup>50</sup> The U.S. Supreme Court has determined that impounding vehicles that violate parking ordinances, impede traffic, or threaten public safety and convenience all serve “community caretaking functions” and are thus reasonable seizures.<sup>51</sup> Courts have additionally held that impounding a vehicle that is at risk of being vandalized or stolen also falls under the community caretaking exception. For example in *People v. Shafrir*, 183 Cal. App. 4th 1238, 1241 (2010), the court held that the impoundment of a legally parked car whose driver had been arrested served a community caretaking function because the car was a “new Mercedes” parked in a “high crime area.”

On the other hand, *People v. Williams*, 145 Cal. App. 4th 756 (2006) provides an example of an impound that did not meet the community caretaking standard and was thus held to be

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<sup>47</sup> Veh. Code § 22669(c).

<sup>48</sup> *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 864

<sup>51</sup> *S. Dakota v. Opperman*, 428 U.S. 364, 369 (1976).

unreasonable seizure in violation of the Fourth Amendment. In *Williams*, a police officer stopped a driver for not wearing his seatbelt, and arrested him on an outstanding warrant.<sup>52</sup> The officer impounded the driver's vehicle pursuant to Vehicle Code Section 22651(h), which authorizes an officer to impound a vehicle when he or she arrests and takes into custody the driver in control of the vehicle.<sup>53</sup> However, the court found that the impound failed to serve a community caretaking function because the vehicle was parked legally in front of the driver's home and posed no hazard to traffic.<sup>54</sup>

The three statutory justifications for impounding SMDs cited above would thus satisfy the community caretaking standard.

## **B. Electric Scooters and the California Environmental Quality Act ("CEQA")**

Regulations of SMDs must comply with the California Environmental Quality Act ("CEQA"). CEQA is intended to inform governmental decision makers and the public about potentially significant environmental effects before a project is carried out. Because SMDs have been framed as "green" transportation options, regulation of SMDs can lead to arguments regarding the environmental impact of such actions. Thus, cities should carefully consider any environmental consequences of their regulations of SMDs, and whether such regulation may qualify for an exemption from CEQA. Key questions are what environmental impact occur as result of a proposed regulation on SMDs, whether it can be determined if such effects are significant, and what is the appropriate baseline condition.

During preliminary review, a city must determine whether an activity is a "project" under CEQA. There is an argument that regulating SMDs falls outside the definition of "project." CEQA Guidelines Section 15378 (b) provides examples of actions that are not projects. For example, actions "[c]ontinuing administrative and maintenance activities, such as ... general policy and procedure making..."<sup>55</sup> or "[o]rganizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment"<sup>56</sup> are not projects. Thus, if a SMD regulations is construed as meeting these definitions, the regulation may not be a "project," and it would not be subject to CEQA. If, however, it is construed as a "project" other exemptions may apply.

While a case can be made that SMD regulations are not projects, it may be a wise to also treat regulations of SMDs as a potential project and consider exemptions. Cities that have approved ordinances regulating SMDs have cited various exemptions to CEQA to avoid undertaking an initial study and potentially further environmental review. Issues regarding some of these exemptions are discussed below. If no exemptions apply, a city will need to determine if it can

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<sup>52</sup> *Williams*, *supra*, at 759.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 760.

<sup>55</sup> CEQA Guidelines Section 15378 (b)(2).

<sup>56</sup> CEQA Guidelines Section 15378(b)(5).

be “fairly argued” based on “substantial evidence” that the SMD regulations may have a significant environmental effect. If there is a fair argument that the regulations may have significant impact, an EIR will need to be prepared.

### 1. The Environmental Effect of the Regulation of SMDs

Environmental impact determinations are particularly important in the face of regulating SMDs, which have been branded—without much evidence in support of that characterization—as environmentally-friendly mobility options. SMD Companies have positioned their devices as first mile/last mile transportation options which make transportation journeys possible without requiring the use of an automobile. These electric, battery-powered scooters create zero emissions. Advocates for their use cite the potential of SMDs to reduce traffic congestion and greenhouse gas emissions by providing alternatives to automobile transportation. Further, the Legislature has found that motorized scooters that produce no emissions do not contribute to air pollution or traffic congestion, two problems that the state finds it is of “paramount importance” to address.<sup>57</sup>

The relationships between SMD environmental benefits and regulation, however, is unclear. Banning SMDs may not create a physical change in the environment, especially in instances where the baseline conditions are those with few or no SMDs. Permitting SMDs could have a physical impact on the environment due to pedestrian conflicts and abandoned scooters. In the former cases, alleged environmental impacts are based on an argument that allowing SMD operation will offset automobile use and resulting impacts from congestion or emissions, and that restricting SMDs will lead to an increase in automobile use, resulting in increased congestion and emissions. Depending on the circumstances, there could be legitimate arguments that the regulation of SMDs could have a significant environmental impact. The Portland, Oregon Bureau of Transportation conducted a survey and found that SMDs replaced some personal driving or ride-hailing trips.<sup>58</sup> But the study also concluded that they replaced walking and biking trips.<sup>59</sup> Thus, there is not a clear causal relationship between limiting or taking SMDs off the road and increases in automobile traffic in all scenarios, and arguments that restricting SMDs will cause negative environmental impacts may be speculative unless

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<sup>57</sup> Veh. Code §21220. “(a) The Legislature finds and declares both of the following: (1) This state has severe traffic congestion and air pollution problems, particularly in its cities, and finding ways to reduce these problems is of paramount importance. (2) Motorized scooters that meet the definition of Section 407.5 produce no emissions and, therefore, do not contribute to increased air pollution or increase traffic congestion.

(b) It is the intent of the Legislature in adding this article to promote the use of alternative low-emission or no-emission transportation.”

<sup>58</sup> Portland, Or. Bureau of Transportation, 2018 E-Scooter Findings Report, 6, 20, <https://www.portlandoregon.gov/transportation/article/709719>. (last visited Mar. 27, 2019). 34 percent of Portland riders and 48 percent of visitors surveyed used an e-scooter instead of driving or using a rideshare service.

<sup>59</sup> 37 percent of Portlanders would have walked and 5 percent would have ridden a personal bicycle instead of using an e-scooter.

supported by data. Any relationship between the regulation and the environmental impact may be dependent upon the unique facts of the jurisdiction.

Cities should be prepared to evaluate the impact of regulating SMDs and should consider how the impacts of the regulations stack up against the relevant environmental standards for determining the impact significance threshold. Cities should consider framing their regulations to fit within a CEQA exemption, such as those discussed below.

## 2. CEQA Exemptions

Cities that have acted to regulate scooters have cited several exemptions from CEQA. Below, four particular exemptions are discussed. But, some cities have also relied on other exemptions.

### i. Common Sense Exemption

CEQA does not apply to projects when the lead agency determines "with certainty that there is no possibility that the activity in question may have a significant effect on the environment."<sup>60</sup> A lead agency's determination that the common sense exemption applies must be supported with factual evidence "demonstrating that the agency considered possible environmental impacts in reaching its decision."<sup>61</sup> This is especially true where opponents of the project have raised arguments regarding possible significant environmental impacts.<sup>62</sup> But, "[d]etermining whether a project qualifies for the common sense exemption need not necessarily be preceded by detailed or extensive factfinding. Evidence appropriate to the CEQA stage in issue is all that is required."<sup>63</sup>

### a. Prohibitions on SMDs

It is possible that the argument relating to the existence of environmental impact depends on the level of inundation of SMDs in a city, making the determination of the baseline conditions a potentially important inquiry. For example, in a city where scooters have not yet arrived, the banning of scooters would not change the environmental conditions that existed prior to the regulations. In a city that has been saturated with scooters, however, there is a stronger argument that regulations that take scooters off the road could have an environmental impact by reducing zero-emission transportation options without replacing them, causing travelers to revert back to either walking, biking or making automobile trips to fill the gap. But, it is unclear

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<sup>60</sup> 14 Cal. Code Regs §15061(b)(3); *See Muzzy Ranch Co. v. Solano Cty. Airport Land Use Com.*, 41 Cal. 4th 372, 386 (2007), *as modified* (Sept. 12, 2007) (explaining application of exemption).

<sup>61</sup> *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 117 (1997), *as modified on denial of reh'g* (Apr. 29, 1997); *California Farm Bureau Fed'n v. California Wildlife Conservation Bd.*, 143 Cal. App. 4th 173, 195 (2006) (stating that a party challenging what is essentially a claim of the common sense exemption under Guidelines section 15061, subdivision (b)(3), unlike a party asserting an exception to a categorical exemption, need only make a "slight" showing of a reasonable possibility of a significant environmental impact).

<sup>62</sup> *Davidon Homes*, 54 Cal. App. 4th at 117.

<sup>63</sup> *Muzzy Ranch Co.*, 41 Cal. 4th at 388.



whether such substitution would cause an increase in automobile use, and the answer likely depends on the circumstances unique to the area. While it is possible that some SMD users would replace their journey by relying on cars, it is also possible that those users would walk or bike. When determining the baseline, however, the current use of SMDs in the city, regardless of whether their operation has been legal, will likely factor into the existing conditions.<sup>64</sup>

Thus, to justify a ban as fitting within this exemption, cities should have some evidence to support that no significant environmental effect will result from prohibiting SMDs on the public right-of-way. Cities seeking to rely on this exemption should build an administrative record showing they considered the potential environmental impacts and demonstrating that there is no possibility of a significant environmental impact. To do so, cities may consider including a discussion of the impact on automobile traffic associated with regulating the use of SMDs. If a city is acting to take scooters off the road/sidewalk, it may consider whether a prospective increase in automobile traffic would surpass the threshold of significance and relevant environmental standards. This may present an intersection with the new CEQA Guidelines section 15064.3. This section establishes vehicle miles traveled (“VMT”)<sup>65</sup> as the appropriate measure of transportation impacts, shifting away from the level of service (“LOS”) analysis. Under a ban, it would be difficult to quantify alleged traffic shifts to show an impact to the LOS. Additionally, while a permitting system could be argued to slightly improve VMT, a ban would likely not substantially increase VMT, regardless of the level of SMD inundation in the jurisdiction, because of the short nature of SMD trips and the likelihood that some replacement trips would be walking or bicycle trips, not vehicle trips. Overall, cities should also be prepared to address challenges from SMD companies, which will likely incorporate data intended to show that SMDs reduce congestion and emissions by replacing automobile trips.

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<sup>64</sup> California courts have required that baselines be defined as the existing conditions, even where illegal activity has altered the baseline, making illegal conditions, such as the operation of SMDs on sidewalks or operation of SMDs while banned, part of the baseline. See, e.g., *Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428, 1452–1453, (1999) (baseline for a proposed quarry development was the actual condition of the land, even though some existing environmental degradation had resulted from prior illegal mining and clearing activities); *Fat v. County of Sacramento*, 97 Cal.App.4th 1270, 1278–1280 (2002) (baseline for airport expansion was existing airport operations, even though the airport had been operating and had expanded without a required permit for several years); *Eureka Citizens for Responsible Government v. City of Eureka*, 147 Cal.App.4th 357, 370–371 (2007) (baseline for proposed school playground use was the existing playground facility, even though prior construction of the facility may have violated the city's code).

*Riverwatch v. County of San Diego*, 76 Cal. App. 4th 1428 (1999) (holding that trial court abused its discretion by requiring an EIR account for prior illegal activity by using an early baseline from which impacts could be measured.

<sup>65</sup> “Vehicle miles traveled” refers to the amount and distance of automobile travel attributable to a project. CEQA Guidelines Section 15064.3(a).

## **b. SMD Permitting Schemes**

SMD regulatory permit schemes have also relied on this exemption.<sup>66</sup> Establishing a permit process for SMDs can ensure the companies' operations do not impede the use or safety of streets and sidewalks, but also shows that a city is exploring mobility options that do not rely on cars. SMD companies may be less willing to challenge exemptions from CEQA used in ordinances approving permit programs in which they will participate. Yet, there could be an argument that any cap on SMD use would cause a detrimental environmental effect if it increases car use enough to trigger a significant effect on the environment, again involving a determination of the relevant baseline. However, as noted above, without evidence these claims run the risk of being speculative.

Overall, in assessing whether there is no possibility of an environmental impact from regulating scooters, cities should be prepared to address the impact of the regulation on the number of SMDs, and the resulting transportation impacts. If the city can show that it can be seen with certainty that there is no possibility that the action may have a significant impact, this exemption may be appropriately applied to exempt the regulation from CEQA.

### **ii. No Expansion of Facilities**

The Class 1 categorical exemption from CEQA applies to existing facilities, and includes projects that consist of negligible or no expansion of the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures [or] facilities,"<sup>67</sup> including streets, sidewalks, bicycle and pedestrian trails, and similar facilities.<sup>68</sup>

The regulation of SMDs in cities' public-rights-of way appears to fit within this exemption because it consists of alternate operation (and perhaps permitting) of public streets, sidewalks, and similar facilities, that (arguably) result in a negligible expansion of use akin to adding bicycle facilities, and similar alterations that do not create additional automobile lanes.

### **a. Prohibitions on SMDs**

Banning SMDs does not create an increase or expansion in SMD use of existing facilities, and can be construed as consisting of the operation of existing public facilities such as streets, sidewalks, and bike lanes. But, depending on the baseline condition, there could be an argument that the effect of completely banning SMDs would be to increase road use by automobiles. Negligible expansions of facilities are appropriate, but not those that create

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<sup>66</sup> See, e.g., OAKLAND Ordinance No. 13502, § 3, (Sep. 17, 2018).

<sup>67</sup> CEQA Guidelines § 15301.

<sup>68</sup> *Id.* at § 15301(c). Amended in the new CEQA Guidelines to incorporate the emphasized text: "Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety, and other alterations such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, transit improvements such as bus lanes, pedestrian crossings, street trees, and other similar alterations that do not create additional automobile lanes)."

additional automobile lanes. Banning scooters would not add automobile lanes, but it could foreseeably lead to an increase in automobile traffic under the theory that SMDs replace a degree of automobile traffic. However, this concern is likely more appropriately raised to challenge a determination of a finding of no significant environmental impact rather than an existing facilities exemption. Further, absent evidence establishing this connection, this argument could be fatally speculative.

### **b. SMD Permitting Schemes**

Regulating SMDs through a permit system also falls within this exemption. The exemption specifically applies to the “permitting” of facilities that include streets, sidewalks, bike lanes, and bicycle share facilities. Again, the baseline use of the facilities may depend on the level of SMD inundation in a city. But, the cap on permits likely keeps any expansion in the use of facilities within the negligible expansion territory.

Thus, if a city can build a record to show that that its SMD regulations consist of alternate operation of public streets, sidewalks, and similar facilities, that will result in a negligible expansion of use akin to adding bicycle facilities, and similar alterations that do not create additional automobile lanes, this exemption will likely be available.<sup>69</sup>

Lead agencies are not required to prepare studies to support determinations that the categorical exemption applies,<sup>70</sup> but the determination should be supported by evidence. Of course, cities must also be conscious of the exceptions to categorical exemptions, including activities where a reasonable probability exists that there will be a significant environmental effect due to unusual circumstances, or where the impact of successive activities of the same type in the same place are significant.<sup>71</sup>

### **iii. Action Taken to Prevent or Mitigate an Emergency**

If an action is “necessary to prevent or mitigate an emergency” it may also be exempt from CEQA.<sup>72</sup> This may fit nicely with findings for urgency ordinances. The applicability of this provision to a ban on SMDs, however, is likely to be heavily fact dependent. “Emergency” is defined as “a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate a loss of, or damage to, life, health, property, or essential public services.”<sup>73</sup> Cities initially faced with an inundation of SMDs could make a claim that bans on SMDs are necessary to prevent the loss of life or damage to health or

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<sup>69</sup> Cities should also ensure that exceptions to the categorical exemptions do not apply.

<sup>70</sup> *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles*, 90 Cal. App. 4th 1162, 1172 (2001), *as modified* (Aug. 8, 2001).

<sup>71</sup> CEQA Guidelines § 15300.2(b)&(c).

<sup>72</sup> Cal. Pub. Res. Code § 21080(2).

<sup>73</sup> *Id.* at 21060.3.

property. As discussed below in part III.C.i, the use of SMDs has resulted in fatalities, and their operation has resulted in injuries to individuals and property in jurisdictions across the country where they have been deployed. The wave of injuries has become so prevalent that some public officials have the SMD-related injury trend a “public health disaster in the making.”<sup>74</sup> Given this context, it is possible that a jurisdiction could support a finding of an emergency to justify a ban on SMDs.

But, an argument that a city is facing an emergency a substantial time period after SMDs arrive could be strained, unless the city is able to show that the time period was necessary to understand the nature of the emergency.

#### **iv. Project Disapproval**

If a project is disapproved or rejected, it is not subject to CEQA.<sup>75</sup> This option could be available to a city if the city is considering a regulatory program, but instead opts not to adopt the program and bans SMDs.

### **3. CEQA Summary**

Overall, the decisions to either ban or permit SMDs could trigger CEQA issues, given arguments regarding the environmental impacts of allowing or banning SMDs. Cities should consider how to frame the activity as a non-project, or to fit into an exemption. In conducting this analysis, the determination of the baseline will be particularly important. Overall, cities should build records to support their determinations.

## **C. Electric Scooters and Injury Liability**

### **1. Liability Challenges**

In addition to the legal risk cities face from SMD Companies challenging their regulation of SMDs, cities may also face legal risk arising from the operation of SMDs in their jurisdiction, including liability arising from injuries caused by dangerous conditions of the public right-of-ways.

The spread of SMDs has resulted in an increase in injuries. Though comprehensive data does not appear to exist at this time, it is clear that the proliferation of SMDs has caused an increase in injuries in cities across the country where SMDs have been released. SMD-related accidents

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<sup>74</sup> Joshua Emerson Smith, *San Diego Mayor Floats New Rules for Dockless Scooters*, SAN DIEGO UNION-TRIBUNE (Oct. 19, 2018), <http://www.govtech.com/fs/San-Diego-Mayor-Floats-New-Rules-for-Dockless-Scooters.html> (referring to a September 2018 statement by public health officials at Scripps Mercy Hospital in San Diego). (last visited Mar. 27, 2019).

<sup>75</sup> Cal. Pub. Res. Code § 21080(3).

have caused several fatalities.<sup>76</sup> The most recent SMD-related fatality occurred in San Diego in March, when a man crashed a SMD he was operating into a tree.<sup>77</sup> Comparing the rise in scooter-related injuries to a diseases outbreak, the Centers for Disease Control, in collaboration with the City of Austin, Texas, has conducted an epidemiological study with the goal of developing and evaluating methods to find and count the number of injuries caused by SMDs.<sup>78</sup>

A prospective SMD accident could result in liability for multiple parties. For example, depending on the circumstances, liability could be attributed to a SMD operator riding without due care, to a negligent third-party such as a driver crashing into a SMD operator, to the SMD company for not complying with safety laws or for providing defective scooters, and potentially to the local government for injuries caused by dangerous conditions of the public property where the SMD was being operated. With so many potentially liable parties, plaintiffs and plaintiffs' attorneys will likely seek to include as many prospective defendants as possible. And, as is often the case, plaintiffs are likely to include defendants viewed as having deeper pockets, like the SMD companies<sup>79</sup> and cities.

Liability for cities could arise under a theory of dangerous conditions on public property. Government Code Section 830 defines "dangerous condition" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Pursuant to Government Code Section 835, a city may be liable for injury caused by a dangerous condition of its property if the plaintiff establishes: (1) that the property was in a dangerous condition at the time of the injury, (2) that the injury was proximately caused by the dangerous condition, and (3) that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred. A plaintiff must also establish either: (4) that a city employee negligently or wrongfully created the dangerous condition; or (5) that the city had actual or constructive notice of the dangerous condition before the incident.

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<sup>76</sup> Ryan Felton, *E-Scooter Ride-Share Industry Leaves Injuries and Angered Cities in its Path*, CONSUMER REPORTS (Feb. 5, 2019), <https://www.consumerreports.org/product-safety/e-scooter-ride-share-industry-leaves-injuries-and-angered-cities-in-its-path/>. (last visited Mar. 27, 2019).

<sup>77</sup> Kucher, *supra* note 36.

<sup>78</sup> Luz Lazo, *The CDC is studying e-scooter injuries*, WASH. POST (Mar. 19, 2019), [https://www.washingtonpost.com/transportation/2019/03/15/cdc-is-studying-e-scooter-injuries/?utm\\_term=.a4659e99260d](https://www.washingtonpost.com/transportation/2019/03/15/cdc-is-studying-e-scooter-injuries/?utm_term=.a4659e99260d). (last visited Mar. 27, 2019).

<sup>79</sup> For example, on October 19, 2018 plaintiffs filed a class action lawsuit against Bird and Lime, as well as the manufacturers of their devices, in Los Angeles Superior Court. See *Danielle Borgia, et al. v. Bird Rides, Inc., et al.*, No. 18STCV01416. (L.A. Cty. Super. Ct. filed Oct. 10, 2018), available at <http://src.bna.com/CFM>. (last visited Mar. 27, 2019). The plaintiffs assert claims for strict products liability, negligence, negligence per se, gross negligence, breach of implied warranties of fitness for a particular purpose and merchantability, public nuisance, declaratory and injunctive relief, and aiding and abetting assault. These claims arise from injuries plaintiffs suffered from tripping on scooters left in sidewalks, being crashed into by scooter riders, having a car crashed into by a scooter, being blocked from a parking space, and being thrown off a scooter when the device's accelerator malfunctioned.

Under this standard, if all the elements are met a city could be liable for injuries resulting from a SMD accident caused by dangerous physical conditions of a public right-of-way. It is unclear if SMD riders are more susceptible to certain dangers from public property than pedestrians or bicycle, which already use such public facilities. But, the prevalence of SMD traffic may increase exposure for contact with property which could be argued to be dangerous.<sup>80</sup>

Further, it is not only structural defects that can create a dangerous condition. Plaintiffs may also seek to hold cities liable for the conditions of sidewalks because of the city's failure to maintain them in a safe condition in the context of the sidewalks being overrun with SMDs, where it is reasonably foreseeable that this condition would create the risk of injury. For example, San Diego was sued in March by a plaintiff, injured when teenagers on an electric scooter lost control and caused a bicyclist to crash into his wheelchair, alleging that the city is liable for creating a dangerous condition on public property because it does not have regulations in place that would require geofencing, speedometers and signs warning pedestrians that the boardwalk was also used by scooters, whose speed could not be monitored.<sup>81</sup>

The decision of whether to or not to regulate scooters itself should not impose liability on a city. Pursuant to Government Code Section 818.2, "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law."<sup>82</sup> California courts have generally recognized that even where cities may reasonably foresee that some motorists and pedestrians will use public-right-of-ways in a negligent manner to the injury of others it does not make them joint tortfeasors with every motorist or pedestrian who uses the right-of-way to injure another.<sup>83</sup>

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<sup>80</sup> There may also be an argument that design immunity pursuant to Government Code Section 830.6 is available if a city can trace back approval to the improvements at issue and support the reasonableness for the design.

<sup>81</sup> Moran, *supra* note 35.

<sup>82</sup> "This immunity is necessary to protect the essential governmental function of making laws, so that the judiciary does not question the wisdom of every legislative decision through tort litigation." *Wood v. Cty. of San Joaquin*, 111 Cal. App. 4th 960, 972 (2003), *as modified* (Sept. 5, 2003).

<sup>83</sup> In *Campbell v. City of Santa Monica*, 51 Cal. App. 2d 626 (1942), the court held that the city was not liable for injuries sustained by plaintiff, as a result of being struck by a privately owned automobile driven by a member of the public along a pedestrian walkway known as the "Promenade," where the city granted permits that allowed certain motor vehicles to use a pedestrian walkway, which had no barriers to protect pedestrians from the motor vehicles on the walkway. The court stated that a "city is liable only for its own shortcomings. Where a city provides streets or sidewalks, or both, it does so with the expectation that motorists and pedestrians will make a lawful and not an unlawful use of them. The fact that the city may reasonably foresee that some motorists and pedestrians will use them in a negligent manner to the injury of others does not make it a joint tort-feasor with every motorist or pedestrian who uses them to the injury of another. While a city may by ordinance prohibit a misuse or negligent use of its streets and sidewalks, its failure to enforce such an ordinance imposes no liability upon it, in the absence of statute."

But, this “does not excuse the City for violating its duty, to avoid the creation of conditions that are dangerous to its citizens or the public generally.”<sup>84</sup> Thus, while a city may not be liable for failing to enact an ordinance regulating scooters, a city may face liability if it appears to affirmatively encourage the use of scooters in public right-of-ways in a dangerous manner<sup>85</sup> or fails to act knowing the use of devices in the public right-of-ways causes dangerous conditions of public property. These are the conditions that plaintiffs will likely allege, regardless of how SMDs are or are not regulated in a city. To reduce liability exposure cities should enforce state laws to keep SMDs off of sidewalks and, as discussed below, out of ADA access areas. Further, the City should consider crafting regulations to restrict the use of SMDs in areas where SMD operation has a history of causing injuries or otherwise protect pedestrians from potentially dangerous conditions.

## 2. Opportunities to Control Liability

The extent of exposure of a city’s liability for injuries caused in part by SMD operation in the city is very fact-specific. However, despite these challenges, banning or regulating SMDs through permit systems provides some opportunities to help cities deal with the SMD problems facing their community. If relying on a ban of SMDs, cities can reduce exposure through minimizing potential incidences of scooter accidents in the jurisdiction. As a result of a ban, there will be less, if not any, SMDs operated in the city, and therefore less potential for SMD accidents.

Regulating through a permit system provides a vehicle, to incorporate protections for a city. First, permit programs may create a source of funding for the City to undertake public improvements to reduce risks associated with flawed conditions of public property. Bird had planned to give cities one dollar per scooter per day to buildout bike lane infrastructure so that SMDs could operate outside sidewalks. However, Bird has since abandoned this plan. But, some cities negotiated this type of fee into their permit agreements with Bird.<sup>86</sup> Additionally, permit requirements can secure funding so that property conditions damaged by the use of SMDs are repaired and potentially dangerous conditions are not created. In San Francisco, for example, SMD permittees are required to provide an endowment specifically dedicated to

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<sup>84</sup> *Quelvog v. City of Long Beach*, 6 Cal. App. 3d 584, 591 (Ct. App. 1970) (holding that complaint alleging that city not only failed to enforce state law prohibiting operation of motor vehicles upon public sidewalks, but affirmatively encouraged such operation of motor vehicles by creating and maintaining easy means of access to sidewalks, and by informing operators of ‘autoettes’ and similar motorized vehicles that they could use sidewalks without interference by police sufficiently alleged cause of action against city on theory of creating and maintaining dangerous condition).

<sup>85</sup> *See id.*

<sup>86</sup> Angie Schmitt, *Bird Quietly Ends a Much-Hyped Bike Lane Subsidy*, STREETS BLOG USA (Jan 10, 2019), <https://usa.streetsblog.org/2019/01/10/bird-quietly-ends-a-much-hyped-bike-lane-subsidy/>. (last visited Mar. 27, 2019).

repair and maintenance and are required to reimburse costs associated with repair and maintenance of public property.<sup>87</sup>

Second, through regulation, cities can control some degree of liability by requiring that SMD companies assent to indemnification agreements. Such agreements can be crafted to address the city's liability concerns. For example, Santa Monica has a codified limitation on municipal liability.<sup>88</sup> In the indemnification agreement required of operators, operators must agree to indemnify, defend, and hold harmless the city for claims arising from the city's permitting process and from injuries connected with any "use, misuse, placement or mis-placement of any of the Operator's device or equipment by any person, except ...[that injury] caused by the sole willful misconduct of the City."<sup>89</sup> The San Francisco's permit program also requires permittees to indemnify the city releasing the city from liability for injuries other than those caused by "gross negligence or willful misconduct of the city."<sup>90</sup> In the Los Angeles pilot program, the indemnification clause also specifically required indemnification for alleged violations of the ADA.<sup>91</sup>

Scooter companies, however, have pushed back on what they see as expansive indemnity language. For example, in Oakland, the draft indemnification provision included in the terms and conditions to operate SMDs in the city contained a provision that released the city "from liability for injuries 'arising out of, or relating to the design, construction, maintenance, repair, replacement, oversight, management, or supervision of any physical, environmental, or dangerous conditions' of public streets."<sup>92</sup> Representatives of scooter companies sent a letter to the city attorney, and other officials challenging the language, noting that "[m]any cities have adopted reasonable indemnification provisions which do not seek to include the city's own negligence and does not explicitly carve out the city's responsibility to riders to maintain the city's right of way and infrastructure."<sup>93</sup>

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<sup>87</sup> SFMTA Powered Scooter Share Permit Terms and Conditions (Oct. 12, 2018), [https://www.sfmta.com/sites/default/files/reports-and-documents/2018/10/scooter\\_program\\_terms\\_conditions\\_and\\_guidline\\_10.12.18\\_0.pdf](https://www.sfmta.com/sites/default/files/reports-and-documents/2018/10/scooter_program_terms_conditions_and_guidline_10.12.18_0.pdf) [hereinafter "SFMTA Powered Scooter Share Permit Terms and Conditions"]. (last visited Mar. 27, 2019).

<sup>88</sup> SANTA MONICA MUNICIPAL CODE § 3.21.070 ("Limitations on City liability").

<sup>89</sup> Santa Monica Administrative Regulations (Exhibit B "Indemnification and Insurance Agreement").

<sup>90</sup> SFMTA Powered Scooter Share Permit Terms and Conditions.

<sup>91</sup> City of Los Angeles Department of Transportation Dockless On-Demand Personal Mobility Conditional Use Permit Rules and Guidelines (Oct. 1, 2018), <https://ladot.lacity.org/sites/g/files/wph266/f/LADOTDocklessCP.pdf>. (last visited Mar. 27, 2019).

<sup>92</sup> Rachel Swan, *Scooter companies tussling with Oakland over who pays for injuries*, S.F. CHRONICAL (Feb. 20, 2019) (9:04 pm), <https://www.sfchronicle.com/bayarea/article/Scooter-companies-tussling-with-Oakland-over-who-13632424.php>. (last visited Mar. 27, 2019); City of Oakland Dockless Scooter Share Program: Terms and Conditions and Permit Application (Draft 3.0 December 11, 2018), <https://www.oaklandca.gov/documents/oak-dot-scooter-sharing-terms-and-conditions-december-2018>. (last visited Mar. 27, 2019).

<sup>93</sup> *Id.*



Third, regulations may also require the companies to maintain insurance policies. Santa Monica's code requires that permittees maintain insurance as determined necessary by the Risk Manager, naming the City as an additional insured.<sup>94</sup> The administrative regulations set the minimum requirements and require each operator to procure and maintain commercial general liability insurance with limits of no less than \$5 million per occurrence and no aggregate annual limit, as well as Workers' Compensation insurance as with Statutory Limits and Employers' Liability Insurance with limits of no less than \$1,000,000 per accident for bodily injury or disease. San Francisco also imposes insurance requirements on scooter permittees which include that companies maintain the following insurance coverages: Workers' Compensation, Commercial General Liability, Commercial Automobile Liability, Professional Liability, and Cyber and Privacy insurance.<sup>95</sup> San Diego's proposed regulations would require each operator to procure and maintain commercial general liability insurance with limits of \$2 million per occurrence and a \$4 million aggregate, as well as a \$4 million umbrella policy.<sup>96</sup>

Fourth, through regulation cities can require other safety requirements of SMD operators as a condition of their operation in the city. This could include public education programs regarding safe riding and applicable laws ranging from where SMDs can be operated to how they should not be left in ADA access areas. Santa Monica, for example, requires certain maintenance obligations of SMD companies. But, Bird has been sued, by a former mechanic for Bird, for allegedly violating the safety requirements of their operation agreement with the City of Santa Monica.<sup>97</sup>

Overall, the operation of SMDs within a jurisdiction exposes that jurisdiction liability based on a number of different theories. Thus, cities should consider their own circumstances and assess their potential liability when considering how to address SMDs. If the goal is to reduce the prevalence of SMDs and limit liability in the jurisdiction, a ban may be the best route. However, liability can also be addressed through a regulatory permit scheme and imposition of requirements on SMD companies so that they shoulder the risks associated with or caused by their use of public rights-of-way. Finally, jurisdictions that do not regulate may still be subject to liability with less opportunity mitigate liability risks and shift the liabilities to the SMD companies where they arguably belong.

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<sup>94</sup> SANTA MONICA MUNICIPAL CODE § 3.21.070(b).

<sup>95</sup> SFMTA Powered Scooter Share Program Permit Application (May 23, 2018), [https://www.sfmta.com/sites/default/files/reports-and-documents/2018/05/powered\\_scooter\\_share\\_program\\_permit\\_application.pdf](https://www.sfmta.com/sites/default/files/reports-and-documents/2018/05/powered_scooter_share_program_permit_application.pdf). (last visited Mar. 27, 2019).

<sup>96</sup> City of San Diego Staff Report, Regulation of Shared Dockless Mobility Devices (Feb. 2, 2019), [https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/Staff%20Report%20for%20-%20%20\(\).pdf?meetingId=1488&documentType=Agenda&itemId=33275&publishId=152805&isSection=false](https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/Staff%20Report%20for%20-%20%20().pdf?meetingId=1488&documentType=Agenda&itemId=33275&publishId=152805&isSection=false). (last visited Mar. 27, 2019).

<sup>97</sup> Madeleine Pauker, *New lawsuit claims deficiencies in scooter safety*, SANTA MONICA DAILY PRESS (Feb. 07, 2019 5:03 PM), <https://www.smdp.com/new-lawsuit-claims-deficiencies-in-scooter-safety/172675>. (last visited Mar. 27, 2019).

#### D. Electric Scooters and ADA Compliance

The proliferation of scooters on public-right-of-ways also has the potential to conflict with a city's obligations under the Americans with Disabilities Act (ADA) and other laws which prohibit discrimination against disabled persons.<sup>98</sup> The ADA prohibits discrimination and ensures equal opportunity for persons with disabilities.<sup>99</sup> Under the ADA, disabled persons may not be "excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."<sup>100</sup> A city must ensure that its services, programs, or activities, when viewed in their entirety, are readily accessible to and useable by individuals with disabilities.<sup>101</sup> A city must take affirmative steps to make reasonable modifications to their policies, practices or procedures when necessary to avoid discrimination on the basis of disability.<sup>102</sup> The Ninth Circuit has held that facilities within the public right of way, such as public sidewalks, are a service, program, or activity of the city within the meaning of Title II of the ADA.<sup>103</sup> Thus, cities must ensure that their public right-of-ways, when viewed in their entirety, are readily accessible to and useable by individuals with disabilities and must take affirmative steps to avoid discrimination on the basis of disability as it relates to accessible right-of-ways. Compliance with these requirements requires addressing the waves of SMDs, whether whizzing down sidewalks or left unattended in sidewalks and obstructing ADA-required access.

Allegations of ADA violations have been leveled against some cities that ban SMD operation as well as some that do not regulate SMDs. For example, in January 2019, San Diego was sued for alleged violations of Title II of the ADA as well as other laws requiring open access of the sidewalks and prohibiting discrimination against the disabled.<sup>104</sup> The suit alleges "[t]he City of San Diego has failed to adequately maintain the system of sidewalks, crosswalks, curb ramps, transit stops, pedestrian crossings and other walkways, by allowing dockless scooters used primarily for recreational purposes to proliferate unchecked throughout San Diego and to block safe and equal access for people with disabilities who live in or visit the City. Defendant City of San Diego has thereby denied Plaintiffs the benefits of the City's services, programs, and activities based on their disabilities."<sup>105</sup> The plaintiff's further assert that the city has "intentionally or recklessly overlooked the egregious actions of the Scooter defendants and their severe negative impact on disability access" through their dockless business model by

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<sup>98</sup> 42 USC §12131 *et seq.* See also The Rehabilitation Act (29 U.S.C. §794, *et seq.*), and California Government Code sections 4450, 11135, 54 *et seq.*, 51 *et seq.* (Unruh Civil Rights Act).

<sup>99</sup> 42 U.S.C. §§ 12101 *et seq.*

<sup>100</sup> 42 U.S.C. § 12132; 28 C.F.R. § 35.149.

<sup>101</sup> 28 C.F.R. § 35.150(a).

<sup>102</sup> 28 C.F.R. § 35.130(b)(7).

<sup>103</sup> *Barden v City of Sacramento*, 292 F3d 1073, 1076 (9th Cir 2002).

<sup>104</sup> *Montoya et al v. Bird Rides Inc. et al.*, No. 3:19-cv-00054-JM-BGS (S.D. Cal. filed Jan. 9, 2019), <https://www.classaction.org/media/montoya-et-al-v-city-of-san-diego-et-al.pdf>. (last visited Mar. 27, 2019). The plaintiffs allege that the city violated Title II of the Americans With Disabilities Act, The Rehabilitation Act, and California Government Code sections 4450, 11135, 54 *et seq.*, 51 *et seq.*

<sup>105</sup> *Id.* at 9.

failing to enforce San Diego Municipal Code provisions which prohibit objects to be placed in the public right of way.<sup>106</sup> As noted above, San Diego does not have specific SMD regulations at this time. The complaint specifically references this in the ADA cause of action, alleging that the city “failed and continues to fail to adopt, implement, or enforce ordinance or other regulations necessary to ensure that the system of sidewalks, crosswalks, transit stops, curb ramps, pedestrian crossings and other walkways are kept free of the Scooter obstructions.”<sup>107</sup>

However, even cities that do regulate or ban SMDs may face plaintiffs asserting ADA violations. For example, in October 2018 an individual plaintiff filed a class action suit against Bird as well as the cities of Beverly Hills (which has banned SMDs), Santa Monica (which has regulated SMDs through a permitting system), and Los Angeles (which has regulated SMDs through conditional use permits and a pilot permitting system), asserting ADA violations in relation to denial of access to the sidewalk.<sup>108</sup>

It is unclear how these ADA cases will be resolved, but cities should be mindful of their ADA obligations when deciding how to regulate scooters in their jurisdictions. In particular, cities should act to keep scooters off of sidewalks and should keep scooters from being parked or abandoned in the ADA access portions of the public right-of-way. In the end, however, whether a city is able to maintain accessible sidewalk systems as required by the ADA comes down to how the devices are actually used and the city’s efforts in enforcing regulations that keep the sidewalks clear of obstruction, which is yet another example of the way in which these operations impose costs on cities to mitigate liability risks that arguably should be factored into the SMD companies’ costs of doing business.

#### **IV. Conclusion**

SMDs offer innovative mobility options that may serve an important role in the transportation planning of both individuals and cities. Despite these benefits, SMDs have their critics and present cities with legitimate concerns for the safety and welfare of their residents and visitors. As such, cities are placed in a precarious position of deciding whether and how to regulate SMDs in their jurisdictions. As addressed above, cities must be mindful when making these decisions of exposure to liability either both from regulating, or from failing to regulate SMDs enough (or at all). On one hand, efforts to regulate may be challenged by SMD companies who likely will argue that the ability of local jurisdictions to regulate is limited by the Vehicle Code or on other grounds. Yet, there may be authority for cities to prohibit SMDs on local streets and sidewalks, or to institute a permitting scheme that limits which SMD companies are allowed to operate, and regulates the manner and conditions of any such operations. On the other hand, individuals may challenge what they see as insufficient regulation where the operation of SMDs cause dangerous conditions, restrict access to the city’s public right-of-ways, or (allegedly)

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<sup>106</sup> *Id.* at 10.

<sup>107</sup> *Id.* at 19.

<sup>108</sup> *Labowitz v. Bird et al*, No. 2:18-cv-09329 (C.D. Cal. filed Oct. 31, 2018), available at <https://www.courthousenews.com/wp-content/uploads/2018/11/Scooters.pdf>. (last visited Mar. 27, 2019).

caused individual injury or harm. In these instances, cities should consider craft their regulations to insulate the city from liability associated with the dangers of SMD operation, and shift the risk to the SMD companies where it arguably should reside.

In addition to the issues addressed in this paper, the regulation of SMDs also presents several other interesting issues and opportunities that cities should consider, such as those relating to the data captured and shared in connection with the operation of SMDs and to issues of equity in access.

It remains to be seen whether the courts or the Legislature will clarify the role of local governments in regulating SMDs. In the meantime, as with other shared economy and disruptive businesses like short term rentals (Airbnb, VRBO, etc.) and parking squatters “selling” public parking (Monkey Parking,<sup>109</sup> etc.), local governments will continue to find themselves on the forefront in dealing with these issues arising from SMDs and balancing the provision of mobility opportunities and the safety of their residents and visitors.

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<sup>109</sup> See Marcus Wohlsen, *App That Lets Users Sell Public Parking Spots is Told to Shut Down*, WIRED (June 23, 2014 3:37 PM), <https://www.wired.com/2014/06/app-that-lets-users-sell-public-parking-spots-is-ordered-to-shut-down/>. (last visited Mar. 27, 2019).