

From: [Sheri Hartz](#)
To: [Nancy Humphrey](#); [Thai Nam Pham](#)
Subject: RE: BIRD's Suggested Language for the E-Scooter Ordinance
Date: Tuesday, March 19, 2019 3:19:31 PM

Thanks, Nancy. We will handle as late correspondence – posting and providing copies to Council and public.

Sheri

From: Nancy Humphrey
Sent: Tuesday, March 19, 2019 3:17 PM
To: Thai Nam Pham <tpham@emeryville.org>; Sheri Hartz <shartz@emeryville.org>
Subject: FW: BIRD's Suggested Language for the E-Scooter Ordinance

This is the email I received this morning re: scooters. It's addressed to staff, not Council, but I thought I'd let you see it in case you have a different interpretation.

Nancy Humphrey
Environmental Programs Supervisor

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Tel. 510-596-3728

From: Marty Fatooh [<mailto:mfatooh@bird.co>]
Sent: Monday, March 18, 2019 11:13 PM
To: Nancy Humphrey <nhumphrey@emeryville.org>
Subject: BIRD's Suggested Language for the E-Scooter Ordinance

Dear Ms. Humphrey and City Staff:

On behalf of everyone at Bird, we are excited that the City of Emeryville has joined countless cities around the world by drafting model legislation which relates to alternative modes of transportation. At Bird, we put cities first and we are looking forward to providing our global service to the residents, visitors, and businesses of Emeryville. The ordinance that has been put forward by the City Attorney and Public Works Department will compliment both e-scooter operators and the public, however we have suggested a few modifications to the ordinance in its current format. Below, I have listed the suggested changes.

4-13.03.- Dockless Shared Mobility System Operator Requirements

- a. Prior to Permit issuance, Permit applicant shall provide the City with a full list of unique identifying numbers for each proposed Permitted Device.

Proposed Change- Operators shall inform Users on how to properly park a Device. Operators shall provide a quarterly report to the City on the effectiveness of efforts to enforce proper parking within their mobile application; the report shall include information on the number and description of incidents of improper parking reported to or found by the Operator, the minimum, maximum, and average response time to these incidents, and other data as requested by the City.

Reason- We are suggesting that the City amends the current language from “Monthly report to the City” to “Quarterly”. By allowing us the time of one full business quarter, Bird will be able to provide a much more in-depth report relating to rider safety and accountability.

Appeal/ Disapproval/ Revocation of Permits-

Proposed Change- Within fifteen (15) days after the City Manager serves notification of disapproval, revocation or suspension of a Permit, an applicant or Permit holder may appeal the action by notifying the City Clerk in writing of the appeal, the reasons for the appeal, and paying any applicable fees.

The City Clerk shall set a hearing on the appeal and shall fix a date and certain, within thirty (30) days after the receipt of the appeal, unless the City and the applicant/Permit holder agree to a longer time to consider the appeal. The City Clerk shall provide notice of the date, time and place of hearing, at least seven (7) days prior to the date of the hearing.

1. The City Manager shall appoint a Hearing Officer to hear the appeal and determine the order of procedure, and rule on all objections to admissibility of evidence. The applicant/Permit holder and the City Manager shall each have the right to submit documents, call and examine witnesses, cross-examine witnesses and argue their respective positions. The proceeding shall be informal, and the strict rules of evidence shall not apply, and all evidence shall be admissible which is of the kind that reasonably prudent persons rely upon in making decisions.
2. The Hearing Officer shall issue a written decision within fifteen (15) days after the close of the hearing. The decision of the Hearing Officer shall be final.

4-13.15. Indemnification

Proposed redline of change:

Operator agrees to defend, indemnify, and hold harmless the City, its officers, elected or appointed officials, employees, agents, and volunteers from and against any and all claims, damages, losses, expenses, fines, penalties, judgments, demands, and defense costs (including, without limitation, actual, direct, out-of-pocket costs and expenses, and amounts paid in compromise, settlement, or judgment, and reasonable legal fees arising from litigation of every nature or liability of any kind or nature including civil, criminal, administrative or investigative) arising out of, in connection with, or which are in any way related to, **the City's issuance of or decision to approve a Permit, the process used by the City in making decisions, Operator's participation in the Dockless Shared Mobility System**, the Operator's (including its officers, managers, employees, contractors, agents, and volunteers) business conduct and operations, any violation of any laws by the Operator (including its officers, managers, employees, contractors, agents, and volunteers) or its users, or any bodily injury including death or damage to property arising out of or in connection with any use, misuse, placement or misplacement, including but not limited to placement or misplacement resulting in alleged violations of the Americans with Disabilities Act (ADA), of any of the Operator's device or equipment by any person, except **to the extent** such loss or damage which was caused by the **sole negligence or** willful misconduct of the City. Operator will conduct all defenses at its sole cost and expense, and City shall reasonably approve selection of the counsel to represent City as proposed by Operator. This indemnity shall apply to all claims and liability regardless of whether any insurance policies of the Operator, its affiliates or any other parties are applicable thereto. The policy limits of any insurance of Operator, its affiliates or other parties are not a limitation upon the obligation of Operator, including without limitation, the amount of indemnification to be provided by Operator. The provisions of this section shall survive the termination of this Agreement.

Reason and explanation of changes:

We've removed the language that asks operators to indemnify the City for claims arising out of (i) the City's issuance of or decision to approve a Permit and (ii) the process used by the City in making decisions. We don't believe that it's right for operators to be required to take on the City's liability for claims made against the City by operators who were denied permits, or for claims brought against the City for the City's own process, both of which are entirely outside of operators' control. We can also think of no good reason for the City to impose such a requirement. By shifting the risk for the City's decision-making process on operators, the City also loses all incentive to be thoughtful in its regulation of scooters or its implementation of city rules.

We've also revised the indemnity to exclude loss or damage arising from the City's negligence or willful misconduct, as opposed to just the "sole willful misconduct of the City". By only excluding "sole willful misconduct", scooter operators would be

liable for claims arising from the city's own negligent maintenance of its streets and sidewalks, or in other words, for maintenance beyond the operators' control. Further still, the language would require operators to indemnify a city even if the City conducted willful misconduct, so long as the operator was also partly responsible. Such a requirement is against public policy and treats electric scooters unfairly compared to other vehicles using the public right of way. The alternative language that we've proposed would still protect the City, but would not unreasonably force operators to take on the financial risk for acts or omissions that are the City's fault.

It is our hope that you will take into consideration our suggested modifications to the ordinance and we look forward to providing the City of Emeryville with the most sustainable and low-cost solution to first and last mile transportation.

Warmly,

Martin Fatooh

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Marty Fatooh

Community Manager- Northern California

BIRD