



April 2, 2019

Michael A. Guina
City Attorney, City of Emeryville
1333 Park Ave.
Emeryville, CA 94608

Dear Mr. Guina:

As scooter Operators looking forward to serving the City, we write to express our concerns over the Section 4-13.15 of the Ordinance passed by Council on March 19, 2019, and listed on tonight's April 2, 2019 Counsel Agenda as Item 10.8 under Consent Items. This section covers Indemnification with respect to the City's Dockless Shared Mobility Systems, and could be interpreted to require an Operator to take on financial liability for circumstances beyond its control (e.g. the City's maintenance of their own infrastructure).

Indemnification

The indemnification provision as written in Section 4-13.15 forces Operators to take on the financial risk created by the City's own negligence or misconduct, including circumstances that are entirely outside of the Operator's control, such as the City's own conduct in maintaining roads or sidewalks in a safe condition. We believe there are alternative ways to draft the Agreement that would still strongly protect the City, but which would be legally enforceable and would provide a more appropriate and fair allocation of liability based on each party's ability to manage given risks. As a policy matter, we appreciate that the City has made the determination that it wants to encourage sustainable micromobility transportation options. However, currently the indemnification provision creates a barrier that runs counter to the City's own policy choices to incorporate emerging mobility technologies into its transportation network.

Many cities have adopted reasonable indemnification provisions which do not seek to include the City's own negligence and do not explicitly carve out the City's responsibility to riders to maintain the City's right of way and infrastructure. We believe that such an alternative strikes a better balance for the City, and we remain committed to working with you to refine these terms to advance our shared mobility goals.

There are several reasons to believe the indemnification provision would be unenforceable and unlawful in full. Among other things, the current indemnification could be interpreted as an attempt to shift City negligence and willful misconduct, no matter how extreme the circumstances, onto other parties. In addition, the current indemnification arguably violates equal protection. Finally, the provision would arguably be preempted by California Civil Code § 1668 and/or California Government Code § 835 to the

extent that it purports to require permittees to indemnify the City for claims related to the City's own negligence or misconduct in maintaining public streets in dangerous or defective condition.

Current Indemnification Language

The Dockless Shared Mobility Systems Ordinance Indemnification provision reads as follows (emphasis added):

*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 such loss or damage which was caused by the sole 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.*

The provision could be interpreted to shift liability to Operators for any claim related to the City's conduct even if that claim is entirely outside the operator's control. Claims for the City's own negligence are not exempted, nor are even claims for the City's own willful misconduct (unless it is the sole cause) or the City's own abuse of discretion in administering the permit process. It appears that an Operator may be required to indemnify the City for its own claims against the City.

Proposed Indemnification Language

We encourage the City to adopt the following full indemnification that is within the bounds of established laws:

*Operator will indemnify, defend, and hold harmless the City and its affiliates, officers, directors, shareholders, members, employees, agents, successors and assigns (collectively, the "Indemnified Parties") from and against all third party liability, actions, claims (including for bodily injury, death or damage to property), demands, costs, losses or damages, including reasonable attorneys' fees (collectively, "Claims"), resulting from Operator's (including its officers, managers, employees, contractors, agents, and volunteers) negligent business conduct or negligent operations, or any violation of any laws by the Operator (including its officers, managers, employees, contractors, agents, and volunteers), except Operator shall not be obligated to indemnify, defend or hold harmless the City or the City's Indemnified Parties for Claims that **arise out of the negligence or willful misconduct of the Indemnified Parties or any one of them.***

Operator's obligation to indemnify, defend, and hold harmless any Indemnified Party under the foregoing paragraph is subject to the Indemnified Party's notifying the Operator promptly in writing of any Claim as to which indemnification will be sought and providing the Operator reasonable cooperation in the defense and settlement thereof. In each case the Operator will have the exclusive right to defend any such claim, however the Operator may not settle or compromise such claim without the prior written consent of the Indemnified Party if such settlement would admit liability or impose any obligation on the Indemnified Party. The Indemnified Party may, at its sole cost and expense, participate in the defense of a claim with counsel of its own choosing.

This Agreement shall apply to all claims and liability regardless of whether any insurance of Operator, its affiliates or 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.

Operators believe that the City and Operators can agree upon an indemnification that is both enforceable and meets the legitimate financial and litigation concerns of the City.

Sincerely,

Bird, Lime, Lyft, and Spin

cc: Christine Daniel, City Manager
Nancy Humphrey, Environmental Programs Supervisor
Mayor Ally Medina
Emeryville City Council