A GUIDE TO LEGAL ISSUES FOR BIKE-SHARING SERVICE PROVIDERS AND GOVERNMENT ADMINISTRATORS IN THE STATE OF FLORIDA

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Some may reflect laws as of different dates.

Original copies of this report also include a CD-ROM appendix with the following documents (now online -- JSA):

1) A September, 2010 agreement between Broward County, Florida and B-Cycle, LLC for the management and operation of a bike-sharing program.

2) A July, 2009 concession agreement between the City of Miami Beach, Florida and Deco Bike, LLC for the implementation, management and operation of a self-service bike-sharing program.

3) A March, 2010 contract between Arlington County, Virginia and Alta Bicycle Share, Inc., to create and provide a bike sharing service.

Documents 1 and 2 were acquired from their respective governments pursuant to the Florida Public Records Act, Chapter 119, Florida Statutes. Document 3 was acquired from Arlington County by Paul DeMaio. It has been made available through the courtesy of Mr. DeMaio.

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I. Introduction

Bike-sharing is a form of bicycle rental that uses self-service vending stations, or kiosks, to dispense the bicycles and securely hold them while not in use. Most use purpose-built bicycles that mate with the kiosk-dispensing system to create a high-security locking system, and contain anti-theft and tracking equipment. Today's commercial systems derive from free "white bicycle" or "yellow bicycle" programs that were tried in a few cities, mostly in Europe, in the 1960s and early 1970s. Sponsors hoped that city dwellers would use the bicycles for short urban trips, leaving them in designated public bicycle racks at the conclusion of each trip. These programs were unsuccessful, primarily due to theft of the bicycles. Later systems using coin-operated dispensing bicycle racks also failed for much the same reason.

Starting in 2005, Lyon, France implemented a large-scale bike-sharing system based on a membership system. Members could use either their membership card or a credit card to dispense the bicycle and pay for the rental. (Other cities are experimenting with membership systems that use the members' cell phones instead of cards.) The Lyon system, and a larger, 23,000-unit version implemented two years later in Paris, were provided without cost by a leading nationwide outdoor advertising firm. The firm paid for both the capital costs of installing the system and its annual operating deficit. The cities keep all rental revenues, but the proceeds from advertising on the bicycles and kiosks goes to the firm. This has led to the same type of friction that American cities sometimes experience with bus-bench franchises: the vendor, who earns revenue from the sale of ads on the back of the benches, is primarily interested in placing them where they will be seen by the largest number of passing motorists, while the city wants the benches put where they will assist the most bus patrons. The advertising firm that provided the Lyon and Paris systems has recently expressed a disinclination to renew those contracts beyond their current terms because of these types of problems.[1]

Several firms are now offering turnkey bike-sharing services to North American localities under a variety of different revenue and operating models. Some are trying the Lyon-style outdoor advertising plan, others prefer a straight vendor-provision arrangement along the lines of a private bus operator that

[1] The advertising company funding the Paris system, JCDecaux, has expressed concern over "extraordinary" rates of theft and vandalism, while the City agency that runs it believes these have been consistent with its experience with other similar public equipment. "It's simple," explains JCDecaux's director general when asked about the discrepancy, "all the receipts go to the city, but all the expenses are ours." Paul DeMaio, "Bike-Sharing: History, Impacts, Models of Provision, and Future," *Journal of Public Transportation* 12, 4 (2009): 41-56; "To the Relief of U.S. Operators, Le Vandalisme Hasn't Translated," *Bicycle Retailer and Industry News* 19, 16 (October 1, 2010): 58.

contracts to a municipal transit agency to provide drivers and equipment, and still others are experimenting with non-profit intermediary organizations.

As of late 2010, Florida has more local bike-sharing operations under contract than any other state, although the entire concept is so new that most of these will not begin operations until early- to mid-2011. Because Florida's climate permits year-round operations, and because its large tourist market broadens the potential for use beyond the urban commuters that have formed the target audience so far, it is likely that this state will be among the fastest-growing markets for bike-sharing operations in the United States. However, several of the legal and procedural issues inherent to the provision of such services have not been firmly resolved in any state, and a Florida provider or governmental entity cannot automatically assume that those solutions arrived at in other states will apply here. For example, potential private-sector service providers have invariably been surprised to the extent that Florida's "Government in the Sunshine" laws open their local records and meetings to public scrutiny. In fact, without a careful document-management policy, it is easy to turn many documents generated by a firm's *national* headquarters or parent company into Florida public records, not just those of the branch or subsidiary directly in charge of a local program.

Therefore, there is a need for a generalized, overview document such as this one. **Let me caution, however that because this area is so new, and because there are so many different ways that a bike-sharing program can be conducted, and because it is almost certain that new legislation and court decisions will alter the applicable law in the immediate future, you cannot rely upon this report for reliable legal advice that is applicable to your specific situation or to a specific contract. It is absolutely imperative that you consult with a Florida licensed attorney before embarking on a bike-sharing enterprise or program in Florida, and under no circumstances should you enter into a municipal service, vendor, or franchise contract without having that document reviewed, and a written risk summary report prepared by, a Florida attorney.** The loss potential for failing to do so can run into the hundreds of thousands, if not millions, of dollars.

II. Government Agency or Private Entity; Franchisee or Vendor?

a. Overview

Paul DeMaio has identified a typology of organizational models for bike-sharing programs, ranging from direct government provision to a fully privatized service.[2] With the former, the government owns the required equipment, employs the necessary personnel and operates the program as a public service for the benefit of the community. In the latter model, a private, for-profit firm runs the program as a business, with its only relation to the government being the normal fees, permits and taxes required of any other firm. Intermediate models include a government program staffed and/or equipped by a private vendor under contract; a program offered by a single-purpose or quasi-governmental agency (such as a transit agency) as an adjunct to its primary area of concern; a university-provided service; a program run

[2] DeMaio, "Bike-Sharing: History, Impacts, Models of Provision, and Future": 42-44.

by a non-profit corporation, in which the non-profit acts as a vendor to the government, with a private-sector supplier then participating as a vendor to the non-profit; and a service organized by a private firm not primarily in the transportation business, typically an outdoor advertising company.

However, for most legal and procedural issues in Florida there is only a single, bright-line distinction: a provider is either acting under the authority of a local governmental agency (even though it may be staffed and equipped by a private contractor), or it is an independently directed private firm. Whichever side of this line a given bike-sharing operation falls will determine most of its fundamental legal and procedural characteristics.

There are, generally speaking, two types of contractual arrangements: vendor contracts and franchise agreements. In a vendor contract, a private firm is either supplying goods or services *to* a government entity, or is providing goods or services directly to the public at large *on behalf of*, a government agency. An office products company that maintains and repairs the copy machines for a city is an example of the former. A private transportation company that supplies buses and bus drivers to a transit company, who then puts transit agency logos on them and assigns them to its normal bus routes, is an example of the latter.

In Florida, both counties and municipalities have broad powers to enter into contracts to perform their duties and to delegate their sovereign powers to contractors as are necessary to perform those duties. Contractors, in turn, do not need express legislative authority from the state to exercise the powers held by their contracting county or municipality; unless there is a prohibition in state statute or administrative rule, the delegation of power is presumed to be within the local government's scope of powers, provided it is granted in the contract document.[3] State statutes require most county and local contracts to be awarded through a competitive bidding process and approved by the entity's governing board through an ordinance or resolution procedure that includes a public hearing with adequate public notice.[4]

Franchise contacts may be entered into by the state, counties or municipalities.[5] They can be exclusive or non-exclusive. They are a special privilege or license conferred upon an individual or corporation by a governmental agency to do something that they cannot normally do by common right.[6] Unlike the vendor-supply model, franchisees almost always provide goods or services directly to the public in place of a government agency. They must be used for the public good, and typically involve

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[3] *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459, 475-76 (Fla. 2005).

[4] For municipalities, these requirements are contained in Chapter 180, Florida Statutes. For counties, the law is more complex. The requirements exist either in various state statutes regulating particular functional activities by counties, or as a result of a given county's own administrative rules issued in conformity to the rather exacting requirements of the Florida Administrative Procedure Act, Chapter 120, Florida Statutes. For further details, see *Florida Jurisprudence 2d*, "Counties and Municipal Corporations", §§ 204-218. An ordinance requires two readings at separate meetings, a resolution only one. Most local government contracts require only a resolution, but there are important exceptions.

[5] For counties: § 125.01, Florida Statutes; for municipalities: § 166.021, Florida Statutes.

[6] *City of Mt. Dora v. JJ's Mobile Homes, Inc.*, 579 So. 2d 219 (Fla. 5th DCA 1991).

functions of a quasi-governmental nature.[7] Very often, franchises are used in place of a lease agreement, where the government wants to link the possession and use of a property to the performance of some specific task (such as operating a concession stand at a ball field) rather than giving the private party unrestricted possession and use rights. As will be discussed later, placing a privately-run bike-sharing program under a franchise contract may be useful as a way to place numerous rental kiosks on disparate public sites within a single jurisdiction without the need to prepare a separate lease for each site. Also, in Florida, it may simplify some problems related to advertising on kiosks located on public lands.

Generally, if a bike-sharing operator is paying a local government for the privilege of using public land or facilities, or is otherwise burdening the community, a franchise (or concession) agreement is most commonly used. If, on the other hand, the local government is paying the bike-sharing operator to either: 1) provide goods and services to it, which it then uses to benefit the public; or 2) provides those goods or services directly to the municipality's citizens and guests under the direction and control of the municipality, then a vendor contract is typically used.

The vendor-franchise distinction often is a matter of custom, not law, and questions of control, ownership, the degree to which private interests are expected to yield to the public good (and vice versa), and the disposition of assets upon termination or transfer of the contract, are better settled within the contract document itself then left to the vagaries of common law usage. In many cases, the distinction is largely irrelevant from a legal standpoint, as the controlling terms, conditions, powers and duties will be so closely specified in the contract that little will be left for a common law interpretation.

b. A Tale of Three Contracts

Consider B-Cycle's Broward County program.[8] Both B-Cycle and the county's staff consider B-Cycle's program to be a private sector effort with only limited assistance provided through $311,000 in funds provided by the Florida Department of Transportation (FDOT) to purchase 75 bicycles and a matching number of kiosks. However, B-Cycle's agreement with the county requires that B-Cycle implement a program with a 275-bicycle fleet that grows to 575 bikes (and supporting kiosks) in the fifth year.[9] The agreement states that if B-Cycle performs successfully for the full five year term, B-Cycle will take title to the 75 bicycles and kiosks. If the agreement is terminated prematurely, ownership of the 75 bicycles and kiosks must be turned over to the county. The agreement does not require that B-cycle maintain separate accounts, records, maintenance stores, or procedures for the public and private bicycles. They remain intermingled unless and until the agreement is prematurely terminated.

The agreement ends up being a form of supply contract known as a lease-purchase contract, the requirements for which are specified in section 125.031, Florida Statutes. While such contracts do not

[7] *Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 510 F.Supp.2d 691 (M.D.Fla. 2007).
[8] Broward County contains the Hollywood-Fort Lauderdale Urban Area.
[9] Based on typical industry figures for capital costs, installation, and operating costs, I estimate that the government contribution will provide only about seven to ten percent of the total costs of meeting the contract's scope of work over the full five-year period.

need to be approved through a formal county commission resolution, they must be approved at an appropriately noticed public meeting,[10] and Broward County did use both a formal competitive bidding process and resolution approved at a regular county commission meeting. The B-Cycle contract reads much like a normal Broward County vendor provision contract. It provides for an extensive set of "scope of services" requirements, indemnification of the county, requirements for local participation by subcontractors, prevailing wage requirements, and other "boilerplate" language. It attempts to skirt clear categorization as a vendor-supply contract by stating, in Section 9.4, that B-Cycle is an independent contractor and that the "*services provided* by B-Cycle pursuant to this agreement shall be subject to the supervision of B-Cycle" and not the county (emphasis added). However, Section 1.5 of the agreement states that the primary responsibilities of the Broward County contract administrator are to "manage and supervise execution and completion of the *Scope of Services* and the *terms and conditions* of this agreement." (emphasis added).

While sections 1.5 and 9.4 limits the county's control over the specific "means and methods" by which the contractor uses to achieve the scope of services (such a provision is typical of construction contracts), it is inadequate to convert the document into a franchise or concessionaire's agreement. A county has no authority to acquire or hold property for any purpose that is not a public use, because that would amount to the expenditure of public funds for a non-public purpose.[11] The intermingling of the 75 publicly funded bicycles and kiosks with the other 200-500 privately financed bicycles is critical. Up to the termination of the agreement (when the 75 bicycles and kiosks either transfer to B-Cycle, or become specific units that can be identified as belonging to Broward County), they comprise an undifferentiated share of the total fleet. Therefore, the entire Broward County bike-share fleet is engaged in a public use. By holding, using, managing, and deriving revenues from the 75 bicycles and kiosks as an intermingled asset with its other, privately financed equipment, B-Cycle is engaged in a public purpose and is acting on behalf of Broward County.[12] Despite any preconceived views that B-Cycle and the county may have of their relationship, it is, under Florida law, a public program staffed and managed by a private firm acting under a vendor services contact from the County, and subject to their direction.[13]

Contrast this to Alta Bicycle Share's March, 2010 contract with Arlington County, Virginia to install and operate a 117-bicycle system manufactured by the Canadian firm Bixi. While obviously not prepared under, or subject to, Florida law, it contains clear policy and operational differences. It straightforwardly states that it is a reliance, or requirements, contract—Alta shall supply only those goods and services that Arlington County believes it needs to do the job. Alta can purchase equipment from Bixi only after Arlington County issues a purchase order, and once purchased, all equipment belongs to the county. The county determines the location of each kiosk, and upon termination of the contract takes possession of

[10] *Frankenmuth Mutual Insurance Co. v. Magaha*, 769 So. 2d 1012 (Fla. 2000); *Opinion of the Florida Attorney General* No. 2006-12 (April 12, 2006).
[11] *State of Florida v. Town of North Miami*, 59 So. 2d 779 (Fla. 1952).
[12] *News and Sun-Sentinel Co. v. Schwab, Twitty & Hauser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).
[13] See *Frankenmuth Mutual Insurance Co. v. Magaha*, 10 Fla. L. Weekly Fed., D340. The case involved computer equipment leased by the Escambia Clerk of the Courts for the use of a third party, Escambia County.

each site, regardless of whether the station is on public or private land. Arlington County collects all revenues, including that from both bicycle rental and advertising. While Alta can solicit sponsorships for its own financial gain, the county can veto any sponsorship arrangement, and all sponsorship funds must first be deposited with the county, who will then disburse them to Alta. The county is responsible for producing and paying for all marketing. This is much the same type of contract that a county would issue to a private firm to, say, operate a local shuttle bus for its transit agency. As far as the public is concerned, they are using an Arlington County bicycle.

Finally, consider DecoBike's July 15, 2009 contract with the City of Miami Beach to establish a 500-bicycle fleet, eventually projected to grow to 900 bikes. It clearly states in Section 2 that it is a non-exclusive concession (franchise) agreement. It runs for five years. All the equipment is owned and operated by DecoBike, and is limited to concession sites and a defined "concession service area" that are specified in the contract. DecoBikes pays the city 12 percent of all gross revenues (except advertising revenues) up to three million dollars and 15 percent of all gross revenues (except advertising revenues) above three million dollars. DecoBike also pays 25 percent of all gross revenues from advertising on the bikes (advertising on the kiosks is prohibited). The first one million dollars in rental income during the first year of operation is exempted from the franchise levy.

As will be discussed in greater detail in a later section, public–private fee arrangements based on shared revenues can sometimes run afoul of state laws prohibiting partnerships or joint-ventures between a government entity and a private firm, especially in those situations where the locality exercises a great deal of control over the operation. However courts applying Florida law have held that the mere sharing of net revenues does not create a partnership or joint venture arrangement, provided there is no agreement that binds the government to risk, obligation, or shared responsibility for loss, and the DecoBike contract meets this requirement.[14]

These three contracts illustrate the different ways a government may contract with a private firm to start a bike-sharing program. While not a Florida contract, Alta Bicycle Sharing's contract with Arlington County operates under a pure vendor-supply model: it is a public program staffed by a private contractor. Should it choose to do so at a later date, Arlington County can substitute a different vendor-contractor to manage the program with little or no change in outward appearance. B-Cycle's Broward County contract, despite a concerted effort to avoid it, is also a vendor-contractor agreement. If B-Cycle performs successfully for five years, it will be paid up to $311,000 in the form of 75 bicycles and their kiosks that were acquired through a grant from FDOT. If B-Cycle does not meet this standard, they will not be paid. This contract, as opposed to the Arlington County contract, allows B-Cycle to solicit advertising and directly receive advertising revenues. The contract's most glaring weakness is that it does not specify which party controls the rights to the permits and permissions for the kiosks located on non-Broward County public lands (mostly municipalities and FDOT), and this may lead to a future dispute in the event the contract is terminated.

[14] *Jackson-Shaw v. Jacksonville Aviation Auth.*, 510 F.Supp 2d, at 721.

The DecoBike contract with the City of Miami Beach is a straightforward franchise contract. In return for allowing the non-exclusive right to operate within their city, the firm pays a specified fee. There is no attempt to portray the program as a city operation, and the contract prohibits the vendor from using the city's logos, trademarks or other symbols. Because neither party has an interest in effecting a seamless transition to a subsequent operation, no provision for this circumstance is even attempted in the document.

III. Zoning, Land Use and Right-of-Way Issues

One area that distinguishes the public and private models is that of permitting. Local land use, zoning, building permit, and sign regulations are far different for bike-sharing operators providing services under the mantle of a public agency from those following a fully- or partially-privatized enterprise. Generally, a local government is exempt from its own zoning regulations, especially if it is exercising a governmental function rather than a proprietary one.[15] A government is generally not exempt from the zoning regulations of another jurisdiction unless specified in state statute. Florida land use law does not recognize the doctrines of superior sovereignty (absent statutory authority), nor does it recognize a distinction between governmental and proprietary uses. When one government seeks to use land within the jurisdiction of another, no preference is accorded to the state over its counties, or to the state or county governments over localities. It is therefore customary for a governmental agency to secure zoning approval before building in another jurisdiction, even if it is an inferior sovereign. In resolving land use disputes between governmental entities, a "balancing of interests" test is applied, of which the governmental-proprietary distinction is just one of many factors that may be considered.[16]

a. Privately owned land

There is essentially no difference in the procedures that must be followed by a private firm or a governmental entity to site a proposed bike-sharing station on private land. Chapter 163, Florida Statutes, requires all county and local governments to have zoning maps and ordinances in place. Generally, if a station is located on private land that is already being used for a related purpose (such as a bike shop), only a building permit will be required, because the bicycle-sharing station will likely qualify as an accessory use, unless it is very large. However, the installation may violate local zoning if it reduces the number of available parking spaces.

If the site is private and is on otherwise vacant land, it may require a site plan approval. Many municipal zoning codes specify that all commercial uses must be contained with a fully enclosed building. This is to restrict stalls, stands, carts and other itinerant land uses. In some cases, an "inherent outdoor use or purpose" may be exempted. In other cases a variance may be required, which can cost several

[15] *Metropolitan Dade County v. Parkway Towers Condominium Assn.*, 281 So. 2d 68 (Fla. 3rd DCA 1973).
[16] *City of Temple Terrace v. Hillsborough Assn. for Retarded Citizens*, 322 So. 2d 571 (Fla. 2nd DCA 1975). Proprietary functions are those customarily provided by the private sector.

thousand dollars per site. A second problem is that "bicycle sharing station" is a new use that does not appear in any municipal zoning code. In most cases, the planning staff will find the closest applicable use, either "bicycle rentals," or "bike shop." This is generally helpful, as bike shops are usually considered a "low impact" use, and are typically allowed in the one or two least-restrictive commercial zoning categories.

Many problems are encountered because bicycle sharing entrepreneurs do not understand a basic, fundamental provision of land use law: a zoning permission, such as a variance, is not given to a land user, or even to a landowner—it is given to the land, and runs with the land.[17] Therefore, a planning department will not necessarily be evaluating whether to recommend an approval for a variance based on the virtues and vices of a given applicant, but of some future hypothetical "worst case" user. For example, if a variance is given so that one of the industry-leading firms can situate an outdoor kiosk as a "bike rental" facility, and that firm decides to end or transfer the operation, then nothing may prevent the site from being used by "Beach Bum Bruce's Bike and Skate Rental," operating out of a beat-up old milk van, as the use has been given rights through the granting of the variance to the previous user.[18]

Florida does not permit use variances. Only specification variances, such as for height, setback, lot coverage, or the indoor use requirement, are allowed.[19] Permission to depart from the general provisions of a zoning ordinance for the use itself can only be extended through a special exception. Special exceptions are permits in which the applicant has the burden of proof to establish that his or her proposed use satisfies an enunciated set of specifications and/or policy-oriented criteria.[20] In some cities, these are mislabeled as conditional use *permits*. (These should not be confused with true conditional uses. True conditional uses are permitted in a given zone, but only if additional conditions, restrictions or specifications are met. The conditions required for an applicant to receive permission must be specified by ordinance or regulation. If these are met, the applicant's proposed use is treated as a permitted use.) Both variances and special exceptions require ordinances and a public hearing. At the hearing, citizen testimony as to adverse impacts or detrimental effects is considered substantial competent evidence so long as it is fact-based and may constitute all or part of the basis upon which a decision is reached.[21]

b. Non-roadway public lands

If the site is on public, non-right-of-way land, such as a park or the grounds of a municipal facility, and the bike-sharing service provider is a public agency, permission may require as little as a memo from one department to another if the provider and the landowner are from the same jurisdiction, or may

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[17] *Thomson v. Village of Tequesta Board of Adjustment*, 546 So. 2d 457 (Fla. 4th DCA 1989).

[18] In some cases, abandonment of the permitted use for a specified length of time (in this case, a gap between the original bike share operator closing down and Beach Bum Bruce starting business) may void the permission, but these are becoming rarer in Florida.

[19] *Board of Adjustment of the City of Ft. Lauderdale v. Kremer*, 139 So. 2d 448 (Fla. 2nd DCA 1962): *Friedland v. City of Hollywood*, 130 So. 2d 306 (Fla. 2nd DCA 1961).

[20] See *Florida Jurisprudence 2d* "Building, Zoning and Land Controls," §§224-226.

[21] *Marion County v. Priest*, 786 So. 2d 623 (Fla. 5th DCA 2001).

require a formal interlocal agreement if the two are from different governmental units. If the provider is a private firm, then the use of public lands will almost always require a lease, even if the agreed rental price is close to zero. Section 125.35, Florida Statutes, requires that any county seeking to lease real property to a private party must make a determination that the lease is in the best interests of the county, and it must lease the parcel to the highest bidder "for the particular use the board deems to be the highest and best." Therefore, a board of county commissioners may designate a bike-sharing station as the highest and best use of piece of real property, accepting bids only from those seeking to use the site for that particular purpose, and reject higher bids from others who may want it for another use.

For municipalities, if a lease agreement requires that bonds be issued, public funds be spent, or the power of eminent domain be exercised, then the land may only be leased for a public use.[22] A public use is one that is fixed and definite, in which the public has an interest, the terms and manner of its operation are within the control of the government, and is *available* to all people equally (although it is not necessary that everyone actually *benefit* from it equally).[23] Florida courts have interpreted this to mean that a municipality cannot acquire a parcel of land through the issuance of bonds, purchase or eminent domain, for the purpose of leasing it for a non-qualifying use, but can lease lands for a non-qualifying purpose that are already owned and currently surplus.[24] Recent legislation regulating the powers of local governments to exercise their powers of eminent domain suggest that a five-year "quiet period" is satisfactory to establish that a parcel was not acquired solely for the purpose of delivering it into the hands of a private use.[25]

In summary, a municipality is not prohibited from leasing real estate to a private party, but that private party must put it to a public use or purpose. Most bike-sharing operations will be able to meet this test, provided: 1) they are operating under a contract that is fixed and definite; 2) the terms and manner of its operation are within an appropriate level of control of the government; 3) the public interest or benefit is large enough, and 3) the service is available to all people equally, although a reasonable service charge or fee can be levied. A local government can lease real estate to a private firm on terms that are disadvantageous to that firm's competitors, provided that both the lease itself and the advantage conferred are in the public interest.[26]

If a local government chooses to grant a franchise to a bike-sharing operator in lieu of a lease of its land, legislative action is required, but a bidding procedure is needed only if specified in the jurisdiction's charter or ordinances.[27] (Almost all jurisdictions do have such a requirement.) A franchise is defined as a contract with a sovereign authority to conduct a specific business of a quasi-governmental nature within a particular area for a limited time, and which may or may not grant exclusive rights to do

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[22] § 167.77, Florida Statutes.
[23] *Devon-Aire Villas Homeowners Assn. v. Americable Associates, Ltd.*, 490 So. 2d 60, 63 (Fla. 3rd DCA 1985).
[24] *City of West Palm Beach v. Williams*, 291 So. 2d 572 (Fla. 1974).
[25] §§ 73.014, 73.021, 127.01 and 163.345, Florida Statutes.
[26] *Astro Limousine Service, Inc. v. Hillsborough County Aviation Authority*, 678 F.Supp. 1561 (M.D. Fla. 1988); *Jackson-Shaw v. Jacksonville Aviation Auth.*, 510 F.Supp 2d 691, at 719.
[27] *Jackson-Shaw v. Jacksonville Aviation Auth.*, 510 F.Supp 2d 691, at 719.

so.[28] A lease, to the contrary, is a contract for the exclusive possession of land or its improvements for a defined or indefinite period that conveys no more rights than the leasing party already owns.[29] Therefore, it appears that if a bike-sharing firm is operating as a franchisee, it does not require a lease for each separate parcel of the franchisor's public land it wishes to place a station on, provided that the possession of these parcels is conditioned on the continuation of the franchise. If the franchise ends, then the permission to use the sites ends. The right to possess and use the parcels travels with the franchise, so if the government elects to cancel the franchise of Provider A and award it to Provider B, the right to use the designated station sites will also transfer. Generally, because the franchise operator is performing a public duty, he or she has no right to transfer their franchise to another private party without legislative action, even if stated otherwise in the franchise agreement.[30]

Under the guise of a franchise, a government and a private entity cannot enter into a partnership. A partnership is an arrangement whereby both parties contribute to the labor or capital of the enterprise, have a mutuality of interest in both profits and losses, and agree to share in the assets and liabilities of the business. Nor can they enter into a joint venture, a less formalized business arrangement defined by four factors: 1) a common purpose; 2) a joint proprietary interest in the subject matter; 3) shared rights to profits and shared duties to carry losses; and 4) joint control or right of control. [31] Normally, in those situations where the locality is exercising a great deal of control over the bike-sharing operator, it must avoid inadvertently falling into a partnership or joint venture. It can do this by specifying a flat fee or a variable fee schedule that never includes the government in the contractor's risk of loss (i.e. the worst possible outcome for the government is zero).[32] Federal courts applying Florida law have held that the mere sharing of net revenues, absent an ability to bind the governmental entity to risk, obligation, or shared responsibility for loss, does not in and of itself create a partnership or joint venture arrangement.[33]

c. Roadway rights-of-way: county and municipal roads

The regulation of leases in public rights-of-way is not treated in a systematic manner in Florida Statutes. Right-of-way is defined as land the state, a county or a municipality own in fee, or controls through an easement, that is devoted for use as a transportation facility.[34] The roadway system in Florida is divided into local roads, county roads, state highways, and state park roads. Section 335.0415, Florida Statutes, provides that the jurisdiction over a given public road, and the responsibility for the operation and the maintenance of its right-of-way, shall be that which was in place on June 10, 1995, unless otherwise provided for through a transfer agreement. This responsibility extends to all facilities within the

[28] *West Coast Disposal Service, Inc. v. Smith*, 143 So.2d 352 (Fla. 2nd DCA 1962).
[29] *Outdoor Media of Pensacola, Inc. v. Santa Rosa County*, 554 So. 2d 613, 615 (Fla. 1st DCA 1989).
[30] *Florida Jurisprudence 2d* "Franchises from Government," § 16.
[31] *Williams v. Obstfeld*, 314 F.3d 1270, 1275 (11th Cir. 2002).
[32] Opinion of the Florida Attorney General No. 2002-07 (January 17, 2002).
[33] *Jackson-Shaw v. Jacksonville Aviation Auth.*, 510 F.Supp 2d 691, at 721.
[34] § 218.39(1)(h), Florida Statutes. {note – citation appears incorrect. See 334.03(21)– JSA]

right-of-way, including the roadbed, curbs, culverts, drains, and sidewalks.[35] With the exception of benches, transit shelters, street light poles, waste disposal receptacles and modular news racks, Florida statutes do not regulate the authority of municipal or county authorities to lease space within their rights-of-way for uses that are rationally related to public, transportation-oriented uses. Under common law, the right to use the streets and highways of municipality for the conduct of private business is not inherent, but is a special and unusual use that can be acquired only by permit, license or franchise that a city may grant to some and deny others, or withhold from all. Such permits confer no rights, and such limited rights as a municipality may choose to confer may be restricted or withdrawn at its discretion.[36] A city's power to safeguard and maintain the character of its streets, sidewalks and other common grounds may be enforced through a permitting system that exacts a fee structure intended to limit the number of applicants through economic means, even if those fees are not directly related to the cost of providing the land. A city may also levy a higher fee for the use of land with a higher commercial value. However, such fees must fund a general plan or purpose that facilitates the use of the public right-of-way (such as going into an area-wide development fund or mobility enhancement fund), or they will be considered a tax, not a fee or a charge, and will fall under constitutional and statutory restrictions on taxes.[37]

The Florida Attorney General has opined that local governments may not use the "local option gas tax" funds specified in section 336.021, Florida Statutes (which allows, but does not require, a county to collect a 0.9-cent per gallon motor fuel tax) to pay for bicycle paths that are constructed as stand-alone projects.[38] This strongly implies that these funds could also not be used to support or fund bike-sharing infrastructure located within the county road system. However, other funds may be used, and at least one jurisdiction, Broward County, has received $311,000 in support funding from the Florida Department of Transportation to help establish a public-private bike-sharing operation without limitation as to whether its stations can be located on the county road system. In addition, the attorney general has issued an opinion stating that the proceeds from the local option gas tax cannot be used to pay the operational expenses for storm drainage, street lighting, or traffic signalization, so it appears that these funds could not be used to support the ongoing operations of a bike-sharing program.[39] Again, this opinion does not foreclose the application of other sources of revenue for such use.

d. Roadway rights-of-way: state highways

The Florida Department of Transportation's authority preempts that of counties and municipalities on state roads and bridges. However, FDOT must exercise its discretion to devise plans and select sites that best serve the public need, and that are consistent, to the maximum amount feasible, with approved

[35] Opinion of the Florida Attorney General No. 2008-49 (September 23, 2008).
[36] *Florida Jurisprudence 2d* "Highways, Streets and Bridges," § 160; *Jarrell v. Orlando Transit Co.,* 167 So. 664 (Fla. 1936).
[37] *Flores v. City of Miami*, 681 So. 2d 803 (Fla. 3rd DCA 1996).
[38] Opinion of the Florida Attorney General No. 2007-02 (January 3, 2007).
[39] Opinion of the Florida Attorney General No. 2010-29 (July 13, 2010).

local government comprehensive plans.[40] Unlike county and municipal roadways, leases of land on state highways are fairly extensively regulated in Florida Statutes. Subsection 337.25(5), Florida Statutes contains the most frequently controlling provisions. (Note that section 337.251 also covers such leases, but it is reserved for "complex lease transactions involving extensive capital improvements by the lessee or provisions for the exchange of goods or services by the lessee in lieu of cash." This would not appear to apply to most bike-share programs, and leases that do not rise to this level are referred back to subsection 337.25(5).) Subsection 337.25(5) requires competitive bids, unless the prospective lessee is the adjacent landowner. Leases can run for a maximum of five years, but can be renewed without re-bidding. If the land is leased for a public purpose (not restricted to a transportation use) to a governmental agency, rent may be waived.

Subsection 337.25(6) states that "nothing in this chapter prevents the joint use of right-of-way for alternative modes of transportation; provided that the joint use does not impair the integrity and safety of the transportation facility." It is unclear if by "joint use," this provision means "multi-government joint use" or "public-private joint use," but the only other use of the term "joint use" in Chapter 337 refers to the latter, so it appears that this section is applicable to the location of bike-sharing infrastructure by a private firm in state highway rights-of-way, but other than serving a hortatory function, it is unclear what its legal impact actually is.

IV. Outdoor Advertising Issues

a. Signs

The regulation of signs in outdoor advertising, if applied reasonably and in a nondiscriminatory manner, is a valid exercise of the police powers of Florida counties and municipalities. Community aesthetics, in and of itself, is a legitimate compelling government interest justifying the regulation of commercial signage.[41] Towards this end, it is a reasonable exercise of local government police powers to separately classify, for legislative purposes, on-site and off-site signage, and to create disparate regulations based on their aesthetic characteristics.[42] Many bike-sharing operations rely on advertising revenues as a fundamental part of their business plans. Generally, these are affixed to either the kiosks or the bicycles themselves. In either case, these involve off-site signage. (Kiosk informational displays—how to rent, return or use a bicycle—are not generally considered signage, or even commercial speech, because it is not speech that contains, as its sole purpose, a proposal to enter into a commercial transaction.[43]) Bicycle or kiosk displays of the bike-sharing provider's own logos or advertising would be on-premises advertising, but in actual practice are not of sufficient concern to warrant extensive discussion. Important exceptions will be specifically mentioned in the following discussion.

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[40] *Florida Department of Transportation v. Lopez-Torres*, 526 So. 2d 674 (Fla. 1988).
[41] *City of Sunrise v. DCA Homes, Inc.*, 421 So. 2d 1084 (Fla. 4th DCA 1982).
[42] *City of Lake Wales v. Lamar Advertising Assn.*, 414 So. 2d 1030 (Fla. 1982).
[43] *Central Hudson v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

One particular concern is mobile signage, such as that affixed to bike-sharing bicycles. A generalized sign regulation, such as one prohibiting "snipe signs," cannot be applied in a selective manner against advertisements on traffic-going vehicles that do not become affixed to the land, but that are in constant circulation.[44] On the other hand, a more narrowly-tailored municipal ordinance that specifically bans mobile vehicle signs, but exempts signage on a business's own vehicle, or on any vehicle that is not used "merely, mainly or primarily to display advertisements," is acceptable, and a city may regulate or prohibit "vehicles with no real purpose apart from advertising." Examples of vehicles that carry the messages of other firms (equivalent to off-premises signs), but not as a primary purpose, and that have "a real purpose other than advertising" include taxis and buses.[45]

This same test is applied regardless of whether the vehicle is standing or parked. For example, the owner of a 40-foot semi-trailer was cited because it was parked at a location visible from a state highway. It carried, in large lettering, the name of the firm that owned it. The court determined that it was an "ordinary and functional trailer," and because it contained no special markings peculiar to a stationary object (arrows, an address, directions, etc.), then it was not "designed intended, or used to advertise or inform," and was not subject to a sign prohibition, even while it was stationary.[46] This would imply that a government regulation affecting signage on bike-sharing bicycles should treat them the same regardless of whether the bicycle is stationary in a kiosk or has been rented and is moving (assuming, of course, that signage itself is identical), provided that the bicycle in the kiosk is fully operational and ready to rent. However, it should be cautioned that in this case, the trailer carried only the name of its owner, and that no analogous case law covering the situation where a temporarily stationary vehicle carrying a display of someone other than the owner (for example, a taxi stationary in a taxi stand) has been found.

As to bike-sharing kiosks, cities and counties have wider latitude to regulate signage. Regulations limiting street furniture on sidewalks or in public rights-of-way, mandating their placement, or prohibiting them altogether, are content-neutral laws that impose reasonable restrictions on the time, place and manner of speech, and serve a legitimate public interest. Moreover, a local government may apply differential treatment to different types of street appurtenances based upon benefit to the community, including economic benefit.[47]

This is also generally true for regulations that regulate or prohibit the placement of advertising on that street furniture. A city may justify a ban on street furniture advertising based purely on aesthetic criteria, and it is irrelevant that some hypothetical advertising scheme can be devised that would maintain standards of neatness and safety, because it is within the city's sole authority to set both the standards and determine the best way to meet them. Generally, state and federal laws that preempt the authority of local governments to regulate certain types of street furniture (such as telecommunications laws relating

[44] *Ads in Motion Florida, Inc. v. City of Ft. Lauderdale*, 429 So. 2d 807 (Fla. 4th DCA 1983).
[45] *Supersign of Boca Raton, Inc. v. City of Ft. Lauderdale*, 766 F.2d 1528 (11th Cir. 1985).
[46] *Sun City Shell, Inc. v. Department of Transportation*, 626 So. 2d 1097 (Fla. 1st DCA 1993).
[47] *One World Family Now v. City of Miami Beach*, 175 F.3d 1282, 1285-86 (11th Cir. 1999).

to pay telephones) do not preempt local government authority to regulate advertising on those appurtenances.[48]

Florida statutes give FDOT jurisdiction to regulate outdoor advertising (i.e. signage) statewide. However, as currently written, state statutes limit the department to: 1) regulate signage in commercial and industrial areas along interstate and federal highway systems (including within urban areas)[49]; and 2) regulate signs along any interstate or federal aid highway, or along any state highway that is outside an urban area.[50] Unless exempt, all signs within FDOTs jurisdictional areas require a sign permit. Signs owned by a county or city, and that are located on their premises and that display information related to government services, activities or information are exempt. Messages that reference *any* commercial enterprise are not eligible for this exemption.[51] Counties and municipalities may establish requirements within their jurisdictions that are more stringent than statutory (i.e. FDOT) requirements.[52]

All persons who engage in the business of outdoor advertising are required to secure an annual license from FDOT for $300. A license is required regardless of whether signage is erected within the department's area of jurisdiction or outside it. (This is largely a moot issue, anyway, as virtually all cities and counties require anyone pulling a building permit to erect a sign to have a license.) "The business of outdoor advertising" is defined as the business of constructing, erecting, operating, using, leasing or selling outdoor advertising structures, signs, or advertisements. Merely manufacturing the equipment used to support or erect a sign (such as a kiosk) does not qualify one as being in the business of outdoor advertising. Nor does placing or erecting this equipment for one's own benefit qualify. But to do so for the use and benefit of another, and to be compensated for it, does put one in the business of outdoor advertising. In those situations where a bike-sharing operator purchases a kiosk from a non-affiliated supplier, then leases land, installs the kiosk and rents advertising space, receiving benefit for doing so, then the bike-share operator is probably in the business or outdoor advertising, and likely requires a license to do so.

b. Benches, transit shelters, waste receptacles

Florida law contains an odd quirk when it comes to several specified items of street furniture. For our purposes, three items are of particular interest: benches (not *bus benches*, just *benches*); transit shelters and waste receptacles located within municipalities. Section 337.408, Florida Statutes, states that a bench or transit shelter, including any advertising displays, may be installed in the rights-of-way of any local, county or state road provided the municipality (or county, in unincorporated areas) has a written agreement and the bench or shelter is located "for the comfort or convenience of the general public". Each must also meet certain safety and locational criteria. A state or county installation permit is not

[48] *Florida Public Telecommunications Assn. v. City of Miami Beach*, 321 F.3d 1046 (11th Cir. 2003).
[49] § 479.02(2), Florida Statutes.
[50] § 479.07(1), Florida Statutes.
[51] § 479.16, Florida Statutes.
[52] *City of Lake Wales v. Lamar Advertising Assn.*, 414 So. 2d 1030 (Fla. 1982).

required. Moreover, this section expressly over-rides any contrary provisions of Chapter 125 (requirements for local government contracts); Chapter 335 (regulations governing the state highway system); Chapter 336 (regulations governing county roads) and Chapter 479 (outdoor advertising regulations). The language for waste receptacles under 110 gallons is identical, except that the local government is also not required to use competitive bids when soliciting vendor contracts.

This presents an extremely interesting question. Although bike-sharing kiosks are clearly not included, because they are not expressly named in the statute, what would be the status of such equipment if a bench or waste receptacle was added to their design? What would be the legal status of a combined bus shelter/kiosk unit, where an equal, or greater, proportion of the unit was dedicated to the shelter as opposed to the kiosk? The possibilities offered by the near-blanket exemption from right-of-way permitting and outdoor advertising regulations under Florida law (given, of course, a contract between the sign company and the applicable municipality) make this an interesting option to explore.

However, in all cases of where overlapping jurisdictions and laws may raise the possibility of preemption, the bike-sharing provider whose business plan is based on outdoor advertising revenues should review the case of *Florida Public Telecommunications v. City of Miami Beach,* in which a federal court held that even where a city's power to regulate the *placement* of street furniture (in this case, pay telephones) was constrained by preemptive state and federal legislation, its ability to regulate the *advertising on those appurtenances* was unaffected.[53] (When the City of Miami Beach entered into a concessions agreement for a bike-sharing program in 2009, it specified that no advertising would be allowed on the kiosks, just the bicycles.) Presumably, such reservation of power could be applied in either direction, to prevent state laws from overriding local government controls over advertising, or to stop local authority from overriding regulatory powers over signage at the state level.

IV. Public Records and Open Meetings

Florida has probably the most comprehensive laws in the United States guaranteeing access to public meetings and records. It's "Sunshine Law," section 286.011, Florida Statutes, requires that meetings of public boards and commissions be open to the public, that they be noticed in advance, and that adequate minutes be taken. The "Public Records Act," Section 119.011, Florida Statutes, requires that all documents made or received in the course of official business, unless specifically exempted, be made available to the public for inspection or copying. Any document intended to "communicate, perpetuate or formalize knowledge of some type" falls within the reach of the law, including draft documents, emails, handwritten notes, computer files, computer data, computer software, tapes, sound recordings, and photographs.[54]

a. Records and Documents

[53] *Florida Public Telecommunications Assn. v. City of Miami Beach*, 321 F.3d 1046 (11th Cir. 2003).
[54] *National Collegiate Athletic Assn. (NCAA) v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009).

A public record is defined as any material prepared in connection with official government agency business that is intended to perpetuate, communicate or formalize business of some type,[55] and that does not fall within one of the handful of specifically defined exceptions listed in Section 119.071, Florida Statutes. A document qualifies as a public record, even if it was prepared by a private party, so long as it was received by a government agent in connection with the transaction of public business. A private party cannot make documents it has provided to a government agency exempt from public availability merely by designating them as confidential or privileged.[56] A government employee who promises to keep such documents confidential is acting beyond her or her authority.[57]

A document created and maintained by a private entity that is never received or viewed by a government employee can still become a public record if the private entity is acting on behalf of a governmental unit and creates a document that reflects the business of the government.[58] The receipt of public funds, or a contractual relationship, is not, by itself, conclusive in determining if a private entity is acting on behalf of a government agency.[59] Florida courts apply nine factors to determine whether a private entity is acting as, or on behalf of, a public agency (this is known as the *Schwab* test): 1) level of public funding; 2) commingling of funds; 3) degree to which the business is conducted on public property; 4) whether the services provided are an integral part of the public agency's decision-making process; 5) whether the private firm is conducting a government function or a function normally performed by a public agency; 6) extent of public agency involvement with, regulation over, or control of, the private firm; 7) substantial financial interest by the public agency; 9) identity of the beneficiaries of the organization.[60]

To reiterate, these factors do not apply if a document produced by a private entity is received by a government employee. In such situations, the document is automatically a public record, unless it falls within one of the specific statutory exemptions. A document is "received" when it is viewed, possessed, examined, or used in the course of public business.[61]

If a private contractor meets *Schwab's* "acting on behalf of a public agency" test, and is a branch or subsidiary of a larger, nationwide firm, and receives a document from the parent corporation that reflects the business of the government, that document (even if it is intended by the corporation to be an "internal" or "confidential" communication), is a public record.[62] That is because the local branch or

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[55] *Shevin v. Byron, Harless, Schaffer, Reid & Assoc.*, Inc. 379 So. 2d 633 (Fla. 1980).
[56] *James, Hoyer, New Comer v. Rodale Press*, 41 So. 3d 386 (Fla. 1st DCA 2010).
[57] *NCAA v. Associated Press*, 18 So. 3d 1201, at 1209.
[58] *News and Sun-Sentinel Co. v. Schwab, Twitty & Hauser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).
[59] *Sarasota Herald-Tribune Co. v. Community Health Corp.*, 582 So. 2d 730 (Fla. 2nd DCA 1991).
[60] *News and Sun-Sentinel v. Schwab, Twitty & Hauser*, 596 So. 2d 1029, at 1031-34; *Wells v. Aramark Food Services Corp.*, 888 So.2d 134 (Fla. 4th DCA 2004).
[61] *NCAA v. Associated Press*, 18 So. 3d 1201 at 1207; *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2nd DCA 1990).
[62] Those who doubt the power of the Florida Public Records Act to reach into the confidential documents of private organizations are urged to read *National Collegiate Athletic Assn. v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009), where the NCAA was compelled to make public several documents related to its internal investigation of rule violations by athletes at a state university because they were viewed (by permission) by school officials over a secure website.

subsidiary is acting on behalf of its local government and is using, storing, or examining a document that reflects the business being transacted between the local division and the government.

Because most Florida bike-sharing operations are branches of nationwide corporations who have not formally created Florida domestic corporate subsidiaries, one question becomes: are *all* the documents of the national firm Florida public records? There is no clear answer to date. The best available determination is that any record made "in connection with the transaction of official [public] business" is a public record, regardless of who holds it, or where it is located. In a very recent Miami case, an organization sought to examine the flight logs of police helicopter pilots. These logs contained records of both the pilots' duty flights and their own personal recreational flying. The City argued that because of this intermingling, only extracts need be provided. The Court determined that the logs were eligible for examination for the entire time period during which each pilot was employed by the city, because personal flying was used to maintain a pilot's FAA certification, and such certification was a requirement of employment. Therefore, all the flights were "in connection with the transaction of public business."[63] Thus, it would appear that any document related to a vendor's performance relative to a given contract's scope of services or measures of effectiveness is a public record regardless of whether it was generated by a local-site employee or someone at the national headquarters, and regardless of where it is kept.

A vendor who is operating a public agency has a duty to turn over the records of the agency to its successor vendor or public entity.[64] This does not mean that such documents, in the absence of language in the vendor contract, automatically belong to the government, and must be turned over for free. Assuming that the contract gives the vendor ownership of the documents at the termination of the contract, the vendor must provide, if requested, the contracting agency or the successor entity with copies at a reasonable cost. However, most vendor contracts by local Florida governments make all documents generated in the course of fulfilling the contract the property of the government. Thus, if a contractor wishes to retain one set of records for its own reference after the services have been provided, this should be specified in the vendor contract.

There are generally considered to be nine exemptions from the Public Records Act. Only one of these is widely applicable to private contracting firms. The Florida Trade Secrets Act, section 815.045, Florida Statutes, exempts qualifying trade secrets from the requirements of the Public Records Act. A "trade secret" is any scientific, technical or commercial information that is: 1) secret; 2) valuable; 3) used (or available for use) in the operation of a business; 4) of advantage to (or potentially of advantage to) the business, irrespective of novelty, invention, patentability, prior art, or level of skill needed to develop. A claim of exemption on such grounds is viewed narrowly. For example, while a customer list can be protected, a list of customers who have filed complaints, along with a description of their complaints and the remedy provided, is not a trade secret because it does not have commercial value.[65] A trade secrets owner must take reasonable measures to prevent it from becoming available to others. The owner of a

[63] *Miami-Dade County v. Professional Law Enforcement Assn.*, 997 So. 2d 1289 (Fla. 2009).
[64] Opinion of the Florida Attorney General No. 09-39 (August 26, 2009).
[65] *James, Hoyer, New Comer v. Rodale Press*, 41 So. 3d 386, at 387.

trade secret who provides it to a government agency without labeling it as such, or who otherwise fails to take reasonable measures waives the exemption. Merely listing it as "privileged," "confidential," or "not for public disclosure" is not a reasonable measure, to prevent it from becoming public.[66] Trade secrets protection for proprietary computer software is broader than for other forms of trade secrets because additional Public Records Act protections are provided for in section 815(3)(a), Florida Statutes.

Note that many types of documents ordinarily thought of as confidential are non-exempt, or are exempt in only a narrow set of circumstances: attorney-client communications, personnel files, accident investigation reports, tax documents, budgets, business plans or personal emails sent from government-owned or supplied computers.

b. Meetings

The citizens of the State of Florida are guaranteed a right of access to the meetings of collegial public bodies, absent exceptional circumstances, by the state constitution. All meetings of public boards or commissions must be open to the public; reasonable prior notice of those meetings must be given; and adequate minutes must be taken.[67] However, most of the mundane, internal, administrative meetings held by the operator of a bicycle-sharing service, regardless of its operational model, would not be considered public because they are not meetings of boards or commissions at which "official acts are taken." The law applies only to decision-making boards and commissions, not to such workaday magisterial activities as daily staff meetings. On the other hand, if a bicycle sharing program is part of a local government agency, then any advisory board or oversight committee (such as a bicycle advisory board or green advisory team) usually must adhere to the Sunshine Law. Advisory boards created pursuant to state, county or local law, or otherwise established by public entities are subject to the Sunshine Law, even if their recommendations are not binding on the entities that create them.[68] The Sunshine Law equally applies to advisory boards where the members are appointed by a single public official or by an employee such as a university purchasing director or town manager.[69]

A thornier question is whether the board meetings of a private corporation providing vendor services to a local government are subject to the Sunshine Law. If the private organization has been delegated the authority to perform a governmental function, such meeting are subject to the Sunshine Law. However, the mere receipt of public funds by a private firm is not by itself sufficient to create such "delegation of authority," and a private corporation that performs services for a public agency and is paid

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[66] *Sepro Corp. v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[67] Art. 1, § 24, Florida Constitution; Chapter 286, Florida Statutes. The only blanket exceptions are for the federal government and the judiciary, although there are other specifically enunciated exempt meetings, such as a city commission meeting to consider a settlement agreement in a lawsuit.
[68] *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *Accord, Spillis, Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694 (Fla. 3rd DCA 1988).
[69] *Wood v. Marsten*, 442 So. 2d 934 (Fla. 1983): *Silver Express Co. v. District Board of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3rd DCA 1997).

for those services pursuant to a contract is not, simply by virtue of that relationship, subject to the Sunshine Law.[70]

There is not a single, clear test to determine whether a private organization has been "delegated the authority to perform a governmental function." If a duty or task is specified in a state statue or rule, or in a local law, and a private firm undertakes that task, it is such a delegation and its meetings fall within the Sunshine Law. This is also true for those cases where a service is traditionally provided by government, but in a particular instance is provided by a firm. If a service has, in the past, been provided by a government agency, but its performance has been shifted to a private organization, the organization also falls within the Sunshine Law. Finally, evidence that a government has tasked a private entity with the performance of a duty or service in order to avoid the burdens of the Sunshine Law is sufficient to sweep the private entity within the Law's mandate.[71] Recent case law indicates that the same nine-part *Schwab* test used to determine whether a private entity is "acting on behalf of a public agency" for the purposes of the Public Records Law should be used to determine if a decision-making board is subject to the Sunshine Law.[72]

Has all of a private firm been "delegated the authority to perform a government function," or only those parts of it directly responsible for a local operation? In general, all the parts of a private organization that are making legislative-type decisions essential to the processes of the quasi-governmental functions being provided must be noticed, open and available to the public. For those private corporations that pre-existed any contract with a Florida governmental entity; that are eligible to do business nation-wide; that widely transact business outside the scope of the local contract; and that have the freedom and authority to made decisions independent of the government, the odds that they will need to throw open their entire corporate governance is quite small. Again, the best yardstick is the nine-part *Schwab* test, this time applied to the question of how much of, and which parts of, a private entity "act on behalf of a public agency."[73] Those firms wanting a higher level of risk amelioration should consider creating a separate Florida domestic corporate subsidiary.

B-Cycle has worked with two municipal governments in Colorado to establish nonprofit corporations to operate bicycle-sharing programs, with B-Cycle then vending to the nonprofit corporations. If this model were followed in Florida, it is probable that these nonprofit corporations would be entirely subject to both the Sunshine Law and the Public Records Act. However, the degree to which the B-Cycle firm would be subject to the Sunshine Law and the Public Records Act cannot be determined, as too little information is available.

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[70] *McCoy Restaurants v. City of Orlando*, 392 So. 252 (Fla. 1980).
[71] Opinion of the Florida Attorney General No. 2007-27 (June 26, 2007); Opinion of the Florida Attorney General No. 2000-03 (January 13, 2000); Opinion of the Florida Attorney General No. 1992-80 (November 5, 1992).
[72] *Memorial Hospital West Volusia, Inc. v. News-Journal Corp.*, 927 So. 2d 961 (Fla. 5th DCA 2006).
[73] *News and Sun-Sentinel Co. v. Schwab, Twitty & Hauser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).