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April 17, 2015

Honorable Lorena S. Gonzalez
Room 6012, State Capitol

**LOCAL GOVERNMENT: DELEGATION OF LAND USE
AUTHORITY - #1509010**

Dear Ms. Gonzalez:

You have asked whether a city may contract away its land use authority to a nonprofit public benefit corporation and whether the Legislature may authorize a city to contract away its land use authority to a nonprofit public benefit corporation.

As an initial matter, under the California Constitution, a city may “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) Often referred to as the police power, this grant of municipal power is broad, giving “counties and cities ... plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation.] Apart from this limitation, the “police power [of a county or city] under this provision ... is as broad as the police power exercisable by the Legislature itself.” [Citation.]” (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1181, quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) “It is from this fundamental power that local governments derive their authority to regulate land through planning, zoning, and building ordinances, thereby protecting public health, safety and welfare. [Citations.]” (*Fonesca, supra*, at p. 1181.)

Additionally, a city has authority to enter into contracts that enable it to carry out its necessary functions. (*Carruth v. City of Madera* (1965) 233 Cal.App.2d 688, 695.) However, a city’s authority to enter into such contracts is not absolute, and it is well settled that “a local government may not contract away its right to exercise its police power in the future, and land use regulations involve the exercise of police power. [Citation.]” (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1724.) Furthermore, this prohibition applies to general law and charter cities alike, regardless of the authority provided

by article XI, section 5 of the California Constitution for certain charter city ordinances to override general laws.¹ Therefore, it is our opinion that cities may not contract away their land use authority because the exercise of that authority is an exercise of their police power under article XI, section 7 of the California Constitution.

Turning to whether the Legislature may authorize a city to contract away its land use authority, we note that under specified circumstances the Legislature has enacted statutes authorizing municipalities to share their land use authority.² Courts have validated or upheld such statutes against constitutional challenges³ where the statute “grants no new powers but merely sets up a new procedure for the exercise of existing powers,” because the parties already “possess the necessary police power, both under constitutional grant and under their respective charters.” (*City of Oakland v. Williams* (1940) 15 Cal.2d 542, 549.)⁴

Therefore, although the Legislature may authorize cities to jointly exercise common police powers, the Legislature may not authorize cities to contract away police power to an entity that does not itself possess any police powers. A nonprofit corporation does not possess any police powers. Furthermore, because the California Constitution expressly specifies entities that may exercise police power (Cal. Const. art. XI, § 7), the principal of *expressio unius est exclusio alterius*⁵ dictates that police powers may not be conferred on any other type of entity by the Legislature.⁶ Accordingly, it is our opinion that the

¹ The courts have applied to charter cities the prohibition against a city contracting away its police power. (See *Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1557-1560; *Wills v. City of Los Angeles* (1930) 209 Cal. 448, 452; *Laurel Hill Cemetery v. City & County of San Francisco* (1907) 152 Cal. 464, 475.)

² See Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.); Gov. Code § 65101 (authorizing the legislative body of each city and county to create one or more planning commissions); Gov. Code § 54981 (authorizing the legislative body of any local agency to contract with any other local agency for the performance by the latter of municipal services or functions within the territory of the former).

³ The constitutional challenge courts usually examine in this context is whether there is a violation of article XI, section 7 of the California Constitution. (See *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 492-493; hereafter *Younger*.)

⁴ For example, in *City and County of San Francisco v. Boyle* (1923) 191 Cal. 172, the California Supreme Court validated an agreement entered into under a state statute authorizing municipalities to jointly exercise common powers by agreement.

⁵ Under the maxim *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1130.)

⁶ “[T]he Legislature has no authority to create other public corporate bodies—whether called districts or by another other name—and clothe them with the power to make and enforce
(continued...)

Legislature may not authorize a city to contract away its police power, which includes the exercise of land use authority, to a nonprofit corporation.

We have determined that a city may not, and the Legislature may not authorize a city to, contract away to a nonprofit entity its police power, which includes land use authority. However, it is well established that a “governmental entity does not contract away its police power unless the contract amounts to the ‘surrender’ or ‘abnegation’ of a proper governmental function. [Citation.]” (*Santa Margarita Area Residents Together v. San Luis Obispo County* (2000) 84 Cal.App.4th 221, 233 (hereafter *Santa Margarita*); see also *Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 734.) Whether a contract amounts to a surrender or abnegation of a local government’s police power will depend upon the facts of the contract.⁷ With respect to contracts with private parties, “the fact that a third party, whether private or governmental, performs some role in application and implementation of an established legislative scheme does not render the legislation invalid as an unlawful delegation.” (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 379-380.)⁸ “The general rule is that while a public body may not delegate its power of control over public affairs to a private group, it may delegate the performance of administrative functions to such groups if it retains ultimate control over administration so that it may safeguard the public interest.” (*County of Los Angeles v. Nesvig* (1965) 231 Cal.App.2d 603, 616.) Ultimately, “[p]owers which require the exercise of judgment and discretion ... must necessarily remain with the public agency and cannot be delegated. Thus, the issue in each case of delegation is whether ultimate control over matters involving the exercise of judgment and discretion has been retained by the public entity. [Citations.]” (*Id.* at p. 617.) If the performance of the function being delegated does not constitute the exercise of police power because the city retains ultimate control of matters involving the exercise of judgment and discretion, then a city may, and the Legislature may authorize a city to, delegate such a function.

For the foregoing reasons, it is our opinion that a city may not contract away its land use authority to a nonprofit corporation, and the Legislature may not authorize a city to

(...continued)

local, police, sanitary, and other regulations conferred by the constitution upon counties, cities, towns, or townships.’ [Citation.]” (*Younger, supra*, 5 Cal.3d at p. 495.)

⁷ For example, in *Santa Margarita, supra*, 84 Cal.App.4th at page 233, the court found that a county’s contract for a project that agreed to a zoning freeze did not surrender or abnegate the county’s police power because the project had to be developed in accordance with the county’s general plan, the contract did not permit construction until the county approved detailed building plans, the contract retained the county’s discretionary authority in the future, and the zoning freeze was temporary.

⁸ However, if the private party granted authority has an interest in the application or establishment of the legislative scheme, then that grant of authority may violate the Fourteenth Amendment to the United States Constitution by depriving a person subject to that authority of property without due process of law. (*Tumey v. State of Ohio* (1927) 273 U.S. 510, 523.)

contract away its land use authority to a nonprofit corporation. However, it is also our opinion that a city may, and the Legislature may authorize a city to, by contract, delegate to a nonprofit corporation the performance of certain functions so long as that delegation does not constitute a surrender or abnegation of the city's police power.

Very truly yours,

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JEV:sjk