

**SUBMITTED TO THE
SEMSWA BOARD OF
DIRECTORS**

January 23, 2008

MEMORANDUM

Date: 1/18/08
To: Board of County Commissioners
From: Suzanne Staiert, Assistant County Attorney
Through: Kathryn Schroeder, County Attorney
Subject: Delegation of County Police Powers

County Police Powers

This memorandum first addresses the County's "police powers" related to land use matters, and the possible delegation of those powers to another entity.

As political subdivision of state government, counties only possess regulatory authority expressly conferred upon it by State Constitution and enactments of General Assembly, along with such incidental implied powers as are reasonably necessary to carry out such express powers. Land use authority is expressly delegated to counties by the Local Government Land Use Control Enabling Act and County Planning Code. C.R.S. §§ 29-20-101 et seq., 30-28-101 et seq. Pursuant to this authority county commissioners are authorized to adopt zoning regulations to guide use and development of land within unincorporated territory of the county.

These delegated legislative and police powers cannot be divested, assigned or waived by contract. *Keeling v. City of Grand Junction*, 689 P.2d 679 (Colo.App.1984), *Colorado Springs Fire Fighters Ass'n v. City of Colorado Springs*, 784 P.2d 766 (Colo.1989). Contracts with counties are entered into subject to the county's broad police power and a county may not contract away such authority. *Crossroads West Ltd. Liability Co. v. Town of Parker*, 929 P.2d 62 (Colo.App.,1996). Such contracts are void when there is a failure to comply with the mandatory provisions of the applicable statutes. *Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 958 P.2d 515 (Colo.App.,1998).

Delegated Police Powers upon transfer of MS4 permit

With respect to the SEMSWA Intergovernmental Agreement, section 5(a) states:

To the extent permitted by law, the City and the County shall delegate to the Authority such police powers as may be necessary to enable the Authority to enforce any and all provisions of NPDES MS4 Stormwater Permits transferred to the Authority or obtained by the Authority.

Section 5(b) states :

(b) The Authority shall not exercise discretionary or final decision-making authority over land use and land development applications or projects within the County or City; except that, in instances where a decision would cause a NPDES MS4 Stormwater Permit violation, the Authority is empowered to veto such decision after giving the County or City sixty (60) days written notice within which to revise its approval so as such decision would not cause a NPDES MS4 Stormwater Permit violation or fund the stormwater facility necessary to correct the violation.

Section 5(a) is a blanket transfer of all police power necessary to enforce the MS4 permit. The provision is overly broad and the application violates state statute. Section 5(b) grants veto powers over land use decisions where, in the opinion of SEMSWA, there would be a violation of the MS4 permit. This is particularly problematic as land use decisions are quasi-judicial and must be properly noticed and heard.

Within the proposed SEMSWA Implementing Intergovernmental Agreement there were further provisions requiring the County to support legislation and pursue violations at the direction of SEMSWA. The County continues to object to these provisions as they divest the county of its delegated powers and are prohibited by law.

Moreover, such delegation is unnecessary for SEMSWA to carry out enforcement of the NPDES MS4 permit. C.R.S. § 29-1-204.2 establishes SEMSWA as a separate governmental entity created as a political subdivision and public corporation of the state. The statute further grants the stormwater authority the duties, privileges, immunities, rights, liabilities and disabilities of a public body politic and corporate. Specifically detailed in section (4) of the statute and stated again within section (4) of the IGA are SEMSWA's right to:

4(h) To sue and be sued in its own name;

4(k) To adopt, by resolution, regulations respecting the exercise of its powers and the carrying out of its purpose.

Although it would be possible to assign or contract certain enforcement duties such as inspection powers or the issuance of permits, these are distinguished from the broad police powers of a County. Final decisions as to the necessity of court action, enactment of legislation and final land use decisions cannot be assigned or waived. These can only be undertaken by the entity vested with specific statutory authority and in accordance with their rules and regulations.

Delegated Police Powers without transfer of MS4 permit

It is important to note that these provisions within the IGA are all conditioned upon a transfer of the MS4 permit. Under any interpretation of the IGA, there are no powers delegated until the permit transfers. Therefore, SEMSWA, acting in a referral capacity

can make recommendations, but they cannot currently act as a regulatory authority over the County. Their current authority is be limited to part 5(c) of the IGA:

(c) The Authority shall serve as an advisory or referral agency to the City and the County in all aspects of drainage, flood control, floodplain management, and stormwater quality and management. The City and County shall refer to the Authority for review and comment land use and development applications for projects located within the jurisdictional boundaries of the Authority where such applications implicate issues of drainage, drainage improvements, modifications to drainage improvements or drainage patterns, or other matters within the purpose of the Authority. The City and the County may refer any other matter to the Authority for review and comment.

This would essentially be the relationship under the County's proposed partnership model. Such a relationship could be established while still operating within the current terms of the IGA. The IGA requires SEMSWA to accept the transfer of the MS4 permit, but it does require the parties to make such a transfer.