

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

KAMALA D. HARRIS  
Attorney General

---

OPINION	:	No. 12-203
	:	
of	:	December 14, 2012
	:	
KAMALA D. HARRIS	:	
Attorney General	:	
	:	
MARC J. NOLAN	:	
Deputy Attorney General	:	
	:	

---

Proposed Relator PROTECT OUR BENEFITS, an organization of persons receiving pension benefits from the San Francisco Employees Retirement System, has requested leave to sue the CITY AND COUNTY OF SAN FRANCISCO in quo warranto on the following questions:

1. Does a voter-approved charter amendment, which specifies that certain supplemental cost-of-living adjustments will not be paid to retired employees of the City and County of San Francisco (City) and their covered beneficiaries “unless the Retirement System was also fully funded based on the market value of the assets for the previous year,” violate the vested pension rights of retired City employees and their covered beneficiaries?

2. Did the City’s Board of Supervisors secure an actuarial report on the cost and effect of the proposed charter amendment before voting to submit that charter amendment to City voters?

## CONCLUSION

Because Proposed Relator's claims do not implicate the state's sovereign interest in the enforcement of state laws respecting the amendment of city charters, and because it is not in the general public interest for us to authorize the filing of the proposed quo warranto action under the circumstances, leave to sue in quo warranto is DENIED. The denial of this application, however, does not preclude Proposed Relator from bringing another form of legal action on its own behalf to challenge the substantive validity of the charter amendment at issue.

## ANALYSIS

Proposed Defendant, the City and County of San Francisco (City), has a public employee retirement system known as the San Francisco Employees Retirement System (SFERS), which is administered by the City's Retirement Board. The SFERS pension plan pays defined pension benefits to retired City employees and their covered beneficiaries. These benefits are funded by investment earnings on assets that SFERS holds in trust in a retirement fund that the City has dedicated for these purposes (the Retirement Fund), and by contributions from the City and current City employees. Proposed Relator, Protect Our Benefits (POB), is a political action committee composed of persons receiving pension benefits from SFERS.

At issue here is a ballot initiative measure, known as Proposition C, passed by City voters in the November 2011 municipal election. Among other things, Proposition C amended the City Charter to specify that certain supplemental cost-of-living adjustments (or Supplemental COLAs) will not be paid to retired City employees and their covered beneficiaries unless the City's Retirement System "was also fully funded based on the market value of the assets for the previous year."<sup>1</sup>

POB argues that its request for leave to sue the City in quo warranto should be granted because (1) Proposition C "eliminates" Supplemental COLAs that the voters had previously authorized and made permanent, and therefore violates vested pension rights of POB members, and (2) the City's Board of Supervisors placed Proposition C on the ballot without first complying with a City Charter directive that the Board obtain an actuarial report regarding the measure's potential cost and effect, in particular with regard to the payment of Supplemental COLA benefits.

The City urges us to deny POB's application. As to the substantive claims that Proposition C violates POB members' vested pension rights, the City argues that quo

---

<sup>1</sup> City Charter § A8.526-3(d).

warranto is not a proper form of action in which to litigate such claims. As for the procedural claim alleging a failure to timely obtain an actuarial report, the City argues that the charter provision requiring an actuarial report in such circumstances is preempted by general state law, and is therefore unenforceable.

The grounds for initiating a quo warranto proceeding are set forth in Code of Civil Procedure section 803, which provides in relevant part:

An action may be brought by the attorney-general, in the name of the people of this state, upon his [or her] own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state.

Where, as here, a private party seeks to file an action in quo warranto in the name of the People of the State of California, that party must obtain the Attorney General's consent to do so.<sup>2</sup> In a proper case, a quo warranto action may be authorized to resolve allegations that a charter city unlawfully exercised its power to amend its charter.<sup>3</sup>

In determining whether to grant leave to sue in quo warranto, we do not attempt to resolve the merits of the controversy. Instead, we decide whether the application presents substantial issues of fact or law that warrant judicial resolution, and whether granting the application will serve the public interest.<sup>4</sup> For the reasons that follow, we conclude that POB's contentions are not proper subjects of a quo warranto action, and we therefore deny the application. In doing so, however, we express no view as to the merits of POB's claims that Proposition C violates its members' vested pension rights. Our denial of the application does not preclude POB from bringing a different form of action challenging the validity of Proposition C.

---

<sup>2</sup> See *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d 687, 693-698 (1985).

<sup>3</sup> *People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach*, 36 Cal. 3d 591, 595 & n. 3 (1984); see *City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th 82, 89 (1999); *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 693-698; see also 74 Ops.Cal.Atty.Gen. 77 (1991).

<sup>4</sup> 93 Ops.Cal.Atty.Gen. 144, 145 (2010); 90 Ops.Cal.Atty.Gen. 82, 84 (2007); 86 Ops.Cal.Atty.Gen. 205, 208-209 (2003); 12 Ops.Cal.Atty.Gen. 340, 341 (1949).

We begin our analysis with a summary of the circumstances that led to the present controversy. As mentioned, the City provides retirement benefits through the SFERS-administered Retirement Fund. As part of their pension benefits, retired City employees are eligible to receive an annual adjustment, known as a cost-of-living adjustment (or Basic COLA), to their pension benefit amount. Under the City Charter, whether the Basic COLA is paid in a given year, and in what amount, depends on changes in the cost of living as measured by the Consumer Price Index.<sup>5</sup> The Charter also limits the Basic COLA that most retirees can receive to 2 percent of the original retirement allowance.<sup>6</sup>

In 1996, City voters passed a measure adding section A8.526-1 to the City Charter and creating a *Supplemental* COLA, which is not linked to the cost-of-living index, but rather is to be paid out of a reserve account containing amounts in excess of the Retirement Fund's expected earnings. These reserve account funds were originally to be used to provide a 3 percent increase in retirement allowances (i.e., 1 percent more than the Basic COLA). In 2002, City voters passed a measure amending Charter section A8.526-1 to specify that any Supplemental COLA "once paid to a [SFERS] member, shall not be reduced thereafter."<sup>7</sup> In 2008, City voters passed a measure that, among other things, added section A8.526-3 to the Charter. Effective in 2009, this new section superseded Charter section A8.526-1<sup>8</sup> and raised the maximum Supplemental COLA from 3 percent to 3.5 percent.

Most recently, in 2011, City voters considered Proposition C, which proposed numerous changes to the City's retirement and health benefits systems. The City informs us that Proposition C was formulated in response to the global economic downturn, as explained in the measure's "Findings and Purpose" section in the November 2011 Voter Information Pamphlet:

Between June 2007 and January 2009, the Dow Jones Industrial Average declined 40%. This historic decline and the subsequent great recession have harmed the City's budget in two ways. First, it caused the City's tax and fee revenues to be significantly lower than expected, worsening the City's deficit. Second, it caused the retirement fund to drop from being fully funded (based on the actuarial value of the assets)—or

---

<sup>5</sup> City Charter § A8.526(b)(1).

<sup>6</sup> City Charter § A8.526(b)(3).

<sup>7</sup> City Charter § A8.526-1(c).

<sup>8</sup> Section A8.526-3 retained the proviso from section A8.526-1 that any Supplemental COLA paid to an SFERS member "shall not be reduced thereafter."

more than fully funded—to being only partially funded. As a result, to make up the shortfall in the retirement fund, the City has had to increase substantially its employer contributions, further exacerbating the City’s deficit.<sup>9</sup>

The Pamphlet summarized the proposed modifications to pension contributions and benefits as follows:

For new employees and (elected or appointed) officials commencing employment or assuming office on and after January 7, 2012, the amendments provide a package of new and less costly retirement benefit. For existing employees and officials, the amendments address the rising costs of the City’s retirement obligations by ensuring a higher stream of payments by both employers and employees and officials to support the retirement fund. These payments rise and fall with the financial health of the retirement system, requiring employees to pay more or less than their current contributions as needed. Lower paid employees will pay lesser percentages; safety employees will pay higher percentages based on their higher retirement benefits. *Similarly, the amendments ensure that retiree supplemental cost of living adjustments will reflect the financial health of the retirement fund, so that the Retirement System pays them only when the retirement fund is fully funded.*<sup>10</sup>

Proposition C passed with approximately 69 percent of the popular vote.<sup>11</sup> As relevant here, Proposition C amended subdivision (d) of Charter section A8.526-3 to read as follows:

To clarify the intent of the voters when originally enacting this Section in 2008, beginning on July 1, 2012 and July 1 of each succeeding year, no supplemental cost of living benefit adjustment shall be payable unless the Retirement System was also fully funded based on the market value of the assets for the previous year.

---

<sup>9</sup> November 2011 San Francisco Municipal Election Voter Information Pamphlet, at 111.

<sup>10</sup> *Id.* at 112 (emphasis added).

<sup>11</sup> City & Co. of San Francisco Dept. of Elections, Results Summary: Consol. Mun. Election (Nov. 8, 2011). Available online at: <http://sfelections.org/results/20111108/>.

## POB's Vested Pension Rights Claim

We first consider POB's claim that Proposition C unlawfully eliminated the Supplemental COLA benefit that its members had been receiving without a "comparable new advantage" or "corresponding benefit," in violation of its members' vested, and constitutionally protected, pension rights. POB's argument is based on three general legal premises: (1) that public employees accrue a vested contractual right to pension benefits, which are considered an element of compensation for work already performed;<sup>12</sup> (2) that vested pension rights are protected by the contract clauses in the federal and state constitutions;<sup>13</sup> and (3) that, to be valid, changes to a pension plan that disadvantage employees and/or retirees should be accompanied by comparable new advantages.<sup>14</sup>

Given these premises, POB alleges that the new provision (Charter section A8.526-3(d)) effectively eliminates Supplemental COLAs because "defined benefit plans are almost never 'fully funded based on the market value of the investments for the previous year.'" Further, POB argues that Proposition C did not bring about any comparable new advantage for its members, and therefore that section A8.526-3(d) should be invalidated on the ground that it violates POB members' constitutionally protected pension rights. POB seeks our authorization to file a quo warranto action to pursue these claims.

While our standards for granting leave to sue in quo warranto are often stated in a shorthand manner—i.e., that an application may be granted when there is a substantial issue of law or fact warranting judicial resolution and that such a resolution is in the public interest—the determination whether to authorize a quo warranto filing necessarily encompasses the more fundamental question as to whether quo warranto is the appropriate legal remedy in the given circumstances. As we stated in an early opinion:

In acting upon an application for leave to sue in the name of the people of the State, it is not the province of the Attorney General to pass upon the issues in controversy, but rather to determine whether there exists a state of facts or question of law that should be determined by a court *in an action quo warranto*; that the action of the Attorney General is a preliminary investigation, and the granting of the leave is not an indication that the

---

<sup>12</sup> *City of Oakland v. Public Employees' Ret. Syst.*, 95 Cal. App. 4th 29, 38-39 (2002).

<sup>13</sup> *Co. of Orange v. Assn. of Orange Co. Dep. Sheriffs*, 192 Cal. App. 4th 21, 41 (2011).

<sup>14</sup> *Miller v. St. of Cal.*, 18 Cal. 3d 808, 817 (1977); *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 447-448 (1958).

position taken by the relator is correct, but rather that the question should be judicially determined *and that quo warranto is the only proper remedy*.<sup>15</sup>

In this connection, we note that “[p]rimarily, the remedy of quo warranto belongs to the state, in its sovereign capacity, to protect the interest of the people as a whole and guard the public welfare.”<sup>16</sup> With regard to the actions of local agencies, it has been observed that:

“In theory, public corporations of any character whatsoever, exercising governmental functions, do so by reason of a delegation to them of a part of the sovereign power of the state. Where they are claiming to act and are actually functioning without having complied with the necessary prerequisites, they are usurping franchise rights as against paramount authority, to complain of which it lies only within the right of the state itself.”<sup>17</sup>

Because the state has a sovereign interest in such matters, quo warranto will lie to resolve the question whether a given charter amendment was *validly enacted* in compliance with state law.<sup>18</sup> For example, the California Supreme Court endorsed the use of quo warranto<sup>19</sup> where plaintiffs contended that the charter city of Seal Beach had enacted a charter amendment concerning employer-employee relations without first bargaining with its employee unions over the proposed charter amendment, as required under the Meyers-Milias-Brown collective bargaining act.<sup>20</sup> Of course, this office had authorized the filing of the Seal Beach quo warranto action in the first instance, and we have only recently authorized the filing of an action (involving the Bakersfield Police Officers’ Association) premised on similar allegations.<sup>21</sup> We have also granted leave to

---

<sup>15</sup> 12 Ops.Cal.Atty.Gen. at 341 (emphasis added).

<sup>16</sup> *Citizens Utils. Co. of Cal. v. Super. Ct.*, 56 Cal. App. 3d 399, 406 (1976).

<sup>17</sup> *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 694 (quoting *VanWagener v. MacFarland*, 58 Cal. App. 115, 120 (1922)).

<sup>18</sup> *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 694.

<sup>19</sup> *Seal Beach Police Officers’ Assn.*, 36 Cal. 3d at 595 & n. 3 (propriety of quo warranto procedure “not questioned”).

<sup>20</sup> Govt. Code §§ 3500-3511.

<sup>21</sup> *See* 95 Ops.Cal.Atty.Gen. 31 (2012). The alleged failure to bargain under the MMBA was also the premise for the quo warranto we authorized in a matter involving the Fresno Police Officers and Firefighters Associations. 76 Ops.Cal.Atty.Gen. 169, 171-173 (1993). In that instance, the court of appeal ultimately determined that the particular

sue in quo warranto where it was alleged that an entire county charter was enacted in violation of the state constitution provisions governing such charters;<sup>22</sup> and in a dispute over whether a county charter amendment that would impose term limits on the office of county sheriff was permitted under the state Constitution.<sup>23</sup>

It has been held that quo warranto is the *only* legal remedy available in circumstances where a charter amendment alleged to have been invalidly enacted due to irregularities in the legislative processes prescribed by state law has taken effect.<sup>24</sup> Therefore, the failure to obtain our permission to proceed in quo warranto under such circumstances may be cause for dismissal of a suit filed under some other legal theory.<sup>25</sup> This prerequisite provides a safeguard against baseless litigation over the proprieties of a charter amendment's enactment.<sup>26</sup>

The state's sovereign interest, and the general public interest, are uniquely implicated where a local agency has enacted or amended charter provisions in violation of state laws governing the lawmaking process.<sup>27</sup> But—apart from the validity of a given charter amendment's enactment under the legislative processes specified and imposed by

---

policy change complained of was *not* a matter for mandatory bargaining under the MMBA, but found no fault with our initial grant of authorization to litigate the matter as a suit in quo warranto. *City of Fresno*, 71 Cal. App. 4th at 94-98.

<sup>22</sup> 86 Ops.Cal.Atty.Gen. 1, 2-5 (2003); see *People ex rel. Kerr v. Co. of Orange*, 106 Cal. App. 4th 914, 917 (2003). See generally Cal. Const. art. XI, § 4 (prescribing elements of charters).

<sup>23</sup> 86 Ops.Cal.Atty.Gen. 127, 128-130 (2003).

<sup>24</sup> *Pulskamp v. Martinez*, 2 Cal. App. 4th 854, 859 (1992) (“a challenge based on purported irregularities in the legislative process of a charter amendment which has taken effect, must be accomplished through [quo warranto]”); *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 694 (“Since an action in the nature of quo warranto will lie to test the regularity of proceedings by which municipal charter provisions have been adopted, it follows that, once those provisions have become effective, their procedural regularity may be attacked only in quo warranto proceedings.”); *Oakland Mun. Improvement League v. City of Oakland*, 23 Cal. App. 3d 165, 168-169 (1972).

<sup>25</sup> *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 698; *Oakland Mun. Improvement League*, 23 Cal. App. 3d at 172-173.

<sup>26</sup> See *Oakland Mun. Improvement League*, 23 Cal. App. 3d at 172-173.

<sup>27</sup> *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 694; see *Citizens Utils. Co.*, 56 Cal. App. 3d at 406.

state law—it is neither necessary nor appropriate to use quo warranto procedures to litigate the question whether the substance of a particular charter amendment violates the rights of certain individuals or groups.

That is not to say that aggrieved parties have no legal recourse in such cases. An enacted charter amendment, like any other law, may be challenged on its merits by those who can demonstrate that it violates their rights. The unavailability or inapplicability of quo warranto procedures in a given context does not “preclude[] an individual or group, upon a proper showing of the confiscatory or discriminatory effect of the [challenged charter] amendments, from attacking the substantive merits thereof.”<sup>28</sup> Our determination here should in no way foreclose POB from pursuing an action to challenge the substantive validity of the complained-of charter amendment in another way and on its own behalf.<sup>29</sup> We merely conclude that a quo warranto action, and the concomitant state involvement, is inappropriate and unnecessary under these circumstances.

### **POB’s Procedural Irregularity Claim**

We next consider POB’s second ground for seeking leave to sue. Charter section A8.500 states that the Board of Supervisors “shall secure an actuarial report of the cost and effect of any proposed change in the benefits under the Retirement System, before . . . voting to submit any proposed Charter amendment providing for such change.” POB alleges that the Board of Supervisors failed to follow this directive before putting Proposition C on the ballot.<sup>30</sup> While this contention does go to a claimed irregularity in the legislative process, rather than an attack on the challenged

---

<sup>28</sup> *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 693. *E.g.*, *Edelstein v. City and Co. of San Francisco*, 29 Cal. 4th 164 (2002) (would-be candidate alleged charter amendment prohibiting write-in voting violated free speech rights); *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 135-137 (1976) (class action to invalidate charter amendment instituting rent control).

<sup>29</sup> In fact, an example of such a direct attack occurred only recently in a case involving another San Francisco city charter amendment. *Edelstein*, 29 Cal. 4th at 169-170. There, a would-be write-in candidate for mayor and a registered voter who supported his candidacy sought declaratory relief against the City on the ground that a particular charter amendment, prohibiting write-in voting in a mayoral run-off election, violated voters’ free speech rights. *Id.* Although the Supreme Court ultimately denied the challenge on the merits (*id.* at 174-183), the case was permitted to proceed as a direct attack on the charter amendment at issue.

<sup>30</sup> The City has come forward with evidence that it would offer to refute that allegation.

amendment's substantive validity with respect to City retirees' pension rights, we nonetheless deny POB's application for leave to sue in quo warranto based on this allegation.

Critically, the actuarial report requirement contained in City Charter section A8.500 is a procedural directive of purely local origin, not one imposed by state laws respecting the amendment of city charters. While the City goes so far as to assert that section A8.500 is *preempted* by state law and is therefore unenforceable as a general matter, we need not (and do not) reach that question in order to resolve POB's request.<sup>31</sup> Our analysis does not turn on whether state law preempts section A8.500, but rather on whether state law is the source of the actuarial report requirement. Plainly, it is not. Thus, because there is no allegation of irregularity in the processes required by *state law*, there is no state sovereign interest in seeing that such a locally-imposed requirement is followed.<sup>32</sup>

### **Conclusion**

Because POB's claims do not implicate the state's sovereign interest in the enforcement of state laws respecting the amendment of city charters, and because it is not in the general public interest for us to authorize the filing of the proposed quo warranto action under the circumstances, leave to sue in quo warranto is DENIED. The denial of

---

<sup>31</sup> We recognize that the state Legislature has "occupied the field" of municipal charter amendment procedures "with the intention of preempting that field of regulation to the exclusion of any attempted municipal regulation in the same field." *Dist. Election of Supervisors Comm. for 5% v. O'Connor*, 78 Cal. App. 3d 261, 267, 272-274 (1978); see also *Seal Beach Police Officers' Assn.*, 36 Cal. 3d at 598-599. Nonetheless, because it is unnecessary to decide the issue in order to resolve the question before us, we decline to do so.

<sup>32</sup> In our previous opinion granting the Bakersfield Police Officers Association's request for leave to sue the City of Bakersfield in quo warranto, we noted that a certain provision of the Bakersfield city charter "substantially parallels" the state law requirement—contained in the Meyers-Milias-Brown Act (Govt. Code §§ 3500-3511)—that local municipalities meet-and-confer with their employee organizations before placing an initiative measure on the ballot that would affect terms and conditions of employment. 95 Ops.Cal.Atty.Gen. at 32. Our granting of leave to sue, however, was premised on the assertion (and supporting, but disputed, factual allegations) that the subject charter amendment was enacted in violation of the governing *state law*.

this application, however, does not preclude POB from bringing another form of legal action on its own behalf to challenge the substantive validity of the charter amendment at issue.

\*\*\*\*\*