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OPINION	:	No. 15-1101
	:	
of	:	September 6, 2016
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Proposed relator DEBORAH ROBERTSON has requested leave to sue proposed defendant EDWARD PALMER in quo warranto to remove him from the public office of Rialto city council member on the ground that he did not reside in the city at the time of his reelection as required by law.

CONCLUSION

Because proposed relator’s allegations regarding Edward Palmer’s eligibility to serve on the Rialto city council do not present a substantial issue of fact or law requiring judicial resolution, and because allowing this lawsuit to proceed would not be in the public interest, leave to sue in quo warranto is DENIED.

ANALYSIS

Proposed relator Deborah Robertson (hereafter “Relator”) has asked the Attorney General for permission to pursue a quo warranto action in court against Edward Palmer

(hereafter “Palmer”) to remove him as a member of the Rialto city council.¹ Relator asserts that Palmer is ineligible to hold this public office, and that he should therefore be removed from it, because he was not a legal resident of Rialto at the time of his reelection to the city council in 2012, as state law requires. Upon close inspection and examination, we conclude that Relator’s allegations do not merit granting this application.

Background

Palmer’s sworn declaration and supporting documentation provide the following chronology:

- In 1986, Palmer purchased a residence at 209 Coral Tree Drive in Rialto (the Coral Tree property) and lived there with his then-wife and their children.
- In 1992, after a divorce, Palmer stopped living at the Coral Tree property, and bought a residence at 5674 Sycamore Avenue in an unincorporated area outside Rialto (the Sycamore property), but near the Coral Tree property. Palmer stayed at the Sycamore property to be near his children when he did not have custody of them.
- In 1994, Palmer purchased the property at 229 North Riverside Avenue in Rialto (the Riverside property). Palmer states that, since 1994, he has continuously maintained and used the upstairs part of the Riverside property as a residence, even when also residing at other addresses.
- In 1995, Palmer, an attorney, started using the downstairs portion of the Riverside property as his law office. During this time, Palmer would stay at the Riverside property whenever he was not caring for his children.
- Eleven years later, in 2006, Palmer sold the Coral Tree property to his son and daughter-in-law. Having remarried the year before, Palmer then moved into the Sycamore property with his new wife and baby daughter, while often staying at the Riverside property because his law office was there.

¹ Rialto is a general law city in San Bernardino County. Relator is the Mayor of Rialto but has made this application in her private capacity.

- In 2007, Palmer, who was now experiencing marital difficulties with his current wife, moved back into the Coral Tree property with his now adult son and daughter-in-law. Even so, Palmer continued to often stay at the Riverside property for convenience.
- In 2008, Palmer was elected to the Rialto City Council. Palmer states that he recorded the Coral Tree property as his address on his nomination papers because he considered it to be his domicile at the time.
- In 2009, the Coral Tree property was foreclosed upon. According to Palmer, he had stopped residing there and moved to the Riverside property “on a more full-time basis,” while still living apart from his wife and working on their marriage. Palmer states that he would go to the Sycamore property almost every night for dinner and to put his daughter to bed for the night, and would then return to the Riverside property.
- In 2010, Palmer changed his residential address with the registrar of voters from the Coral Tree property to the Riverside property as he now considered that latter address to be his domicile or legal residence.
- In 2012, Palmer was reelected to the Rialto City Council. On his nomination papers and California voter registration form, he designated the Riverside property as his current legal residence and home address.

For her part, Relator claims—upon her information and belief—that Palmer did *not* reside at the Riverside property/business address at the time of his 2012 reelection, but was instead living at the Sycamore address, outside Rialto, with his wife and daughter. Relator also argues that, in any event, the Riverside property was located within an area rezoned for office services in 1983, and thus could not be legally claimed as a residence address for election purposes in 2012.

Palmer responds that Relator’s claim that he was living outside Rialto at the time of his 2012 reelection is unsupported, and contradicted by his own evidence and declaration that his legal residence at that time was the Riverside property. As to the zoning issue, Palmer submits a 2011 letter from the Rialto City Administrator to the San Bernardino County Registrar of Voters indicating that the Riverside property may be lawfully maintained as a residence under the Rialto Municipal Code.

Against this backdrop, we turn to the merits of the parties' contentions.

Applicable Law

Code of Civil Procedure section 803 provides: "An action may be brought by the attorney-general, in the name of the people of this state, upon his 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 . . . within this state."² An action filed under this statute is known as a "quo warranto" action, and it is the proper legal avenue for testing title to public office.³ A party must obtain the Attorney General's consent in order to sue in quo warranto.⁴ We apply a two-part test to determine whether to grant an application for leave to sue. First, is there a substantial question of fact or law warranting judicial resolution? Second, if so, would authorizing leave to sue serve the overall public interest?⁵ We are accorded broad discretion in evaluating both parts of this test.⁶

The office of city council member is a "public office" within the meaning of Code of Civil Procedure section 803.⁷ A person may not be a council member of a general law city unless the person resides within city boundaries when nomination papers are issued, at the time of assuming office, and throughout the term of office.⁸ For this purpose, "residence" means "legal residence" or "domicile."⁹ Although a person may permissibly reside in multiple places or locations, one may have only one legal residence/domicile at a time.¹⁰ In this context, a person's domicile refers to "the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or

² Code Civ. Proc., § 803; see *Citizens Utilities Co. of Cal. v. Super. Ct.* (1976) 56 Cal.App.3d 399, 405-406; 97 Ops.Cal.Atty.Gen. 12, 14 (2014).

³ *Nicolopoulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225-1226; 95 Ops.Cal.Atty.Gen. 43, 44 (2012).

⁴ 96 Ops.Cal.Atty.Gen. 48, 49 (2013).

⁵ 96 Ops.Cal.Atty.Gen., *supra*, at p. 49; 89 Ops.Cal.Atty.Gen. 44, 46 (2006).

⁶ *Rando v. Harris* (2014) 228 Cal.App.4th 868, 878-882; 96 Ops.Cal.Atty.Gen., *supra*, at p. 49.

⁷ 87 Ops.Cal.Atty.Gen. 30, 31 (2004).

⁸ Gov. Code, §§ 34882, 36502, subd. (a); 87 Ops.Cal.Atty.Gen., *supra*, at p. 32; 85 Ops.Cal.Atty.Gen. 90, 91-92 (2002).

⁹ *Walters v. Weed* (1988) 45 Cal.3d 1, 7; 86 Ops.Cal.Atty.Gen. 194, 196 (2003).

¹⁰ *Smith v. Smith* (1955) 45 Cal.2d 235, 239; 89 Ops.Cal.Atty.Gen., *supra*, at p. 47; 87 Ops.Cal.Atty.Gen., *supra*, at p. 33.

she returns in seasons of repose”;¹¹ it has also been defined as the place that one physically occupies with the intention to make it one’s permanent home.¹² Factors used in determining a person’s legal residence or domicile include the person’s acts and declarations, as well as the address listed on official documentation such as his or her voter registration and driver’s license.¹³

No Substantial Question Is Presented Regarding Palmer’s Legal Residence

We identify two central issues in the parties’ submissions:

1. At the time of Palmer’s reelection in 2012, did he physically reside at, and intend his legal residence/domicile to be, the Riverside property in the City of Rialto?
2. If so, did the City of Rialto’s zoning laws permit Palmer to use the Riverside property as a legal residence?

We address each issue in turn.

First, we have no reason to doubt Palmer’s factual claim that he resided at the Riverside property, and intended it to be his legal residence/domicile, in 2012.

Palmer has submitted to us a declaration, made under penalty of perjury, in which he details his continuous use of the Riverside property as a residence since he purchased it in 1994, and recounts his intention to use it as his domicile from 2009 until December 2015.¹⁴ We have also been provided with copies of: Palmer’s change-of-address form, submitted to the county registrar of voters in 2010, indicating that Palmer changed his

¹¹ Gov. Code, § 244, subd. (a); see *Walters v. Weed*, *supra*, 45 Cal.3d at p. 7; 72 Ops.Cal.Atty.Gen. 63, 64, 66 (1989).

¹² *Fenton v. Bd. of Directors* (1984) 156 Cal.App.3d 1107, 1116; 97 Ops.Cal.Atty.Gen. 1, 4 (2014); see also Elec. Code, § 349, subd. (b) (“The domicile of a person is that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning”).

¹³ *Fenton v. Bd. of Directors*, *supra*, 156 Cal.App.3d at p. 1116; 95 Ops.Cal.Atty.Gen., *supra*, at p. 46.

¹⁴ Palmer states that in December 2015, he reconciled with his wife, and moved with her to another address that is located in the City of Rialto.

residential and mailing addresses to the Riverside property; Palmer's declaration of candidacy and ballot designation worksheet from 2012, listing the Riverside property as his current residence and home address; and Palmer's California voter registration form from 2012, also reflecting his home address as the Riverside property. Palmer has also submitted photographs depicting an upstairs residence at the Riverside property that includes household items, a kitchen with appliances, a living room with furniture, a bathroom with supplies, and a bed with bedding. Lastly, a copy of Palmer's 2014 California driver license reflects the Riverside property address as his residence. In contrast, we have Relator's bare assertion that, based on her information and belief, Palmer was not a legal resident of Rialto at the time of his reelection to the city council in 2012, but rather was living with his family at the Sycamore property, outside Rialto.

In rejecting a similar assertion made in an earlier quo-warranto application, we explained: "Implied in Relator's argument is a presumption that a person may not maintain a domicile separate from the residence shared with his or her spouse and children. But the law provides otherwise."¹⁵ Indeed, under the law, a married person may keep a different domicile than his or her family's domicile.¹⁶ At most, the parties' allegations show that in 2012, Palmer had another residence besides the one located at the Riverside property, but not another domicile.¹⁷ In the absence of any substantial, competent evidence contradicting Relator's sworn declaration and corroborating documentation, we do not discern any substantial question as to whether the Riverside property was Palmer's domicile in 2012.¹⁸

Next, we address whether a substantial question of fact or law exists as to whether, on account of local zoning restrictions, the Riverside property could lawfully be declared a residence at the time of Palmer's reelection to the city council in 2012. We do not think there is one. Palmer's residential use of the property has never been found (or even claimed to be) illegal; at no time did the City of Rialto issue Palmer any citation, directive, or warning that he was violating any zoning law. To the contrary, there was

¹⁵ 86 Ops.Cal.Atty.Gen., *supra*, at p. 197.

¹⁶ Gov. Code, § 244, subd. (g); Elec. Code, §§ 2028, 2029.

¹⁷ See 72 Ops.Cal.Atty.Gen. 15, 23 (1989) ("The material submitted by the proposed relator does establish the fact that each proposed defendant has more than one residence. But it does not establish the domicile of the proposed defendant").

¹⁸ 87 Ops.Cal.Atty.Gen., *supra*, at pp. 33-34; 75 Ops.Cal.Atty.Gen. 287, 289 (1992); 75 Ops.Cal.Atty.Gen. 26, 28 (1992); 72 Ops.Cal.Atty.Gen., *supra*, at p. 23; 72 Ops.Cal.Atty.Gen. 8, 14-15 (1989).

official, explicit *authorization* for Palmer to reside at the Riverside property in the year before his reelection.

While the Riverside property was not zoned for residential use at the time of Palmer's 2012 reelection,¹⁹ the Rialto City Administrator determined that the property was exempt from the rezoning plan, and effectively sanctioned Palmer's residential use of it.²⁰ In a letter dated September 7, 2011, to the San Bernardino County Registrar of Voters, the city administrator explained that "[b]ecause the residential structure [at the Riverside property] pre-dates the adoption of the Specific Plan *it can be used as a residence* pursuant to [chapter] 18.60 of the Rialto Municipal Code, Non-conforming Uses"²¹

Relator disputes that the city administrator's view was correct. She produces a correspondence dated January 12, 2016, sent to her from the city planning manager, reporting that no "Conditional Development Permit" has been issued for the Riverside property.²² In Rialto, a conditional development permit must be obtained for a certificate

¹⁹ Rialto Mun. Code, §§ 18.02.040, 18.06.020. The Riverside property was developed for residential use prior to 1983, but in that year, an area including the Riverside property was rezoned for "office services" as part of Rialto's "Central Area Specific Plan." (See http://www.rialtoca.gov/documents/downloads/Rialto_Central_Area_Specific_Plan.pdf, at V-20 to V-24; see generally Rialto Mun. Code, ch. 18.78 [specific plans].)

²⁰ See Rialto Mun. Code, § 2.04.080 (the city administrator "has the power under the supervision and control of the city council to see that all city laws and ordinances are duly enforced, and that all franchises, permits, licenses and privileges granted by the city are faithfully performed and observed").

²¹ Rialto City Administrator Michael E. Story, letter to San Bernardino County Registrar of Voters re Zoning Verification for the Property Located at 229 N. Riverside Ave., Rialto, CA 92376, Sep. 7, 2011, emphasis added; see Rialto Mun. Code, §§ 18.04.610 ("Nonconforming use' means a lawful use of a building or land, or any part thereof, existing at the time of the adoption of this title which does not conform to the regulations for the district in which it is located as set forth in this title"), 18.60.010, subd. (c) ("The provisions of this chapter apply to uses which become nonconforming by reason of any amendment to this title, as of the effective date of such amendment"), 18.60.030 ("Any nonconforming use may be maintained and continued, provided there is no increase or enlargement of the area space, or volume occupied or devoted to such nonconforming use").

²² Rialto Planning Manager Gina M. Gibson, letter to Deborah Robertson re Zoning for Property Located at 229 N. Riverside Ave., Rialto, CA, Jan. 12, 2016.

of occupancy, building permit, or business license in a zone where the proposed use would otherwise be prohibited,²³ but a conditional development permit ordinarily is not needed where there is a legal nonconforming use.²⁴ The city planning manager’s letter from 2016 does not address—let alone question—the city administrator’s 2011 finding that there was a valid nonconforming residential use at the Riverside property.²⁵

²³ Rialto Mun. Code, § 18.66.010, 18.66.030; see generally *Tustin Heights Assn. v. Bd. of Supervisors of Orange County* (1959) 170 Cal.App.2d 619, 626 (“A conditional use may be permitted if it is shown that its use is essential or desirable to the public convenience or welfare and at the same time that it will not impair the integrity and character of the zoned district”).

²⁴ 66 Cal.Jur.3d, Zoning and Other Land Controls, § 402 (ordinarily, the owner of a valid nonconforming use may not be compelled to obtain a special-use permit for that use), citing *McCaslin v. City of Monterey Park* (1958) 163 Cal.App.2d 339, 349 (“Having established the nonconforming use, he was entitled to continue his operations as a matter of right. He was not required to obtain a special use permit”).

²⁵ Relator further contends that because Palmer maintained residences at other addresses for a period of more than one year after he bought the Riverside property in 1994, his nonconforming use of Riverside amounted to a “discontinuance” under local zoning law, which prohibited him from lawfully declaring residence at the Riverside property for his reelection in 2012. (See Rialto Mun. Code, § 18.60.050 [“Any part of a building, structure or land occupied by a nonconforming use, which is discontinued for a period of one year or more, shall not again be used or occupied for a nonconforming use”].) Because Palmer alleges he has continuously used the Riverside property as a residence, but not always as his sole *legal* residence, since 1994, a pertinent zoning issue might have been whether uninterrupted domiciliary use—not just uninterrupted residential use—was required to satisfy the continuous-use prerequisite of a nonconforming use under Rialto zoning law. (See *Cramer v. Tyars* (1979) 23 Cal.3d 131, 140 [“The term ‘resides’ has received differing interpretations depending on the context and purpose of the statute in which it appears”].) Information about the use of the Riverside property between 1983, when it was rezoned for office services, and 1994, when Palmer purchased it, also might have been useful in resolving any discontinuous-use claim. (See *People v. Johnson* (1954) 129 Cal.App.2d 1, 10 [whether a nonconforming use was the same before and after the passage of a zoning ordinance is usually a factual issue for the trial court].)

Ultimately, though, we cannot (and need not) resolve potential zoning issues, which might conceivably have been—but were not—raised at an earlier time. Had the city or other interested party alleged, back in 2012, that Palmer was in violation of city zoning laws, he could have asserted nonconforming use as an affirmative defense before the

Finally, Relator argues that an earlier quo-warranto matter²⁶—in which we granted the relator’s application for leave to sue—is much like this one, and that we should similarly grant this application. But we perceive key differences between the two cases, and reject the suggestion that the same result is warranted here. In the earlier matter, we granted the relator’s application on the ground that a city council member for the City of Calimesa had changed his residence to an address in the City of Yucaipa.²⁷ In finding substantial questions of fact and law, we cited evidence that the city council member sold his Calimesa home, signed a deed of trust providing that the Yucaipa address was his primary residence, and designated the Yucaipa address in a telephone directory as his residence.²⁸ Although he owned a commercial building in Calimesa and alleged that he kept some of his possessions there, he acknowledged that it had never been zoned for residential use, and that he did *not* live there because of “the city’s threat to prosecute him for zoning and building violations.”²⁹ It was also significant that his commercial

local planning commission and, if necessary, in an appeal to the city council and then in court. (See Gov. Code, §§ 65009, 65100; Rialto Mun. Code, § 18.02.050; *Hopkins v. MacCulloch* (1939) 35 Cal.App.2d 442, 451-452; 62 Am.Jur.Trials 1, Introduction, § 1.) If Palmer had received an adverse decision regarding his nonconforming use, he could have applied to the planning commission for another exemption, such as a variance, with unknown results. (See Rialto Mun. Code, ch. 18.64 [variances]; see generally *Tustin Heights Assn. v. Bd. of Supervisors of Orange County*, *supra*, 170 Cal.App.2d at p. 627 [“The essential requirement of a variance is showing that strict enforcement of the zoning limitations would cause unnecessary hardship”]; 66 Cal.Jur.3d, Zoning and Other Land Controls, §§ 6 [the three usual exceptions to zoning ordinances are nonconforming uses, conditional uses, and variances], 9 [discussing variances].) Given these possibilities, it would be infeasible, if not impossible, for a quo-warranto court considering the matter at this juncture to determine retrospectively what the result of any zoning enforcement and litigation would have been. More importantly, though, because Palmer had taken a number of steps to openly and officially declare that he was using the Riverside property as his residence, and because no issue was ever raised (until now) regarding the legality of him doing so, we believe that Palmer could reasonably assume that his actions were lawful and not subject to the sort of retrospective challenge asserted here. Of course, the city administrator’s letter from 2011 provides further support for the reasonableness of Palmer’s position.

²⁶ 85 Ops.Cal.Atty.Gen., *supra*, at pp. 90-94.

²⁷ 85 Ops.Cal.Atty.Gen., *supra*, at p. 94.

²⁸ 85 Ops.Cal.Atty.Gen., *supra*, at pp. 90-91, 93-94.

²⁹ 85 Ops.Cal.Atty.Gen., *supra*, at pp. 90-91.

building could not “be used as a residence...at the time of the building’s construction.”³⁰

Here, in contrast, there is no evidence contradicting Palmer’s declaration and documentation that he was living at his Riverside address in Rialto at the time of his reelection in 2012. Nor is there any allegation that the city believed there was a zoning or building violation there. In fact, the city administrator found the Riverside property’s residential use permissibly grandfathered in because it predated the zoning change. We therefore find that the circumstances considered in our earlier opinion are easily distinguishable from those presented here, and find in this case that there is no substantial question of fact or law warranting judicial resolution.³¹

Granting the Application Would Not Be in the Public Interest

Finally, we believe that it would not serve the public interest to allow a quo warranto lawsuit to proceed in this case. We have found Relator’s claims to be lacking in substance, and therefore not proper matters upon which to expend scarce judicial resources. Relator’s application for leave to file an action in quo warranto is DENIED.

³⁰ 85 Ops.Cal.Atty.Gen., *supra*, at p. 91.

³¹ 86 Ops.Cal.Atty.Gen., *supra*, at p. 197.