

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

| | | |
|-------------------------|---|-------------------|
| OPINION | : | No. 15-401 |
| | : | |
| of | : | December 21, 2015 |
| | : | |
| KAMALA D. HARRIS | : | |
| Attorney General | : | |
| | : | |
| LAWRENCE M. DANIELS | : | |
| Deputy Attorney General | : | |
| | : | |

The DISTRICT ATTORNEY OF LOS ANGELES COUNTY has requested leave to sue ALBERT ROBLES in quo warranto on the following question:

Does the doctrine of incompatible public offices preclude Albert Robles from simultaneously serving as a director of the Water Replenishment District of Southern California and as city council member and mayor of the City of Carson?

CONCLUSION

Whether the doctrine of incompatible public offices precludes Albert Robles from simultaneously serving as a director of the Water Replenishment District of Southern California and as city council member and mayor for the City of Carson presents substantial questions of fact and law warranting judicial resolution. Accordingly, the application for leave to sue is GRANTED.

ANALYSIS

The Water Replenishment District of Southern California (WRD) is responsible for the replenishment of groundwater in two basins, which various entities draw from to supply water for about four million residents in southern Los Angeles County. The WRD is governed by a five-member Board of Directors. The City of Carson is a general law city in Los Angeles County, and is governed by a five-member city council that includes an elected mayor as one of its five members. Carson lies wholly within the WRD-managed area, and the city and its residents rely on groundwater that two water utilities produce from the two basins.

Albert Robles has served continuously on WRD's Board of Directors since 1992. He was most recently reelected as a WRD director in November 2012, and he began his current four-year term in January 2013. In March 2013, Robles was elected for the first time to the Carson city council. Two years later, in March 2015, then-mayor of Carson Jim Dear vacated his position as mayor. In April 2015, the city council appointed Robles to serve the rest of Dear's term as mayor, which included assuming Dear's mayoral seat on the city council.

Based on these undisputed facts, the Los Angeles County District Attorney (Relator) now seeks our permission to sue Robles in quo warranto on the ground that he cannot lawfully hold the public offices of WRD director and Carson city council member/mayor at the same time because the two offices are legally incompatible. Relator maintains that Robles's accession to the office of Carson city council member resulted in the forfeiture of his seat on the WRD Board of Directors, and requests that we therefore permit her to file a quo warranto action in superior court to seek Robles's removal from the WRD directorship.

We conclude that Relator has raised substantial questions of fact and law as to whether the public offices of WRD director and Carson city council member/mayor are legally incompatible. In addition, we believe that the proposed quo warranto action would serve the public interest. As a result, we grant Relator's application for leave to sue.

Quo Warranto Principles

Code of Civil Procedure section 803 provides, in pertinent part: "An action may be brought by the attorney-general, in the name of the people of this state, upon [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 . . . within this state."¹ The purpose

¹ Code Civ. Proc., § 803. Even though section 803 references the "complaint of a private party," public officers and public agencies are also permitted to seek the

of the quo warranto procedure is to protect the public interest in ensuring that public offices are lawfully held.²

In order to file a quo warranto action in the superior court, a party must first obtain the Attorney General's consent.³ In considering a quo warranto application, the Attorney General does not resolve the merits of the underlying controversy. Rather, the Attorney General evaluates whether the application presents a substantial issue of fact or law that warrants judicial resolution, and whether granting the application would serve the public interest.⁴

Quo warranto is the proper legal avenue to utilize in determining whether a person has forfeited a public office by assuming another, incompatible public office.⁵

Prohibition Against Holding Incompatible Public Offices

Government Code section 1099 codifies the common-law rule against holding incompatible offices.⁶ It provides, "A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible."⁷ In enacting this statute, the Legislature intended to codify the common law rule, as informed by applicable judicial and administrative precedent.⁸

Under section 1099 and common-law precedent, a person may not simultaneously hold two offices if there is any significant clash of duties or loyalties between the offices.⁹ The prohibition applies where each position is a public office, rather than just a position of employment, and where no statute specifically allows one person to hold both offices.¹⁰ To find that two offices are incompatible, it is not necessary that a conflict has actually

Attorney General's leave to sue in quo warranto. (97 Ops.Cal.Atty.Gen. 1, 1, fn. 4 (2014).)

² *Citizens Utilities Co. v. Superior Court* (1976) 56 Cal.App.3d 399, 406.

³ 96 Ops.Cal.Atty.Gen. 48, 49 (2013).

⁴ 93 Ops.Cal.Atty.Gen. 144, 145 (2010).

⁵ See 95 Ops.Cal.Atty.Gen. 67, 76 (2012); 93 Ops.Cal.Atty.Gen., *supra*, at p. 151; 91 Ops.Cal.Atty.Gen. 25, 27 (2008).

⁶ Gov. Code, § 1099, subd. (f).

⁷ Gov. Code, § 1099, subd. (a).

⁸ Stats. 2005, ch. 254, § 2; 90 Ops.Cal.Atty.Gen. 24, 25-26 (2007).

⁹ Gov. Code, § 1099, subd. (a)(2); 90 Ops.Cal.Atty.Gen. 12, 14 (2007).

¹⁰ Gov. Code, § 1099, subds. (a), (c); 95 Ops.Cal.Atty.Gen., *supra*, at p. 69.

occurred; it is sufficient that a conflict may occur in the regular operation of the statutory plan.¹¹ Further, when a conflict or potential for conflict exists, the doctrine does not permit the incumbent simply to “omit to perform one of the incompatible roles. The doctrine was designed to avoid the necessity for that choice.”¹² It takes only one potential significant conflict of duties or loyalties to render offices legally incompatible.¹³

Where two offices are legally incompatible, “a public officer shall be deemed to have forfeited the first office upon acceding to the second.”¹⁴ This means that a person’s assumption of the second incompatible office has the effect of automatically and immediately vacating the person’s right to hold the first office.¹⁵ As the California Supreme Court has instructed, “the mere acceptance of the second incompatible office *per se* terminates the first office as effectively as a resignation.”¹⁶ Similarly, we have referred to the forfeiture of the first office as an “automatic resignation” of that office.¹⁷

¹¹ 87 Ops.Cal.Atty.Gen. 153, 154 (2004).

¹² 67 Ops.Cal.Atty.Gen. 409, 414 (1984), quoting 3 McQuillin, *Municipal Corporations* (rev. ed. 1973) § 12.67, pp. 295-296.

¹³ 85 Ops.Cal.Atty.Gen. 199, 200 (2002).

¹⁴ Gov. Code, § 1099, subd. (b). The Legislature has made this specific prescription enforceable in quo warranto. (*Ibid.*)

¹⁵ *People v. ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 644.

¹⁶ *Ibid.*, quoting 2 McQuillin, *Municipal Corporations* (2d ed. 1943) § 469.

¹⁷ 95 Ops.Cal.Atty.Gen., *supra*, at p. 73, fn. 29; 85 Ops.Cal.Atty.Gen. 60, 61 (2002); see also 90 Ops.Cal.Atty.Gen., *supra*, at p. 17 & fn. 2. At common law, this rule of forfeiting the first incompatible office appears to have stemmed from a presumption that the officeholder made an election between the two offices, as shown by the acceptance of the second office; the rule served to protect the public’s right to know which office would be kept and which one abdicated, and to preclude the officeholder from choosing, based merely on personal advantage, which office to retain. (Annot., *Effect of Election to or Acceptance of One Office by Incumbent of Another Where Both Cannot Be Held by Same Person* (orig. pub. in 1936) 100 A.L.R. 1162, § 2 (in subheading entitled “Election as Basis of Doctrine”).)

There Is a Substantial Issue as to the Incompatibility of the Public Offices that Robles Holds

To begin with, we confirm, as we have concluded before, that the positions held by Robles—WRD director, and city council member and mayor of a general law city—are all “public offices” for purposes of the incompatible-offices doctrine.¹⁸ Each one is (1) a position in government, (2) created by law, (3) with a continuing and permanent tenure, (4) in which the incumbent performs a public function for the public benefit and exercises some of the state’s sovereign powers.¹⁹

The first office for our analysis is that of WRD director. Robles was most recently reelected to that post in November 2012. While serving as WRD director, Robles became a Carson city council member, and later assumed the office of mayor and the mayor’s seat on the city council. Under the first-office forfeiture rule, if the offices of WRD director and Carson city council member (whether a regular seat or the mayoral seat on that body) are incompatible, then Robles will be deemed to have vacated the office of WRD director. To determine whether the offices are incompatible, we examine their respective functions.

The WRD was formed in 1959 to manage the Central and West Coast Basins, two subterranean aquifer systems in southeastern Los Angeles County, from which water is pumped and mostly sold to millions of residents and other water users within the WRD’s service area.²⁰ Under the Water Replenishment District Act,²¹ the WRD is charged with replenishment and protection of the Basins.²² The WRD has the authority to do whatever is necessary to replenish the groundwater of the Basins, including buying, selling, exchanging, distributing, storing, recycling, and purifying the water for the benefit of persons or property in the district.²³ It may also build any works necessary to accomplish

¹⁸ 91 Ops.Cal.Atty.Gen., *supra*, at p. 26 (city council member of general law city); 90 Ops.Cal.Atty.Gen., *supra*, at p. 15 (WRD director); 84 Ops.Cal.Atty.Gen. 34, 38 (2001) (elected mayor of general law city).

¹⁹ *Moore v. Panish* (1982) 32 Cal.3d 535, 545; *People ex rel Chapman v. Rapsey*, *supra*, 16 Cal.2d at pp. 639-640; 97 Ops.Cal.Atty.Gen. 50, 53 (2014); 76 Ops.Cal.Atty.Gen. 244, 245-246 (1993).

²⁰ *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1454; *Hillside Memorial Park and Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th 534, 540; 90 Ops.Cal.Atty.Gen., *supra*, at p. 13; WRD, at <http://www.wrd.org>.

²¹ Wat. Code, §§ 6000-60622.

²² Wat. Code, §§ 60220-60232.

²³ Wat. Code, §§ 60220, 60221, 60222.

groundwater replenishment, and may condemn property to supply the district with replenishment groundwater.²⁴ The WRD has the power to raise funds to pay for its activities through levies denominated as water charges, general assessments, and replenishment assessments.²⁵ The WRD is governed by a five-member board of directors, each elected to a four-year term.²⁶

The City of Carson is a general law city that lies wholly within the WRD's service area.²⁷ Two municipal water utilities, the California Water Service Company and the Golden State Water Company, pump water from the Basins for sale to Carson and its residents.²⁸ Carson is governed by a city council that consists of five members, one of whom is separately elected as the mayor, and each of whom serves for a four-year term.²⁹ The city council's authority includes acquiring water supplies for the city and its inhabitants by contract, condemnation, or other means; enacting ordinances and imposing taxes; passing resolutions; issuing subpoenas; adopting annual budgets; purchasing and exercising eminent domain over real property for municipal purposes; and initiating bond proceedings.³⁰

Do the powers and duties of WRD director and Carson city council member clash in a significant way, thereby rendering the offices incompatible? For the reasons that follow, we believe this question raises substantial legal and factual issues.

²⁴ Wat. Code, §§ 60221, subd. (f), 60230, subd. (h).

²⁵ Wat. Code, § 60305.

²⁶ Wat. Code, §§ 60131, 60134, 60231.

²⁷ WRD, Water Replenishment District Service Area, at <http://www.wrd.org/about/water-district-service-area.php>; Carson, California, at <http://ci.carson.ca.us/content/government.asp>.

²⁸ Relator's Verified Statement of Facts in Support of Application for Leave to Sue in Quo Warranto, at p. 5; see *Central and West Basin Water Replenishment District v. Southern California Water Co.* (2003) 109 Cal.App.4th 891, 897; California Water Service, California Water Service Begins Main Replacement Project in Carson, at https://www.calwater.com/latest_news/california-water-service-begins-main-replacement-project-carson/; Golden State Water Company, Your Service Area, at <http://www.gswater.com/yourcommunity/>; Golden State Water Company, 2010 Urban Water Management Plan, pp. 1-2, 4-2 – 4-3, 4-5 – 4-10 at http://www.gswater.com/southwest/files/2012/12/Southwest_2010UWMP_000.pdf.

²⁹ Carson, California, at <http://ci.carson.ca.us/content/government.asp>; see Gov. Code, §§ 34900, 34902, 34903, 36501.

³⁰ Gov. Code, §§ 36935, 37100, 37100.5, 37104, 37200, 37350, 37350.5, 37351, 37502, 38730, 38742, subds. (a), (b).

As Relator acknowledges, WRD does not sell water to Carson or its inhabitants, or directly set their water rates, and WRD has no groundwater-extraction rights in the Basins. Rather, WRD buys water from other sources and then spreads, sinks, or injects it into the underground of the Basins to replenish the water supply for groundwater pumpers. As to Carson, two water utility companies extract water from the Basins and then sell it to the city and its residents. Thus, the relationship between WRD and Carson is not a classic vendor-purchaser arrangement between a water district and another public agency.³¹

Nonetheless, on allegations very close to those presented here, we have determined there to be a substantial incompatible-offices question. In 91 Ops.Cal.Atty.Gen. 25 (2008), the Los Angeles County District Attorney requested permission to file a complaint in quo warranto against Sergio Calderon on the ground that he was simultaneously holding two incompatible offices: director of the WRD and council member of the City of Maywood.³² We found a potential conflict between the interests of those two offices, based on two considerations.³³ First, “a conflict could arise if the District decided to raise the price for pumping groundwater in a manner that caused the price increase to be passed on to the City.” Second, “the City’s water use practices and land use regulatory activities could degrade the supply and quality of the groundwater that the District is charged with supplying and conserving.”³⁴ Because of these two significant conflicts, we concluded that there was a substantial question as to whether the offices were incompatible, and granted the district attorney’s quo warranto application.³⁵

The issues here are very similar. By statute, WRD funds its replenishment activities with an assessment, commonly referred to as a pump tax, which it imposes on groundwater extractors in the Basins.³⁶ According to Relator, two of these extractors, the California Water Service Company and the Golden State Water Company, pass on the WRD’s pump

³¹ See also 80 Ops.Cal.Atty.Gen. 242, 244-247 (1997); 73 Ops.Cal.Atty.Gen. 268, 269, 271-272 (1990); 73 Ops.Cal.Atty.Gen. 183, 185-186, 188 (1990).

³² 91 Ops.Cal.Atty.Gen., *supra*, at p. 25.

³³ 91 Ops.Cal.Atty.Gen., *supra*, at pp. 26-27.

³⁴ 91 Ops.Cal.Atty.Gen., *supra*, at p. 27.

³⁵ *Ibid.* As it happens, Robles, who is an attorney, represented Calderon in that matter. According to one newspaper article, Robles advised Calderon to resign from the city council based on the alleged incompatibility, and then to ask for his council seat back later. (Mai-Duc and Becerra, *Carson Councilman Albert Robles Faces Conflict-of-Interest Probe*, L.A. Times (May 8, 2014), at <http://www.latimes.com/local/la-me-robles-carson-oil-20140509-story.html>.)

³⁶ Wat. Code, §§ 60305, 60317, 60317.5.

tax to Carson and its residents in the water rates they charge.³⁷ Carson has the right to object to the assessment as excessive before the WRD Board of Directors at WRD's annual public hearing if the assessment unfavorably affects these water rates.³⁸ Carson also has the right to sue in court to reduce or eliminate an assessment, as some other entities have done.³⁹ A Carson city council member's interest in keeping pump taxes, and thus water bills, lower for the city and its inhabitants could be at odds with a WRD director's power to fund groundwater replenishment in the Basins with pump taxes.⁴⁰

Another basis for incompatibility lies in the possibility that the Carson city council's regulation of water practices and land uses could threaten the groundwater quality or supply.⁴¹ WRD has a duty to protect and conserve the water supply generally, as well as to protect the quality of the groundwater.⁴² In carrying out this duty, WRD may take any action, including legal action, to prevent contaminants from entering the groundwater.⁴³ In particular, WRD may sue to recover its expenditures from those responsible for

³⁷ Relator's Verified Statement of Facts in Support of Application for Leave to Sue in Quo Warranto, at pp. 5, 10.

³⁸ Wat. Code, §§ 60306, 60307.

³⁹ See, e.g., *Water Replenishment District of Southern California v. City of Cerritos*, *supra*, 220 Cal.App.4th at pp. 1453-1456 (describing the trial court's interim order that, pursuant to article XIII D of the California Constitution, invalidated a replenishment assessment that the WRD imposed on the Cities of Cerritos, Downey, and Signal Hill); *id.* at p. 1456 (citing related actions filed against WRD by the Central Basin Municipal Water District and the Tesoro Refining and Marketing Company). In 2014, WRD sponsored a bill adding a 180-day statute of limitations for bringing new actions challenging the imposition of a replenishment assessment and limiting the types of such actions to writs of mandate, review, or prohibition. The bill was enacted into law, becoming effective on January 1, 2015. (Wat. Code, § 60317, subds. (b), (c), added by Stats. 2014, ch. 736 (A.B. 2259), § 1 (eff. Jan. 1, 2015); Assem., Conc. in Sen Amend. of Assem. Bill No. 2259 (2013-2014 Reg. Sess.) as amended Jul. 1, 2014, p. 2; Sen Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2259 (2013-2014 Reg. Sess.) as amended Jul. 1, 2014, p. 3.)

⁴⁰ See 85 Ops.Cal.Atty.Gen., *supra*, at p. 201 (finding a potential clash of duties between a city council member and water district director because, even though the water district does not sell water directly to the city, the water district's rates may be passed on indirectly to the city via water charges).

⁴¹ 91 Ops.Cal.Atty.Gen., *supra*, at p. 27; 85 Ops.Cal.Atty.Gen., *supra*, at p. 202.

⁴² Wat. Code, § 60222.

⁴³ Wat. Code, § 60224.

contaminants, and may also seek injunctive relief.⁴⁴ The WRD may raise an assessment to cover clean-up costs,⁴⁵ and may pass ordinances designed to protect water quality.⁴⁶ We believe that, as a result, the WRD directors could act to block the Carson city council's approval of development that might have an adverse effect on the groundwater supply. Conversely, Carson's interest in fostering economic activity could clash with WRD's interest in protecting the Basins.

These are examples of conflicting duties and loyalties that could arise for someone serving as both a WRD director and a Carson city council member. Other clashes could arise, for instance, from the power of eminent domain that both Carson and WRD possess,⁴⁷ from the city council's power to deny WRD permission for construction projects in Carson,⁴⁸ or from WRD's statutory (albeit as-yet unexercised) power to sell water directly to Carson and its residents.⁴⁹ We conclude that Relator has raised substantial questions of fact and law as to whether these two offices are incompatible, such that Robles may be found to have forfeited the office of WRD director upon assuming a seat on the Carson city council.

Allowing the Action to Proceed Would Serve the Public Interest

We generally view the need for judicial resolution of a substantial question of fact or law as a sufficient "public purpose" to warrant granting leave to sue, absent countervailing circumstances not present here (such as pending litigation or shortness of time remaining in the term of office).⁵⁰ Robles asserts, as a countervailing circumstance, that the question whether his positions as WRD director and Carson city council member are incompatible is moot because he is no longer serving as a regular member of the city council, but now serves as Carson's mayor, which he appears to assert is a completely different public office requiring a separate comparative analysis. We find the argument unpersuasive.

⁴⁴ Wat. Code, §§ 60226, 60230, subd. (b).

⁴⁵ Wat. Code, §§ 60306, 60230, subd. (j).

⁴⁶ Wat. Code, §§ 60160, 60163, 60164, 60224.

⁴⁷ Gov. Code, § 37350.5; Wat. Code, § 60230, subd. (h); see 97 Ops.Cal.Atty.Gen., *supra*, at p. 54 (potential conflict for director of water and fire districts from their common power of eminent domain).

⁴⁸ Gov. Code, § 65850, subd. (a); Wat. Code, 60221, subd. (f).

⁴⁹ Wat. Code, § 60221, subd. (a).

⁵⁰ 95 Ops.Cal.Atty.Gen. 77, 87 (2012).

First, if the office of WRD director and Carson city council member are legally incompatible—and we have found there to be a substantial question whether they are—Robles automatically vacated his WRD office when he first became a Carson city council member.⁵¹ Second, as mayor of Carson, Robles continues to serve as a member of the city council, with all the powers and duties of every other member of the council⁵² plus additional powers and duties.⁵³ Our conclusion that there is a substantial question as to whether the offices of WRD director and Carson city council member are incompatible therefore applies with at least as much force to the offices of WRD director and mayor of Carson.

We find that allowing Relator to sue in quo warranto would serve the public interest in ensuring that public officials avoid conflicting loyalties in performing their public duties. Accordingly, Relator's application for leave to sue in quo warranto is GRANTED.

⁵¹ Cf. 95 Ops.Cal.Atty.Gen., *supra*, at pp. 72-73 (rejecting an argument that quo warranto application became moot when proposed defendant resigned his later-assumed office.

⁵² Gov. Code, §§ 34900, 34903; 89 Ops.Cal.Atty.Gen. 159, 164 (2006); 79 Ops.Cal.Atty.Gen. 21, 23 (1996).

⁵³ The mayor of Carson is president and presiding officer of the city council and runs council meetings. The mayor has other powers and duties as well, such as to make appointments to boards, commissions, and committees; to sign city treasury warrants, subpoenas, and city contracts; to administer oaths and affirmations; and to chair the Carson Disaster Council. The Carson mayor's salary is 10 percent higher than a Carson council member's salary. (Gov. Code, §§ 36516.1, 36802, 37105, 40602, 40603, 40605; Carson Muni. Code, §§ 2301.1, 2406, 2407, 2701, 2736, 2751, 3702, 21001; 81 Ops.Cal.Atty.Gen. 75, 76-77 (1998).)