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May 18, 2018

**VIA ELECTRONIC AND US MAIL**

Mr. Lawrence M. Daniels  
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Re: Opinion No. 18-304

Dear Mr. Daniels:

I write on behalf of the League of California Cities<sup>1</sup> (League) in response to your solicitation of views regarding whether the positions of county supervisor and member of a local transportation commission (LTC) and/or member of a multi-agency joint powers agency (JPA) established to provide public transportation services are incompatible public offices.<sup>2</sup>

The League agrees with the conclusions reached by the Office of the County Counsel of Mono County in its letter dated March 14, 2018, which is attached here as Exhibit A. The League writes separately to note that the same conclusions should apply equally to city council members who simultaneously serve as a member of an LTC or multi-agency JPA established to provide public transportation services.

Pursuant to section 1099 and established precedent, a person may not simultaneously hold two public offices if there is any significant clash of duties or loyalties between the offices, if the dual office holding would be improper for reasons of public policy, or if either office exercises a supervisory, auditing or removal power over the other. (§ 1099, subd. (a); *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636.) However, for the prohibition on simultaneously holding incompatible offices to apply, there must be an “absence of statutes suggesting a contrary result.” (90 Ops.Cal.Atty.Gen. 24 (2007), quoting 38 Ops.Cal.Atty.Gen.113 (1961).)

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<sup>1</sup> The League is an association of 474 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee (LAC), which is comprised of 24 city attorneys from all regions of the state. The LAC monitors litigation affecting municipalities and requests from the Attorney General for views on pending requests for legal opinions. The LAC reviewed the Attorney General’s request for views on Opinion No. 18-304 and identified the legal issues that it presents as being of concern to cities state-wide.

<sup>2</sup> For purposes of this letter, the League assumes, without analyzing, that the positions covered by this request are public offices.

In short, the prohibition does not apply in situations where the officials of one public agency are authorized by the Legislature to be the representatives of constituent member public agencies. Here, the Legislature has so authorized a city council member to serve as a member of an LTC or JPA. (Gov. Code § 29535 [“The appointments to the [LTC] *may include* members of the board of supervisors, *the city councils*, the transit district, and other local transit operators.” (emphasis added)]; 78 Ops.Cal.Atty.Gen. 60 (1995) [finding that city council members are statutorily authorized to simultaneously serve as members of a JPA].) Therefore, the League urges the Attorney General to conclude that the positions of county supervisor *or city council member*, and member of a local transportation commission and/or member of a multi-agency JPA established to provide public transportation services are not incompatible offices.

Thank you for the opportunity to comment on the questions presented. Please do not hesitate to contact us with any questions, or to discuss this matter further.

Sincerely,

  
Alison Leary  
Deputy General Counsel  
League of California Cities

# **Exhibit A**

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March 14, 2018

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**Re: Request for Opinion; Incompatible Offices**

Dear Ms. Lee:

I respectfully request an opinion from the office of the Attorney General on the following questions:

1. May a county board of supervisors appoint one of its own members to serve as its representative to the local transportation commission (LTC) created under Government Code section 29535, where the county receives transportation funds allocated by the LTC to carry out transportation-related projects? In other words, may a member of the board of supervisors of a county simultaneously serve as a member of an LTC established under section 29535, or are the offices incompatible?
2. May a multi-agency joint powers agency (JPA) established by cities and/or counties to provide public transportation services appoint one of its own board members to serve as its representative to the LTC, where the JPA receives transportation funds allocated by the LTC to carry out transportation-related projects? In other words, may a member of a JPA established by cities and counties to provide transit services simultaneously serve as a member of an LTC established under section 29535, or are the offices incompatible?
3. May a county board of supervisors which has appointed one of its members to represent the county on the LTC (as described in question 1) also appoint that same individual as its representative to the transit JPA described in question 2? In other words, may a member of the board of supervisors of a county simultaneously serve as the County's representative to the LTC and as the County's representative to a transit JPA? (Assume for purposes of this question

that the transit JPA has not also appointed the same individual as its representative to the LTC).

### **Conclusions**

This office concludes as follows:

1. A member of the board of supervisors of a county may simultaneously serve as a member of a local transportation commission, where the county receives transportation funds through the LTC to carry out transportation-related projects because simultaneous holding of the offices in question is expressly authorized by law.
2. A member of the board of a JPA established by cities and counties within the region of the LTC to provide public transit services (i.e., a “transit operator”) may simultaneously serve as a member of the LTC, where the JPA receives transportation funds through the LTC to carry out transportation-related projects because simultaneous holding of the offices in question is expressly authorized by law. However, that member must abstain from participation in certain actions taken by the LTC as discussed in more detail below.
3. The same person appointed by the board of supervisors as its representative to the LTC may also serve as the board of supervisors’ appointed representative to a JPA established by the County and other public agencies to serve as a transit operator because the simultaneous holding of the offices of: (a) county supervisor and LTC member; (b) county supervisor and JPA board member; and (c) JPA member and LTC member, are expressly authorized by law. Further, because it is assumed that this individual is not the JPA’s appointed representative to the LTC, he or she need not abstain from those votes for which the member appointed to represent the transit operator must abstain.

### **Overview of Applicable Transit Law**

Article 11 (commencing with section 29530) of Title 3, Division 3, Chapter 2, of the California Government Code,<sup>1</sup> which is part of the Mills Alquist-Deddeh Act (SB 325, 1971), also known as the Transportation Development Act or TDA, authorizes the establishment of a local transportation fund (LTF) within the county treasury of any county that has entered into an agreement with the State Board of Equalization (SBE) in accordance with that Article. The LTF is funded by the transfer of a portion of the statewide base sales and use tax (*see* § 29530); the state sales tax on diesel fuel (*see* Public Utility Code (PUC) §§ 99312.1, and 99313), plus any interest or other income earned on such amounts.

In any county that establishes an LTF, there must be a transportation planning agency designated by the Director of Transportation which is one of the following: (1) a statutorily-created regional transportation agency; (2) a council of governments; (3) a

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<sup>1</sup> All statutory references are to the California Government Code, unless otherwise noted.

local transportation commission (LTC); or (4) upon request of that county, a county within the jurisdiction of a regional transportation agency. (*See* § 29532.)

In counties where there is no statutorily-created regional transportation agency or council of governments,<sup>2</sup> an LTC is established and shall be comprised of the following members: (1) three members appointed by the board of supervisors; (2) three members appointed by the city selection committee or by the city council in any county in which there is only one incorporated city; and, where applicable, (3) three members appointed by a transit district and one member representing, collectively, the transit operators in the county. (*See* § 29535.) The statute provides that “*appointments to the commission may include members of the board of supervisors, the city councils, the transit district, and other local transit operators.*” (*Id.*, emphasis added.)

Monies within the LTF are continuously appropriated by the board of supervisors to the transportation planning agency (for purposes of this request, an LTC), which then allocates those funds to cities, counties, transit operators or transit districts for transportation activities and projects as described in Article 11 and in Chapter 4 (commencing with section 99400) of Part 11 of Division 10 of the PUC (part of the TDA). (*See* § 29531; and *see* PUC §§ 99233.7 and 99234.9.)

Activities eligible for funding with LTF dollars include: local streets, roads, pedestrian and bicycle paths; passenger rail service and capital improvements; payment to another entity under contract to provide special transportation assistance to a city, county or transit district; administrative and planning costs related to special transportation services; capital expenditures to acquire vehicles and related equipment, bus shelters, bus benches and communication equipment; and acquisition or lease of vans and related equipment for a farmworker vanpool program, public transit and passenger rail service. (*See e.g.*, PUC §§ 99400, 99233.7 and 99234.9.) In order to receive funds for these purposes, eligible entities must file claims with the LTC, which annually determines the amount to be allocated to each claimant based on guidance set forth in the TDA. (*See* PUC §99230.)

For example, the TDA provides that: operators and city or county governments with responsibility for providing municipal services to a given area collectively, may file claims for those moneys that represent that area’s apportionment (*see* PUC § 99231); administrative funds may be allocated to the county and to the LTC (*see* PUC § 99233.1); funds may be allocated to counties and cities for facilities for pedestrians and bicycles (*see* PUC § 99233.3); funds may be allocated to operators to support public transportation systems and grade separation projects (*see* PUC §§ 99233.8 and 99260); etc.

A transit district is defined in the TDA as “a public district organized pursuant to state law and designated in the enabling legislation as a transit district or a rapid transit district.” (PUC § 99213.) An operator is defined as “any transit district, included transit district, municipal operator, included municipal operator, or transit development board”

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<sup>2</sup> Or, if there is a council of governments, the determination that a local transportation commission should nevertheless function as the local transportation agency has been made pursuant to § 29536.

(PUC § 99210.) A “transit operator” is defined<sup>3</sup> as “an entity that qualifies as a claimant under Section 99203 and is eligible to receive allocations under this chapter, and includes a joint powers authority formed to operate a public transportation system.”<sup>4</sup>

## Facts

A local transportation commission has been established within the County of Mono (hereinafter the “Mono LTC”) in accordance with section 29535.

In 1999, Mono County entered into a joint powers agreement with Merced and Mariposa counties to establish the Yosemite Area Regional Transportation Authority (YARTS), pursuant to the California Joint Exercise of Powers Act (§§ 6500 et seq., the “JPA law”). Similarly, in 2006, Mono County entered into a joint powers agreement with Inyo County and the cities of Bishop and Mammoth Lakes to establish the Eastern Sierra Transit Authority (ESTA). Both YARTS and ESTA (collectively the joint powers agencies or “JPAs”) were formed to exercise powers common to their member agencies – specifically, to establish, and operate, transit systems (i.e., bus service) within the region. (See § 26002 and § 39732, authorizing counties and cities, respectively, to establish and operate transit systems.)

Under the joint powers agreement establishing ESTA, two members of the Mono County board of supervisors (selected by the board of supervisors), together with two representatives of each of the other member agencies (selected by the governing bodies of those agencies), serve as ESTA’s board members.<sup>5</sup> Under the YARTS joint powers agreement, one representative and one alternate is appointed by each member agency from “among the elected officials of any publicly elected political office within its geographic limits.”

Pursuant to the TDA, Mono County, the Town of Mammoth Lakes, and transit operators providing services within the region (i.e., YARTS and ESTA) are eligible to claim and receive funds from the LTF which are allocated by the Mono LTC.<sup>6</sup> Projects actually funded in this manner within Mono County include street and road maintenance projects (county and city), and the purchase of buses and related equipment (ESTA and YARTS), among others.

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<sup>3</sup> For what appears to be the limited purpose of authorizing entry into agreements for joint development projects.

<sup>4</sup> PUC section 99203 in turn defines claimant as “an operator, city, county, or consolidated transportation service agency.”

<sup>5</sup> In 2015, the ESTA joint powers agreement was amended to allow one of each entity’s two representatives to be a person other than a member of that entity’s governing board.

<sup>6</sup> The County of Inyo, City of Bishop and ESTA are eligible to claim funds through the Inyo County transportation planning agency, while the Counties of Merced and Mariposa and YARTS would be eligible to claim funds through their local or regional transportation planning agencies.

## Analysis

### I. The Common Law Doctrine of Incompatible Offices

The common law prohibition on holding incompatible offices prevented a person from simultaneously holding two public offices if the performance of the duties of either office could have an adverse effect on the other. Offices were considered incompatible if one office exercised a supervisory, auditory, or removal power over the other or if the offices presented opportunities for significant clashes of duties and loyalties. (*See People ex rel. Deputy Sheriffs' Assn. v. County of Santa Clara* (1996) 49 Cal.App.4th 1471, 1481.)

Prospective as well as present clashes of duties and loyalties could give rise to the prohibition. And only one potential clash was required to make offices incompatible. The ability to abstain when a conflict is presented will not excuse the incompatibility or obviate the effects of the prohibition. A public officer who enters upon the duties of a second office automatically vacates the first office if the two are incompatible. Both positions must be "offices" (i.e., not mere employment). (82 Ops.Cal.Atty.Gen. 83, 83-84 (1999); 82 Ops.Cal.Atty.Gen. 68, 69 (1999); 82 Ops.Cal.Atty.Gen. 74, 75 (1999).)

### II. Government Code Section 1099

In 2005, the Legislature codified the common law doctrine of incompatible offices by enacting Government Code section 1099. Subdivision (a) of section 1099 provides that a "public officer ... shall not simultaneously hold two public offices that are incompatible *unless simultaneous holding of the particular offices is compelled or expressly authorized by law.*" (Emphasis added.)

Public offices are incompatible when: (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body; (2) based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices; or (3) public policy considerations make it improper for one person to hold both offices. (*See Gov't Code §1099 (a).*)

In the event that one person holds two incompatible offices, the person is deemed to have forfeited the first office upon assuming the second.

#### A. *Are the positions covered by this request "public offices"?*

The term "public office" for the purposes of the doctrine of incompatible offices has been described by the Attorney General's Office as follows:

A public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state. (68 Ops. Cal. Atty. Gen. 337, 342.)



Public offices include elected or appointed memberships on governmental boards, commissions, or committees.

In this case, each of the offices in question falls within the definition of a public office. A member of a board of supervisors is an elected officer of a governmental board and both LTC commissioner and director of a JPA as described are appointed officers of governmental bodies.

*B. Are the positions incompatible?*

Government Code Section 1099 provides that public offices are not incompatible if the “simultaneous holding of the particular offices is compelled or expressly authorized by law.” In this case, state law expressly authorizes the appointment of members of boards of supervisors and members of local transit operators to local transportation commissions. (See § 29535: “[a]ppointments to the commission may include **members of the board of supervisors**, the city councils, the transit district, and **other local transit operators**” (emphasis added).) Indeed, it is specifically envisioned that such members may be appointed, notwithstanding that the entity they represent is a claimant for/recipient of funds from the LTC. (See e.g., § 29531; PUC §§ 99230, 99231, 99233.1, 99233.3, 99233.7, 99233.8 99234, and 99260 which all address the eligibility and/or process for a county or a transit operator to claim funds through an LTC.)

In a 2007 opinion, the Attorney General considered whether the appointment of a general manager or department head of a municipal water district, public utility district, county water district or irrigation district, or a city manager or department head of a city, could serve on the board of directors of a county water authority which is a provider (i.e., seller) of water to those districts and cities. (See 90 Ops. Cal. Atty. Gen.24.) Citing section 1099, and several court decisions confirming that public officials of one agency may represent that agency on the board of another agency (despite a clash or duties, loyalties or other incompatibility) where such appointment is legislatively authorized, the opinion concludes that the listed individuals could so serve.<sup>7</sup> The opinion reasons that because the County Water Authority Act (the “Act”) requires each member agency to appoint a representative to the Authority’s board of directors and specifies that that person may be a member of the member agency’s governing board or another person, the exception to the doctrine of incompatible offices set forth in section 1099 applies.<sup>8</sup>

While acknowledging that the simultaneous appointments created the “possibility of a significant clash of duties or loyalties between the offices” which would otherwise constitute an incompatibility under subdivision (a)(2) of Section 1099, the opinion concludes that the legislature abrogated that prohibition by authorizing the appointment of a representative from each member agency to the water authority’s board. “We find that the Legislature has abrogated the prohibition in the present circumstances because a possibility of a significant clash of duties or loyalties between the office is statutorily recognized and the simultaneous holding of the particular offices is compelled or expressly authorized by law.” (90 Ops. Cal. Atty. Gen 24, citations omitted.)

<sup>7</sup> Assuming they were “public officials”, which was also at issue in the request.

<sup>8</sup> Water Code Appendix 45, section 6(b).

The opinion goes on to explain that “[a]s the representative of a constituent member agency, each Authority director may not only have a loyalty to his or her appointing agency but may even promote the interests of the appointing agency. The Legislature has weighed the advantages and disadvantages of having Authority directors with such conflicting loyalties and has determined that the public would be best served by allowing the interests of the appointing agencies to be represented on the Authority’s board of directors.”

The analysis is the same in a 2012 opinion also involving service on a water authority board by public officials representing its member agencies. As the opinion notes: “[o]ne of the main purposes of an Authority is to provide its member agencies with adequate supplies of water. Ordinarily, when one public entity furnishes a commodity or service to another, having the same public officer represent the interests of both seller and buyer presents precisely the type of inherent conflict of interest that the doctrine of incompatible offices is designed to prevent.” (95 Ops. Cal. Atty. Gen. 120 (2012).) However, the Attorney General again points out “it has long been recognized that the Legislature may abrogate or modify the prohibition against holding incompatible offices whenever it chooses.”

The 2012 opinion explains that “avoidance of ‘divided loyalties’, the main purpose of the incompatible offices rule, simply has no application in the situation where one public agency is a member of another public agency and is required to appoint a ‘representative’ to assert its interests on the latter agency’s board of directors. Application of the rule in these circumstances would remove the person from the first office, potentially losing his or her knowledge of the interests that are to be represented.” (*Id.*)

Here, the TDA specifically envisions that both counties and operators will be claimants for and recipients of LTF funds allocated by the LTC, a circumstance that would normally give rise to an incompatibility. However, the TDA provides for both counties and operators to appoint representatives to an LTC, and states that those representatives may be members of the appointing entity’s governing board. “Appointments to the commission may include members of the board of supervisors, the city councils, the transit district, and other local transit operators.” (§ 29535.) The Legislature has thus abrogated the doctrine of incompatible offices in the context of local transportation commissions in order to allow entities that receive funding through LTCs to have their interests represented.

Further, the TDA provides that representatives appointed by a transit district, operator or city (but not by the county) may not vote on specified matters before the LTC. (§ 29536: “[T]he members appointed by the city selection committee of the county from a city for which a transit service is provided and the members appointed by a transit district and the member representing other transit operators shall have no vote in the approval of the claims filed under Article 8 (commencing with Section 99400), Chapter 4, Part 11, Division 10 of the Public Utilities Code.) This restriction underscores the fact of participation by operators on an LTC and highlights that counties’ appointed representatives (which have broad responsibility for transit throughout their jurisdiction

and not simply an interest in one particular region or operator) need not recuse themselves from voting on matters where funding to the county or any other claimant is at issue.

Because the TDA explicitly authorizes a member of a county board of supervisors, and a member of a transit operator within a county, to sit as members of an LTC, under the express language of section 1099, the doctrine of incompatible offices does not apply to prevent such appointments. Similarly, the simultaneous appointment by a county board of supervisors of the same person to serve as its representative on the board of a transit operator JPA comprised of cities and counties and the LTC would likewise not violate the doctrine, since that person's service to the JPA does not disqualify him or her from also serving on the LTC. Finally, while section 29536 prohibits a person appointed by a transit operator as its representative on an LTC from voting on specified matters, this question assumes that the individual appointed by the board of supervisors to both the LTC and the transit JPA would not serve as the JPA's representative to the LTC and, thus, would not be so restrained.

Thank you for your attention to this matter and your anticipated response. If you have any questions, please do not hesitate to contact me at (760) 924-1704 or [ssimon@mono.ca.gov](mailto:ssimon@mono.ca.gov).

Sincerely,



Stacey Simon