ATTOLLES LAW, S.C.

TO: Adams County Board of Supervisors

FROM: Andrew Phillips, Matthew Thome, Malia Malone

RE: County Treasurer

DATE: April 28, 2025

BACKGROUND AND EXECUTIVE SUMMARY

During the Fall 2024 General Election, Kara Dolezal was elected as the Adams County Treasurer. At the time of her election, Ms. Dolezal was serving as the Treasurer of the Town of Lincoln and continued to serve as the Town Treasurer after assuming office as the County Treasurer. Ms. Dolezal was subsequently re-elected as Town Treasurer at the April 1, 2025 election and has continued to perform the functions of that office. We have been asked to analyze the ability of Ms. Dolezal to simultaneously hold the offices of Town Treasurer and County Treasurer and what impact, if any, Ms. Dolezal's election as Town Treasurer at the April 1, 2025 election has on her status as County Treasurer. As explained below, we have reached the following conclusions.

First, we believe the offices of Town Treasurer and County Treasurer are incompatible because there are various conflicts of interest that may arise in the performance of the duties of both offices and because the County Treasurer is in certain respects the superior of the Town Treasurer. This conclusion is consistent with an opinion of the Wisconsin Attorney General, who has opined that "the duties of the local treasurer and the duties of a county treasurer are wholly inconsistent." 30 Op. Att'y Gen. 379 (1941). As the Attorney General explained:

> The local treasurer represents and acts for the local municipality. Thus, by reason of the accounting and settlement between the local municipality and the county such conflicting interests would exist in reference thereto that the discharge of both duties at the same time is wholly incompatible.

Id. Although this opinion is quite old, we do not doubt that it remains correct today. It is our opinion that, because the offices of Town Treasurer and County Treasurer are incompatible, Ms. Dolezal may not hold both offices.

Second, a valid argument exists that Ms. Dolezal has necessarily vacated her office as County Treasurer by accepting office as Town Treasurer following the April 1, 2025, election. It is well-established that, if a person holding one public office accepts another public office that is incompatible with the first, they are deemed to have vacated the first office by accepting the second. This principle is well-established both in Wisconsin and elsewhere, and has often been compared to an implicit resignation of the first office. By accepting the incompatible office of Town Treasurer, Ms. Dolezal implicitly resigned from office as County Treasurer and created a vacancy in that office.

Third, because we view Ms. Dolezal's acceptance of the office of Town Treasurer as effectively a resignation of her office as County Treasurer, we believe the County Board may proceed to appoint a new County Treasurer now, without the need for a judicial determination that a vacancy exists or a notice of the existence of a vacancy by the County Clerk.

Finally, if Ms. Dolezal does not acknowledge that she has vacated the office of County Treasurer and does not cooperate in transitioning the office to her successor, the County may initiate a *quo warranto* action, which is a lawsuit to test Ms. Dolezal's ability to hold the office and to resolve who has title to the office between her and the County Board's appointed successor.

ANALYSIS

I. The Offices of County Treasurer and Town Treasurer Are Incompatible

A. Background on the Incompatibility Doctrine

We begin with a summary of the incompatibility doctrine. The common law doctrine of incompatibility prohibits a person from simultaneously holding incompatible public offices. *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 394, 347 N.W.2d 614, 615 (Ct. App. 1984). Offices are incompatible when "one office was superior in some respect to another, so that the duties exercised under each might conflict to the public detriment." *Id.* at 396 (citing *State v. Jones*, 130 Wis. 572, 575-76 (1907)). The doctrine of incompatibility also applies when "the nature and duties of two offices [are] such as to render it improper from considerations of public policy for one person to discharge the duties of both." *Id.* (quoting *Martin v. Smith*, 239 Wis. 314, 326 (1941)).

Importantly, it is the potential for conflict that causes positions to be incompatible, not whether an actual conflict has arisen. OAG 65-88, 65 Op. Att'y Gen. 293, 1988 WL 483405 (Wis. A.G. Nov. 18, 1988). Such a situation exists, for example, when a person holds offices or positions with duties that might conflict. *Id.* Incompatibility exists if "substantial conflicts might arise that would be detrimental to the public." *Otradovec*, 118 Wis. 2d at 397. It does not matter whether conflicts exist in all or a greater part of the function of the office and position. *Id.*; *see also State v. Jones*, 130 Wis. 572, 575–76, 110 N.W. 431 (1907). "Incompatibility may exist even if the duties of the offices would conflict only on rare occasions." Letter to Hon. Walter Kunicki, OAG 14-93, 81 Wis. Op. Atty. Gen. 90, 1993 WL 467840 (Wis. A.G. Nov. 4, 1993). As the Attorney General has explained in one opinion addressing incompatibility:

> Incompatibility is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. If the duties of the two offices are such that when placed in one person they

> might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible. Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second; obviously, in such circumstances, where both posts are held by the same person, the design that one act as a check on the other would be frustrated.

Letter to Mr. Darwin L. Zwieg, 1985 WL 257949, OAG 10-85 (Wis. A.G. March 26, 1985).

B. The Attorney General has previously opined that the duties of county treasurers and local treasurers are incompatible.

Next, we consider the question of whether the offices of County Treasurer and Town Treasurer are incompatible. Importantly, the Attorney General has previously opined on a similar question. Specifically, in 1941, the Corporation Counsel for Milwaukee County sought advice from the Attorney General on many varied topics, including whether the county treasurer may deputize a local treasurer for the purpose of collecting the second [property tax] installment, together with other collections. The Attorney General responded by opining, in relevant part:

> [I]n our opinion, the appointment of a local treasurer as a deputy county treasurer would be wholly improper, because the duties of the local treasurer and the duties of a county treasurer are wholly inconsistent. The local treasurer represents and acts for the local municipality. Thus by reason of the accounting and settlement between the local municipality and the county such conflicting interests would exist in reference thereto that the discharge of both duties at the same time is wholly incompatible.

30 Op. Att'y Gen. 379 (1941).

C. The Attorney General's opinion remains correct today.

Although the Attorney General issued this opinion over eighty years ago, we see no reason to question its reasoning regarding the inherent incompatibility between the offices of county treasurer and municipal treasurer. Regarding the property tax collection process, in particular, state law details the respective duties and responsibilities of the county treasurer and the town treasurer regarding the imposition and collection of property taxes. Several provisions of law relating to the tax collection process demonstrate that the county treasurer and town treasurer have divergent interests and that the county treasurer is in certain respects superior to, and acts as a check on, local treasurers.

For example, in taxation districts that have not adopted an ordinance allowing for the payment of property taxes in 3 or more installments, it is the taxation district treasurer (i.e., the municipal or town treasurer) who collects timely property tax payments through January 31 on behalf of, not only the local municipality, but also the state and county. Wis. Stat. § 74.11(6). There is then a settlement process under which the municipal treasurer must pay to each taxing jurisdiction within the municipality its proportionate share of the general property taxes collected by the local treasurer through January 31 (except that the state's share is paid to the county) and retain for the

municipality its proportionate share of the property taxes. Wis. Stat. § 74.23(1)(b); § 74.25(1)(b)2. After completing this process, the municipal treasurer transfers the tax roll to the county treasurer, who reviews the tax roll for errors or inadequacies. Wis. Stat. § 74.25(3); § 74.43. And, "[w]hen a [municipal] treasurer pays money to a county treasurer … the county treasurer shall give the [municipal] treasurer a receipt prescribed by the department of revenue for the amount paid." Wis. Stat. § 74.71.

Moreover, unless a local municipality adopts an ordinance obligating the municipality to pay for the local treasurer's failure to pay all taxes required by law to the county treasurer, a town treasurer must execute and deliver to the county treasurer a bond conditioned for the faithful performance of the town treasurer's duties and that the town treasurer "will account for and pay over according to law all taxes of any kind which are received and which are required to be paid to the county treasurer." Wis. Stat. § 70.67(1). "The county treasurer shall give to the town, city, or village treasurer a receipt for the bond, and shall file and safely keep the bond in the county treasurer's office." *Id.* And, it falls to the county treasurer to endorse the taxation district treasurer's bond if the taxation district treasurer has fulfilled the requirements for settlement with the county. Section 74.45(2) provides:

> After the taxation district treasurer has fulfilled the requirements for settlement with the county under s. 74.25 or 74.30, the county treasurer if requested to do so, shall endorse the bond of the taxation district treasurer executed under s. 70.67(1) as satisfied and paid. The endorsement fully discharges the taxation district treasurer and his or her sureties from the obligations of the bond, unless the return of the taxation district treasurer under s. 74.43 is false. If the return is false, the bond continues in force and the taxation district treasurer and his or her sureties are subject to action upon the bond for all deficiencies and damages resulting from the false return.

These are just some of the statutory provisions that govern the property tax collection process, but they should suffice to demonstrate the following key points: (1) taxation district treasurers (i.e., municipal or town treasurers) collect taxes on behalf of the county and other taxing units and thus owe a fiduciary responsibility to those taxing units; (2) the taxation district treasurers (i.e., the municipal or town treasurers) are subordinate to the county treasurer in collecting county and state taxes; and (3) the county treasurer has specified supervisory responsibilities over the municipal treasurer's performance of their duties. This subordinate/supervisory relationship between the two offices makes the positions incompatible.

Moreover, we also note that, if a municipal treasurer does not settle with the county treasurer when required, or the county treasurer does not settle with the municipal treasurer when required, state law allows for the imposition of interest and penalties. Wis. Stat. § 74.31 provides:

> If the taxation district treasurer or county treasurer does not settle as required under ss. 74.23 to 74.30:
>
> (1) Interest charge. The taxation district or county which has not settled shall pay 12 percent annual interest on the amount not timely paid to the taxing jurisdiction, including this state, to which money is due, calculated from the date settlement was required.

> (2) Penalty. The taxing jurisdiction, including this state, to which money is due may demand, in writing, payment from the taxation district or county which has not settled. If, within 3 days after receipt of a written demand, settlement is not made, the taxation district or county shall pay the taxing jurisdiction, including this state, making the demand a 5 percent penalty on the amount remaining unpaid.

The possibility of such interest charges and penalties being imposed in favor of one jurisdiction, and against the other, again demonstrates how there may arise a conflict of interest between a municipal treasurer and a county treasurer during the tax collection process.

Simply put, in the case of town treasurer and county treasurer, the duties of each office involve the handling and accounting of public funds. The relationship inherently involves oversight and accountability between the two offices – there is a built in "check and balance" in the statutes in order to promote accountability and transparency in handling taxpayer funds. Furthermore, the statutory scheme ensures that the county treasurer receives all tax moneys due from the town treasurer, either through a bond or an ordinance guaranteeing payment. *Town of Akan v. Kanable*, 18 Wis.2d 615 6221-622, 119 N.W.2d 419 (1962). We believe that under this framework, the same person cannot hold both offices.[1]

II. A Vacancy Exists in the Office of County Treasurer

A. An officeholder's acceptance of an incompatible second office creates a vacancy in the first office.

It is well-established under Wisconsin common law that, if a person holding one public office accepts another public office that is incompatible with the first, they are deemed to have vacated the first office by accepting the second. As the Court of Appeals explained in *In re Appeal of Bd. of Canvassers of City of Bayfield*:

> When the common law declares two offices incompatible, a person can hold but one; however, if a public official accepts another office incompatible with that which he holds, he thereby vacates the first office.

147 Wis. 2d 467, 474, 433 N.W.2d 266, 269 (Ct. App. 1988); *see also Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163, 169 (1941) ("[A]t common law where the nature and duties of two offices were such as to render it improper from considerations of public policy for one person to discharge the duties of both, a person could hold but one; that if one holding a public office accepts another incompatible with the one which he holds, he thereby vacates the first office."); *State ex rel. Stark*

[1] We find further confirmation for our conclusion in an opinion from the Michigan Attorney General. Michigan employs a similar property tax collection process in which township treasurers collect taxes on behalf of the county and state and must pay to the county treasurer the state and county taxes collected and provide an accounting. Notably, the Michigan Attorney General has observed that "the offices of county treasurer and township treasurer are clearly incompatible." *See* Honorable Kevin A Elsenheimber, 2007 Mich. OAG No. 7198, 2007 WL 444543 (Mich. Ag. Jan. 29, 2007).

v. Hines, 194 Wis. 34, 215 N.W. 447 (1927) ("[T]he acceptance by the incumbent of one office of an incompatible office, vacate[s] the first office, except in a case where the official cannot, by his own act, vacate the first office.").

Further, "Wisconsin Stat. § 17.03 provides a list of events that cause a vacancy." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 25, 402 Wis.2d 539, 976 N.W.2d 821. And, while our supreme court recently held that "[t]he Legislature was deliberate and specific in defining which events constitute a vacancy, and explicitly stated that the list was exclusive absent a contrary provision of law," Wis. Stat. § 17.03(2) expressly provides that a public office is vacant when the incumbent resigns. And, the common law rule that an officeholder's acceptance of an incompatible office vacates the first office by accepting the second has been compared to an implied resignation. A leading municipal law treatise, for example, provides:

> Ordinarily the acceptance by an officer of another office incompatible with the first constitutes an abandonment or resignation of the first office.

3 McQuillin Mun. Corp. § 12:173.6 (3d ed.). Courts from several other states have similarly compared the acceptance of an incompatible office to an implied resignation. *See, e.g.*, *Felkner v. Chariho Regional Sch. Committee*, 968 A.2d 865, 872 (R.I. 2009) ("[T]he holding of two incompatible offices results in a resignation of the first-acquired office because no person simultaneously can serve the public trust impartially when inconsistent duties and liabilities are involved."); *State ex rel. O'Hara v. Appling*, 215 Or. 303, 334 P.2d 482 (Ore. 1959) (explaining and adopting rule of implied resignation); *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 76 N.E.2d 886 (Ohio 1947) ("The principle is firmly established that the acceptance by an officer of a second office which is incompatible with the one already held is a vacation of the original office and amounts to an implied resignation or abandonment of the same."); *Pruitt v. Glen Rose ISD No. 1*, 126 Tex. 45, 49, 84 S.W.2d 1004, 1006 (1935) ("If a person holding an office is elected or appointed to another (where the two offices cannot be legally held by the same person) and he accepts and qualifies as to the second, such acceptance and qualification operate, ipso facto, as a resignation of the former office.").

Our supreme court has also previously compared an officer's acceptance of an incompatible office to a resignation. In *State ex rel. Thompson v. Nye*, our supreme court concluded that, if the offices of member of the assembly and the grain commission were incompatible, "under well-established principles of law the acceptance of the latter office, if the offices are incompatible, vacated the former." 148 Wis. 659, 135 N.W. 126, 130 (1912). In reaching this conclusion, the court explained:

> Our statute (sections 961 and 962) confers upon such officers the right to resign. Section 961 provides how resignation shall be made and only requires the action of the officer, and section 962 provides that every office shall become vacant by resignation. So in the instant case the defendant had the absolute right to resign. Therefore his acceptance of the office of grain commissioner, assuming that it was incompatible with the office of member of assembly, absolutely vacated the office of member of assembly.

Id. That said, in *State ex rel. Stark v. Hines*, our supreme court explained in the case of a municipal judge who also accepted the office of city attorney that "[h]e did not resign, but under the common-

law rule, he created a vacancy in the office of judge by accepting the incompatible office of city attorney." 194 Wis. 34, 215 N.W. 447 (1927). Whether the acceptance of an incompatible office is viewed as an implied resignation or as creating a vacancy in the office of County Treasurer under well-established common law, we believe the County will likely prevail in any judicial proceeding addressing the question of whether Ms. Dolezal's actions have created a vacancy in the office of County Treasurer.

B. Ms. Dolezal cannot restore her right to office as County Treasurer by resigning as Town Treasurer.

Finally, we note that we have also considered the possibility of Ms. Dolezal resigning from her office as Town Treasurer. After all, wouldn't that solve the problem? Unfortunately, the answer is no. As it is our understanding that Ms. Dolezal has accepted office of Town Treasurer following her April 1 election,[2] the damage has already been done, and she has necessarily vacated her office as County Treasurer via her acceptance of office as Town Treasurer. Ms. Dolezal cannot simply resign from office as Town Treasurer and claim she therefore remains as County Treasurer. As one treatise explains:

> It has sometimes been urged, as a third exception to the general rule to the effect that the acceptance of the second incompatible office vacates the first, that the resignation of the second office subsequently to its acceptance will restore the officer's right to the office first held. This, of course, is not the case.

100 A.L.R. 1162 (collecting cases); *see also* 62 C.J.S. Municipal Corporations § 420 ("Once the resignation becomes effective by the acceptance of the incompatible office, a resignation of the second office does not revive or restore the right to hold the first office.").

Our attorney general has also issued an opinion applying this rule. In 73 Wis. Op. Atty. Gen. 83, 1984 WL 249017 (OAG 25-84), the attorney general opined that a sheriff who accepted the incompatible office of supervisor created a vacancy for which the Governor could appoint a successor. The attorney general explained:

> His act of resigning the office of supervisor would not restore any right to the office of sheriff in such individual if there were an undersheriff, or as against a successor appointed by the Governor. In 67 C.J.S. Officers § 32 (1978), it is stated: 'One who vacates an office by acceptance of an incompatible office is not restored to the first by resignation from the second.' The office is vacant in the sense that the Governor has power to appoint a successor pursuant to section 17.21(1).

In short, we do not believe Ms. Dolezal can restore her right to the office of County Treasurer by resigning from her office as Town Treasurer. It is our view that the office of County Treasurer has become vacant by operation of law.

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[2] We have obtained a copy of the oath of office that Ms. Dolezal allegedly executed on April 17, 2025. Although the oath identifies her office as "Election Board," this is plainly a scrivener's error. It is also our understanding that Ms. Dolezal has appeared as Town Treasurer at a Town meeting, is holding herself out as Town Treasurer, and is performing the duties of that office.

III. The County Board May Proceed to Fill the Vacancy Now

Next, we believe the County Board may proceed to appoint a new County Treasurer now, without need for a judicial determination that a vacancy exists or a notice of the existence of a vacancy by the County Clerk. Specifically, Wis. Stat. § 17.17 addresses how notice of vacancies shall be given "otherwise than by resignation." Here, because Ms. Dolezal's acceptance of an incompatible office may be viewed as an implied resignation, we believe the County Board may proceed to fill her seat without a court judgment or notice of vacancy by the clerk under § 17.17.

Indeed, the County Board is obligated to fill the vacancy. Specifically, Wis. Stat. § 17.21 provides that "[v]acancies in elective county offices *shall be filled* in the manner and for terms as follows." (emphasis added). It goes on to provide:

> In the office of county clerk, treasurer, or surveyor, by appointment by the county board for the residue of the unexpired term unless a special election is ordered by the county board, in which case the person appointed shall serve until his or her successor is elected and qualified. The county board may, if a vacancy occurs before June 1 in the year preceding expiration of the term of office, order a special election to fill the vacancy. If the county board orders a special election during the period beginning on June 1 and ending on November 30 of any year, the special election shall be held concurrently with the succeeding spring election. If the county board orders a special election during the period beginning on December 1 and ending on May 31 of the succeeding year, the special election shall be held on the Tuesday after the first Monday in November following the date of the order. A person so elected shall serve for the residue of the unexpired term.

Wis. Stat. § 17.21(3). Thus, the County Board must fill a vacancy in the office of County Treasurer by appointment. The appointed person would serve the residue of Dolezal's term, unless the County Board orders a special election to fill the vacancy.

IV. If Ms. Dolezal contests the appointment of her successor, the County and the successor Treasurer may institute a quo warranto action on behalf of the State.

Finally, we have considered the possibility that Ms. Dolezal will dispute that she has vacated her office as County Treasurer and will contest the appointment of her replacement. In such a scenario, the County and the appointed successor may initiate a quo warranto action to resolve title to the office. The proper way to test the ability of an individual to hold a public office is a quo warranto action. "Quo warranto actions test the ability of an individual to hold office." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 13, 402 Wis.2d 539, 976 N.W.2d 821. Quo warranto relief "is an exclusive remedy, except when the issue warranting quo warranto relief is ancillary to an issue that does not sound in quo warranto." *City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 348, 382 N.W.2d 52, 57 (1986). Here, because Ms. Dolezal's ability to hold the office of County Treasurer would be the primary issue in the dispute, the proper judicial mechanism for resolving who has title to the office of County Treasurer would be a quo warranto action.

The procedure for a quo warranto action is set forth in statute, in Chapter 784. Quo warranto may be obtained via a civil action. Wis. Stat. § 784.01. Actions of quo warranto may be tried to a jury. Wis. Stat. § 784.02; *see also State ex rel. Leonard v. Rosenthal*, 123 Wis. 442, 102 N.W. 49 (1905).

Under Wis. Stat. § 784.02, an action of quo warranto may be brought under the following circumstances:

> (1) An action may be brought by the attorney general in the name of the state, upon his or her own information or upon the complaint of any private party, against the parties offending in the following cases:
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> (a) When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or
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> (b) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of office; or
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> (c) When any association or number of persons shall act, within this state, as a corporation without being duly incorporated.
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> (2) Such action may be brought in the name of the state by a private person on personal complaint when the attorney general refuses to act or when the office usurped pertains to a county, town, city, village, school district or technical college district.

(emphasis added). Accordingly, with respect to an action involving the County Treasurer, an action "may be brought in the name of the state by a private person on personal complaint," without first filing a complaint with the attorney general. Although the statute refers to a "private person," our supreme court has held that a municipality may also serve as a private plaintiff so long as the municipality otherwise has standing to initiate the action. *See City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 382 N.W.2d 52 (1986). Here, we believe it would be appropriate for both the County (through the County Board) and the person appointed by the County Board as Ms. Dolezal's replacement, to serve as the private plaintiffs. At that point, the Court would resolve entitlement to the office of County Treasurer pursuant to the procedures in Chapter 784 of the statutes. Assuming the Court rules in favor of the County and the appointed successor, at that point the appointed successor could assume execution of the office. *See* Wis. Stat. § 784.09.