

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. ZISK AND LOIS E. ZISK
Petitioners

vs.

CITY OF ROSEVILLE, CALIFORNIA; OWEN H. WALTRIP; BARON REED; KENNETH F. ROYER; GILBERT A. DURAN; HARRY CRABB, JR.; MEL HAMEL; WILLIAM SANTUCCI; PAULINE ROCCUCCI; RICHARD ROCCUCCI; JOHN BYOUK; THOMAS CHAMBLISS; MARTHA RILEY; GEORGE BULJAN; JUNE WANISH; KEITH F. SPARKS; WILLIAM OWEN; G. RICHARD BROWN; DENNIS DECUR; MICHAEL F. DEAN; STEVEN BRUCKMAN; MARK J. DOANE; ROBERT HUTCHISON; ALLEN E. JOHNSON; STEVEN DILLON; PATTY DUNN; FREDERICK L. BARNETT; LARRY PAGEL; JAMES D. GARBOLINO; J. RICHARD COUZENS; JAMES D. ROEDER

Respondent(s)

**On Petition For Writ of Certiorari To
United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR REHEARING

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In Propria Persona

QUESTIONS PRESENTED FOR REVIEW

- I Weather petitioners have been deprived of a constitutionally protectable property interest for an improper motive and by means that were fraudulent, pretextual, arbitrary, capricious and without any rational basis and without substantive procedural due process or just compensation, repugnant to Title 42 U.S.C.A. §§ 1983 and 1985 and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

- II Weather the entry of an order by Judge Shubb, dismissing petitioners' verified amended civil complaint in the lower District Court was executed by a Judge with impartiality that might reasonably be questioned, who acted in excess of his jurisdiction.

- III Weather the appearance in this matter, of the law firm of Porter, Scott, Weiberg and Delehant representing respondents, constituted the appearance of every lawyer in the firm, including the daughter of Judge Shubb, creating an impression of private consultation, conflict of interest and appearance of impartiality, requiring disqualification of Judge Shubb, pursuant to 28 U.S.C.A. § 455.

- IV Weather Judge Shubb exceeded his jurisdiction by refusing to enter a default judgment against respondents, pursuant to Federal Rule of Civil Procedure 55 and Federal Rule of Civil Procedure 79(a) is an abuse of discretion and denial of due process, when the factual evidence in the record demonstrates that respondents are in default.

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PETITION FOR REHEARING

William J. Zisk and Lois E. Zisk, the petitioners in this proceeding, respectfully petitions for rehearing of the order of the Court entered on April 19, 1999, denying the petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit. This petition is made on the following grounds:

- I Petitioners have been deprived of a constitutionally protectable property interest for an improper motive and by means that were fraudulent, pretextual, arbitrary, capricious and without any rational basis and without substantive procedural due process or just compensation, repugnant to Title 42 U.S.C.A. §§ 1983 and 1985 and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.
- II The entry of an order by Judge Shubb, dismissing petitioners' verified amended civil complaint in the lower District Court was executed by a Judge with impartiality that might reasonably be questioned, who acted in excess of his jurisdiction.
- III The appearance in this matter, of the law firm of Porter, Scott, Weiberg and Delehant representing respondents, constituted the appearance of every lawyer in the firm, including the daughter of Judge Shubb, creating an impression of private consultation, conflict of interest and appearance of impartiality, requiring disqualification of Judge Shubb, pursuant to 28 U.S.C.A. § 455.
- IV Judge Shubb exceeded his jurisdiction by refusing to enter a default judgment against respondents, pursuant to Federal Rule of Civil Procedure 55 and Federal Rule of Civil Procedure 79(a) is an abuse of discretion and denial of due process, when the factual evidence in the record demonstrates that respondents are in default.

The grounds stated above are confined to intervening circumstances of substantial and controlling effect.

For the reasons set forth above, petitioners requests that the Court set aside the order denying the petition for Writ of Certiorari and hear the petition for the issuance of a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.

Dated June 11, 1999

The image shows two handwritten signatures in black ink. The signature on the left is 'Lois E. Zisk' and the signature on the right is 'William J. Zisk'. Both signatures are written in a cursive, flowing style.

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REASONS WHY REREARING SHOULD BE GRANTED

I

Review is warranted because respondents have conspired to deprive petitioners of a constitutionally protectable property interest for an improper motive and by means that were fraudulent, pretextual, arbitrary, capricious and without any rational basis and without substantive procedural due process or just compensation repugnant to Title 42 U.S.C.A. §§ 1983 and 1985 and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The Fourth Amendment of the Constitution of the United States states as follows:

The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment of the Constitution of the United States states in relevant part:

...., nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the Constitution of the United States states in relevant part:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the law.

Title 42 U.S.C.A. states in relevant part:

Sec. 1983, Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,....

Sec. 1985. Conspiracy to interfere with civil rights.

(2) Obstructing justice;; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Petitioners submit that the above assertion of violations of petitioners' Constitutional Civil Rights is fully supported by the evidence in the entire record in these proceedings. See, petitioners' petition for Writ of Certiorari, statement of the case at 3 - 23. See also, petitioners' Verified First Amended Civil Complaint, filed in Federal District Court on February 2, 1996, Case No. CIV-S-95 2134 EJM/GGH. See also, petitioners' Verified Civil Complaint, filed in Federal District Court on March 19, 1997, Case No. CIV-S 97-0426 WBS/GGH. See also, letter of response to appeal by petitioners from the Federal Emergency Management Agency in Washington, D.C. to Mayor Claudia Gamar of the City of Roseville, California, dated October 30, 1997 (Appendix A herewith), confirming the fraudulent floodplain zoning of petitioners' property.

Petitioners respectfully submit that respondents have violated petitioners Constitutional Civil Rights and thus is appropriate for review by this Court.

II

Review is warranted because the entry of an order by Judge Shubb, dismissing petitioners' verified amended civil complaint in the lower District Court was executed by a Judge with impartiality that might reasonably be questioned, who acted in excess of his jurisdiction.

Pursuant to Title 28 U.S.C.A. § 455(a), a judge must recuse him or herself "where a reasonable person with knowledge of all the facts would conclude that judge's impartiality might reasonably be questioned." *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993) (Quotation omitted), *cert. Denied*, 510 U.S. 1163, 114 S.Ct. 1188, 127 L.ed.2d 538 (1994). This statute is designed "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865, 108 S.Ct. 2194, 2205, 100 L.Ed.2d 855 (1988). Accordingly, [w]here the question is close, the judge must recuse himself." *Dandy*, 998 F.2d at 1349.

By its terms § 455(a) mandates disqualification in a proceeding in which a judge's "impartiality might reasonably be questioned." *Id.* Under

subsection (a) requires an "evaluation on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance," *Liteky v. United States*, 510 U.S. 540, 548, 114 S.Ct. 1147, 1153, 127 L.Ed.2d 474 (1994). What is required "is a reasonable factual basis for doubting the judge's impartiality." *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.) (quotation omitted), cert. Denied, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980).

Petitioners respectfully submit that the orders of Judge Shubb dismissing petitioners' verified amended civil complaint *before* recusal was an exercise in excess of his jurisdiction and thus is appropriate for review by this Court.

III

Review is warranted because the appearance in this matter, of the law firm of Porter, Scott, Weiberg and Delehant representing respondents, constituted the appearance of every lawyer in the firm, including the daughter of the judge presiding over this matter, creating an impression of private consultation, conflict of interest and appearance of impartiality, requiring disqualification of the judge, pursuant to 28 U.S.C.A. § 455.

Title 28 U.S.C.A. states in relevant part:

Sec. 455. Disqualification of justice; judge or magistrate.

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(5) He or his spouse, or person within the third degree of relationship to either of them, or the spouse of such a person:

- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially effected by the outcome of the proceeding;

The Court of Appeals for the Seventh Circuit has held that: (1) appearance of law firm in case before a judge constituted an appearance of every lawyer in the firm, including brother of judge; (2) Circumstances of familial relationship and importance to each litigant of outcome of case made it reasonable for a member of public or party or counsel opposed, to question a judge's impartiality; (3) failure to recuse represented an abuse of discretion and, given mandatory nature of statute, warranted mandamus relief see, *SCA Services, Inc. v. Morgan* 557 F.2d 110 (7th Cir. 1977), *In re United States*, 666 F 2d 690, 694 (1st Cir. 1981). Mandamus is the proper remedy to vacate the orders of a judge who acted when he should have recused. See, *Moody v. Simmons*, 858 F.2d 137, 143 (3rd Cir. 1988), cert. denied, 489 U.S. 1078, 109 S.Ct. 1529, 103 L.Ed. 2d 835 (1989).

Under § 455(a) a recusal is required when a reasonable person would harbor doubts about the judge's impartiality. See *United States v. Sciarra*, 851 F 2d 621, 634 (3d Cir. 1988) *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987).

A formal opinion issued by the A.B.A. committee on Professional Ethics as long ago as 1931 opined that every member of a law firm is prohibited from accepting employment which another member could not accept because of a conflict of interest. See, A.B.A. Comm. on Prof. Ethics, Formal Opinion No. 33 (1931). More recently, the Seventh Circuit, in a case involving a conflict of interest situation assumed this same ethical stance; "confidential information presumptively possessed by . . . [one attorney] would be imputed to the other members of the . . . firm." *Schloetter v. Railoc of Inc., Inc.* 546 F.2d 706, 710 (7th Cir. 1976).

Under the well-settled principals of agency law, the appearance of Porter, Scott, Weiberg and Delehant in the case before Judge Shubb is the appearance of every lawyer in the firm including Carrisa A. Shubb, the daughter of Judge Shubb. Petitioners respectfully submit that Judge Shubb had a mandate to recuse and all orders issued by Judge Shubb were in excess of his jurisdiction and thus are appropriate for review by this Court.

IV

Review is warranted because Judge Shubb exceeded his jurisdiction by refusing to enter a default judgment against respondents,

pursuant to Federal Rule of Civil Procedure 55 and Federal Rule of Civil Procedure 79(a) is an abuse of discretion and denial of due process, when the factual evidence in the record demonstrates that respondents are in default.

Federal Rules of Civil Procedure, Rule 12(a) 1(A) states in relevant part:

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or...

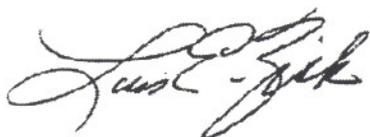
The record in this proceeding is supported by petitioners declaration that absolutely no written response whatsoever was received by petitioners or the Court during the twenty (20) days that followed service of summons. See petitioners Writ of Certiorari, Appendix I at 37.

Petitioners respectfully submit that respondents are in default and lack jurisdiction and standing in this proceeding and thus is appropriate for review by this Court.

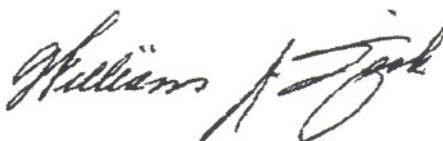
CERTIFICATE OF PETITIONERS

I certify that the above petition is presented in good faith and not for delay and is restricted to the grounds specified in Paragraph 2, Rule 44, Rules of the Supreme Court (U.S. Supreme Court Rule 44, paragraph 2).

Dated June 11, 1999



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APPENDIX TO PETITION FOR REHEARING

Appendix A

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Federal Emergency Management Agency Letter	1



Federal Emergency Management Agency
Washington, D.C. 20472

OCT 30 1997

The Honorable Claudia Gamar
Mayor, City of Roseville
311 Vernon Street, Suite 208
Roseville, California 95678

Dear Mayor Gamar:

This responds to a letter dated September 17, 1996, from Mr. Dennis Huff, District Engineer, Placer County Flood Control and Conversation District, regarding the preliminary Flood Insurance Rate Map (FIRM) for Placer County, California and Incorporated Areas, dated September 29, 1995. Mr. Huff transmitted a copy of a letter dated September 10, 1996 in which Mr. Garth Gaylord, Associate Engineer, and Mr. Rhon Herndon, Senior Civil Engineer both of the City of Roseville Engineering Division, indicated that the City had recently completed a flood improvement project on Cirby Creek. The project extends from the vicinity of Interstate 80 upstream to near the confluence with Linda Creek. Mr. Gaylord and Mr. Herndon requested that the FIRM be revised to reflect changes in the floodplain resulting from the project.

The flood improvement project begins approximately 2,200 feet upstream from the confluence with Dry Creek and consists of approximately 3,000 feet of channel improvements, with the upper 1,300 feet having a floodwall with exposed heights of 1.5 to 6.5 feet. In letters dated April 23 and June 24, 1997, Mr. Gaylord submitted as-built construction drawings for the flood improvement project a geotechnical and stability analysis for the floodwall and information on the City's operational plan to install flashboards in the floodwall during periods of highwater. We reviewed the information determined that the floodwall meets the minimum geotechnical and embankment stability criteria for National Flood Insurance Program regulations.

In a letter dated January 17, 1997, Mr. Huff submitted a revised HEC-2 model that included changes resulting from channel, levee, and floodwall

improvements. The revised HEC-2 model submitted by Mr. Huff was evaluated and used to develop new base flood elevations (BFEs). The base flood is the flood having a 1-percent chance of being equaled or exceeded during any given year. The new BFEs are reduced by up to 5.2 feet from those shown on the preliminary FIRM, with the maximum reduction occurring just upstream of Interstate 80. The floodway was also revised to be consistent with new BFEs.

In their September 10, 1996 letter, Mr. Gaylord and Mr. Herndon indicated that the areas shown as being flooded on the preliminary FIRM were not inundated by major floods that occurred in 1986 and 1995. The City's explanation is that the base flood discharge was too high in this area. Approximately 1,400 feet downstream from Huntington Drive in the vicinity of Sierra Gardens Drive, a major tributary enters Cirby Creek. The City explained that the base flood discharge in the HEC-2 model was not reduced above this confluence to account for the reduced drainage area of Cirby Creek in the vicinity of his property. Mr. Telliano indicated that he has resided at this location for 30 years and has not witnessed flood elevations as high as those depicted on the preliminary FIRM.

We reviewed the hydrology and hydraulics used to determine the BFEs in the vicinity of Huntington Drive and Queens Court on Cirby Creek and agree that the base flood discharge and BFEs are too high in this area. The discharges used for Cirby Creek in developing the preliminary FIRM were taken from the April 1992 final report entitled *Dry Creek Watershed Flood Control Plan*, by James M. Montgomery (JMM). However, the base flood discharges in the vicinity of Huntington Drive were not consistent with discharges published in the JMM report and were revised in a reach from Sierra Gardens Drive to 400 feet above Huntington Drive. This resulted in the base flood discharge being reduced from 688 to 510 cubic feet per second (cfs) in the vicinity of Huntington Drive.

Using the revised base flood discharge, revised BFEs were computed in the vicinity of Huntington Drive. The BFE in the approach section to the culvert on Huntington Drive was revised from 159.4 feet to 158.5 feet (NGVD) using procedures described in *Techniques of Water Resources Investigations of the U.S. Geological Survey, Book 3, Chapter A3, Measurement of Peak Discharge at Culverts by Indirect Methods*. The computations indicated that of the total flow of 510 cfs at Huntington Drive, 450 cfs would flow through the pipe-arch culvert and 60 cfs would leave the channel in a 100 foot reach upstream of the road and flow north towards the intersection of Queens Court and Huntington Drive, which is

the lowest elevation on Huntington Drive in the vicinity of Cirby Creek. The diverted floodwaters would flow north on Huntington Drive to Russell Way and then west on Russell Way parallel to Cirby Creek. We have revised the SFHA boundary delineations in the vicinity of Queens Court and Huntington Drive to reflect this flow pattern.

We have revised the BFEs along two reaches of Cirby Creek to reflect the flood control project in the lower reach of Cirby Creek and the revisions in the vicinity of Huntington Drive. In addition, the realignment of the channel as part of the flood improvement project has caused slight changes in the stream distances above the confluence with Dry Creek. Copies of the revised preliminary FIRM panels 06061C 0478F and 0479F, Flood Profile Panels 33P-39P and Floodway Data Table showing these modifications to Cirby Creek are enclosed. We are also enclosed copies of additional panels that were revised to update road names and locations and corporate limits as requested by Mr. Huff.

With a letter dated November 27, 1996, Mr. William J. Zisk and Mrs. Lois E. Zisk submitted an appeal on the BFEs on Dry Creek in the vicinity of their property on Thomas Street in Roseville. The Zisks submitted a copy of a letter dated May 31, 1990, from the Federal Emergency Management Agency resolving a previous appeal of the preliminary Flood Insurance Study (FIS) report and FIRM, dated July 28, 1989, for the City of Roseville, California; excerpts of a transcript of proceedings filed in the Superior Court of the State of California for *The City of Roseville vs. William J. Zisk, Lois E. Zisk, et al*; excerpts from a report entitled, "Flood Plain Information, Dry Creek and Tributaries, Roseville, California, prepared by the U.S. Army Corps of Engineers (USACE), Sacramento District, dated May, 1973; excerpts from a report entitled "Flood Analysis of the Roseville Basin," prepared by Philip Williams & Associates. Dated August 23, 1983; excerpts from an April 1988 USACE report; excerpts from a September 1986 report entitled "Roseville Hydrology" prepared by Nolte and Associates; and an excerpt from a HEC-2 model dated February 11, 1987, that is the basis for the effective FIRM, dated September 28, 1990.

The basis of the Zisks' appeal is that base flood discharges for Dry Creek developed for the preliminary FIRM dated September 29, 1995, were based on future rather than present land-use conditions. As stated in Section 3.1 of the 1995 preliminary FIS report, the base flood discharges for Dry Creek are taken from the April 1992 JMM report. Which considered 1989 land-use conditions. The discharge in the vicinity of the Zisk Property, based on

land-use conditions in existence in 1989, is 10,365 cfs. We are enclosing excerpts from Table 2-7 of the JMM report and from the current HEC-2 model to document that the hydraulic model is consistent with the JMM hydrology report.

The Zisks noted that 16,140 cfs was used in the 1987 HEC-2 model for the 1995 preliminary FIRM. Please note that the 1987 model was used to develop the effective 1990 FIRM but *not* the 1995 preliminary FIRM; as indicated above a revised HEC-2 model and the April 1992 JMM report were used to develop the 1995 preliminary FIRM. The preliminary 10,365-cfs discharge in the vicinity of the Zisks' property referenced above contrasts with the 12,400-cfs discharge that was used for the 1990 effective FIRM.

In summary, the base flood discharges for Dry Creek are based on 1989 land-use conditions as documented in the JMM report and in fact, are lower than corresponding values used for the effective FIRM.

This letter hereby resolves all appeals and protests of the preliminary FIRM dated September 29, 1995, in the City of Roseville. The next step in processing of the preliminary FIRM and FIS report is to issue a final flood elevation determination (FFED) letter. The FFED letter will finalize the BFEs for your community, initiate a 6-month compliance period, and establish an effective date for the FIRM and FIS report. During the 6-month compliance period, your community must adopt a complaint floodplain management ordinance based on the flood hazard information shown on the revised FIRM. Based on the current schedule, the FIRM and FIS report for your community will become effective in May 1998.

If you have any questions regarding floodplain management measures for your community, please contact our Regional Office staff in San Francisco, California, at (415) 923-7177. If you have questions regarding the information in this letter, the revised preliminary FIRM, or the floodplain mapping for your community, please contact Mr. Karl Mohr of our staff in Washington, DC, either by telephone at (202) 646-2770 or by facsimile at (202) 646-4596.

Sincerely,

Michael K. Buckley, P.E., Director

Hazard Identification & Risk Assessment Division
Mitigation Directorate

Enclosures

cc: Mr. Jan Witter, Executive Director
Mr. Dennis Huff, District Engineer

Mr. Dennis Huff, District Engineer
Placer County Flood Control and Conservation District

The Honorable Bill Santucci
Placer County Supervisor, District 1

Mr. And Mrs. William Zisk

Mr. Jack Telliano