

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RABBIT CREEK COMMUNITY
CHURCH OF ANCHORAGE, ALASKA,
an Alaska non-profit corporation,

Plaintiff,

vs.

MUNICIPALITY OF ANCHORAGE, an
Alaska home-rule municipality,

Defendant.

Case No. 3:08-cv-00122 TMB

O R D E R DENYING PLAINTIFF'S
MOTION FOR DISQUALIFICATION

I. BACKGROUND AND OVERVIEW

Plaintiff Rabbit Creek Community Church (“Rabbit Creek”) is a Christian organization seeking to expand the size of its church facilities. Rabbit Creek requested permission for this expansion from Defendant Municipality of Anchorage’s planning department; the Municipality denied this request based at least in part on AMC § 21.45.235, a zoning regulation that applies solely to churches. Rabbit Creek now challenges this regulation, and seeks to invalidate it based on claims that it violates the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act of 2000.

On June 12, 2008, Rabbit Creek filed a *Motion Concerning Possible Grounds for Disqualification* at Docket No. 9. The motion asks me to determine whether I possess a “financial interest in the subject matter in controversy” that requires my recusal under 28 U.S.C.A. § 455(b)(4). Specifically, Plaintiff contends that any decision to uphold or overturn the

statute could potentially affect the value of my own property, and thus requires me to recuse myself. ¹

For the reasons outlined below, I conclude that recusal is not required.

II. ANALYSIS

Under 28 U.S.C.A. § 455(b)(4), a judge must disqualify himself from hearing a case whenever he “...or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.”

Section 455 differentiates between two kinds of interests. If a judge has a direct legal or equitable ownership in the subject matter, he is disqualified regardless of the size of the interest. However, an interest that does not entail direct ownership falls under the “other interest” category, and requires disqualification only if the litigation could substantially affect that interest. *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980).

Because a judge must recuse himself when he has a direct financial interest in the subject matter, judges are disqualified whenever their property is *directly* affected by the outcome of the case. Thus, for example, where a judge owns stock in the company whose dispute is before him; where his decision will stop the flow of mining tailings onto his property, *North Bloomfield Gravel Mining Co. v. Keyser* 58 Cal. 315, 323 (1881); or where his decision will prevent the

¹ Plaintiff’s motion is entitled “Motion Concerning Possible Grounds for Disqualification.” I construe this as a motion to disqualify, and analyze it as such. Disqualification may be decided as a matter of law, *Jefferson County v. Acker*, 92 F.3d 1561, 1581 (11th Cir. 1996); *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir.1983).

diversion of underground water under his land, *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 182 Cal. 315 (1920), he should recuse himself. In those situations, the danger is that a judge may have an opportunity to unfairly sway the proceedings and align them with his own interests. This potential conflict requires disqualification to maintain public confidence in the impartiality of the courts and eliminate even the appearance of impropriety. *U.S. v. State of Ala.*, 828 F.2d 1532, 541 (11th Cir. 1987).

However, it is important to distinguish between two types of financial interests: direct and indirect. While a judge should recuse himself upon discovering that he has even the smallest “financial interest” in the subject matter in controversy, disqualification is warranted only when that interest is a *direct* interest – not when it is remote, contingent, or speculative. *Herrington v. Sonoma County*, 834 F.2d 1488, 1503 (9th Cir. 1987). This explains why a judge must disqualify himself when he owns stock in the companies before him (since his ruling could affect their stock price and provide a direct and immediate benefit to his finances), but why the possibility that a judge might ultimately benefit from lower gas bills “as a public utility consumer and member of the general public, depending on the outcome of the litigation before him, [is] not a substantial or disqualifying ‘financial interest.’” *McCann v. Communications Design Corp.*, 775 F.Supp.1535, 1541 (D.Conn. 1991)(quoting *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980)). “Such a remote and contingent interest has been described as “closely analogous to what is known as a ‘bare expectancy’ in property law,” which has no “legal significance.”” *Id.* at 366-67.

Here, Rabbit Creek's property is located in a different "zone" than mine: Rabbit Creek's property is zoned as R-6, while mine is zoned as R-1. However, Rabbit Creek contends that the statute it seeks to overturn is not limited to R-6 zones. The same statute, it argues, could potentially restrict churches from expanding in almost *all* residential zones. Thus Rabbit Creek argues that my ruling on whether to uphold this statute could potentially affect my property, and this requires me to recuse myself under Section 455.

I respectfully disagree.

Section 455 would compel my recusal if I had a direct financial interest in the subject matter of this litigation. Here, that subject matter can broadly be defined as the Rabbit Creek Church and its property, any closely surrounding properties, and any parcels of land directly affected by AMC § 21.45.235's building restrictions. Thus I might reasonably be seen to have a *direct* interest in this matter if, for example, I had a financial stake in the Church or its land; leased property to Rabbit Creek Church or other churches; owned property that directly abutted a church's property (and thus might be impacted by the church's proposed expansion); had a business that provided any services to churches (and thus might benefit by their growth); or was paid to consult or render advice on statutes such as AMC § 21.45.235.

Viewed in this light, it is clear that I lack any direct financial interest in the case's outcome. I have no ownership interest in Rabbit Creek or any other church. I do not own, lease, or rent property to Rabbit Creek, or any other religious group. I do not sell goods or services to any churches. I do not own, lease, or rent land neighboring the Rabbit Creek Church; own any business interests that could be financially impacted by the proposed expansion; or possess any

other financial interest that would be directly affected by this case. Simply put, I have no interest in Rabbit Creek Church or its property, surrounding properties, or AMC § 21.45.235. As a result, no ruling I might issue could provide me with any direct financial benefit.

At best, my ruling might generate an *indirect* effect on the value of my property, based on the impact that the presence or absence of churches has on the overall value of properties in a city. Put another way, my ruling would not directly affect any *specific* parcels of land that I own, but rather the Anchorage real estate market *as a whole*. Yet courts have consistently found this type of impact far too remote, contingent, and speculative to represent a legitimate conflict. “It could be said that no judge who owns a house should render a decision that potentially affects the value of real estate in general, that no judge who owns stock should decide a case under the securities or antitrust laws, and so on. Effects of this sort are both ubiquitous and too indirect to require disqualification.” *New York City Development Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir. 1986).²

It is also worth nothing that the challenged ordinance applies only to *churches* - not to residences like my own. There might be a stronger basis for recusal if Rabbit Creek was trying to modify the property lines or tax bases of my R-1 zoning, as this challenge would more likely affect my property and its value directly. But Rabbit Creek is not challenging the validity of the R-1 zoning in which I live, or even the municipality’s *general* R1-R11 residential zoning plans.

²

Nor would any ruling affect my *particular* parcel of land. For this conflict to arise, there would have to be an unlikely combination of events in which (1) I choose to sell my property; (2) the interested purchaser of that property is a church, and (3) this church is willing to pay only a reduced price for my property because of AMC § 21.45.235’s restrictions on its use. This is the very type of contingent and speculative concern that courts have repeatedly found provides no basis for disqualification. *See e.g. Herrington v. Sonoma County*, 834 F.2d 1488, 1503 (9th Cir. 1987).

Rather, Rabbit Creek seeks to invalidate an ordinance that applies directly to churches, and only *indirectly* to other properties. As a result, the ruling would affect my property only in the most remote way; it would have no immediate or quantifiable effect on the value of my land. This is not the “direct interest” contemplated under Section 455; if anything, it falls under the “other interest” category.

Indeed, as noted above, judges have even been permitted to hear antitrust cases in which they are called to rule for or against the very utility company with whom they are a customer.

See In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794 (10th Cir. 1980).

Likewise, the “remote contingent possibility” that a judge might receive a refund as a consumer from an electric company appearing before him, depending on the future outcome of the litigation, is not a disqualifying “financial interest.” *In Re Virginia Elec. & Power Co.*, 539 F.2d 357, 366 (4th Cir. 1976). Here, my property would merely be affected, if at all, in the remote way that *all* houses will be affected by the presence or absence of churches in Anchorage.

Without any legal or equitable interest in properties that could be directly affected by my ruling, I have no direct financial interest in this case, and disqualification cannot be based on this aspect of Section 455.

Ultimately, any “interest” I have in this litigation is simply aligned with that of the general public, all of whose properties would potentially be affected by a change in zoning laws. In evaluating this type of potential conflict, courts have consistently held that a judge’s interest in common with many others in a public matter is not sufficient to disqualify him. *See In re City of Houston*, 745 F.2d 925, 929-30 (5th Cir. 1984)(collecting cases). “Where the interest of a judge

as a resident, taxpayer, or property owner is not direct or immediate but remote or contingent, such interest ordinarily is not sufficient *per se* to disqualify him.” *Id.* This justification applies with even more force where the impact would not be direct, but rather speculative. Judges’ “speculative interest as members of large groups” are “too attenuated to warrant disqualification.” *U.S. v. Ala.*, 828 F.2d 1532, 1541-42 (11th Cir. 1987). Likewise, any potential effects of this suit upon the value of my property are remote, contingent, and speculative, and provide no legitimate basis for recusal.

Accordingly, I conclude that I do not need to recuse myself at this time. However, because a conflict could conceivably arise at some point in the future - perhaps as a result of new events, new arguments, or a new procedural posture - Rabbit Creek’s motion is DENIED WITHOUT PREJUDICE. Additionally, because courts are under an independent and continuing duty to evaluate their potential conflicts, I may also raise the issue *sua sponte* if I discover new facts or arguments that warrant my recusal.

III. CONCLUSION

For the reasons explained above, Plaintiff’s Motion for Disqualification at Docket No. 9 is **DENIED WITHOUT PREJUDICE.**

Dated at Anchorage, Alaska, this 16th day of July, 2008.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE