

Judicial Inquiry Commission

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May 15, 1998

The Judicial Inquiry Commission has considered your request for an advisory opinion whether a judge is disqualified from presiding over a certain case under the following facts:

A civil action has been filed that seeks declaratory and injunctive relief with regard to storm water fees which recently were included in certain property tax bills in the county in which the judge resides, five dollars per parcel of residential property, and fifteen dollars per parcel of non-residential property. The plaintiffs allege that a statute that is involved is unconstitutional, and that the fee is either an unlawful fee or an unlawful ad valorem tax. The requested relief includes a declaration that the statute is unconstitutional, a refund to the plaintiffs of any of the fees they have paid, costs, and attorneys fees. Defendants include the county, its tax assessor, and the Storm Water Management Authority. A motion for certification of a plaintiff class has been filed; the proposed class includes all owners of real property in the county who were assessed the fee, excluding all members of the Alabama judiciary and those related to them by blood or marriage.

If the judge is not excluded from the class, and if the plaintiffs are successful in obtaining a refund of amounts collected, the judge would receive five dollars for the fee on his homestead, and fifteen dollars for each parcel of other real property he owns in the affected area, minus a proportionate share of any costs and attorneys fees awarded. If the statute is declared unconstitutional, future assessments of the particular fee in question also would not be imposed. However, the defendants contend that, if the plaintiffs are successful, funds still will be required to assure adequate financing of mandated programs for which the challenged fee is intended, and that other methods of financing could increase the cost assessed to or otherwise borne by property owners, so that any benefit to the judge from the lawsuit is speculative.

All parties have indicated to the judge that they do not believe that recusal is required. It is possible that all of the judges in the circuit own real property in the county.

This question is governed by Canon 3C(1)(c), which provides for disqualification in instances where the judge "knows that he, individually or as a fiduciary, 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." It is the opinion of the Commission that the judge is not disqualified to hear the action in question unless the outcome of the proceeding could substantially affect his interest as a property owner.

As the Commission noted in Advisory Opinion 92-445, “ ‘It is now well established that an interest which a judge holds in common with the public at large is not disqualifying.’ W. Kilgarlin and J. Bruch, “Disqualification and Recusal of Judges,” 17 St. Mary’s Law Journal 599, 620 (1986).” The Commission has previously held in Advisory Opinion 91-434 that a judge did not have a “financial interest” in the outcome of a civil action against a gas company where there was a possibility that the result of the action might cause a reduction in the judge’s utility rate, or a refund for excessive rates paid in the past. The Commission noted in Advisory Opinion 91-434 that “financial interest” under Canon 3C(1)(c) is defined in the canon as either “ownership of a legal or equitable interest” or active participation in the affairs of a party. The Commission decided that the remote, contingent benefit that the judge might at some future date share in a refund that might be ordered for certain utility customers as a result of the proceeding did not constitute a “financial interest,” but did constitute an “other interest.” *See also*, Advisory Opinion 95-585. The Commission similarly finds that the judge has no disqualifying financial interest in the present case.

Based on the facts presented, the Commission also finds that the judge’s “other interest” could not be substantially affected by the outcome of this case .

Yours truly,

JUDICIAL INQUIRY COMMISSION