

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND**

HERON COVE ASSOCIATION, et al,

Case No. 24-2751-AA

Appellants,

Hon. Stephen P. Carras

v.

MIDLAND COUNTY BOARD OF
COMMISSIONERS, and GLADWIN
COUNTY BOARD OF COMMISSIONERS,
and FOUR LAKES TASK FORCE,

Appellees.

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**APPELLEES MIDLAND COUNTY BOARD OF COMMISSIONERS, GLADWIN
COUNTY BOARD OF COMMISSIONERS AND FOUR LAKES TASK FORCE'S
RESPONSE IN OPPOSITION TO APPELLANTS' HERON COVE ASSOCIATION, ET
AL'S. MOTION TO DISQUALIFY JUDGE CARRAS**

NOW COME Appellees, MIDLAND COUNTY BOARD OF COMMISSIONERS,
GLADWIN COUNTY BOARD OF COMMISSIONERS, and FOUR LAKES TASK FORCE
(collectively, "Appellees") and submit this response to Appellants HERON COVE
ASSOCIATION'S and each person listed in the caption (collectively "Appellants") motion to
disqualify Judge Carras ("DQ Motion"), and in response to said motion states as follows:

1. Appellees admit that the matter before this Court arises out of the lake level special assessment rolls prepared by the Appellee, Four Lakes Task Force (“FLTF”) and approved by Appellees, Gladwin and Midland County Board of Commissioners (the “Counties”), pursuant to Part 307 “Inland Lakes Levels” of the Michigan Natural Resources and Environmental Protection Act (“Part 307”)¹ to cover the administrative, operation, maintenance, repair, replacement and improvements costs to four high hazard dams required to maintain the lake levels of Smallwood, Secord, Wixom and Sanford Lakes located in Gladwin and Midland Counties (the “Four Lakes”). Appellees further admit that this matter has been assigned to Judge Carras, which, pursuant to Section 30707(5) of Part 307 (MCL 324.30707(5)) and the 2019 Lake Level Order (Record Tab #2), this Court “shall” have **continuing jurisdiction**. (Emphasis Added).

2. Appellees admit the allegations set forth in paragraph 2 of Appellants’ DQ Motion.

3. Appellees admit only that on May 19, 2020, the embankment at the Edenville Dam (at Wixom Lake) failed and the flow of water and debris caused the Sanford Dam (at Sanford Lake) to fail resulting in devastating floods in the Four Lakes region. Appellees deny any characterization that following the dam failures their “objective shifted to rebuilding the dams” of the Four Lakes; rather, Appellees initial focus was to address the removal of substantial debris (i.e. damaged boats, docks, rocks and sediment) that washed downstream as well as emergency stabilization of existing dam structures and shoreline restoration (hereinafter referred to as the “Recovery”). Appellees further state that FLTF sought funding through state and federal sources, as well as private donations, including donations from The Herbert H. and Grace A. Dow Foundation (“Dow Foundation”), to assist with costs needed for the Recovery. FLTF secured more than \$50 million in public grants and donations to assist with the Recovery. Appellees further state

¹ 1994 PA 451, as amended, MCL 324.30701 et seq.

that no special assessment revenue was used or was necessary for the Recovery. Appellees further state, that focus on restoration of the Four Lakes began following an extensive feasibility study and working with state, federal and local officials and stakeholders. (See, **Exhibit A** to Br in Supp, Affidavit David Kepler.)

4. Appellees admit that this Court has continuing jurisdiction pursuant to Section 30707(5) of Part 307 (MCL 324.30707(5)) and the 2019 Lake Level Order (Record Tab #2).

5. Appellees admit that Appellants filed their original Claim of Appeal on February 20, 2024, and amended their Claim of Appeal on February 21, 2024, within the 15-day statutory period set forth in Section 30714(4) of Part 307 (MCL 324.30714(4)).

Appellees state that Appellants' allegations set forth in paragraph 6 of Appellants' DQ Motion are irrelevant and immaterial to the motion before the Court, and further state they are false. Appellees deny that it has made numerous public statements denouncing the appeal; rather FLTF has made comments directly contrary to Appellants' claims. FLTF has issued two press releases, one on February 26, 2024 "FLTF Response to Heron Cove Appeal" and the other on March 4, "Dam Restoration Timeline." The February 26 press release clearly acknowledges Appellants' right to appeal the assessment roll, which in pertinent part, states: "[W]hile respect landowners' rights to appeal the assessment rolls, it is important to understand the implications..." (See, **Exhibit C** to Br in Supp, Press Releases.) Nowhere in either of the press releases can it be said that the FLTF let alone the Counties, have "denounced" the appeal. That is no denunciation of the appeal. It merely restates a fact as a result of finance law. Municipal financing (*i.e.*,

municipal bonds) cannot be issued until and unless the security for such financing, namely, lake level special assessments, is “final.” That cannot happen until this appeal is resolved.²

6. Appellees neither admit nor deny the allegations set forth in paragraph 7 of Appellants’ DQ Motion and leave Appellants to their proofs. However, Appellees maintain that the information regarding Judge Carras’ role as 1 of 15 trustees in connection with the Dow Foundation was readily available and in the public domain long before the filing of Appellants’ DQ Motion and therefore in accordance with MCR 2.003(D)(1)(a) which provides that a party must file a motion for disqualification within 14 days of learning of the grounds for disqualification, and the failure to file such motion within 14 days constitutes a waiver of the issue. *Wayne County Jail Inmates v Wayne County Chief Executive Officer*, 178 Mich App 634, 444 NW2d 549 (1989); *Reno v Gale*, 165 Mich App 86; 418 NW2d 434 (1987). Appellees maintain that the DQ Motion is untimely for the reason that it falls outside the period of time for filing a motion for disqualification. The Claim of Appeal was filed on February 21, and this motion was not filed until March 13. Appellees maintain that that it was well known that the Claim of Appeal would be assigned to Judge Carras since this Court has continuing jurisdiction (See Record Tab #13 “Notice of Four Lakes Special Assessment Hearing), and further maintain that it is doubtful that none of the named Appellants listed in the caption for this administrative appeal were unaware that Judge Carras was 1 of 15 trustees on the Dow Foundation board of directors. Appellees further state, for the reasons set forth in Appellees accompanying brief, that Appellants are not entitled to disqualification of Judge Carras as there are no valid grounds under applicable law and judicial cannons.

² For that reason, Appellees have moved to expedite the resolution of this appeal, seeking to reconcile Appellants’ right to this hearing with the need to move the project forward.

7. Appellees neither admit nor deny the allegations set forth in paragraph 8 of Appellants' DQ Motion and leave Appellants to their proofs. However, Appellees state that in the immediate aftermath of the May 19, 2020, dam failure, FLTF sought funding for the Recovery from public and private sources and several individuals, corporations and non-profit foundations were eager to assist. Appellees maintain that the Dow Foundation is NOT a corporate sponsor, but a non-profit foundation which, on November 13, 2020, over three years prior to the motion before the Court, donated \$1 Million which designated funds to be used for "general operating support, or for flood and/or feasibility studies" and further provided that the donation could not be used for the restoration or construction of dams. (See, **Exhibit B** to Br in Supp, "November 13, 2020 Dow Foundation Award Letter.") Moreover, Appellees further state for the reasons set forth in Appellees' accompanying brief, that Appellants are not entitled to disqualification of Judge Carras as there are no valid grounds under applicable law and judicial cannons.

8. Appellees neither admit nor deny the allegations set forth in paragraph 9 of Appellants' DQ Motion and leave Appellants to their proofs. However, Appellees state that in the immediate aftermath of the May 19, 2020, dam failure, FLTF sought funding for the Recovery from public and private sources and several individuals, corporations and non-profit foundations were eager to assist. Appellees maintain that the Dow Foundation is NOT a corporate sponsor, but a non-profit foundation which, on November 13, 2020, over three years prior to the Motion before the Court, \$1 Million which designated funds to be used for "general operating support, or for flood and/or feasibility studies" and further provided that the donation could not be used for the restoration or construction of dams. (See, **Exhibit B**.) Moreover, Appellees further state for the reasons set forth in Appellees' accompanying brief, that Appellants are not entitled to

disqualification of Judge Carras as there are no valid grounds under applicable law and judicial canons.

9. Appellees admit MCR 2.003 sets forth the grounds for judicial disqualification.

10. Appellees deny that Judge Carras's position of 1 of 15 trustees of the Dow Foundation that awarded a donation years ago and restricted the funds to be used in the Recovery efforts, and Appellees' purported statements "raises and objective and reasonable perception that there is serious risk of actual bias impacting Appellants' due process rights under" *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 173 L Ed 1208 (2009), or that there is an objective and reasonable perception of an appearance of impropriety. Appellees further state that to assess the appearance of impropriety, courts consider whether a reasonable person informed of all the facts and circumstances would perceive the judge's ability to be impartial to be impaired. *Kern v Kern-Koskela*, 320 Mich App 212, 232, 905 N.W.2d 453 (2017), citing *People v Aceval*, 486 Mich. 887, 889, 781 N.W.2d 779 (2010) (statement by HATHAWAY, J.). Here, Appellees maintain that Appellants' unsupported accusation of a lack of impartiality is tenuous and tenuous allegations do not overcome the heavy presumption of impartiality. *Armstrong v. Ypsilanti Charter Twp.*, 248 Mich. App. 573, 600, 640 N.W.2d 321, 336 (2001). "Where a party relies on alleged prejudice or bias of the trial judge in seeking his disqualification, the prejudice or bias must be shown." *McKain v. Moore*, 172 Mich App 243, 256, 431 NW2d 470, 476 (1988) citing *MacDonald v. Ford Motor Co.*, 117 Mich App 538, 542, 324 NW2d 489 (1982), lv. den. 417 Mich. 970 (1983). Accordingly, applying the applicable standard and precedent to the issue extant demonstrates that Appellants' DQ Motion is without merit.

11. Appellees deny the allegations set forth in paragraph 12 of Appellants' DQ Motion. There is no merit for a finding of "bias" by Judge Carras, who has no known connection to Appellee's or any affiliated entities.

WHEREFORE, for the reasons set forth herein and in their accompanying brief, Appellees maintain that Appellants have failed to carry their burden of persuasion that disqualification is necessary or appropriate, the DQ Motion should be denied, and sanctions should be awarded to Appellees for having to defend this motion.

Respectfully submitted,

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