

1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 IN AND FOR THE THIRD APPELLATE DISTRICT

3 ---o0o---

4 CITY OF ROSEVILLE et al)
5)

6 Plaintiffs, Respondents)
7 and Cross-Appellants)

VOLUME II

8 vs)

9 WILLIAM ZISK AND LOIS ZISK et al)
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11 Defendants, Appellants)
12 and Cross-Respondents)
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14 CLERK'S TRANSCRIPT ON APPEAL

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16 APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

17 OF THE STATE OF CALIFORNIA IN AND FOR

18 THE COUNTY OF PLACER

19 ---o0o---

20 KEITH F. SPARKS, JUDGE

21 ---o0o---

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lants and Cross-Respondents

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26	Trial Brief - No Recovery of Damages for Claimed Losses Resulting from Zoning of Defendants' Property	646
27		
28	Trial Brief re Inadmissibility of Evidence of Option Price	715

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

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Attorney for Plaintiff

FILED

SEP 6 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

M. I. Dobbas
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

MICROFILMED

Plaintiff,

NO. 4 1 1 0 4

v.

WILLIAM ZISK and LOIS ZISK,
et al.,

APPLICATION FOR EX PARTE ORDER
TO VACATE AND SET ASIDE ORDER
SHORTENING TIME; DECLARATION
AND POINTS AND AUTHORITIES IN
SUPPORT THEREOF

Defendants.

Plaintiff CITY OF ROSEVILLE hereby applies to the Court for an ex parte order to vacate and set aside the order shortening time in which the plaintiff has to answer defendants' first set of interrogatories to 15 days, issued and filed by the Honorable Keith F. Sparks, on September 1, 1977, on the ground that said order is null and void, unauthorized by law, and in excess of the Court's jurisdiction.

DECLARATION OF DENNIS W. DE CUIR

I, DENNIS W. DE CUIR, declare:

1. I am the attorney for Plaintiff City of Roseville in the above-entitled proceeding.

1 2. On September 1, 1977, Stephen James Wagner, one
2 of the attorneys for defendants, personally appeared in my office
3 and delivered a document entitled "Order Shortening Time," appar-
4 ently issued by this Honorable Court and filed on September 1,
5 1977, a document entitled "Declaration for Order Shortening Time
6 for Answering Interrogatories," apparently executed by Richard
7 F. Desmond, one of the attorneys for defendants, and filed on
8 September 1, 1977, and a document entitled "Interrogatories to
9 Plaintiff," containing a total of 106 separate interrogatories
10 with subparagraphs, along with an attached proof of service exe-
11 cuted on the same date by Attorney Stephen James Wagner.

12 3. The plaintiff had not been served with any notice
13 of a hearing. Furthermore, the defendants had not contacted the
14 plaintiff with respect to said order and interrogatories in any
15 manner or at any time. The plaintiff had not and does not waive
16 notice of the application for such an order shortening time.

17 4. Defendants' interrogatories are, among other things,
18 complex, they demand information equally available to the defen-
19 dants, and they are objectionable, burdensome and oppressive.
20 Plaintiffs do not have the capacity to answer, respond or object to
21 106 interrogatories within 15 days, or probably within 30 days,
22 because of the fact that the questions are so voluminous and
23 other pressing matters of equal or greater import are the sole res-
24 ponsibility of this office.

25 I declare under penalty of perjury that the foregoing
26 is true and correct.

27 Executed on September 2, 1977, at Roseville, California.

28


DENNIS W. DE CUIR

POINTS AND AUTHORITIES

1
2 This proceeding in eminent domain commenced on
3 December 20, 1973. Defendants themselves placed this case at
4 issue and agreed, by not objecting, to a trial date of November 1,
5 1977. Defendants have not, until this time, served any interroga-
6 tories upon the Plaintiff.

7 Section 2030 of the Code of Civil Procedure provides,
8 in part, that the party upon whom interrogatories have been
9 served has 30 days after service to serve answers upon the parties
10 submitting them, unless the Court, on motion and notice and for
11 good cause shown, enlarges or shortens the time.

12 As can be seen from the papers on file in this case
13 and the foregoing declaration, no motion was made, no notice was
14 given, received or waived. The plaintiff disputes the adequacy
15 of the cause alleged as good by defendants in their declaration
16 in support of their order.

17 Of course, Section 2030 allows an ex parte order en-
18 larging time but it is abundantly clear that an order shortening
19 time can only be issued upon a noticed motion.

20 Therefore, the issuance of the order shortening time
21 was contrary to the statute and deprived the plaintiff of due
22 process by lack of notice and a hearing. We contend that the or-
23 der is null and void and may be vacated and set aside at any time.
24 When a required notice has not been given, the order is void.

25 (Svistunoff v. Svistunoff (1952) 108 Cal.App.2d 646.)

26 Defendants' declaration asserts that the Court has
27 ordered that all law and motion must be completed within 30 days
28 prior to trial. We are aware of no such order. We believe that

1 defendants have erroneously failed to refer to Rule 222 of the
2 California Rules of Court which provides, in part, that the right
3 to conduct discovery proceedings within 30 days before trial shall
4 be within the discretion of the Court. In exercising its discre-
5 tion, the Court must take into consideration the necessity and
6 reasons for such discovery, the diligence or lack of diligence of
7 the party seeking discovery, and his reasons for not having com-
8 pleted his discovery prior to 30 days before trial.

9 If after this void order shortening time is vacated,
10 defendants have any reason to claim the need to conduct further
11 discovery, they will be free to make an appropriate application
12 to this Court. Defendants cannot avoid Rule 222 by burdening
13 the plaintiff with a shortened period of time.

14 DATED: SEP 2 1977

Respectfully submitted,



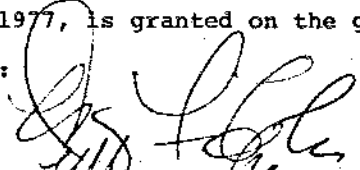
DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff City of
Roseville

18
19
20 ORDER VACATING AND SETTING
ASIDE ORDER SHORTENING TIME

21
22 Good cause appearing therefor:

23 IT IS HEREBY ORDERED that the application of the Plain-
24 tiff City of Roseville to vacate and set aside the order shorten-
25 ing time filed on September 1, 1977, is granted on the ground
26 tht such order is null and void:

27 DATED:
28 SEP 6 - 1977



Judge of the Superior Court

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th Street, Suite 900
Sacramento, California 95814
Telephone: (916) 443-2051

Attorneys for Defendants

FILED

SEP - 8 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY: *[Signature]*
DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

No. 41104

MICROFILMED

Plaintiff,

NOTICE OF DEPOSITION

vs.

WILLIAM ZISK and LOIS ZISK, et al.,

Defendants.

TO: ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

TIME: 10:00 A.M.

PLACE: 1006 - 4th Street, Suite 900
Sacramento, California 95814

DATE: September 20, 1977

WITNESS: KEN JAMES, City Engineer,
City of Roseville

ED MAHANY, Director, Department of Parks
and Recreation, City of Roseville

At the time, place, and on the date specified above,
Defendants will take the deposition of the above named witness
before a Notary Public authorized to administer oath, said
deposition continuing from day to day until completed.

DATED: September 6, 1977. DESMOND, MILLER, DESMOND
& BARTHOLOMEW

By: *[Signature]*
RICHARD F. DESMOND
Attorneys for Defendants

DESMOND, MILLER,
DESMOND &
BARTHOLOMEW
ATTORNEYS AT LAW
1006 FOURTH STREET
SUITE 900
SACRAMENTO, CALIF.
TELEPHONE 443-2051

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City of Roseville vs. Zisk, et al; Placer Superior No. 41104
PROOF OF SERVICE BY MAIL - CCP 10, 2015.5

407

I declare that I am ~~resident~~/employed in) the county of Sacramento, California.
(COUNTY WHERE MAILING OCCURRED)

I am over the age of eighteen years and not a party to the within entitled cause; my (business/residence) address is:
1006 - 4th Street, Suite 900, Sacramento, California 95814

On September 6, 1977, I served the attached NOTICE OF DEPOSITION
(DATE) on the Plaintiff
(PLACE)

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the
United States mail at Sacramento, California addressed as follows:

DENNIS DE COIR, City Attorney
City of Roseville
316 Vernon Street
Roseville, California

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on
September 6, 1977 at Sacramento, California.
(DATE) (PLACE)

VALERIE C. BURTON

Valerie C. Burton
(SIGNATURE)

(TYPE OR PRINT NAME)

ATTORNEYS PRINTING SUPPLY FORM NO. 11
REV. JANUARY 1973

SEP 21 1977

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th Street, Suite 900
Sacramento, California 95814
Telephone: 443-2051

408

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

No. 41104

Plaintiff,

ANSWER TO INTERROGATORIES
PROPOUNDED TO DEFENDANTS -
SET NO. 1 AND SET NO. 2

vs.

WILLIAM ZISK and LOIS ZISK,
et al.,
Defendants.

Come now the Defendants, WILLIAM ZISK and LOIS ZISK,
and answer the Interrogatories Propounded to Defendants - Set
No. 1, on August 12, 1977, and Set No. 2, on August 26, 1977, as
follows:

INTERROGATORY NO. 1: With regard to the subject property,
state the following:

- a. The date upon which you acquired it;
- b. The name, business and telephone number, home address
and telephone number, employer and position of each
grantor to you;
- c. The number of acres originally purchased on the date
of acquisition from such grantor or grantors; and
- d. The terms of such acquisition, including the total
consideration agreed to be paid by you and the total

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1 consideration actually paid, and any arrangements
2 to finance the payment of such consideration, including
3 the names, home and business addresses and phone
4 numbers of the persons with whom such arrangements
5 were made and the terms and consideration for such
6 arrangements.

7 ANSWER:

- 8 a. In the fall of 1966;
- 9 b. Marge Arnett, Trustee of the Estate of Harry Phillips,
10 Alta Vista Avenue, Roseville, California; William W.
11 Zisk, deceased; and Mary A. Zisk, 2743 Sunrise
12 Blvd., Rancho Cordova, California, telephone, 635-4934;
- 13 c. 12.2 acres according to the deed;
- 14 d. Principal amount of \$35,000 payable approximately
15 \$8,000 down, balance at \$200 per month plus interest
16 at the rate of six and one-half percent (6-1/2%)
17 per annum, entirely financed by the grantors.

18 INTERROGATORY NO. 2: State the name, business address and
19 telephone number, home address and telephone number, employer
20 and position of each person who has ever been contacted or
21 retained by or on behalf of you for purposes of studying,
22 investigating or planning for any possible use or development of
23 your property, both before and after the date of acquisition up
24 to the date you file your answers to these interrogatories.

25 ANSWER: None.

26 INTERROGATORY NO. 3: For each person identified in
27 your answer to Interrogatory No. 2 above, state the following:

- 28 a. The date of contact or retention;

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- 1 b. The name of the person who made the contact or retention;
- 2 c. The terms of all agreements for such services, including
- 3 the consideration to be paid and a full description of
- 4 the services rendered or to be rendered; and
- 5 d. The results in detail of all such studies, investiga-
- 6 tions or planning and, if any of these are in writing,
- 7 give a full description of each such writing sufficient
- 8 for identification or, in the alternative, attach a
- 9 copy thereof to your answers to these interrogatories.

10 ANSWER: Not applicable.

11 INTERROGATORY NO. 4: Have you or any of your predecessors
12 in interest, at any time appraised, caused to be appraised, or
13 reviewed any appraisal of your property or any part thereof
14 prepared by any appraiser or person knowledgeable in the field
15 of real estate?

16 ANSWER: Defendants have not. Defendants
17 have no knowledge relative to any appraisals prepared for any of
18 their predecessors in interest.

19 INTERROGATORY NO. 5: If your answer to the preceding
20 interrogatory is affirmative, and if you will do so without the
21 necessity of a request for production, please attach a copy of
22 each such appraisal considered in your answer to Interrogatory
23 No. 4.

24 ANSWER: Not applicable.

25 INTERROGATORY NO. 6: If you refuse to, or are unable
26 to comply with the request in the preceding Interrogatory No. 5,
27 state the date of each such appraisal or appraisals, the name of
28 the appraiser or person knowledgeable in the field of real

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1 estate and give corresponding business and home addresses and
2 telephone numbers, a description of the property appraised, the
3 reason why the appraisal was made, the location of copies of
4 such appraisals on the date of your answers to these interroga-
5 tories, the name and address of the custodian of such appraisal
6 or appraisals on the date of your answers to these interrogatories,
7 and the appraised value of your land or any other property as
8 represented in such appraisal or appraisals.

9 ANSWER: Not applicable.

10 INTERROGATORY NO. 7: List and describe in a manner
11 sufficient for identification the name, business and home
12 addresses and telephone numbers of the persons who prepared or
13 are preparing files, and the present location of the contents of
14 any such files, maintained by or known to you that relate to the
15 subject property.

16 ANSWER: Defendants have prepared files which
17 have been turned over to their attorneys. We are not aware of
18 any other files.

19 INTERROGATORY NO. 8: Have you prepared or has any person
20 prepared for you any marketing or marketability study or studies
21 with regard to the subject property?

22 a. If the answer to this interrogatory is affirmative,
23 and if you will do so without the necessity of a
24 request for production, please attach copies of each
25 such marketing or marketability study to your answer
26 to these interrogatories;

27 b. If you will not comply with subparagraph (a) of this
28 interrogatory, describe each such marketing or market-

1 ability study by name, date, the person who prepared
2 such study or studies, and the present location of any
3 copies of such studies in a manner sufficient for
4 identification.

5 ANSWER: No.

6 INTERROGATORY NO. 9: Give the name, business and personal
7 addresses and telephone numbers of any appraisers or persons
8 knowledgeable in the field of real estate whom you have contacted
9 relative to making an appraisal of the subject property, whether
10 or not any appraisal was made by such person.

11 ANSWER: Fred J. Festersen, Fred Festersen
12 & Associates, Inc., 605 Douglas Blvd., Roseville, California
13 95678, telephone, 782-2176.

14 INTERROGATORY NO. 10: As to any appraiser or other person
15 retained by you to make an appraisal of the subject property,
16 give a separate outline of each such person's qualifications and
17 the circumstances of such retention, including the following
18 information:

- 19 a. The education background of such person;
20 b. The titles of any courses in real estate appraisal or
21 related field with the date, address, and name of the
22 institution or person who conducted such courses or
23 from whom such courses were taken;
24 c. The names of any public entities in Placer, Nevada,
25 Yuba, Sutter, Yolo, Sacramento, and El Dorado Counties
26 for whom such appraiser has made appraisals;
27 d. The names of any private persons or corporations
28 for which appraisals were made in the counties listed

- 1 - in subparagraph (c) of this interrogatory;
- 2 e. How long such persons have made appraisals;
- 3 f. Any memberships in professional organizations in the
- 4 appraisal field, including any offices held in any
- 5 such organizations by such persons and when such
- 6 offices were held;
- 7 g. Any writings published by such persons in the appraisal
- 8 field;
- 9 h. The date you retained such persons;
- 10 i. When the appraisal report is to be submitted if it has
- 11 not been submitted yet. If the report has already
- 12 been submitted, what is the date of the report and
- 13 what is the date of valuation used in the report.

14 ANSWER: The answer to Interrogatory No.

15 10 will be submitted upon a mutually arranged exchange of

16 information relative to all appraisers in the case. See

17 Swartzman vs. Superior Court, 231 Cal.App.2d 195.

18 INTERROGATORY NO. 11: As to any appraisal report already

19 submitted by any appraiser or person, oral or written, regarding

20 the subject property, please give the following information:

- 21 a. In the appraisal, what zoning has been assumed for
- 22 the property in the alleged before and after condition?
- 23 If the zoning has been assumed to be different on
- 24 different portions of the subject property, so indicate.
- 25 b. In the appraisal, what highest and best use has
- 26 been assumed for the subject property? Give both the
- 27 before and after condition highest and best use that
- 28 has been assumed. If different parts of the subject

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property have purportedly different highest and best uses, in either the before or after conditions, identify such uses.

- c. If, in arriving at his or her opinion of highest and best use, the appraiser or other person has relied upon the opinion of any expert, give the name, business and personal addresses and telephone numbers of such expert and explain the manner in which the appraiser or other person relied upon such expert's opinion.
- d. Give the opinion of the fair market value of the part sought to be acquired as described in the complaint on file herein which such appraiser or other person has provided.
- e. If the appraiser has an opinion of severance damage, give the appraiser's or other person's reasons for such damage and the amount of such damage.

ANSWER: None has been submitted.

INTERROGATORY NO. 12: Describe in detail each and every use which has been made of the subject property from the date you acquired it to the date you file your answers to these interrogatories.

ANSWER: As a homesite and base for operation of the Defendants' trucking business and sand and gravel operations and improvement of the property for future development. A rental unit exists on the premises.

INTERROGATORY NO. 13: With regard to each user described in your answer to Interrogatory No. 12 above, state the following:

- a. The name and present address of each person making

- 1 such use.
- 2 b. The period of time during which each such person
- 3 listed in subparagraph (a) , above, made such use of
- 4 the property.
- 5 c. The monthly or yearly rental paid by each such
- 6 person making such use of the property, if any rentals
- 7 were paid.
- 8 d. The portion, including both the location and number of
- 9 acres, of the subject property or of all of your
- 10 property located at the street address commonly known
- 11 as 205 Thomas Street, which each such person listed in
- 12 subparagraph (a), above, used.
- 13 e. State the total yearly income which has been obtained
- 14 from the subject property for each calendar year from the date
- 15 you acquired such property, or all of your property at the
- 16 street address commonly known as 205 Thomas Street, up to the
- 17 date you complete the answer or response to this interrogatory,
- 18 if any such yearly income has been obtained.

19 ANSWER:

- 20 a. Defendants and their tenants, Junior
- 21 and Rose Meyers, 205 Thomas Street, Roseville.
- 22 b. Since the purchase of the property.
- 23 c. \$87.00 per month from the rental unit.
- 24 d. The entire property.
- 25 e. None directly attributable except the rentals from
- 26 the hereinabove described rental unit.

27 INTERROGATORY NO. 14: Have you caused to be made,

28 or are you aware of, any studies of any kind, whether

1 written or oral, which have been conducted to determine
2 whether any of the land uses permitted or which are available
3 by the grant of a permit under the ordinances of the City of
4 Roseville which have been in effect since the time you
5 acquired your property, which suggest or conclude that such
6 uses are physically or economically feasible or infeasible,
7 practical or impractical on the subject property?

8 ANSWER: No.

9 INTERROGATORY NO. 15: If your answer to the foregoing
10 Interrogatory No. 14 is in the affirmative, state the
11 following with regard to each and every study considered in
12 your answer to such interrogatory:

- 13 a. The name and business and residence addresses
14 and telephone numbers of each and every person
15 making such study;
- 16 b. The date such study was made;
- 17 c. The use or uses which were considered in such
18 study;
- 19 d. The conclusions reached in such study;
- 20 e. Each reason and factual basis for any such
21 conclusion described in your answer to subparagraph
22 (d) above;
- 23 f. Whether a written report was rendered and, if
24 so, state the name, address and employer of each
25 person who has custody and control of each such
26 report, or the location of copies of each such
27 report;
- 28 g. The total estimated costs and the total estimated

1 income from each such use which was considered,
2 and a breakdown of such total costs and total
3 income into each item and the amount thereof
4 making up such total costs and total income.

5 ANSWER: Not applicable.

6 INTERROGATORY NO. 16: (Erroneously labeled No. 19 on
7 the original set): With regard to any communication
8 at any time made by or on behalf of you to potential lenders
9 or purchasers regarding the value of the property which is
10 the subject of this action, or any part thereof, from the
11 date you acquired such property up to the present time,
12 state the following:

- 13 a. The name, address, employer and position of
- 14 the person making such representation or communication;
- 15 b. The date thereof; and
- 16 c. The name, address, employer and position of the
- 17 person to whom such representation or communication
- 18 was made;
- 19 d. The purpose for which such representation or
- 20 communication was made;
- 21 e. Whether written or oral;
- 22 f. State in detail what valuation was communicated,
- 23 and set forth a simple description of the property
- 24 that was included in such valuation;
- 25 g. If such representation or communication was in
- 26 writing, describe such writing in a manner sufficient
- 27 for identification or, in the alternative, if you will
- 28 do so without the necessity of a request for production.

1 attach a copy of such writing to your answers to these
2 interrogatories.

3 ANSWER: Not applicable.

4 INTERROGATORY NO. 17: State the date upon which
5 you contend that any portion or all of your property was
6 allegedly confiscated or taken by the City of Roseville,
7 including each fact supporting your contention that such
8 property was confiscated and taken on the date you contend
9 the confiscation or taking occurred.

10 ANSWER: On or about March 15, 1973, or at
11 some date thereafter, the exact date of which is unknown at this
12 time.

13 INTERROGATORY NO. 18: At any time since the date
14 you acquired your property, have you made any attempt to
15 sell the property, or any part thereof, in any manner
16 whatsoever?

17 ANSWER: No.

18 INTERROGATORY NO. 19: If your answer to Interrogatory
19 No. 18, above, is in the affirmative, state the following
20 with regard to each such attempt considered in your answer
21 thereto:

- 22 a. Describe each and every such attempt;
- 23 b. If any attempt or attempts were made to sell,
24 state the price at which the property was offered
25 for sale and state what part or parts were so
26 offered;
- 27 c. State the date each such offer was made;

28 ANSWER: Not applicable.

1 INTERROGATORY NO. 20: State whether any person has
 2 made any offer to purchase, lease, rent or otherwise acquire
 3 any interest in your property from the time you first
 4 acquired it to the present time. In addition, give the
 5 following:

- 6 a. The date thereof;
- 7 b. The name, business and home telephone numbers and
 8 addresses of the person making such offer;
- 9 c. Describe simply the portion of the property
 10 which was involved in such offer;
- 11 d. State whether such offer was oral or in writing;
- 12 e.. State each term of such offer or offers, including
 13 the price or other consideration, and all conditions
 14 attached thereto;
- 15 f. State the name, address, business and occupation
 16 or position of the person to whom or through whom
 17 such offer or offers were transmitted;
- 18 g. State each and every reason why such offer or
 19 offers were not accepted by you.

20 ANSWER: No.

21 INTERROGATORY NO. 21: State the facts upon which
 22 you base your allegation that the fair market value of the
 23 subject property was higher before the alleged "precondemnation
 24 announcements," which you contend resulted in a decline in
 25 the fair market value of the property in paragraph V of your
 26 Answer on file herein.

27 ANSWER: Subsequent to the implementation
 28 of the City Plans by action of City officials, it is the opinion

1 of the Defendants that upon being fully informed of those
2 circumstances, any prospective buyer of the property would come
3 to the conclusion that he could never develop the property and
4 therefore, its use was forever limited to existing conditions.

5 INTERROGATORY NO. 22: State the facts on which you
6 base your contention that the alleged "precondemnation
7 announcements" resulted in a loss of rent, revenue, profits
8 and returns on the property, as alleged in subparagraph a of
9 paragraph V in the Answer on file herein, setting forth in
10 detail that portion of the subject property and any improve-
11 ments thereon that would have otherwise produced rent,
12 revenue, profits and returns but for the alleged "precondemna-
13 tion announcements."

14 ANSWER: If the lot split had been granted,
15 Defendants would have built a new home on Parcel A and used the
16 remainder for rental as an interim use pending ultimate sale or
17 development of the property. Defendants were deprived of the
18 full use, benefit, and revenue of their property as a result and
19 the ability to improve and enhance the value of the property and
20 its rental income. The loss consisted of loss of reasonable
21 return on the before value of the property plus the expenses
22 incurred in connection with the application for the lot split
23 and use permit, together with taxes attributable to the portion
24 of the property completely removed from use for the purposes
25 described in the Complaint, from the date of the lis pendens.

26 INTERROGATORY NO. 23: Do you contend that the alleged
27 acts described in subparagraph b of paragraph V of your Answer
28 on file herein or in your First Amended Cross-Complaint on file

1 herein caused or constituted a physical invasion of the subject
2 property that produced any phenomena or disturbance on the
3 subject property which can be measured, recorded or perceived by
4 the human senses or by use of any devices or instruments of the
5 physical sciences.

6 ANSWER: Not actual, but equivalent to a
7 physical invasion.

8 INTERROGATORY NO. 24: If your answer to Interrogatory
9 No. 23, above, is in the affirmative, describe each phenomena
10 or disturbance; how they might be measured, recorded or
11 perceived; the dates and times when such measurements,
12 records or perceptions may have been or can now be made, and
13 the names, business and home addresses and telephone numbers
14 of persons who have knowledge of such facts.

15 ANSWER: Not applicable.

16 INTERROGATORY NO. 25: With regard to the allegations
17 in paragraph V of your Answer, where you claim "That the
18 fair market value of the property declined as a result of
19 plaintiff's precondemnation announcements that it intended
20 to condemn portions of said property . . ." state the
21 following:

- 22 a. State the date of each and every such claimed
23 "precondemnation announcement;"
- 24 b. State whether each such claimed "precondemnation
25 announcement" was written or whether it was
26 oral;
- 27 c. As to each and every claimed "precondemnation
28 announcement" which was oral, state the name and

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address of the person making such announcement and state in detail the entire contents of such claimed announcement;

d. As to each and every claimed "precondemnation announcement" which was in writing, set forth the name and address of the person writing such claimed announcement and set forth verbatim such announcement, or in the alternative, attach a copy thereof to your answers to these interrogatories;

e. State the total amount which you claim the fair market value of the subject property declined as the result of such claimed "precondemnation announcements;"

f. Describe in detail how you calculate such claimed decline in fair market value of the subject property resulting from such claimed "precondemnation announcements," including, but not limited to, the claimed fair market value before such "precondemnation announcements," the claimed fair market value after the "precondemnation announcements," and the date you used for establishing such valuations, and set forth each and every fact upon which you base such claims of value and decline in value.

ANSWER:

a. At every meeting of the City Planning Commission and the City Council dealing with the application for a use permit and lot split on the subject property, and in connection with the development

1 of the open space element of the General Plan, all
2 of which dates are peculiarly within the knowledge
3 of the Plaintiff.

4 b. The announcements were originally oral and
5 reduced to writing in the Minutes of the public
6 agency.

7 c. Defendants do not know the answer to this Interroga-
8 tory, but answer to such Interrogatory is peculiarly
9 within the knowledge of the Plaintiff.

10 d. See Answer to Interrogatory No. c.

11 e. Unknown at the present time.

12 f. Not applicable at the present time.

13 INTERROGATORY NO. 26: With regard to the claim which
14 you make in paragraph V of your Answer to the effect that
15 defendants "were unable to fully use their property to their
16 damage, which is reflected in depreciation of value of the
17 property and from the loss of use of the property for its
18 highest and best use, loss of rent, revenue, profits and
19 return on the propety and capital investment of defendants
20 and holding costs, charges and expenditures incurred by
21 defendants in holding their said land for the benefit of
22 plaintiff; . . ." state the following:

23 a. Set forth in detail all facts supporting your
24 claim that defendants were unable to "fully use
25 their property" including, but not limited to, the
26 time period during which defendants were "unable
27 to fully use their property," the portion of the
28 property which was so affected, the use which was

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made of that portion of the property prior to said claimed "precondemnation announcements," all uses made after said "precondemnation announcements," and the amount of damage which is claimed therefrom;

b. For each calendar year in which you claim there was a "loss of rent, revenue, profits and returns on the property," set forth the amount of such loss claimed, set forth in detail how such amount was calculated, and set forth each and every fact upon which said claim of such loss is based;

c. For each calendar year in which "holding costs, charges and expenditures" are claimed, state the amount thereof which is claimed, how such amount was calculated, and state each and every fact upon which said claim is made.

ANSWER:

a. The denial of the lot split and use permit. The time period continued from March 15, 1973, to date. All portions of the property were affected, particularly Parcel A on the lot split and the existing residence of the Defendants. Parcel A of the lot split had been fully developed for the purposes of constructing a residence thereon. No use has been made of said parcel other than as vacant land since March 15, 1973. The amount of damage is presently unknown.

b. Defendants have not computed these amounts at this time and they are presently unknown.

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c. See Answer to Interrogatory 26 b.

INTERROGATORY NO. 27: With regard to each use you made of the subject property or any part thereof prior to the precondemnation announcements" alleged in paragraph V of your Answer that was in any way terminated or affected by such claimed "precondemnation announcements," state the following:

- a. The use that was made;
- b. The portion of the subject property upon which such use was conducted;
- c. The period of time during which such use was conducted;
- d. When such use was terminated or modified;
- e. State each fact or reason that caused the alleged "precondemnation announcements" to terminate or affect each use, including, but not limited to, a detailed description of any economic calculations or opinions, and identify the persons who have knowledge of such facts or reasons by name, business and residence addresses and phone numbers.

ANSWER:

- a. The existing residence of the Defendants on the subject property.
- b. See Answer to Interrogatory No. 27 a.
- c. From the date of purchase until the date of interference.
- d. Such use was never terminated or modified. The activity of the Plaintiff prevented termination and modification of such use.

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e. Defendants were unable to build a new home and obtain interim rental income from the existing home. At the present time, no economic calculations or opinions relative to this type of loss have been made.

INTERROGATORY NO. 28: At any time since you acquired the subject property, have you ever made or caused to be made any physical improvements, modifications, repairs or changes in any of the property described as Parcels A and B in plaintiff's Complaint on file herein?

ANSWER: Yes.

INTERROGATORY NO. 29: If your answer to Interrogatory No. 28 is in the affirmative, state the following with regard to each physical improvement, modification, repair or change in such property which was considered in your answer to said Interrogatory No. 28:

- a. The date thereof;
- b. The location thereof;
- c. Set forth in detail what it consisted of;
- d. State the time period over which it was accomplished;
- e. State the cost or expense incurred in doing so;
- f. State the name, address and business or occupation of the person or firm accomplishing same unless you performed the work yourself, in which case please indicate that you did the work;
- g. State each reason for making such improvement, modification, repair or change.

ANSWER:

DESMOND, MILLER,
DESMOND &
BARTHOLOMEW
ATTORNEYS AT LAW
1006 FOURTH STREET
SUITE 800
SACRAMENTO, CALIF.
TELEPHONE 442-8081

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- a. 1966 to Octoer, 1973.
- b. The entire property.
- c. Clearing and cleaning of trash, debris, brush, weeds, and wild growth; built a chain link fence along the northwesterly boundary of the property in 1970 or 1971; built a 7-strand barbed wire fence on railroad tie posts along the southerly boundary; purchased a drag line and obtained permits to clean and straighten and clear and widen the channel at the insistence and request of the Plaintiff in order to improve the remainder of the property for ultimate development as suggested by the Plaintiff; imported fill, leveled and improved grades and elevations; installed sprinkler systems; seeded areas for lawn and pasture grasses; miscellaneous landscaping and planting of trees; road improvements; imported gravel; and painting.
- d. From 1966 to 1973.
- e. Defendants have not as yet calculated the costs or expenses incurred.
- f. Less than 10% of the work was done with the help of others at minimal costs. Most of the work was volunteer work.
- g. To increase the value of the property and its desirability and availability for future use and development and sale.

INTERROGATORY NO. 30: Do you contend that the document entitled "Flood Plain Information - Dry Creek and Tributaries - Roseville, California," prepared for the City of Roseville by

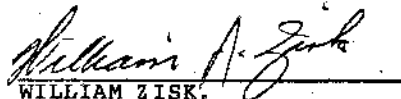
DESMOND, MILLER,
DESMOND &
BARTHOLOMEW
ATTORNEYS AT LAW
1006 FOURTH STREET
SUITE 900
SACRAMENTO, CALIF.
TELEPHONE 443-8081

1 the Department of the Army, Sacramento District Corps of Engineers,
2 dated May 1973, contains inaccurate statements or drawings with
3 respect to your property? If so, state in detail the facts upon
4 which you base your contention that such statements or drawings
5 are inaccurate.

6 ANSWER: Yes. The Defendants do not at
7 this time have detailed information as to all inaccurate state-
8 ments or drawings contained in said document. Among the inaccura-
9 cies known to Defendants at this time are the location of
10 contours and elevations and flood plains upon said map on the
11 subject property; location of improvements on the subject
12 property; and errors in the cross-sections and profiles on the
13 subject property and errors in the flood plain locations on the
14 subject property. Defendants are unaware of the exact nature of
15 the errors and discrepancies and inaccuracies at the present
16 time nor are they aware of all of the inaccuracies at the
17 present time. Certain of the inaccuracies have been explained
18 by the Corps of Engineers during communications between the
19 Corps of Engineers and the Plaintiff during the year 1973, all
20 of which information is known to the Plaintiff at this time.

21 I declare under penalty of perjury that the foregoing
22 is true and correct.

23 Executed on September 15, 1977, at Roseville,
24 California.

25 
26 WILLIAM ZISK,
27 Plaintiff

City of Roseville vs. Zisk, et al.; Placer Superior No. 41104
PROOF OF SERVICE BY MAIL - CCP 1013a, 2015.5

429

I declare that I am ~~(30% of 2005)~~ employed in the county of Sacramento, California.
COUNTY WHERE MAILING OCCURRED

I am over the age of eighteen years and not a party to the within entitled cause; my (business/residence) address is:
1006 - 4th Street, Suite 900, Sacramento, California 95814

On September 20, 1977, I served the attached ANSWER TO INTERROGATORIES
(DATE)
PROPOUNDED TO DEFENDANTS - SET NO. 1 on the Plaintiffs
AND SET NO. 2

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the
United States mail at Sacramento, California addressed as follows:

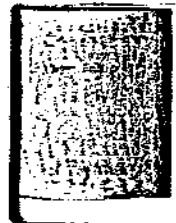
DENNIS W. DE CUIR
City Attorney, City of Roseville
316 Vernon Street
Roseville, California 95678

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on
September 20, 1977, at Sacramento, California.
(DATE) (PLACE)

VALERIE C. BURTON

Valerie C. Burton
SIGNATURE

(TYPE OR PRINT NAME)
ATTORNEYS PRINTING SUPPLY FORM NO. 71
REV. JANUARY 1973



DENNIS W. DE CUIP
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

430

Attorney for Plaintiff

FILED

SEP 22 1977

MAURINE I. DOBBS
COUNTY CLERK
BY *[Signature]*
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)
Plaintiff and Petitioner,)
v.)
WILLIAM J. ZISK and LOIS E.)
ZISK,)
Defendants and Respondents.)

NO. 4 1 1 0 4 MICROFILMED
PETITION FOR ORDER
PERMITTING ENTRY ON
PROPERTY

Petitioner alleges:

1. Petitioner, The City of Roseville, is a charter city duly authorized under the under the laws of the State of California to exercise the power of eminent domain.
2. WILLIAM J. ZISK and LOIS E. ZISK are the owners of the following described real property located within the City of Roseville, County of Placer, State of California, commonly known by the street address as 205 Thomas Street and shown on the attached map, incorporated herein.
3. Pending in this court is the above entitled eminent domain proceeding, by which the Plaintiff seeks to

1 acquire the property of Defendants that is identified on the
2 map as Parcel A and Parcel B. The trial of this proceeding is
3 set to begin on November 1, 1977, and Petitioner must enter
4 upon all of the property of the Defendants for the purposes
5 described below in paragraph 4.

6 4. Petitioner, through its City Attorney, a survey
7 crew from the Spink Corporation, and not more than three con-
8 sultants of the City Attorney, desires to enter upon said real
9 property and the improvements thereon for the purposes of making
10 studies, surveys, examinations, tests, appraisals, and to place
11 stakes and other small monuments to identify property lines in
12 the location of the project, namely a bike-way and hiking trail,
13 on the property. Petitioner desires that the above described
14 entry on the property take place on September 27, 28, 29, and 30,
15 1977, between the hours of 7:00 a.m. and 5:00 p.m., and that the
16 above described entry of the improvements take place on September
17 29, 1977, between the hours of 12:00 p.m. and 5:00 p.m.

18 5. Such entry upon said real property, including the
19 placement of stakes and small monuments, will not result in
20 damages to said owners, except in the nominal amount of \$5.00.

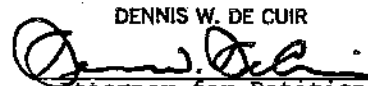
21 6. Petitioner agrees to deposit the sum of \$5.00 as
22 and for the probable amount of compensation to be paid said
23 owners for damages resulting from such entry and other activities
24 upon said land.

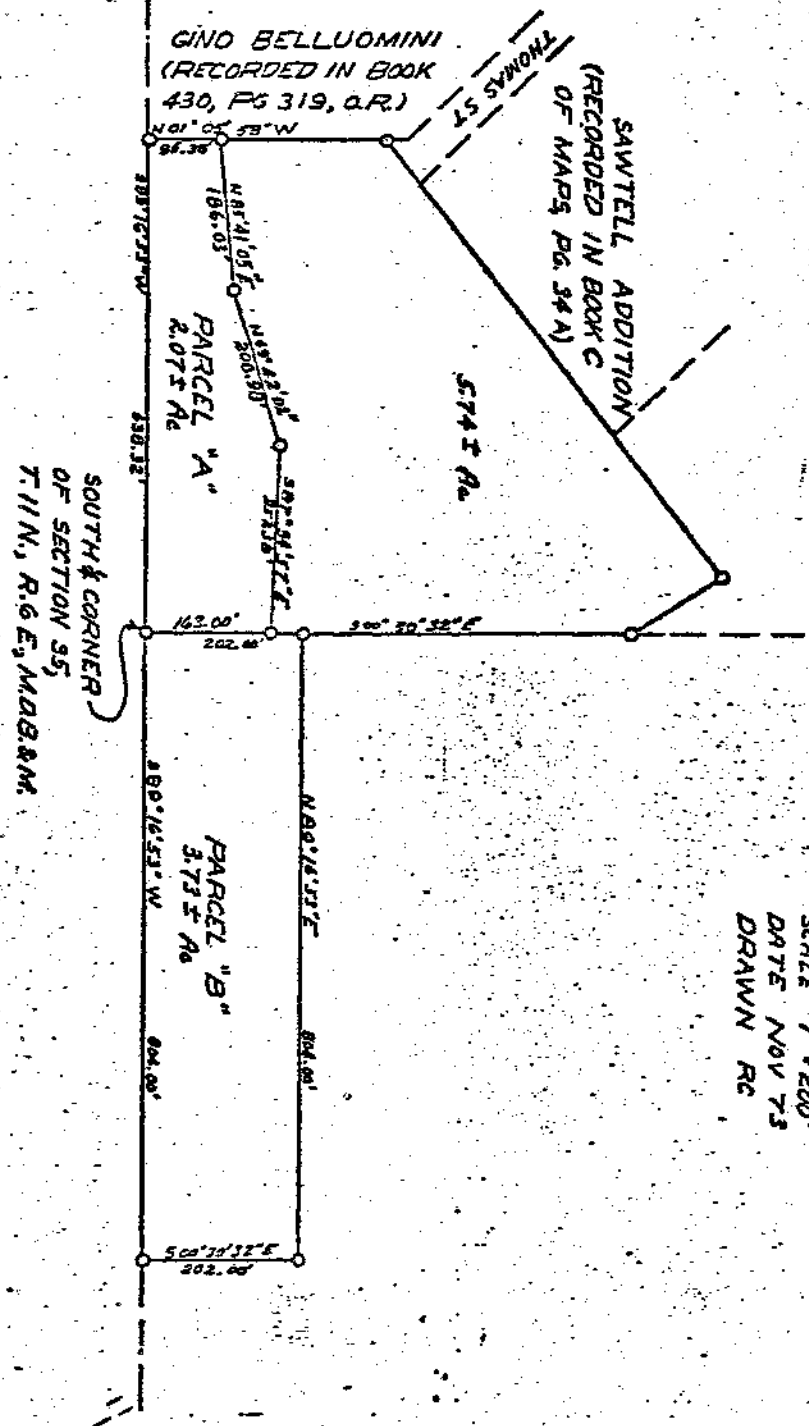
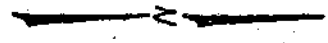
25 WHEREFORE, petitioner, City of Roseville, prays for
26 an order of this Court permitting entry upon said real property
27 for the purposes and activities heretofore stated and that said
28 order determine what, if any, compensation shall be paid to said

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owners for damages resulting therefrom.

DATED: SEP 22 1977

DENNIS W. DE CUIR

Attorney for Petitioner



PROPERTY TO BE ACQUIRED
 FROM WILLIAM J. AND
 LOIS E. ZISK

SCALE 1"=200'
 DATE NOV 73
 DRAWN RC

DENNIS W. DE WIER
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

434

FILED

SEP 22 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

[Signature]
DEPUTY

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)
Plaintiff and Petitioner,)
v.)
WILLIAM J. ZISK and LOIS E.)
ZISK,)
Defendants and Respondents.)

NO. 4 1 1 0 4

ORDER

MICROFILMED

The Petition of the City of Roseville for an order of entry upon the property of WILLIAM J. ZISK and LOIS E. ZISK having heretofore been filed and good cause appearing therefor,

IT IS HEREBY ORDERED that said petition shall be heard on September 26, 1977, in Department 1 of the above entitled Court, City of Auburn, California, at the hour of 10:00 a.m.,

IT IS FURTHER ORDERED that notice of said hearing be given to the attorneys of defendants, Desmond, Miller, Desmond and Bartholomew by personal service of a copy of said petition and a copy of this order, or by mail, at least three days prior

1 to the date of said hearing.

2 SEP 22 1977

3 DATED: _____

4 
5 _____
6 Judge of the Superior Court

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DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

Attorney for Plaintiff

FILED
SEP 23 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY *Alker*
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)

Plaintiff,)

v.)

WILLIAM J. ZISK and LOIS E.)
ZISK,)

Defendants, et al.,)

NO. 4 1 1 0 4
STIPULATION RE:
DISCOVERY


MICROFILMED

IT IS STIPULATED by DENNIS W. DE CUIR, Attorney for Plaintiff, CITY OF ROSEVILLE, and by RICHARD F. DESMOND, Attorney for Defendants, WILLIAM J. ZISK and LOIS E. ZISK, as follows:

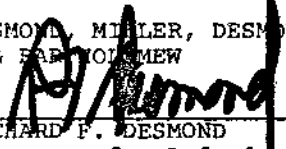
Plaintiff and Defendants shall identify their respective appraisal witnesses at the pretrial conference set for October 7, 1977, by name, business and home address and telephone number. No other appraisal witnesses may be called to testify at the trial of this proceeding unless so identified and disclosed. Plaintiff and Defendants may depose each others' appraisal witnesses upon five (5) days' written notice.

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DATED: September 25, 1977.


DENNIS W. DE CUIR
Attorney for Plaintiff

DATED: September _____, 1977.

DESMOND MILLER, DESMOND
& FARFOL MEW
By: 
RICHARD F. DESMOND
Attorneys for Defendants

[STIPULATION RE DISCOVERY]

DENNIS W. DE CUIR
City Attorn
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

437

FILED

SEP 23 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY *M. I. Dobbas*
DEPUTY

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Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,)

Plaintiff,)

v.)

WILLIAM J. ZISK and LOIS E.
ZISK,)

Defendants,)

NO. 41104

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR ORDER PERMITTING
ENTRY ON LAND

MICROFILMED

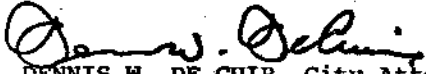
This proceeding commenced in 1973. Therefore, the provisions of the old eminent domain law dealing with surveying, tests and other preliminary activities in preparation for trial apply (subd. (c), Sec. 1230.065, C.C.P.).

Section 1242.5 of the Code of Civil Procedure, which is the effective section regarding entry upon land for the purpose of conducting studies and surveys under the old law, provides, in part, that entry may be made either with the written consent of the owner or pursuant to an order for entry from the Superior Court in accordance with subdivision (b) of that section.

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Subdivision (b) of Section 1242.5 of the Code of Civil Procedure provides that the person seeking entry must petition the Court, having given such prior notice to the owner of the property as the Court determines is appropriate under the circumstances of the particular case. Upon such petition and after notice, the Court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the proper amount of compensation to be paid to the owner for the actual damage to the property and interference with its purposes and use. After such determination, the Court may issue its order permitting the entry.

Proof has been made by way of declaration that the required notice of this petition has been given. We ask the Court to issue the order.

Respectfully submitted,

DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff City of
Roseville.

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext.272

439

Attorney for Plaintiff

FILED
SEP 23 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
EX *M. I. Dobbas*
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)
Plaintiff,)
v.)
WILLIAM J. ZISK and LOIS E.)
ZISK,)
Defendants.)

NO. 4 1 1 0 4
DECLARATION IN SUPPORT OF
PETITION FOR ORDER PERMITTING
ENTRY ON LAND

MICROFILMED

I, DENNIS W. DE CUIR, declare as follows:

1. I am the City Attorney of the City of Roseville,
plaintiff in this proceeding in eminent domain.

2. The trial in this eminent domain proceeding is
set to commence on November 1, 1977. In order to establish on
the property which is sought to be acquired in this proceeding
the exact location of the project planned by the City of Rose-
ville, namely a bikeway and hiking trail, it is necessary to
enter upon the property, survey it, establish the boundary lines
of the property to be taken, the property lines of the entire
property owned by the defendants, and to place stakes and other

1 small monuments to mark such locations.

2 3. In addition, it is necessary to to establish the
3 contours and elevations of the property because such information
4 is relevant to the issue of highest and best use.

5 4. I am informed by James Edwards, of the Spink Corpora-
6 tion, consulting engineers for the City of Roseville, that a
7 minimum of four (4) days will be necessary for the corporation's
8 survey crews to perform this work.

9 5. The nature and the scope of the activities of the
10 survey crew will be largely confined to areas of the property
11 which are distant from the defendants' residence and which are,
12 as I am informed and believe, in a natural and unimproved por-
13 tion of the property. Therefore, the entry will have a minimal
14 effect upon the property. I expect that there will be no
15 actual damages to the property; except nominal damage, and it
16 will not, in any event, disturb the owners in their use and
17 enjoyment of the property. In my opinion, nominal damages will
18 not exceed five dollars (\$5.00).

19 6. It is also necessary for the City's consultants to
20 enter upon the property and inspect the improvements thereon
21 for the purpose of making studies, surveys, examinations, tests
22 and appraisals.

23 7. In my opinion, the foregoing activities will have

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no actual effect upon the property or the owners' use and enjoyment of it.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Roseville, California, this 23rd day of September 1977.


DENNIS W. DE CUIR

PROOF OF SERVICE

I HEREBY CERTIFY that I am a citizen of the United States, over the age of 18 years. My business address is 316 Vernon Street, Roseville, California 95678. I am not a party to nor interested in this action.

On September 23, 1977, I personally served copies of the following in this action:

- Petition for Order Permitting Entry on Property Order
- Declaration in Support of Petition for Order Permitting Entry on Land
- Memorandum of Points & Authorities in Support of Petition for Order Permitting Entry on Land
- Order Permitting Entry on Land

I served the aforementioned copies by personal delivery to the parties and at the address indicated below:

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th St., Suite 900
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 23, 1977, at Roseville, California.

Velma La Chapelle
VELMA LA CHAPELLE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF PLACER

443

DATE: Sept. 26, 19 77 COURT MET AT ten a.m. DEPARTMENT NO. 3
PRESENT: HON. Keith F. Sparks JUDGE M. A. Hulse DEPUTY CLERK
None REPORTER R. Murray BAILIFF

TITLE: <u>CITY OF ROSEVILLE</u> <u>vs.</u> <u>WILLIAM J. ZISK</u>	COUNSEL: <u>Dennis W. De Cuir</u> <u>Desmond, Miller, Desmond & Bartholomew</u> <small>(UNDERLINE COUNSEL PRESENT)</small>
--	---

NATURE OF PROCEEDINGS: Motion to Permit Entry on Land ACTION NO. 41104
LAW AND MOTION

OFF CALENDAR.
 CONTINUED TO _____
 SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.

MICROFILMED

MATTER ARGUED BY COUNSEL AND SUBMITTED.
 MOTION GRANTED. Mr. DeCuir stated that Mr. Desmond has received the Order as drafted and has no objections.
 MOTION DENIED.

DEMURRER SUSTAINED DAYS TO AMEND
 OVERRULED ANSWER

GROUNDS: _____
 TAKEN UNDER SUBMISSION.
 POINTS AND AUTHORITIES TO BE SUBMITTED _____

NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

DEFENDANT IS SWORN AND RETIRED WITH COUNSEL FOR EXAMINATION.

OTHER: Counsel presented Ex-Parte Motion for Partial Summary Judgment which is set for Thursday, October 6, 1977 at 4:00 p.m.

LAW AND MOTION MINUTES

BOOK _____

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Placer
By M. A. Hulse DEPUTY

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

444

Attorney for Plaintiff

FILED

SEP 26 1977

MAURINE L DOBBAS
COUNTY CLERK OF PLACER COUNTY

M. L. Dobbas
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)

Plaintiff,)

v.)

WILLIAM J. ZISK and LOIS E.)
ZISK,)

Defendants.)

NO. 41104

ORDER PERMITTING ENTRY ON
LAND

MICROFILMED

The petition of the City of Roseville for an order per-
mitting entry on the real property of William J. Zisk and
Lois E. Zisk pursuant to Code of Civil Procedure Section 1242.5
came on regularly for hearing on September 26, 1977. Upon
notice duly and properly given, and evidence, oral and documen-
tary having been presented, and good cause appearing therefor,
the Court finds and determines:

1. Petitioner is authorized by law to exercise the
power of eminent domain for the purposes set forth in the com-
plaint on file herein.

2. Defendants William J. Zisk and Lois E. Zisk are the

1 owners of the real property upon which petitioner seeks entry
2 for the purposes of preparing for the trial of this proceeding.
3 The nature and scope of the activities that are reasonably
4 necessary to accomplish such purpose are making studies, surveys,
5 examinations, tests, appraisals and placing stakes and other
6 small monuments to identify property lines and the location of
7 the project and to determine contours and elevations. Such
8 entry and activities are to be conducted between the hours of
9 7:00 a.m. and 5:00 p.m. on September 27, 28, 29 and 30, 1977,
10 by the City Attorney, a survey crew from the Spink Corporation
11 and not more than three (3) consultants of the City Attorney,
12 and entry of the improvements on September 29, 1977 between the
13 hours of 12:00 p.m. and 5:00 p.m. by not more than three (3)
14 consultants of the City Attorney.

15 3. The entry and activities will not result in actual
16 damages to the owners except in a nominal amount of five dollars
17 (\$5.00).

18 IT IS HEREBY ORDERED that petitioner and its consultants
19 be and are hereby authorized to enter upon the lands and improve-
20 ments of defendants William J. Zisk and Lois E. Zisk described
21 in the petition for the purposes set forth above. Petitioner
22 may engage in those described activities.

23 IT IS FURTHER ORDERED that petitioner shall, prior to
24 such entry, deposit with the Clerk of this Court, pursuant to
25 Section 1243.6 of the Code of Civil Procedure, the sum of five
26 dollars (\$5.00).

27 DATED: SEP 26 1977

28



Judge of the Superior Court

FILED

SEP 26 1977

MAURICE DOBBAS
COUNTY CLERK
[Signature]

PROOF OF SERVICE

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441104

I HEREBY CERTIFY that I am a citizen of the United States, over the age of 18 years. My business address is 316 Vernon Street, Roseville, California 95678. I am not a party to nor interested in this action.

On September 26, 1977, I personally served a copy of Order Permitting Entry On Land in this action by personal delivery to the parties at the address indicated below:

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th St., Suite 900
Sacramento, CA 95814

MICROFILMED

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 1977, at Roseville, California.

[Signature]
DENNIS W. DE CUIR

447

FILED

SEP 26 1977

MAURICE I. DOBEAS
COUNTY CLERK
PLACER COUNTY

1 DENNIS W. DE CUIR
2 City Attorney
3 City of Roseville
3 316 Vernon Street
3 Roseville, CA 95678
3 Telephone: (916) 783-9151, Ext. 272
4 Attorney for Plaintiff

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

11 CITY OF ROSEVILLE, a municipal)
12 corporation,)
13 Plaintiff,) NO. 4 1 1 0 4
14 v.) DECLARATION RE PRIOR
15 WILLIAM J. ZISK and LOIS E.) MOTION, C.C.P. §1008
16 ZISK,)
17 Defendants.)

18 I, DENNIS W. DE CUIR, declare as follows:
19 1. I am the Attorney for Plaintiff City of Roseville
20 in the above-entitled proceeding.
21 2. Plaintiff earlier made a motion for summary
22 judgment as to paragraphs V, VI, and VII of Defendants' Answer.
23 3. That motion was denied without prejudice to the Court
24 ruling on the admissibility of evidence in support of claims set
25 forth in said paragraphs by Judge Vernon Stoll on December 30,
26 1974.
27 4. The motion was made prior to the initiation of any
28 discovery by the Plaintiff and before the California appellate

1 courts decided a number of important, controlling decisions.

2 5. Because of the controlling importance of the
3 judicial decisions since the earlier motion was made and because
4 of the new evidence produced by the answers to interrogatories
5 and the deposition of the defendant, it is respectfully submitted
6 that the motion may, and should be renewed.

7 I declare under penalty of perjury that the foregoing
8 is true and correct. Executed at Roseville, California, on
9 September 26, 1977.

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12 DENNIS W. DE CUIR
13 Attorney for Plaintiff
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DENNIS W. DEWIER
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

Attorney for Plaintiff

FILED

SEP 26 1977

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MAURINE L. DOBBS
COUNTY CLERK OF PLACER COUNTY
BY [Signature]
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)

Plaintiff,)

v.)

WILLIAM J. ZISK and LOIS E.)
ZISK,)

Defendants.)

NO. 4 1 1 0 4

NOTICE OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
FOR PLAINTIFF

MICROFILMED

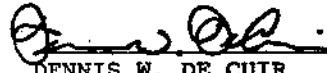
TO WILLIAM J. ZISK and LOIS E. ZISK and to DESMOND,
MILLER, DESMOND & BARTHOLOMEW, their attorneys:

NOTICE IS HEREBY GIVEN that on October 6, 1977, at 4:00
p.m., or as soon thereafter as the matter can be heard, in
Department 1 of the above-entitled Court at Auburn, California,
Plaintiff will and does hereby move the Court for an Order for
Partial Summary Judgment striking Paragraphs V, VI and VII
of Defendants' Answer on file herein.

This motion is based upon this notice, the pleadings,
records, and papers on file in this proceeding, the attached
memorandum of points and authorities, oral and documentary

1 evidence that will be presented at the hearing of the motion
2 and the attached declaration of Dennis W. De Cuir, the deposition
3 of William J. Zisk, dated September 7, 1977, and Defendants'
4 Answers to Interrogatories, Set No. 1 and Set No. 2.

5
6 DATED: September 26, 1977.

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8 
9 DENNIS W. DE CUIR
10 City Attorney,
11 Attorney for Plaintiff
12 City of Roseville
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DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

451

FILED

SEP 26 1977

MAURINE INDOBRAS
COUNTY CLERK OF PLACER
BY *[Signature]*
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E.
ZISK,

Defendants.

NO. 41104

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

In this eminent domain proceeding, Plaintiff CITY OF ROSEVILLE seeks to acquire a portion of Defendants' property shown as Parcel A and Parcel B on the attached map attached to this memorandum as Exhibit "A." Defendants reside on the remainder where they conduct a sand and gravel trucking business. They also rent a small residence situated on the remainder.

II. SUMMARY JUDGMENT

Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. Such motion shall be granted if all the papers submitted show that there is no triable issue

1 as to any material fact and that the moving party is entitled to
2 judgment as a matter of law. (Sec. 437c, C.C.P.)

3 Of course, summary judgment should be used with caution
4 (Schrimsher v. Bryson (1976) Cal.App.3d 660, 663). But under
5 the 1974 amendment to Section 437 c of the Code of Civil Proce-
6 dure, the court may now draw inferences reasonably deducible from
7 evidence (Hale v. George A. Hormel & Co., (1975) 48 Cal.App.3d
8 73, 81).

9 III. DEFENDANTS' ANSWER

10 In Paragraphs V, VI and VII of Defendants' Answer, they
11 have made allegations that do not, as a matter of law, constitute
12 a defense. Just as importantly, for the purposes of this motion,
13 the evidence shows that the Defendants cannot produce a triable
14 issue of fact in support of their allegations.

15 A. Paragraph V of the Answer

16 Defendants claim in Paragraph V of their Answer
17 that the fair market value of their property declined as a result
18 of the City's alleged "precondemnation announcements;" that the
19 City intended to condemn portions of their property; and that
20 the Defendants were unable to fully use their property to their
21 damage which is, as they allege, reflected in a depreciation of
22 the value of their property, the loss of use of the property for
23 its highest and best use, a loss of rent, revenue, profits and
24 returns on the property, and the capital investment of Defendants
25 and holding costs, charges and expenditures incurred by them in
26 holding their land for the benefit of the City (Subp. a, Para. V).

27 Defendants also allege in subparagraph b of Para-
28 graph V that the acts of the City constitute a direct legal

1 restraint on the use of their property and a physical invasion
2 of it. They also contend that all of the acts of the City were
3 calculatingly designed to decrease any future condemnation award.
4 Because of these so-called "oppressive acts" by the City, the
5 Defendants claim that the taking of the property sought by the
6 complaint and the alleged severance damage to the remainder
7 actually occurred at a date earlier than the date set out by
8 former Section 1249 of the Code of Civil Procedure.

9 B. The Evidence Against Defendants' Allegations

10 Taking these allegations in reverse order, the
11 Defendants have admitted in their Answer to Interrogatory No. 23
12 that there was no actual physical invasion of their property by
13 the so-called "precondemnation announcements;" rather, they
14 assert that there was an invasion which was equivalent to a
15 physical invasion, but it was not described.

16 In their abated complaint (Placer County No. 41105),
17 their abated cross-complaint in this proceeding, and in their
18 complaint filed in federal district court (U.S.D.C., E.D., S76-
19 296) Defendants alleged that the oppressive acts and precondemna-
20 tion activities of the City were the adoption of a Park, Stream-
21 bed and Recreation Element of the General Plan in 1968 and the
22 adoption of an Open Space and Conservation Element of the General
23 Plan in 1973, along with the denial of a use permit application
24 and lot split for construction of a single family dwelling in
25 1973, and the subsequent and prior adoption of various floodplain
26 regulations.

27 Despite these allegations, Defendant WILLIAM J. ZISK
28 admitted during his deposition on September 7, 1977, that the

1 planning and zoning regulations of the City of Roseville had no
2 economic effect whatsoever on the use of his property up to the
3 date of the deposition except as it may have lost its speculative
4 value. Furthermore, Mr. Zisk admitted that the Park, Streambed
5 and Recreation Element of the General Plan and the Open Space
6 and Conservation Element of the General Plan did not affect the
7 use of his property for his sand and gravel trucking business or
8 for the use of his property as a home or as a rental residence
9 to the present tenants. Defendant Zisk produced no evidence at
10 his deposition to show any loss of rent, revenue, profits or
11 returns on his property. He admitted that he was and continues
12 to be able to fully use his property as a homesite and base of
13 operations for his trucking business, despite the activities of
14 the City. His sole complaint appears to be that he has personally
15 concluded that he cannot develop his property for speculative
16 purposes or for some undefined future use.

17 In answers to the first and second set of interrog-
18 atories propounded to Defendants, Mr. Zisk stated that he had
19 made no attempts to sell the property from the date he acquired
20 it (Interrogatory No. 18).

21 In answer to Interrogatory No. 21, which called
22 for facts upon which Defendants' based their allegation that the
23 fair market value of the property was higher before the alleged
24 "precondemnation announcements," which they contend resulted in
25 a decline of its fair market value in Paragraph V of the Answer,
26 Mr. Zisk stated that subsequent to the implementation of the City
27 plans, it was the Defendants' opinion that upon being fully
28 informed of the circumstances, any prospective buyer of the

1 property would come to the conclusion that he could never develop
2 the property and, therefore, its use was forever limited to exist-
3 ing conditions.

4 In answer to Interrogatory No. 22, which called for
5 facts on which Defendants based their contention that the alleged
6 "precondemnation announcements" resulted in a loss of rent,
7 revenue, profits and returns on the property, as alleged in Para-
8 graph V of the Answer, Defendants answered that they would have
9 built a new home and used the remainder for rental as an interim
10 use pending ultimate sale or development of the property. They
11 claim a loss of reasonable return on the before value of the
12 property plus expenses in connection with the application for
13 the lot split and use permit, together with taxes and other costs.

14 In summary, Defendant WILLIAM J. ZISK has admitted
15 that except for not reaping the hoped-for fruits of land specula-
16 tion, he has not been affected in any way whatsoever by the acts
17 of the City of which he complains. Mr. Zisk's testimony, and
18 his answers to the first and second set of interrogatories
19 clearly show that there is no triable issue as to any material
20 fact and that the City of Roseville is entitled to partial
21 summary judgment as a matter of law (Sec. 437c, C.C.P.). Further-
22 more, Mr. Zisk clearly testified that he had made no attempts to
23 contact lenders for the purpose of developing his property, that
24 he delayed development subsequent to his initial plans to build
25 two houses on his property in 1967 because he could not afford
26 to carry the full financial burden at that time, and that he
27 had not sought to sell the property.

28

1 C. Argument

2 Under City of Los Angeles v. Lowensohn (1976) 54 Cal
3 App.3d 625, it is clear that a condemnee can have no recovery
4 "for the taking of a pipe dream" (Id., at 636).

5 In Lowensohn, the appellant landowners contended
6 that the trial court erred by failing to submit to the jury the
7 issue of precondemnation damages, reflected in loss of rental
8 income and the payment of holding costs during the period of
9 unreasonable delay in bringing the condemnation proceeding. They
10 had purchased the property in 1962 for investment purposes and
11 they never put any improvements on it (Id., at 628).

12 Following discussions which commenced in 1963, the
13 board of airport commissioners adopted a resolution in 1968 re-
14 questing an ordinance of condemnation of certain property for
15 airport purposes. The ordinance was adopted by the city council
16 in 1969 and identified the appellants' property as one of 2300
17 parcels to be condemned. The complaint to take appellants' land
18 was not filed until 1972 (Id., at 629).

19 When the case was tried in 1974, the trial court
20 sustained an objection to appellants' offer of proof of precondem-
21 nation damages.

22 The Court of Appeal distinguished the major delay
23 damages cases of Stone v. City of Los Angeles (1975) 51 Cal.App.3d
24 987 and Klopping v. City of Whittier (1972) 8 Cal.3d 39 by noting,
25 among other things, that there was no actual loss of rental
26 income or sales as a result of the activities of the city and that
27 the landowners had purchased the property for investment purposes
28 (supra at 636).

1 "In sum, appellants sought recovery for something
2 that was nonexistent in fact and constituted pure
3 fiction. There is no recovery via condemnation for
4 the taking of a pipe dream. Since appellants failed
5 to show 'delay damages,' evidence of expenses or
6 'holding costs' would have been inadmissible. [citing
7 Stone, supra, 51 Cal.App.3d 987, 999]"

8 As the evidence shows, the defendants here cannot produce
9 a triable issue of material fact showing delay damages. They
10 admit to none except for the frustration of their development
11 plans, which they themselves characterize as speculation.

12 Defendant's candor in calling his purposes "speculative"
13 in refreshing. But we view it as one league away from holding
14 the property for investment, as was the case in Lowensohn. "In-
15 vestment," as a term of common usage, connotes a security of
16 return on invested capital that "speculation" does not.

17 Cardinal among the cases on this point is HFH, LTD. v.
18 Superior Court (1975) 15 Cal.3d 508, 521, where the Supreme
19 Court quoted a distinguished commentator, as follows:

20 "'They bought lands which [they] knew might be
21 subjected to restrictions; and the price [they] paid
22 should have been discounted by the possibility that
23 restrictions would be imposed. Since [they] got
24 exactly what [they] meant to buy, it can perhaps
25 be said that society has effected no redistribution
26 so far as [they are] concerned, any more than it
27 does when it refuses to refund the price of [their]
28 losing sweepstakes ticket.'"

It could not be clearer from Mr. Zisk's deposition
that the defendants received and continue to use exactly what
they meant to buy, a site for a home and a business. Having
earlier failed, through no fault of the City, to develop the site,
the defendants cannot now assert that the City is liable in
damages.

1 The long settled state of zoning law renders the possi-
2 bility of a change in zoning clearly foreseeable to land specula-
3 tors who discount their estimate of its value by the probability
4 of such change (Id.).

5 In this case, the defendants admit they knew, prior to
6 the time of purchase, that the land was subject to floodplain
7 zoning (R-1 FP). The zoning change to FF and FW by Ordinances
8 Nos. 1224 and 1227, asserted as damaging in their inverse condem-
9 nation claims, has not disturbed the continued use of the property
10 for defendants' own residential and business purposes, although
11 there may be some doubt regarding the propriety of a trucking
12 business based in an R-1 zone. In any event, defendants' only
13 grievance is confined entirely to their frustrated hope to specu-
14 late in the real estate market. Government cannot guarantee
15 windfalls.

16 In HFH, LTD. v. Superior Court, supra, 15 Cal.3d 508,
17 518, the landowners urged, as an alternative to the proposition
18 that inverse condemnation lies for any reduction in market value
19 induced by zoning (which the Court had rejected), that interim
20 damages should be available because they would still suffer an
21 uncompensated loss of use of their property even if they eventually
22 succeeded in invalidating the zoning by an action in mandate.

23 The Court ruled that governmental immunity applied; the
24 zoning ordinance constituted legislation so if it were improper
25 the remedy was solely in undoing the wrongful legislation, not
26 in money damages awarded against the state (Id., at 519).

27 Furthermore, the law of this state does not afford
28 damages for "precondemnation activities" which are merely the

1 execution of planning and zoning responsibilities.

2 "Neither Klopping nor any other decision of
3 which we are aware holds that the enactment of a
4 general plan for the future development of an
5 area, indicating potential public uses of pri-
vately owned land, amounts to inverse condemna-
tion of that land." (Selby Realty Co. v. City of
Buenaventura (1973) 10 Cal.3d 110, 119).

6 "A cause of action is not stated in inverse
7 condemnation for adoption of a general plan or
for denial of a permit." (Id., at 128.)

8 In State of California v. Superior Court (Veta) (1974)
9 12 Cal.3d 237, the Court held that the denial of a building per-
10 mit on the ground that the land proposed for development may
11 ultimately be designated for public use in a coastal zone plan
12 does not amount to a taking (Id., at 255).

13 There can be no taking without an allegation of facts
14 regarding no reasonable use and an actual acquisition or public
15 use. Zoning is not an acquisition for public use (Pinheiro v.
16 County of Marin (1976) 60 Cal.App.3d 323). Defendants here have
17 admitted they continue to use their property for a reasonable,
18 beneficial use.

19 This case is also different from the Klopping case,
20 supra, 8 Cal.3d 39, where the City of Whittier dismissed a
21 previously filed condemnation proceeding and authorized the dis-
22 missal with a declaration of its "firm intention" to reinstitute
23 proceedings when a collateral case was terminated. Defendants
24 here have no triable issue of fact on that score.

25 Under Klopping, the test is whether the alleged "pre-
26 condemnation announcement" of intent to condemn has a discernible
27 relation to a desire to insure public input into the decision-
28 making process (supra, at 55). If the announcement of intent to

1 condemn has "no discernible relation" to a desire to insure
2 public input, there may be a question of fact. It cannot be said
3 here that the general plan elements of the City of Roseville have
4 no discernible relation to a desire to insure public input into
5 the decision-making process. Therefore, there can be no triable
6 issue of fact. The Supreme Court clearly held in Klopping,
7 supra, that it may be necessary for landowners to bear some
8 incidental loss - thus, the public treasury is not required to
9 compensate a landowner for damages to his property after the
10 announcement of the injury if it is not unreasonably caused.
11 Were it otherwise, then public project planning would have to
12 be done in secret so as to avoid liability in damages, a result
13 hardly consonant with modern democracy.

14 As Mr. Zisk has admitted in his deposition, the Park,
15 Streambed and Recreation Element of the General Plan, adopted
16 by the City of Roseville in 1968, was intended as a guide. He
17 should not be heard to complain that he has been injured just
18 because he, along with other members of the public, were informed
19 in advance that his property might be suitable for development
20 for public park purposes. As a matter of law, this gives no
21 rise to a defense nor does it present any triable issue of fact
22 and thus, Paragraph V of the Defendants' Answer should be
23 stricken.

24 D. Paragraph VI of the Answer

25 Because the alleged precondemnation activities of the
26 City of Roseville are not actionable and since the allegations
27 of the defendants present no triable issue of fact, their claim
28 in Paragraph VI of their Answer that the nature of the activities

1 of the City prior to the issuance of the summons requires a
2 different valuation date than that provided by former Section
3 1249 of the Code of Civil Procedure has no basis. The valuation
4 date under former Section 1249, which applies to this proceeding
5 because it was brought prior to the enactment of the new Eminent
6 Domain Law, will be the date of the issuance of the summons if
7 this Court finds that the delay in bringing the case to trial in
8 one year was due to the defendants, as we will urge at the pre-
9 trial conference. Otherwise, the date of valuation will be the
10 date of the trial. No other dates for valuation are provided
11 in the law unless, under Klopping, supra, there was a defacto
12 taking (and Klopping was not a defacto taking case).

13 We have already laid to rest the issue of a defacto
14 taking, for it has been shown by the defendants' admissions that
15 they have not been damaged in their former and present uses of
16 the property, except as they have speculatively hoped to develop
17 it.

18 Defendants' Answer, in Paragraph VI, also fails to
19 present any triable issue of fact with regard to a claim for
20 delay damages.

21 In Smith v. State of California (1975) 50 Cal.App.3d
22 529, the plaintiffs filed an inverse condemnation action against
23 the state based on the State Highway Commission's adoption and
24 public announcement of a proposed freeway route that would bisect
25 their property. Plaintiffs alleged that in the seven years
26 following the announcement of the plan, the state had taken no
27 specific action to acquire the property, that the state had
28 presented information to the public that acquisition would not

1 be accomplished for at least eight more years and that the delay
2 was arbitrary, capricious, unreasonable and constituted a defacto
3 taking of the property.

4 The complaint alleged that on July 21, 1966, the high-
5 way commission adopted a proposed Route 64 freeway to be located
6 generally between existing Route 1 near Malibu and Route 5. Maps
7 were published as part of the resolution of adoption of the route
8 showing the freeway bisecting plaintiffs' property. The resolu-
9 tion to acquire the right-of-way and to construct the freeway was
10 announced to the public. Pursuant to this resolution, plans and
11 designs were prepared which indicated that a substantial part of
12 the plaintiffs' property would be needed for the construction of
13 the freeway as proposed.

14 Plaintiffs claimed that the delay by the state was a
15 defacto taking, entitling them to the fair market value of their
16 property, which they alleged to be \$850,000. They also alleged
17 further damages in the sum of \$525,000 for being prevented from
18 dealing in an open market, loss of prospective purchasers, loss
19 of rents, income and profits, the inability to develop the
20 property and the costs of taxes and other expenses necessary to
21 maintain it in its unimproved state. The plaintiffs claimed they
22 based their case on the Klopping and Selby cases.

23 The Court of Appeal held that the delay was neither
24 capricious nor arbitrary and appeared to be the result of prudent
25 scheduling of major public works (Id., at 537). The Court also
26 stated:

27 "Without question, when the state embarks
28 upon a plan to develop a freeway, because of
the public airing which is legally attendant
to such a project, marketability of property
in the affected area is adversely impacted.

1 On the other hand, invocation of the doctrine
2 of inverse condemnation or the assessment of
3 damages against the state upon the public
4 announcement of the state's plan would result
5 in acquisition of large amounts of property
6 that may never be used and would inordinately
7 increase the cost of any such project. The
8 real result would be a severe hampering of the
9 state's ability to undertake necessary and
10 worthwhile improvements in our highway system."
11 (Id., at 536.)

12 The Court also remarked that Plaintiffs' particular
13 property was not singled out for singular and unique treatment
14 in contrast to the property of thousands of others along the
15 proposed route.

16 Defendant WILLIAM ZISK has admitted that he under-
17 stands that the City is acquiring other properties for bikeway
18 and hiking trail purposes just as his is sought for acquisition
19 for such purposes (Depo. p.90, ll. 19-22). Obviously, his prop-
20 erty was not singled out for abuse through regulation (Zisk v.
21 City of Roseville (1976) 56 Cal.App.3d 41, 49), nor was it
22 singled out for the purposes of acquisition. So it can hardly
23 be said, when one considers that the Smith case holds that a
24 period of seven years after the adoption of a freeway plan is not
25 an unreasonable period, that there are any facts that could
26 present a triable issue as the defendants assert here. The
27 earliest alleged precondemnation announcement of which they com-
28 plain, being the Park, Streambed and Recreation Element of the

1 General Plan, was adopted five years in advance of the condemna-
2 tion resolution. Moreover, defendants assert that the alleged
3 taking of their property occurred in March of 1973, according
4 to their answer to Interrogatory No. 17. Even if defendants had
5 facts to support their claim that the March date was the date of
6 the taking, under the Smith case it cannot be argued that the

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1 intervening months constitute an unreasonable delay for which the
2 public should be liable in damages.

3 E. Paragraph VII of the Answer.

4 The seventh paragraph of Defendants' Answer alleges
5 that the City is estopped by reason of the adoption of the general
6 plan elements to deny that it has taken (1) the property sought
7 to be acquired, (2) damaged the remainder of the property, and
8 (3) that it has acquired an interest in all of the property.

9 Estoppel will not lie against a municipal corpora-
10 tion except in "extraordinary circumstances." (City of Los
11 Angeles v. Cohn (1894) 101 Cal.373; City of Long Beach v. Mansell
12 (1970) 3 Cal.3d 462.) None of the elements required for promissory
13 estoppel have been set forth, so we assume that defendants are
14 relying upon the doctrine of equitable estoppel. While promis-
15 sory estoppel has been used in a government property acquisition cases
16 (Hilltop Properties v. State (1965) 233 Cal.App.2d 349), nothing
17 in the purported defense would suggest any reliance on that
18 theory. In the Hilltop Properties case, it was alleged that the
19 state's agents promised to purchase the owner's properties if he
20 reserved it from his proposed subdivision. No promise or detri-
21 mental reliance have been asserted here. With regard to equitable
22 estoppel, there must be not only a representation of material
23 facts to an ignorant party, but also the party must have been
24 induced to rely on it (7 Witkin, Summary of California Law, 8th
25 ed., Equity, §132 at 5352).

26 The defendants' problems were their own, for had
27 they not waited until 1973 to develop their property, without
28 making any substantial attempts after they purchased it in 1966

1 to attempt to sell it or finance development, the facts of this
2 case may have been different. Nevertheless, the public should
3 not be called upon to bear the expense of the defendants' in-
4 ability to maximize a profit on their property. Every purpose
5 that the defendants had in purchasing the property in 1966, for
6 use as a business base and for use as a residence, continues to
7 be fulfilled without change to this date. The only alleged
8 damages that the defendants assert are those that allegedly
9 result from the frustration of their plans, which they admit
10 never went as far as seeking commercial financial assistance.

11 In Pettit v. Fresno (1973) 34 Cal.App.3d 813, the
12 plaintiffs purchased property in reliance on representations of
13 the planning department of the defendant city that they had a
14 nonconforming right of use for commercial purposes, and they
15 spent considerable sums in improvements, but their building per-
16 mit was, in fact, issued in violation of the zoning ordinance.
17 The Court of Appeal held there was no estoppel.

18 More recently, the California Supreme Court has
19 made it very clear that estoppel does not apply in these cases.
20 In Avco Community Developers, Inc., v. South Coast Regional Com-
21 mission (1976) 17 Cal.3d 785, 793, the Court ruled:

22 "By zoning the property or issuing approvals
23 for work preliminary to construction the govern-
24 ment makes no representation to a landowner that
25 he will be exempt from the zoning laws in effect
26 at the subsequent time he applies for a building
27 permit or that he may construct particular struc-
28 tures on the property, and thus the government
cannot be estopped to enforce the laws in effect
when the permit is issued."

27 And further, at 801, the Court rejected the appli-
28 cation of estoppel to a so-called "Beach Agreement," which the

1 developers said obligated the state to permit them to develop
2 their property, with the following:

3 "Thus, even upon the dubious assumption that
4 the Beach Agreement constituted a promise by the
5 government that zoning laws thereafter enacted
6 would not be applicable to tract 7479, the agree-
ment would be invalid and unenforceable as
contrary to public policy."

7 IV. CONCLUSION

8 In closing, we note that we are not without sympathy
9 for any person whose development plans are frustrated. Neverthe-
10 less, no claim can be made on the public fisc just because a
11 landowner thinks he could have otherwise made a profit by develop-
12 ing his property to a higher or better use. In fact, even a large
13 investment prior to the issuance of final development permits does
14 not entitle a landowner to any vested right in development.

15 In Avco Community Developers, Inc., v. South Coast
16 Regional Commission, supra, 17 Cal.3d 785, the California Supreme
17 Court held that there was no vested right to proceed with a plan-
18 ned unit development in the coastal zone without a permit from
19 the regional commission where, though the developer had spent
20 over \$2,000,000 in development costs, there was no building per-
21 mit nor performance of substantial work before the effective date
22 of the Coastal Initiative. Damages were, therefore, unavailable.

23 In HFH, Ltd., v. Superior Court, supra, 15 Cal.3d 508,
24 the Court pointed out that the plaintiffs had failed to distin-
25 guish between the "damaged" property, which is a requisite for a
26 finding of compensability, and "damages," by which courts measure
27 the compensation due. Reasoning backwards, the plaintiffs there
28 had erroneously contended that since they could calculate damages

1 by measuring a decline in market value, they must have been "dam-
2 aged" within the meaning of the Constitution (Id., at 518).

3 The defendants here have admitted in their answers to
4 interrogatories and in deposition that the only damage they have
5 suffered is what they may otherwise have gained in developing
6 their property to some other use above and beyond the uses to
7 which they have been, and continue to put the property. They
8 have merely, in their Answer, attempted to shoe-horn an inverse
9 condemnation claim into the trial.

10 We submit that the purported defenses set out in Para-
11 graphs V, VI and VII of Defendants' Answer are without merit,
12 they state no defense, they are not actionable as a matter of
13 law, they present no triable issue of fact, and they should be
14 stricken by partial summary judgment.

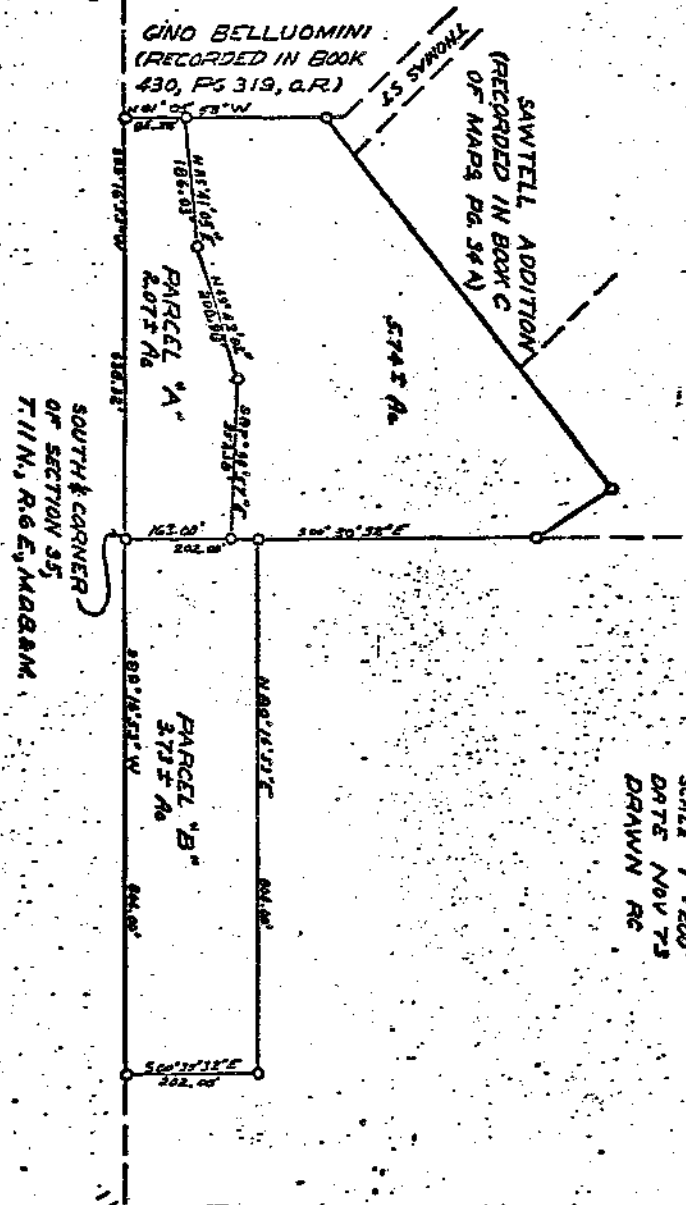
15 DATED: September 26, 1977

Respectfully submitted,


DENNIS W. DE CUIR

DENNIS W. DE CUIR

28



PROPERTY TO BE ACQUIRED
 FROM WILLIAM J. AND
 LOIS E. ZISK

SCALE 1"=200'
 DATE NOV 75
 DRAWN RC

EXHIBIT

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DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

Attorney for Plaintiff

FILED
SEP 26 1977
MAURICIO DOSSAS
COUNTY CLERK OF PLACER COUNTY
BY *[Signature]*
SERVING

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E. ZISK,

Defendants.

NO. 41104

DECLARATION IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

I, DENNIS W. DE CUIR, declare as follows:

1. I am Attorney for the Plaintiff City of Roseville in the above-entitled proceeding. On September 7, 1977, I deposed WILLIAM J. ZISK, one of the Defendants in this action. Mr. Zisk was duly sworn by the notary public and his testimony, as I have paraphrased it from the reporter's transcript, with page and line references, is as follows:

2. Between 1952 and 1966, while Mr. Zisk and his wife resided in Roseville on Sixth Street, they were looking for a piece of property that would serve as a base of operations for his business as well as a home, and that would have some

1 speculative value (pp. 12-13).

2 3. While he was looking for a piece of property that
3 would serve as a base of operations for his business, provide a
4 home, and have some speculative value, he examined a zoning map
5 of the City of Roseville (p. 13, ll. 7-11). He had come to
6 acquire an understanding of the zoning regulations prior to 1966
7 (p. 13, ll. 15-18).

8 4. Before Mr. and Mrs. Zisk purchased their property,
9 he had had discussions with relatives regarding the high water
10 mark of water flooding on the property (p. 16, ll. 15-26).
11 Before the Zisks purchased the property at 205 Thomas Street,
12 part of which is the subject of this proceeding, Mr. Zisk
13 examined a map showing the zoning districts (p. 23, ll. 23-25).
14 His understanding was that the entire property was zoned R-1,
15 R-1 FP, which meant to him that he could use it for building
16 purposes with the aid of a use permit (p. 25, ll. 23-27). His
17 understanding of the reasons behind the R-1 FP designation was
18 that there would be areas that could possibly be subject to
19 flooding and those would be the areas that would be controlled
20 under the FP portion (p. 27, ll. 9-10). He knew in advance,
21 before he purchased the property at 205 Thomas Street, that in
22 order to develop it under the existing zoning he would have
23 needed to apply for and be granted a use permit from the City
24 of Roseville (p. 27, ll. 12-17).

25 5. Mr. Zisk could not exactly recall where the north-
26 westerly boundary of the R-1 FP zone lay. It was possibly his
27 thinking that the boundary may well have been in such a location
28 as to include the existing house and rental at 205 Thomas Street

1 within the boundaries of the zone shown on Plaintiff's Exhibit 1
2 for Identification (p. 28, ll. 1-9).

3 6. What Mr. Zisk intended to do with the property when
4 he purchased it in 1966 was to use it as a base of operations
5 for his business, use it as a residence, and on a speculative
6 basis to develop the balance of it (p. 29, ll. 3-9). He
7 originally approached the Planning Commission in 1967 for approval
8 to construct two dwellings. He said the Planning Commission
9 felt that he should clean the channel of the creek and get a
10 lot split (p. 29, ll. 16-28; p. 30, ll. 1-14). Complications
11 arose (p. 30, ll. 21-22) but his plans were delayed because his
12 parents, who had an interest in the property wished to convey
13 their interest to the defendants (p. 36, ll. 20-27). Mr. Zisk
14 said that the City had nothing to do with his inability to
15 proceed with construction in 1967 (p. 36, ll. 28; p. 37, ll. 1-4).

16 7. The business that Mr. Zisk conducts on his property
17 involves hauling sand, gravel, aggregates of all types, which
18 could include bark, landscape materials, fertilizer and other
19 commodities (p. 37, ll. 11-19). Since 1952 up until the date of
20 the deposition, Mr. Zisk has been engaged in the same business
21 without any change in the nature of it (p. 37, ll. 24-28). In
22 using the property for his sand and gravel business, the property
23 provides a base to maintain the equipment, office facilities for
24 conducting the business, and areas for the stockpile of materials,
25 which on occasion include sand, gravel, topsoil and decomposed
26 granite. He had never planned since he purchased the property
27 to conduct any other business there other than speculation
28 (p. 38, ll. 7-10).

1 8. From the present time back to the date that the
2 Zisks purchased their property in 1966, they have only derived
3 income from it in its use in the sand and gravel trucking
4 business and rental income of approximately \$85 a month from a
5 residence on the property (p. 42, ll. 2-4, 7-28; p. 43, ll. 1-2).
6 Otherwise, the Zisks pastured a horse on their property, and
7 kept some chickens and perhaps other livestock (pp.45-46). Mr.
8 Zisk testified that he has been able to continue the use of
9 the property as a homesite and for his business since the date
10 he acquired it up to the date of the deposition (p. 85, ll. 6-13).
11 There has been no change in his ability to use the property for
12 a homesite and for his business since the date he acquired it to
13 the date of the deposition (p. 85, ll. 14-17). Mr. Zisk
14 testified that the planning and zoning regulations of the City of
15 Roseville have had no economic affect whatsoever on the use of
16 his property as a homesite and for his business (p. 85, ll. 27-28;
17 p. 86, ll. 1-4).

18 9. During 1967 Mr. Zisk was aware of the City's
19 consideration of a report which later became the Park, Streambed
20 and Recreation Element of the General Plan. He attended public
21 meetings with respect to it. While he attended public meetings,
22 he did not speak on the subject (p. 88 ll. 20-28). He interpreted
23 the document as a "guide," (p. 89, ll. 5-7), not as a definite
24 plan (p. 90, ll. 12-18). He failed to go forward with his 1967
25 development plans for building two residences because he was
26 bearing the full burden of financing the property after his
27 parents conveyed it to him. He had not contacted any lenders or
28 persons who may have assisted him in financing the development

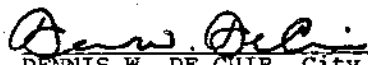
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of his plans (p. 92, ll. 26-28; p. 93, ll. 1-11).

474

I declare under penalty of perjury that the foregoing
is true and correct.

Dated and executed at Roseville, California,
September 26, 1977.


DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff
City of Roseville

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

475

Attorney for Plaintiff

FILED

SEP 26 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

M. I. Dobbas
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E.
ZISK,

Defendants.

NO. 4 1 1 0 4

EX PARTE MOTION FOR ORDER
SHORTENING TIME OR SPECIALLY
SETTING A HEARING ON MOTION
FOR PARTIAL SUMMARY JUDGMENT;
DECLARATION AND POINTS AND
AUTHORITIES; ORDER.


MICROFILMED

Plaintiff CITY OF ROSEVILLE in the above-entitled proceeding moves the Court for an order shortening the time for service of the Notice of Motion for Partial Summary Judgment to seven (7) days so that such notice may be served not later than the end of the business day on September 26, 1977; or in the alternative, for an order allowing the usual ten (10) days' notice by specially setting the hearing on the motion for Thursday, October 6, 1977, at 4:00 P.m.

This motion is made pursuant to C.C.P. §1005, on the ground that it is necessary in order to settle the issues for the pretrial conference set on October 7, 1977. This motion is based on the declaration of Dennis W. De Cuir, and on all the pleadings,

1 records and papers on file in this action.

2 DATED: September 26, 1977

3
4 
5 DENNIS W. DE CUIR
6 Attorney for Plaintiff
7 City of Roseville

8 DECLARATION IN SUPPORT OF EX PARTE MOTION

9 I, DENNIS W. DE CUIR, declare as follows:


10 1. I am the attorney representing the Plaintiff CITY
11 OF ROSEVILLE in the above-entitled proceeding.

12 2. This declaration is in support of the Plaintiff's
13 Motion for an Order Shortening Time for service on the notice
14 to seven (7) days or, in the alternative, for a special setting
15 on October 6, 1977, which will allow the usual ten (10) days'
16 notice. Unless this motion is heard prior to the pretrial con-
17 ference on October 7, 1977, unsettled issues will certainly remain
18 and perhaps require the continuance of the pretrial conference.

19 3. I had intended to serve and file this motion on
20 Friday, September 23, 1977. However, because of the demands of
21 other litigation (Physicians' Consulting Laboratories v. Roseville
22 Community Hospital; City of Roseville, Placer County No. 47765)
23 and the unexpected delay in obtaining defendants' permission to
24 enter upon their property for purposes of surveying, which
25 required me to prepare, file and serve a petition for entry on
26 land, I was unable to complete this motion and supporting papers.

27 I declare under penalty of perjury that the foregoing
28 is true and correct.

1 Executed on September 26, 1977, at Roseville, Cali-
2 fornia.

3
4 
5 DENNIS W. DE CUIR
6 Attorney for Plaintiff
7 City of Roseville

8 MEMORANDUM OF POINTS AND AUTHORITIES

9 Special settings that accelerate eminent domain pro-
10 ceedings carry out the legislative requirement that courts give
11 these actions preference over all other civil actions (Swartzman
12 v. Superior Court (1964) 231 Cal.App.2d 195,199).

13 DATED: September 26, 1977 Respectfully submitted,


14
15 
16 DENNIS W. DE CUIR

17 ORDER

18 Good cause appearing therefor,

19 IT IS HEREBY ORDERED that the above-referenced Notice
20 of Motion for Partial Summary Judgment may be served not later
21 than the end of the business day on September 26, 1977, for the
22 hearing set on October 6, 1977, at 4:00 p.m.

23 DATED: SEP 26 1977

24
25 
26 Judge of the Superior Court

PROOF OF SERVICE

I HEREBY CERTIFY that I am a citizen of the United States, over the age of 18 years. My business address is 316 Vernon Street, Roseville, California 95678. I am not a party to nor interested in this action.

On September 26, 1977, I personally served copies of the following in this action:

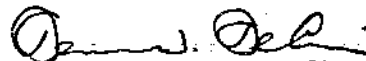
Notice of Motion for Partial Summary Judgment
for Plaintiff
Declaration in Support of Motion for Summary
Judgment
Declaration re Prior Motion, C.C.P. §1008
Order of Partial Summary Judgment Striking
Paragraphs in Answer
Ex Parte Motion for Order Shortening Time or
Specially Setting a Hearing on Motion for
Partial Summary Judgment; Declaration and
Points and Authorities; Order
Memorandum of Points and Authorities in
Support of Motion for Summary Judgment

I served the aforementioned copies by personal delivery to the parties and at the address indicated below:

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th St., Suite 900
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 1977, at Roseville,
California.



DENNIS W. DE CUIR

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

Attorney for Plaintiff

479
FILED
SEP 30 1977
MAURICE L. DOBBS
COUNTY CLERK
BY *[Signature]*

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)

Plaintiff,)

v.)

WILLIAM J. ZISK and LOIS E.)
ZISK, et al.,)

Defendants.)

NO. 41104

FINAL OFFER OF JUST
COMPENSATION FOR TAKING
OF PROPERTY

MICROFILMED

Plaintiff CITY OF ROSEVILLE does hereby offer defen-
dants the sum of thirteen thousand one hundred ten dollars
(\$13,110.00) as just compensation for the taking of the real
property described in the complaint.

Said offer is the value of the property as determined
by an independent real estate appraiser in accordance with stan-
dard real estate appraisal practice.

DATED: September 30, 1977

[Signature]
DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff City of
Roseville

(PROOF OF SERVICE BY MAIL -- 1013a, 20155 C. C. P.)

STATE OF CALIFORNIA }
COUNTY OF }

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

City Hall, 316 Vernon Street, Roseville, CA 95678

0 September 30 1977 I served the within

FINAL OFFER OF JUST COMPENSATION FOR TAKING OF PROPERTY

on the parties
in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the

United States mail at Roseville, California
addressed as follows:

Desmond, Miller, Desmond
& Bartholomew
1006 - 4th Street
Sacramento, California 95814

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on September 30, 1977 at Roseville California
(date) (place)

Velma LaChapelle
Signature

*Both the certification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th Street, Suite 900
Sacramento, California 95814
Telephone: 443-2051

Attorneys for Defendants

FILED

SEP 30 1977

MAURIEL DUBOIS
COUNTY CLERK
BY: *[Signature]*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

vs.

WILLIAM J. ZISK and LOIS E. ZISK,

Defendants.

No. 41104

MICROFILMED

FINAL DEMAND FOR
COMPENSATION (PURSUANT TO
CODE OF CIVIL PROCEDURE,
SECTION 1250.410, formerly
Section 1249.3)

Come now the Defendants, WILLIAM A. ZISK and LOIS E. ZISK, and, pursuant to the provisions of Section 1250.410, formerly Section 1249.3, of the Code of Civil Procedure, whichever is applicable, and make their final demand for compensation in this action in the amount of \$98,500.00.

DATED: September 30, 1977.

DESMOND, MILLER, DESMOND & BARTHOLOMEW

By: *[Signature]*
RICHARD F. DESMOND
Attorneys for Defendants

City of Roseville vs. sk; Placer Superior No. 4104
PROOF OF SERVICE BY MAIL - CCP 101, 2015.5

482

I declare that I am (resident of/employed in) the county of Sacramento, California.
(COUNTY WHERE MAILING OCCURRED)

I am over the age of eighteen years and not a party to the within entitled cause; my (business/residence) address is:

1006 - 4th Street, Suite 900, Sacramento, California 95814

On September 30, 1977, I served the attached FINAL DEMAND FOR COMPENSATION
(DATE)

(Pursuant to Code of Civil Procedure, on the Plaintiff
Section 1250.410, formerly Section 1249.3)

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the

United States mail at Roseville, California addressed as follows:

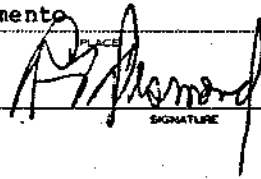
DENNIS DE CUIR
City Attorney, City of Roseville
316 Vernon Street
Roseville, California 95678

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on

September 30, 1977, at Sacramento, California.
(DATE) (PLACE)

RICHARD F. DESMOND

(TYPE OR PRINT NAME)



SIGNATURE

ATTORNEYS PRINTING SUPPLY FORM NO. 11
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DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

Attorney for Plaintiff

FILED
OCT 5 1977
M.A. DUBBAS
COUNTY CLERK OF PLACER COUNTY
BY [Signature]
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)

Plaintiff,)

v.)

WILLIAM J. ZISK and LOIS E.)
ZISK,)

Defendants.)

NO. 41104
PLAINTIFF'S EXHIBIT B IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

MICROFILMED

In support of its motion for partial summary judgment striking paragraphs V, VI, and VII of the Answer of WILLIAM J. ZISK and LOIS E. ZISK, Plaintiff, CITY OF ROSEVILLE files the following Exhibit B, which consists of verbatim excerpts from the deposition of Defendant, WILLIAM J. ZISK, taken on September 7, 1977, and excerpts from the answers to interrogatories propounded to defendants, served by mail on September 20, 1977. We have also attached a copy of Defendants' Answer to this exhibit.

I. DEPOSITION OF WILLIAM J. ZISK

Plaintiff referred to the following testimony of WILLIAM J. ZISK, taken at his deposition, in the declaration of DENNIS W. DE CUIR, filed in support of Plaintiff's motion for

1 summary judgment. The questions and testimony which appear below
 2 have been electronically reproduced and reduced from a copy of
 3 the certified transcript prepared by Beverly D. Toms, CSR and
 4 notary public, who duly swore the witness. A duplicate original
 5 of the deposition will be filed by the deposition reporter prior
 6 to the hearing on the motion for summary judgment.

7	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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9	12, 11. 7-28		
10	13, 11. 1		2

11
 12 " 7 Q Did anyone offer to involve you in any real estate trans-
 13 8 actions between 1952 and 1966, other than your residence at
 14 9 401 Sixth Street?

15 10 A We had solicited and were involved in locating a piece
 16 11 of ground. This may have involved discussing it with other
 17 12 individuals.

18 13 Q Where was that piece of property located, do you recall?

19 14 A There were numerous inquiries. I don't recall exactly
 20 15 which ones right offhand.

21 16 Q Were these inquiries initiated by you or by someone else?

22 17 A Both ways.

23 18 Q When you say you, you mean -- strike that. When you have
 24 19 used the term "we" in the preceding answers, did you intend
 25 20 to include yourself and Mrs. Zisk?

26 21 A Yes. "

/

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	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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3	12, 11. 7-28		
4	13, 11. 1		2

5	" 22	Q At the time of the solicitations for involvement in real	
6	33	estate transactions, were you looking for a particular type	
7	34	of property?	
8	23	A Yes.	

9	26	Q Describe the type of property you were looking for.	
10	27	A Primarily a piece of property that would be served as a	

11	28	base of operation for my business as well as a home, as well	
12	1	as speculative value."	

13

13, 11. 7-11

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14	13, 11. 7-11		3
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15	" 7	Q When you were looking for a piece of property that would	
16	8	serve as a base of operations for your business that would	
17	9	provide a home and also have some speculative value, did you	
18	10	examine the zoning map of the City of Roseville?	
19	11	A Yes."	

-----000000-----

21	13, 11. 15-18		3
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22	" 15	Q In examining the zoning map of the City of Roseville	
23	16	prior to 1966, did you come to acquire an understanding of the	
24	17	zoning regulations?	
25	18	A I believe I had an understanding, yes."	

26

27 /

28 /

PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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3	16, 11. 15-26	4
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4	* 15	Q Did you have friends or acquaintances who related to you information regarding the property before you purchased it?
5	16	
6	17	A There more than likely would have been discussions among relatives, yes.
7	18	
8	19	Q Do you recall the subject of the discussions?
9	20	A Prior history of the property, things of that nature.
10	21	Q Did those discussions involve the prior history of property with respect to its status as a flood plain?
11	22	
12	23	A Those discussions may have been discussed.
13	24	Q Was there any discussion of where the high water mark had historically been located when the property flooded?
14	25	
15	26	A There was discussions on that. "

-----000000-----

17	23, 11. 4-28	4
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20	*4	Q You have earlier explained that you acquired some familiarity with the zoning map and the zoning regulations of the City of Roseville, prior to the time you purchased your property in 1966. I'm handing you a copy of what appears to be a page showing the zoning districts existing in the City of Roseville in 1966. The page is identified at the bottom by the title, "City of Roseville Planning Department" and is also noted on the right-hand corner with the words, "Roseville, California. 1966."
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PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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23, 11.13-28		4
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4	<p>13 Mr. Zisk, I merely want to show you this so that you can familiarize yourself with what appear to be the zoning districts in existence at the time that you purchased your property on Thomas Street. Do you recall having looked at a map like this?</p>	
5		
6		
7		
8	<p>17 A It may not have been one exactly like this. I believe I may have seen a larger copy.</p>	
9		
10	<p>19 Q Do you recall looking at the boldly inked lines which appear to go over the property you now own at 205 Thomas Street?</p>	
11		
12	<p>22 A Yes.</p>	
13		
14	<p>23 Q Before you purchased the property did you examine such a map?</p>	
15		
16	<p>24 A Yes.</p>	
17		
18	<p>26 Q Were you then aware that the greater portion of your property before you purchased it had two types of zones that applied to it?"</p>	

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25, 11. 1-5		4
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21		25
22	<p>1 A Yes.</p>	
23		
24	<p>2 Q Did you know that one zone which applies to that area, which I will call for the purposes of illustration the northwesterly edge of your property, is an R-1 zone?</p>	
25		
26	<p>3 A Yes.</p>	
27		
28		

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
3	25, 11. 6-28		4
4	6	Q Did you realize at the time that you looked at this map and prior to the time you purchased your property, that most of it was identified with the zone entitled R-1 FP?	
5	7		
6	8		
7	9	A No. My recollection of the zoning was R-1 and R-1 FP.	
8	10	Unless my memory serves me incorrect. And the definitions of which was which was based on the areas adjacent to the creek as compared to the areas away from the creek and there was no definite line, it was definitely an arbitrary line.	
9	11		
10	12		
11	13	Q Let me explore with you what I think might be an explanation	
12	14	of your memory that the property was zoned R-1 and R-1 --	
13	15	strike that. Let me explain to you what I think might be an	
14	16	explanation for your memory, that the property was zoned R-1	
15	17	and R-1 FP. May it not have been the case that your memory	
16	18	that the property was zoned R-1 means that part of the property	
17	19	on this northwest corner had the R-1 zoning designation and that	
18	20	the greater portion of your property which is south and easterly	
19	21	of that bold meandering line was in the zone entitled R-1 FP?	
20	22		
21	23	A No. No, my interpretation was that the entire property,	
22	24	which included that area, was R-1, R-1 FP.	
23	25		
24	26	Q What did that mean to you when it was so designated?	
25	27	A It meant that you could use it for building purposes with	
26	28	the aid of a use permit.	
27	29	Q Did you have that understanding prior to the time you"	
28	30		
29	26, 11. 1-2		4
30	31	purchased your property in 1966?	26
31	32	A Yes."	
32	33		

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
	26, 11. 3-28		4
	" 3	Q How did you come to that understanding? Was it through	
	4	conversations with persons knowledgeable in the area of planning	
	5	and zoning?	
	6	A It was by checking the uses on the existing zoning maps.	
	7	Q On the copy of the map that I'm holding in my hand, I'm	
	8	going to mark with a red pen the bold line that meanders on	
	9	this map through what appears to be your property. Now, I	
	10	ask you, do you recall seeing the location of that bold line	
	11	that's marked in red on the zoning map that you saw prior to	
	12	the time you purchased your property in 1966?	
	13	A I can't say that I recall exactly that's where I saw it.	
	14	Q Do you think that's where it may have been?	
	15	A It more than likely possibly may have been there.	
	16	Q Did you inquire of anyone about the fact that it appears	
	17	the existing residence is shown by a box and the existing rental	
	18	is shown by another small box south and easterly of that line	
	19	I've marked in red?	
	20	A I also observed that the creek is not anywhere near where	
	21	it actually is.	
	22	Q Did you make inquiry of any person regarding the fact that	
	23	this line which apparently identifies the R-1 FP zone included	
	24	the residence and the rental within it?	
	25	A Did I inquire?	
	26	Q Did you ask anyone in City Hall about the fact that this	
	27	line I have marked in red included the residence and the rental	
	28	within the R-1 FP zone? "	

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
3	27, 11. 1-28		4
4	*1	A No.	
5	2	Q Did you inquire of anyone else about that fact?	
6	3	MR. DESMOND: I'll object to the form of the question.	
7	4	It assumes that that line was in existence. And it assumes	
8	5	something not in evidence. He says he doesn't recall whether	
9	6	that line was there or where it was.	
10	7	Q What was your understanding of the reasons behind the R-1	
11	8	FP designation, Mr. Zisk?	
12	9	A That there would be areas that could possibly be subject	
13	10	to flooding and those would be the areas that would be controlled	
14	11	under the FP portion.	
15	12	Q So you have testified now that you knew in advance, before	
16	13	you purchased the property at 205 Thomas Street, that in order	
17	14	to develop it under the existing zoning, you would need to	
18	15	apply for and be granted a use permit from the City of Roseville,	
19	16	is that correct?	
20	17	A That is correct.	
21	18	Q While you cannot exactly recall, you think it may have been	
22	19	the case that the northwesterly boundary of the R-1 FP zone	
23	20	is located where I've drawn it in, in red, on that bold line?	
24	21	On the map I have shown you.	
25	22	A Are you asking me, again, if I recall if that's where the	
26	23	line was?	
27	24	Q Let me ask the deposition reporter to read the question	
28	25	back.	
	26	(Whereupon the Court Reporter read back the last question.)	
	27	Q Let me rephrase that question, Mr. Zisk. It might be	
	28	easy to answer if I can try again to put it in words that are "	

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
3	28, 11. 1-28		5
4	" 1	easy to understand.	28
5	2	My understanding of your testimony is that you do not	
6	3	exactly recall where the northwesterly boundary of the R-1 FP	
7	4	zone lay, but while you do not exactly recall, it is your	
8	5	thinking that it may well have been where I have marked it in	
9	6	red on this map, is that correct?	
10	7	A It could possibly be, yes.	
11	8	Q Thank you. Please mark this as the Plaintiff's Exhibit	
12	9	Number 1, for identification.	
13	10	(Plaintiff's Exhibit No. 1, marked for	
14	11	identification: One-page map entitled	
15	12	"City of Roseville, Planning Department,	
16	13	Roseville, California, 1966.")	
17	14	Q Mr. Zisk, were you aware that the U. S. Army Corps. of	
18	15	Engineers had done a study of the Dry Creek Drainage Basin	
19	16	and the flooding of Dry Creek and its tributaries in 1965?	
20	17	A '65?	
21	18	Q Yes.	
22	19	A I'm not aware of that.	
23	20	Q Had you inquired about any scientific evidence regarding	
24	21	the flooding of the property you bought in 1966 before you	
25	22	purchased it?	
26	23	A Could you read that back again, please.	
27	24	(Whereupon the Court Reporter read back the last question.)	
28	25	A Scientific. No.	
	26	Q And correct me if I'm wrong, you did not ask about any	
	27	studies or inquire about any scientific evidence that would have	
	28	given you information on how or when or what kind of flooding	
		might occur on the property you bought in 1966 before you	
		purchased it?"	

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
3	29, 11. 1-28		6
4			39
5	" 1	A From whom?	
6	2	Q From anyone. A No.	
7	3	Q What did you intend to do with the property?	
8	4	MR. DESMOND: When?	
9	5	Q When you purchased it in 1966.	
10	6	A I thought I had answered that previously. We originally purchased the property to use as a base of operations for my business, to use as a residence, and on a speculative basis to develop the balance of it.	
11	7		
12	8	Q I'm sorry, I don't mean to ask you questions twice. I try to avoid it. I believe that the question I asked you earlier related to the properties that you were looking at before you purchased your property in 1966. I think I had asked you what it was you were looking for. And what types of property you were interested in.	
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1 2 3 4	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
5	30, 11. 1-28		6
6			30
7	"1	dwelling units, connecting it with Thomas Street?	
8	2	A I don't believe a discussion of a driveway took place, but	
9	3	the discussions of the two residences did, yes.	
10	4	Q Did you draw up plans for the two dwellings you were	
11	5	thinking of building?	
12	6	A They weren't specified exactly, no.	
13	7	Q Did you investigate or seek information on filing a parcel	
14	8	map in order to build two dwelling units on your property?	
15	9	A The time I approached the Planning Commission was an inquiry,	
16	10	and in their reviewing the request they were receptive to the	
17	11	dwellings on basically two stipulations. That they felt that	
18	12	I should clean the channel of the creek and get a lot split.	
19	13	Q Did you talk to any engineers about getting a lot split?	
20	14	A I don't believe I did at that time.	
21	15	Q Wasn't it a fact that at the Planning Commission meeting	
22	16	on February 23, 1967 that the meeting was continued in order to	
23	17	provide you the opportunity to file a parcel plan for your	
24	18	property?	
25	19	A I'm not exactly certain.	
26	20	Q Why didn't you file a parcel map?	
27	21	A There was some complications that arose shortly thereafter.	
28	22	Q What were those complications?	
29	23	A I don't know if you brought out the fact that we were not	
30	24	originally the sole owners of that property. By "myself", I	
31	25	mean the wife and I.	
32	26	Q Please explain.	
33	27	A Originally the property was purchased with four individuals	
34	28	on the title. Two being my wife and myself. The other two "	

1 2 3	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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4	36, 11. 1-28		6
5			36

1 I'm having difficulty hearing.

2 THE WITNESS: I'm speaking this way, I guess. Maybe I
3 could turn just a little. How is that?

4 Q I'm sorry, I've forgotten the question I asked.

5 MR. DeCUIR: Could you read it back.

6 (Whereupon the Court Reporter read back the last question.)

7 Q But, as you have said, then you had not approached
8 either your parents or your wife's parents for assistance?

9 A No.

10 Q I don't want to belabor the point at all, Mr. Zisk, but
11 I do want to ask you, when you said just a few moments ago
12 that the delay in the conveyance of your parents' interest
13 had great bearing on your inability to go forward with your
14 development plans, if there were, to your knowledge, any other
15 reasons which may have had a lesser bearing on you not going
16 forward at that time.

17 A Are you asking if there was any lesser --

18 Q Yes.

19 A Not to my knowledge.

20 Q So if we eliminate all lesser difficulties that might have
21 had, as far as you can recollect, any bearing on your inability
22 to proceed with construction in 1967, the one reason that
23 remains is the fact that you owned your property along with
24 your parents and that they wished to convey their interest to
25 you and not join with you in your construction of the second
26 dwelling for them. Is that correct?

27 A That's correct.

28 Q Looking at it another way then, the City of Roseville?

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
3	37, 11. 1-28		7
4			37
5	1	or its Officers, employees or officials, had nothing to do with	
6	2	your inability to proceed with construction in 1967, is that	
7	3	correct?	
8	4	A At that time, no.	
9	5	Q You had earlier testified as to the reasons you purchased	
10	6	your property at 205 Thomas Street. As I remember your	
11	7	testimony, you said that you wanted to be able to use the property	
12	8	in your business. You wanted to have a property which would	
13	9	also provide you a home site. And that you wanted to purchase	
14	10	property also for speculative purposes.	
15	11	When you said that you wanted to use the property in your	
16	12	business, could you describe for the record what business you	
17	13	had in mind at the time.	
18	14	A The continuation of my sand and gravel business.	
19	15	Q Your sand and gravel business involves hauling sand and	
20	16	gravel and aggregate, or is it just sand and gravel?	
21	17	A Sand, gravel, aggregates of all types, just about any	
22	18	commodity that can be hauled in a dump truck. Could include	
23	19	bark, landscape materials, fertilizer -- whatever.	
24	20	Q And that's the same business that you started in 1952?	
25	21	A Yes.	
26	22	Q When you left employment with the County of Placer.	
27	23	A Yes.	
28	24	Q Up until today's date, you have been engaged in that very	
29	25	same business, since 1952, without change, is that correct?	
30	26	A Changes of equipment, but --	
31	27	Q No change in the nature of your business.	
32	28	A Nature of the business is the same.*	

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
3	38, 11. 1-28		7
4			38
5	" 1	Q In using your property for your sand and gravel business	
6	2	then, what is it that the property provides for your use?	
7	3	A A base to maintain the equipment, office facilities	
8	4	for conducting a business. Areas for stockpile materials.	
9	5	Q What kind of materials do you stockpile?	
10	6	A On occasions, sand, gravel, top soil, decomposed granite.	
11	7	Q Have you ever planned since you purchased your property to	
12	8	conduct any other business there?	
13	9	A Other than a speculation?	
14	10	Q Yes.	A No.
15	11	Q Has anyone approached you about using your property for	
16	12	any other use other than, perhaps, purchasing it from you?	
17	13	A Not that I recollect.	
18	14	Q You had mentioned speculation as one of the reasons you	
19	15	purchased your property. Could you describe for me completely	
20	16	what you had in mind.	
21	17	A Eventual development of the property.	
22	18	Q How did you intend to develop it?	
23	19	A There wasn't a definite commitment, but the existing	
24	20	zoning permitted residential uses and this was the most readily	
25	21	available use.	
26	22	Q Was it that you had in mind to parcel the property in as	
27	23	many residential units as could fit on the land and then to	
28	24	sell the lots?	
29	25	MR. DESMOND: By "you", do you mean him or any ultimate	
30	26	buyer or whether it was just his personal --	
31	27	MR. DeCUIR: Mr. Zisk or any other person with whom you	
32	28	might deal."	

1	PAGE AND LINE	DEPONENT'S TESTIMONY	DECLARANT'S
2	REFERENCE TO		PARAGRAPH
3	DEPOSITION		NUMBER
3	42, 11. 1-28		8
4			42
5	* 1	would be, inasmuch as this is fairly much in my line of work.	
6	2	Q You presently have the rental you described which provides	
7	3	you an income of \$88 a month, is that correct?	
8	4	A I believe I said \$85 to \$87, I'm not sure of the amount.	
9	5	Q Do you derive any other income from the property right	
10	6	now?	
11	7	A Actual cash income other than the business use?	
12	8	Q Yes, income.	
13	9	A No.	
14	10	Q Other than the use of your property for your trucking	
15	11	business, your sand and gravel trucking business.	
16	12	A No.	
17	13	Q What I want to do is ask you that same question for every	
18	14	year that you've owned the property, from the present time back	
19	15	to the date that you bought the property. Now, rather than	
20	16	asking you that same question for each year, going from 1977	
21	17	to 1976, etcetera, I can just ask you the one question and that	
22	18	is, if you have derived any income from your property other than	
23	19	from the use of it for your sand and gravel trucking business	
24	20	in any year during the time that you've owned the property.	
25	21	Now, if your memory is as good as it's shown itself to be	
26	22	all morning long and this part of the afternoon, then maybe	
27	23	you can answer that question without going from year to year to	
28	24	year to year. Can you answer that question?	
	25	A I don't believe I have.	
	26	Q So that we can get it clear for the record, then it is your	
	27	testimony that you have not derived any income from the property	
	28	other than the income you receive in your sand and gravel	
		trucking business and the rental income that you derive from the	

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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3	43, 11. 1-2		8
4			
5	" 1	rental on your property, is that correct?	43
6	2	A I believe that's correct."	

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8	45, 11. 19-28		8
9	" 19	Q (By Mr. DeCuir) Did you use the property you owned for any agricultural purposes since you purchased it?	
10	20		
11	21	A Yes.	
12	22	Q What were those? Did you grow crops?	
13	23	A I pastured a horse on there. For almost the entire time I've been there.	
14	24		
15	25	Q Do you still have the horse?	
16	26	A Yes.	
17	27	Q Did you have any other livestock?	
18	28	A Chickens. You mean during this entire period that we have "	

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19	85, 11. 1-5		8
20			
21	" 1	Q Did you base your allegation that the property was worth that figure on the opinions of other persons?	85
22	2		
23	3	MR. DESMOND: If you can recall. If you don't recall,	
24	4	say so.	
25	5	A I don't recall."	

26 /

27 /

28 /

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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85, 11. 6-28

8

*6 Q You have earlier testified that at the time you sought to
7 acquire the property and all of the property that you had in
8 mind a number of purposes. Use as a home site, use for your
9 business, and speculation. Isn't it your testimony that you
10 have been able to continue the use of the property as a home
11 site and for your business since the date you acquired it up
12 to today's date?

13 A Yes.

14 Q And there has been no change in your ability to use the
15 property for your home site and for your business since the
16 time you acquired it to today's date?

17 A I believe that's correct.

18 Q Is it your testimony that insofar as the uses of the
19 property for your home site and for your businesses are
20 concerned -- strike businesses and insert business -- that
21 the planning and zoning regulations of the City of Roseville
22 have had no economic effect whatsoever on those two uses of your
23 property? Is that your testimony?

24 A I believe so.

25 Q Is that your testimony?

26 A I believe so.

27 Q So when you get right down to it, the only effect upon the
28 value of your property that you can see from the planning and "

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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3	86, 11. 1-8		8
4			86
5	" 1	zoning regulations of the City of Roseville is, in effect, upon	
6	2	the value of your property for speculative purposes. Isn't	
7	3	that your testimony?	
8	4	A Or any future use of the property.	
9	5	Q For speculative purposes?	
10	6	MR. DESMOND: Well, if that's speculative purposes.	
11	7	I object to the form of the question. It's been asked and	
12	8	answered, also."	

ooo000o

13	88, 11. 20-28		9
14	"20	Q During 1967, were you aware of the City's consideration	
15	21	of a report which later became entitled, "Park, Stream Bed and	
16	22	Recreation Element of the General Plan?"	
17	23	A Yes.	
18	24	Q Did you attend any public meetings with respect to that	
19	25	particular plan?	
20	26	A Yes.	
21	27	Q Did you speak with respect to that plan?	
22	28	A No, I don't believe I did."	

22		/	
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28		/	

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
3	89, 11. 1-7		9
4			89
5	"1	Q Were you able to examine a copy of that plan before its 2 adoption by the City Council?	
6	2		
7	3	A Adoption as a guide?	
8	4	Q As an element of the General Plan.	
9	5	A At the time that this document was proceeding through the 6 Council it was always my interpretation that that document was 7 being referred to as a "Guide."	
10			
11			
12		-----000000-----	
13	90, 11. 1-28		9
14			90
15	"1	meetings because you were otherwise occupied or you were busy 2 or you had some other reason not to go to a Council meeting 3 to tell people what you thought.	
16	2		
17	3		
18	4	A Maybe I better clarify this. I don't recall saying I 5 did not attend these meetings. I did -- I was here the 6 night that they adopted that plan. And it was the unanimous 7 consensus of the Council, to my knowledge, as I sat out there 8 in those chambers, that the City of Roseville would never be 9 able to implement that plan, but rather than discard it totally 10 that they would retain it and use it strictly as a guide for 11 future reference.	
19	5		
20	6		
21	7		
22	8		
23	9		
24	10		
25	11	Q Is it your impression that it has been used for any other 12 means than a guide?	
26	13		
27	14	A It appears that way now."	
28			

1 2	PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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3	90, 11. 15-28		9
4	" 15	Q In what manner has it been used --	
5	16	A It's being used as a definite plan.	
6	17	Q -- rather than a guide?	
7	18	A Yes.	
8	19	Q You are aware, are you not, that other properties have been acquired by the City for bike trail and hiking path purposes?	
9	20		
10	21		
11	22	A Yes.	
12	23	Q In 1968 did you have any contact with City employees or officials with respect to your proposal to build two dwelling units on your property?	
13	24		
14	25	A Did I have occasion to contact any Councilman?	
15	26	Q No, officials or employees.	
16	27	A I don't believe I did."	
17	28		

18	92, 11. 26-28		9
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19			
20			
21	" 26	Q Since your testimony is that between 1969 and 1972 you did not go forward with your development of plans because you were bearing the full burdening of the financing on your "	
22	27		
23	28		

24		/	
25		/	
26		/	
27		/	
28		/	

PAGE AND LINE REFERENCE TO DEPOSITION	DEPONENT'S TESTIMONY	DECLARANT'S PARAGRAPH NUMBER
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3	93, 11. 1-11	9
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4		93
5	" 1 property, I want to ask you if you, during those years,	
6	2 contacted any lenders or persons who may have assisted you in	
7	3 financing your development of plans.	
8	4 MR. DESMOND: Hasn't that been asked and answered this	
9	5 morning?	
10	6 MR. DeCUIR: It may have been, Mr. Desmond. I'm not	
11	7 sure.	
12	8 THE WITNESS: I don't believe --	
13	9 MR. DESMOND: I'll stipulate he didn't.	
14	10 THE WITNESS: I'll answer it again. I don't believe	
15	11 I did contact any lenders."	

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II. INTERROGATORIES

PAGE AND LINE
REFERENCE TO
ANSWERS TO
INTERROGATORIES

INTERROGATORIES AND
ANSWERS THERETO

PAGE AND LINE
REFERENCE TO
PLAINTIFF'S
POINTS AND
AUTHORITIES

11, 11. 4-12

" 4 INTERROGATORY NO. 17: State the date upon which
5 you contend that any portion or all of your property was
6 allegedly confiscated or taken by the City of Roseville,
7 including each fact supporting your contention that such
8 property was confiscated and taken on the date you contend
9 the confiscation or taking occurred.

10 ANSWER: On or about March 15, 1973, or at
11 some date thereafter, the exact date of which is unknown at this
12 time. "

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11, 11. 13-17

" 13 INTERROGATORY NO. 18: At any time since the date
14 you acquired your property, have you made any attempt to
15 sell the property, or any part thereof, in any manner
16 whatsoever?

17 ANSWER: No. "

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1 PAGE AND LINE
2 REFERENCE TO
3 ANSWERS TO
4 INTERROGATORIES

INTERROGATORIES AND
ANSWERS THERETO

PAGE AND LINE
REFERENCE TO
PLAINTIFF'S
POINTS AND
AUTHORITIES

11, 11. 18-28

6 " 18 INTERROGATORY NO. 19: If your answer to Interrogatory
7 19 No. 18, above, is in the affirmative, state the following
8 20 with regard to each such attempt considered in your answer
9 21 thereto:
10 22 a. Describe each and every such attempt;
11 23 b. If any attempt or attempts were made to sell,
12 24 state the price at which the property was offered
13 25 for sale and state what part or parts were so
14 26 offered;
15 27 c. State the date each such offer was made;
16 28 ANSWER: Not applicable."

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PAGE AND LINE
REFERENCE TO
ANSWERS TO
INTERROGATORIES

INTERROGATORIES AND
ANSWERS THERETO

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PLAINTIFF'S
POINTS AND
AUTHORITIES

12, 11. 1-20

INTERROGATORY NO. 20: State whether any person has made any offer to purchase, lease, rent or otherwise acquire any interest in your property from the time you first acquired it to the present time. In addition, give the following:

- a. The date thereof;
- b. The name, business and home telephone numbers and addresses of the person making such offer;
- c. Describe simply the portion of the property which was involved in such offer;
- d. State whether such offer was oral or in writing;
- e. State each term of such offer or offers, including the price or other consideration, and all conditions attached thereto;
- f. State the name, address, business and occupation or position of the person to whom or through whom such offer or offers were transmitted;
- g. State each and every reason why such offer or offers were not accepted by you.

ANSWER:

NO.

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1 2 3	PAGE AND LINE REFERENCE TO ANSWERS TO INTERROGATORIES	INTERROGATORIES AND ANSWERS THERETO	PAGE AND LINE REFERENCE TO PLAINTIFF'S POINTS AND AUTHORITIES
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4 12, 11. 21-28
5 13, 11. 1-4

6 *21 INTERROGATORY NO. 21: State the facts upon which
7 22 you base your allegation that the fair market value of the
8 23 subject property was higher before the alleged "precondemnation
9 24 announcements," which you contend resulted in a decline in
10 25 the fair market value of the property in paragraph V of your
11 26 Answer on file herein.

12 27 ANSWER: Subsequent to the implementation
13 28 of the City Plans by action of City officials, it is the opinion
14 1 of the Defendants that upon being fully informed of those
15 2 circumstances, any prospective buyer of the property would come
16 3 to the conclusion that he could never develop the property and
17 4 therefore, its use was forever limited to existing conditions."

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1 PAGE AND LINE
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3 ANSWERS TO
4 INTERROGATORIES

INTERROGATORIES AND
ANSWERS THERETO

PAGE AND LINE
REFERENCE TO
PLAINTIFF'S
POINTS AND
AUTHORITIES

5 13, 11. 5-25

6 "5 INTERROGATORY NO. 22: State the facts on which you
7 base your contention that the alleged "precondemnation
8 announcements" resulted in a loss of rent, revenue, profits
9 and returns on the property, as alleged in subparagraph a of
10 paragraph V in the Answer on file herein, setting forth in
11 detail that portion of the subject property and any improve-
12 ments thereon that would have otherwise produced rent,
13 revenue, profits and returns but for the alleged "precondemna-
14 tion announcements."

15 ANSWER: If the lot split had been granted,
16 Defendants would have built a new home on Parcel A and used the
17 remainder for rental as an interim use pending ultimate sale or
18 development of the property. Defendants were deprived of the
19 full use, benefit, and revenue of their property as a result and
20 the ability to improve and enhance the value of the property and
21 its rental income. The loss consisted of loss of reasonable
22 return on the before value of the property plus the expenses
23 incurred in connection with the application for the lot split
24 and use permit, together with taxes attributable to the portion
25 of the property completely removed from use for the purposes
described in the Complaint, from the date of the lis pendens."

26 DATED: October 4, 1977

27 RESPECTFULLY SUBMITTED,

28 
DENNIS W. DE CUIR

City Attorney
Attorney for Plaintiff

MAR 2 1974
CITY ATTORNEY

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DESMOND, MILLER & DESMOND
1006 - 4th St., 9th Floor
Sacramento, Calif. 95814
Telephone: (916) 443-2051

Attorneys for Defendants
WILLIAM J. ZISK and LOIS E. ZISK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

---ooc---

CITY OF ROSEVILLE, a municipal corporation,	)	No. 41104
)	
Plaintiff,	)	<u>ANSWER TO COMPLAINT</u>
)	
.vs.)	
)	
WILLIAM J. ZISK, LOIS E. ZISK et al.,)	
)	
Defendants.)	

Come now the defendants, WILLIAM J. ZISK and LOIS E. ZISK and answering the complaint in eminent domain on file herein, admit, deny, and allege as follows:

I

Answering Paragraphs I, II, V, VI, and VII of the complaint these answering defendants have no information or belief concerning the allegations in said paragraphs contained, and therefore deny each and every, all and singular, the allegations in said paragraphs contained for lack of information and belief.

II

Deny each and every, all and singular, the allegations contained in Paragraphs III, IV and VIII of the complaint.

III

Answering Paragraph IX, these answering defendants deny that any other person has any interest in the real property

DESMOND, MILLER & DESMOND
ATTORNEYS AT LAW
1006 FOURTH STREET
SUITE 901
SACRAMENTO, CALIF.
TELEPHONE 443-2051

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OFFICE OF THE CITY ATTORNEY

1 and allege that these answering defendants are the sole owners
2 of the property and that no other party has any interest in said
3 parcel of real property.

IV

4
5 These answering defendants allege that at the time
6 of filing this answer, they have no information or belief as to
7 the value of the real property interests herein sought to be
8 condemned, nor do they have any information or belief as to the
9 amount of damages suffered by the remainder of their property,
10 and they pray for leave of court to amend this answer to insert
11 the true value of the real property and the severance damages
12 to the remainder when it has been ascertained.

V

13
14 That as a direct and proximate consequence and result
15 of the actions and conduct and precondemnation activities of the
16 plaintiff, defendants have been damaged and injured as follows:

17 a. That the fair market value of the subject property
18 declined as the result of plaintiff's precondemnation announce-
19 ments that it intended to condemn portions of said property and
20 that they were unable to fully use their property to their
21 damage which is reflected in depreciation of value of the
22 property and from the loss of use of the property for its highest
23 and best use, loss of rent, revenue, profits and returns on the
24 property, and the capital investment of defendants and holding
25 costs, charges and expenditures incurred by defendants in
26 holding their said land for the benefit of the plaintiff; and/or

27 b. That the acts of the plaintiff which have occurred
28 since, during and subsequent to the adoption of the Park and
29 Recreation Plan, did constitute and create a direct legal
30 restraint on the use of, and were a physical invasion of the
31 subject property for the purposes of public parks and recreation
32 and/or all of the acts of the plaintiff were calculating designed

1 to decrease any future condemnation award, and, because of these
2 particularly oppressive acts by the plaintiff, the taking of the
3 property required in the complaint and the severance damage to
4 the remainder did actually occur at a date earlier than the
5 date set by C.C.P. Section 1249. Defendants are uncertain of
6 the exact amount of the damages alleged in this paragraph, and
7 pray leave to insert those amounts when the same have been
8 ascertained.

VI

9
10 That by reason of the nature of the activities of the
11 plaintiff occurring prior to the issuance of summons herein,
12 a different valuation date than that required by Section 1249
13 C. C. P. is required in order to effectuate the constitutional
14 requirement of just compensation; that the exact date is unknown
15 to defendants at this time, and defendants pray leave to amend
16 this answer to insert the proper date when it has been
17 ascertained.

VII

18
19 That by reason of all of the acts and conduct of the
20 plaintiff from the adoption of the Parks and Recreation Plan
21 and the Open Space Element of the General Plan, it is estopped
22 to deny that it has taken the property sought to be acquired in
23 the complaint herein, and damage to the remainder of the subject
24 property for public purposes, and it is further estopped to deny
25 that all of the public purposes outlined in the Parks and
26 Recreation Plan and in the Open Space Element of the General
27 Plan are the work of improvement for which the property described
28 in the complaint is being acquired, and it is further estopped
29 to deny that it has acquired an interest in all of the property
30 owned by these answering defendants as of the effective date of
31 taking and devaluation which the trier of fact may find to be
32 required in order to effectuate the constitutional requirement

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of just compensation.


WHEREFORE, defendants pray for judgment against the plaintiff as follows:

1. That the plaintiff take nothing by reason of its complaint in eminent domain, and that defendants be dismissed with their costs.

2. That if the property owned by defendants is condemned that they be awarded the market value of the property and severance damages, together with their costs of suit incurred herein, and interest on the award at 7% per annum from the date that the plaintiff exercised possession of the property until paid.

3. For such other and further relief as to this Court seems meet and just.

DESMOND, MILLER & DESMOND
Attorneys for Defendants

By 
RICHARD F. DESMOND

STATE OF CALIFORNIA

COUNTY OF PLACER

CITY OF ROSEVILLE v. ZISK
ss. NO. 41104

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business residence address is:

City Hall, 316 Vernon Street, Roseville, CA 95678

On October 4, 1977, I served the within Plaintiff's Exhibit B

in Support of Motion for Partial Summary Judgment

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope

with postage thereon fully prepaid, in the United States post office mail box at Roseville, CA 95678 addressed as follows:

Richard F. Desmond, Esq.
DESMOND, MILLER, DESMOND
& BARTHOLOMEW
1006 4th Street, Suite 900
Sacramento, CA 95814

Dated at Roseville, California

Date October 4, 1977

I certify (or declare), under penalty of perjury * that the foregoing is true and correct.

Cheri P. Martin
(Signature) CHERI P. MARTIN

1 DESMOND, MILLER, DESMOND & BARTHOLOMEW
2 1006 - 4th Street, Suite 900
3 Sacramento, California 95814
4 Telephone: 443-2051

FILED

OCT 6 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY.

M. I. Dobbas
DEPUTY

Attorneys for Defendants

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

10 CITY OF ROSEVILLE, a municipal
11 corporation,

No. 41104

12 Plaintiff,

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

13 vs.

14 WILLIAM J. ZISK and LOIS E.
15 ZISK,

MICROFILMED

16 Defendants.

17 I

18 REQUIREMENTS FOR PARTIAL SUMMARY JUDGMENT OR RULING
19 THAT ISSUES ARE WITHOUT SUBSTANTIAL CONTROVERSY.

20 Section 437(c) of the Code of Civil Procedure provides
21 that a Motion for Summary Judgment may be granted or a ruling
22 that certain issues are without substantial controversy made "if
23 all the papers submitted show that there is no triable issue as
24 to any material fact." It further provides that in "determining
25 whether the papers show that there is no triable issue as to any
26 material fact the Court shall consider all of the admissible
27 evidence set forth in the papers and all inferences reasonably
28 deducible from such evidence, except Summary Judgment shall not

1 be granted by the Court based on inferences reasonably deducible
2 from such evidence, if contradicted by other inferences or
3 evidence, which raise a triable issue as to any material fact."
4 (Emphasis added.)

5 The section provides that supporting and opposing affidavits
6 or declarations shall be made by "any person on personal knowledge,
7 shall set forth admissible evidence, and shall show affirmatively,
8 that the affiant is competent to testify to the matters stated
9 therein." The Motion "shall be supported or opposed by affidavits,
10 declarations, admissions, answers to interrogatories, depositions
11 and matters of which judicial notice shall or may be taken."
12 (Emphasis added.)

13 The Summary Judgment Motion has been said to be "drastic"
14 and should be used with caution so that it does not become a
15 substitute for the open trial method of determining facts.
16 Whitney's At The Beach vs. Superior Court, 3 Cal.App.3d 258, 267
17 (1970). If there is any doubt as to the propriety of the Motion,
18 the Court should deny the Motion. Southern Pacific Co. vs.
19 Fish, 166 Cal.App.2d 353, 361-362 (1958); Jack vs. Wood, 258
20 Cal.App.2d 639, 645-646 (1968).

21 Before any defects in the counter-affidavits of the opposing
22 party need be examined, the sufficiency of the supporting affida-
23 vits of the moving party must be found. The supporting affidavits,
24 to be sufficient, must comply with statutory requirements even
25 though no counter-affidavit is filed, and also where the counter-
26 affidavit is insufficient. Jack vs. Wood, supra.

27 The supporting affidavits must contain facts sufficient
28 to entitle the moving party to a Judgment or ruling that there is

1 no substantial controversy on certain issues; the facts stated in
2 the affidavit must be within the personal knowledge of the
3 affiant and shall be set forth with particularity; and the
4 affidavit shall show affirmatively that the affiant, if sworn,
5 can testify competently to those facts. Southern Pacific Co.
6 vs. Fish, supra.

7 The requirement of particularity in the statement of
8 facts in the supporting affidavits means that all requisite
9 evidentiary facts must be stated, not merely ultimate facts or
10 conclusions of law. Dixon vs. Grace Lines, Inc., 27 Cal.App.3d
11 278, 289 (1972); Kramer vs. Barnes, 212 Cal.App.2d 440, 446
12 (1963); Jack vs. Wood, supra. The word "particularity" in a
13 pleading or affidavit means the detailed statement of particulars;
14 the word "particulars" has been held to be synonymous with
15 "details". Jack vs. Wood, supra.

16 Statements of an affiant in a supporting affidavit which
17 are not shown to be within his personal knowledge, or for which a
18 proper foundation is not shown as admissible opinion testimony,
19 do not constitute the proof required by the statute. The suffi-
20 ciency of an affidavit must be tested by the same rules as those
21 applicable to oral testimony. Kramer vs Barnes, supra; Dixon vs.
22 Grace Lines, supra.

23 The alleged "facts" must be competent and admissible
24 as evidence. Upon a Motion for Summary Judgment there is no
25 waiver of the right to object to incompetent evidence. Larsen
26 vs. Johannes, 7 Cal.App.3d 491 (1970).

27 The inquiry on such a Motion must be directed to the
28 issues raised by the pleading. Freidberg vs. Freidberg, 9

1 Cal.App.3d 754 (1970).

2 Rules existing prior to the 1973 changes in the Summary
3 Judgment statute as to the strict evidentiary and substantive
4 requirements of the moving declarations, the construction of
5 those declarations, in case of doubt against the moving party,
6 the duty of the Court to deny the remedy when a triable issue
7 appears, and other rules laid down in the decisions predating the
8 statutory amendment were unaffected by the amendment. See 48
9 Cal.S.B.J. 654, 732 (1973); 4 Witkin, California Procedure 2nd,
10 1975 Supplement, sec. 183. See also Primer for Summary Judgment,
11 Judge Ernest J. Zack, (1970), 2 West LA, L. Review and Summary
12 Judgment Act, Ernest J. Zack, (1973), 48 State Bar Journal,
13 654.

14 Depositions, documents, and records of a former proceeding
15 were stated to be considered in the same light as declarations in
16 strictly construing the moving party's showing and liberally
17 construing the opposing party's opposition. Toel Research
18 & Engineering Corp. vs. Henigson, 46 Cal.App.3d 675, 678-679
19 (1975).

20 II

21 THE COURT CANNOT CONSIDER THE DEPOSITION OF WILLIAM ZISK

22 Many of the facts relied upon by Plaintiff in this Motion
23 are derived from the Zisk Deposition. Mr. Zisk's Deposition was
24 taken on September 7, 1977, and pursuant to Code of Civil Procedure,
25 Section 2019(e) Mr. Zisk was notified on September 23, 1977, that
26 his Deposition was now available for his reading, correcting and
27 signing. The Deposition has not been filed and is NOT a part of
28 the record. Mr. Zisk has until October 22, 1977, in which to

1 read, correct and sign the Deposition. The only authority for
2 the use of Depositions in civil cases lies in the Code of
3 Civil Procedure. Unless a Deposition is taken, signed and filed
4 pursuant to the Code, it may not be admitted in evidence at trial
5 or at a hearing. (Voorheis vs. Hawthorne-Michaels Company, 151
6 Cal.2d 688, 694). Code of Civil Procedure, Section 2019(e)
7 clearly provides that before the Deposition is filed, the deponent
8 must be given thirty (30) days in which to correct, approve or
9 refuse to approve the Deposition. A Deposition is not final
10 until read, signed and filed. Until that time it may be corrected
11 or the answers changed. Certainly, an answer in a Deposition
12 remains undetermined, or uncertain, until such time as the
13 document is signed. (Coy vs. Superior Court, 58 Cal.2d 210,
14 218-219). It is the reading and signing of a deposition by the
15 deponent that renders it his testimony, rather than its mere
16 recordation by a reporter." (Reimel vs. House, 268 Cal.App.2d
17 780, 786).

18 Since the Deposition of Mr. Zisk has yet to be signed
19 and filed with the Court, it is not a paper available to this
20 Court in determining whether or not there are triable issues of
21 fact in the case at bar.

22 III

23 THE COURT CANNOT CONSIDER THE DECLARATION OF
24 DENNIS DE CUIR.

25 The declaration of Dennis De Cuir, attorney for Plaintiff
26 herein, may not be considered by this Court in determining the
27 Motion for Partial Summary Judgment, since it does not comply
28 with the requirements of C.C.P. Section 437(c). The affidavit

-5-

1 fails to state that he "is competent to testify to the matters
2 stated therein, or that the facts stated therein are within the
3 personal knowledge of declarant. As the Court in De Echeguren
4 vs. De Echeguren, 210 Cal.App.2d 141, 148 held:

5 "Nowhere does [the declaration] allege facts, let alone
6 facts with the requisite particularity and within the
7 personal knowledge of the declarant. Nowhere does [the
8 affidavit] make an affirmative showing that the declarant,
9 if sworn as a witness, could testify to any factual matters.
10 It is clear that the declaration fails to establish that
11 defendants are entitled to summary judgment."

12 Moreover, the declaration is entirely hearsay and therefore
13 cannot be considered. It consists entirely of a statement
14 of the declarant's interpretation of a document or paper which,
15 at least at this time, cannot be considered by the Court for the
16 reasons discussed above. It is an attempt to do by hearsay what
17 cannot be accomplished by the original. Furthermore, if the
18 paper (the Deposition) can be considered, it MUST be considered
19 in its entirety and NOT via a hearsay paraphrasing of the document.

IV

THE NOTICE OF MOTION IS ITSELF DEFECTIVE AND AMBIGUOUS

20 The Notice of Motion states that the Plaintiff will move
21 for an "Order for Partial Summary Judgment striking Paragraphs V,
22 VI, and VII of Defendants' Answer".

23 The Code allows the granting of a Partial Summary Judgment
24 ONLY if "all the papers submitted show that there is no triable
25 issue as to any material fact and that the moving party is
26 entitled to a judgment as a matter of law."

27 It is clear that the Notice of Motion must set forth
28 the MATERIAL facts as to which the moving party contends no
substantial controversy exists, and he must further show, from

1 admissible evidence, that there can be no controversy. In order,
2 therefore, to respond to such Motion, opposing counsel must be
3 advised of the particular facts as to which it is contended no
4 substantial controversy exists.

5 Furthermore, it should be noted that it has been established
6 as the law of this case that the issues raised by the pleadings
7 in Zisk vs. City of Roseville, #41105, and those raised by the
8 Cross-Complaint herein, are before this Court in the eminent
9 domain proceeding. Thus, a striking of the paragraphs does not
10 eliminate the issues raised in those pleadings. Those pleadings
11 quote the direct language from the objectionable activities of
12 the City and those quotes are part of the papers in the case.

V

14 THE INTERROGATORIES HAVE BEEN IMPROPERLY REFERENCED IN
15 THE NOTICE OF MOTION AND THEREFORE CANNOT BE CONSIDERED.

16 A notable change in the recently amended section allows
17 Summary Judgment Motions to now be considered on papers other
18 than affidavits. Thus, the Court can not consider Interrogatories.

19 Plaintiff has referred to only portions of the Interroga-
20 tories and not to all of them. As discussed below, they must be
21 considered in their entirety.

VI

22 PRELIMINARY CONCLUSION

23 As the case law requires, the Motion must first be analyzed
24 to determine whether Plaintiff states grounds in the first
25 instance. An analysis of the defects clearly indicates that it
26 has not, and therefore, its Motion should be denied.

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VII

1
2 ASSUMING, ARGUENDO, THE LEGAL SUFFICIENCY OF THE MOTION
3 AS PRESENTED, THE INTERROGATORIES DO SHOW A SUBSTANTIAL
4 CONTROVERSY.

5 The Motion for Partial Summary Judgment seems to contend
6 that as to the issues raised in Paragraphs V, VI, and VII of the
7 Answer, there is no substantial controversy in fact. Defendants
8 respectfully submit that there are triable issues of fact as to
9 each and every issue raised by all of the pleadings in the
10 case.

11 The gist of the Defendants' position as raised by the
12 pleadings and under the law of the case, is that by reason of
13 Plaintiff's conduct and activity, both prior to and subsequent
14 to the filing of the Complaint, and for the purposes of the
15 acquisition therein sought, additional takings and interference
16 with possession and use have occurred giving rise to the right to
17 additional just compensation other than that created by the
18 Complaint and law of direct condemnation itself. Although there
19 was no Order of possession herein, there was a substantial
20 interference with the use and enjoyment of the property from 1973
21 to the future date of payment of just compensation and there was
22 the imposition of direct legal restraint, all in aid of the
23 project, for which Defendants are entitled to compensation.

24 The sufficiency of the pleadings are not in question.
25 The only question is whether there are enough facts to create a
26 substantial controversy on these issues. Defendants submit that
27 if anyone is entitled to Partial Summary Judgment, it should be
28 them.

In support of its Motion, Plaintiff has cited portions

1 of the Answers to Interrogatories, but not all of them. They are
2 discussed below.

3 Plaintiff points out to the Court that in Answer to Inter-
4 rogatory No. 18, Mr. Zisk stated that he had made no attempts to
5 sell the property. This has nothing to do with the issue before
6 the Court. The fact that one does not attempt to sell his
7 property does not mean that the property has not been damaged as a
8 result of precondemnation activities. (Stone vs. City of Los
9 Angeles, 51 C.A.3d 987.) In fact, as pointed out in Plaintiff's
10 Points and Authorities, the Answer to Interrogatory No. 21 shows
11 that in Mr. Zisk's opinion, any prospective buyer being informed
12 of the circumstances would come to the conclusion that he could
13 never develop the property and therefore, the value of the pro-
14 perty would be depressed. This answer alone presents a triable
15 issue as to whether or not the property suffered a decline in
16 value as a result of the precondemnation activities and announce-
17 ments of Plaintiff. In fact, in Answer to Interrogatory No. 22,
18 Mr. Zisk stated that had it not been for the precondemnation
19 activities of the Plaintiff, he would have built a new home on
20 the subject property and rented the remainder on an interim basis
21 pending ultimate sale or development. Therefore, as a result of
22 the precondemnation announcements and activities of the Plaintiff,
23 Mr. Zisk was unable to rent said property and build said home and
24 therefore, suffered monetary damages. Once again, this Answer to
25 Interrogatory No. 22 sets forth a triable issue of fact since Mr.
26 Zisk testifies that he was, in fact, damaged.

27 Plaintiff argues, in spite of Mr. Zisk's statement, that
28 there was no interference with the use actually being made of the

1 property, ergo, there was no damage. This argument is made on
2 the basis that it is assumed that the present use is the highest
3 and best use and without any basis in fact. Plaintiff has pre-
4 sented no evidence whatsoever, by declaration or other documents,
5 that the present use is the highest and best use, that the
6 attempt to develop the property was merely a "plan", that the
7 property was not rendered unsalable or its value or use was
8 not affected, that none of the ordinances or resolutions were
9 adopted for the purpose of holding the value down for future
10 acquisition, that the flood plain ordinance did not constitute a
11 previous taking and so forth.

12 The ONLY evidence submitted is the Answers to the sets
13 of Interrogatories in which it is clearly stated, in sum, that
14 the Plaintiffs are entitled to additional compensation for the
15 acts complained of. The amount thereof, whether it be \$1,000.00
16 or \$100,000.00 is not before us at this time.

17 It should be remembered that this is Plaintiff's Motion
18 for Partial Summary Judgment and that Plaintiff has the burden of
19 submitting affidavits showing that there is no triable issue.
20 Rather than doing so, Plaintiff has directed the Court to Inter-
21 rogatories which show without a question that there are triable
22 issues of fact. It is respectfully submitted that the Plaintiff
23 has not even begun to meet its burden.

24 VIII

25 REQUEST FOR JUDICIAL NOTICE.

26 Again, assuming arguendo that Plaintiff's Motion is sufficient
27 on its face, Defendants feel they should request the Court to
28 take judicial notice of the following documents which will establish

1 establish that there is substantial factual controversy on
2 these issues on their face:

- 3 1. The Park, Streambed and Recreation Element of the
4 General Plan, adopted by the City on or about March
5 20, 1968.
- 6 2. Environmental Impact Review #73-22 filed with the
7 City.
- 8 3. The Environmental Impact Report filed with the City
9 by Atteberry and Associates in about June, 1972, in
10 connection with Defendants' application for a lot
11 split.
- 12 4. The Open Space and Conservation Element of the
13 General Plan adopted by the City on or about June 20,
14 1973.
- 15 5. Minutes of the City Council for October 3, 1973.
- 16 6. The Zoning Ordinance of the City of Roseville in
17 effect during 1973 and amendments made during that
18 year.
- 19 7. Ordinance #1224 adopted by the City on November 28,
20 1973.
- 21 8. Ordinance #1227 adopted by the City in 1973.
- 22 9. The Report of the Army Corps of Engineers as to
23 Flood Plain requirements in the City of Roseville
24 submitted in 1973.
- 25 10. Minutes of the City Council December 19, 1973.

26 The Court has previously taken judicial notice of the
27 above documents at other hearings in this proceeding and they are
28 all presently contained in the Court's files. If Defendants are

-11-

1 mistaken in this recollection, additional copies will be provided
2 at the hearing on the Motion.

IX

THE ESTOPPEL ARGUMENT

3
4
5 In Paragraph VII to the Answer on file herein, Defendants
6 set up the theory of estoppel and allege that the City is estopped
7 from denying that it has taken (1) the property sought to be
8 acquired; (2) damaged the remainder of the property; and (3) that
9 it has acquired an interest in all of the property. Plaintiff
10 has requested Partial Summary Judgment as to Paragraph VII
11 contending that estoppel is not proper in this case.

12 The doctrine of estoppel is founded on concepts of equity
13 and fair dealing. The rationale for applying the doctrine of
14 equitable estoppel against governmental agencies was expressed in
15 City of Long Beach vs. Mansel, 3 Cal.3d 462, wherein the Court
16 held:

17 "The government may be bound by an equitable estoppel
18 in the same manner as a private party when the elements
19 requisite to such an estoppel against the private party are
20 present, and, in the considered view of a court of equity,
21 the injustice which would result from failure to uphold an
22 estoppel is of sufficient dimensions to justify any effect
23 upon public interest or policy which would result from the
24 raising of an estoppel." (At 496-497).

25 The City of Roseville announced as early as
26 March 20, 1968, that it intended to purchase the subject property
27 as well as other properties in the streambed area. It was
28 recommended to the City "that consideration be given to the
formal attainment or reservation of the site approximately 5
years prior to the time of anticipated need." Furthermore, by
using the conservation element to the General Plan, the City

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1 intended to enact the flood plain ordinances and conservation
2 zones and subsequently enacted them, so as to provide for some
3 interim protection of streambeds and other areas of public
4 interest pending acquisition in the future.

5 It is respectfully contended that "the injustice which
6 would result from failure to uphold (this) estoppel is of sufficient
7 dimension to justify any effect upon public interest or policy
8 which would result therefrom." Furthermore, there is no substan-
9 tial public interest being violated by the application of the
10 doctrine of equitable estoppel in the case at bar.

11 Plaintiff cites the cases of Pettie vs. Fresno, 34 Cal.App.3d
12 813 and Avco Community Developers, Inc. vs. South Coast Regional
13 Commission, 17 Cal.3d 785 as standing for the proposition that
14 estoppel does not apply in land use regulation cases. This
15 contention is clearly without merit. The facts in the case at
16 bar show that the intent of the Plaintiff in enacting the various
17 land use regulations was to freeze or depress the value of the
18 subject property so that the entire property could be acquired in
19 the future at a more reasonable price. Under these circumstances,
20 it is respectfully submitted that estoppel may be applied.

21 X

22 CASES DISCUSSED

23 The California Courts have held that several factual
24 situations give rise to additional damages in an eminent domain
25 action, including but not limited to:

26 1. Where there has been unreasonable conduct on the part
27 of the condemnor prior to the condemnation which results in a
28 diminution in market value (Klopping vs. Whittier, 8 C.3d 39;

1 Stone vs. City of Los Angeles, supra);

2 2. Where there has been a direct legal restraint imposed
3 upon the property as a result of harsh land use regulations often
4 calculated to decrease any future condemnation award. (Peacock
5 vs. County of Sacramento, 271 Cal.App.2d 845, 856, 862-864; Sneed
6 vs. County of Riverside, 218 Cal.App.2d 205, 209-211; Kissinger vs.
7 City of Los Angeles, 161 Cal.App.2d 454, 458-460);

8 3. Where there has been a physical invasion as the
9 result of the taking of a flowage easement in a person's land by
10 designating that taking as a zoning ordinance. (Turner vs. County
11 of Del Norte, 24 Cal.App.3d 311, 315; Beckley vs. Reclamation
12 Board, 205 Cal.App.2d 734).

13 4. Where there has been oppressive conduct on the part
14 of the condemnor for the purpose of decreasing any future condem-
15 nation award by "freezing" the value of the property. (Peacock,
16 supra; Kissinger, supra).

17 See also U.S. vs. Dickinson, 331 U.S. 745; Parker vs. City
18 of Los Angeles, 44 C.A.3d 556; Baigh vs. City of Los Angeles, 139
19 C.A. 595; Natural Soda Products vs. City of Los Angeles, 23 C.2d
20 193; and Pierpont Inn, Inc. vs. State of California, 20 C.2d 282,
21 relative to accrual of causes of action for just compensation and
22 flood water.

23 It should be noted that none of the cases dealt with
24 the issue of Summary Judgment. Nevertheless, Plaintiff cites
25 City of Los Angeles vs. Lowensohn, 54 C.A.3d 625, in support of
26 its Motion for the proposition that delay alone is not enough,
27 and, with HPH, Lts. vs. Superior Court, 15 C.3d 508, that inter-
28 ference with a "pipe dream" is not actionable. Plaintiff miscon-

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1 ceives Defendants' position and evidence in this case.

2 HFH, supra was strictly a down-zoning case which did
3 not involve the taking of an interest in realty, and under the
4 particular facts, it was held not actionable. There was no
5 showing there that the down-zoning was in aid of future condemna-
6 tion.

7 Lowensohn, supra, involved the weighing of facts where the
8 Court found that there had been no attempts to develop the
9 property, rent, or sell it. There were certainly no regulations,
10 ordinances or resolutions adopted with a design to hold the value
11 down for future acquisition. Here, as in Stone, supra, the owner
12 was frustrated in his attempts to develop the property and enjoy
13 the fruits of his extensive work done to beautify and improve the
14 streambed, to develop rental from the remainder of his property
15 (the present home). In neither Stone, supra, Klopping, supra,
16 Lowensohn, supra, nor HFH, supra, was there an acquisition of a
17 flowage easement by the adoption of a flood plain ordinance. In
18 none of the cases cited by Plaintiff was there a showing that the
19 owner was completely deprived of the costs actually incurred for
20 a development which was stopped by the public entity, contrary to
21 law and prior to the filing of any condemnation case, but stopped
22 solely for the purpose of holding the value down in the event of a
23 future condemnation.

24 XI

25 CONCLUSION

26 Defendants respectfully submit that the Motion for Summary
27 Judgment should be denied upon the grounds that an analysis of
28 the Motion itself shows that it is insufficient upon many grounds,

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1 that the papers properly incorporated in the Motion (if any) show
2 a substantial controversy; and that when all of the issues raised
3 by all of the pleadings are considered together with all of the
4 facts now before this Court, it is unquestioned that there is
5 substantial controversy as to every fact referenced in the
6 Motion.

7 DATED: October 6, 1977.

Respectfully submitted,
DESMOND, MILLER, DESMOND
& BARTHOLOMEW
By: *[Signature]*
RICHARD F. DESMOND
Attorneys for Defendants

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1 DESMOND, MILLER, DESMOND & BARTHOLOMEW
2 1006 - 4th Street, Suite 900
3 Sacramento, California 95814
4 Telephone: 443-2051

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5 Attorneys for Defendants

FILED

OCT 6 - 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

M. I. Dobbas
DEPUTY

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

9
10 CITY OF ROSEVILLE, a municipal
11 corporation,

No. 41104

12 Plaintiff,

DECLARATION IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

13 vs.

14 WILLIAM J. ZISK and LOIS E.
15 ZISK,

MICROFILMED

16 Defendants.

17 I, ROBERT U. GRANT, declare:

18 That I am a Civil Engineer and Real Estate Broker duly
19 licensed by the State of California, was formerly employed as a
20 Civil Engineer by the State Division of Highways, State Division
21 of Water Resources, and the County of Sacramento; and am presently
22 in private practice in the County of Sacramento. I have experience
23 for the past 22 years in the fields of engineering for the develop-
24 ment of all forms of housing and subdivisions and all phases of
25 engineering in connection therewith. I have also often been
26 involved in land planning for future development and in connection
27 therewith, I have become familiar with all aspects of governmental
28 planning and regulation. I am also familiar with property values

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DESMOND, MILLER,
DESMOND &
BARTHOLOMEW
ATTORNEYS AT LAW
1006 FOURTH STREET
SUITE 900
SACRAMENTO, CALIF.
TELEPHONE 443-2051

1 and the effects of governmental planning and regulations upon
2 values and their effects upon the market.

3 I have previously testified in the Superior Courts of
4 this State in condemnation cases as to engineering matters
5 involving highest and best use of property, property values and
6 effect of public project developments and governmental regulations
7 upon the use of property and their effects in future use, develop-
8 ment and values.

9 I am familiar with the Parks and Streambed Plan and Open
10 Space Elements of the General Plan of the City of Roseville, the
11 Flood Plain Ordinances and Zoning Ordinances of that City, the
12 history of the Zisks' attempts to develop their property and the
13 improvements which they have made to the channel of Dry Creek. I
14 am familiar with the terrain and features of the property and
15 generally with the entire watercourse of Dry Creek through the
16 City. Since the adoption of the present Flood Plain Ordinance, I
17 have represented the owners of property located entirely within
18 the designated flood plain in negotiations and dealings with the
19 City for the purposes of obtaining variances for the constructions
20 of levees for the protection of the uplands and the elimination
21 of the uplands from the flood plain. To date, no variances
22 have been granted. All attempts to sell that property have
23 failed because of the refusal of the City to allow any development
24 in the flood plain, either in the designated floodway or floodway
25 fringe. I find no history of flooding in the floodway fringe and
26 in portions of the designated floodways on either property in the
27 past. The factual data upon which the flood plain regulations
28 were based has been generalized in many respects and in some

1 instances has been interpreted inaccurately.

2 Artificial obstructions created in the stream channel by the
3 City under its governmental powers has been responsible in part
4 for evaluated potential flood plain elevations.

5 It is my conclusion, based upon all of my studies and
6 experience, that the adoption of the flood plain ordinance has
7 the same effect as the taking of a flowage easement across
8 portions of the Zisk property, including the remainder not taken
9 in this action. As a result of those ordinances and the subsequent
10 continued refusal of the City to allow private development within
11 said boundaries, the highest and best use of properties located
12 thereon, is limited to the uses allowed under the ordinances
13 without a permit or a variance and that the Zisk property, as a
14 result of all of the regulations and conduct of the City, has no
15 use other than the present uses, and is unsalable for any type of
16 development.

17 My analysis of the aforesaid plans, the flood plain ordi-
18 nances and supporting data, and the subsequent conduct of the
19 City clearly indicates that all of the official acts of the City
20 dealing with property within the flood plain boundaries on Dry
21 Creek are part of a program to hold all of the properties therein
22 in a status quo for ultimate acquisition and benefit of the
23 general public for park and recreation and open spaces, or
24 both.

25 As a result of all of these activities, it became obvious
26 to the general real estate market that, with the determination by
27 the City Council on April 25, 1973, denying Zisks' appeal from
28 the determination that the lot split and use permit would have a

-3-

1 non-trivial effect on the environment, no portion of the property
2 could be developed for anything other than its present use, and
3 that the property would thereafter be held in status quo for the
4 purposes herein set forth. Such property thereupon was damaged,
5 and there is no evidence of a reasonable probability that the
6 City's position will change.

7 By reason of the City's actions, the Zisks were damaged
8 in 1973 by the taking of a flowage easement, a reduction in value
9 of the remainder of their property for reasons other than the
10 take and construction of the improvements in the manner proposed
11 for the project described in the Complaint in Eminent Domain,
12 were deprived of the use of their property for development for
13 their home, the reasonable rental value of the existing home,
14 lost the benefit of doubling appreciation in the development of
15 their new home over the past four (4) years, and lost all costs
16 and expenses incurred on their application for a variance and a
17 use permit in 1973.

18 If called as a witness in this action, I am competent
19 to testify and can and will testify as to the facts and opinions
20 hereinabove set forth.

21 I declare under penalty of perjury that the foregoing
22 is true and correct.

23 Executed on October 6, 1977, at Sacramento, California.

24 
25 ROBERT U. GRANT
26
27
28

OCT - 7 1977

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1 DENNIS W. DE CUIR
2 City Attorney
3 316 Vernon Street
4 Roseville, CA 95678
5 Telephone: (916) 783-9151, Ext. 272
6
7 Attorney for Plaintiff

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10	CITY OF ROSEVILLE, a municipal)	
	corporation,)	
11		)	NO. 4 1 1 0 4
	Plaintiff,)	
12		)	PLAINTIFF'S RESPONSES TO
	v.	)	INTERROGATORIES 1 THROUGH
13		)	106, PROPOUNDED BY
	WILLIAM J. ZISK and LOIS E.	)	DEFENDANTS
14	ZISK,)	
)	
15	Defendants.)	

16
17 Plaintiff City of Roseville responds to Interrogatories
18 1 through 106, inclusive, served on Plaintiff by defendants
19 WILLIAM J. ZISK and LOIS E. ZISK, as follows:

- 20 INTERROGATORY NO. 1: What does condemnor contend to
21 be the area in square feet and the legal description of:
- 22 a. The entire property of which the property taken
 - 23 is a part;
 - 24 b. The property taken;
 - 25 c. The remainder of the property left after the taking.

26 RESPONSE: The legal description and approximate area
27 of the property sought to be acquired by the Plaintiff in this
28 proceeding are shown on Exhibits "C" and "D" which are attached

1 to the amendment to the complaint filed on July 2, 1974. Plaintiff
2 refers defendants to such exhibits, which show the approximate area
3 of the property sought for acquisition as 5.80 acres. The remain-
4 der that will be left after final judgment is entered is shown as
5 having an approximate area of 5.74 acres. Plaintiff objects to
6 computing the area in square feet on the ground that the request
7 is a computation that can be equally as well made by Defendants
8 and is otherwise an annoyance and oppressive.

9 INTERROGATORY NO. 2: Has any property other than that
10 in which condemnee holds an interest been taken by condemnor for
11 the same purpose as that for which condemnee's property was taken?

12 RESPONSE: Plaintiff objects to this interrogatory on
13 the ground that it constitutes an annoyance and is oppressive
14 because it is ambiguous and too general since no dates are set
15 forth to confine the inquiry within a reasonable or relevant period
16 of time. Furthermore, the information sought is equally available
17 to the defendants from The Official Records of Placer County and
18 would not, in any event, lead to the discovery of admissible evi-
19 dence. Without waiving such objections, since 1973, no other
20 property has been "taken" for the same purposes as set out in the
21 complaint on file herein, although other properties have been
22 acquired for park and other purposes. Such acquisitions may be
23 identified from the Official Records of Placer County, but they
24 will be inadmissible in the trial of this proceeding under Section
25 822(a) of the Evidence Code. If defendants identify the City
26 properties they wish to investigate, Plaintiff will reasonably
27 cooperate in confirming the terms of the transactions.

1 INTERROGATORY NO. 3: If so, for each other item or
2 piece of property, state:

- 3 a. Its legal description and location;
4 b. Its area in square feet;
5 c. The area in square feet of the portion not taken;
6 d. Its physical characteristics and condition at the
7 time of taking, including existence and condition
8 of improvements;
9 e. Its zoning;
10 f. The name, address and occupation of each owner
11 of the property prior to taking;
12 g. The date the property was taken;
13 h. The manner in which the taking was accomplished;
14 i. The amount of compensation given for land taken;
15 j. The amount of compensation given for each
16 improvement taken, identifying each improvement
17 and its value;
18 k. The amount of compensation given for severance
19 damages to remaining real property;
20 l. The amount of compensation given for severance
21 damages for remaining improvements;
22 m. The amount of compensation given for any other
23 loss or damage, identifying each item of damage
24 and the value given therefor; and
25 n. The name, address, job title or capacity and duties
26 of each person who has knowledge of any of the
27 matters referred to in the preceding subdivisions.

28

1 RESPONSE: Not applicable. See the Response to
2 Interrogatory No. 2.

3 INTERROGATORY NO. 4: Does condemnor have possession
4 or control of any records of the acquisitions listed in its
5 answers to the preceding Interrogatories?

6 RESPONSE: Yes.

7 INTERROGATORY NO. 5: If so, what is the name and
8 address of each person who has such records?

9 RESPONSE: Pauline Brockman, City Clerk of the
10 Edmond O. Mahany, Robert G. Hutchison, and Dennis W. De Cuir,
City of Roseville, 316 Vernon Street, Roseville, California.

11 Other records relating to such acquisition are in the control of
12 Maurine I. Dobbas, County Clerk, Courthouse, Auburn, California.

13 INTERROGATORY NO. 6: If you will do so without a
14 Motion to Produce, attach a copy of each such record to the
15 answers to these Interrogatories.

16 RESPONSE: Plaintiff objects to attaching copies of
17 the requested records on the grounds stated in the response to
18 Interrogatory No. 2.

19 INTERROGATORY NO. 7: What does Plaintiff contend to
20 be the highest and best use of:

- 21 a. The entire property in the before condition; and
22 b. The remainder in the after condition.

23 RESPONSE: Plaintiff objects on the ground that this
24 interrogatory calls for the privileged work product of its
25 attorneys. Without waiving such objection, Plaintiff states that
26 it has not completed its investigation of the facts relating to
27 this case or its preparation for trial. Plaintiff's investigation
28 of this matter is continuing. Contentions as to value and highest

1 and best use may be discovered during the mutually agreed-upon
2 depositions of each parties' valuation witnesses, pursuant to the
3 stipulation on file herein. (Swartzman v. Superior Court (1969)
4 231 Cal.App.2d 195). Therefore, the foregoing answer is given
5 without prejudice to Plaintiff's right to produce evidence of any
6 subsequently discovered facts or opinions or conclusions sub-
7 sequently related.

8 INTERROGATORY NO. 8: State each and every fact upon
9 which you base the answer to the preceding Interrogatory.

10 RESPONSE: See the Response to Interrogatory No. 7,
11 which is incorporated herein.

12 INTERROGATORY NO. 9: Other than as already stated,
13 does Plaintiff acknowledge any direct damage which has been sus-
14 tained by Defendants as a result of the taking?

15 RESPONSE: No, Plaintiff contends that no taking has
16 occurred at this time.

17 INTERROGATORY NO. 10: If so, for each item of direct
18 damage give:

- 19 a. A description of the damage; and
20 b. The amount of the damage.

21 RESPONSE: Not applicable.

22 INTERROGATORY NO. 11: Does Plaintiff acknowledge that
23 Defendants have suffered any indirect or incidental damage as a
24 result of the taking?

25 RESPONSE: No, Plaintiff contends that no taking has
26 occurred at this time.

27 INTERROGATORY NO. 12: If so, for each item of indirect
28 or incidental damage, give:

- 1 a. A description of the damage; and
2 b. The amount of the damage.

3 RESPONSE: Not applicable.

4 INTERROGATORY NO. 13: Does Plaintiff contend that the
5 taking will result in benefit to the remainder of Defendants'
6 property?

7 RESPONSE: Plaintiff objects on the grounds that this
8 Interrogatory calls for the privileged work product of its
9 attorneys. Without waiving such objection, Plaintiff answers yes.

10 INTERROGATORY NO. 14: If so, for each benefit, give:

- 11 a. A description of the benefit;
12 b. The specific activity of condemnor that resulted
13 in benefit;
14 c. The date the benefit commenced;
15 d. The value of the benefit;
16 e. Its effect on the compensation to which Defendants
17 are entitled as a result of the taking; and
18 f. The name, address, job title or capacity and
19 experience of each person who furnished the
20 information given in the preceding subdivisions.

21 RESPONSE: Plaintiff objects to this Interrogatory on
22 the grounds stated in the Response to Interrogatory No. 13.
23 Without waiving such objection, Plaintiff contends that upon taking
24 possession of the property sought to be acquired herein, Plaintiff
25 expects to maintain the streambed area. The value of the benefit
26 is undetermined at this time. The person who furnished this
27 information is Edmond O. Mahany, Parks and Recreation Director,
28 City of Roseville, 316 Vernon Street, Roseville, California.

1 While Plaintiff contends the remainder will benefit from this
2 acquisition, Plaintiff also contends, from the investigation made
3 up to this date, that there will be no severance damages.

4 INTERROGATORY NO. 15: Does Plaintiff have possession
5 or control of any record evidencing any of the matters referred
6 to in its answers to the preceding Interrogatory?

7 RESPONSE: No, not that Plaintiff is presently aware
8 of.

9 INTERROGATORY NO. 16: If so, what is the name and
10 address of the person who has present custody of such records?

11 RESPONSE: Not applicable.

12 INTERROGATORY NO. 17: If you will do so without a
13 Motion to Produce, attach a copy of each record to the answers
14 to these Interrogatories.

15 RESPONSE: Not applicable.

16 INTERROGATORY NO. 18: To what use does Plaintiff
17 intend to put the property?

18 RESPONSE: Plaintiff intends to use the property for
19 a bike path and hiking trail to be installed in such a manner as
20 to best assure the maintenance of the natural setting.

21 INTERROGATORY NO. 19: Describe in detail the entire
22 project for which the subject property is being acquired or, in
23 the alternative, submit any plans and specifications or documents
24 which would show in detail the entire nature and scope of the
25 project in question.

26 RESPONSE: The bike path and hiking trail will be
27 approximately ten (10) feet wide, extending from and beyond the
28 westerly terminus of the property to be acquired, near the north

1 edge of Dry Creek, in an easterly direction, and exiting from the
2 northerly boundary of the eastern portion of the property to be
3 acquired near the place where Dry Creek begins to exit such
4 boundary.

5 INTERROGATORY NO. 20: What alterations or improvements
6 will be made to the Defendants' property or the portion sought to
7 be acquired in pursuance of the use listed in your answer to the
8 preceding Interrogatory?

9 RESPONSE: See the Responses to Interrogatories No.
10 19 and No. 14.

11 INTERROGATORY NO. 21: On what date will construction
12 of the work of public improvement or project listed in your answer
13 to the two (2) preceding Interrogatories commence and end?

14 RESPONSE: Maintenance will commence upon possession.
15 The work of placing the bike path and hiking trail will be
16 scheduled to begin within the year following the date of acquisi-
17 tion, taking into consideration seasonal conditions and construc-
18 tion bidding requirements. The work should be completed within
19 approximately one or two years following acquisition.

20 INTERROGATORY NO. 22: On what date was the project in
21 question adopted?

22 RESPONSE: In August, 1973.

23 INTERROGATORY NO. 23: Are there any writings which
24 describe the project and/or the plans and specifications for said
25 project? If so, please state the following:

- 26 a. Description of the documents in question;
27 b. Identify the documents sufficiently so that they
28 may be referred to in any subsequent Motions; and

1 c. The location of said documents.

2 RESPONSE: Yes. A map and an aerial photograph in the
3 office of Edmond O. Mahany and a map entitled "Bicycle Path Zisk
4 Property" in the office of the Public Works Director, and a
5 privileged work product map in the office of the City Attorney.

6 INTERROGATORY NO. 24: Have any monies been appropriated
7 for the implementation or construction of the project?

8 RESPONSE: Funds for the placement of the trail are
9 available in the budget.

10 INTERROGATORY NO. 25: If your answer to the preceding
11 Interrogatory is yes, how much?

12 RESPONSE: No final cost estimate has been made of the
13 funds necessary to improve the property with a trail; however,
14 Plaintiff contends that sufficient funds are available.

15 INTERROGATORY NO. 26: What protective measures do you
16 intend to take to protect, maintain and care for the take area
17 pending commencement of the construction of the project?

18 RESPONSE: See the Response to Interrogatory No. 14.

19 INTERROGATORY NO. 27: When will the entire project be
20 completed?

21 RESPONSE: It is not precisely known at this time, but
22 see the Response to Interrogatory No. 21.

23 INTERROGATORY NO. 28: When will the project as it
24 affects the subject property be completed?

25 RESPONSE: See the Response to Interrogatory No. 21.

26 INTERROGATORY NO. 29: What restrictions, if any, will
27 be placed on the public in general in the use of the work of
28 public improvements?

1 RESPONSE: Plaintiff will post signs or otherwise
2 designate the limits of the public property. Vehicles will be
3 prohibited. The improvement will allow normal police protection.

4 INTERROGATORY NO. 30: Will the taking of the subject
5 property affect existing utilities?

6 RESPONSE: No.

7 INTERROGATORY NO. 31: If so, what utilities will be
8 affected and to what extent?

9 RESPONSE: Not applicable.

10 INTERROGATORY NO. 32: Will the accessibility to
11 utilities by the remaining property be affected by the proposed
12 take?

13 RESPONSE: No.

14 INTERROGATORY NO. 33: If so, to what extent will
15 future utility access be affected?

16 RESPONSE: Not applicable.

17 INTERROGATORY NO. 34: If current utilities will be
18 affected by the proposed take or future utility access will be
19 affected by the proposed take, what does condemnor plan to do to
20 alleviate this problem?

21 RESPONSE: Not applicable.

22 INTERROGATORY NO. 35: Does condemnor intend to con-
23 struct a fence, or like structure, on the property line between
24 the proposed take and the remaining property?

25 RESPONSE: Not at this time.

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1 INTERROGATORY NO. 36: If so, what type of fencing,
2 or like structure, does condemnor intend to erect?

3 RESPONSE: Not applicable.

4 INTERROGATORY NO. 37: Where does condemnor intend to
5 erect said fencing or like structure?

6 RESPONSE: Not applicable.

7 INTERROGATORY NO. 38: Will the proposed take of the
8 subject property affect the draining pattern or drainage of the
9 remaining property?

10 RESPONSE: No.

11 INTERROGATORY NO. 39: If so, how will the remaining
12 property be affected by the drainage?

13 RESPONSE: Not applicable.

14 INTERROGATORY NO. 40: Does condemnor intend to remedy
15 any drainage problems that have been explained in the preceding
16 two (2) Interrogatories?

17 RESPONSE: Not applicable.

18 INTERROGATORY NO. 41: If so, what remedies does
19 condemnor intend to take?

20 RESPONSE: Not applicable.

21 INTERROGATORY NO. 42: Will the taking of the subject
22 property affect the current house that is on condemnees' remaining
23 property?

24 RESPONSE: No.

25 INTERROGATORY NO. 43: How close will the "take" line
26 be to the existing house?

27 RESPONSE: Plaintiff has not measured the distance
28 from the "take" line to the existing house. If Defendants wish

1 Plaintiff to do so, and permit Plaintiff to enter upon their
2 property again, Plaintiff will measure such distance. Plaintiff's
3 continuing investigation may allow it to determine such distance
4 by other means.

5 INTERROGATORY NO. 44: Does condemnor have possession
6 or control of any maps or records referred to in your answers to
7 Interrogatories Nos. 23 through 43?

8 RESPONSE: Yes.

9 INTERROGATORY NO. 45: If so, describe them and where
10 they are located, naming the custodian thereof, and you will do
11 so without a Motion to Produce, attach a copy of such evidence to
12 the answers to these Interrogatories.

13 RESPONSE: Maps of the property which is sought to be
14 acquired in this proceeding are located in the offices of the
15 City Clerk, Public Works Director, and Parks and Recreation
16 Director and may each be identified by the name of the Defendants.
17 See also the Responses to Interrogatories 23 through 45.

18 INTERROGATORY NO. 46: When will the activities listed
19 in answers to Interrogatories 23 through 43 commence?

20 RESPONSE: Plaintiff objects to this Interrogatory on
21 the grounds that it is vague, ambiguous, too general, an annoyance
22 and oppressive; and futher, the question has been asked and
23 answered.

24 INTERROGATORY NO. 47: Please set forth what you contend
25 to be the fair value of the taken property and in connection with
26 answering this question, please give the following values:

27 a. The value of the land itself in the before
28 condition;

- 1 b. The value of improvements in the before condition;
2 c. The value of the whole in the before condition;
3 d. The value of the land in the after condition;
4 e. The value of the improvements in the after
5 condition; and
6 f. The value of the entire remainder in the after
7 condition.

8 RESPONSE: See the Response to Interrogatory No. 7,
9 which Plaintiff incorporates herein.

10 INTERROGATORY NO. 48: After the project in question
11 is complete, what access will the subject property have to the
12 work of public improvements?

13 RESPONSE: The subject property will have direct
14 access to the property to be acquired in this proceeding and the
15 trail.

16 INTERROGATORY NO. 49: Do you intend that the work of
17 public improvement will be used by the public in general? If so,
18 state the following:

- 19 a. Total amount of users for said project on a weekly
20 basis;
21 b. During what hours of the day will the work of
22 public improvement be available to the public?; and
23 c. During what hours of the day do you anticipate the
24 highest usage by the public would be?

25 RESPONSE: Yes. Plaintiff has not made any precise
26 studies which would allow it to state the number of persons who
27 would use the bike path and hiking trail on a weekly basis or the
28 hours or the days when the highest use would occur. However,

1 Plaintiff anticipates that persons who will use the trail will
2 generally do so during daylight hours. The trail will be generally
3 available for public use.

4 INTERROGATORY NO. 50: If the general public is going
5 to use the work of public improvement, what measures will be taken
6 by you to insure that members of the general public will not
7 trespass on the subject property or do any other damage to the
8 subject property?

9 RESPONSE: Plaintiff objects to this Interrogatory on
10 grounds that it assumes that the Plaintiff has a duty to "insure"
11 that illegal activities will not occur, that it calls for infor-
12 mation that will be inadmissable, and that the information con-
13 stitutes the privileged work product of its attorneys. Without
14 waiving such objections, Plaintiff refers Defendants to the
15 Response to Interrogatory No. 29, which is incorporated herein.

16 INTERROGATORY NO. 51: At the time the work of public
17 improvement was adopted, do you contend that the use to which the
18 subject property could be put was limited by one or more provisions
19 of any resolution, ordinance, or land use regulation of the City
20 of Roseville? If so:

- 21 a. State each and every fact upon which you rely in
- 22 making this contention;
- 23 b. If you rely on any written instrument, describe
- 24 said instrument and its location; and
- 25 c. Will you, upon request, supply to Defendants a
- 26 copy of such written documents without a Motion to
- 27 Produce?

28

1 RESPONSE: Plaintiff objects to this Interrogatory on
2 grounds that it is an annoyance, oppressive and calls for the
3 privileged work product of its attorneys. Without waiving such
4 objections, Plaintiff contends that the uses to which the subject
5 property could be put were limited by the following, among other
6 policies, regulations and provisions of law: The Subdivision
7 Ordinance, The Zoning Ordinance, The General Plan, Ordinance
8 No. 1191, The Uniform Codes, The Roseville City Code, and the
9 guidelines for studying the environment. Such documents are
10 available to Defendants as public records.

11 INTERROGATORY NO. 52: What is your contention as to
12 how the various flood plain regulations of the City of Roseville
13 affected or limited the use of the subject property at the time
14 of the adoption of the project in question?

15 RESPONSE: Plaintiff objects to this Interrogatory on
16 the ground that it calls for the privileged work product of
17 Plaintiff's attorneys. However, without waiving such objection,
18 the provisions of Ordinance No. 1191, extending Ordinance No. 1158,
19 and later the provisions of Ordinances No. 1224 and 1227 appear to
20 have established regulations applicable to the use of the subject
21 property and such speak for themselves.

22 INTERROGATORY NO. 53: State each and every fact upon
23 which you rely in the answer to the previous Interrogatory.

24 RESPONSE: See Response to Interrogatory No. 52
25 incorporated herein.

26 INTERROGATORY NO. 54: If you contend at the time the
27 project was adopted that the various flood plain regulations
28 affected or limited the use of the subject property, what measures

1 would have to be taken by the Defendants in order to get a use
2 permit for development on the subject property?

3 RESPONSE: Plaintiff objects to this Interrogatory on
4 the grounds it calls for the privileged work product of its
5 attorneys and upon the further grounds of annoyance, expense and
6 oppression. It would work an injustice to require the Plaintiff
7 to answer this Interrogatory (Holguin v. Superior Court (1972)
8 22 Cal.App.3d 812, 821). Plaintiff also objects on the grounds
9 that the Interrogatory is vague and ambiguous as to what kind of
10 "development" it might refer; thus the Interrogatory is impossible
11 to answer. Without knowing the nature of the development that
12 might be proposed, there is no means by which Plaintiff can
13 determine what measures would have to be taken to obtain a permit.

14 INTERROGATORY NO. 55: What is your contention as to
15 how the general plan of the City of Roseville affected or limited
16 the use of the subject property at the time of the adoption of the
17 project in question?

18 RESPONSE: Plaintiff objects on the grounds that this
19 Interrogatory calls for the privileged work product of its
20 attorneys. Without waiving such objection, Plaintiff contends
21 that the General Plan of the City of Roseville, and each of its
22 elements, constituted, and presently constitute, a guide for the
23 growth and development of the City, and with respect to the subject
24 property, had and have that same effect.

25 INTERROGATORY NO. 56: State each and every fact upon
26 which you rely in the answer to the previous Interrogatory.

27 RESPONSE: See the Response to Interrogatory No. 55.

28

1 INTERROGATORY NO. 57: If you contend at the time the
2 project was adopted that the general plan affected or limited the
3 use of the subject property, what measures would have to be taken
4 by the Defendants in order to get a use permit for development on
5 the subject property?

6 RESPONSE: Plaintiff objects to this Interrogatory on
7 the grounds stated in the Response to Interrogatory No. 54,
8 incorporated herein.

9 INTERROGATORY NO. 58: What is your contention as to
10 how the zoning ordinance of the City of Roseville affected or
11 limited the use of the subject property at the time of the adoption
12 of the project in question?

13 RESPONSE: Plaintiff contends that the zoning which
14 affected the subject property at the time of the adoption of the
15 project was R-1, R1-FP. The text of the zone provided for the
16 permitted uses and uses permitted with the grant of a use permit.
17 Such text speaks for itself. Otherwise, Plaintiff objects on the
18 grounds that the Interrogatory calls for the privileged work
19 product of its attorneys. Plaintiff will, upon request, provide
20 Defendants with a copy of such text.

21 INTERROGATORY NO. 58: State each and every fact upon
22 which you rely in the answer to the previous Interrogatory.

23 RESPONSE: See the Response to the preceding Interro-
24 rogatory No. 58.

25 INTERROGATORY NO. 59: If you contend at the time the
26 project was adopted that the zoning ordinance affected or limited
27 the use of the subject property, what measures would have to be
28 taken by the Defendants in order to get a use permit for

1 development on the subject property?

2 RESPONSE: See the Response to Interrogatory No. 54,
3 which Plaintiff incorporates herein.

4 INTERROGATORY NO. 60: What is your contention as to how
5 the park and recreation plan of the City of Roseville affected or
6 limited the use of the subject property at the time of the adoption
7 of the project in question?

8 RESPONSE: See the Response to Interrogatory No. 55,
9 which Plaintiff incorporates herein.

10 INTERROGATORY NO. 61: State each and every fact upon
11 which you rely in the answer to the previous Interrogatory.

12 RESPONSE: See the Response to Interrogatory No. 55,
13 which Plaintiff incorporates herein.

14 INTERROGATORY NO. 62: If you contend at the time the
15 project was adopted that the park and recreation plan affected or
16 limited the use of the subject property, what measures would have
17 to be taken by the Defendants in order to get a use permit for
18 development on the subject property?

19 RESPONSE: See the Response to Interrogatory No. 54,
20 which Plaintiff incorporates herein.

21 INTERROGATORY NO. 63: At the time the work of public
22 improvement was adopted, what is your contention as to the amount
23 of levee work which could have been done by the Defendants on the
24 subject property to alleviate any flooding problem or to change
25 the flood plain boundaries?

26 RESPONSE: Plaintiff objects to this Interrogatory on
27 the grounds that it is an annoyance and oppressive, that such
28 information is equally available to Defendants and that requiring

1 Plaintiff to answer such a question would work an injustice.
2 Without waiving such objection, Plaintiff states that its investi-
3 gation is not complete but continuing; and therefore, Plaintiff
4 reserves the right to introduce subsequently discovered facts,
5 opinions, dates or conclusions.

6 INTERROGATORY NO. 64: State each and every fact upon
7 which you rely in the answer to the previous Interrogatory.

8 RESPONSE: Not applicable.

9 INTERROGATORY NO. 65: At the time of the filing of the
10 Complaint herein, do you contend that the use to which the subject
11 property could be put was limited by one or more provisions of any
12 resolution, ordinance, or land use regulation of the City of
13 Roseville? If so:

14 a. State each and every fact upon which you rely in
15 making this contention;

16 b. If you rely on any written instrument, describe said
17 instrument and its location; and

18 c. Will you, upon request, supply to Defendants a copy
19 of such written documents without a Motion to Produce?

20 RESPONSE: Yes. See the Response to Interrogatory No.
21 51, which Plaintiff incorporates herein.

22 INTERROGATORY NO. 66: What is your contention as to how
23 the various flood plain regulations of the City of Roseville
24 affected or limited the use of the subject property at the time of
25 filing of the Complaint herein?

26 RESPONSE: See the Response to Interrogatory No. 52,
27 which Plaintiff incorporates herein.

28

1 INTERROGATORY NO. 67: State each and every fact upon
2 which you rely in the answer to the previous Interrogatory.

3 RESPONSE: Not applicable.

4 INTERROGATORY NO. 68: If you contend at the time of
5 filing of the Complaint herein that the various flood plain regu-
6 lations affected or limited the use of the subject property, what
7 measures would have to be taken by the Defendants in order to get
8 a use permit for development on the subject property?

9 RESPONSE: See the Response to Interrogatory No. 54,
10 which Plaintiff incorporates herein.

11 INTERROGATORY NO. 69: What is your contention as to
12 how the general plan of the City of Roseville affected or limited
13 the use of the subject property at the time of filing of the
14 Complaint herein?

15 RESPONSE: See the Response to Interrogatory No. 55,
16 which Plaintiff incorporates herein.

17 INTERROGATORY NO. 70: State each and every fact upon
18 which you rely in the answer to the previous Interrogatory.

19 RESPONSE: See the Response to Interrogatory No. 55,
20 which Plaintiff incorporates herein.

21 INTERROGATORY NO. 71: If you contend at the time of
22 filing of the Complaint herein that the general plan affected or
23 limited the use of the subject property, what measures would have
24 to be taken by the Defendants in order to get a use permit for
25 development on the subject property?

26 RESPONSE: See the Response to Interrogatory No. 54,
27 which Plaintiff incorporates herein.

28

1 INTERROGATORY NO. 72: What is your contention as to
2 how the zoning ordinance of the City of Roseville affected or
3 limited the use of the subject property at the time of filing of
4 the Complaint herein?

5 RESPONSE: See the Response to the first Interrogatory
6 No. 58, which Plaintiff incorporates herein.

7 INTERROGATORY NO. 73: State each and every fact upon
8 which you rely in the answer to the previous Interrogatory.

9 RESPONSE: See the Response to Interrogatory No. 72,
10 which Plaintiff incorporates herein.

11 INTERROGATORY NO. 74: If you contend at the time of
12 filing of the Complaint herein that the zoning ordinance affected
13 or limited the use of the subject property, what measures would
14 have to be taken by the Defendants in order to get a use permit
15 for development on the subject property?

16 RESPONSE: See the Response to Interrogatory No. 54,
17 which Plaintiff incorporates herein.

18 INTERROGATORY NO. 75: What is your contention as to
19 how the park and recreation plan of the City of Roseville affected
20 or limited the use of the subject property at the time of filing
21 of the Complaint herein?

22 RESPONSE: See the Response to Interrogatory No. 55,
23 which Plaintiff incorporates herein.

24 INTERROGATORY NO. 76: State each and every fact upon
25 which you rely in the answer to the previous Interrogatory.

26 RESPONSE: See the Response to Interrogatory No. 55,
27 which Plaintiff incorporates herein.

28

1 INTERROGATORY NO. 77: If you contend at the time of
2 filing of the Complaint herein that the park and recreation plan
3 affected or limited the use of the subject property, what measures
4 would have to be taken by the Defendants in order to get a use
5 permit for development on the subject property?

6 RESPONSE: See the Response to Interrogatory No. 54,
7 which Plaintiff incorporates herein.

8 INTERROGATORY NO. 78: At the time of filing of the
9 Complaint herein, what is your contention as to the amount of
10 levying which could have been done by the Defendants on the subject
11 property to alleviate any flooding problem or change the flood
12 plain boundaries?

13 RESPONSE: See the Response to Interrogatory No. 63,
14 which Plaintiff incorporates herein.

15 INTERROGATORY NO. 79: State each and every fact upon
16 which you rely in the answer to the previous Interrogatory.

17 RESPONSE: Not applicable.

18 INTERROGATORY NO. 80: As of the date of answering these
19 Interrogatories, do you contend that the use to which the subject
20 property could be put was limited by one or more provisions of any
21 resolution, ordinance, or land use regulation of the City of
22 Roseville? If so:

23 a. State each and every fact upon which you rely in
24 making this contention;

25 b. If you rely on any written instrument, describe
26 said instrument and its location; and

27 c. Will you, upon request, supply Defendants a copy of
28 such written documents without a Motion to Produce?

1 RESPONSE: See the Response to Interrogatory No. 51,
2 which Plaintiff incorporates herein, with the further response
3 that Ordinances No. 1224 and No. 1227 and a new General Plan are
4 in effect and could affect the uses to which the subject property
5 could be put. Plaintiff contends that Ordinance No. 1191 is no
6 longer in effect. Such documents are available to Defendants as
7 public records.

8 INTERROGATORY NO. 81: What is your contention as to
9 how the various flood plain regulations of the City of Roseville
10 affected or limited the use of the subject property as of the date
11 of answering these Interrogatories?

12 RESPONSE: See the Response to Interrogatory No. 52,
13 which Plaintiff incorporates herein.

14 INTERROGATORY NO. 82: State each and every fact upon
15 which you rely in the answer to the previous Interrogatory.

16 RESPONSE: See the Response to Interrogatory No. 52,
17 which Plaintiff incorporates herein.

18 INTERROGATORY NO. 83: If you contend as of the date of
19 answering these Interrogatories that the various flood plain regu-
20 lations affected or limited the use of the subject property, what
21 measures would have to be taken by the Defendants in order to get
22 a use permit for development on the subject property?

23 RESPONSE: See the Response to Interrogatory No. 54,
24 which Plaintiff incorporates herein.

25 INTERROGATORY NO. 84: What is your contention as to
26 how the general plan of the City of Roseville affected or limited
27 the use of the subject property as of the date of answering these
28 Interrogatories?

1 RESPONSE: See the Response to Interrogatory No. 55,
2 which Plaintiff incorporates herein.

3 INTERROGATORY NO. 85: State each and every fact upon
4 which you rely in the answer to the previous Interrogatory.

5 RESPONSE: See the Response to Interrogatory No. 55,
6 which Plaintiff incorporates herein.

7 INTERROGATORY NO. 86: If you contend as of the date of
8 answering these Interrogatories that the general plan affected or
9 limited the use of the subject property, what measures would have
10 to be taken by the Defendants in order to get a use permit for
11 development on the subject property?

12 RESPONSE: See the Response to Interrogatory No. 54,
13 which Plaintiff incorporates herein.

14 INTERROGATORY NO. 87: What is your contention as to
15 how the zoning ordinance of the City of Roseville affected or
16 limited the use of the subject property as of the date of answering
17 these Interrogatories?

18 RESPONSE: Plaintiff objects to this Interrogatory on
19 the ground that it calls for the privileged work product of its
20 attorneys. Without waiving such objection, Plaintiff contends that
21 the zoning which affects the subject property is set out in
22 Ordinance No. 1224 and other zoning ordinances, all of which are
23 public records available to Defendants and all of which speak for
24 themselves, setting out the permitted uses and uses permitted by
25 grant of a permit.

26 INTERROGATORY NO. 88: State each and every fact upon
27 which you rely in the answer to the previous Interrogatory.

28 RESPONSE: See the Response to Interrogatory No. 87,

1 which Plaintiff incorporates herein.

2 INTERROGATORY NO. 89: If you contend as of the date of
3 answering these Interrogatories that the zoning ordinance affected
4 or limited the use of the subject property, what measures would
5 have to be taken by the Defendants in order to get a use permit
6 for development on the subject property?

7 RESPONSE: See the Response to Interrogatory No. 54,
8 which Plaintiff incorporates herein.

9 INTERROGATORY NO. 90: What is your contention as to
10 how the park and recreation plan of the City of Roseville affected
11 or limited the use of the subject property as of the date of
12 answering these Interrogatories?

13 RESPONSE: The Park, Streambed and Recreation Element
14 of the General Plan has been replaced.

15 INTERROGATORY NO. 91: State each and every fact upon
16 which you rely in the answer to the previous Interrogatory.

17 RESPONSE: Not applicable.

18 INTERROGATORY NO. 92: If you contend as of the date of
19 answering these Interrogatories that the park and recreation plan
20 affected or limited the use of the subject property, what measures
21 would have to be taken by the Defendants in order to get a use
22 permit for development on the subject property?

23 RESPONSE: Not applicable.

24 INTERROGATORY NO. 93: As of the date of answering
25 these Interrogatories, what is your contention as to the amount of
26 levee work which could have been done by the Defendants on the
27 subject property to alleviate any flooding problem or change the
28 flood plain boundaries?

1 RESPONSE: See the Response to Interrogatory No. 63,
2 which Plaintiff incorporates herein.

3 INTERROGATORY NO. 94: State each and every fact upon
4 which you rely in the answer to the previous Interrogatory.

5 RESPONSE: Not applicable.

6 INTERROGATORY NO. 95: Describe in detail the nature,
7 scope, and extent of any easement or other interest other than a
8 fee interest in the subject property which you contend existed
9 across the subject property as of the date of the filing of the
10 Complaint herein.

11 RESPONSE: Plaintiff is informed and believes, and on
12 such information and belief contends that the easements and other
13 interests shown on the exhibit attached hereto as Exhibit "A"
14 existed across the subject property on the date of the filing of
15 the Complaint herein.

16 INTERROGATORY NO. 96: State each and every fact upon
17 which you rely in the answer to the previous Interrogatory.

18 RESPONSE: A preliminary title report prepared by
19 Title Insurance and Trust, Placer County.

20 INTERROGATORY NO. 97: Do you contend that the creek
21 which flows across the subject property is a navigable stream?

22 RESPONSE: Plaintiff objects to this Interrogatory on
23 the ground that it calls for the privileged work product of its
24 attorneys. Without waiving such objection, Plaintiff states that
25 it has not yet determined what its contentions will be in this
26 regard and therefore cannot answer at this time.

27 INTERROGATORY NO. 98: State each and every fact upon
28 which you rely in the answer to the previous Interrogatory.

1 RESPONSE: Not applicable.

2 INTERROGATORY NO. 99: What do you contend are the per-
3 mitted uses for the subject property under the current land use
4 regulations of the City of Roseville?

5 RESPONSE: See the Responses to Interrogatories No. 7,
6 No. 51, No. 55, and No. 80, which Plaintiff incorporates herein.

7 INTERROGATORY NO. 100: State each and every fact upon
8 which you rely in the answer to the previous Interrogatory.

9 RESPONSE: Not applicable.

10 INTERROGATORY NO. 101: What do you contend are the per-
11 mitted uses for the subject property under the land use regulations
12 of the City of Roseville which were in effect on the date of filing
13 of this Complaint?

14 RESPONSE: See the Response to Interrogatories No. 7,
15 No. 51, and No. 55, which Plaintiff incorporates herein.

16 INTERROGATORY NO. 102: State each and every fact upon
17 which you rely in the answer to the previous Interrogatory.

18 RESPONSE: Not applicable.

19 INTERROGATORY NO. 103: What do you contend are the per-
20 mitted uses for the subject property under the land use regulations
21 of the City of Roseville which were in effect at the time the pro-
22 ject in question was adopted?

23 RESPONSE: See the Response to Interrogatory No. 101,
24 which Plaintiff incorporates herein.

25 INTERROGATORY NO. 104: State each and every fact upon
26 which you rely in the answer to the previous Interrogatory.

27 RESPONSE: Not applicable.

28

1 INTERROGATORY NO. 105: Do you contend that the adoption
2 of the project interfered in any way with the Defendants' full use
3 and enjoyment of the property at any time since the adoption of
4 the project? If not, state each and every fact upon which you
5 rely in denying that there was any interference with Defendants'
6 full use and enjoyment of their property by the adoption of the
7 project.

8 RESPONSE: No. Defendants have been free to fully use
9 their property since the adoption of the project and they have
10 always been free to apply for any and all necessary governmental
11 approvals to convert their property to any allowable use.

12 INTERROGATORY NO. 106: Do you contend that there were
13 reasons other than the adoption of the project for denying
14 Defendants' request for a lot split in 1973? If so, state:

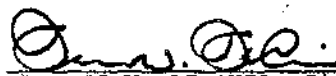
15 a. Each and every fact or factors upon which the
16 requestid lot split was denied; and

17 b. Names, addresses, and telephone numbers of any
18 persons who have any information regarding the fact or factors
19 for which the lot split was denied.

20 RESPONSE: Yes. Plaintiff objects to any inquiry into
21 the reasons, motives, background or recommendations on which the
22 staff, Council or Commission may have acted (Board of Administration
23 v. Superior Court (1975) 50 Cal.App.3d 314). Without waiving this
24 objection, plaintiff contends, among other things, that the
25 development proposed for the lot split would have resulted in a
26 steep rise in the water surface elevation. The area was currently
27 under study by the U.S. Army Corps of Engineers and preliminary
28 information from the Corps showed that the Defendants' draft EIR

1 was inadequate. The persons who have knowledge of such facts are
2 members of the City Council, Planning Commission and City staff at
3 that time.


4
5 DATED: October 7, 1977

6
7 
8 DENNIS W. DE CUIR, City Attorney
9 Attorney for Plaintiff

10 VERIFICATION

11 I am the City Attorney for the City of Roseville.
12 I have read the responses to Interrogatories No. 1 through
13 No. 106 and know the contents thereof. The responses are true
14 to my own knowledge, except the matters that are stated on my
15 information and belief, and as to those matters, I believe
16 them to be true.

17 I declare under penalty of perjury that the above
18 is true and correct and that this declaration was executed on
19 October 7, 1977, at Roseville, California.

20
21 
22 DENNIS W. DE CUIR, City Attorney
23 Attorney for Plaintiff

24 /
25 /
26 /
27 /
28 /

TOTAL AMOUNT : \$43.18
 FIRST INSTALLMENT : \$21.59 DUE AND PAYABLE
 SECOND INSTALLMENT : \$21.59 NOT YET DUE OR PAYABLE
 PERSONAL PROPERTY OF: \$NONE; LAND \$450.00
 IMPROVEMENTS : \$NONE
 PARCEL NUMBER : 13-040-03
 CODE AREA NUMBER : 5-01
 ASSESSED : TO THE PROPERTY HEREIN DESCRIBED

2. AN EASEMENT AFFECTING THE PORTION OF SAID LAND AND FOR THE PURPOSES STATED HEREIN, AND INCIDENTAL PURPOSES,
 IN FAVOR OF: W. G. HEMPHILL
 FOR : PIPE LINE ACROSS THE SOUTHEAST QUARTER OF SECTION 35
 RECORDED : APRIL 20, 1907 IN BOOK 5 PAGE 213 OF CONTRACTS
 LOCATION NOT DISCLOSED
 THE INTEREST OF HEMPHILL IS NOW HELD BY THE CITY OF ROSEVILLE
 AFFECTS PARCEL TWO

3. RESERVATION OF ALL OF THE WATER NECESSARY FOR THE OPERATION OF ITS RAILROAD, AS CONTAINED IN GRANT, CENTRAL PACIFIC RAILROAD COMPANY, A CORPORATION, TO THOMAS ANNIS, DATED MARCH 22, 1873, RECORDED OCTOBER 27, 1874 IN BOOK X OF DEEDS AT PAGE 326. AFFECTS PARCEL TWO.

4. AN EASEMENT AFFECTING THE PORTION OF SAID LAND AND FOR THE PURPOSES STATED HEREIN, AND INCIDENTAL PURPOSES,
 IN FAVOR OF: CITY OF ROSEVILLE
 FOR : PUBLIC UTILITY EASEMENT
 RECORDED : SEPTEMBER 23, 1957 IN BOOK 743 PAGE 192 OFFICIAL RECORDS

5. A DEED OF TRUST TO SECURE AN INDEBTEDNESS OF THE AMOUNT STATED HEREIN
 DATED : NOVEMBER 19, 1966
 AMOUNT : \$24,000.00
 TRUSTOR : WILLIAM J. ZISK AND LOIS E. ZISK, HIS WIFE, AND
 WILLIAM W. ZISK AND MARY A. ZISK, HIS WIFE
 TRUSTEE : TITLE INSURANCE AND TRUST COMPANY, A CORPORATION
 BENEFICIARY: MARJORIE ARNETT, AS TRUSTEE UNDER THE LAST WILL
 AND TESTAMENT OF MABEL M. PHILLIPS, DECEASED
 RECORDED : DECEMBER 23, 1966 IN BOOK 1138 PAGE 368 OFFICIAL RECORDS
 AFFECTS : PARCELS ONE AND TWO DESCRIBED HEREIN

6. AN EASEMENT AFFECTING THE PORTION OF SAID LAND AND FOR THE PURPOSES STATED HEREIN, AND INCIDENTAL PURPOSES,
 IN FAVOR OF: THE CITY OF ROSEVILLE
 FOR : OVERHEAD ELECTRICAL UTILITY LINES WITH ALL NECESSARY
 POLES, WIRES AND APPURTENANCES THERETO
 RECORDED : AUGUST 28, 1968 IN BOOK 1212 PAGE 16 OFFICIAL RECORDS
 AFFECTS : A PORTION OF PARCEL ONE

EXHIBIT A

7. AN EASEMENT AFFECTING THE PORTION OF SAID LAND AND FOR THE PURPOSES STATED HEREIN, AND INCIDENTAL PURPOSES, CONDEMNED BY FINAL DECREE
IN FAVOR OF: CITY OF ROSEVILLE
FOR : WATER TRANSMISSION PIPELINE PURPOSES
CASE NO. : 33405, IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF PLACER
RECORDED : JULY 28, 1972 IN BOOK 1433 PAGE 574 OFFICIAL RECORDS
AFFECTS : A PORTION OF PARCEL TWO

NOTE:
THERE HAVE BEEN NO CONVEYANCES OF THE HEREIN DESCRIBED PROPERTY DURING THE 5 MONTH PERIOD PRIOR TO THE DATE HEREOF.

DESCRIPTION

ALL THAT REAL PROPERTY IN THE CITY OF ROSEVILLE, CALIFORNIA, COUNTY OF PLACER, DESCRIBED AS FOLLOWS:

(SEE ATTACHED SHEET)

EXHIBIT A

1 DENNIS W. DE CUIR
 City Attorney
 2 City of Roseville
 316 Vernon Street
 3 Roseville, CA 95678
 Telephone: (916) 783-9151, Ext. 272
 4 Attorney for Plaintiff

FILED OCT 7 - 1977

MAURINE J. DOBBAS
 COUNTY CLERK OF PLACER COUNTY
 By *M.A. Hulse*
 DEPUTY

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 IN AND FOR THE COUNTY OF PLACER

10	CITY OF ROSEVILLE, a municipal)	
	corporation,)	
11		)	NO. 41104
	Plaintiff,)	
12		)	DECLARATION OF
	v.	)	DENNIS W. DE CUIR
13)	
	WILLIAM J. ZISK and LOIS E.)	
14	ZISK, et al.,)	
)	
15	Defendants.)	

MICROFILMED

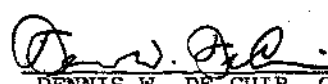
17 I, DENNIS W. DE CUIR, declare as follows:

18 The "Declaration in Support of Motion for Summary
 19 Judgment," filed by me on September 26, 1977, relates my
 20 personal recollection of the testimony of William J. Zisk at
 21 his deposition on September 7, 1977, at which I was personally
 22 present and which I personally took. My recollection was
 23 refreshed by reading the copy of the transcript of the deposition
 24 certified by the deposition reporter. Further, the verbatim
 25 portions of said deposition as set forth in "Plaintiff's
 26 Exhibit B In Support of Motion for Summary Judgment" on file
 27 herein/which accurately reflects the questions asked and the answers
 28 given by William Zisk at said deposition.

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If sworn as a witness, I can testify competently
thereto.

I declare under penalty of perjury that the foregoing
is true and correct. Executed at Roseville, California, on
October 7, 1977.


DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff

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567

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

DATE: Oct. 7, 1977 COURT MET AT 3:30 p.m. DEPARTMENT NO. 3
PRESENT: HON. Keith F. Sparks JUDGE Y. A. Hulse DEPUTY CLERK
Marilyn Waller REPORTER R. Murray BAILIFF

TITLE:

CITY OF ROSEVILLE

vs.

WILLIAM J. ZISK, et al.

COUNSEL:

Dennis W. De Cuir
William J. Turner

Richard Desmond
Steven Wagner

MICROFILMED

NATURE OF PROCEEDINGS: Motion for Summary Judgment

ACTION NO. 41104

Supplemental Declaration of Dennis W. De Cuir presented to the Court and Ordered filed over objection by Mr. Desmond. The same opportunity extended to defendants to file supplemental declaration by Mr. Zisk. Mr. Desmond stated he will file his declaration by October 19, 1977.

Hearing on Plaintiff's Motion for Partial Summary Judgment & Pre Trial Order is set for hearing on October 24, 1977 at 3:00 p.m. and the Pre-Trial Conference is set for the same date and time.

Mr. De Cuir made a motion to strike the Declaration of Robert U. Grant filed Oct. 6, 1977 and Mr. Turner argued same. Motion taken under submission and continued until the time of the Pretrial Conference. Pretrial Statements are ordered filed.

Each party identified their appraisal witnesses and there was some discussion of the "Klopping" problem. The Court stated that if there are problems in that regard, a hearing can be scheduled prior to the trial.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Marilyn I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY: Y. A. Hulse DEPUTY

1 DESMOND, MILLER, DESMOND & BARTHOLOMEW
2 1006 - 4th Street, Suite 900
3 Sacramento, California 95814
4 Telephone: 443-2051

FILED

OCT 7 - 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

M. I. Dobbas
DEPUTY

Attorneys for Defendants

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

10 CITY OF ROSEVILLE, a municipal
11 corporation,

No. 41104

12 Plaintiff,

DEFENDANTS' PRE-TRIAL
STATEMENT

13 vs.

14 WILLIAM J. ZISK and LOIS E.
15 ZISK,

16 Defendants.

17 Pursuant to Rule 210, Defendants submit the following
18 Pre-Trial Statement:

MICROFILMED

I

19 NATURE OF THE CASE

20 This is an action in eminent domain for a partial taking of
21 the subject property for purposes of parks and recreation.
22 Defendants claim just compensation for the property taken by the
23 pleadings and severance damages to the remainder. In addition,
24 Defendants have raised additional issues by way of affirmative
25 defense and Cross-Complaint. In summary, Defendants contend that
26 by reason of the precondemnation activity for the purposes
27 of the acquisition set forth in the Complaint, there has been
28

-1-

1 inverse condemnation constituting taking of an interest in
2 the remainder and causing damages to be suffered by Defendants by
3 reason of unreasonable and wrongful precondemnation activity
4 of the Plaintiff.

II

MATTERS AGREED UPON OR ADMITTED

- 5
- 6
- 7 1. Defendants are the owners of the fee simple title to
8 the subject property.
- 9 2. The date of valuation shall be the date of trial.
- 10 3. The pleadings are in order except that the Answer
11 should be amended to conform to proof as to the amount of just
12 compensation for the taking, severance damages, and other elements
13 of just compensation and to describe the exact nature of the
14 inverse taking to conform to proof.

III

ISSUES OF FACT IN DISPUTE AND CONTENTIONS OF PARTIES

- 15
- 16
- 17 1. The amount of just compensation to which
18 Defendants are entitled.

IV

DISCOVERY

19

20

21 Discovery has been completed with the exception that
22 Plaintiff has not answered Interrogatories within the
23 prescribed time and Defendants reserve the right to compel
24 Answers to said Interrogatories.

NEGOTIATIONS FOR SETTLEMENT

25

26 All negotiations for settlement have been fruitless.
27 Offer and demand pursuant to the Code Section has been made.

28 ////

TRIAL

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- 1. It is estimated that trial will require fifteen (15) days.
- 2. Jury trial is demanded by both sides.
- 3. Defendants waive Notice of Trial.

DATED: October 7, 1977.

DESMOND, MILLER, DESMOND
& BARTHOLMEW

By: *[Signature]*
RICHARD P. DESMOND
Attorneys for Defendants

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

FILED

OCT 7 - 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
M. I. Dobbas
DEPUTY

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)
)
Plaintiff,)
)
v.)
)
WILLIAM J. ZISK and LOIS E.)
ZISK, et. al.,)
)
Defendants)

No. 4 1 1 0 4

PLAINTIFF'S
PRETRIAL STATEMENT

MICROFILMED

Nature of Action

This is an action in eminent domain based upon the City of Roseville Resolution No. 73-122 duly passed on December 19, 1973, and was commenced by the City of Roseville, a Municipal Corporation, on December 20, 1973. The Complaint was amended on July 2, 1974.

The purpose of this action is to acquire Parcel A and Parcel B as described in plaintiff's Amendment to Complaint for public park and bicycle path purposes. The property to be acquired herein and the remaining property is located largely within and in the vicinity of Dry Creek southerly of Thomas Street in the City of Roseville, California.

Parties

1
2 An answer has been filed on behalf of defendants
3 William J. Zisk and Lois E. Zisk claiming ownership of the
4 property and seeking compensation.

5 Defendants Mary A. Zisk, Title Insurance and Trust
6 Company, a corporation, trustee, and Marjorie Arnett, as
7 Trustee under the Last Will and Testament of Mabel M. Phillips,
8 deceased, beneficiary, have been served with summons and com-
9 plaint but have not appeared. Plaintiff intends to take the
10 default of these defendants or obtain a disclaimer from them.

11 The County of Placer may have a lien for unpaid taxes
12 or assessments, on the property to be acquired herein.
13 Plaintiff is informed that the County of Placer will file an
14 answer requesting that any such amounts be paid to the County
15 of Placer from any judgment award herein and plaintiff requests
16 that such payment be made to the County of Placer from the
17 judgment award herein.

18 Prior Ruling of Court on Cross-Complaint
19 of Defendants Zisk

20 Defendants Zisk filed a cross-complaint herein in
21 addition to their answer. Following the hearing on plaintiff's
22 demurrer to that cross-complaint, the Court by Order dated
23 October 28, 1976 sustained plaintiff's demurrer to the Second,
24 Third and Fourth Causes of action. The Court further ordered
25 that the First Cause of action for inverse condemnation is abated
26 and consolidated with the action of Zisk v. City of Roseville,
27 No. 41105.

28 In its order of October 28, 1976, the Court further
held that:

"... if the eminent domain proceeding is carried

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through to a dispositive conclusion, the abatement shall become permanent and the cause of action for inverse condemnation shall be barred (Zisk v. City of Roseville (1976) 56 Cal. App. 3d 41,48)."

Accordingly, there are no inverse condemnation issues to be tried at the forthcoming trial.

Motions Pending

Plaintiff has moved for partial summary judgment as to the claims of defendants Zisk set forth in paragraphs V, VI and VII of their answer in which defendants apparently seek damages resulting from alleged precondemnation activities of plaintiff. This motion is now set for hearing on October 7, 1977.

Issues for Trial

(A) Issues for Court Without Jury

Inasmuch as in an action in eminent domain, all issues are for the Court's determination except for the sole issue relating to compensation to be awarded, (People v. Ricciardi (1943) 23C 2d 390, 402-403), the following determinations should be made by the Court before impanelling the jury and plaintiff requests that the Court bifurcate the case accordingly:

1. What is the appropriate valuation date (CCP §1249). Plaintiff contends that the date of value should be December 20, 1973, the date summons was issued.
2. In the event plaintiff's above referred to motion for partial summary judgment is denied,

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the Court should determine whether defendants Zisk have produced facts sufficient to establish that they are entitled to present evidence to the jury for claims of damages allegedly resulting from the land use activities of the plaintiff. (City of Los Angeles v. Lowensohn (1976) 54 C.A. 3d 626, 629.)

(B) Issues for Jury

1. The fair market value of Parcel A and Parcel B;
2. The severence damages, if any, accruing to the remainder of the property of which said Parcels A and B are a part; and
3. The special benefits, if any, accruing to the remainder of the property of which said Parcels A and B are a part.

Remaining Discovery

Pursuant to stipulation on file herein, plaintiffs

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1 and defendants Zisk have agreed to waive any requirement that
2 there be an exchange of information pursuant to Sections 1272.01 -
3 1272.09 of the Code of Civil Procedure and have agreed that
4 instead of any such exchange, said parties will identify their
5 respective appraisal witnesses by names, addresses and telephone
6 numbers. The parties further have stipulated and agreed that no
7 other appraisal witnesses may be called to testify at the trial
8 of this proceeding unless so identified and disclosed at the
9 Pretrial Conference. The parties have further stipulated and
10 agreed that depositions of any such appraisal witnesses may be
11 taken at any time before trial upon five (5) days written notice.

12 It is estimated that at least five (5) days will be
13 necessary for the trial of this action.

14 DATED: October 7, 1977

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17 
18 DENNIS W. DE CUIR
19 ATTORNEY FOR PLAINTIFF
20
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576

FILED

OCT 13 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY *M. I. Dobbas* DEPUTY

1 DENNIS W. DE CUIR
2 City Attorney
3 City of Roseville
3 316 Vernon Street
4 Roseville, CA 95678
5 Telephone: (916) 783-9151, Ext. 272
6
7
8 Attorney for Plaintiff

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 CITY OF ROSEVILLE, a municipal)
11 corporation,)
12)
13 Plaintiff,)
14)
15 v.)
16 WILLIAM J. ZISK and LOIS E.)
17 ZISK, et al.,)
18)
19 Defendants.)

NO. 4 1 1 0 4
DECLARATION IN SUPPORT
OF ISSUANCE OF
SUBPENA DUCES TECUM

MICROFILMED

17 I, DENNIS W. DE CUIR, declare and state as follows:

18 1. I am the attorney for Plaintiff in the above-
19 referenced matter.

20 2. The above case is an action in eminent domain wherein
21 Plaintiff seeks to acquire certain parcels of land located in the
22 City of Roseville, California, along Dry Creek southerly of Thomas
23 Street. William J. and Lois E. Zisk claim to be the owners of the
24 parcels being acquired herein and the remaining property of which
25 said parcels are a part. The issues in this case relate to the
26 physical characteristics and valuation of said property.

27 Defendants Zisk have represented that they intend to

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call Fred Festersen, Sr., as an appraisal witness to testify for said Defendants at the trial of the above-referenced matter presently scheduled to commence on November 1, 1977.

Said Fred Festersen, Sr., has in his possession or under his control any and all notes, papers, files, reports, photographs, sales data, valuation studies and calculations, engineering studies, correspondence and memoranda which in any way relate to said witness' employment by Defendants, studies and/or any anticipated testimony in connection with the above-referenced matter.


Said material relates to the subject matter of this litigation and discovery thereof by Plaintiff is necessary to facilitate full preparation by Plaintiff for trial of this case.

WHEREFORE, it is requested that said Fred Festersen, Sr., be required to appear and bring with him and produce all of said material above-referenced at his deposition to be taken by Plaintiff herein and that Subpena Duces Tecum issue requiring said appearance and production.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Roseville, California.

DATED: OCT 12 1977


DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff
City of Roseville
/
/
/

FILED

OCT 13 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY: *[Signature]*
DEPUTY

1 DENNIS W. DE CUIR
2 City Attorney
3 City of Roseville
4 316 Vernon Street
5 Roseville, CA 95678
6 Telephone: (916) 783-9151, Ext. 272
7
8 Attorney for Plaintiff

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF PLACER

11	CITY OF ROSEVILLE, a municipal corporation,)	
12)	
13	Plaintiff,	)	NO. 4 1 1 0 4
14	v.	)	DECLARATION IN SUPPORT
15	WILLIAM J. ZISK and LOIS E. ZISK, et al.,	)	OF ISSUANCE OF
16	Defendants.	)	SUBPENA DUCES TECUM

MICROFILMED

17 I, DENNIS W. DE CUIR, declare and state as follows:

18 1. I am the attorney for Plaintiff in the above-
19 referenced matter.

20 2. The above case is an action in eminent domain wherein
21 Plaintiff seeks to acquire certain parcels of land located in the
22 City of Roseville, California, along Dry Creek southerly of Thomas
23 Street. William J. and Lois E. Zisk claim to be the owners of the
24 parcels being acquired herein and the remaining property of which
25 said parcels are a part. The issues in this case relate to the
26 physical characteristics and valuation of said property.

27 Defendants Zisk have represented that they intend to

28

1 call Frank La Bella as an appraisal witness to testify for said
2 Defendants at the trial of the above-referenced matter presently
3 scheduled to commence on November 1, 1977.

4 Said Frank La Bella has in his possession or under his
5 control any and all notes, papers, files, reports, photographs,
6 sales data, valuation studies and calculations, engineering
7 studies, correspondence and memoranda which in any way relate to
8 said witness' employment by Defendants, studies and/or any
9 anticipated testimony in connection with the above-referenced
10 matter.


11 Said material relates to the subject matter of this
12 litigation and discovery thereof by Plaintiff is necessary to
13 facilitate full preparation by Plaintiff for trial of this case.

14 WHEREFORE, it is requested that said Frank La Bella be
15 required to appear and bring with him and produce all of said
16 material above-referenced at his deposition to be taken by
17 Plaintiff herein and that Subpena Duces Tecum issue requiring
18 said appearance and production.

19 I declare under penalty of perjury that the foregoing
20 is true and correct.

21 Executed at Roseville, California.

22 DATED: OCT 12 1977

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25 DENNIS W. DE CUIR, City Attorney
26 Attorney for Plaintiff
27 City of Roseville
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FILED

OCT 18 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY: *M. Stepp* DEPUTY

1 DENNIS W. DE CUIR
2 City Attorney
3 City of Roseville
316 Vernon Street
4 Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272
5 Attorney for Plaintiff

6
7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 CITY OF ROSEVILLE, a municipal)
corporation,)
11 Plaintiff,) NO. 4 1 1 0 4
12 v.) DECLARATION IN SUPPORT
13 WILLIAM J. ZISK and LOIS E.) OF ISSUANCE OF
14 ZISK, et al.,) SUBPENA DUCES TECUM
15 Defendants.)

MICROFILMED

16
17 I, DENNIS W. DE CUIR, declare as follows:

- 18 1. I am the attorney for Plaintiff in the above-
19 referenced matter.
20 2. The above case is an action in eminent domain wherein
21 Plaintiff seeks to acquire certain parcels of land located in the
22 City of Roseville, California, along Dry Creek southerly of Thomas
23 Street. William J. and Lois E. Zisk claim to be the owners of the
24 parcels being acquired herein and the remaining property of which
25 said parcels are a part. The issues in this case relate to the
26 physical characteristics and valuation of said property.
27 Defendants Zisk have filed a declaration of Robert U.
28 Grant herein dated October 6, 1977, indicating that Robert U. Grant

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has conducted studies and formed opinions relating to the subject matter of Defendants' claims herein.

Said Robert U. Grant has in his possession or under his control any and all notes, papers, reports, photographs, studies, calculations, regulations and ordinances, correspondence, files, memoranda which in any way relate to said Robert U. Grant's employment by Defendants, studies, said October 6, 1977 declaration of Robert U. Grant and/or any anticipated testimony of Robert U. Grant in connection with the above-referenced matter.

Said material relates to the subject matter of this litigation and discovery thereof by Plaintiff is necessary to facilitate full preparation by Plaintiff for trial of this case.

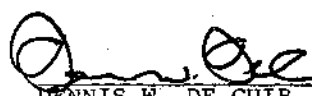
WHEREFORE, it is requested that said Robert U. Grant be required to appear and bring with him and produce all of said material above-referenced at his deposition to be taken by Plaintiff herein and that a Subpena Duces Tecum issue requiring said appearance and production.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Roseville, California.

OCT 12 1977

DATED: _____


DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff
City of Roseville

/

/

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/

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

Attorney for Plaintiff

FILED
OCT 13 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,
Plaintiff,
v.
WILLIAM J. ZISK and LOIS E. ZISK, et al.,
Defendants.

NO. 41104
DECLARATION IN SUPPORT
OF ISSUANCE OF
SUBPENA DUCES TECUM

MICROFILMED

I, DENNIS W. DE CUIR, declare and state as follows:

1. I am the attorney for Plaintiff in the above-referenced matter.
2. The above case is an action in eminent domain wherein Plaintiff seeks to acquire certain parcels of land located in the City of Roseville, California, along Dry Creek southerly of Thomas Street. William J. and Lois E. Zisk claim to be the owners of the parcels being acquired herein and the remaining property of which said parcels are a part. The issues in this case relate to the physical characteristics and valuation of said property.

Plaintiff has been informed and believes that Stephen P. Thomas has been requested to conduct engineering studies relating

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DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

Attorney for Plaintiff

FILED
OCT 13 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY *M. J. [Signature]*
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,)	
)	
Plaintiff,	)	NO. 41104
)	
v.	)	DECLARATION IN SUPPORT
	)	OF ISSUANCE OF
WILLIAM J. ZISK and LOIS E. ZISK, et al.,	)	SUBPENA DUCES TECUM
)	
Defendants.)	

MICROFILMED

I, DENNIS W. DE CUIR, declare and state as follows:

- I am the attorney for Plaintiff in the above-referenced matter.
 - The above case is an action in eminent domain wherein Plaintiff seeks to acquire certain parcels of land located in the City of Roseville, California, along Dry Creek southerly of Thomas Street. William J. and Lois E. Zisk claim to be the owners of the parcels being acquired herein and the remaining property of which said parcels are a part. The issues in this case relate to the physical characteristics and valuation of said property.
- Plaintiff has been informed and believes that Stephen P. Thomas has been requested to conduct engineering studies relating

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to the property which is the subject of this action.

Said Stephen P. Thomas has in his possession or under his control any and all notes, files, papers, reports, photographs, studies, calculations, correspondence and memoranda which in any way relate to the arrangement pursuant to which Stephen P. Thomas is to conduct said studies, the studies themselves and/or any anticipated testimony of Stephen P. Thomas in connection with the above-referenced matter.


Said material relates to the subject matter of this litigation and discovery thereof by Plaintiff is necessary to facilitate full preparation by Plaintiff for trial of this case.

WHEREFORE, it is requested that said Stephen P. Thomas be required to appear and bring with him and produce all of said material above-referenced at his deposition to be taken by Plaintiff herein and that a Subpena Duces Tecum issue requiring said appearance and production.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Roseville, California.

DATED: OCT 12 1977


DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff
City of Roseville

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/

1 TURNER & MULCARE
A PROFESSIONAL CORPORATION
2 1650 S. Amphlett Blvd., Suite 225
San Mateo, CA 94402
3 Telephone: (415) 573-7677

4 DENNIS W. DE CUIR
City Attorney
5 City of Roseville
316 Vernon Street
6 Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

FILED

OCT 17 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY *[Signature]*
DEPUTY

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 CITY OF ROSEVILLE, a municipal)
corporation,)
11 Plaintiff,)
12 v.)
13 WILLIAM J. ZISK and LOIS E.)
14 ZISK, et al.,)
15 Defendants.)

MICROFILMED

NO. 4 1 1 0 4

ASSOCIATION OF
ATTORNEYS

16
17 It is agreed by and between the undersigned that the
18 firm of TURNER & MULCARE, a professional corporation, 1650
19 South Amphlett Boulevard, Suite 225, San Mateo, California, 94402,
20 (415) 573-7677, be associated as attorney of record along with
21 DENNIS W. DE CUIR, City Attorney of the City of Roseville, in the
22 above-entitled proceeding.

23 DATED: October 13, 1977

George A. Buljan
GEORGE A. BULJAN, MAYOR
City of Roseville

TURNER & MULCARE, a professional
corporation

26
27 By *William J. Turner*
WILLIAM J. TURNER

Dennis W. De Cuir
DENNIS W. DE CUIR, City Attorney
City of Roseville

28

PROOF OF SERVICE BY MAIL (C. C. P. 1013a, 5.5)

585

STATE OF CALIFORNIA

COUNTY OF PLACER

} ss. CITY OF ROSEVILLE

v.
WILLIAM J. ZISK and NO. 41104
LOIS E. ZISK, et al.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my ^{business} ~~RESIDENT~~ address is:

316 Vernon Street, Roseville, California 95678

On October 1977, I served the within Association of Attorneys

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Roseville, CA, addressed as follows:

Richard Desmond
DESMOND, MILLER, DESMOND
& BARTHOLOMEW
1006 4th Street, Suite 900
Sacramento, CA 95814

Dated at Roseville, CA

Date October 14, 1977

I certify (or declare), under penalty of perjury * that the foregoing is true and correct.

Cheri P. Martin
(Signature) Cheri P. Martin

Proof of service by mail forms, being signed under penalty of perjury, do not require notarization.
Cowdery's Form No. 1045 - Proof of Service by Mail (California Actua)

Revised 10-70

586

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th Street, Suite 900
Sacramento, California 95814
Telephone: 443-2051

Attorneys for Defendants

FILED
OCT 19 1977

MAURINE I. DOBEAS
COUNTY CLERK OF PLACER
BY *[Signature]*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

No. 41104

Plaintiff,

DECLARATION IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

vs.

WILLIAM J. ZISK and LOIS E. ZISK,

Defendants.

MICROFILMED

I, WILLIAM J. ZISK, declare:

That in reading the Memorandum of Points and Authorities in Support of Motion for Summary Judgment by the Plaintiff in this action, I note that Plaintiff has informed this Court that the planning and zoning regulations of the City of Roseville had no economic effect whatsoever in the use of my property except as it may have lost its value for future development. As a lay person, I am not familiar with real estate terminology. When I used the term "speculative value" in my deposition, I meant that my property lost value because neither I, nor anyone else was able to develop or sell it for its highest and best use.

If the lot split I requested from the City had been

DESMOND, MILLER,
DESMOND &
BARTHOLOMEW
ATTORNEYS AT LAW
1006 Fourth Street
SUITE 900
SACRAMENTO, CALIF.
TELEPHONE 443-2051

1 granted, I would have been able to build a new home on Parcel A
2 and use the remainder for rental as an interim use pending
3 further development. I could not put any development on the
4 property because the City would not allow it because of the
5 regulations imposed on my property. After April 25, 1973, it
6 became obvious that I would be unable to use my property for any
7 purpose other than its existing use. As a proximate result, I
8 lost the reasonable return on the before value of the property
9 plus all the expenses I incurred in connection with the application
10 for the lot split and use permit, together with any taxes attribut-
11 able to the portion of the property completely removed from use
12 for the purposes as set forth in the Complaint for Eminent Domain
13 from April 25, 1973. I was unable to realize the fair rental
14 value of the existing home from that date.

15 Furthermore, after the implementation of the plans and
16 zoning regulations by the City, it is my opinion that any potential
17 purchaser, being fully informed of all the facts and circumstances,
18 including the denial of the lot split and including the planning
19 and zoning regulations imposed on my property by the City of
20 Roseville for the purpose of denying me the opportunity to
21 develop my property, would come to the conclusion that he could
22 not develop the property either and therefore would not buy it
23 since it was forever limited to the existing conditions. It is
24 my opinion that the existing condition is not the highest and
25 best use of the property.

26 At no time prior to the activity of the City commencing
27 with my application for a lot split in March, 1973, had I ever
28 been denied any use of my property by reason of alleged possibility

1 of future flooding. The only reason why my property, if any,
2 located outside the banks of Dry Creek is subject to flooding is
3 because of the construction and maintenance of improvements
4 constructed, owned and operated by the City in the channel of the
5 stream, including but not limited to, the bridges, sewer pipes
6 and fences located upstream from Riverside Avenue and downstream
7 from my property, and/or improper maintenance and clearing of the
8 channel by the City.

9 I declare under penalty of perjury that the foregoing is
10 true and correct.

11 Executed on October 19, 1977, at Roseville, California.

12 
13 WILLIAM J. ZISK
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PLACER COUNTY COUNSEL

County Administrative Center
175 Fulweiler Avenue
Auburn, California 95603
Telephone: (916) 823-4781

Attorneys for County of Placer

FILED
OCT 21 1977
MAURINE J. DOEBBAG
COUNTY CLERK OF PLACER COUNTY
BY *M. J. Doebbag*
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)
)
Plaintiff,)
)
vs.)
)
WILLIAM J. ZISK, LOIS E. ZISK,)
WILLIAM W. ZISK, Trustor; et al.)
)
Defendants.)

No. 41,104
ANSWER OF DEFENDANT
COUNTY OF PLACER

MICROFILMED

Comes now Defendant, COUNTY OF PLACER, and answers the
Complaint of Plaintiff and admits, denies and alleges:

I

Defendant claims an interest in the properties described in
Plaintiff's Complaint and alleges that said interest is a valid
claim and lien against said property for State, County of Placer,
school district, special district taxes, assessment district
assessments, maintenance district assessments, and city taxes,
if said property is located within the limits of any incorporated
city, together with penalties, interest and cost.

II

That said interest in said real property consists of a lien

1 thereon as and for taxes, penalties, interest due and payable,
2 and due and not payable to said Defendant, the amount, nature and
3 extent of which are not at this time known for which reason said
4 Defendant prays leave of court to insert herein by amendment full
5 particulars and details respecting the nature, value, extent and
6 the amount of damages claimed for the same when the same shall
7 become known to this Defendant.

III

8
9 Defendant further alleges that each claim and lien against
10 said property is a valid and legal claim for taxes or assessments,
11 and for penalties, interest and costs, if any, which have accrued
12 thereon, duly and regularly assessed, levied and charged against
13 said property, and that each claim and lien is superior and para-
14 mount to any right, title or interest of the person or persons to
15 whom said taxes or assessments were levied or assessed, or
16 claimed through or under said person or persons, and each claim
17 and lien is superior to any and all other liens against said
18 property.

IV

19
20 That the COUNTY OF PLACER is authorized by law to collect
21 said taxes, assessments, penalties, interest and costs on behalf
22 of the state, school districts, assessment districts, maintenance
23 districts, the cities within which said property is located if
24 said property be within the limits of an incorporated city and
25 special districts.

26 WHEREFORE, this answering Defendant prays that each lien and
27 claim be determined and established to be a good and valid lien
28 and claim against said property and that any additional penalties,

1 interest or costs accruing thereon be declared to be a good and
 2 valid lien and claim against said property, and that each lien
 3 and claim be first paid out of any compensation or damages
 4 awarded for the condemnation and taking of said property, and
 5 for its costs, and for such other and further relief as to the
 6 court may seem meet and proper in the premises.

7 DATED: October 18, 1977.

COUNTY OF PLACER
 L. J. DEWALD, COUNTY COUNSEL

BY: 
 Lawrence P. Boulger, Deputy

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AFFIDAVIT OF SERVICE BY MAIL

592

STATE OF CALIFORNIA)
COUNTY OF PLACER) ss.

I, the undersigned, declare:

1. That I am a citizen of the United States.
2. That I am over 18 years of age.
3. That I am a resident of Placer County California.
4. That I am not a party to the within action.
5. That my business address is County Administrative Center,
Auburn, California 95603.
6. That I served a copy of the attached

ANSWER OF DEFENDANT COUNTY OF PLACER
(Superior Court #41,104)

by placing said copy in an envelope addressed to following person(s) at the following (office)(residence) address:

Desmond, Miller, Desmond & Bartholomew
1006 - 4th Street
Sacramento, CA 95814

which envelope was then sealed and postage fully prepaid therein, and thereafter was on October 21 1977, deposited in the United States mail at Auburn, California.

7. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: This 21st day of October 1977

E. Lamberton

REF: CCP 1013A
Note: Attach to original or a
true copy of paper served.

TURNER & MULCA
A Professional Corporation
1650 Amphlett Blvd., Suite 225
San Mateo, CA 94402
Telephone: (415) 573-7677

DENNIS W. DE CUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

FILED

OCT 21 1977

MAURINE I. DOSSAS
COUNTY CLERK OF PLACER COUNTY
BY *M. I. Dossas*
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)
Plaintiff,)
v.)
WILLIAM J. ZISK and LOIS E.)
ZISK, et al.,)
Defendants.)

NO. 4 1 1 0 4
SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

MICROFILMED

The defendants have now admitted that they cannot marshal a single, triable issue of fact to support Paragraph V, VI or VII of their Answer.

Declarants William J. Zisk and Robert U. Grant have surmised their case into the subjunctive: if this ... if that ... we would have, and so on. Their alleged damages are entirely conjectural, based solely on plans or hopes for speculating in the real estate market. The declarations assert no more than the alleged failure to reap the benefit of doubling appreciation in the development of a new home (Grant's decl., p. 4, ll. 14-15), rental income from a hitherto unrented structure (Grant's decl., p.4, ll. 13-14; Zisk's decl., p.2, ll. 13-14), and the sale or

1 development of the vacant balance of their land (Grant's decl.,
2 p.3, ll. 13-15; Zisk's decl., p.2, ll. 1-2).

3 Defendants have not presented a single fact showing
4 that the economic and beneficial uses to which they always in-
5 tended to put the property, i.e., as a base of operations for a
6 trucking business, as a home, and for the rental of the other
7 existing dwelling, have been affected in any way by the acts of
8 the City of which they complain. Thus, Mr. Zisk's admissions
9 that the defendants have not been damaged in the use of their
10 property, except as it may have lost speculative value, stands.
11 The defendants have, furthermore, failed to offer a single fact
12 positing any type of estoppel.

13 The contention of declarant Robert U. Grant that the
14 floodplain zoning ordinances have the effect of taking a flowage
15 easement is a sham. Defendant William Zisk admitted in his
16 deposition that he bought his property in 1966 with the knowledge
17 that all of it was zoned R-1, R-1 FP, and thereby subjected to a
18 predecessor Floodplain (FP Combining Zone). He understood when he
19 purchased it that the FP Zone designated areas of his property
20 that could flood and that those were the areas "controlled under
21 the FP portion" (De Cuir's decl., p.2; Zisk's depo., pp. 26-28).
22 He also understood that in order to develop it he would need to
23 apply for and be granted a special permit from the City (De Cuir's
24 decl., p.2; Zisk's depo., p.27, ll. 12-17).

25 Furthermore, the flowage easement issue is not before
26 the Court by way of any pleading, and the ordinances in question
27 have been validated and found not to deprive the defendants of
28 any constitutional rights:

1 "We conclude, however, that the pleadings
2 fail to disclose a deprivation of any consti-
3 tutional right by the councilmen (they accorded
4 the plaintiffs the constitutional right to fair
5 compensation for property condemned). When
6 the city council adopted Ordinances 1224 and
7 1227 which regulated land uses within flood prone
8 areas and rezoned certain lands surrounding
9 streambeds, plaintiffs' land was not singled out
10 for abuse; on the contrary, all lands similarly
11 situated were rezoned. Thus these flood plain
12 ordinances were neither vague nor arbitrary,
13 nor an improper exercise of the city council's
14 police power; rather, they were adopted as a
15 proper regulation of land use and were a permis-
16 sible exercise of that power. (Morse v. County
17 of San Luis Obispo (1967) 247 Cal.App.2d 600,
18 603; Metro Realty v. County of El Dorado (1963)
19 222 Cal.App.2d 508, 515-516.)" (Emphasis
20 added. Zisk v. City of Roseville (1976) 56 Cal.
21 App.3d 41, 49.)

22 The defendants have utterly failed to vault City of
23 Los Angeles v. Lowensohn (1976) 54 Cal.App.3d 625, by even a
24 suggestion that they can produce evidence tending to show any
25 actual losses. They have not claimed an inability to rent the
26 existing rental or to continue their trucking business. If the
27 defendants were intent on testing either the validity of the
28 zoning or the denial of permission to build a home on the creek
they had their potential remedy in mandate. Moreover, the alleged
injuries of which they complain are simply non-compensable in
damages, as a matter of law. (See HFH, LTD. v. Superior Court
(1975) 15 Cal.3d 508, 521 [diminution of market value due to
zoning]; State of California v. Superior Court (Veta) (1974)
12 Cal.3d 237 [denial of building permit on the ground that the
land proposed for development may ultimately be designated for
public use]; Selby Realty Co. v. City of San Buenaventura (1973)
10 Cal.3d 110, 118; and AVCO Community Developers, Inc. v. South
Coast Regional Commission (1976) 17 Cal.3d 785, 793.)

1 In addition, defendants' Answer is conclusively shown
2 to be without merit when one refers to the accepted eminent
3 domain jury instruction (BAJI 11.75), which expressly states that
4 the subject property may not be valued by reference to what it
5 was worth to the defendant for speculation or merely for possible
6 use, nor what the defendant claims it was worth to him.

7 We must finally object and ask the Court to strike
8 the Declaration of William J. Zisk. We object on the ground
9 that it contains mere conclusions and opinions which are incompe-
10 tent and unsupported by any foundation and on the ground that it
11 was not properly served and filed on October 19, 1977 as provided
12 by the Court's order, entered at the October 7, 1977 hearing on
13 plaintiff's motion. As can be seen from the attached proof of
14 service, a copy of the declaration was not mailed to plaintiff's
15 counsel until October 20, 1977, in violation of Rule 249(c)(6)
16 of the Rules of Court.

17 We submit that this is a proper case for partial sum-
18 mary judgment.

19 DATED: OCT 21 1977

Respectfully submitted,

20
21 

22 DENNIS W. DE CUIR
23 City Attorney
24 Attorney for Plaintiff City of
25 Roseville
26
27
28

City of Roseville vs. Risk; Placer Superior No. 1104
PROOF OF SERVICE BY MAIL - CCP 1013a, 2015.5

597

I declare that I am (a ~~resident~~ of ~~employed~~ in) the county of Sacramento, California
(COUNTY WHERE MAILING OCCURRED)

I am over the age of eighteen years and not a party to the within entitled cause; my (business/~~resident~~ address is:
1006 - 4th Street, Suite 900, Sacramento, California 95814

On October 20, 1977, I served the attached DECLARATION IN OPPOSITION
(DATE)
TO NOTICE FOR SUMMARY JUDGMENT on the Plaintiff

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the
United States mail at Sacramento, California addressed as follows:

DENNIS DE CUIR
City Attorney, City of Roseville
316 Vernon Street
Roseville, California 95678

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on
October 20, 1977 at Sacramento, California.
(DATE) (PLACE)

VALERIE C. BURTON

Valerie C. Burton
SIGNATURE

(TYPE OR PRINT NAME)

ATTORNEYS PRINTING SUPPLY FORM NO. 11
REV. JANUARY 1973

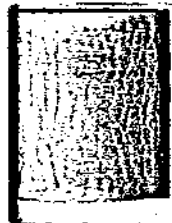


EXHIBIT "A"

(PROOF OF SERVICE BY MAIL — 1013a, 20155 C. C. P.)

STATE OF CALIFORNIA
COUNTY OF PLACER

} No. 41104

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

City Hall, 316 Vernon Street, Roseville, CA 95678On October 21, 1977, I served the within SUPPLEMENTAL MEMORANDUMIN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENTon the defendants

in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the

United States mail at Roseville, California
addressed as follows:DESMOND, MILLER, DESMOND,
& BARTHOLOMEW
1006 - 4th St., Suite 900
Sacramento, CA 95814

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on October 21, 1977 at Roseville California
(date) (place)Telma La Chapelle
Signature

*Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

DENNIS W. DE () IR
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599

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Attorneys for Plaintiff

FILED

OCT 24 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

MA. Dobbas
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E. ZISK, et al.,

Defendants.

NO. 4 1 1 0 4

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF BIFURCATION

MICROFILMED

Ordinarily where the trial is by jury all questions of fact are to be decided by the jury (Sec. 312, Evid.C.; Sec. 592, C.C.P.). However, the rule differs in eminent domain proceedings.

In a condemnation case, all issues except the sole issue relating to compensation are to be tried by the Court (People v. Ricciardi (1943) 23 Cal.2d 390).

"It is only the 'compensation,' the 'award,' which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury." (Id. at 402, quoting Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 397.)

In the Ricciardi case, id. at 404, the California Supreme

1 Court ruled that it was error to advise the jury that the question
2 of whether the defendants had suffered an infringement in their
3 rights in the property not sought to be condemned was a "question
4 of fact for the jury." The parties in this case have two disputes
5 which are preliminary to what should be presented to the jury for
6 purposes of establishing the compensation to be paid to the
7 defendants: The date of valuation; that is, whether the date
8 should be set as the date of the issuance of summons or the date
9 of trial; and certain allegations made by the defendants in their
10 answer, relating to the activities of the City prior to the time
11 this proceeding was commenced.

12 When confronted with similar precondemnation activity
13 allegations, the courts in this state, consistent with the rule
14 in the Ricciardi case, supra, commonly bifurcate the trial to
15 allow the court to rule on the property owners' defensive
16 allegations before the jury is impanelled.

17 In Stone v. City of Los Angeles (1975) 51 Cal.App.3d
18 987, 991 the trial court conducted a hearing before the jury was
19 impanelled to determine if there was an issue of fact regarding
20 "unreasonable delay" and the nature of damages.

21 In City of Los Angeles v. Lowensohn (1976) 54 Cal.App.3d
22 625 the court bifurcated proceedings for a preliminary court trial
23 to resolve the legal issue of unreasonable delay. The court
24 determined that the delay was unreasonable and ruled that there
25 were damages to be considered by the jury. However, after the
26 Plaintiff voir dired the property owner's appraiser, the court
27 sustained an objection to the offer of proof of precondemnation
28 damages. The Court of Appeal held that the trial judge was

1 entitled, as a matter of law, to exclude the proffered evidence
2 without submission to the jury since no damages would have been
3 produced in evidence (Id. at 633).

4 The Court in Lowensohn, supra, distinguished a contrary
5 result in Stone, supra, by noting that the property owners had
6 shown no actual loss of rental income or sales as a result of the
7 condemnor's activities, that the property was purchased for
8 investment purposes, that there had been no attempt or willingness
9 to rent the property and no evidence that similarly vacant land
10 was rented, that there were no improvements on the property, and
11 that development to its highest and best use would take five to
12 ten years (City of Los Angeles v. Lowensohn, supra at 636).

13 Wagner v. State of California ex rel. Department of Public
14 Works (1975) 51 Cal.App.3d 472 is an inverse condemnation case
15 where the court bifurcated the trial. The pretrial order stated
16 that the issues other than damage were to be determined at a
17 "legal issue trial," and set the trial of the issues of damage
18 for a later date.

19 At the trial of the "legal issues" the Court sustained
20 the state's objection to testimony offered by the Plaintiffs to
21 show a diminution in the value of their properties and a loss of
22 rental income resulting from the construction of a freeway.
23 Thereafter the Court filed findings of fact which found, among
24 other things, that there was no impairment of access to plaintiff's
25 properties, that there was no unreasonable delay in construction,
26 that no nuisance had been created and that no easement had been
27 taken from the property owners. The trial court then entered its
28 judgment for the defendant State of California at the close of the

1 first phase of the bifurcated trial.


2 The Court of Appeal held that substantial evidence
3 supported the trial court's findings, noting that a property
4 owner is entitled to compensation for impairment of access only
5 when he shows a "substantial impairment of his right of access to
6 the general system of public streets." (Id. at 477.)

7 The property owners also contended on appeal that the
8 trial court was required to present the issue of impairment of
9 access to the jury if the evidence was such that a jury could
10 find the fact requisite to recovery. The Court of Appeal ruled
11 that the question of substantial interference with access is
12 one to be determined by the trial judge. It is only when he finds
13 from the evidence that there was a substantial impairment that the
14 amount of compensation to be awarded becomes a jury question.
15 (Id. at 479.)

16 Because the valuation date has yet to be set, and because
17 there may be other issues arising out of the Defendants' answer
18 which are questions for the court pursuant to the rule in
19 Ricciardi, supra, if the court does not grant Plaintiff's motion
20 for summary judgment, we respectfully request the court to bifurcate
21 the trial so that these issues are determined prior to the time
22 the jury is impanelled.

23 DATED: October 24, 1977

24 Respectfully submitted,

25 

26 DENNIS W. DE CUIR, City Attorney
27 Attorney for Plaintiff

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FILED

OCT 24 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

M. I. Dobbas
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)

Plaintiff,)

v.)

WILLIAM J. ZISK and LOIS E.)
ZISK, et al.,)

Defendants.)

NO. 4 1 1 0 4

MEMORANDUM OF POINTS AND
AUTHORITIES REGARDING
COMPLETION OF NOTICED
DEPOSITIONS

MICROFILMED

Plaintiff has properly noticed and subpoenaed the depositions of three potential witnesses for the Defendants for October 24, 25 and 28, 1977. In addition, Plaintiff has commenced but continued the depositions of Defendants' two appraisal witnesses to October 28, 1977. The latter continued depositions could not have been completed because Defendants' appraisal witnesses had barely commenced their studies and had not conducted sufficient investigation to render opinions of value. Further, both appraisers stated they were awaiting engineering studies being conducted by Stephen Thomas, whose deposition has been set for October 25, 1977.

Rule 222 of the Rules of Court generally provides that the right to conduct discovery proceedings within thirty (30) days before trial shall be within the discretion of the Court.

1 "...In exercising its discretion, the Court
2 shall take into consideration the necessity
3 and reasons for such discovery, the diligence
4 or lack of diligence of the parties seeking
5 such discovery and his reasons for not having
6 completed his discovery prior to thirty (30)
7 days before trial, whether the permitting of
8 such discovery will prevent the case from going
9 to trial on the date set or otherwise interfere
10 with the trial calendar or result in prejudice
11 to any party, and any other matter relevant to
12 the request" (Rule 222, Rules of Court.)

13 The depositions noticed for October 24, 25 and 28, 1977,
14 are of potential engineering witnesses of the Defendants. Plain-
15 tiff diligently sought to identify such witnesses in order to have
16 sufficient time to take their depositions prior to the final
17 thirty (30) days before trial. In Plaintiff's first set of inter-
18 rogatories propounded to Defendants, which were answered on
19 September 20, 1977, Defendants stated that they had not contacted
20 or retained any such witnesses (See answers to Interrogatories
21 2, 3, 14 and 15).

22 Since the deponents have all been subpoenaed and the depo-
23 sitions will all occur within the week prior to the trial, per-
24 mitting such discovery will not prevent the case from going to
25 trial on the date set or otherwise interfere with the trial cal-
26 endar or result in prejudice to any party. Thus, the require-
27 ments of Rule 222 will be met.

28 We also note that motions for protective orders must be
"seasonably made" (Sec. 2019(b)(1), C.C.P.). In view of the
policy in favor of liberal discovery, we think the Court should
not order that a deposition not be taken unless there is a strong
showing of good cause (Sec. 2019(b)(1), C.C.P.; People v. Superior
Court (Witzerman) (1967) 248 Cal.App.2d 276).

1 At the deposition of Robert U. Grant which was duly and
2 properly noticed for 9:30 a.m. today, October 24, 1977, counsel
3 for defendants and the deponent appeared but refused to answer
4 any questions or produce any of the documents which were sub-
5 poenaed. Plaintiff submits that this tactic of defendants is
6 inappropriate and that if defendants contend the deposition
7 should not be taken, they should have made a motion for protec-
8 tive order under C.C.P. §2019(b)(1). See California Civil
9 Discovery Practice, California Continuing Education of the Bar,
10 (1975) §2.9. Instead, defendants put plaintiff to the time and
11 expense of preparing for and appearing at the deposition this
12 morning which was a total waste of time.

13 It was agreed at the deposition of Mr. Grant that the
14 objections of defendants to plaintiff's taking of the depositions
15 of Robert U. Grant, Stephen P. Thomas, W.G. Atteberry, and the
16 continued depositions of defendants' appraisal witnesses Fred
17 Festersen, Sr., and Frank La Bella, could be taken up at pretrial
18 on October 24, 1977.

19 Accordingly, in view of the fact that such discovery is
20 essential to allow plaintiff to prepare for trial; that plaintiff
21 has been diligently attempting to prepare for trial by conducting
22 such discovery, but has been totally thwarted by defendants'
23 refusal or inability to prepare its witnesses to allow meaningful
24 discovery to be conducted to date; and because such scheduled
25 discovery is set so it will not prevent the case from going to
26 trial as scheduled, it is submitted that the Court should order
27 that the presently scheduled depositions and continued depositions
28

1 be conducted and that the deposition of Robert U. Grant be held
2 on Wednesday, October 26, 1977 at 2:00 p.m. at the same place
3 earlier noticed.

4 DATED: OCT 24 1977

Respectfully submitted,

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6 DENNIS W. DE CUIR
7 City Attorney
8 Attorney for Plaintiff City of
9 Roseville

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6 Attorneys for Plaintiff

FILED OCT 24 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
M. I. Dobbas
DEPUTY

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 CITY OF ROSEVILLE, a municipal)
11 corporation,)
12)
13 Plaintiff,)
14)
15 v.)
16 WILLIAM J. ZISK and LOIS E.)
17 ZISK, et al.,)
18)
19 Defendants.)

NO. 41104
MEMORANDUM OF POINTS
AND AUTHORITIES REGARDING
EXCEPTION TO HEARSAY RULE

MICROFILMED

17 A hearsay statement made by a party to a court proceeding,
18 whether made before or after he becomes a party, is admissible
19 against him as an admission of a party (Sec. 1220, Evid.C).
20 Jefferson, in his California Evidence Bench Book at 59, comments
21 that the rationale underlying this exception is that a party cannot
22 be permitted to object to the unreliability of his own hearsay
23 statement because of the absence of an oath or an opportunity to
24 cross examine himself.

25 Therefore, the use of the declaration of Dennis W. De Cuir
26 in Support of Plaintiff's Motion for Partial Summary Judgment,
27 based as it is upon the refreshment of the declarant's memory by
28 a review of the certified copy of the deposition of William J. Zisk,

1 taken by the declarant, is a proper exception to the hearsay rule.

2 We also note that the time for submitting the transcript
3 of the deposition to witness Zisk will soon run; therefore,
4 Defendants' objections to its use without the expiration of the
5 thirty (30) day period will become moot.

6
7 DATED: October 24, 1972

8
9 Respectfully submitted,

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12 DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff

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1 DESMOND, MILLER, DESMOND & BARTHOLOMEW
2 Attorneys at Law
3 1006 4th Street
4 Sacramento, California 95814
5 Telephone: (916) 443-2051

6 Attorneys for Defendants

FILED OCT 24 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
By *M. Miller*
DEPUTY

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 -oOo-

11 CITY OF ROSEVILLE, a municipal)
12 corporation,)
13)
14 Plaintiff,)
15)
16 vs.)
17 WILLIAM ZISK, LOIS ZISK, et al.,)
18)
19 Defendants.)

NO. 41104
NOTICE OF MOTION ^{MICROFILMED}
FOR ORDERS
QUASHING SUBPOENA

20 NOTICE IS HEREBY GIVEN that on October 24, 1977 at
21 3:30 p.m., or as soon thereafter as the matter can be heard in
22 the courtroom of Honorable Judge Sparks at Auburn, California,
23 the Defendants will move to quash and set aside the following
24 Subpoena Dueces Tecum and the Notice of Taking Depositions,
25 heretofore issued and served herein:

- 26 ROBERT U. GRANT for deposition on Monday, October 24th.
- 27 STEPHEN THOMAS for deposition on Tuesday, October 25th.
- 28 W.G. ATTERBERRY for Friday, October 28th.

Said motion will be made on the ground that the
Subpoena is void and the Subpoena and Notice of Taking


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Deposition is void in that discovery has closed in this action as a result of Rules of Court.


This motion will be based on this Notice and the Points and Authorities served and filed herewith, the pleadings, records and files in the above entitled action and such oral and documentary evidence as may be presented at the hearing of this Motion.

Dated this 24th day of October, 1977.


RICHARD F. DESMOND

POINTS AND AUTHORITIES

California Rules of Court, Rules 203(a)
Rules 221 and 222


RICHARD F. DESMOND

611

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Sacramento, California 95814
Telephone: 443-2051

Attorneys for Defendants

FILED OCT 24 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
M. I. Dobbas
DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

Plaintiff,

vs.

No. 41104

SUPPLEMENTAL POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION FOR PARTIAL SUMMARY
JUDGMENT

WILLIAM J. ZISK and LOIS E.
ZISK,

Defendants.

MICROFILMED

I

THE AFFIDAVIT OF DENNIS DE CUIR IS NOT ADMISSIBLE SINCE IT IS NOT THE BEST EVIDENCE.

In previous Points and Authorities and oral arguments, Defendants have objected to the admissibility of the Affidavit of Dennis De Cuir declaring the contents of William Zisk's Deposition on the grounds that it was hearsay and that the Deposition may not be used for any purpose until read, corrected, and signed. In addition, the said Affidavit is objected to on the ground that it is not the best evidence.

"The rule is now well established that averments in the movants's Affidavit which depend upon written documents are incompetent and cannot be considered unless there are annexed

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1 thereto the original documents or certified or authenticated
 2 copies of such instruments, or excuse for non-production thereof
 3 shown. (Citation). It is the rule in California that there can
 4 be no waiver in summary judgment proceedings of the right to
 5 object to matter inadmissible by virtue of its incompetency.
 6 (Citation)." (Miller & Lux, Inc. vs. Bank of America, 212 Cal.App.
 7 2d 719, 725; see also Milley vs. Harper, 248 Cal.App.2d 463, 468).

8 Furthermore, California Code of Civil Procedure, Section
 9 437(c) as amended provides that, "Supporting and opposing Affidavits
 10 or Declarations . . . shall set forth admissible evidence . . ."
 11 (Emphasis added) It appears clear that the Affidavit of Dennis
 12 De Cuir is based upon statements of William Zisk recorded by a
 13 certified shorthand reporter and therefore, that recordation is
 14 the best evidence. The documents attached to the Declaration and
 15 Supplemental Declaration of Dennis De Cuir were neither "original
 16 documents" or "certified" documents or "authenticated copies of
 17 such instruments" nor has any "excuse for non-performance thereof
 18 (been) shown," as provided for in Miller & Lux, Inc., supra.

19 It is therefore respectfully submitted that based upon
 20 previous objections and this objection, that the Affidavit of
 21 Dennis De Cuir is not admissible in this Motion for Partial
 22 Summary Judgment.

23 II

24 THE DECLARATION OF ROBERT GRANT IN OPPOSITION TO THE
 25 MOTION FOR SUMMARY JUDGMENT IS SUFFICIENT.

26 At the Pre-Trial Conference of October 7, 1977, counsel
 27 for Plaintiff objected to the Declaration of Robert Grant in
 28 opposition to Motion for Summary Judgment on the grounds that it

1 contained conclusions, opinions, and ultimate facts and did not
2 wholly contain evidentiary facts.

3 Different rules have been established for Affidavits
4 in support of Motions for Summary Judgment as opposed to Affidavits
5 opposing Motions for Summary Judgment.

6 "A movant's affidavits are strictly construed, and must
7 show evidentiary facts as opposed to ultimate facts or
8 conclusions. The counter-affidavits of a party resisting a
9 motion for summary judgment are liberally construed.
10 California courts, in utilizing the rule of liberal construc-
11 tion, have not required resisting parties to limit their
12 affidavits to strictly evidentiary fact, but have found
13 counter-affidavits containing only ultimate facts and
14 conclusions sufficient to defeat a motion for summary
15 judgment. (People vs. Rath Packing Company, 44 Cal.App.3d
16 56, 62; Blaustein vs. Burton, 9 Cal.App.3d 161, 175-176;
17 McGranahan vs. Rio Vista, etc. School District, 224 Cal.App.
18 2d 624, 627; Scheble vs. Neil, 200 Cal.App.2d 435, 439).

19 The Courts have further held that "the issue to be determined
20 by the trial Court in consideration of a Motion for Summary
21 Judgment, is whether or not any facts have been presented which
22 give rise to a triable issue or defense, and not to pass on or
23 determine the true facts in the case. Any doubts are to be
24 resolved against the moving party." (Emphasis added) (McGraham
25 vs. Rio Vista, etc. School District, supra).

26 Therefore, if the Affidavit of Robert Grant sets forth
27 any issues of fact to be tried, regardless of whether they were
28 set forth as ultimate facts, conclusions of law, opinions, or
29 evidentiary facts, this Court must deny Plaintiff's Motion for
30 Summary Judgment.

31 Furthermore, ample foundation has been laid to establish
32 the declarant, Robert Grant, as an expert witness in this area
33 and he is therefore entitled to give his opinion as to certain
34 matters. This evidence would certainly be admissible in Court

1 although the trier of fact would be entitled to consider its
 2 weight. Assuming arguendo that the opinion testimony is not
 3 valid, the Declaration nonetheless sets forth the following
 4 facts:

- 5 1. To date no variance has been granted;
- 6 2. All attempts to sell the property have failed
 7 because of refusal of the City to allow development;
- 8 3. There is no history of flooding in the floodway
 9 fringe or floodways on the subject property;
- 10 4. The factual data on which the regulations were
 11 based is generalized and inaccurate;
- 12 5. Artificial obstructions created backup of water;
- 13 6. The effect of the flood plain ordinance was to take
 14 a flowage easement across the Zisk property;
- 15 7. The current use of the property is limited to
 16 the existing use and is unsalable for any type of
 17 development;
- 18 8. The regulation and zoning placed upon the property
 19 are part of a program to hold the value of the
 20 property down for future acquisition for public
 21 purpose;
- 22 9. As a result of the actions set forth above, the
 23 Zisks were damaged.

24 It is respectfully submitted that the Declaration of
 25 Robert Grant is admissible and is sufficient to show that there
 26 is a triable cause of action as to those issues presented in
 27 Paragraphs V, VI, and VII of the Answer in this action.

28 DATED: October 24, 1977.

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 DESMOND &
 BARTHOLOMEW
 ATTORNEYS AT LAW
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 SUITE 808
 SACRAMENTO, CALIF.
 TELEPHONE 442-2061

Respectfully submitted,
 DESMOND, MILLER, DESMOND
 & BARTHOLOMEW
 BY: *[Signature]*
 RICHARD F. DESMOND
 Attorneys for Defendants

615

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

DATE: Oct. 24, 1977 COURT MET AT 3:25 P.M. DEPARTMENT NO. 3

PRESENT: HON. Keith F. Sparks JUDGE M. A. Hulse DEPUTY CLERK

Vicki Valine REPORTER R. Murray SAILIFF

TITLE:

CITY OF ROSEVILLE
vs.
WILLIAM J. ZISK, et al.

COUNSEL:

Dennis W. De Cuir
Wm. J. Turner

Desmond, Miller, Desmond & Bartholome
Stephen Wagner

MICROFILMED

NATURE OF PROCEEDINGS: Cont'd Motion for Partial Summary Judgment & Trial Setting Conference ACTION NO. 41104

Mr. Desmond advised that a problem has arisen as to discovery and presented a Motion For Order Quashing Subpoenas, handing same to the Court with an Order requesting that the court correct the time to show that service be made as of 3:25 P.M. instead of 3:15 p.m.

Motion argued for summary judgment by Mr. Turner and responding argument by Mr. Wagner. Reference was made to file 41105 by Mr. Wagner. Additional arguments by Mr. Desmond.

Mr. Turner argued Motion Re Discovery and filed Points and Authorities.

Motion to Quash Subpoenas denied.

Motion for Summary Judgment continued to Monday October 31, 1977 at 1:30 p.m.

Mr. Desmond made a motion for payment of expert fees and argued same. Responding argument by Mr. DeCuir. Motion denied.

Pre Trial Conference is also continued to Monday, October 31, 1977 at 1:30 p.m.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbins
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY M.A. Hulse DEPUTY

DENNIS W. DE GUIR
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

616

Attorney for Plaintiff

FILED

OCT 26 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E. ZISK, et al.,

Defendants.

NO. 4 1 1 0 4

DISCLAIMER OF
MARJORIE ARNETT

Comes now Defendant Marjorie Arnett, and hereby dis-
claims any and all right, title, or interest in any or all of the
real property and interests in real property described in
Plaintiff's complaint on file herein as amended on July 2, 1974,
and to any and all compensation to be awarded herein, such to be
without cost to said disclaiming party.

DATED: October 24, 1977

Marjorie Arnett
Marjorie Arnett

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DENNIS W. DE IR
City Attorney
City of Roseville
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618

FILED

OCT 31 1977

MAURINE J. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY [Signature]
DEPUTY

Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E. ZISK,
et al.,

Defendants.

NO. 41104

DISCLAIMER OF TITLE
INSURANCE AND TRUST
COMPANY

MICROFILMED

Comes now Defendant Title Insurance and Trust Company,
and hereby disclaims any and all right, title, or interest in any
or all of the real property and interests in real property described
in Plaintiff's complaint on file herein as amended on July 2, 1974,
and to any and all compensation to be awarded herein, such to be
without cost to said disclaiming party.

DATED: Oct. 27, 1977

TITLE INSURANCE & TRUST COMPANY,
as Trustee under that deed of trust recorded 12/23/1966, Book 1138, pg. 368,
P.C.R.

By _____
Defendant
By Richard M. Zisk, Assistant Secretary
An officer of the corporation
authorized to make such dis-
claimers.

619

RECORDING REQUESTED BY

94707-34

AND WHEN PROVIDED MAIL TO

Mr. & Mrs. Wm. Zisk
205 Thomas Street
Reno, NV, CA 95478

24536

OFFICIAL RECORDS
PLACER COUNTY - CALIF.
RECORD REGISTERED BY

TITLE INS. & TRUST CO.
SEP 22 3 17 PM '75

MAURINE L. GORDAS
COUNTY RECORDER
24536 1500

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TITLE GROUP NO.

FULL RECONVEYANCE

TITLE INSURANCE AND TRUST COMPANY, a California corporation, as duly appointed Trustee under Deed of Trust hereinafter referred to, having received from holder of the obligations thereunder a written request to reconvey, reciting that all sums secured by said Deed of Trust have been fully paid, and said Deed of Trust and the note or notes secured thereby having been surrendered to said Trustee for cancellation, does hereby RECONVEY, without warranty, to the person or persons legally entitled thereto, the estate now held by it thereunder. Said Deed of Trust was executed by

William J. Zisk and Lois E. Zisk, his wife; and William W. Zisk and Mary A. Zisk, his wife
Trustee

and recorded in the official records of Placer County, California, as follows:

on December 23, 1966 in book 22307 page 1138 page 368

In Witness Whereof, Title Insurance and Trust Company, as such Trustee, has caused its corporate name and seal to be hereunto affixed by its Assistant Secretary, hereto duly authorized on the date shown, in the subsequent edgment certificate shown below.

TITLE INSURANCE AND TRUST COMPANY, a California Corporation

STATE OF CALIFORNIA
COUNTY OF PLACER
On September 22, 1975

by James J. Hanson Assistant Secretary

before me, the undersigned, a Notary Public in and for the State of California, personally appeared JAMES J. HANSON known to me to be the Assistant Secretary of TITLE INSURANCE AND TRUST COMPANY, the corporation that executed the foregoing instrument as such Trustee, and known to me to be the person who executed said instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same as such Trustee. WITNESS my hand and official seal.



Gordon W. DeVore
Gordon W. DeVore
Name (Typed or Printed)

(This area for official notarial seal)

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NO 1669 and 428

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

Plaintiff,

Vs.

WILLIAM ZISK and LOIS ZISK,
et al.,

Defendants.

No. 41104
PRE-TRIAL CONFERENCE ORDER

MICROFILMED

DENNIS W. DeCUIR, Esq., City Attorney, City of
Roseville, and WILLIAM J. TURNER, Esq., of the law firm of
TURNER & MULCARE, appeared as co-counsel on behalf of the
Plaintiff; and

RICHARD F. DESMOND, Esq., and STEPHEN JAMES WAGNER, Esq.,
of the law firm of DESMOND, MILLER, DESMOND & BARTHOLOMEW,
appeared as counsel on behalf of the defendants.

A pre-trial conference was held in the above entitled
cause before Honorable KEITH F. SPARKS, Judge, on the 31st
day of October, 1977, and the following action was taken.

This proceeding is an eminent domain where the
plaintiffs, CITY OF ROSEVILLE, seek to condemn a parcel of
real property.

1 The Defendants WILLIAM J. ZISK and LOIS E. ZISK,
2 have filed an answer alleging ownership of the subject
3 properties. The Defendants MARJORIE ARNETT and TITLE
4 INSURANCE AND TRUST COMPANY are named as defendants and
5 executed disclaimers of any interest in the award herein.
6 The Defendant COUNTY OF PLACER has filed an answer alleging a
7 tax lien interest on the property.

8 The property sought to be condemned is correctly
9 described now in the Complaint as it has been amended and
10 constitutes the taking of a parcel of land from a larger
11 parcel.

12 There was no order of immediate possession in this
13 case.

14 The date of valuation by stipulation of the parties
15 is to be determined at the date of trial by the Trial Judge.

16 The Plaintiffs CITY OF ROSEVILLE contend the date
17 of valuation should be the date of the summons of
18 December 20, 1973. The Defendants ZISK contend on the other
19 hand that the date should be the date of trial.

20 There are no further law and motion matters
21 pending.

22 Discovery is now ordered closed.

23 The issues to be determined at the time of trial
24 are as follows:

- 25 1. The fair market value of the property;
- 26 2. The severance damage, if any, to the remainder
27 parcel;
- 27 3. Special benefits, if any, to the remainder parcel;
- 28 4. Pre-condemnation activities. In that connection

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the Court has advised both counsel that the fact that that is at issue does not suggest how this Court views the ruling ought to be on the question of pre-condemnation activities.

Both sides are directed by the Court to exchange topographical maps prior to the opening statement in this case.

The case is presently set for trial before the Court sitting with a jury to commence, tomorrow, November 1, 1977. That trial is confirmed.

Counsel have both indicated to the Court there are a substantial number of pre-trial matters that should be heard outside the presence of the jury, and those matters would influence the manner of voir diring the jury and the manner in which opening statements would be given. For that reason, the jury impanelment should be deferred until such time as the Trial Court has ruled on a number of these motions.

Therefore, it will be the order of this Court that the jury will be brought in; the rolé called; and then they will be dismissed until Friday and brought back to court on Friday for the purpose of impanelment after the legal issues have been resolved.

The Plaintiffs CITY have made a motion for partial summary judgment against Paragraphs Five and Six of the Defendants ZISKS' Answer. The Court denied that motion today. Therefore, they are entitled to present evidence on those Answers providing they meet the legal foundations necessary under the law. The Court expresses no opinion on those matters. Those raised matters are for the Court's

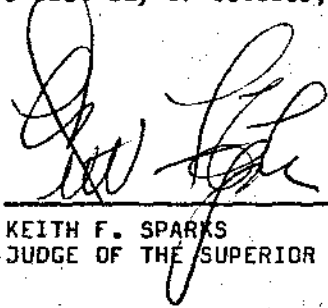
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initial determination as preliminary matters.

There is no issue of inverse condemnation, that having been consolidated with the abated proceeding by prior order of this Court.

All counsel are directed to be present in the chambers of the Trial Judge at 9:30 for the purpose of discussing pre-trial matters.

Dated at AUBURN, CALIFORNIA, this 7th day of October, 1977.



KEITH F. SPARKS
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

Plaintiff,

vs.

WILLIAM ZISK and LOIS ZIS ,
et al.,

Defendant

STATE OF CALIFORNIA, }
COUNTY OF PLACER } ss.

FILED
OCT 31 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

No. 11104

CERTIFICATE OF MAILING OF
PRE-TRIAL CONFERENCE ORDER

I, MAURINE I. DOBBAS, County Clerk and Clerk of the Superior Court in and for said County and State,
do hereby certify:

That on October 31, 1977, I served copies of the attached Pre-Trial Conference Order by
depositing them, enclosed in sealed envelopes with the postage thereon fully prepaid, in the United States Post
Office at Auburn, California, addressed as follows:

Mr. Dennis W. DeGuir
City Attorney
316 Vernon Street
Roseville, California, 95678

Mr. Richard F. Desmond
Mr. Stephen James Wagner
Desmond, Miller, Desmond
& Bartholomew
1006 Fourth Street, Suite 900
Sacramento, California, 95814

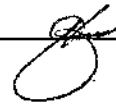
Mr. William J. Turner
Turner & Mulcare
1650 South Amphlett Boulevard, Suite 225
San Mateo, California, 94402

and that the persons on whom said service was made reside/have their office at a place where there is a delivery
service by mail, and that there is a regular communication by mail between the place of mailing and the places
so addressed.

DATED October 31, 1977,

MAURINE I. DOBBAS, County Clerk and
Clerk of the Superior Court of the State of California,
in and for the County of Placer

By _____ Deputy



10/24/77
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DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th Street, Suite 900
Sacramento, California 95814
Telephone: 443-2051

Attorneys for Defendants

FILED NOV - 1 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
By [Signature]
Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

No. 41104

Plaintiff,

POINTS AND AUTHORITIES RE DATE OF VALUATION

vs.

WILLIAM J. ZISK and LOIS E. ZISK,

Defendants.

MICROFILMED

PLAINTIFF HAS THE BURDEN OF PROVING THAT THE DELAY IN COMMENCEMENT OF TRIAL WAS CAUSED BY THE DEFENDANT.

California Code of Civil Procedure, Section 1263.130

(formerly Section 1249) provides:

"Subject to Section 1263.110, if the issue of compensation is not brought to trial within one year after commencement of proceeding, the date of valuation is the date of commencement of the trial unless the delay is caused by the defendant, in which case the date of valuation is the date of commencement of the proceeding."

Plaintiff contends that the delay in bringing this case to trial was caused by Defendants. Plaintiff further contends that the burden is upon Defendants to show that the delay was not caused by them. Defendants have been unable to find any case which impliedly or expressly holds that the burden of establishing

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1 the cause of the delay is on the Defendant. Admittedly, there is
2 very little case law dealing with this issue. Nonetheless, the
3 leading authority, People vs. Murata, 55 Cal.2d 1, holds that it
4 is clearly the Plaintiff's burden to bring the case to trial:

5 "The proviso puts the burden on the condemnor to get
6 the case to trial within the one year period if the condemnor
7 is to have the advantage of having the value and damages
8 fixed as of the date of issuance of Summons. . . . This
9 section is plainly an expedition statute; it puts a premium
10 on the condemnor to get the case to trial within the year
11 and puts a burden on the defendant who, for any reason,
12 delays the setting of trial beyond the one year period."
13 (Murata, supra, at 5).

14 Since it is clear that the burden of bringing the case to
15 trial is placed on the condemnor, it seems logical that if
16 the case is not brought to trial within one year, the burden is
17 upon the condemnor to show why.

18 A brief history of what has happened in this case should
19 prove helpful to this Court. This case was originally set to be
20 tried on November 13, 1974, some ten and a half (10-1/2) months
21 after the issuance of Summons. However, by stipulation of
22 counsel, a copy of which is attached hereto, the trial date was
23 dropped and it was further stipulated that the date of valuation
24 would remain the date of issuance of Summons for a period of
25 eight (8) months after November 6, 1974, the date of the Stipulation.
26 Pursuant to said Stipulation, if the matter was not brought to
27 trial within eight (8) months thereafter, the date of valuation
28 would be established by the Court pursuant to CCP, Section 1249
trial within eight (8) months thereafter, the date of valuation
would be established by the Court pursuant to CCP, Section 1249
(now 1263.130). It was further agreed that the Defendants shall
not be prejudiced in any attempt they have or will make to

1 establish a different date of valuation. Candidly, the trial was
2 continued due to an operation on the mouth of Defendant' attorney,
3 Richard F. Desmond. However, this appears to be irrelevant
4 since the parties did stipulate to the continuance and set forth
5 the terms as provided herein.

6 Thus, the critical time for this Court to closely scrutinize
7 is from November 6, 1974, until July 6, 1975, when trial should
8 have commenced pursuant to the Stipulation if the date of valuation
9 was to remain the same. Reviewing Defendants' files, the following
10 chronology occurred during that time period:

11	<u>DATE</u>	<u>ACTION</u>	<u>COMMENTS</u>
12	11-7-74	Minute Order	The Pre-Trial Conference, and Trial were removed from the civil active list pursuant to Stipulation
13			
14	12-3-74	Notice of Motion for Reconsideration of Leave to File Cross-Complaint	This Motion was based upon the outcome in Action 41105
15			
16	10-30-74	Minute Order	City's Motion for Summary Judgment denied without prejudice to the Court ruling on the admissibility the evidence in support of claims set forth in Paragraphs V through VII
17			
18	1-30-75	Motion for Relief from Court Order and renewal of Motion for Leave to File Cross-Complaint	This Motion was made based upon the final outcome in Action No. 41105
19			
20	1-30-75	Points and Authorities in Opposition to Motion for Leave to file Cross-Complaint filed by City	
21			
22	2-21-75	Notice of ruling on Motion	Court allowed Defendants to file a Cross-Complaint and gave City an open extension of time in which to respond
23			
24			
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28			

DESMOND, MILLER,
DESMOND &
BARTHOLOMEW
ATTORNEYS AT LAW
1506 FOURTH STREET
SUITE 800
SACRAMENTO, CALIF.
TELEPHONE 443-8081

1	2-24-75	Cross-Complaint filed	
2			
3	5-21-75	Demurrer to Cross- Complaint filed	
4	6-30-75	Points and Authorities in Opposition to Demurrer filed by Defen- dants	
5			
6			
7	7-10-75	Closing Points and Authorities filed by City	
8			
9	8-14-75	Closing Points and Authorities filed by Defendants	
10			
11	9-3-75	Additional Points and Authorities filed by City	
12			
13	12-11-75	Minute Order	It was ordered that the Demurrer be rebusmitted as of November 25, 1975, since additional briefing was filed
14			
15			

As can clearly be seen by the chronology of events, on the final date on which the trial could commence and maintain the date of valuation pursuant to the Stipulation (7-6-75), the City was still pressing its Demurrer to the Cross-Complaint filed by Defendants. Furthermore, some months thereafter the Plaintiff was still submitting additional Points and Authorities on that issue (9-3-75). In fact, the matter was not submitted to the Court until November 25, 1975. The reason it was not submitted was set forth in the Minute Order of the Court dated December 11, 1975, to wit, additional briefing was filed by the parties.

It appears that all parties all allowed to take any necessary legal maneuvers, that are done in good faith, without prejudice to having a new date of valuation established pursuant

1 to CCP, Section 1249. (City of Santa Maria vs. Alco-Pacific
2 Enterprises, Inc., 266 Cal.App.2d 477. It is therefore respect-
3 fully submitted that either party caused the delay in bringing
4 this matter to trial and therefore, pursuant to CCP, Section 1249
5 and Murata, supra, the Court must re-establish the date of
6 valuation.

7 II

8 THE TRIAL COURT IS BOUND BY THE DOCTRINE OF THE LAW OF
9 THE CASE IN DETERMINING THAT ALL ISSUES PRESENTED IN
10 THE INVERSE CONDEMNATION ACTION 41105 AND THE CROSS-
COMPLAINT IN ACTION 41104 ARE PRESENTED IN THE DIRECT
CONDEMNATION CASE.

11 The Appellate Court in Zisk vs. City of Roseville, 56
12 Cal.App.3d 41 held as follows:

13 "In the present case, the City's pending action in eminent
14 domain deals with the same issues as the first cause of
15 action and as would be involved in a writ based on inverse
condemnation." (Zisk, supra, at 48)

16 Thus, we have a determination by the Appellate Court
17 that all issues presented in the inverse condemnation action
18 (41105) are properly before the Court in the condemnation action
19 (41104). This Court is bound by the Appellate Court's ruling
20 under the doctrine of the law of the case. The doctrine has been
21 succinctly stated as follows:

22 "Where, upon appeal, the (Appellate) Court, in deciding
23 the appeal, states in its Opinion a principle or rule of
24 law necessary to the decision, that principle or rule
25 becomes the law of the case and must be adhered to throughout
26 its subsequent progress, both in the lower court and upon
27 subsequent appeal. . . . And this, although in its subsequent
28 consideration this court may be clearly of the opinion that
the former decision is erroneous in that particular . . .
indeed, it is only when the former rule is ruled erroneous
that the doctrine of the law of the case becomes at all
important. (Emphasis in original) (Talley vs. Ganhal, 151
Cal.418).

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III

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ASSUMING ARGUENDO THAT THE DOCTRINE OF THE LAW OF THE CASE IS NOT APPLICABLE, SOUNDLY THE REASONING SHOWS THAT THE ISSUES RAISED IN THE INVERSE CONDEMNATION COMPLAINT HAVE BEEN RAISED IN ACTION NO. 41104.

The Appellate Court ruled that it was proper to abate the cause of action in inverse condemnation, case 41105. For a plea in abatement to be allowed, it must be shown that the cause of action in the two cases is the same and the parties are the same. To determine whether the causes of action are the same, you must look to the primary right violated. Thus, if the primary right violated is the same, the cause of action is the same. Since the Appellate Court upheld the abatement, it necessarily ruled that the primary right violated and the cause of action pled in 41104 and 41105 were the same. Therefore, whatever issues were involved in 41105 are now involved in 41104 and Defendants are entitled to litigate those issues if a triable issue of fact is presented.

This reasoning was upheld by the Intended Decision of Judge Cameron filed in this Court on August 4, 1976, wherein His Honor ruled that since the issues presented in the Cross-Complaint in 41104 were the same as those presented in the Inverse Condemnation Complaint in 41105, the two were merged. The Cross-Complaint then became abated pursuant to the Appellate Court decision, Zisk vs. City of Roseville, supra. Once again, since the Cross-Complaint was abated, it necessarily follows that the issues raised in the Cross-Complaint were also raised in all of the pleadings in action 41104 (the Complaint and Answer). Therefore, Defendants are entitled to litigate the issues presented in the

1 Answer, the Cross-Complaint, and the Complaint in Inverse Condemna-
2 tion.

3 DATED: October 24, 1977.

Respectfully submitted,

DESMOND, MILLER, DESMOND
& BARTHOLOMEW

By: Richard P. Desmond
RICHARD P. DESMOND
Attorneys for Defendants

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FILED NOV - 1 1977
MAURINE I. DOBEAS
COUNTY CLERK OF PLACER COUNTY
By *[Signature]*
Deputy

TURNER & MULCARE
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Telephone: (415) 573-7677

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E. ZISK, et al.,

Defendants.

NO. 4 1 1 0 4

MEMORANDUM OF POINTS AND
AUTHORITIES REGARDING THE
DATE OF VALUATION.

MICROFILMED

In their pretrial statements the parties have requested the Court to establish different dates of valuation: Plaintiff requests the date of the issuance of summons and the Defendants ask for the date of the trial. Former section 1249 of the Code of Civil Procedure controls the date of valuation in this case (See Paragraph 1 of Stipulation re Continuance heretofore filed on November 20, 1974 and C.C.P. Sec. 1230.065 (b)). Section 1249 provides, in part, as follows:

"For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken...; provided, that in any case in which the issue is not tried within one

1 year after the date of the commencement of the action,
2 unless the delay is caused by the defendant, the com-
3 penetration and damages shall be deemed to have accrued
4 at the date of the trial" (emphasis added.)

5 Under the standard instructions, the jury must determine
6 the fair market value of the property taken and the severance
7 damages, if any, as of the date of valuation (BAJI 11.72).

8 In this case summons issued on December 20, 1973. The
9 defendants served plaintiff with their Answer on March 20, 1974.

10 On September 5, 1974, plaintiff filed its At-Issue Memorandum /
11 Readiness. On September 12, 1974, defendants filed their

12 "Declaration in Opposition to Plaintiff's At-Issue Memorandum
13 and Certificate of Readiness", one of the grounds of which was
14 the pendency of defendants' motion for leave to cross-complain.^{Fn. 1}

15 Despite defendants' opposition, the pretrial conference was set
16 for November 6, with the trial to commence on November 13, 1974,
17 well within one year of date of issuance of summons.

18 Subsequently, by stipulation entered at the request of
19 defendants, the trial was ordered dropped from the pretrial
20 conference and trial calendar. There appears to be no dispute
21 here that such continuance of the November 13, 1974 trial date
22 was caused by defendants inasmuch as defendants admit, at page
23 3 of their Points and Authorities Re Date of Valuation filed
24 October 24, 1977, that

25 "Candidly, the trial was continued due
26 to an operation on the mouth of Defendants'
27 attorney, Richard F. Desmond."

28 But for defendants' objection to the November 13, 1974
29 trial date and their request for continuance, the case would have

30 Fn. 1. Defendants had belatedly noticed motion for leave to file
31 the cross-complaint for September 16, 1974, and later
32 continued the motion until September 23, 1974.

1 been tried commencing November 13, 1974. Since the delay of
2 trial past one year from the December 20, 1973 date of issuance
3 of summons was obviously caused by defendants, under the provi-
4 sions of C.C.P. §1249, the date of value remains December 20,
5 1973. Fn. 2

6 For convenience we attach hereto the following documents
7 from the record in this proceeding: Plaintiff's At-Issue Memo-
8 randum and Certificate of Readiness, filed September 5, 1974
9 (Exhibit A), Defendants' "Declaration In Opposition to Plaintiff's
10 At-Issue Memorandum and Certificate of Readiness," dated
11 September 11, 1974 (Exhibit B); Minute Order of Judge Leland J.
12 Propp setting pretrial and trial dates, filed September 16, 1974
13 (Exhibit C); and Stipulation re Continuance, filed November 20,
14 1974 (Exhibit D).

15 The cases are in accord with plaintiff's position. In
16 County of San Mateo v. Bartole (1960) 184 Cal.App.2d 422, 436-438,
17 the Court found the delay to have been caused by the defendants
18 when they moved for the continuance of two trial dates, the
19 special defenses trial and the valuation trial, previously set
20 within the one-year period, to dates beyond it. The property
21 owners claimed that the continuances were not for delay but to
22 enable them to prepare for trial. The Court of Appeal rejected
23 their claim, holding that the date of the issuance of summons

24 Fn. 2. The attached stipulation re continuance provides in
25 pertinent part that, if after 8 months the trial has
26 not commenced, "... the date of valuation shall be
27 established by the Court at the time of trial under
28 the provisions of C.C.P. §1249." Thus, we must look
to C.C.P. §1249 which directs inquiry only into whether
the delay past one year after commencement of the action
was caused by defendants.

1 was properly the date of valuation when the trial set within the
2 one year period was continued at defendants' request.

3 While the Court in City of Santa Maria v. Alco-Pacific
4 Enterprises, Inc. (1968) 266 Cal.App.2d 477, 481-482, ruled that
5 the evidence in the record in that case did not establish that
6 the delay past one year from date of issuance of summons was
7 caused by defendants, the Court quoted approvingly from the
8 language of the Supreme Court in People v. Murata (1960) 55 Cal.
9 2d 1, regarding application of C.C.P. §1249 as follows:

10 "If the condemner delays setting the case for
11 trial beyond this period, it forfeits the right
12 to have value and damages fixed as of the date
13 of the issuance of the summons, but if the delay
14 in setting the case for trial beyond the one-
15 year period 'is caused by the defendant,' the
16 condemner retains the right to have value and
17 damages fixed as of the earlier date. The section
18 is plainly an expedition statute; it puts a premium
19 on the condemner to get the case to trial within
20 the year, and it puts a burden on the defendant
21 who for any reason delays the setting of the trial
22 beyond the one-year period.'" (emphasis added.)

23 Since the defendants here caused the delay of trial past
24 one year from date of summons, under the express terms of C.C.P.
25 §1249 the valuation date remains December 20, 1973. This is so,
26 regardless of what occurred thereafter relating to the setting
27 of the case for trial. Therefore, the alleged "chronology" in
28 defendants' Points and Authorities Re Valuation Date of what
occurred after defendants caused the case to be continued beyond
one year is not relevant to the determination of the valuation
date.


Even if such "chronology" was relevant, it is obvious that
the subsequent proceedings therein listed were related to
defendants' cross-complaint which was belatedly filed and

1 ultimately abated by order of Court.

2 Accordingly, since the delay of trial past December 20,
3 1974 was caused by defendants, the valuation date must be
4 December 20, 1973, under the provisions of C.C.P. §1249.

5 DATED: NOVEMBER 1, 1977

6
7 Respectfully submitted,

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9 
10 WILLIAM J. TURNER
11 TURNER & MULCARE, A Professional
12 Corporation
13 Attorneys for Plaintiff
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637

Name, Address and Telephone of Attorney(s)

G. RICHARD BROWN
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678

Telephone: 783-9151, Ext. 272
Attorney(s) for Plaintiff.....

Stamp: Now for Use of Court Clerk Only

FILED

SEP 1974

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY GAY TROMBLEY
DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER.....

Plaintiff(s): CITY OF ROSEVILLE, a municipal corporation,

Defendant(s): WILLIAM J. ZISK, LOIS E. ZISK, et al.

(Abbreviated Title)

CASE NUMBER 4 1 1 0 4
AT-ISSUE MEMORANDUM and
CERTIFICATE OF READINESS

Nature of Case

- Personal Injury, Property Damage or Wrongful Death, involving Motor Vehicle
- All other Personal Injury, etc.
- Family Law Eminent Domain
- Other civil: _____

AT-ISSUE MEMORANDUM

1. Pretrial conference requested: (Yes/No) Yes
2. Jury trial requested: (Yes/No) Yes
3. Time estimated for trial: 3 days.
4. Reporter requested: (Yes/No) Yes
5. Case entitled to preference (Yes/No) Yes, under code section: 1264 CCP
6. Names, addresses and telephone numbers of all attorneys and of parties appearing in person:

(Use reverse side if necessary)

FOR PLAINTIFF(S)

G. Richard Brown
City Attorney
City of Roseville
316 Vernon St.,
Roseville, CA 95678 (783-9151)

FOR DEFENDANT(S)

FOR
Steven E. Harrold
Desmond, Miller & Desmond
1006 - 4th St., Suite 900
Sacramento, CA 95814
(443-2051)

All essential parties have been served with process or have appeared, and this case is at issue as to all such parties. To my knowledge no other party will be served with process and no ~~other party will be served with process~~. No pleading is to be filed or is unanswered, and all contemplated amendments to pleadings are completed except amendments relating to the amount of special damages, the true names of parties sued under fictitious names, and the following procedural matters:
October 15 - Plaintiff - Motion for Summary Judgment as to Certain Defenses

I certify under penalty of perjury that the foregoing is true and correct and this certificate was executed on _____ at Roseville, California.

Attorney(s) for Plaintiff

By G. Richard Brown

(Signature of attorney who will try case)
G. RICHARD BROWN
(Type or print name)

ANY PARTY NOT IN AGREEMENT WITH THIS AT-ISSUE MEMORANDUM MUST, WITHIN 10 DAYS AFTER ITS SERVICE, SERVE AND FILE HIS OWN AT-ISSUE MEMORANDUM.

(For use by court clerk)

Set for pretrial/setting conference: _____ Set for trial: _____
on _____ at _____ m. on _____ at _____ m.
in Department _____

Date: _____ Clerk Date: _____ Clerk

EXHIBIT A

Approved by Third District (See reverse side for Certificate of Readiness, etc.)
Superior Courts 7/1/71

AT-ISSUE MEMORANDUM

FORM 2 (6-1)

CERTIFICATE OF READINESS

(For use only when a Certificate of Readiness must be filed simultaneously with the At-Issue Memorandum. See each court's General Calendar or consult its clerk.)

I certify that this case is ready for setting for a pretrial or trial setting conference, if required, or for trial and, except as provided in Rule 221(b) of the California Rules of Court, all discovery will be completed at least 30 days before trial.

Discovery commenced or completed: None

Discovery remaining: Exchange of information - CCP §1272.01

I certify under penalty of perjury that the foregoing is true and correct and this certificate was executed on Sept 5 at 1974 California.

Attorney for PLAINTIFF by [Signature]

I concur: Attorney for [Signature] by [Signature]

Attorney for [Signature] by [Signature]

ANY PARTY NOT IN AGREEMENT WITH THIS CERTIFICATE OF READINESS MUST, WITHIN 10 DAYS AFTER ITS SERVICE, SERVE AND FILE AN APPROPRIATE MOTION UNDER RULE 221(c) OF THE CALIFORNIA RULES OF COURT.

PROOF OF SERVICE BY MAIL (C.C.P. 1013c)

I served the At-Issue Memorandum and (if completed above) Certificate of Readiness by depositing a copy(ies) thereof (enclosed in sealed envelope(s), postage prepaid) in the United States mail, addressed to each party or to his attorney as shown in such memoranda, on 9/5/74 at Roseville, California.

At the time of service, I was at least 18 years of age, a United States citizen (employed/ residing) residing in the county where the mailing occurred and not a party to the action. My (residence/business) business address is:

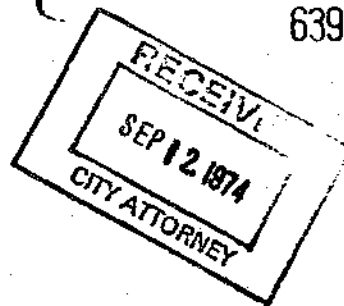
City Hall, 316 Vernon Street, Roseville, CA 95678

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on September 5, 1974 at Roseville, California.

[Signature of Velma La Chapelle] (Signature of declarant)

VELMA LA CHAPPELLE

(Type or print name)



1 DESMOND, MILLER & DESMOND
2 1006 4th Street, Suite 900
3 Sacramento, California 95814
4 Telephone: 443-2051

5 Attorneys for Defendants

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 --0000--

11 CITY OF ROSEVILLE, a municipal corporation,

12 Plaintiff,

13 vs.

14 WILLIAM J. ZISK, LOIS E.
15 ZISK, et al.,

16 Defendants.)

NO. 41104

DECLARATION IN OPPOSITION TO
PLAINTIFF'S AT-ISSUE MEMORANDUM
AND CERTIFICATE OF READINESS

17 --0000--

18 Defendants contend that the instant matter is not at
19 issue, nor is it ready for pre-trial or trial.

20 At least two pre-trial motions remain to be heard;
21 defendants' motion for leave to cross-complain in the instant
22 proceeding to be heard September 23, 1974, and plaintiff's motion
23 for summary judgment to be heard October 15, 1974.

24 Since both such pre-trial motions are founded on defen-
25 dants' contention that issues of de facto taking and inverse
26 condemnation, relative to plaintiff's pre-condemnation conduct
27 affecting the defendants' property, exist and should be litigated
28 in the instant eminent domain action, it is impossible for this
29 proceeding to be at issue before and until a final determination
30 is rendered relative to the standing pre-trial motions. Only
31 when said pre-trial motions are heard and determined will all
32 parties be fully apprised of the issues attendant hereto and be

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DESMOND
ATTORNEYS AT LAW
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SACRAMENTO, CALIF.
TELEPHONE 443-2051

EXHIBIT B

1 in any position to intelligently direct discovery and prepare for
2 trial.

3 Based on the foregoing, defendants respectfully submit
4 that the instant matter is not at issue, that discovery has not
5 been completed, that this matter is not ready to be set for trial
6 and pre-trial and that this Court should reject plaintiff's
7 contrary assumptions.

8 DATED: September 11, 1974.

9 DESMOND, MILLER & DESMOND
10 Attorneys for Defendants

11 By 
12 STEVEN E. HARROLD

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G. RICHARD BROWN
City Attorney
City of Roseville
316 Vernon Street
Roseville, CA 95678

Telephone: 783-9151, Ext. 272
Attorney for Plaintiff

640 A
FILED

NOV 20 1974

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY: P. OLIVER
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,)	
)	
Plaintiff,	)	NO. 4 1 1 0 4
)	
v.	)	STIPULATION RE CONTINUANCE
)	
WILLIAM ZISK, LOIS ZISK, et al,)	
)	
Defendants.)	

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys, as follows:

1. The date of valuation for the property taken by this action shall remain the date of issuance of summons herein, notwithstanding that the trial of this action shall commence more than one year after the date of issuance of said summons, for a period of eight (8) months. After said eight (8) month period, if the trial of this matter has not commenced, the date of valuation shall be established by the Court at the time of trial under the provisions of CCP §1249.

Defendants shall not be prejudiced in any attempt which they have made or will make to establish a different date of valuation prior in time to the date of issuance of summons.

2. The provisions of Assembly Bill 3925 (Chapter 1469 of the Statutes of 1974) shall not be applicable to this action, notwithstanding the fact that said Assembly Bill may have

EXHIBIT D

RECEIVED
SEP 17 1974
CITY ATTORNEY

641

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

FILED

SEP 16 1974
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
DEPUTY

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff(s)

vs.

WILLIAM J. ZISK, LOIS E.
ZISK, et al.,
Defendant(s)

N O. 41104

MINUTE ORDER

In the above entitled case:

On the Court's own motion

Request and stipulation of counsel for respective parties and
good cause appearing

Request of counsel for plaintiff/defendant, no objection by
opposing counsel

Notice of Settlement by counsel for plaintiff/defendant

IT IS ORDERED that the Pretrial Conference, be,

Set for Wednesday, November 6, 1974, at 11:00 a.m., and the
Jury Trial be set for November 13, 14, and 15, 1974.

~~Proposed by the plaintiff/defendant/et al. to attend the court~~

Continued to

IT IS FURTHER ORDERED that the jury heretofore summoned be:

Directed not to appear on the day and hour set forth on the
Jury Venire
Transferred to Case No.

Dated: SEP 16 1974

EXHIBIT C

LELAND J. PROPP
Judge of the Superior Court.

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become operative at the time for trial of this action.

DATED: NOV 6 1974

DESMOND, MILLER AND DESMOND

By 
RICHARD F. DESMOND
Attorney for Defendants

G. RICHARD BROWN
G. RICHARD BROWN, City Attorney
Attorney for Plaintiff

643

FILED NOV - 1 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
By P. Oliver
Deputy

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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,)	
	)	MICROFILMED
Plaintiff,)	
	)	NO. 4 1 1 0 4
v.	)	TRIAL BRIEF
)	
WILLIAM J. ZISK and LOIS E. ZISK, et al.,	)	NO RECOVERY OF DAMAGES FOR DENIAL OF APPLICATION FOR LOT SPLIT IN 1973.
Defendants.)	

Defendants apparently contend that in 1973, the City of Roseville improperly denied their application for a lot split on their property and that such denial can form a basis for liability of the City for damages.

The California Supreme Court has made it clear that an alleged improper denial by a public agency of an application for a permit for land use cannot form the basis for a claim for damages against the agency.

The Plaintiff in Selby Realty Co. v. City of San Buenaventura, 10 C.3d 110 (1973), sought damages in inverse condemnation based upon the alleged wrongful refusal of the City to grant his application for a building permit. In that regard, the

1 Supreme Court held:

2 "Nor is a cause of action in inverse condemnation
3 stated for the denial of a building permit. The
4 gravamen of plaintiff's complaint is that the City
5 refused to issue the permit unless plaintiff com-
6 plied with an assertedly invalid condition. The
7 appropriate method by which to consider such a
8 claim is by a proceeding in mandamus under section
9 1094.5 of the Code of Civil Procedure. (See Gong v.
10 City of Fremont, supra., 250 Cal.App.2d 568, 575;
11 Mid-Way Cabinet etc. Mfg. v. County of San Joaquin
12 (1967) 257 Cal.App.2d 181, 191 [Cal.Rptr. 37].)"
13 Selby Realty Co. v. City of San Buenaventura, supra.
14 at 128.

15 In Pfeiffer v. City of La Mesa, 69 C.A.3d 74 (1977) the
16 land owner complied "under protest" with an allegedly invalid
17 condition attached to the granting of a building permit and then
18 brought an action in inverse condemnation to recover for the
19 damages caused by that condition. The Court of Appeal answered
20 the question of whether or not the landowner could obtain recovery
21 of damages under such circumstances as follows:

22 "We conclude, as did the trial judge, he cannot,
23 and that the proper method to test the validity
24 of conditions in a building permit is a proceeding
25 in mandamus under Code of Civil Procedure section
26 1094.5." Pfeiffer v. City of La Mesa, supra. at 76.

27 Further, even if defendants could prevail in an action
28 for mandate in connection with the denial of his application for
subdivision of the subject property, defendants would be precluded
from recovery of damages even in that action.

Government Code Section 818.4 provides as follows:

"A public entity is not liable for an injury caused
by the issuance, denial, suspension or revocation
of, or by the failure or refusal to issue, deny,
suspend or revoke, any permit, license, certificate,
approval, order, or similar authorization where the
public entity or an employee of the public entity is
authorized by enactment to determine whether or not
such authorization should be issued, denied, suspended
or revoked."

1 Government Code Section 821.2 is the same except that it
2 precludes liability of public employees.

3 The California Supreme Court in State of California v.
4 Superior Court (Veta), 12 C.3d 237 at 244-247 (1974) discussed
5 the question of whether damages could be recovered in a mandate
6 action assuming the permit denial was improper. The Court con-
7 cluded that the immunities set forth in Government Code Section
8 818.4 and 821.2 precluded plaintiff from attempting to recover
9 damages from a public entity or employee for failure to issue the
10 requested permit. See also HFH, Ltd. v. Superior Court, 15 C.3d
11 508 at 519 (1975).

12 The above authorities make it clear that the City of
13 Roseville cannot be held liable for damages resulting from an
14 alleged wrongful denial of an application for lot split of the
15 subject property.


16 Accordingly, it is submitted that any evidence offered
17 by defendants in an attempt to prove that their application for
18 approval of a lot split in 1973 was improperly denied by plaintiff
19 must be excluded. Such evidence is irrelevant and immaterial to
20 the valuation issues involved in this case.

21 DATED: October 31, 1977

22 Respectfully submitted,

23 
24 DENNIS W. DE CUIR, City Attorney
Attorney for Plaintiff

25 TURNER & MULCARE

26 BY 
27 WILLIAM J. TURNER
Attorney for Plaintiff

DENNIS W. DE CUIP
City Attorney
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316 Vernon Street
Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

FILED NOV - 1 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY

By [Signature]
Deputy

TURNER & MULCARE
A PROFESSIONAL CORPORATION
1650 S. Amphlett Blvd., Suite 225
San Mateo, CA 94402
Telephone: (415) 573-7677

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

v.

WILLIAM J. ZISK and LOIS E. ZISK, et al.,

Defendants.

NO. 4 1 1 0 4

MICROFILMED

TRIAL BRIEF

NO RECOVERY OF DAMAGES FOR CLAIMED LOSSES RESULTING FROM ZONING OF DEFENDANTS' PROPERTY

I.

GENERAL FACTUAL BACKGROUND

Defendants' property lies within and adjacent to Dry Creek in the City of Roseville. Dry Creek has a history of flooding.

As early as the 1950's, flood plain zoning affected Defendants' property (Ord. 597). Since May, 1959, up until the end of 1973, a very substantial portion of Defendants' property was included within an area covered by the "FP", Special Flood Plain Combining District Regulations, contained in the comprehensive zoning ordinance of the City of Roseville (Ord. 802).

Following review of an extensive study in 1973 conducted

1 by the Department of the Army Corps of Engineers of the Creek
 2 System in Roseville, the City of Roseville, on November 28, 1973,
 3 adopted more refined zoning regulating development in the flood-
 4 prone areas. These zoning regulations, which became effective in
 5 December, 1973, were designated "FW" (Floodway) and "FF"
 6 (Floodway Fringe). Like the predecessor "FP" zone, these regu-
 7 lations applied to flood-prone areas along and within the extensive
 8 creek system throughout the City of Roseville.

9 The 1973 Corps of Engineers Study was relied upon and
 10 used by the City, along with other available information, as a
 11 basis for its adoption of the "FW" and "FF" zones in November of
 12 1973.

13 Defendants apparently seek damages for an alleged loss in
 14 value of their property arising out of such rezoning.

15 Plaintiff contends that its adoption of the "FW" and "FF"
 16 combining zones was amply supported by a reasonable basis in fact
 17 and is, accordingly, a valid exercise of the police power.
 18 Plaintiff further contends that it is a firmly established rule
 19 of law that no recovery may be obtained for losses in value which
 20 may be occasioned by rezoning.

21 II.

22 DEFENDANTS CANNOT RECOVER FOR ANY LOSSES
 23 IN VALUE RESULTING FROM REZONING OF THEIR PROPERTY

24 A. THE FLOODPLAIN ORDINANCES ARE VALID
 25 EXERCISES OF THE POLICE POWER.

26 It is a well established rule of law that if there appears
 27 to be any reasonable basis in fact supporting a legislative
 28 determination on zoning, the Courts may not and will not attempt

1 to substitute their judgment for that of the legislative body.

2 This principle of judicial deference to legislative
3 determinations is succinctly set forth by the California Supreme
4 Court as follows:

5 "Every intendment is in favor of the validity
6 of the exercise of police power, and, even though
7 a court might differ from the determination of
8 the legislative body, if there is a reasonable
9 basis for the belief that the establishment of a
10 strictly residential district has substantial
11 relation to the public health, safety, morals or
12 general welfare, the zoning measure will be deemed
13 to be within the purview of the police power."
14 (Citing cases) (Wilkins v. City of San Bernardino,
15 29 C.2d 332, 338-339 (1946).

16 The Courts have reiterated this principle by stating:

17 "The wisdom of the prohibitions and restrictions
18 is a matter for legislative determination, and even
19 though a Court may not agree with that determination,
20 it will not substitute its judgment for that of the
21 zoning authorities if there is any reasonable justifi-
22 cation for their action." (Emphasis added)
23 Johnston v. City of Claremont 49 Cal.2d 826, 838 (1958).

24 See also Miller v. Board of Public Works 195 Cal. 477,
25 490, 495, (1925) and Consolidated Rock Products v. City of
26 Los Angeles, 57 C.2d 515, 522-523 (1962).

27 The Court of Appeal has already determined that the
28 Floodplain zoning regulations of the City of Roseville are valid
exercises of the police power. In this regard, the Court stated:

29 "When the city council adopted Ordinances 1224
30 and 1227 which regulated land uses within flood-prone
31 areas and rezoned certain lands surrounding stream-
32 beds, plaintiffs' land was not singled out for abuse;
33 on the contrary, all lands similarly situated were
34 rezoned. Thus these flood plain ordinances were
35 neither vague nor arbitrary, nor an improper exercise
36 of the city council's police power; rather, they were
37 adopted as a proper regulation of land use and were
38 a permissible exercise of that power." Zisk v. City
of Roseville, 56 Cal.App.3d 41, 59 (1976).

Such finding by the Court of Appeal obviously constitutes

1 collateral estoppel on any question of validity of the zoning
2 ordinances.

3 Accordingly, defendants may not attack the validity of
4 the Floodplain ordinances of the City of Roseville and any evidence
5 offered to that effect should be excluded.

6 B. THERE CAN BE NO RECOVERY FOR ANY
7 CLAIMED LOSS IN VALUE RESULTING FROM ZONING.

8 The California Supreme Court in HFH, Ltd. v. Superior
9 Court, 15 C.3d 508 (1975) firmly reiterated the long standing rule
10 in California that a zoning action which merely decreases the
11 market value of the property does not give rise to a cause of
12 action in inverse condemnation. 1/

13 The Supreme Court in HFH, Ltd. v. Superior Court, supra,
14 rejected plaintiff's claim for inverse condemnation when an 80%
15 diminution in value was alleged. See also the rejection of such
16 claims in Pinheiro v. County of Marin, 60 C.A.3d 323, 325, 327
17 (1977) (79% diminution alleged); Dale v. City of Mountain View,
18 55 C.A.3d 101, 106, 107, 110 (1976) (over 75% diminution alleged);
19 and Consolidated Rock Products Co. v. City of Los Angeles, 57 C.2d
20 515 (1962), appeal dismissed 371 U.S. 36 (1962) (relatively small,
21 if not minimal value remaining as a result of rezoning).

22 Similarly, federal cases hold that a diminution in value
23 does not give rise to a cause of action against a municipality for
24 zoning. Hadachek v. Sebastian, 239 U.S. 394, 405 (1915) (over 90%
25 decrease in value as a result of zoning);

26 1/ Changes of zoning often result in either an increase or a
27 decrease in the value of the property involved. Owners do
28 not pay the zoning authority when value is increased and
the Courts have held that the zoning authority does not
pay the owners when the values decrease.

1 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926)
2 (75% decrease in value as a result of zoning); and Reimann v.
3 Little Rock, 237 U.S. 137 (1915).

4 It is also firmly established that there is no vested right
5 to zoning. In this regard, the California Supreme Court stated
6 as follows:

7 "The Court of Appeal in Morse v. County of San Luis
8 Obispo, supra., 247 Cal.App.2d 600, spoke as follows
9 in affirming a judgment of dismissal following the
10 sustaining of a demurrer to a complaint seeking
11 damages in inverse condemnation for the down-zoning
12 of property:
13 'Plaintiffs are apparently attempting to recover
14 profits they might have earned if they had been
15 successful in getting their land rezoned to permit
16 subdivision into small residential lots, but land-
17 owners have no vested right in existing or anticipated
18 zoning ordinances. (Anderson v. City Council [1964]
19 229 Cal.App.2d 79, 88-90 [40 Cal.Rptr. 41]. A
20 purchaser of land merely acquires a right to continue
21 a use instituted before the enactment of more restrictive
22 zoning. Public entities are not bound to reimburse
23 individuals for losses due to changes in zoning, for
24 within the limits of the police power 'some uncompen-
25 sated hardships must be borne by individuals as the
26 price of living in a modern enlightened and progressive
27 community.' (Metro Realty v. County of El Dorado [1963]
28 222 Cal.App.2d 508)' (247 Cal.App.2d at pp.
602-603; italics added.)"
HFH, Ltd. v. Superior Court, supra. at 515-516.

20 See also Avco Community Developers, Inc. v. South Coast
21 Regional Commission, 17 C.3d 785 at 791-798 (1976).

22 In fact, in the present case, the "FF" and "FW" flood
23 plain zones adopted in November 1973 do not substantially change
24 what use could have been made under the prior "FP" zoning which
25 was on the property when defendants purchased in 1966. Therefore,
26 even if losses resulting from zoning were recoverable, it is
27 unlikely that defendants could prove any losses here.

28 To the extent that plaintiff intends to rely on the cases

1 of Sneed v. County of Riverside (218 C.A.2d 205 (1963)) and
2 Peacock v. County of Sacramento (271 C.A.2d 845 (1969)),
3 plaintiff's reliance is misplaced. Both of those cases involved
4 actual public use of the property by the agency following zoning
5 to allow such actual public use without condemnation. The prop-
6 erties were singled out and zoned differently from other similarly
7 situated properties to allow public use for aircraft overflights
8 over the properties.

9 In the present case, there has been no physical user of
10 defendants' land by plaintiff. Further, the Court of Appeal in
11 Zisk v. City of Roseville, supra, at 49, has determined that the
12 Zisk property was not singled out for abuse and that "... on
13 the contrary, all lands similarly situated were rezoned." The
14 finding by the Court of Appeal in Zisk v. City of Roseville, supra,
15 that the floodplain zones of the City of Roseville are proper
16 exercises of the police power in and of itself distinguishes the
17 facts of this case from Sneed and Peacock.

18 The case of Eldridge v. City of Palo Alto, 57 C.A.3d 613
19 (1976), earlier referred to by counsel for defendants also does
20 not apply here. The Court in that case reversed a judgment entered
21 after a demurrer was sustained without leave to amend in an inverse
22 condemnation case. The Court in Eldridge emphasized that the
23 complaint had alleged that as a result of the zoning, the owners
24 had been denied any "reasonable or beneficial use" of their prop-
25 erty (Eldridge, supra at 624, 628, 629.) Here, it is admitted by
26 defendants that following the rezoning of their property in 1973,
27 they have continued to live there, rent out the second house on
28 the property as they had done before and have continued to use the

1 property as a base for their business operations. In short, there
2 has not been a deprivation of all reasonable or beneficial use of
3 the defendants' property here as was alleged in Eldridge.
4 Therefore, Eldridge is not in point.

5 III.

6 CONCLUSION


7 For the reasons above stated, plaintiff submits that
8 defendants may not seek recovery of damages for claimed losses
9 resulting from rezoning of their property nor can they attack the
10 validity of the zoning ordinances.

11
12 DATED: November 1, 1977

13 Respectfully submitted,

14 
15 DENNIS W. DE CUIR, City Attorney
16 Attorney for Plaintiff

17 TURNER & MULCARE

18
19 BY 
20 WILLIAM J. TURNER
21 Attorney for Plaintiff

22 /
23 /
24 /
25 /
26 /
27 /
28 /

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10 San Mateo, CA 94402
11 Telephone: (415) 573-7677

12 Attorneys for Plaintiff

653

FILE
NOV - 1 1977

MAURINE I. BOBBAC
COUNTY CLERK OF PLACER COUNTY
BY [Signature]
DEPUTY

MICROFILMED

13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 IN AND FOR THE COUNTY OF PLACER

15 CITY OF ROSEVILLE, a municipal)
16 corporation,)

17 Plaintiff,)

18 v.)

19 WILLIAM J. ZISK and LOIS E.)
20 ZISK, et al.,)

21 Defendants.)

NO. 4 1 1 0 4

PLAINTIFF'S TRIAL BRIEF

NO RECOVERY OF DAMAGES FOR
CLAIMED LOSSES ARISING FROM
ADOPTION OF GENERAL PLAN OR
GENERAL PLAN ELEMENTS.

22 Defendants apparently seek to recover damages arising out
23 of the City of Roseville's adoption of certain elements to its
24 General Plan.

25 It has been firmly established by the California Supreme
26 Court that claimed losses arising out of the
27 adoption of a general plan by a public agency may not form a basis
28 for a claim against the agency for damages.

In the case of Selby Realty Co. v. City of San Buenaventura,
10 C.3d 110 (1973), plaintiff owner brought an action seeking,
inter alia, damages in inverse condemnation when it was denied a
permit because it refused to dedicate a portion of its property
for a street. The proposed street was delineated in the circulation

1 element of the City's general plan.

2 The Supreme Court held that such designation of a portion
3 of the owner's property for future public use could not form a
4 basis for a cause of action in inverse condemnation and stated as
5 follows:

6 "Even if on some theory the bald allegations of
7 the complaint in the abstract may be deemed to state
8 a cause of action for inverse condemnation, the
9 demurrers were properly sustained since it is clear
10 that the county could not be held liable. (See Routh
11 v. Quinn (1942) 20 Cal.2d 488, 493-494 [127 P.2d 1,
12 149 A.L.R. 215].) (4) Such a cause of action could
13 have been based only upon the county's adoption of
14 the general plan. Neither Kloppling nor any other
15 decision of which we are aware holds that the
16 enactment of a general plan for the future development
17 of an area, indicating potential public uses of privately
18 owned land, amounts to inverse condemnation of that land.
19 (Emphasis added) Selby Realty Co. v. City of San
20 Buenaventura, supra, at 119.

21 The Supreme Court goes on in Selby to repeat the firmly
22 established rule that enactment of a general plan cannot consti-
23 tute a taking, as follows:

24 "In the fourth cause of action, plaintiff alleges
25 that a "scheme" exists among the defendants to take
26 its land without compensation, that in furtherance
27 of that "scheme" the city has denied plaintiff a
28 permit to build its apartment houses for the purpose
of "extorting" plaintiff's land. (15) Insofar as the
"scheme" alleged involves the adoption of a plan by
the city, the same considerations set forth above with
regard to the county's adoption of the general plan
are applicable; the mere enactment of a general plan
cannot be deemed a "taking." (Emphasis added) Selby
Realty Co. v. City of San Buenaventura, supra, at 127.

Accordingly, the effect which the City of Roseville general
plan or elements may have had on the value of defendant's property

26 /
27 /
28 /

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

656

DATE: November 1, 1977 COURT MET AT 10:00 A.M. DEPARTMENT NO. 1
PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Vickie Valine REPORTER Dennis Ludlow BAILIFF

TITLE:

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff,

-VS-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

MICROFILMED

Desmond, Miller, Desmond & Bartholomev
by Richard F. Desmond and
Steven James Wagner

NATURE OF PROCEEDINGS: Jury Trial (Condemnation)

ACTION NO. 41,104

Court and counsel met in chambers prior to convening. Upon convening, the roll of jurors was called and those jurors present were excused until 10:00 A.M. on Friday, November 4, 1977, at 10:00 A.M. Court adjourned until 1:30 P.M.

Reconvene at 1:48 P.M. All counsel present. The Court and counsel discussed the issues to be resolved prior to the selection of the jury in this action. Counsel for defendants introduced a number of exhibits as listed on the attached sheets. Evening recess taken at 4:55 P.M.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY: P. Oliver DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

NO. 41,104

657

City of Roseville

Plaintiff

Date 11-1-77

William A. Newsom

Judge

Wm. & Lois Zisk

Defendant

EXHIBITS

No.	M.	Ev.	Description
Q-3	x	x	Agreement Regarding Streambed Alteration Notification
Q-4	x	x	Permit dated June 8, 1973
Q-5	x	x	Notification of Removal of Materials and/or Alteration of Lake, River, or Streambed Bottom, or Margin.
R	x	x	Environmental Impact Statement, Bill Zisk Residence
S-1		x	Copy of Minutes - Roseville City Council, 6-20-73
S-2		x	Resolution No. 73-56, Roseville City Council
S-3		x	Open Space and Conservation Element of the Roseville General Plan
T		x	Letter dated July 13, 1973, to Mr. Robert Kachel
U		x	Letter dated July 24, 1973, to Mr. Rex Bronson
V		x	Council Communication dated August 23, 1973
W		x	Copy of Minutes - Roseville City Council, 8-29-73
X		x	Letter dated August 31, 1973, to Mr. Rex Bronson
Y		x	Memorandum dated August 31, 1973, to Flood Plain Cmnte.
Z		x	Memorandum dated Sept. 5, 1973, to Planning Director
AA		x	Letter dated Sept. 7, 1973, to Mr. Bill J. Zisk
BB	x		Memo dated Sept. 10, 1973, to Mr. Fred Barnett
CC		x	Letter dated Sept. 19, 1973, to Mr. Fred Barnett
DD		x	Copy of Minutes - Roseville Planning Comm., 9-13-73
EE		x	Letter dated Sept. 14, 1973, to City Council
FF		x	Copy of Minutes - Roseville City Council, 10-3-73
GG	x		Copy of Minutes - Special Meeting of the Roseville Parks and Recreation Commission for October 8, 1973

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

658

NO. 41,104

City of Roseville
Plaintiff

Date 11-1-77

William A. Newsom
Judge

Wm. & Lois Zisk
Defendant

EXHIBITS

No.	Id.	Ev.	Description
A		x	Charter of the City of Roseville
B		x	Zoning Map
C	x	x	Copy of Minutes - Roseville Planning Comm., 2-23-67
D		x	Letter dated March 30, 1967, to William J. Zisk
E-1		x	Resolution No. 68-21, Roseville City Council
E-2		x	Park & Streambed Plan for the City of Roseville
F		x	Ordinance No. 1158, City of Roseville
G		x	City of Roseville Grading Permit dated March 3, 1972
H		x	Letter dated March 23, 1972, to Mr. Bill Zisk
I		x	Notice of Initiation of Flood Plain Information Study
J		x	Ordinance No. 1190, City of Roseville
K		x	Ordinance No. 1191, City of Roseville
L		x	Environmental Impact Review Form
M		x	Letter dated March 22, 1973, to City of Roseville
N		x	Letter dated April 25, 1973, to Mr. Bill Zisk
O		x	Copy of Minutes - Roseville City Council, 4-25-73
O-1	x		Excerpt of City Council Meeting of 4-25-73
P		x	Flood Plain Information
P-1		x	Brochure - Floods, Dry Creek & Tributaries
Q-1	x	x	Letter dated May 11, 1973, to Mr. William Zisk
Q-2	x	x	Letter dated May 23, 1973, to Mr. William L. Zisk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

659

NO. 41,104

City of Roseville

Plaintiff

Date 11-1-77

William A. Newsom

Judge

Wm. & Lois Zisk

Defendant

EXHIBITS

No.	Id.	Ev.	Description
HH		x	Copy of Minutes - Joint Meeting, Roseville Planning Comm. and Roseville Flood Plain Study Comm., 10-25-73
II		x	Council Communication dated October 26, 1973
JJ		x	Copy of Petition for Writ of Mandate
KK		x	Copy of Claim of Mr. & Mrs. William Zisk
LL		x	Memorandum dated 11-26-73 to Hon. Mayor & City Council
MM		x	Notice of Call of Special Meeting of Rsvl. Plann. Comm.
NN		x	Comprehensive Zoning Ordinance 802
OO-1		x	Copy of Minutes - Roseville City Council, 11-28-73
OO-2		x	Transcript of Roseville City Council meeting, 11-28-73
OO-3		x	Ordinance No. 1224, City of Roseville
OO-4		x	Ordinance No. 1227, City of Roseville
OO-5		x	Flood Plain Map
PP		x	Council Communication dated December 13, 1973
QQ-1		x	Copy of Minutes - Roseville City Council, 12-19-73
QQ-2		x	Transcript of Portion of City Council Mtg., 12,19-73

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

660

DATE: November 2, 1977 COURT MET AT 10:45 A.M. DEPARTMENT NO. _____

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Vickie Valine REPORTER Dennis Ludlow BARRIFF

TITLE:

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

MICROFILMED

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and

Steven James Wagner

NATURE OF PROCEEDINGS:

Jury Trial (Condemnation) Continued

ACTION NO. 41,104

Court and counsel present as stated above. Counsel for defendants introduced a number of additional exhibits as listed on the attached sheets.

William J. Zisk duly sworn and examined on his own behalf. Noon recess taken between the hours of 12:05 P.M. and 2:12 P.M. Upon reconvening, Mr. Zisk resumed the witness stand. Counsel for plaintiff made a motion for exclusion of witnesses during this prima facie case and the motion was granted. Mr. Zisk continued testimony throughout the day and the evening recess was taken at 4:30 P.M.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbins
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY Paula Oliver DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

661

NO. 41,104

City of Roseville
Plaintiff

Date 11-2-77

William A. Newsom
Judge

Wm. & Lois Zisk
Defendant

EXHIBITS

No.	M.	Ex.	Description
// -2-77 RR		x	Letter dated Jan. 23, 1974, to Stephen P. Thomas
SS		x	Council Communication dated November 12, 1976
TT		x	Resolution 76-108, Roseville City Council
UU	x		Letter dated August 21, 1973
UU-1	x		Map of Zisk Property
VV		x	Copy of Answer to Petition for Writ of Mandate
WW		x	Large Aerial photograph
XX 1-10		x	Ten (10) black & white photographs
YY 1&2		x	Two (2) large color photographs
ZZ		x	Eight (8) small color photographs (in Plastic Sheet)
AAA		x	Small color photograph on black backing
BBB		x	Five small color photographs on black backing
CCC 1-11		x	Eleven (11) small color photographs

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER**

662

DATE: November 3, 1977 COURT MET AT: 10:00 A.M. DEPARTMENT NO. _____

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Vickie Valine REPORTER Dennis Ludlow BAILIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeCuir</u>, Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u></p> <p>Desmond, Miller, Desmond & Bartholomew by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p>

NATURE OF PROCEEDINGS: Jury Trial (Condemnation) Continued ACTION NO. 41,104

MICROFILMED

Court and counsel present as stated above. The Court stated that in view of the length it was going to take to resolve the non-jury issues, the jury previously summoned in this case would be dismissed and a new jury panel would be summoned for Tuesday, November 15, 1977, at 10:00 A.M.

Mr. Zisk resumed the witness stand and continued his testimony from the preceding day. Defendant's exhibit DDD. Newspaper clippings (in manila envelope) was marked for identification.

Mr. Frank LaBella, Jr. was duly sworn and examined on behalf of defendants.

Plaintiff's exhibits:

1. Flood Plain Information map introduced into evidence.
2. Notes of Frank LaBella marked for identification.

Stephen P. Thomas duly sworn and examined on behalf of defendants.

Evening recess taken at 4:50 P.M.

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine L. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY: [Signature] DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

663

DATE: November 4, 1977 COURT MET AT 10:12 A.M. DEPARTMENT NO. _____

PRESENT: HON. William A. Newson JUDGE Paula Oliver DEPUTY CLERK

Vickie Valine REPORTER Dennis Ludlow BAILIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeCuir</u>, Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u></p> <p>Desmond, Miller, Desmond & Bartholomew by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p>

NATURE OF PROCEEDINGS: Jury Trial (Condemnation) Cont. ACTION NO. 41,104

Court and counsel present as stated above. Stephen P. Thomas resumed the witness stand and continued his testimony from the preceeding day. Plaintiff's exhibits:

- EEE. Fourteen color photographs marked for identification.
- FFF. Aerial photograph admitted into evidence. MICROFILMED

Noon recess taken between the hours of 12:10 P.M. and 2:10 P.M. Upon reconvening, Mr. Thomas resumed the witness stand and concluded his testimony.

Lois E. Zisk duly sworn and examined on her own behalf. Defendant's exhibit GGG. Book of House Plans marked for identification.

Richard S. Desmond duly sworn and examined on behalf of defendants.

Defendants rest as to the prima facie case.

Kenneth Martin James and Frederick L. Barnett each duly sworn and examined. Plaintiff's exhibits introduced as listed on the attached sheet.

Evening recess at 4:30 P.M.

BOOK _____ PAGE _____

MINUTES

This minute order was duly entered in R/A and a copy placed in the file
Attest: Marilyn I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY *P. Oliver* DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF PLACER

664

NO. 41104

CITY OF ROSEVILLE
 Plaintiff

Date 11-3-77

William A. Newsom
 Judge

WM. & LOIS ZISK
 Defendant

EXHIBITS
PLAINTIFFS

No.	M.	Ev.	Description
11-4-77 3	x	x	Black & white photograph
4		x	Aerial photograph map
5	x	x	Acetate map overlay
6		x	Map - City of Roseville
7	x	x	State of Policy dated July 5, 1960
8	x	x	Letter dated March 7, 1956, to David C. Koester
9	x		Newspaper clipping
10	x	x	Flood Plain Information June 1965
11	x	x	Flood Plain Maps

5
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

665

DATE November 8, 1977 COURT MET AT 10:24 A.M. DEPARTMENT NO. 1
PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Vickie Valine REPORTER Dennis Ludlow BAILIFF

TITLE:

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner

NATURE OF PROCEEDINGS: Jury Trial (Condemnation) Cont.

ACTION NO. 41,104

Court and counsel present as stated above. Mr. Frederick L. Barnett resumed the witness stand and continued his testimony from the preceding court session. A number of plaintiff's exhibits were introduced as listed on the attached sheet. Noon recess taken at 12:00 Noon.

Reconvene at 2:13 P.M. by stipulation of counsel, witness Lauri Arcuri was duly sworn and examined out of order for the convenience of the witness. Following Mr. Arcuri's testimony, Mr. Barnett resumed the witness stand. Evening recess taken at 5:45 P.M.

MICROFILMED

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine I. Dobbos
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY P. Oliver DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF PLACER

666

NO. 41104

City of Roseville

Plaintiff

Date 11-8-77

William A. Newsom

Judge

Wm. & Lois Zisk

Defendant

EXHIBITS

No.	M.	Ex.	Description
-8-77 12	x		Album of Storm Damage Photographs
13	x	x	Map - Flood Profiles, Dry Creek, May 1973
14	x	x	Color slide
15	x	x	Color slide
16	x	x	Color slide
17	x	x	Memorandum dated July 18, 1973, to Planning Director
18	x	x	Letter dated October 2, 1973, to Fred Barnett
19		x	"Spink Corporation" Map
20		x	Letter dated July 18, 1952, to Dept. of the Army
21		x	Public Notice Relative to Preliminary Examination
22		x	Resolution No. 72-94
23		x	Letter dated March 19, 1973, to District Engineer
24		x	Letter dated March 30, 1973, to Mr. Steven H. Dillon
25		x	Letter dated June 26, 1973, to U. S. Army Corps of Eng.
26		x	Letter dated June 26, 1973, to St. Dept. of Fish & Game
27		x	Letter dated July 20, 1973, to Mr. Robert Kochel
28	x	x	Environmental Impact Report
29		x	Resolution No. 73-122, Roseville City Council

1 TURNER & MULCARE
 A PROFESSIONAL CORPORATION
 2 1650 South Amphlett Blvd., Suite 225
 San Mateo, CA 94402
 3 Telephone: (415) 573-7677

4 DENNIS W. DE CUIR
 City Attorney
 5 City of Roseville
 316 Vernon Street
 6 Roseville, CA 95678
 Telephone: (916) 783-9151, Ext. 272
 7

FILED NOV - 8 1977
 MAURINE I. DOBRAS
 COUNTY CLERK OF PLACER COUNTY
 By [Signature]
 Deputy

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 IN AND FOR THE COUNTY OF PLACER

11	CITY OF ROSEVILLE, a municipal corporation,)	NO. 41104	MICROFILMED
12)		
13	Plaintiff,	)	PLAINTIFF'S TRIAL BRIEF
14	v.	)	RE: COURT'S DETERMINATION
15	WILLIAM J. ZISK and LOIS E. ZISK, et al.,	)	OF RECOVERABILITY OF
16	Defendants.	)	KLOPPING DAMAGES

18 I
 19 INTRODUCTION

20 Defendants Zisk have presented evidence in an attempt to
 21 carry their burden of proving they are entitled to present
 22 evidence to the jury of claimed damages resulting from allegedly
 23 unreasonable pre-condemnation activities of plaintiff City of
 24 Roseville. In seeking such damages in addition to the compensation
 25 provided for by C.C.P. § 1248, which is the market value of the
 26 property being acquired and severance damages, if any, to their

1 remaining property, defendants Zisk apparently rely upon the case
2 of Klopping v. City of Whittier, 8 C.3d 39 (1972). The Court
3 there held that a condemnee must be provided with an opportunity
4 to demonstrate:

5 " . . . that (1) the public authority acted improperly
6 either by unreasonably delaying eminent domain action
7 following an announcement of intent to condemn or by
8 other unreasonable conduct prior to condemnation; AND
9 (2) as a result of such action the property in question
10 suffered a diminution in market value." (Emphasis
11 added) Klopping v. City of Whittier, supra, at 52.

12 As will be shown below, defendants Zisk have failed to carry
13 their burden of proving that the City has acted improperly by
14 unreasonably delaying eminent domain action following an
15 announcement of intent to condemn or that the City has engaged in
16 unreasonable conduct prior to condemnation. Further, even if
17 defendants had carried their burden of proving unreasonable
18 conduct on the part of the City, the evidence shows they have not
19 suffered any compensable damage as a result.

20 It is encumbant upon the Court at this time to determine the
21 recoverability of defendants' alleged Klopping damages.

22 "When the proceeding comes on for hearing all issues
23 except the sole issue relating to compensation, are
24 to be tried by the Court (Vallejo etc. R.R.
25 Co. v. Reed Orchard Co., 169 Cal.545, 556 [147 P.238];
26 Oakland v. Pacific Coast Lumber etc. Co., supra,
[71 Cal.392 [153 P.705] at page 397.)" People v.
Ricciardi, 23 C.2d 390, 402 (1943).

27 Here, defendants have not carried their burden.

28 Accordingly, defendants are precluded from presenting any
29 evidence to the jury relating to their claims for damages arising
30 out of any activities of the City prior to the filing of this

1 action in eminent domain. Evidence to be presented to the jury in
2 this case is therefore limited to the issues set out in C.C.P.

3 Section 1248 which are as follows:

- 4 1. The value of the property sought to be condemned
5 (C.C.P. § 1248, paragraph 1.);
- 6 2. The severance damages which will accrue to the remaining
7 property of defendants by reason of its severance from
8 the property sought to be condemned and the construction
9 of the improvement in the manner proposed by plaintiff
10 (C.C.P. § 1248, paragraph 2.); and
- 11 3. The amount that the remaining property of defendants will
12 be benefited by construction of the improvement in the
13 manner proposed by plaintiff (C.C.P. § 1248, paragraph
14 3.).

15 II

16 DEFENDANTS HAVE NOT CARRIED THEIR BURDEN 17 OF PROVING UNREASONABLE PRE-CONDEMNATION 18 CONDUCT ON THE PART OF THE CITY OF ROSEVILLE

19 The evidence does not establish the City of Roseville acted
20 improperly either by unreasonably delaying eminent domain action
21 following an announcement of intent to condemn or by other
22 unreasonable conduct prior to condemnation. Klopping v. City of
23 Whittier, supra. at 52,

24 A. The Evidence Does Not Establish An Unreasonable Delay
25 In Filing An Eminent Domain Action Following Announcement Of
26 Intent To Condemn.

Defendant WILLIAM ZISK testified that he first learned
the City of Roseville was contemplating acquisition of a portion
of his property when he received a letter dated September 7, 1973
from the City. (Exhibit AA) On December 19, 1973, less than
three and a half (3 1/2) months later, the City passed a

1 Resolution determining that it would acquire a portion of the Zisk
2 property. (Exhibit QQ2) One (1) day later, on December 20, 1973,
3 this action in eminent domain was filed pursuant to the resolution.

4 There has been no unreasonable delay in filing an eminent
5 domain action following an announcement to condemn.

6 In Smith v. State of California, 50 C.A.3d 529 (1975)
7 the Court found that the property owner could not state a claim
8 for damages under Klopping, even though the Division of Highways
9 had adopted a proposed freeway route through the owner's land on
10 July 21, 1966 and had not taken any action to acquire the property
11 at the time of filing of the action on April 24, 1973. The Court
12 there discussed in depth the various cases holding that adoption
13 of a tentative plan for possible public acquisition of property
14 cannot give rise to claims for damages even though such action may
15 adversely effect the marketability of the property.

16 In Elgin Capital Corp. v. County of Santa Clara, 57 C.A.3d
17 687 (1975) the Court held that a delay of twenty-two (22) months
18 from the commencement of public discussions by the County of acquisi-
19 tion of plaintiff's land until the time of filing the condemnation
20 action to acquire the land did not constitute an unreasonable
21 delay giving rise to Klopping damages. The Court noted that
22 C.C.P. § 1243.1 only requires the public entity to commence an
23 action in eminent domain within six (6) months after it establishes
24 by public resolution the necessity to acquire a parcel of property
25 by eminent domain and found it was clearly reasonable for the
26 eminent domain action to be filed within five (5) weeks after the

1 County passed its resolution of condemnation.

2 In the present case, the resolution of the City of
3 Roseville to acquire the Zisk property was passed December 19, 1973,
4 and one day later, on December 20, 1973, this eminent domain action
5 was filed. Obviously, there has been no unreasonable delay in
6 filing this action.

7 If defendants contend that unreasonable delay results
8 from the fact that the subject property was earlier designated for
9 possible future public use in elements of General Plan of the
10 City, such cannot give rise to a claim for damages under Klopping.
11 The California Supreme Court in Selby Realty Co. v. City of
12 San Buenaventura, 10 C.3d 110 (1973) held:

13 "Neither Klopping nor any other decision of which
14 we are aware holds that the enactment of a general
15 plan for the future development of an area, indicating
16 potential public uses of privately owned land, amounts
17 to inverse condemnation of that land." Selby Realty
18 Co. v. City of San Buenaventura, supra. at 119.

19 B. The Evidence Does Not Establish The City of Roseville
20 Engaged In Unreasonable Pre-Condemnation Conduct.

21 Defendants Zisk apparently contend that certain pre-
22 condemnation activities of the City of Roseville were unreasonable
23 and oppressive and give rise to a claim for damages. The general
24 categories of these alleged oppressive acts relate to the
25 following:

- 26 1. The adoption by the City of Roseville of various
elements of its General Plan;
2. Denial by the City of Roseville of defendants'
application for a lot split and a permit for

1 construction of a house in the immediate
2 vicinity of the creek bed; and

- 3 3. The rezoning of portions of the subject property from
4 the prior designation of Flood Plain (FP) to the
5 flood plain designation of Floodway (FW) and
6 Floodway Fringe (FF).

7 The evidence does not establish that the activities of
8 the City were unreasonable in connection with the above matters.
9 In any event, it is firmly established by numerous decisions of
10 the California Supreme Court that no claim for damages can arise
11 out of such governmental activities.

12 1. No claim for damages for adoption of General Plan
13 Elements.

14 Defendants apparently urge that the adoption in 1968
15 of the Park, Streambed and Recreation Element of the City's General
16 Plan designating the subject property for possible future public
17 use gives rise to a claim for damages in this action. William Zisk
18 testified he was present when this element to the General Plan was
19 adopted in 1968 and it was then clear to him that the General Plan
20 was to be used only as a guide for possible future development.
21 In fact, he understood that such plan would never be implemented.
22 Further, there is no evidence whatsoever that the General Plan of
23 the City or any of its elements ever interfered with defendants'
24 use of the subject property. Even if the General Plan did interfere
25 with such a use or have an effect on property value, no claim for
26 recovery of such losses could arise. As above noted, the Supreme
Court in Selby Realty Co. v. City of San Buenaventura, 10 C.3d
110 (1973) stated:

1 "Neither Klopping nor any other decision of which
2 we are aware holds that the enactment of a general
3 plan for the future development of an area,
4 indicating potential public uses of privately owned
land, amounts to inverse condemnation of that land."
Supra. at 119.

* * *

5 " . . . the mere enactment of a general plan cannot
6 be deemed a 'taking'." Supra. at 121.

7 2. No recovery of damages for claimed wrongful
8 denial of lot split and building permit application.

9 Defendants Zisk contend that their application in
10 March of 1973 to split off a one-half acre site from the rest of
11 their property and build a house on the one-half acre was wrong-
12 fully denied. Accordingly, they seek damages.

13 Even if damages were recoverable for a wrongful
14 denial of a building permit, defendants have failed to carry
15 their burden of proving that any such denial was wrongful.

16 Defendants first claim that the City improperly
17 required an EIR on the proposed project. The evidence establishes
18 that in 1972, pursuant to the California Environmental Quality
19 Act of 1970 [Pub. Res. Code §§ 21000 et seq] the City adopted the
20 requirement that an EIR accompany any proposal for development in
21 a floodplain area. The requirement included the application made
22 by the Zisks in 1973. The evidence further establishes the City
23 acted on the application with dispatch and properly expressed
24 concern with the fact that portions of the supporting piers under
25 the deck of the proposed house were actually situated in the
26 channel of Dry Creek. The City also properly considered the

1 possible conflict of the location of the house with the construction
2 of the proposed bicycle path. Selby Realty Co. v. City of
3 San Buenaventura, supra. Certainly, defendants cannot complain
4 that the City should have allowed them to proceed with the
5 construction of their home in view of the then unanswered flood
6 hazard problems and the possibility that a portion of the planned
7 house would be acquired for purposes of constructing a bicycle
8 trail through the area.

9 Even if it be assumed, arguendo, the City improperly
10 denied the application for the lot split and building permit, it
11 has been firmly established there can be no action for damages
12 against an agency for the wrongful denial of such application.
13 Mandate is the appropriate remedy, if any.

14 In Selby Realty Co. v. City of San Buenaventura,
15 supra., the plaintiff sought damages in inverse condemnation based
16 upon the alleged wrongful refusal of the City to grant an applica-
17 tion for a building permit. The Supreme Court held:

18 "Nor is a cause of action in inverse condemnation
19 stated for the denial of a building permit. The
20 gravamen of plaintiff's complaint is that the City
21 refused to issue the permit unless plaintiff
22 complied with an assertedly invalid condition.
23 The appropriate method by which to consider such
24 a claim is by a proceeding in mandamus under
25 Section 1094.5 of the Code of Civil Procedure."
26 Selby Realty Co. v. City of San Buenaventura,
supra. at 128.

24 The Court in Pfeiffer v. City of La Mesa, 69 C.A.3d
25 74 (1977) addresses the question of whether an owner can maintain
26 a claim for damages against a City for imposing invalid conditions

1 to the granting of a building permit and gives the following
2 answer:

3 "We conclude, as did the trial judge, he cannot,
4 and that the proper method to test the validity
5 of conditions in a building permit is a proceeding
6 in mandamus under Code of Civil Procedure Section
7 1094.5." Pfeffer v. City of La Mesa, supra. at
8 76.

9 The recent case of City of Walnut Creek v. Leadership
10 Housing Systems, 73 C.A.3d 611 (1977) is to the same effect. The
11 Court there considered the claim of the land developer that he was
12 entitled to recover Klopping damages because his application for
13 approval of his proposed development was rejected solely because
14 the City desired to acquire the property. The Court noted the
15 City Council also considered factors other than the proposed
16 condemnation when it rejected the development proposal. The Court
17 when on to state as follows:

18 "We cannot presume that these acts [of considering
19 other factors such as traffic] were spurious.
20 The closing clause of Ledership's statement
21 properly recognized that an action in inverse condem-
22 nation is not the remedy for the improper denial
23 of the permit, if such had been the case. A
24 petition for a writ of mandate, not inverse
25 condemnation or an action for damages, is the
26 appropriate remedy for abuse of discretion
in refusing a permit (citing numerous cases)."
City of Walnut Creek v. Leadership Housing Systems,
supra. at 621.

27 Further, even if the Zisks had successfully pursued
28 an action for mandate in connection with the denial of their
29 application for lot split and building permit, they could not
30 recover damages. Government Code Section 818.4 provides as follows:

1 "A public entity is not liable for an injury caused
2 by the issuance, denial, suspension or revocation of,
3 or by the failure or refusal to issue, deny, suspend
4 or revoke, any permit, license, certificate, approval,
5 order, or similar authorization where the public
6 entity or an employee of the public entity is
7 authorized by enactment to determine whether or not
8 such authorization should be issued, denied,
9 suspended or revoked."

10 See HFH, Ltd. v. Superior Court, 15 C.3d 508, 518,
11 et seq (1975) which is directly controlling.

12 Accordingly, defendants cannot base their claim for
13 recovery of Klopping damages on the fact that they were denied a
14 lot split and building permit for construction of a house on the
15 subject property.

16 3. No damages as a result of rezoning of portions of
17 the subject property from Flood Plain (FP) to Floodway (FW) and
18 Floodway Fringe (FF).

19 The evidence shows that the channel of Dry Creek
20 traverses the entire length of that portion of the Zisk property
21 which is being acquired. It further shows that since as early as
22 1959 a substantial portion of the Zisk property has carried the
23 combining zone designation of Flood Plain (FP). Mr. Zisk frankly
24 admitted in testimony that when he purchased the property in 1966
25 he was fully aware that the property was in large part designated
26 a flood plain area and he realized a special permit would be
27 required to enable him to build there. The evidence also establishes
28 there has been a history of flooding associated with the creek
29 system running through the City of Roseville and that substantial
30 study and investigation has been conducted over the years by the

1 City and the U. S. Army Corps of Engineers. The FW and FF zones
2 which were adopted by the City of Roseville on November 28, 1973
3 and applied to all properties found by the Corps of Engineers to
4 be within the flood prone areas of the creeks in the City were
5 based on an extensive study undertaken by the Corps. The evidence
6 overwhelmingly establishes that the decision of the City of Roseville
7 to rezone the property so designated by the Corps of Engineers was
8 supported by reasonable bases and fact. Indeed, the City would be
9 remiss if it ignored the conclusions reached by the Corps of
10 Engineers following its May, 1973 study.

11 As a practical matter, the new FW and FF zoning
12 adopted by the City of Roseville in November, 1973, did not expand
13 significantly the areas of the subject property earlier designated
14 as "FP" and the permitted land uses under the new "FW" and "FF"
15 designations do not differ substantially from those permitted under
16 the prior "FP" designation.

17 Obviously, in view of these facts, the designation of
18 portions of the subject property "FW" and "FF" is not an
19 unreasonable or oppressive act.

20 In fact, the Court of Appeal in Zisk v. City of
21 Roseville, 56 C.A.3d 41 (1976) actually found the rezoning
22 reasonable. Thus, defendants are collaterally estopped from
23 claiming the rezoning unreasonable. The Court of Appeal stated:

24 "When the city council adopted Ordinances 1224 and
25 1227 which regulated land uses within flood-prone
26 areas and rezoned certain lands surrounding stream-
beds, plaintiffs' land was not singled out for abuse;
on the contrary, all lands similarly situated were

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rezoned. Thus these flood plain ordinances were neither vague nor arbitrary, nor an improper exercise of the city council's police power; rather, they were adopted as a proper regulation of land use and were a permissible exercise of that power." Zisk v. City of Roseville, supra. at 49.

Even without this determination of the validity of the rezoning of the subject property, the evidence presented in this case clearly establishes there can be no challenge of the legislative determination to rezone the subject property along with other properties similarly situated.

The California Supreme Court has declared a rule of judicial deference to the legislative determination of local agencies with regard to zoning matters. In this regard, the Court has stated:

"The wisdom of the prohibitions and restrictions is a matter for legislative determination, and even though a Court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action." (Emphasis added) Johnston v. City of Claremont, 49 C.2d 826, 838 (1958)

The Supreme Court later commented on this principle as follows:

"As a corollary to this recognized principle of the capacity of the police power to meet the reasonable current requirements of time and place and period in history is the equally well settled rule that the determination of the necessity and form of such regulations, as it is true with all exercises of the police power, is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular

1 regulation, but solely by the answer to the question
2 is there any reasonable basis in fact to support
3 the legislative determination of the regulation's
4 wisdom and necessity?" Consolidated Rock Products
5 Co. v. City of Los Angeles, 57 C.2d 515, 522
6 (1962) appeal dismissed, 371 U.S. 36 (1962)

7 The evidence presented overwhelmingly establishes
8 there is "any reasonable basis in fact" for the legislative
9 determination of the City to rezone the subject property from "FP"
10 designation to the "FW" and "FF" designations.

11 Further, any claim by defendants that they are
12 entitled to seek damages for alleged loss in value as a result of
13 such rezoning has been firmly rejected by the recent Supreme Court
14 case of HFH, Ltd. v. Superior Court, 15 C.3d 508 (1975).

15 Thus, defendants are precluded from attacking the
16 "FW" and "FF" zoning which has been applied to their property by
17 the City and are not entitled to seek damages for claimed loss in
18 value resulting from its rezoning.

19 III

20 ASSUMING, ARGUENDO, THAT DEFENDANTS CARRIED THEIR
21 BURDEN OF PROVING UNREASONABLE PRE-CONDEMNATION
22 ACTIVITIES OF PLAINTIFF, DEFENDANTS CANNOT PROVE DAMAGES

23 Defendant William Zisk testified that when he purchased the
24 subject property in 1966, he intended to and did thereafter use the
25 property as a residence for himself and his family and as a base
26 for his business. He continued to rent out the other smaller
house on the property to others. He admitted that continuously
from 1966 to the present, these uses have never changed. Thus,
damages claimed are not based upon interference with an existing

1 use but are based solely upon the frustration of planned future
2 uses of the property.

3 Even if defendants could establish there were unreasonable
4 and oppressive pre-condemnation activities, defendants are unable,
5 as a matter of law, to show they have suffered compensable
6 damages from such activities.

7 In City of Los Angeles v. Lowensohn, 54 C.A.3d 625 (1976), a
8 case strikingly similar to the instant case, the Court considered
9 the land owner's claim for Klopping damages. The trial court in
10 Lowensohn first determined whether the City had unreasonably
11 delayed in bringing the condemnation action. The Court found that
12 since the City of Los Angeles had adopted an ordinance in February,
13 1969 directing the City Attorney to commence eminent domain
14 proceedings to acquire the subject property, and such action was
15 not filed until August 28, 1972, there was an unreasonable delay.
16 (In the instant case there was one (1) day between resolution
17 passage and suit.) The trial court then submitted to the jury
18 the issue of the amount of damages, if any, which were caused by the
19 unreasonable delay in bringing the action.

20 At the conclusion of the voir dire examination of the appraisal
21 witness of the owner, the trial court sustained an objection of the
22 owner's offer of proof of pre-condemnation damages. The Court
23 found that although the City had unreasonably delayed the condemna-
24 tion of the subject property, "as a matter of law" the evidence
25 would not justify the award of any damages. City of Los Angeles
26 v. Lowensohn, supra. at 631. The Court of Appeal noted that

1 although the owners had purchased the property for investment
2 purposes, there was no actual loss of rental income. The Court
3 in essence found the owners' losses resulted from claimed inability
4 to use the land in the future.

5 "In sum, appellants sought recovery for something that
6 was non-existent in fact and constituted pure fiction.
7 There is no recovery via condemnation for the taking of
8 a pipe dream. Since appellants failed to show 'delay
9 damages', evidence of expenses of 'holding costs' would
10 have been inadmissible. City of Los Angeles v.
11 Lowensohn, supra. at 636.

12 Accordingly, the trial court took from the jury the issue of
13 Klopping damages, even though the Court had initially found there
14 was an unreasonable delay on the part of the City of Los Angeles.
15 In the present case, the same type facts exist with regard to the
16 claim for damages made by defendants Zisk. Here, defendants admit
17 there has been no actual loss of rental or actual use of their
18 property as a result of any activities of the City. Aside from
19 claiming costs incurred in connection with their application for
20 lot split and building permit, defendants merely claim their plans
21 for future uses of the property were frustrated. Defendants thereby
22 seek damages for loss of rents which might later be received from
23 future hypothetical construction. They also seek loss of
24 appreciation which would have resulted from hypothetical structures
25 which may have been built on their property. These claims are
26 basically the same as the "pipe dream" found to exist in the minds
of the owners in the Lowensohn case, supra., and cannot properly
form the basis of Klopping damages.

In the Klopping case itself, the plaintiffs sought damages

1 because they claimed a loss of actual rental income they had been
2 receiving from their properties.

3 "Specifically they alleged that they were unable to fully
4 use their properties [as already improved] and suffered a
5 loss of rental income." Klopping v. City of Whittier,
6 supra. at 53.

7 It is firmly established that the condemnee in an eminent
8 domain action may not seek compensation based upon profits he
9 would have obtained from a particular plan to use the property in
10 the future. In this regard, the Court in City of Daly City v.
11 Smith, 110 C.A.2d 524 (1952) quoted with approval the following
12 language:

13 "'Appellant could not be allowed to show enhanced damage
14 which it would suffer by reason of being prevented from
15 carrying out a particular scheme of improvement, existing
16 only in contemplation at the time of the trial. The
17 trial court . . . simply declined to allow appellant to
18 show the location and size of its proposed improvements,
19 and by this ruling we think no error was committed.'" City of Daly City v. Smith, supra., at 532.

20 To the same effect is County of Los Angeles v. Bean, 176
21 C.A.2d (1959). There the Court states:

22 "Appellant insists that he should have been entitled to
23 show what he intended to do with the property (namely
24 to produce oil therefrom). A proper objection was
25 sustained. It is settled that the use intended by the
26 owner does not enhance the market value of property.
27 (Redwood City Elementary School District v. Gregoire,
28 128 Cal.App.2d 766, 773 (276 P.2d 78). Actual market
29 value is the measure and not its value in use to the
30 owner." County of Los Angeles v. Bean, supra. at 528.

31 In People Ex Rel Dept. of Pub. Wks. v. Alexander, 212 C.A.2d
32 84 (1963) the court approved the following instruction:

33 //

1 "The income or productive value of an actual or
2 contemplated use is not a measure of compensation. Profits
3 which might be derived from devoting property to a particular
4 purpose depends so much on conditions that cannot be foreseen
5 that they have no competency, and are not to be considered
6 by you." People Ex Rel Dept. of Pub. Wks. v. Alexander,
7 supra. at 99.

8 The appellate court went on to state that the instruction

9 ". . . properly points out that income or profits which
10 might be obtained from devoting land to a particular
11 use is not a proper measure of compensation in a
12 condemnation proceeding, as such profits would be
13 variable, depending upon unforeseeable conditions;
14 consideration of such theoretical profits might lead a
15 jury to award damages for remote or merely conjectural
16 possibilities." People Ex Rel Dept. of Pub. Wks. v.
17 Alexander, supra. at 100.

18 Obviously, here defendants are claiming losses of rents from
19 and appreciation in value of improvements to be built in the
20 future. Such losses are speculative and conjectural and not
21 properly allowable as is shown by the above authorities.

22 Also, as shown above, there can be no recovery of damages for
23 claimed wrongful denial of permit. Government Code § 818.4;
24 Selby Realty Co. v. City of San Buenaventura, supra. at 127-128;
25 HFH, Ltd. v. Superior Court, supra. at 519-520. Thus, claimed
26 attorneys' fees, costs of an EIR and engineering costs incurred
27 in connection with defendants' application for a lot split and
28 building permit are also not recoverable as a matter of law.

29 Accordingly, since no recoverable damages have been established,
30 no evidence of such claimed activities or of claimed damages should
31 be submitted to the jury.

32 //

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IV

CONCLUSION

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3 Defendants have failed to carry their burden of proving
4 unreasonable and oppressive pre-condemnation activities on the
5 part of the City. There was no delay, much less an unreasonable
6 delay. The City's land use planning and zoning activities
7 were authorized and mandated by law and were patently reasonable.

8 The evidence shows the damages claimed are based upon losses
9 claimed to result from denial of a lot split and building permit
10 and from the inability to construct hypothetical improvements in
11 the future. Such claims cannot form the basis of a claim for
12 compensation as a matter of law.

13 Accordingly, the Court should order that only issues to be
14 determined by the jury are the fair market value of the property
15 being acquired by plaintiff, severance damages, if any, and
16 special benefits, if any, accruing to the remainder of defendants'
17 property. It is requested the Court cause to be filed a
18 Memorandum of Decision to the same effect as that set forth in
19 Exhibit "A" attached hereto.

20 DATED: November 7, 1977.

21
22 Respectfully submitted,

23 TURNER & MULCARE

24
25 By

William J. Turner

26 WILLIAM J. TURNER
Attorneys for Plaintiff
CITY OF ROSEVILLE

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal)
corporation,)
)
Plaintiff,)
)
v.)
)
WILLIAM J. ZISK and LOIS E.)
ZISK, et al.,)
)
Defendants.)

NO. 41104

MEMORANDUM OF DECISION

18 There is no evidence to support a finding that plaintiff
19 City of Roseville has acted improperly by unreasonably delaying an
20 action in eminent domain nor is there any evidence to support a
21 finding that the City of Roseville has engaged in any unreasonable
22 conduct prior to or subsequent to the commencement of this eminent
23 domain action. The evidence further establishes that defendants
24 Zisk have suffered no compensable damage as a result of any action
25 of plaintiff City of Roseville. Accordingly, no evidence of claimed
26 damages resulting from alleged pre-condemnation activities of the

1 City of Roseville may be submitted to the jury nor may defendants
2 seek recovery of damages for inability to use their property
3 pursuant to a proposed plan.

4 The Court further concurs with the findings of the Court of
5 Appeal in Zisk v. City of Roseville, 56 C.A.3d 41, 49 (1976) that
6 the adoption by the City of Roseville of Ordinance Nos. 1224
7 and 1227 on November 28, 1973, which applied the combining zoning
8 designations of Floodway (FW) and Floodway Fringe (FF) to certain
9 portions of the Zisk property, were valid exercises of the police
10 power. The Court further finds from the evidence presented herein
11 that said ordinances and their application to the subject property
12 as provided for in said ordinances and referenced maps are amply
13 supported by reasonable bases in fact. Accordingly, no evidence
14 is admissible at the jury phase of this trial which in any way
15 attacks the validity of the application of such zoning to the
16 subject property and no damages may be sought for any alleged
17 losses resulting therefrom.

18 The sole issues for determination by the jury herein shall
19 be those as set forth in C.C.P. Section 1248, paras. 1., 2., and
20 3., which are generally as follows:

- 21 1. The value of the property sought to be acquired here by
22 plaintiff;
- 23 2. The damages which will accrue to the remaining property
24 of defendants Zisk not sought to be condemned by reason
25 of its severance from the property sought to be condemned
26 and the construction of the improvement in the manner

1 proposed by plaintiff; and

2 3. How much the remaining property of defendants Zisk will
3 be benefited by the construction of the improvement in
4 the manner proposed by plaintiff.

5 Counsel for plaintiff is hereby designated to prepare written
6 Findings of Fact and Conclusions of Law in accordance with the
7 above Memorandum of Decision, if requested by any party.

8

9 DATED: _____

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JUDGE OF THE SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

688

DATE: November 9, 1977 COURT MET AT 10:48 A.M. DEPARTMENT NO. 1
PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Vickie Valine REPORTER Dennis Ludlow BAFF

TITLE:

CITY OF ROSEVILLE, a municipal corporation,
Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner

MICROFILMED

NATURE OF PROCEEDINGS: Jury Trial (Condemnation) Cont.

ACTION NO. 41,104

Court and counsel present as stated above. Pauline Brockman duly sworn and examined on behalf of the plaintiff. Plaintiff's exhibits:

- 30. Declaration of Pauline Brockman marked for identification.
- 31. Group exhibit: A. Roseville City Zoning Ordinance No. 597;
(Evidence) B. Zoning Ordinance, City of Roseville;
C. Zoning Ordinance, City of Roseville, No. 802;
D. Comprehensive Zoning Ordinance No. 802, Rsvl. Expansion;
E. Zoning Map.

Counsel for defendants made a motion to exclude from the record the depositions of Messrs. Pesterson, LaBella, Thomas and Grant taken in October, 1977, citing CCP 2019(e) as the basis of his motion. The motion was argued briefly and submitted.

Plaintiff's rest. Prima facie case submitted. The Court stated a ruling on the pre-condemnation damages would be sent to counsel by mail. Adjourn 11:30 A.M.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY P. Oliver DEPUTY

FILED

NOV - 9 1977

MAURINE I. BOBBAS
COUNTY CLERK OF PLACER COUNTY

BY *[Signature]*
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

-000-

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.,

Defendants.

MICROFILMED

No. 41104

MEMORANDUM OF DECISION

Defendants argue that they are entitled to present to the jury the issue of pre-condemnation damages.

As I understand defendants' argument, it is that the decision in Klopping vs. Whittier, 8 Cal 3d 39, in addition to permitting pre-condemnation damages which stem from a decline in value caused by unreasonable delay, also sanctions an award of damages where the pre-condemnation activities of the public authority are inequitable and oppressive. My own understanding of the decision in Klopping is somewhat different, since I believe that the second theory of damages articulated in that case is also tied to unreasonable delay, and prohibits oppressive delay which

1 results in a de facto taking prior to the date set by statute.
2 A decline in value of the subject property after that de facto
3 taking will not be permitted to decrease the amount of the
4 condemnation award.

5 Just as I find no warrant under Klopping for the award
6 of pre-condemnation damages separate and distinct from the damages
7 generally recognized under the concept of inverse condemnation,
8 so I find nothing in the Peacock, Sneed and Kissinger line of
9 cases which provides for such damages apart from inverse con-
10 demnation. It is true that a Zoning Ordinance may not be used
11 as a device to take property, or diminish its value, without
12 payment of just compensation. Such damages, however, are
13 subsumed under the heading of inverse condemnation, and none of
14 the cases cited by the condemnee is authority for an award of
15 damages based upon inequitable conduct apart from unreasonable
16 delay and unrelated to a de facto taking which amounts to
17 inverse condemnation.

18 Even if it could be inferred that the holding in
19 Klopping is sufficiently broad to permit an award of damages
20 without reference to unreasonable delay, upon a showing of malice
21 and oppression on the part of the public authority, the evidence
22 adduced during this phase of the trial fails to establish that
23 the public authorities acted with such malice and oppression.
24 (In this respect, there is the further obstacle of Government
25 Code immunity conferred upon the public authority. c.f. Govt.
26 Code Sections 820 ff.)

27 Under the circumstances, the Court finds that defendants
28 are not entitled to present to the jury evidence of damages

1 allegedly arising from pre-condemnation activities of the public
2 authority. This finding extends, but is not limited to, claimed
3 damages for loss of rental income, attorneys' fees and costs in
4 connection with the denial of the subject permit, loss of
5 anticipated use pursuant to the proposed plan, engineering costs,
6 and all related costs and expenses.

7 It is further found that there is no legal basis for
8 the presentation of evidence to the jury attacking the validity
9 of the zoning imposed upon the subject property by the City of
10 Roseville under its Ordinance Nos. 1224 and 1227 adopted
11 November 28, 1973.

12 The remaining issues to be determined by the jury are
13 therefore limited as set forth in the pre-trial conference order
14 of October 31, 1977, as follows:

- 15 1. The fair market value of the subject property
16 as of the time of trial.
- 17 2. The severable damages, if any, to the remainder
18 parcel.
- 19 3. Special benefits, if any, to the remainder parcel.

20 It is my understanding that the Rules of Court do not
21 require the preparation of written findings of fact and conclusions
22 of law in connection with this interim order.

23 DATED: November 9, 1977

24
25 Judge of the Superior Court
26
27
28

1 DENNIS W. DE CUIR
2 City Attorney
3 City of Roseville
316 Vernon Street
4 Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

FILED NOV 14 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
By P. Oliver
Deputy

5 TURNER & MULCARE
6 A PROFESSIONAL CORPORATION
1650 S. Amphlett Blvd., Suite 225
7 San Mateo, CA 94402
Telephone: (415) 573-7677

8 Attorneys for Plaintiff

MICROFILMED

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF PLACER

12
13 CITY OF ROSEVILLE, a municipal)
corporation,) NO. 41104
14)
Plaintiff,) PLAINTIFF'S PROPOSED
15) QUESTIONS FOR VOIR DIRE
v.)
16)
17 WILLIAM J. ZISK and LOIS E.)
ZISK,)
18)
Defendants.)

19
20 Plaintiff herein submits its proposed questions for the
21 voir dire examination of the jury by the Court.

22 1. I am now going to question the prospective jurors who
23 are seated in the jury box concerning their qualifications to
24 serve as jurors in this case. All members of this jury panel,
25 however, should pay close attention to my questions, making note
26 of the answers you would give if these questions were put to you

1 personally. If and when any other member of this panel is called
2 to the jury box, he will be asked to give his answer to these
3 questions.

4 2. In the trial of this case the parties are entitled
5 to have a fair, unbiased and unprejudiced jury. If there is any
6 reason why any of you might be biased or prejudiced in any way,
7 you must disclose such reason when you are asked to do so. It is
8 your duty to make this disclosure.

9 3. This trial will likely take ten (10) days to complete,
10 but it may take longer. Will any of you find it difficult or
11 impossible to participate for this period of time.

12 4. The nature of this case is as follows:

13 The City of Roseville is acquiring a 5.8 acre parcel of
14 property which is part of an 11 1/2 acre parcel belonging to
15 defendants Zisk. The property involved here is located generally
16 in an area between Dry Creek and Atlantic Street at the end of
17 Thomas Street in Roseville and the portion of the property to be
18 acquired lies within and along Dry Creek.

19 5. The parties to this case and their respective attorneys
20 are:

21 Plaintiff City of Roseville;

22 Its attorneys are Dennis W. De Cuir and William J. Turner.

23 Defendants and owners of the property involved are

24 William J. Zisk and Lois E. Zisk.

25 Their attorneys are Richard S. Desmond and Stephen Wagner.

26 //

1 6. During the trial of this case, the following
2 witnesses may be called to testify on behalf of the parties.

3 These witnesses are:

4 Kenneth M. James

5 Frederick W. Festersen

6 Frank La Bella, Jr.

7 William Zisk

8 Steven Thomas

9 Frank L. Blaesi

10 Thomas W. Clark

11 James Edwards

12 Frederick Barnett

13
14
15 Have any of you heard of or been otherwise acquainted with
16 any of the parties, attorneys or witnesses just named? The
17 parties are not required and might not wish to call all of these
18 witnesses, and they may later find it necessary to call other
19 witnesses.

20 7. Have any of you heard of, or have you any knowledge
21 of, the facts or events in this case? Are any of you familiar
22 with the area mentioned in this case?

23 8. Do any of you believe that a case of this nature
24 should not be brought into court for determination by a jury?

25 9. Do any of you have any belief or feeling toward any
26 of the parties, attorneys or witnesses that might be regarded as

1 a bias or prejudice for or against any of them? Do you have any
2 interest, financial or otherwise, in the outcome of this case?

3 10. Have any of you served as a juror or witness involving
4 any of these parties, attorneys or witnesses?

5 11. Have any of you served as a juror in any other case?
6 (If so, was it a civil or criminal case?) You must understand
7 that there is a basic difference between a civil case and a
8 criminal case. In a criminal case a defendant must be found
9 guilty beyond a reasonable doubt; in a civil case such as this,
10 you need only find that the evidence you accept as the basis
11 of your decision is more convincing, and thus has the greater
12 probability of truth than the contrary evidence.

13 12. Have any of you or any member of your family or close
14 friends ever had any connection with, or any dealings with any of
15 the defendants Zisk to your knowledge?

16 13. To your knowledge, have any of you, or any member of
17 your family or close friends, ever had any connection with, or
18 dealings with, the plaintiff City of Roseville? Are any of you
19 or them related to any officer or employee of the plaintiff City
20 of Roseville.

21 14. To your knowledge, have any of you, or any member
22 of your family or close friends, ever been involved in an eminent
23 domain proceeding such as this or will likely become involved in
24 such a proceeding in the future?

25 15. Do you have any relatives or close friends who have
26 been or will be affected by the proposed project or a similar

1 public project? (If so, who and how affected?)

2 16. Have any of you, or any member of your family or
3 close friends, ever sold property to a public agency?

4 /
5 17. Are any of you, or any member of your family or
6 close friends to your knowledge presently involved in a lawsuit of
7 any kind? (If so, does the lawsuit involve a public agency?)

8 18. Have any of you, or any member of your family or
9 close friends to your knowledge, ever been involved in a lawsuit
10 involving a public agency?

11 19. Have any of you, or any member of your family or
12 close friends, had any specific training in real property sales,
13 development or use?

14 20. Have you, or any member of your family or any close
15 friends, ever been engaged in any phase of the real estate
16 business including:

- 17 (i) Acting as a real estate agent, broker or
18 salesman,
19 (ii) Acting as a real estate appraiser,
20 (iii) Dealing in trust deeds,
21 (iv) Buying or selling real property as a business,
22 (v) Owning or managing income property, or
23 (vi) Engaging in the construction business?

24 21. Have any of you ever bought or sold any property in
25 the Roseville area? If so, where was the property located, what
26 type property was it and when did the transaction take place?

1 22. Have you ever made an investigation of property
2 values in Placer County? If so, when was the investigation made,
3 for what purpose and what type property was involved?

4 23. Do you have any preconceived ideas as to the value
5 of real property in the City of Roseville or in the general
6 vicinity of Roseville?

7 24. Have you, or any of your friends or relatives, ever
8 been in the real estate business or in a real estate appraisal
9 field? If so, describe any such involvement in these areas.

10 25. Have you, or any members of your immediate family
11 or close friends, ever been engaged in any work involving the
12 acquisition of private property for public purposes or involving
13 the zoning or governmental planning for proper use of property?

14 26. Under the law of this state, all private property is
15 held subject to the necessary right of eminent domain, which is
16 the right of the state or its authorized agencies to acquire
17 private property for public use whenever the public interest so
18 requires. The right of eminent domain is exercised through
19 proceedings commonly called a condemnation action. This is such
20 an action.

21 27. The Constitution of this state requires that a
22 property owner be paid just compensation for the taking or damaging
23 of his property for public use. It will be the duty of the jury
24 ultimately selected in this case to determine the just compensation
25 to be paid.

26 28. In order to find the amount of just compensation in

1 this case, the jury may be called upon to determine three (3)
2 issues. These issues are:

- 3 (i) The fair market value of the real property
4 being acquired.
- 5 (ii) Severance damages, if any, to the defendants'
6 remaining real property by reason of the
7 acquisition of the property to be acquired
8 and the construction of the proposed public
9 improvement; and
- 10 (iii) The special benefits, if any, to the defendants'
11 remaining real property by reason of the
12 construction of the proposed public improvement.

13 29. Just compensation is measured in terms of fair
14 market value as of November 1, 1977, the date of value in this
15 case.

16 30. I will give you more specific instructions on the
17 issues in this case at the conclusion of all the evidence.
18 However, I will now advise you of the definition of fair market
19 value: (See BAJI 11.73 (1976 Revision))

20 31. The property owner has the burden of proof as to
21 the issue(s) of the fair market value of the real property being
22 acquired and the severance damages, if any, to the defendants'
23 remaining property and plaintiff City has the burden of proving the
24 special benefits, if any, to defendants' remaining property.
25 The party having the burden of proof as to an issue has the burden
26 of establishing by a preponderance of the evidence all of the
facts necessary to prove that issue. By a preponderance of the
evidence is meant such evidence as, when weighed with that opposed
to it, has more convincing force and the greater probability of

1 truth. In the event that the evidence is evenly balanced so
2 that you are unable to say that the evidence on either side of
3 an issue preponderates, then your finding upon that issue must
4 be against the party who had the burden of proving it. In
5 determining whether an issue has been proved by a preponderance
6 of the evidence, you should consider all of the evidence bearing
7 upon that issue regardless of who produced it.

8 32. Do you have any objection to the concept of private
9 ownership of property?

10 33. Do you have any objection to the plaintiff acquiring
11 private property for a public use as long as just compensation
12 is paid for the property.

13 34. Are you, or any member of your family or close
14 friends, to your knowledge, a member of any organization that is
15 opposed to such public projects?

16 35. Do you have any objection to the concept that just
17 compensation is measured by fair market value as I have defined
18 that term for you earlier?

19 36. Do you have any feeling that because the plaintiff
20 needs the property for public purposes that it should pay anything
21 other than its fair market value?

22 37. In these cases the evidence of value for the most
23 part is introduced by way of what the courts have sometimes
24 referred to as expert testimony. This expert testimony frequently
25 is introduced through real estate appraisers or real estate
26 brokers. Have you any prejudice against real estate brokers or
appraisers, or that type of testimony?

1 38. In a condemnation case the property owner produces
2 all of his evidence of value first, then the government calls its
3 witnesses. Having this in mind, will you keep your mind open
4 throughout all the case and not determine the matter in your mind
5 until all of the evidence is in?

6 39. It is important that I have your assurance that you
7 will, without reservation, follow my instructions and rulings on
8 the law and will apply that law to this case. To put it somewhat
9 differently, whether you approve or disapprove of the court's
10 rulings or instructions, it is your solemn duty to accept as
11 correct these statements of the law. You may not substitute
12 your own idea of what you think the law ought to be. Will all
13 of you follow the law as given to you by me in this case?

14 40. Each of you should now state your name, where you
15 live, your marital status (whether married, single, widowed or
16 divorced), the number and ages of your children, if any, your
17 occupational history and present employer, if any. Please begin
18 with juror number one.

19 41. Each of you should now state whether you or your
20 spouse owns or has an interest in any real property and, if so,
21 whether its value or use may be affected by the public project
22 involved in this case. We will again start with juror number
23 one.

24 42. Do you know of any other reason, or has anything
25 occurred during this question period, that might make you doubtful
26 you would be a completely fair and impartial juror in this case?

1 If there is, it is your duty to disclose the reason at this
2 time.

3 Plaintiff further requests that it be permitted to submit
4 further questions if it should develop in the course of voir dire
5 that additional questions are necessary or, in the alternative,
6 that the court permit counsel to examine the jurors on points
7 raised by answers to questions proposed by the court.

8 DATED: NOVEMBER 14, 1977.

9

10

DENNIS W. DE CUIR
TURNER & MULCARE

11

12

By William J. Turner

WILLIAM J. TURNER
Attorneys for Plaintiff
CITY OF ROSEVILLE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

702

DATE: November 15, 1977 COURT MET AT 10:00 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Linda Smith REPORTER Dennis Ludlow BAILIFF

TITLE:

CITY OF ROSEVILLE, a municipal corporation,
Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner MICROFILMED

NATURE OF PROCEEDINGS: Jury Trial (Condemnation) ACTION NO. 41,104

Court and counsel present as stated above. Roll of jurors was called with the following jurors absent without excuse: David M. Bacchi, Paul L. Beske, Carol A. Coble, Carl D. Dunham, Vivian J. Ellwein, Alex Koshman, James Frank Laird, Sharon L. Locke, Diane Lockyer, Barry R. Prior and Louis J. Shiller. By direction of the Court, twelve jurors were drawn to occupy the jury box. The Court outlined the cause of action and briefly questioned the jurors after they had been sworn on voir dire. The following jurors were excused for cause: Ranae L. Bybee, Stanley J. Casebalt, Dorene J. Wilson, Lloyd F. Schimmelman and Joseph C. Smith, each because of a work hardship; James L. Killion, an employee of the City of Roseville; Fred C. Besana, Theodore I. Nevarez, Lawrence J. Cox, Donald Rodriguez, Thomas E. Hitchner, Robert K. Bolin and James A. Dumas, each because he/she could not remain impartial; and Richard R. Kennedy who had been called to active duty in the Armed Services.

Counsel conducted voir dire examinations. Noon recess was taken between the hours of 12:09 P.M. and 2:15 P.M. Upon reconvening, counsel resumed voir dire examinations. Robert A. Friebus was excused because he could not remain impartial. Counsel exercised peremptory challenges. Evening recess at 4:30 PM. Jury panel admonished.

BOOK _____ PAGE _____

MINUTES

This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY P. Oliver DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

703

DATE: November 16, 1977 COURT MET AT 10:06 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Linda Smith REPORTER Dennis Ludlow BAILIFF

TITLE:

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.

Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcaire by William J. Turner

MICROFILMED

Desmond, Miller, Desmond & Bartholomew
By Richard F. Desmond and
Steven James Wagner

NATURE OF PROCEEDINGS: Jury Trial (Continued) ACTION NO. 41,104

Court and counsel present as stated above. Counsel resumed voir dire examination from the previous day and continued to exercise peremptory challenges. The following persons were excused for cause: Joan A. Mora, Peter K. Martin, Harry Gordon Ainsleigh and Burton C. Massey, each because he/she could not remain impartial; and Louis Leroy Reinhardt because of a work hardship.

Noon recess taken between the hours of 12:05 P.M. and 2:18 P.M. Voir dire examination continued.

Both sides being satisfied, the following jurors were sworn to try the cause:

- | | |
|------------------------|-------------------------|
| 1. Robert L. Wright | 7. Robert P. Stone |
| 2. Muriel A. Maggert | 8. Geneva D. Pace |
| 3. Clark R. Pavillard | 9. Vance C. Brady |
| 4. Ronald R. Murphy | 10. Neva E. Sharper |
| 5. Dorothy M. Zapolski | 11. Vivian A. Forsey |
| 6. Jose D. Alarcon | 12. Florence L. McClure |
- Alternate: Maria L. Uribe.

The Court thanked and excused the remaining jury panel subject to further jury service upon notification.

Opening statement waived by plaintiffs. Kenneth Martin James duly sworn and examined on behalf of plaintiffs. Plaintiff's exhibits introduced as noted on attachment. Evening recess taken at 4:30 P.M. Jury admonished.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Martina I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY: [Signature] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

NO. 41104

City of Roseville

Plaintiff

Date 11-8-77

William A. Newsom

Judge

Wm. & Lois Zisk

Defendant

EXHIBITS

No.	M.	Ev.	Description
1-16-77 32	x	x	Placer County Road Map
33		x	City of Roseville Map
34	x		Acetate map overlay - current zoning
35	x		Acetate map overlay - bicycle path
36	x	x	Black & white photograph
37		x	Sketch - "Typical Cross-Section"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

705

DATE: November 17, 1977 COURT MET AT 10:30 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Linda Smith REPORTER Dennis Ludlow BAILIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-VS-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeCuir</u>, Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u></p> <p>Desmond, Miller, Desmond & Bartholomew by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p>

NATURE OF PROCEEDINGS: Jury Trial (Continued) ACTION NO. 41,104

Court and counsel met in chambers prior to convening. A discussion ensued regarding the admissibility of examining the underlying basis for the present zoning on the subject property.

MICRO-FILMED

Open court at 10:30 A.M. Parties represented as stated above and all jurors present. Kenneth Martin James resumed the witness stand and continued his testimony of the previous day. Defendant's exhibit HHH, an "L-Shaped" Map was introduced into evidence.

Jury recessed at 11:20 A.M. Court remained in session in the absence of the jury. Counsel for plaintiffs moved that Mr. Desmond be precluded from stating the zoning on the subject property is inappropriate. The Court stated that he did not want Mr. Desmond to allude specifically to the propriety of the Flood Plain zoning. Mr. Desmond made a motion for mistrial on the grounds that the Court's conduct is prejudicial. Motion for mistrial denied. The Court directed the jury be excused for lunch recess at 11:54 A.M.

Reconvene at 1:42 A.M. outside the presence of the jury. A discussion regarding the motions made before the lunch recess ensued. The Court directed the jury be excused until Tuesday, November 22, 1977, at 10:00 A.M. Further discussion regarding the content of defendant's opening statement continued. An offer of proof having been made by defendants, the Court ruled that defendants in their opening statement would not be permitted to allude to evidence that rezoning of the subject property to a higher use was reasonable and probable as of November 1, 1977.

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine I. Dabbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Placer

BY P. Oliver DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

706

DATE November 22, 1977 COURT MET AT 10:10 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newson JUDGE Paula Oliver DEPUTY CLERK

Linda Smith REPORTER Dennis Ludlow BARRIFF

TITLE:

CITY OF ROSEVILLE, a municipal corporation,

Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.

Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner MICROFILMED

NATURE OF PROCEEDINGS: Jury Trial (Continued) ACTION NO. 41,104

Parties represented as stated above, all jurors present. Mr. Desmond presented his opening statement. Recess at 11:15 A.M. Court remained in session outside the presence of the jury. Counsel for plaintiffs stated he felt Mr. Desmond had improperly stated some matters with regard to zoning in his opening statement. The Court reiterated its statement regarding reference to zoning in the opening statement. The jury was readmitted to the courtroom at 11:30 A.M. and Mr. Desmond continued his opening statement. Noon recess taken at 12:05 P.M.

Reconvene at 1:45 P.M. William J. Zisk duly sworn and examined on his own behalf.

Recess at 3:16 P.M. Court remained in session outside the presence of the jury. Counsel for plaintiffs made a motion to quash certain subpoenas served upon the Roseville City councilmen on the grounds of inappropriate service. Motion taken under submission.

Jury readmitted into the courtroom at 3:55 P.M. Mr. Zisk resumed the witness stand and continued testimony. Defendant's exhibits introduced into evidence:
III. Eight black and white photographs (in plastic sheet)
JJJ. Cash Receipt #008494, City of Roseville (2-8-67)
KKK. Six color photographs (in plastic sheet)
LLL. (1&2) Two color photographs.

Jury excused for the evening recess at 4:30 P.M. Court remained in session in the absence of the jury. The Court granted plaintiffs' motion to quash service of subpoenas. Evening recess at 5:00 P.M.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court, State of California, in and for the County of Placer
BY P. Oliver DEPUTY

707

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

DATE November 23, 1977 COURT MET AT 10:35 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Linda Smith REPORTER Dennis Ludlow BAILIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeCuir</u>, Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u></p> <p>Desmond, Miller, Desmond & Bartholomew by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p>

NATURE OF PROCEEDINGS: Jury Trial (Continued) ACTION NO. 41,104

MICROFILMED

Parties represented as stated above. All jurors present. Mr. Zisk resumed the witness stand and continued his testimony of the previous day. Exhibits introduced as stated on attachment.

Noon recess taken between the hours of 12:10 P.M. and 1:50 P.M. Upon reconvening, Mr. Zisk resumed the witness stand and continued testimony.

Steven P. Thomas duly sworn and examined on behalf of defendants.

Jury excused and admonished at 3:35 P.M. Court remained in session briefly in their absence.

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF PLACER

708

NO. 41,104

City of Roseville
 Plaintiff

Date 11-23-77

William A. Newton
 Judge

Wm. Zisk & Lois Zisk
 Defendant

EXHIBITS

No.	M.	Ev.	Description
-23-77 38	x	x	Joint Tenancy Deed (Martin/Arnett to Zisk)
39		x	Joint Tenancy Deed (Arnett to Zisk)
40		x	Assessor's Parcel Map (13-04)
41		x	Assessor's Parcel Map (13-04)
42		x	Assessor's Parcel Map (13-04)
43		x	Assessor's Parcel Map (13-04)

11-23-77			
Id.	M.	Ev.	Description
MMM		x	Color photograph
NNN		1 & 2	Two (2) color photographs
OOO		1-3	Three (3) color photographs
PPP		x	Five (5) black & white photographs in plastic sheet
QQQ	x		Four (4) color photographs

DESMOND, MILLER, DESMOND & BARTHOLOMEW
1006 - 4th Street, Suite 900
Sacramento, California 95814
Telephone: 443-2051

Attorneys for Defendants

FILED
NOV 29 1977

MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY [Signature]
DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

CITY OF ROSEVILLE, a municipal
corporation,

Plaintiff,

No. 41104

POINTS AND AUTHORITIES RE
LARGER PARCEL

vs.

WILLIAM ZISK and LOIS ZISK,
et al.,

Defendants.

Title in eminent domain and the size of the larger parcel is always in issue. CCP, 1248; People, ex rel Department of Public Works vs. Nyrin, 256 Cal.App.2d 288 at 292. It is a mixed question of law and fact.

Occupancy of land for over five (5) years as sufficiency to bar recovery of the real property confers a title thereto upon the possessor sufficient against all. CCP, 1007; CCP, 318; CCP, 321; CCP, 325.

There is no record in this action that the adjacent owner claims any portion of the property or title thereto south of the fence line. Defendants therefore are required only to present a prima facie case giving rise to title by adverse possession or prescription. The elements of proof of such a matter are:

DESMOND, MILLER,
DESMOND &
BARTHOLOMEW
ATTORNEYS AT LAW
1006 FOURTH STREET
SUITE 900
SACRAMENTO, CALIF.
TELEPHONE 443-2051

1 1. Actual open and notorious occupancy of the land for a
2 continuous period of five (5) years or more and possession under
3 claim of right. All of these elements have been clearly established
4 in a prima facie case. Furthermore, there is evidence of an agreed
5 boundary under which those principles would be applied. Further-
6 more, the apparent record owner has made no claim of title to the
7 strip nor has any evidence been adduced indicating that such
8 record owner makes a claim.

9 2. The only other element is the payment of all taxes
10 levied and assessed during the period of time. Certain exceptions
11 exist as to that rule which are set forth in the cases of Fredericks
12 vs. Sorensen, 113 Cal.App.2d 759 and Duncan vs. Peterson, 3 Cal.
13 App.3d 607. Both cases also involve and explain the doctrine of
14 agreed boundaries. Both of those cases held that where an agreed
15 boundary has been determined, the new boundary effectively
16 attaches to the respective deeds and, in legal effect, becomes a
17 true dividing line between the properties. Thus, the fact that
18 the assessor can observe the actual boundaries and, although he
19 used the legal description for the purposes of the assessments,
20 the payment of taxes is not really a material issue and, as a
21 matter of fact, taxes were actually assessed on the basis of what
22 the assessor could observe.

23 Therefore, Defendants respectively contend that they have
24 established a prima facie case of ownership to the fence line as
25 described in the evidence.

26 DATED: November 28, 1977.

Respectfully submitted,

DESMOND, MILLER, DESMOND
& BARTHOLOMEW

By: 
RICHARD F. DESMOND
Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

711

DATE: November 29, 1977 COURT MET AT 10:10 A.M. DEPARTMENT NO. 1

PRESENT, HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Linda Smith REPORTER Dennis Ludlow BARRIFF

TITLE:

CITY OF ROSEVILLE, a municipal corporation,
Plaintiff,

-VS-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner

MICROFILMED

NATURE OF PROCEEDINGS: Jury Trial (Cont) ACTION NO. 41,104

Court and counsel met in chambers prior to convening.

Open court at 10:10 A.M. Parties represented as stated above, all jurors present. Mr. Stephen P. Thomas resumed the witness and continued his testimony of the previous day. Defendant's exhibits introduced as stated on attachment.

Noon recess taken between the hours of 11:55 A.M. and 1:45 P.M. All are present. By stipulation of counsel, Steven H. Dillon was duly sworn and examined out of order as an adverse witness under Evidence Code section 776. Defendant's exhibits introduced as noted on attachment.

By stipulation of counsel, Robert W. Bell was duly sworn and examined out of order for the convenience of the witness. Following his brief testimony, Mr. Bell was excused and Mr. Dillon resumed the witness stand. Evening recess taken at 4:30 P.M.

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file
Arrest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY _____ DEPUTY

NO. 41,104

City of Roseville

Date 11-29-77

712

Plaintiff

William A. Newsom

Judge

Wm. Zisk & Lois Zisk

EXHIBITS

Defendant

No.	Id.	Ev.	Description
RRR	x		Map - Before (Adverse Possession Theory)
SSS	x		Map - After " " "
TTT		x	Map - Before
UUU		x	Map - After
VVV		x	Map overlay
WW-1	x	x	General Plan City of Roseville
WW-2	x	x	Roseville General Plan Technical Addendum & E.I.R.
XXX	x	x	Open-Space and Conservation Element of Rsvl. Gen. Plan
YYY		x	Comprehensive Zoning Ordinance (Ord. No. 802)
ZZZ		x	Zoning Map
4A	x		Zoning Map (plastic coated)

713

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

DATE November 30, 1977 COURT MET AT 10:18 A.M. DEPARTMENT NO. 1
 PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Linda Smith REPORTER Dennis Ludlow SHERIFF

TITLE:	COUNSEL:
CITY OF ROSEVILLE, a municipal corporation, <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> WILLIAM J. ZISK and LOIS E. ZISK, et. al. <p style="text-align: right;">Defendants.</p>	<u>Dennis W. DeCuir</u> , Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u> Desmond, Miller, Desmond & Bartholomew by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u> MICROFILMED

NATURE OF PROCEEDINGS: Jury Trial (Cont.) ACTION NO. 41,104

Parties represented as stated above. All jurors present. Mr. Steven H. Dillon resumed the witness stand and concluded his testimony of the previous day.

Noon recess taken at 12:20 P.M. Reconvene at 2:08 P.M. outside the presence of the jury. Counsel for defendants made a motion to strike the testimony of Mr. Dillon regarding any statute that was not in effect on November 1, 1977. Motion taken under submission. Counsel for defendants made a motion to strike Mr. Dillon's testimony with regard to the power of the General Plan or in the alternative to re-open the pre-condemnation damages issue. The Court stated that specific instruction would be given to the jury prior to their deliberation defining the roll of the General Plan.

The jury was admitted into the courtroom at 2:29 P.M. Mr. Stephen P. Thomas resumed the witness and continued his testimony from the previous day.

Court and counsel retired to chambers for conference at 2:45 P.M. Reconvene at 3:15 P.M. Mr. Thomas resumed the witness stand and continued his testimony. Evening recess at 4:04 P.M. Jury is admonished.

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file
 Attest: Maurine I. Dobbas
 County Clerk and Clerk of the Superior Court of the State of California, in and for the
 County of Placer
 BY [Signature] DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

714

DATE: December 1, 1977 COURT MET AT 10:08 A.M. DEPARTMENT NO. 1
PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Linda Smith REPORTER Dennis Ludlow BAILIFF

TITLE:

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner

MICROFILMED

NATURE OF PROCEEDINGS: Jury Trial (Cont.)

ACTION NO. 41,104

Parties represented as stated above. All jurors present. Mr. Stephen P. Thomas resumed the witness stand and continued his testimony.

Noon recess taken between the hours of 11:59 A.M. and 1:52 P.M. Upon re-convening, Mr. Thomas resumed the witness stand and concluded his testimony.

Frank LaBella Jr. duly sworn and examined on behalf of defendant.

Jury excused at 4:40 P.M. Court remained in session in the absence of the jury. Counsel for defendants made an offer of proof regarding the proposed testimony of George A. Buljan, Mayor of Roseville. Counsel for plaintiffs requested that if called to testify, the Mayor's testimony be taken outside the presence of the jury at the beginning of the next Court session, and it was so ordered. Evening recess at 4:48 P.M.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court, State of California, in and for the
County of Placer

BY P. Oliver DEPUTY

1 DENNIS W. DE CUIR
2 City Attorney
3 City of Roseville
316 Vernon Street
4 Roseville, CA 95678
5 Telephone: (916) 783-9151, Ext. 272

6 TURNER & MULCARE
7 A PROFESSIONAL CORPORATION
8 1650 South Amphlett Blvd., Suite 225
9 San Mateo, CA 94402
10 Telephone: (415) 573-7677

FILED
DEC - 2 1977

MAURINE J. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY *[Signature]*
CLERK

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF PLACER

13 CITY OF ROSEVILLE, a municipal)
14 corporation,)
15 Plaintiff,)
16 v.)
17 WILLIAM J. ZISK and LOIS E.)
18 ZISK, et al.,)
19 Defendants.)

MICROFILMED
NO. 41104

TRIAL BRIEF RE INADMISSIBILITY
OF EVIDENCE OF OPTION PRICE

20 Pursuant to Evidence Code Section 816, an appraisal
21 witness may take into account as a basis for his opinion the price
22 and other terms and circumstances of a sale or contract to sell
23 and purchase comparable property if he first establishes that the
24 property is in fact comparable to the subject property.

25 Evidence Code Section 822(b), however, prohibits evidence
26 of the price at which an option to purchase property was made.
In this regard, Evidence Code Section 822 provides in pertinent
part as follows:

1 "Notwithstanding the provisions of Sections 814 to
2 821, the following matter is inadmissible as evidence
and is not a proper basis for an opinion as to the
value of property:

3 (a)

4 (b) The price at which an offer or option to
5 purchase or lease the property or property
6 interest being valued or any other property
was made, or the price at which such property
or interest was optioned, offered, or listed
for sale or lease" (Emphasis added)

7 As a result of depositions heretofore taken in this case,
8 plaintiff anticipates that appraisal witnesses for defendants
9 Zisk will attempt to testify as to the terms and circumstances of
10 what is in reality an option of a parcel of land known as the
11 Parrott property. Any obligation of the buyers to complete that
12 transaction is contingent upon their obtaining approval by the
13 City of Roseville of a subdivision allowing a certain number of
14 lots. It is also contingent upon the potential buyers obtaining
15 the necessary financing. Plaintiff is also informed that the time
16 limit within which the above approvals and financing were to have
17 been obtained expired three (3) months ago. Accordingly, the
18 transaction involving the Parrott property does not represent a
19 binding contract to sell or purchase and is in fact a mere
20 option.

21 "The test of whether an instrument is an option
22 or a contract of sale is whether there is such an
obligation on the part of the holder to buy that it
23 can be enforced by specific performance."
People v. Ocean Shore R. R. Co., 90 C.A.2d 464,
469-470 (1949)

24
25 City of Walnut Creek v. Leadership Housing Systems,
26 73 C.A.3d 611 (1977), involved a possible sale of property which

1 was contingent upon the prospective purchaser obtaining
2 governmental approval for construction of a minimum of 139 units.
3 The court there assumed that the transaction involved was an
4 option and not a contract when it found that:

5 "Since Leadership's option had expired prior to the
6 filing of the condemnation action, the court properly
7 denied it the relief sought in its answer." (Emphasis
8 added) City of Walnut Creek v. Leadership Housing
9 Systems, supra. at 619.

8 The transaction involving the Parrott property has even
9 more contingencies than were involved in the Leadership Housing
10 case. Not only is the Parrott transaction contingent upon the
11 purchaser obtaining approval of a certain number of lots in a
12 prospective subdivision, it is also contingent upon the purchaser
13 obtaining financing. Further, the time limit within which the
14 purchaser was to be allowed to accomplish those contingencies has
15 expired for three (3) months now. Certainly the seller could not
16 now obtain specific performance requiring the prospective purchaser
17 to buy the property.

18 Accordingly, evidence of the option agreement regarding the
19 Parrott property is inadmissible under Evidence Code Section 822(b).

20 DATED: November 14, 1977.

21 Respectfully submitted,
22 DENNIS W. DE CUIR
23 TURNER & MULCARE

24 By William J. Turner
25 WILLIAM J. TURNER
26 Attorneys for Plaintiff
CITY OF ROSEVILLE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

718

DATE December 2, 1977 COURT MET AT 10:00 A.M. DEPARTMENT NO. 1

PRESENT HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Linda Smith REPORTER Dennis Ludlow SHERIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeQuir</u>, Roseville City Atty. <u>Turner & Malcase</u> by <u>William J. Turner</u></p> <p><u>Desmond, Miller, Desmond & Bartholomew</u> by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p>

NATURE OF PROCEEDINGS: Jury Trial (Continued) ACTION NO. 41,104

MICROFILMED

Parties represented as stated above. Court met outside the presence of the jury. George A. Buljan was duly sworn and examined. Following his brief testimony, the witness was excused. The Court ruled that he may not testify on the issue of rezoning before the jury in this action.

The jury was admitted into the courtroom at 10:34 A.M. Mr. LaBella resumed the witness stand and continued his testimony of the previous day.

Noon recess taken between the hours of 12:15 P.M. and 1:54 P.M. Upon reconvening, Mr. LaBella resumed the witness stand and continued his testimony. The jury was recessed at 2:17 P.M. and the Court remained in session in their absence. Court and counsel discussed the admissibility of the "comparable sales" to be presented by Mr. LaBella. The jury was readmitted at 2:37 P.M. Defendant's exhibits introduced as stated on attachment.

Evening recess at 4:17 P.M. Jury is admonished.

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine I. Dobbos
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Placer

BY [Signature] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

719

NO. 41,104

City of Roseville
Plaintiff

Date 11-29-77

William A. Newsom
Judge

Wm. Zisk & Lois Zisk
Defendant

EXHIBITS

No.	Id.	Ev.	Description
12-2-77 4B	x	x	Chart (Comparables, LaBella)
4C	x	x	Roseville City Map (Comparables, LaBella)
4D	x		Contract & documents for LaBella Sale #9
4D-1		x	LaBella Comparable #8 (portion of 4C)
4E	x	x	Appraisal Chart (LaBella)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

720

DATE December 5, 1977 COURT MET AT 10:12 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Lew G. Schwenk REPORTER Dennis Ludlow BAILIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-VS-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeCuir</u>, Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u></p> <p><u>Desmond, Miller, Desmond & Bartholomew</u> by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p>

NATURE OF PROCEEDINGS: Jury Trial (Cont.) ACTION NO. 41,104

Parties represented as above, all jurors present. Mr. Frank LaBella resumed the witness and continued his testimony of the previous day. Plaintiffs' exhibits introduced into evidence:

- 44. Plat Map
- 45. Contour Map

Noon recess taken between the hours of 12:10 P.M. and 1:48 P.M. Upon reconvening, Mr. LaBella resumed the witness stand outside the presence of the jury. Counsel for plaintiffs made a motion to strike the evidence as to the "Parrot" sale (LaBella #8). The motion was argued by counsel and deferred by the Court until December 6, 1977.

The jury was admitted into the courtroom at 1:53 P.M. The testimony of Mr. LaBella was concluded.

Kenneth Martin James duly sworn and examined out of order by stipulation of counsel. Evening recess taken at 3:33 P.M. Jury admonished.

MICROFILMED

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine L. Dobbas

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Placer

BY *P. Oliver* DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

721

DATE: December 6, 1977 COURT MET AT: 11:05 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK
Lew G. Schwenk REPORTER Dennis Ludlow BAILIFF

TITLE:

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Malcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner

MICROFILMED

NATURE OF PROCEEDINGS: Jury Trial (Cont.)

ACTION NO. 41,104

Parties represented as above, all jurors present. Frederick W. Festerson duly sworn and examined.

Noon recess taken between the hours of 12:15 P.M. and 1:45 P.M. Upon reconvening, Mr. Festerson resumed the witness stand outside the presence of the jury. Counsel for defendant renewed his motion to strike the Parrot sale from the comparable sales presented by witness Frank LaBella. Defendants exhibits introduced as noted on attachment. The Court granted the motion to strike the sale.

The jury was admitted into the courtroom at 2:06 P.M. The Court instructed the jury on his ruling regarding the comparable sales. Mr. Festerson concluded his testimony. Evening recess at 4:30 P.M.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Mourine J. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

722

NO. 41,104

City of Roseville
Plaintiff

Date 11-29-77

William A. Newsom
Judge

Wm. Zisk & Lois Zisk
Defendant

EXHIBITS

No.	M.	Ev.	Description
12-6-77 4F	x		Real Estate Purchase Contract (LaBella Sale #8)
4G	x		Letter dated July 14, 1977, to Mr. H.S. McCallan, Jr.'
4H		x	Title 18 - Subdivisions (Roseville Municipal Code-1975)
4I	x		Grant Deed (Butler)
4J		x	Chart (Comparables, Pesterson)

723

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

DATE: December 7, 1977 COURT MET AT 10:29 P.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Lew G. Schwenk REPORTER Dennis Ludlow BAILIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeCuir</u>, Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u></p> <p>Desmond, Miller, Desmond & Bartholomew by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p>

NATURE OF PROCEEDINGS: Jury Trial (Continued) ACTION NO. 41,104

Parties represented as above, all jurors present. Opening statement presented by counsel for plaintiff. Thomas W. Clark, Jr. duly sworn and examined on behalf of plaintiff. Plaintiff's exhibits introduced into evidence:

- 46. Comparable Sales Map
- 47. Appraisal Chart
- 48. Black & white photograph
- 49. Black & white photograph
- 50. Black & white photograph
- 51. Black & white photograph
- 52. Computation chart.

MICROFILMED

Noon recess taken between the hours of 12:00 Noon and 1:30 P.M. Upon reconvening, Mr. Clark resumed the witness stand and continued his testimony. Evening recess taken at 4:20 P.M. Jury admonished.

BOOK _____ PAGE _____

MINUTES

This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine J. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY P. Oliver DEPUTY

724

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

DATE: December 8, 1977 COURT MET AT 10:20 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Lew G. Schwenk REPORTER Dennis Ludlow BAILIFF

TITLE:	COUNSEL:
<p>CITY OF ROSEVILLE, a municipal corporation, Plaintiff,</p> <p style="text-align: center;">-VS-</p> <p>WILLIAM J. ZISK and LOIS E. ZISK, et al. Defendants.</p>	<p><u>Dennis W. DeCuir</u>, Roseville City Atty. Turner & Mulcare by <u>William J. Turner</u></p> <p>Desmond, Miller, Desmond & Bartholomew by <u>Richard F. Desmond</u> and <u>Steven James Wagner</u></p> <p style="text-align: right;">MICROFILMED</p>

NATURE OF PROCEEDINGS: Jury Trial (Continued) ACTION NO. 41,104

Parties represented as stated above, all jurors present. Thomas W. Clark resumed the witness stand and continued his testimony from the previous day.

Noon recess taken between the hours of 11:53 A.M. and 1:50 P.M. Upon re-convening, Mr. Clark resumed the witness stand and concluded his testimony.

Frank Blaesi duly sworn and examined on behalf of the plaintiff. Plaintiffs' exhibits introduced into evidence:

- 53. Flood Hazard Boundary Map
- 54. Comparable Sales Map
- 55. Black & white photograph
- 56. Black & white photograph
- 57. Black & white photograph
- 58. (A-E) Five Black & white photographs
- 59. Black & white photograph.

Evening recess at 4:30 P.M.

BOOK _____

MINUTES

PAGE _____

This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY P. Oliver DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

725

DATE: December 9, 1977 COURT MET AT: 10:20 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Lew G. Schwenk REPORTER Dennis Ludlow BAILIFF

TITLE:

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff,

-VS-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

COUNSEL:

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner

NATURE OF PROCEEDINGS: Jury Trial (Continued)

ACTION NO. 41,104

Parties represented as above, all jurors present. The Court informed the jury that there would be no testimony this date. In stead, the Court, all jury members and alternate, all counsel and court attaches traveled by bus to the Roseville area and viewed the comparable sales which had been the subject of testimony since December 1, 1977.

MICROFILMED

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file.
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY: [Signature] DEPUTY

726

FILED DEC 12 1977
MAURINE I. DOBBAS
COUNTY CLERK OF PLACER COUNTY
By P. Oliver
Deputy

1 DENNIS W. DE CUIR
City Attorney
2 City of Roseville
316 Vernon Street
3 Roseville, CA 95678
Telephone: (916) 783-9151, Ext. 272

4 TURNER & MULCARE
5 A PROFESSIONAL CORPORATION
1650 S. Amphlett Blvd., Suite 225
6 San Mateo, CA 94402
Telephone: (415) 573-7677

7
8 Attorneys for Plaintiff

9
10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF PLACER

12
13 CITY OF ROSEVILLE, a municipal)
corporation,)
14 Plaintiff,)
15 v.)
16 WILLIAM J. ZISK and LOIS E.)
17 ZISK,)
18 Defendants.)
19

NO. 41104 MICROFILMED
PLAINTIFF'S REQUESTED
JURY INSTRUCTIONS

20 Plaintiff hereby requests the following BAJI instructions
21 be given, along with the attached instructions:

- 22 1.00
- 23 1.01
- 24 1.02
- 25 11.70 (1976 Revision adapted as attached - Plaintiff's
Proposed Instruction No. 1)
- 26

- 1 11.72 (1976 Revision with November 1, 1977 inserted
as date of value)
- 2 11.73
- 3 11.75
- 4 11.80 (1975 Revision)
- 5 11.82 (with November 1, 1977 inserted as date of
value)
- 6 11.85 (1976 Revision with last paragraph modified as
set forth in Plaintiff's Proposed Instruction
No. 2)
- 7 11.86
- 8 11.95 (1976 Revision)
- 9 11.98 (1971 Revision)
- 10 11.99
- 11 15.20
- 12 15.22
- 13 15.30
- 14 15.31

18 DATED: November 14, 1977.

19 Respectfully submitted,

20 DENNIS W. DE CUIR
21 WILLIAM J. TURNER

22
23 By William J. Turner
24 Attorneys for Plaintiff
25 CITY OF ROSEVILLE
26
27
28

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1

POWER OF EMINENT DOMAIN

Under the Constitution and laws of this state, all private property, real and personal and any interest therein, is held subject to the right of eminent domain, which is the right of certain authorized agencies or public entities, upon payment of just compensation to or for the owner, to take private property for a public use.

The right of eminent domain is exercised through proceedings commonly called a condemnation action. This is such an action.

The plaintiff, City of Roseville, is authorized by law to exercise the right of eminent domain to take from the defendants the property here under consideration for the purpose of public park and bicycle path purposes.

As jurors in this case, it will be your duty to determine the just compensation to be paid by the plaintiff to the defendants.

JUDGE OF THE SUPERIOR COURT

Authority:

BAJI No. 11.70 as modified

Given _____
Refused _____
Modified _____

PLAINTIFF'S PROPOSED INSTRUCTION NO. 2

SEVERANCE DAMAGES - FEE BEING TAKEN

Where the property being taken is only a part of a larger parcel of property, in addition to compensation for the property being taken, the defendant is entitled to recover compensation, called "severance damages," for the damage, if any, to the remainder.

Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

Severance damages are determined by ascertaining the market value of the remainder as of the date of valuation and by deducting therefrom the market value of the remainder after the severance of the part being taken and the construction of the project in the manner proposed by the plaintiff. Compensation for injury to the remainder shall be based on the project as proposed. Any features of the project which mitigate the damage or provide benefit to the remainder such as delineation or posting notice of location of property lines, creek maintenance operations and prohibition of motor vehicles on the planned bicycle trail shall be taken into account in determining the compensation for

//

1 injury to the remainder.

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JUDGE OF THE SUPERIOR COURT

Authority:

BAJI No. 11.85 (1976 Revision) as modified and adapted

Given _____
Refused _____
Modified _____

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3.

1
2
3 You shall now retire and select one of your number to
4 act as foreman, who will preside over your deliberations. In
5 this regard, it is only necessary that nine of you agree as to
6 each item set forth on the form of verdict which will be given
7 to you. It is not necessary that the same nine jurors agree on
8 all of the items, as long as nine have agreed on each. As soon
9 as you shall have agreed upon a verdict, you shall have it
10 signed and dated by your foreman and then shall return with it to
11 this room.

12
13
14 JUDGE OF THE SUPERIOR COURT
15

16
17 Authorities:

18 Code of Civil Procedure, Sections 613 and 618
19 City of Los Angeles v. Frew, 139 C.A.2d 859 (1956)
20 A modification of BAJI 15.50

21 Given _____

22 Refused _____

23 Modified _____

24
25 Verdict - Concluding Instruction - More than One Issue
26

Plaintiffs

vs.

REQUEST FOR INSTRUCTIONS

WILLIAM J. ZISK, et al.
Defendants.

<u>OPENING</u>			
1.00	Respective Duties of Judge and Jury	3.12	Amount of Caution Varies
1.01	Instructions to be Considered as a Whole	3.50	Contributory Negligence -- Definition
1.02	Statements of Counsel -- Evidence Stricken Out -- Insinuations of Questions	3.15	Negligence Not to be Compared
		3.75	Proximate Cause - Definition
		3.77	Concurring Causes
<u>EVIDENCE</u>		<u>DAMAGES</u>	
2.00	Direct and Circumstantial Evidence -- Inferences	14.00	Introductory
2.01	Weighing Conflicting Testimony	14.10	Expenses Incurred
2.20	Credibility of Witness	14.11	Loss of Earnings
2.21	Discrepancies in Testimony	14.12	Loss of Earning Capacity
2.22	Witness Wilfully False	14.20	Property Damages <small>MICROFILMED</small>
2.25	Extrajudicial Admissions -- Cautionary Instruction	14.13	Pain and Suffering
2.40	Expert Testimony -- Qualifications of Expert	14.61	No Punitive Damages
2.43	Statements Made by Patient to Physician	<u>CLOSING</u>	
2.60	Burden of Proof	15.20	Jury Not to Take Cue from Judge
		15.22	All Instructions Not Necessarily Applicable
<u>LIABILITY</u>		15.30	Jurors to Deliberate
3.00	When Plaintiff Entitled to Recover (No Issue of Contributory Negligence)	15.31	How Jurors Should Approach Their Task
3.01	When Plaintiff Entitled to Recover (Contributory Negligence an Issue)	15.32	Each Juror Should Deliberate and Vote on Each Issue to be Decided
3.10	Negligence and Ordinary Care -- Definitions	15.33	Chance or Quotient Verdict Prohibited
3.11	A Test for Determining the Question of Negligence	15.50	Concluding Instruction

The Court is respectfully requested to give each of the instructions (from BAJI, Fifth Edition) hereinabove indicated, EXCEPT those where the number is circled, together with such other additional instructions as are attached hereto.

DESMOND, MILLER, DESMOND & BARTHOLOMEW

By:

Attorneys for Plaintiffs-Defendants
RICHARD F. DESMOND

(COUNSEL: Complete 2.60 and attach proposed verdict forms.) Revised 9/2/69

733
FILED
DEC 12 1977
MAURINE A. DOBBAS
COUNTY CLERK OF PLACER COUNTY
BY *[Signature]*
DEPUTY

1 DENNIS W. DE CUIR
2 City Attorney
3 City of Roseville
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4 Roseville, CA 95678
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9 San Mateo, CA 94402
10 Telephone: (415) 573-7677
11
12 Attorneys for Plaintiff

13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 IN AND FOR THE COUNTY OF PLACER

MICROFILMED

13	CITY OF ROSEVILLE, a municipal)	
14	corporation,)	
15)	
16	Plaintiff,	)	NO. 4 1 1 0 4
17)	
18	v.	)	PLAINTIFF'S REQUEST
19		)	FOR ADDITIONAL JURY
20	WILLIAM J. ZISK and LOIS E.	)	INSTRUCTIONS
21	ZISK,)	
22)	
23	Defendants.)	

24 Plaintiff hereby requests that the following BAJI
25 instructions be given, along with the attached instructions, in
26 addition to those instructions earlier requested by Plaintiff:
27 BAJI Instruction Numbers 2.06 and 11.75.
28

5 SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

734

DATE: December 12, 1977 COURT MET AT 10:14 A.M. DEPARTMENT NO. 1

PRESENT: HON. William A. Newsom JUDGE Paula Oliver DEPUTY CLERK

Robin Fouquette REPORTER Dennis Ludlow BAILIFF

TITLE:

COUNSEL:

CITY OF ROSEVILLE, a municipal
corporation,
Plaintiff,

-vs-

WILLIAM J. ZISK and LOIS E. ZISK, et al.
Defendants.

Dennis W. DeCuir, Roseville City Atty.
Turner & Mulcare by William J. Turner

Desmond, Miller, Desmond & Bartholomew
by Richard F. Desmond and
Steven James Wagner MICROFILMED

NATURE OF PROCEEDINGS:

Jury Trial (Continued)

ACTION NO. 41,104

Parties represented as above, all jurors present. Mr. Frank Blaesi resumed the witness stand and continued his testimony of December 8, 1977. During the course of Mr. Blaesi's testimony, a number of objections were stated regarding Mr. Desmond's questioning. After some direction from the Court, Mr. Desmond was found to be in contempt and the Court ordered a contempt hearing to be held at 1:30 P.M. this date. Noon recess taken at 11:58 A.M.

Reconvene at 1:48 P.M. outside the presence of the jury. The Court stated the contempt hearing in this matter would be set for formal hearing following the conclusion of the trial. Mr. Desmond made a motion that the jury be directed to disregard the statements of the Court (with regard to the pre-noon objections). The motion was denied.

The jury was admitted into the courtroom and Mr. Blaesi concluded his testimony.

Upon motion of plaintiff, the following exhibits were stricken:
C. Minutes of Roseville Planning Commission, February 23, 1967
E-2. Park & Streambed Plan for the City of Roseville
R. Environmental Impact Statement
FF. Roseville City Council Minutes, October 3, 1973
Q-4. Permit dated June 8, 1973
XXX. Open Space and Conservation Element of Roseville General Plan
4D-1. LaBella Comparable #8 (portion of exhibit 4C)

Evening recess at 4:00 P.M.

BOOK _____

MINUTES

PAGE _____
This minute order was duly entered in R/A and a copy placed in the file
Attest: Maurine I. Dobbas
County Clerk and Clerk of the Superior Court of the State of California, in and for the
County of Placer

BY P. Oliver DEPUTY

736

FILED

DEC 1 1977

MAURINE J. DOBBAS
COUNTY CLERK OF POLK COUNTY

BY *[Signature]*
DEPUTY

41104 City of Reul. vs. Zick MICROFILMED

Instructions withdrawn or refused.

(THREE PAGES) BAJI 11.82 (PAGE ONE)

**EMINENT DOMAIN—WEIGHING EXPERT
OPINION—EVIDENCE OF MATTERS
RELIED UPON**

Certain matters may be considered by a witness in forming his opinion of the fair market value of the subject property [and severance damage, if any,] and if evidence of such matters has been received it may be considered by you only for the limited purpose of enabling you to understand and weigh the testimony of the witnesses as to their opinion of the fair market value of the subject property [and severance damage [and special benefits], if any].

Among those matters are:

(1) The area and location of the subject property; the nature of its developments; the uses for which it is adaptable and available; [its proximity to nearby shopping areas and commercial facilities;] [the availability of public transportation;] [the availability of utilities;] [the zoning of the subject property and any limitations placed upon its use by existing zoning laws;] [and].
(other elements)

(2) The nature of the improvements on properties and the character of the neighborhood in the general vicinity of the subject property; the character of the existing uses being made of such properties; and the trend of land use and development in such neighborhood, if any.

(3) The price and other circumstances of any sale or contract to sell and purchase [of the subject property or] of other properties which they

W. Gray
W. H. W.

consider to be comparable to defendant's property as shedding light on the value of the property being valued. Generally, the more similar one property is to another, the closer the value of the one may be expected to approach the value of the other. Thus, in weighing the opinion of a witness as to the value of the subject property based upon his reliance on sales or contracts to sell and purchase comparable properties, you should consider the following matters: Was such sale or contract to sell and purchase freely made in good faith; how near, the date of valuation of the defendant's property, is the date of the other sale; how near the size of the other property is to the size of defendant's property; how similar are the physical features, including both improvements and natural features; how similar is the use to which the other property is, or may be, put, to the use which is, or may be, made of the defendant's property; how far the other property is from the defendant's property; and how similar the neighborhood of the other property is to the neighborhood of the defendant's property.

[(4) A witness may also consider the rent and other terms and circumstances of any lease of the subject property or of a comparable property.]

[(5) A witness may consider the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon.]

[(6) A witness may also consider the value of the property being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the prop-

(THREE PAGES) **BAJI 11.82** (PAGE THREE)

erty or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.]

[(7) A witness may also consider the reasonable probability, if any, of a change in zoning restrictions in the near future, and the effect such a probability would have upon the value of the property. Thus, in weighing the opinion of a witness as to the value of the subject property based in part upon the reasonable probability of a change in zoning in the near future, you must determine whether or not the evidence establishes that there is in fact a reasonable probability of such change in zoning in the near future.]

As you have been previously instructed, you may consider evidence of any of the foregoing matters only for the purpose of enabling you to understand and weigh the testimony of the witnesses as to their opinions of market value [and severance damage and [special benefits], if any].

Requested by Plaintiff		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused					
Withdrawn	✓			<i>[Signature]</i>	Judge

BAJI 11.72 (1976 Revision)

JUST COMPENSATION—FAIR MARKET VALUE—
VALUATION DATE

The compensation to which the property owner is entitled is the fair market value of the property being taken [and where the property being taken is part of a larger parcel, the damages, if any, to the remainder, called severance damages].

You must determine the fair market value of the property being taken [and the severance damages, if any,] as of the date of valuation which is Nov. 1 1977 and you must make your determination solely in accordance with these instructions.

(date of valuation)

Requested by Plaintiff		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		<i>W. A. N.</i> Judge			
Withdrawn					

Two Pages BAJI 11.80 (1975 Revision) Page One

**EMINENT DOMAIN—OPINION OF WITNESSES
AS TO VALUE**

You must determine the fair market value of the subject property [and the severance damage [~~and special benefits~~], if any,] only from the opinions of the witnesses who have been permitted by the court to express their opinion of such market value [and severance damage [~~and special benefits~~], if any].

Thus, you may not find the market value of the subject property [or the severance damage [~~or special benefits~~], if any,] to be either less than or more than that testified to by the witnesses who have been permitted to express their opinions on such matters.

An expert appraiser [or the owner of the property being condemned] [or any witness who has knowledge of the market value of the subject property] may give his opinion of such market value [and severance damage [~~and special benefits~~], if any,] and the reasons for such opinion.

Evidence which has been received from witnesses as to the reasons for their respective opinions of value, and all other evidence concerning the subject property [and other properties,] [including your view of [it] [them]], is to be considered by you only for the limited purpose of enabling you to understand and weigh the testimony of the witnesses as to their opinion of such market value [and severance damage [and special benefits], if any].

You should consider each such opinion and should weigh the qualifications of the witness and the reasons given for his opinion. Give each opinion the weight to which you deem it entitled.

You must resolve any conflict in the testimony of the witnesses by weighing each of the opinions expressed against the others, taking into consideration the reasons given for the opinion, the facts relied upon by the witness, his relative credibility and his special knowledge, skill, experience, training, and education.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input type="checkbox"/>	Requested by	<input type="checkbox"/>
Given as Requested	<input type="checkbox"/>	Given as Modified	<input type="checkbox"/>	Given on Court's Motion	<input type="checkbox"/>
Refused	<input checked="" type="checkbox"/>	<i>LC 11.80</i> _____ Judge			
Withdrawn	<input type="checkbox"/>				

BAJI 11.95 (1976 Revision)

SPECIAL BENEFITS

Where the property being taken is only a part of a larger parcel of property, you must determine how much, if any, the defendant's remaining property will be specially benefited by the construction and use of the proposed improvement in the manner proposed by the plaintiff whether or not the special benefit is caused by a portion of the improvement located on the property being taken.

Special benefits are advantages to the remaining property that are reasonably certain to result from the construction and use of the improvement in accordance with the proposed plan, and which are peculiar to the land in question as contrasted to general benefits which result from advantages that will accrue to the community from the improvement. A benefit may be special, not general, even though it accrues to property of other owners as well as to that of the defendant.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input type="checkbox"/>	Requested by	<input type="checkbox"/>
Given as Requested	<input type="checkbox"/>	Given as Modified	<input type="checkbox"/>	Given on Court's Motion	<input type="checkbox"/>
Refused	<input type="checkbox"/>	<i>W.A.W.</i> _____ Judge			
Withdrawn	<input checked="" type="checkbox"/>				

1 PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

744

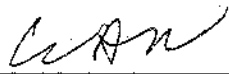
2 EVIDENCE STRICKEN

3
4 In addition to any evidence earlier stricken by the
5 Court in your presence, the following evidence and all testi-
6 mony explaining or interpreting that evidence has also been
7 stricken by the Court:

- 8 Exhibit C - Planning Commission minutes of
9 February 23, 1967.
10 Exhibit E-2 - Park and Streambed Plan which was
11 repealed on June 15, 1977.
12 Exhibit Q-4 - June 5, 1973 permit.
13 Exhibit R - Environmental Impact Report of
14 June 1973.
15 Exhibit FF - City Council minutes of October 3, 1973.
16 Exhibit XXX - Open Space and Conservation Element to
The General Plan which was repealed on
June 15, 1977.

17 Additionally, the Court has ordered stricken from
18 evidence the portion of the testimony of William Zisk relating
19 to the value, if any, in the grading work, fill, dredging or
20 channelization done by Mr. Zisk or the hours devoted by him to
21 such work.

22 You must not consider for any purpose any such evidence
23 that has been stricken by the Court and such matter is to be
24 treated as though you had never known of it.

25
26 

Judge of the Superior Court

27 Given _____

28 Refused _____

Modified _____

W. J. ... ✓

1 PLAINTIFF'S PROPOSED INSTRUCTION NO. 2

745

2 SEVERANCE DAMAGES - FEE BEING TAKEN

3 Where the property being taken is only a part of a larger
4 parcel of property, in addition to compensation for the property
5 being taken, the defendant is entitled to recover compensation,
6 called "severance damages," for the damage, if any, to the
7 remainder.

8 Damage to the remainder is the damage, if
9 any, caused to the remainder by either or both of the following:

10 (a) The severance of the remainder from the part taken.

11 (b) The construction and use of the project for which the
12 property is taken in the manner proposed by the plaintiff whether
13 or not the damage is caused by a portion of the project located on
14 the part taken.

15 Severance damages are determined by ascertaining the
16 market value of the remainder as of the date of valuation and by
17 deducting therefrom the market value of the remainder after the
18 severance of the part being taken and the construction of the
19 project in the manner proposed by the plaintiff. Compensation for
20 injury to the remainder shall be based on the project as proposed.
21 Any features of the project which mitigate the damage or provide
22 benefit to the remainder such as delineation or posting notice of
23 location of property lines, creek maintenance operations and
24 prohibition of motor vehicles on the planned bicycle trail shall
25 be taken into account in determining the compensation for

26 //

1 injury to the remainder.

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Authority:

9

BAJI No. 11.85 (1976 Revision) as modified and adapted

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W. H. W.

22

Given _____

23

Refused _____

24

Modified _____

25

26

BAJI 11.85 (1976 Revision)

SEVERANCE DAMAGES—FEE BEING TAKEN

Where the property being taken is only a part of a larger parcel of property, in addition to compensation for the property being taken, the defendant is entitled to recover compensation, called "severance damages," for the damage, if any, to the remainder.

Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

Severance damages are determined by ascertaining the market value of the remainder as of the date of valuation and by deducting therefrom the market value of the remainder after the severance of the part being taken and the construction of the project in the manner proposed by the plaintiff.

Compensation for injury to the remainder shall be based on the project as proposed. Any features of the project which mitigate the damage or provide benefit to the remainder, including but not limited to easements, crossings, underpasses, access roads, fencing, drainage facilities, and cattle guards, shall be taken into account in determining the compensation for injury to the remainder.

Requested by Plaintiff		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		_____ Judge			
Withdrawn					

BAJI 11.70 (1976 Revision)
POWER OF EMINENT DOMAIN

Under the Constitution and laws of this state, all private property, real and personal and any interest therein, is held subject to the right of eminent domain, which is the right of certain authorized agencies or public entities, upon payment of just compensation to or for the owner, to take private property for a public use.

The right of eminent domain is exercised through proceedings commonly called a condemnation action. This is such an action.

The plaintiff, _____, is authorized by law to exercise the right of eminent domain to take from the defendant[s] the property here under consideration for the purpose of _____.

As jurors in this case, it will be your duty to determine the just compensation to be paid by the plaintiff to the defendant[s].

Requested by Plaintiff		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		<p align="right">_____</p> <p align="right">Judge</p>			
Withdrawn					

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DEFENDANTS' PROPOSED INSTRUCTION NO. 10

"Fair market value" is defined as the highest price on the date of valuation that would be agreed to by a seller, being willing to sell, but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy, but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

The property must be valued with reference to all the uses and purposes for which it is adaptable and available, including its highest and best use. This definition of fair market value presupposes that both parties are familiar with the property and all of its present adaptabilities and uses, and those uses which would be reasonably probable in the near future.

BAJI 11.73 MODIFIED
CCP, Section 1263.320

GIVEN: ✓
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: ✓ 11.73

WAW
JUDGE OF THE SUPERIOR COURT

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5

WILLINGNESS TO SELL

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3 The fact, if it is a fact, that an owner is unwilling
4 to sell, or objects to the acquisition of his property by the
5 City of Roseville for the public good, does not affect its
6 market value. All property is held subject to appropriation for
7 public purposes on the payment of just compensation. The measure
8 of compensation in the case of an owner who objects to the
9 sale of his property to a public agency is not different from
10 the measure of compensation in the case of an owner who is willing
11 that his property be acquired for the public use.

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14 _____
15 JUDGE OF THE SUPERIOR COURT

16 Authorities:

- 17 San Diego Land etc. Co. v. Neale, 78 Cal.63 (1888)
18 People v. Marblehead Land Co., 82 Cal.App. 289 (1927)
19 Gilmer v. Lime Point, 18 Cal. 229, 253-54 (1861)
20 City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 168 (1930)
21 People ex rel. Dept. of Public Works v. Wasserman,
22 240 Cal.App.2d 716, 719 (1966)

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26 Given _____
27 Refused _____
28 Modified _____

PLAINTIFF'S PROPOSED INSTRUCTION NO. 6

IMPROVEMENT PLANS

A plan which defendants may or may not have had for the improvement of the property adds nothing to its market value. The fact that a plan for improvements, if any, was affected by condemnation, however much a disappointment, is not a matter of compensation.

WAW

Judge of the Superior Court

Authorities:

Sacramento etc. R.R. Co. v. Heilbron, 156 Cal. 408 (1909)

County of Los Angeles v. Bean, 176 Cal.App.2d 521 (1959)

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 7

AVERAGE SQUARE FOOT VALUE

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It is not proper to determine the value of the whole property and then apply the average square foot value to the part being acquired unless you find that each square foot has the same value. If you find that the part being acquired is different in quality, then a different value should be applied.

[Signature]

Judge of the Superior Court

Authority:

L.A. County Flood etc. Dist. v. McNulty, 59 Cal.2d 333 (1963)

Given _____
Refused _____
Modified _____

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8

VALUE AS PART OF WHOLE

Where a part, only, of a larger piece of property is being acquired, the part being acquired should be valued as a part of the whole and not as though it were a separate parcel. Value as a part of the whole is not, however, necessarily based upon an average value of the whole. Thus, in some situations, the part taken may have a higher value because of certain advantages over other parts of the property or, on the other hand, the part taken may have a lower value because of relatively poorer qualities. The relative worth of the lands taken, as compared to other parts of the property, should be considered. Therefore, in arriving at the value of the property taken, proper allowances should be made for differences in value, if any.

WAW

 Judge of the Superior Court

Authorities:

City of Los Angeles v. Allen, 1 Cal.2d 572 (1934)

People v. Loop, 127 Cal.App.2d 786 (1954)

L.A. County Flood etc. Dist. v. McNulty 59 Cal.2d 333 (1963)

Given _____

Refused ✓

Modified _____

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9

COST NOT CRITERION

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The compensation to which an owner whose land is acquired is entitled is the market value of the property paid in terms of money. A defendant is not entitled to the cost of the property if such is not the equivalent of market value. It is the market value of the property and not its cost, or the cost of any improvements thereon, which is the measure of compensation, and the compensation cannot exceed the market value.

W. A. W.

Judge of the Superior Court

Authorities:

- Olson v. United States, 292 U.S. 246, 255 (1934)
- City of Los Angeles v. Klinker, 219 Cal.198, 211 (1933)
- People v. Ocean Shore Railroad, 32 Cal.2d 406, 428 (1948)

Given _____

Refused _____

Modified _____

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PLAINTIFF'S PROPOSED INSTRUCTION NO. 11

SEPARATE ASSESSMENT OF SEVERANCE DAMAGE

In computing such severance damage, if any, you are to exclude the portion to be acquired, and are to consider only the before and after value of the remaining property. You will separately assess in your verdict the market value of the portion sought to be acquired. To again include it in your consideration of damage would give double compensation for the part acquired and would be improper.

If you find that the market value of the remaining property is not diminished or decreased, then the defendants should be compensated only for the market value of the land sought to be acquired.

WAW

Judge of the Superior Court

Authorities:

- Code of Civil Procedure, Section 1248, Subd. 2
- People ex rel. Dept. P.W. v. Schultz Co.,
123 Cal.App.2d 925, 937 (1954)

Given _____

Refused *J* _____

Modified _____

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12

NO DECREASE IN VALUE

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If you find the market value of the remaining property is not diminished or decreased by the taking of a portion of the property and the construction of the improvement in the manner proposed, then the defendants are not entitled to recover anything in this action except the market value of the land sought to be taken, and accordingly you should allow no compensation for severance damage.



JUDGE OF THE SUPERIOR COURT

Authority:

Muller v. Railway Co., 83 Cal. 240, 243 (1890)

Given _____
Refused _____
Modified _____

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14
JURISDICTION OF BOARD OF RECLAMATION

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California Water Code Section 8710 provides as follows:

"Every plan of reclamation, flood control, drainage, improvement, dredging or work, that includes or contemplates the construction, enlargement, revetment or alteration of any levee, embankment, canal or other excavation in the bed of or along or near the banks of the Sacramento or San Joaquin Rivers or any of their tributaries or connected therewith, or upon any land adjacent thereto, or within any of the overflow basins thereof, or upon any land susceptible to overflow therefrom, shall be approved by the board before construction is commenced."

Dry Creek is a tributary of the Sacramento River.

Approval of the State Board of Reclamation must be obtained before any work is commenced in Dry Creek or on land adjacent to Dry Creek, as required by Water Code Section 8710.

W R N

Judge of the Superior Court

Authority:

California Water Code §8710

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Refused _____
Modified _____

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DEFENDANTS' PROPOSED INSTRUCTION NO. 24

Neither the Plaintiff nor the Defendants has the burden of proof on the issue of compensation.

BAJI 11.98, 1976 Revision

11.98 ?
127CA2J786

yes

GIVEN: _____
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: _____

U. M. W.
JUDGE OF THE SUPERIOR COURT

DEFENDANTS' PROPOSED INSTRUCTION NO. 22

In arriving at your opinion of market value in the before condition you shall ignore any general plan or regulation which you find to have, been imposed by the City of Roseville against this property for the purposes of maintaining the property in its present condition for future acquisition or public use by the residents of the City of Roseville. In arriving at the value of the property in the after condition and as damaged by the entire public project, you may consider such plans and regulations.

Buena Park School District vs. Metrim Corporation,
176 Cal.App.2d 255

People, et rel Department of Public Works vs. Southern Pacific
Transportation Company, 33 Cal.App.3d 960

Department of Public Works vs. Graziadio,
231 Cal.App.2d 525

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GIVEN: _____
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: _____



JUDGE OF THE SUPERIOR COURT

DEFENDANTS' PROPOSED INSTRUCTION NO. 23

If you find that the City of Roseville, purporting to exercise its police power by enacting any of the zoning ordinances or general plans, has in reality discriminated against any particular parcel or parcels of land in order to depress their value with a view to future taking in eminent domain, the landowner is entitled to attack the validity of such invalid zoning ordinance in this action and if you are convinced of the invalidity of the ordinance, the property may be valued free of its restrictions.

People, et rel Department of Public Works vs.
Southern Pacific Transportation Company,
33 Cal.App.3d 960

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GIVEN: _____
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: _____

WAW

JUDGE OF THE SUPERIOR COURT

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DEFENDANTS' PROPOSED INSTRUCTION NO. 21

In determining the fair market value of the property being taken, you may not include any increase or decrease in the value thereof because of the proposed improvement, that is, the use which the Plaintiff is to make of the property.

You may not include any increase or decrease in value because of any preliminary action of the Plaintiff relating to the taking of the property, such as refusing to approve a lot split or refusing to allow any uses of the property prior to the filing of the condemnation suit which refusal results from the preliminary plans for the taking; such as any regulation or plan imposed or adopted by the Plaintiff for the purposes of preventing development or uses of the subject property in order to lower the value of the subject property for its ultimate acquisition.

BAJI 11.77, 6th Edition, MODIFIED
Buena Park School District vs. Metrim Corporation,
176 Cal.App.2d 255

GIVEN: _____
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: ✓ _____

W. R. W.

JUDGE OF THE SUPERIOR COURT

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DEFENDANTS' PROPOSED INSTRUCTION NO. 14

The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:

- A. The project for which the property is taken;
- B. The eminent domain proceeding in which the property is taken;
- C. Any preliminary actions of the plaintiff relating to the taking of the property.

Any increase or decrease in value caused by the acts of the City of Roseville in aid of the public project, by the construction of the public improvement, or knowledge of the public improvement is excluded in the determination of fair market value.

BAJI 11.77 MODIFIED
CCP, Section 1263.330
Buena Park School District vs. Metrim Corp.,
176 C.A.2d 255
Klopping vs. City of Whittier,
8 Cal.3d 39

GIVEN: _____
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: ✓ _____

W. A. W.
JUDGE OF THE SUPERIOR COURT

DEFENDANTS' PROPOSED INSTRUCTION NO _____

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The authority of the Reclamation Board of the State of California to issue permits is limited to adopted flood control projects and agreements under the Colbey-Alquist Act. There is no evidence in this case that the Colbey-Alquist Act applies in that no flood control project has been adopted by the State of California on Dry Creek.

GIVEN: _____
 GIVEN AS MODIFIED: _____
 WITHDRAWN: _____
 REFUSED: _____

[Signature]
 JUDGE OF THE SUPERIOR COURT

DEFENDANTS' PROPOSED INSTRUCTION NO. 27

Ownership of real property can be established by deed,
 contract, or adverse possession. The elements of proof of owner-
 ship by adverse possession are actual open and notorious occupancy
 of the land by the claimants for a continuous period of five (5)
 years or more under claim of right. Proof that the boundary has
 been agreed to between the adjacent landowners is proof of ownership.
 Taxes must have been paid by the claimant for at least the five
 (5) year period. In determining whether taxes have been paid by
 the claimants, you should consider whether the boundaries were
 obvious to the assessor and whether or not reasonable assessment
 did include all of the claimed property.

People, ex rel Department of Public Works vs Myrin,
 256 Cal.App.2d 288; CC 1248, 1007, 318, 321

Fredericks vs. Sorenson,
 113 Cal.App.2d 759

Duncan vs. Peterson,
 3 Cal.App.3d 607

GIVEN: _____
 GIVEN AS MODIFIED: _____
 WITHDRAWN: _____
 REFUSED: _____ ✓

W. A. W.
 JUDGE OF THE SUPERIOR COURT

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DEFENDANTS' PROPOSED INSTRUCTION NO. 26

In determining the size of the larger parcel from which the property sought to be acquired in this action has been severed, and in order to determine severance damages you are entitled to consider all of the property which the Defendants Zisk prove that they own.

(Should follow BAJI 11.85)

GIVEN: _____
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: _____

C. W. W.

JUDGE OF THE SUPERIOR COURT

DEFENDANTS' PROPOSED INSTRUCTION NO. 15

In determining the fair market value of the property being taken, you will disregard any decrease in market value caused by the likelihood that it would be acquired for the public improvement, provided that there has been no unreasonable delay in commencing this action after the announcement of intent to condemn the subject property.

BAJI 11.79 MODIFIED

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GIVEN: _____

GIVEN AS MODIFIED: _____

WITHDRAWN: ✓ _____

REFUSED: _____

W W W
JUDGE OF THE SUPERIOR COURT

769

FILED

DEC 14 1977

MAURINE L. DOBBAS
COUNTY CLERK OF PLACER COUNTY

BY *P. Miller*
DEPUTY

41104

City of Raul vs. Zisk

MICROFILMED

Instructions Given 12-14-77

BAJI 11.99

EMINENT DOMAIN--COSTS

Costs of this action have nothing to do with the question of just compensation. They are not to be considered by you in your deliberation.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	<input type="checkbox"/>
Given as Requested	<input checked="" type="checkbox"/>	Given as Modified	<input type="checkbox"/>	Given on Court's Motion	<input type="checkbox"/>
Refused	<input type="checkbox"/>	<i>W. J. ...</i> _____ Judge			
Withdrawn	<input type="checkbox"/>				

Part 11

Part 11

EMINENT DOMAIN

11.98

771

(f) Burden of Proof—Costs

Analysis

Inst.No.

Eminent Domain—Burden of Proof (1971 Revision)11.98

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BAJI 11.98 (1971 REVISION)

EMINENT DOMAIN—BURDEN OF PROOF

In this action the defendant[s] has [have] the burden of proving, by a preponderance of the evidence, the market value of the property to be acquired [and the severance damage, if any, to defendant's remaining property].

[The plaintiff has the burden of proving, by a preponderance of the evidence, the special benefits, if any, accruing to defendant's remaining property.]

By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.

In determining whether the market value of the property to be acquired, [the severance damage, if any, to the defendant's remaining property] [the special benefits, if any, accruing to defendant's remaining property] [has] [have] been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon such market value [severance damages] [special benefits] regardless of who produced it.

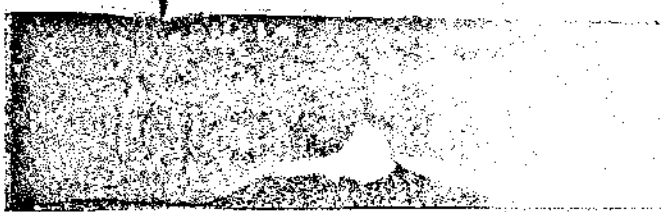
COMMENT

Monterey County v. Cushing, 83 Cal. 507, 23 P. 700; City of Santa Cruz v. Younger, 223 Cal.App.2d 818, 36 Cal.Rptr. 253; People v. Thomas, 108 Cal.App.2d 832, 239 P.2d 914.

Library References:

West's Key No. Digests, Eminent Domain ¶222(5), 26(1-5).

*W.A.N.
Gwen*



1971 July 1st

772

11.73

EMINENT DOMAIN

BAJI 11.73

FAIR MARKET VALUE DEFINED

"Fair market value" is defined as the highest price, in terms of money, for which [each of] the subject property [properties] would have sold on the open market on Nov. 1, 1971; the seller having a reasonable time within which to sell, and being willing to sell but not forced to do so; the buyer being ready, willing and able to buy but not forced to do so, and having a reasonable time and full opportunity to investigate the property in question and to determine its condition, suitability for use, and all of the things about the property that would naturally and reasonably affect its market value.

The property must be valued with reference to all the uses and purposes for which it is adaptable and available, including its highest and best use. This definition of fair market value presupposes that both parties are familiar with the property and all of its present adaptabilities and uses, and those uses which would be reasonably probable in the near future.

COMMENT

*Corven
W.A.W.*

The classic definition of fair market value is contained in Sacramento etc. R. R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979, to which later cases all refer. See People v. Ricciardi, 23 Cal.2d 390, 141 P.2d 799; Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co., 128 Cal.App. 713, 18 P.2d 413; Buena Park School Dist. v. Metrim Corp., 176 Cal.App.2d 255, 1 Cal.Rptr. 250.

"Fair market value" is not the exclusive standard by which to measure just compensation where such a standard is meaningless as in the condemnation of a public utility. Citizens Utilities Co. v. Superior Court, 59 Cal.2d 805, 31 Cal.Rptr. 316, 382 P.2d 356.

2.00 EVIDENCE & GUIDES—CONSIDERATION

PART 2
EVIDENCE AND GUIDES FOR ITS
CONSIDERATION

A. GENERAL RULES

Analysis

	Inst. No.
Direct and Circumstantial Evidence—Inferences	2.00
Weighing Conflicting Testimony	2.01
Failure to Produce Available Stronger Evidence	2.02
Wilful Suppression of Evidence	2.03
Failure to Deny or Explain Adverse Evidence	2.04
Limited Admission of Evidence—Parties or Purpose	2.05
Deposition Testimony	2.06
Interrogatories	2.07

BAJI 2.00

**DIRECT AND CIRCUMSTANTIAL EVIDENCE—
INFERENCES**

Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

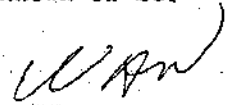
EVIDENCE STRICKEN

In addition to any evidence earlier stricken by the Court in your presence, the following evidence and all testimony explaining or interpreting that evidence has also been stricken by the Court:

- Exhibit C - Planning Commission minutes of February 23, 1967.
- Exhibit G - *Grading permit of March 3, 1972*
- Exhibit E-2 - Park and Streambed Plan which was repealed on June 15, 1977.
- Exhibit Q-4 - June 5, 1973 permit.
- Exhibit R - Environmental Impact Report of June 1973.
- Exhibit FF - City Council minutes of October 3, 1973.
- Exhibit XXX - Open Space and Conservation Element to The General Plan which was repealed on June 15, 1977.

Additionally, the Court has ordered stricken from evidence the portion of the testimony of William Zisk relating to the value, if any, in the grading work, fill, dredging or channelization done by Mr. Zisk or the hours devoted by him to such work.

You must not consider for any purpose any such evidence that has been stricken by the Court and such matter is to be treated as though you had never known of it.



Judge of the Superior Court

Given *in*

Refused

Modified

BAJI 15.20

JURY NOT TO TAKE CUE FROM JUDGE

I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest how you should decide any questions of fact submitted to you, or that I believe or disbelieve any witness.

If anything I have done or said has seemed so to indicate, you will disregard it and form your own opinion.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		<i>WAW</i> _____ Judge			
Withdrawn					

BAJI 15.22

ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE

The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case [including that of damages] must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict.

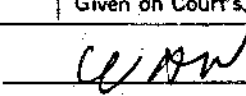
Requested by Plaintiff		Requested by Defendant	<input checked="" type="checkbox"/> Requested by	
Given as Requested		Given as Modified	Given on Court's Motion	
Refused		<i>W.M.W.</i> _____ Judge		
Withdrawn				

BAJI 15.30**JURORS TO DELIBERATE**

When you go to the jury room it is your duty to discuss the case for the purpose of reaching an agreement if you can do so.

Each of you must decide the case for yourself, but should do so only after a consideration of the case with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way simply because a majority of the jurors, or any of them, favor such a decision.

Requested by Plaintiff		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		 _____ Judge			
Withdrawn					

BAJI 15.31**HOW JURORS SHOULD APPROACH
THEIR TASK**

The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		<i>W. J. [Signature]</i> Judge			
Withdrawn					

15.32 CONCLUDING INSTRUCTIONS

BAJI 15.32

**EACH JUROR SHOULD DELIBERATE AND
VOTE ON EACH ISSUE TO BE DECIDED**

Each of you should deliberate and vote on each issue to be decided.

However, before you may return a verdict to the court, at least nine jurors must agree on it in its final and complete form, so that each of those nine or more may be able to state truthfully that the verdict is his.

COMMENT

2 Witkin, Calif.Proc., Trial, § 83.

To arrive at a legal verdict at least nine identical jurors must agree to the entire verdict. *Schoenbach v. Key System Transit Lines*, 168 Cal.App.2d 302, 335 P.2d 725. See, *Earl v. Times-Mirror Co.*, 185 Cal. 165, 196 P.2d 57; *Nelson v. Superior Court*, 26 Cal.App.2d 119, 78 P.2d 1037; *Balero v. Littell*, 124 Cal.App. 190, 12 P.2d 41; *Kirby v. Adcock*, 116 Cal.App.2d 570, 253 P.2d 700.

Library References:

West's Key No. Digests, Trial C-217.

*Given
LAW*

BAJI 15.33 (1975 Revision)**CHANCE OR QUOTIENT VERDICT PROHIBITED**

The law forbids you to determine any issue in this case by chance. Thus, if you determine that a party is entitled to recover, you must not arrive at the amount of damages to be awarded [or any percentage of negligence] by agreeing in advance to take the independent estimate of each juror of the amount to be awarded [or such percentage], then to total such estimates, divide such total by twelve and to make such resulting average the amount of your award [or percentage].

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		<i>[Signature]</i> Judge			
Withdrawn					

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3.

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You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In this regard, it is only necessary that nine of you agree as to each item set forth on the form of verdict which will be given to you. It is not necessary that the same nine jurors agree on all of the items, as long as nine have agreed on each. As soon as you shall have agreed upon a verdict, you shall have it signed and dated by your foreman and then shall return with it to this room.

W AN

JUDGE OF THE SUPERIOR COURT

Authorities:

Code of Civil Procedure, Sections 613 and 618
City of Los Angeles v. Frew, 139 C.A.2d 859 (1956)
A modification of BAJI 15.50

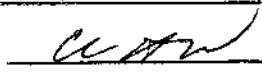
Given _____
Refused _____
Modified _____

Verdict - Concluding Instruction - More than One Issue

BAJI 15.50 (1976 Revision)

CONCLUDING INSTRUCTION

You shall now retire and select one of your number to act as foreman who will preside over your deliberations. As soon as nine or more of you have agreed upon a verdict [and, if your verdict is in favor of the plaintiff, nine or more identical jurors have agreed upon every answer required in the direction for special findings], you shall have the verdict [and the special findings] signed and dated by your foreman and then shall return with your verdict [and special findings] to this room.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		 Judge			
Withdrawn					

BAJI 1.00

RESPECTIVE DUTIES OF JUDGE AND JURY

Ladies and Gentlemen of the Jury:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, prejudice or passion.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested	<input checked="" type="checkbox"/>	Given as Modified		Given on Court's Motion	
Refused		<i>W/aw</i>			
Withdrawn					

Judge

BAJI 1.01
INSTRUCTIONS TO BE CONSIDERED
AS A WHOLE

If in these instructions any rule, direction or idea is repeated or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested	<input checked="" type="checkbox"/>	Given as Modified		Given on Court's Motion	
Refused		<i>[Signature]</i> Judge			
Withdrawn					

BAJI 1.02

**STATEMENTS OF COUNSEL—EVIDENCE
STRICKEN OUT—INSINUATIONS
OF QUESTIONS**

You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you had never known of it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused		<i>W. H. W.</i> Judge			
Withdrawn					

BAJI 2.01

WEIGHING CONFLICTING TESTIMONY

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. The testimony of one witness worthy of belief is sufficient for the proof of any fact. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested	<input checked="" type="checkbox"/>	Given as Modified		Given on Court's Motion	
Refused		<i>[Signature]</i> Judge			
Withdrawn					

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DEFENDANTS' PROPOSED INSTRUCTION NO. 2

BAJI 2.02

FAILURE TO PRODUCER AVAILABLE STRONGER EVIDENCE

If weaker and less satisfactory evidence is offered by a party, when it was within his power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

GIVEN: ✓

GIVEN AS MODIFIED: _____

WITHDRAWN: _____

REFUSED: _____

W. J. ...
JUDGE OF THE SUPERIOR COURT

BAJI 2.06
DEPOSITION TESTIMONY

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

Requested by Plaintiff	<input checked="" type="checkbox"/>	Requested by Defendant	<input type="checkbox"/>	Requested by	<input type="checkbox"/>
Given as Requested	<input checked="" type="checkbox"/>	Given as Modified	<input type="checkbox"/>	Given on Court's Motion	<input type="checkbox"/>
Refused	<input type="checkbox"/>	<i>W. A. N.</i> Judge			
Withdrawn	<input type="checkbox"/>				

CREDIBILITY OF WITNESS

You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case.

In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to the following:

His demeanor while testifying and the manner in which he testifies;

The character of his testimony;

The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies;

The extent of his opportunity to perceive any matter about which he testifies;

His character for honesty or veracity or their opposites;

The existence or nonexistence of a bias, interest, or other motive;

A statement previously made by him that is consistent with his testimony;

A statement made by him that is inconsistent with any part of his testimony;

The existence or nonexistence of any fact testified to by him;

His attitude toward the action in which he testifies or toward the giving of testimony;

His admission of untruthfulness.

Requested by Plaintiff	<input checked="" type="checkbox"/> Requested by Defendant	<input checked="" type="checkbox"/> Requested by	
Given as Requested	<input checked="" type="checkbox"/> Given as Modified	<input type="checkbox"/> Given on Court's Motion	
Refused			
Withdrawn		<u>W. H. W.</u>	Judge

BAJI 2.40

EXPERT TESTIMONY—QUALIFICATIONS OF EXPERT

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his opinion as an expert as to any matter in which he is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

Requested by Plaintiff	<input checked="" type="checkbox"/> Requested by Defendant	<input checked="" type="checkbox"/> Requested by	
Given as Requested	<input checked="" type="checkbox"/> Given as Modified	Given on Court's Motion	
Refused			
Withdrawn		<i>W. H. ...</i>	Judge

DEFENDANTS' PROPOSED INSTRUCTION NO. 4

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BAJI 2.42

HYPOTHETICAL QUESTIONS

Questions have been asked in which an expert witness was asked to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

GIVEN: ✓
GIVEN AS MODIFIED: _____
WITHDRAWN: _____
REFUSED: _____

C. J. Han
JUDGE OF THE SUPERIOR COURT

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DEFENDANTS' PROPOSED INSTRUCTION NO. 6

Whenever evidence was submitted for a limited purpose,
you must not consider it for any other purpose.

Your attention was called to these matters when the
evidence was admitted.

BAJI 2.05 MODIFIED

GIVEN: ✓

GIVEN AS MODIFIED: _____

WITHDRAWN: _____

REFUSED: _____

W. R. W.
JUDGE OF THE SUPERIOR COURT

DEPENDANTS' PROPOSED INSTRUCTION NO. 7

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Under the law of this State, all private property is held subject to the necessary right of eminent domain, which is the right of the State or its authorized entities to take private property for public use whenever the public interest so requires. The right of eminent domain is exercised through proceedings commonly called a condemnation action. This is such an action. Plaintiff herein, the City of Roseville, is authorized to exercise the right of eminent domain to acquire the property here under consideration for public park ^{and bicycle paths} purposes.

BAJI 11.70 MODIFIED

GIVEN: *[Signature]*
GIVEN AS MODIFIED: *[Signature]*
WITHDRAWN: _____
REFUSED: _____

[Signature]
JUDGE OF THE SUPERIOR COURT

DEFENDANTS' PROPOSED INSTRUCTION NO. 9

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The compensation to which the property owners are entitled is the fair market value of the property and severance damage *you* determined in the manner stated in the instructions I will give you.

In determining just compensation, you must consider market value as of the date of valuation which is November 1, 1977.

However, in valuing the property, you must consider its physical condition as it was on December 20, 1973.

GIVEN: ✓
GIVEN AS MODIFIED: ✓
WITHDRAWN: _____
REFUSED: _____

W. H. W.

JUDGE OF THE SUPERIOR COURT

BAJI 11.75

VALUE OF USE TO PARTIES NOT TEST

The subject property may not be valued with reference to what it was worth to the defendant for speculation or merely for possible uses, nor what the defendant claims it was worth to him; nor what it may be worth to the plaintiff for the purpose[s] for which it is being acquired.

Requested by Plaintiff		Requested by Defendant	<input checked="" type="checkbox"/>	Requested by	
Given as Requested	<input checked="" type="checkbox"/>	Given as Modified		Given on Court's Motion	
Refused					
Withdrawn				<u>W. H. W.</u>	Judge


1 may have been placed in your files but which are not a part of
2 the record in this case.

3 NOTICE IS FURTHER GIVEN that the following exhibits shall
4 be copied into such transcript: 7, 8, 9, 13, 17, 18, 20, 21, 22,
5 23, 24, 25, 26, 27 and 28.

6 NOTICE IS FURTHER GIVEN that Volume I of the Clerk's
7 Transcript on Appeal in Placer County No. 41105 is incorporated
8 into your transcript by this reference, but such prior transcript
9 need not be otherwise copied or included in this transcript
10 (Rule 11(b)).

11 NOTICE IS FURTHER GIVEN that all of the exhibits are
12 deemed a part of the Clerk's transcript pursuant to Rule 5(a),
13 even though such exhibits have not been designated for copying
14 for inclusion in this transcript. Plaintiff, respondent and
15 cross-appellant intends to request their transmission to the
16 Court of Appeal at the appropriate time pursuant to Rule 10(d).

17 DATED: June 28, 1978
18

19
20 
21 DENNIS W. DE CUIR, City Attorney,
22 Attorney for Plaintiff, Respondent
23 and Cross-Appellant City of Roseville
24
25
26
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1 STATE OF CALIFORNIA)
2 COUNTY OF PLACER)

DECLARATION OF MAILING

3
4 As Deputy County Clerk of the County of Placer, I
5 declare that on the 11 day of October 1978, I mailed
6 a true and correct copy of Clerk's ~~and Reporter's~~ Transcript
7 on Appeal by depositing same in the United States Post Office
8 at Auburn, County of Placer, State of California, enclosed
9 in a sealed envelope with postage prepaid, to the following:


10
11 DESMOND, MILLER, DESMOND & BARTHOLOMEW
12 1006 9th Street, #900
13 Sacramento, CA 95814

14 DENNIS W. DE CUIR
15 316 Vernon Street
16 Roseville, CA 95678

17 CLERK'S TRANSCRIPT IN THREE VOLUMES
18
19
20

21 I declare under penalty of perjury that the foregoing
22 is true and correct.

23 Executed at Auburn, California on 10-11-78

24
25
26 
27 (Signature of Declarant)
28