

**In the United States Court of Federal Claims**

**FILED**  
AUG 1 2007  
U.S. COURT OF  
FEDERAL CLAIMS

**CONGRESSIONAL REFERENCE  
TO THE  
UNITED STATES COURT OF FEDERAL CLAIMS**

**Congressional Reference No. 02-746X**

**NOT FOR PUBLICATION  
(Filed August 1, 2007)**

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**SARABETH M. DAVIS, ROBERT S.  
BORDERS, VICTOR MARON,  
IRVING BERKE, and ADELE E.  
CONRAD,**

**Plaintiffs,**

**v.**

**THE UNITED STATES,**

**Defendant.**

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*Laurie M. Erickson*, Huntington Beach, California, for plaintiffs.

*Steven D. Bryant*, Washington, D.C., with whom were Trial Attorney *Kelle S. Acock*, and *Acting Assistant Attorney General Matthew McKeown*, for defendant. *Major Patrick L. Gary*, U.S. Army Litigation Division, Of Counsel.

**REPORT OF THE REVIEW PANEL**

Before the Review Panel: BOHDAN A. FUTEY, Senior Judge, Presiding Officer, and FRANCIS M. ALLEGRA, Judge, and LAWRENCE S. MARGOLIS, Senior Judge, Members of the Panel.

This congressional reference case comes before the court on Plaintiffs' Brief Of Exceptions To The Findings And Conclusions In The Hearing Officer's Report

And Request For Oral Argument. On September 15, 2006, Judge Thomas Wheeler, as the Hearing Officer in this case, issued his report finding that plaintiffs do not have a legal or equitable claim and, therefore, any award would be a gratuity. *See Davis v. United States*, 72 Fed. Cl. 731 (2006). Plaintiffs argue that the Hearing Officer made mistakes of fact and law in his report and that their claim is equitable.

Under 28 U.S.C. § 2509(d), “[t]he findings and conclusions of the hearing officer shall be submitted by him . . . to the review panel for review by it pursuant to such rules as may be provided for the purpose . . . . The panel, by majority vote, shall adopt or modify the findings or conclusions of the hearing officer.” The Review Panel may only set aside the Hearing Officer’s factual findings if it finds them “clearly erroneous.” *See* RCFC App. D, ¶ 8(d). “The hearing officer’s legal conclusions are reviewed *de novo*.” *Kanehl v. United States*, 40 Fed. Cl. 762, 766 (1998) (citing *Merchants Nat’l Bank of Mobile v. United States*, 7 Cl. Ct. 1, 9 (1984)). The Review Panel does not find the factual findings clearly erroneous and adopts the Hearing Officer’s findings of fact.

### Discussion

Plaintiffs argue that the Hearing Officer erred by concluding that the government’s alleged failure to follow applicable regulations in issuing the 1989 Air Installations Compatible Use Zones (“AICUZ”) report was not wrongful and, therefore, any award would be a gratuity. Plaintiffs claim that because the government did not follow the AICUZ regulations, the 1989 AICUZ study misrepresented the proximity of the clear zone to plaintiffs’ property. As a result, plaintiffs allege that the City of Los Alamitos, California declined to issue a conditional use permit (“CUP”) that would have allowed plaintiffs to complete a sale of their property to Grace Church. In addition, plaintiffs aver that they were subsequently unable to sell their property, and the bank eventually foreclosed on the property. Plaintiffs maintain that, on this basis, their claim is equitable.

Defendant asserts that the 1989 AICUZ study did not cause plaintiffs’ alleged damages. Instead, defendant argues, the Los Alamitos City Council denied the CUP for many reasons other than the fact that, according to the 1989 AICUZ, plaintiffs’ property was immediately adjacent to the clear zone. The City Council did express concern about the proximity of the proposed church to the clear zone, however, defendant claims that this is immaterial because safety was an issue before defendant published the AICUZ. Defendant concludes, therefore, that because the government did not act wrongfully, the Hearing Officer was correct in his conclusion that any award would be a gratuity.

This court has declared that “[a]n equitable claim in a congressional reference must rest on the violation of a duty found through positive law.” *INSLAW, Inc. v.*

*United States*, 40 Fed. Cl. 843, 858 (1998) (citing *Menominee Indian Tribe v. United States*, 39 Fed. Cl. 441, 458 (1997)). In other words, the court must find that the government owed a duty to the plaintiffs and that the government breached that duty. *Id.* During oral arguments, plaintiffs' attorney stated that the government's violation of the Department of Defense AICUZ Instruction would be per se negligence, i.e., wrongful conduct triggering equitable liability. As the court explained in *INSLAW*, however:

[a] statute or regulation can be adopted as the standard of conduct where the purpose of that regulation is to protect a class of persons including plaintiffs, to protect the particular interest invaded, to protect that interest against the kind of harm that resulted, and to protect that interest against the particular hazard from which the harm results.

*Id.* In that case, the Review Panel found that the Code of Federal Regulations provision the government allegedly violated did not create a duty to the plaintiffs because its purpose was primarily to protect the general public by establishing government contracting standards, not to protect specific government contractors from individual harm. *Id.* at 858-59.

The situation in the instant case is quite similar. The AICUZ Instruction is designed to protect the integrity of the process, the general public, and nearby municipalities, not individual landowners. *See* Air Installations Compatible Use Zones, Def. Instruction No. 4165.57 § 4.2.1 (1977). The 1989 AICUZ Study reiterates these objectives. It states that the Study "is intended as a planning guide for the Department of Defense, United States Army, California National Guard, and local governments to assist in orderly development of civilian and military communities by providing advance information regarding aviation impacts upon adjacent land uses." Plaintiffs' Opposition To Defendant's Motion For Summary Judgment, Exhibit J at 12. The Study also notes that it "is intended to inform the general public about the AICUZ program . . ." *Id.* Neither the Instruction nor the Study mentions individual landowners such as plaintiffs. Because they do not create a duty to the plaintiffs, the government's conduct cannot be considered wrongful in determining whether equitable relief is warranted.

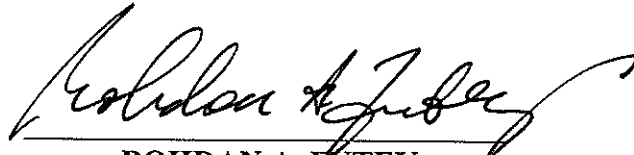
Plaintiffs also assert that the Hearing Officer erred in failing to apply California's causation standard here. Under that standard, "a cause in fact is something that is a substantial factor in bringing about the injury." *Lineaweaver v. Plant Insulation Co.*, 37 Cal. Rptr. 2d 902, 905 (Cal. Ct. App. 1995) (citations omitted); *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052-53, 1052 n.7 (1991); *Vesely v. Sager*, 5 Cal. 3d 153, 163 (1971) ("[A]n actor may be liable if his negligence is a substantial factor in causing an injury"). It is at least arguable that California law

should apply as to this point, since that law would have applied had plaintiffs initiated suit under the Federal Torts Claims Act. *See* 28 U.S.C. § 1346(b); *United States v. Muniz*, 374 U.S. 150, 152-53 (1963); *see also Richards v. United States*, 369 U.S. 1, 2-3 (1962). Nonetheless, we agree with the Hearing Officer in concluding that plaintiffs have not shown that the Department of the Army, in producing the 1989 AICUZ study, was a substantial factor causing the City of Los Alamitos to deny Grace Church's application for a conditional use permit. In fact, the evidence put forth by plaintiffs is decidedly to the contrary, indicating that the city had numerous concerns and bases for rejecting the application, including an anticipated loss of tax revenue. Thus, even if the California standard of causation applies, plaintiffs cannot carry their burden.

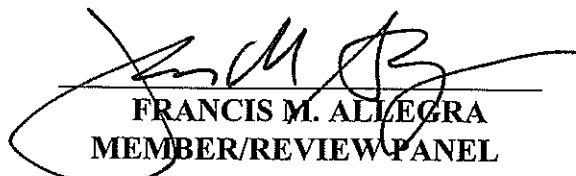
Conclusion

Accordingly, for the reasons stated above, the Review Panel adopts the well supported findings and the conclusion of the Hearing Officer that plaintiffs have neither a viable legal or equitable claim against the United States stemming from the events at issue and that, consequently, any payment to plaintiffs would constitute a gratuity. This report shall be forwarded to the Chief Judge for submission to Congress pursuant to 28 U.S.C. § 2509.

**FOR THE REVIEW PANEL:**



**BOHDAN A. FUTEY  
PRESIDING OFFICER**



**FRANCIS M. ALLEGRA  
MEMBER/REVIEW PANEL**



**LAWRENCE S. MARGOLIS  
MEMBER/REVIEW PANEL**