

ORIGINAL

Decision No. 76268

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MICHAEL A. and DEBORAH K. DREILING,)

Complainants,)

vs.)

The Estate of William Gardner,)

Defendant.)

Case No. 8926
(Filed June 18, 1969)

Michael A. Dreiling, in propria persona,
for complainants.
Marvin G. Giometti, of Barbieri, Giometti,
McCarthy & Steiner, for defendant.
W. B. Stradley, for the Commission staff.

O P I N I O N

Complainants, who purchased a home on Balboa Avenue at Inverness Park in March, 1968, allege that since November, 1968, they have been deprived, by pollution of source facilities and refusal of the owner of the water system to deliver water from a replacement well, of water formerly supplied to them by William Gardner, a neighbor. They ask that the defendant estate (William Gardner died May 26, 1969) be declared a public utility; that the system, including the new well installed on a parcel of Gardner's land by a federal agency in August, 1968, and connected by the agency to the system, be declared dedicated to public use, and that the estate be required to supply water to complainants from the new source.

The estate, by its answer, denies the material allegations of the complaint and any obligation to furnish water to complainants or anyone else, and admits that no payments for water by any user have been made, as complainants allege, since 1961. Defendant

interposes a general demurrer to the complaint, and by a special defense asserts that the action is barred by complainants' failure to file a claim with the administrator or the court in pending administration proceedings (Estate of William Gardner, Deceased, No. 188736, Superior Court, San Francisco).

The complaint states a cause of action within the Commission's jurisdiction (Public Utilities Code, Section 2707). Complainants' failure to file a claim with the administrator or the court is no bar to disposition of the complaint here, as the Commission has exclusive jurisdiction in a matter of this kind, subject to review of its action by the Supreme Court (Public Utilities Code, Section 1759).

We pass to the basic issue - whether or not the Gardner water system has been dedicated to public use. If so, it will be subjected to appropriate regulation by this Commission; if not, the complaint will be dismissed. The case was submitted at the conclusion of a public hearing held July 29, 1969, at Point Reyes Station, before Examiner Gregory.

Alois Gardner, Sr., William's father, constructed a water system in the early 1900's to obtain water for his residence on upper Balboa Avenue and for his two residential properties - one of which was called the "White House" - at the corner of lower Balboa Avenue and what is now Sir Francis Drake Boulevard, in Inverness Park. The community, located in an area at the head of Tomales Bay formerly devoted chiefly to hunting and fishing, has become basically a retreat for summer and weekend vacationers, who, with a number of year-round residents, maintain their homes along, or on the vicinity of, Balboa Avenue, on the lower slopes of Inverness Ridge.

The community, according to Commission records of which we here take official notice of two proceedings,^{1/} has had public utility water service, at least since 1944, from James L. Downey, who with his partner, Porter, purchased the spring-fed water system of the Tomales Bay Land Company that had long supplied water in that locality. Downey's system has been subject to recurring water shortages in dry seasons. The Commission, in 1961, directed him to improve and safeguard the quality of his water supply. This record does not reveal whether the Gardner properties, or the premises supplied by his system since the late 1920's or early 1930's, as discussed later, ever received water service from Downey or his predecessors, with one recent exception.

The Gardner system, until August, 1968, when a pumped well was installed by a federal agency to replace polluted surface source facilities, consisted of a rock catch basin on Inverness Ridge, from which water flowed, by gravity, through 1-1/2 miles of 1-1/2 inch pipe to a 1,500-gallon tank south of Balboa Avenue at a point between Gardner's upper and lower properties. A pipeline connected that tank with the two lower premises. Another pipeline connected the 1,500-gallon tank with a 2,000-gallon tank on Gardner's premises on upper Balboa Avenue. All transmission, storage and distribution facilities were at lower elevations than the rock basin source. Supply and pressure were regulated by a system of valves.

In the late 1920's or early 1930's Alois Gardner, Sr., during then prevailing dry spells, permitted three neighbors close by his

^{1/} Granucci, et al., dba Tomales Bay Land Co. - transfer - Porter and Downey, dba Inverness Park Water Company, Decision No. 37392, dated October 10, 1944, Application No. 26242, Case No. 4725. Storer v. Inverness Park Water Company, Decision No. 62328, dated July 25, 1961, Case No. 7061.

upper Balboa Avenue residence to draw water from his 2,000-gallon tank. (The record does not show whether other close neighbors, during that time, were accorded the same privilege.) In April, 1937, a Mrs. Helen Smith acquired, and still occupies, one of the two lower Gadner residences which were then receiving water from the 1,500-gallon tank. Mrs. Smith paid Joe Gadner (Alois, Sr.'s brother, who managed the system and who occupied the "White House", next door to Mrs. Smith, from 1930 until his death in 1962) an annual sum of \$15 for her domestic water - she used nearby creek water for irrigation - until Joe's death. Thereafter, she paid nothing to the Gadners, including William, who earlier had succeeded to the Gadner properties and water system after his father's death. Mrs. Smith testified that following Joe's death she had arranged (at some time not disclosed by the record) with Downey's local manager for a connection to one of Downey's pipe lines in the vicinity of her premises.

From what is shown by this record, it appears that, at least during the 1930's, Gadner's neighbors on upper Balboa Avenue were not charged for the water obtained from his 2,000-gallon storage tank. Instead, in what seems to have been a spirit of neighborly cooperation, they provided occasional sums for maintenance of the system. Later, when predecessors of more recent owners acquired the premises, annual sums, ranging from \$15 to \$25, though not billed were collected by Joe - and then by William - from those who used water from the system. Among them was Mrs. Flora Nave, who purchased one of the premises in 1946. She testified that she paid \$15 a year initially, that she later received a letter from William requesting \$25, but that she finally negotiated payments of \$20. She sold her property, some seven years ago, to the Tachouets, who have occupied the premises chiefly on weekends.

Marvin Franke, who purchased the Bukowski property (two doors away from Mrs. Nave's residence) seven years ago, acted as manager for the Gadner system until he sold his property about three weeks before the hearing. He testified that when he purchased the premises water from the Gadner system had cost \$25 per year, but that when he talked to William Gadner about payment for water, Gadner refused to take any money. The system, Franke stated further, had experienced "problems", over the years, during wintertime. When Gadner refused to let him have water from the 2,000-gallon tank, after replacement, in August, 1968, of the polluted source facilities, Franke drilled a well and installed a pump on his property.

Complainants purchased their home, situated across Balboa Avenue from the Gadner residence and below the 2,000-gallon reservoir, in March, 1968. Water was then being supplied from the Gadner system. Complainants offered to pay Gadner for the water, but he refused to take any money. The supply gradually deteriorated, due to improper maintenance of a chlorinator ordered installed after samples, analyzed in 1965 by county health officers, revealed bacteriological contamination, and also due to turbidity resulting from sediment deposited in the rock catch basin during road work on the Point Reyes National Seashore Project. An agency of the Department of the Interior, after discussions with complainants and with Franke and Gerald Ford (of the Seashore Project), agreed with Gadner to install a well and pump on a parcel of Gadner's land south of Balboa Avenue and to run a supply line from the well to the 2,000-gallon tank. The tank was then filled with water from the well. Gadner refused to supply water to complainants from the new source, stating that he was not in the "water business", but he left in place the existing pipe line connected to the polluted rock basin source.

By November, 1968, complainants' water supply was unfit for domestic use and by March, 1969, it ceased flowing in the pipe. They have since transported water to their home from a public park, miles distant. All samples of Gardner's system water originating in the polluted source, analysed subsequent to October, 1968, by county health authorities, have shown unacceptable levels of bacteriological contamination and turbidity.

Complainants, during the crisis in their water supply, attempted to secure a connection to Downey's nearby system. In December, 1968, they received a telephone call from Downey, who stated that he had insufficient water during summertime, but that if Gardner would relinquish the rights to his water sources he (Downey) would provide water service to complainants.

The foregoing summarizes the evidence received at the hearing, in addition to the two Commission proceedings here officially noticed for the purpose of indicating some historical background to this controversy.

Determination of whether or not private property has been dedicated to public use, so as to invoke public regulation of such property and use, depends upon whether the devotion to public use has been of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that the service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable rates. To hold that property has been dedicated to a public use is not a trivial thing, and such dedication is never presumed without evidence of unequivocal intention. (See Allen v. Railroad Comm. (1919), 179 Cal. 68; Richardson v. Railroad Comm. (1923), 191 Cal. 716 and authorities therein cited.)

The record here, in our opinion, fails to establish that Alois Gadner, Sr., or his son, William, ever supplied water to their close neighbors or to the more distant premises occupied by Mrs. Smith, or to any other person, in a manner consistent with an unequivocal, or other, intention of conferring upon such persons the legal right to be served with water from the Gadner system, as originally constituted or as improved by the replaced source facilities installed in August, 1968.

The fact that the Gaders received certain payments commencing in the late 1920's or early 1930's, from those who, with permission, received water from the system during times of scarcity, and continued to receive payments, until about 1961, from those persons or their successors in interest, is not conclusive on the question of the status of the water supply as that of a public service or otherwise. Such payments, originally made by users for the purpose of defraying occasional maintenance expenses, though later converted into what seems to have been an annual charge, also - so far as this record reveals - for maintenance, were discontinued, about 1961, and subsequent offers of payment for water were actually refused by William Gadner. In addition, the evidence shows that in all the years during which the Gadner system has been operating, no proceeding, formal or informal, has been before this Commission, until the present complaint, for any purpose connected with its status, rates, or operation.

Section 2704 of the Public Utilities Code provides that -

"Any owner of a water supply not otherwise dedicated to public use and primarily used for domestic purposes by him or for the irrigation of his lands, who (a) sells or delivers the surplus of such water for domestic purposes or for irrigation of adjoining lands, ... or

(c) sells or delivers a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available, is not subject to the jurisdiction, control, and regulation of the commission."

We hold that the circumstances in which the Gadners' neighbors, including Mrs. Helen Smith, originally received and continued to receive water from the Gardner system, as disclosed by this record, lead inescapably to the conclusion that such water was supplied by the Gadners as an accommodation, within the meaning and purpose of subparagraph (c) of the code section quoted above. It follows that the complaint herein must be dismissed.

Findings and Conclusions

The Commission, on this record, finds that:

1. Alois Gardner, Sr., and following his death his son, William Gardner (now deceased), during their lifetimes owned and maintained a water system at Inverness Park, Marin County, for the purposes of supplying their properties with water primarily for domestic use.
2. Said water system, commencing in the late 1920's or early 1930's and terminating about August, 1968, supplied water, with the Gadners' permission or acquiescence and by way of neighborly accommodation, to four premises at Inverness Park described herein above.
3. Neither Alois Gardner, Sr. nor his son, William Gardner, during their lifetimes, either by act or intent, offered to supply or supplied water from their system to the public in general, or to any limited portion of the public at Inverness Park, other than as an accommodation to neighbors to whom no other water supply for domestic purposes was equally available.

The Commission, therefore, concludes that complainants have failed to establish dedication, by Alois Gardner, Sr. or William Gardner, his son, of their water supply to public use, and that their complaint herein should be dismissed.

O R D E R

IT IS HEREBY ORDERED that the complaint of Michael A. and Deborah K. Dreiling, filed herein on June 18, 1969, be and it hereby is dismissed.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 15th day of OCTOBER, 1969.

William Gardner, Jr.
President
Augustine
John
Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.