

ALJ/emk/jt

ORIGINAL

Decision 82 12 010 DEC 1 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LA CANADA FLINTRIDGE DEVELOPMENT CORPORATION,)

Complainant,

vs.

MESA CREST WATER COMPANY, a corporation,

Defendant.

Case 82-10-04
(Filed October 12, 1982)

Gilbert Dreyfuss, Attorney at Law,
for complainant.

Frank W. Doherty, Attorney at Law,
for defendant.

O P I N I O N

Complainant La Canada Flintridge Development Corporation (LCFDC), a California corporation, seeks an order providing that defendant Mesa Crest Water Company (Mesa Crest) immediately commence to serve and continue to serve Tract 33531 located in the City of La Canada Flintridge (City) with water. LCFDC also requests an early hearing and an order that Mesa Crest shall pay for actual or consequential damages caused by Mesa Crest's delay in providing water to Tract 33531.

A duly noticed hearing was held before Administrative Law Judge N. R. Johnson in Los Angeles on November 9, 1982, and the matter was submitted.

Testimony was presented on behalf of LCFDC by City's planning director, Donald H. Otterman; by Nelson and Belding Contracting Corporation's (Nelson and Belding) construction foreman, Ernest Roemhild, and its general superintendent and equipment manager, Vernon L. Seyfried; by the project manager and designer of the subdivision employed by the engineering firm of Sikand and Associates, Gerald R. Price; and by the general manager of Mesa Crest, F. Patrick Flynn. Mesa Crest limited its showing to cross-examination of the various witnesses and arguing the merits of the case.

Background

Tract 33531, owned by LCFDC, is an 82-lot residential subdivision located in City. Concurrent with the recording of the final subdivision map LCFDC executed a subdivision improvement agreement with City calling for the completion of all public improvements and posted improvement security bonds with City for \$2,496,040 to insure that obligation. Included in this improvement security bond was a faithful performance bond for \$800,000 and a labor and material bond for \$400,000 to assure completion of all water facilities for Tract 33531. Although LCFDC had entered into a main extension contract with Mesa Crest dated August 5, 1981, it chose to exercise the option provided in Section C.1.c. of Mesa Crest's extension rule, which permits a subdivider to arrange for the installation of the necessary facilities under competitive bidding procedures. Such a procedure was implemented resulting in LCFDC and Mesa Crest agreeing to award the contract for the construction of on-site water facilities to L.D.M. Pipeline, Incorporated (LDM). This agreement was executed by Mesa Crest and LDM on November 17, 1981.

LDM rendered progress billings to Mesa Crest who forwarded such billings to LCFDC for payment. LCFDC elected to pay the bills directly to LDM rather than give the money to Mesa Crest for forwarding to LDM. During the course of the construction of the water system certain controversies arose among LCFDC, LDM, and other contractors performing work in Tract 33531. As a result, LCFDC chose to withhold payments to LDM equal to the amounts in controversy with LDM and the other contractors. LDM filed a mechanic's lien naming Mesa Crest, LCFDC, and Does 1 to 20, inclusive, as defendants. The mechanic's lien is for \$42,273.37 plus annual interest at 7% from August 6, 1982 until the matter is settled. Mesa Crest has withheld providing water to the LCFDC development until the controversies have been resolved.

Position of LCFDC

Testimony presented on behalf of LCFDC indicated that:

1. The grading and street improvements were done by Nelson and Belding.
2. The total damage done by Nelson and Belding in performing its construction work consisted of damaging one service main and one fire hydrant.
3. Nelson and Belding provided a laborer on the job whose sole duty was to assure that the marking of the various service laterals with 4-foot laths was maintained.
4. The project manager was on the construction premises on the average of two or three times a week and spent one to four hours each visit.

5. The project manager noted that LDM moved and drove over sandbags which were used for erosion control negating the effect of the placing of such sandbags.
6. The project manager recommended LCFDC backbill LDM the cost of replacement of the earth eroded away because of the removal of the erosion control sandbags.
7. The storm drains were installed by the firm of Colich and Son. The initial schedule called for the installation of the storm drains on the west side of the project with the work to be completed by December 1981. It was planned that during this period LDM would install the water system on the east side of the development and move to the west side of the project after the storm drain work was completed. However, the installation of the storm drains was delayed until after the entire water system was installed with the result that the installation of the storm drains was made more difficult by having to place them under the then existing water pipes.
8. Mesa Crest was well-satisfied with the quality of work performed by LDM.
9. There is in existence Faithful Performance Bond No. 103028 from Developer's Insurance Company (DICO) and LCFDC in favor of City and Labor and Material Bond No. 103028A from DICO and LCFDC to the "benefit of any and all persons, companies, and corporations entitled to file claims under Title 15...so as to give a right of action to them or

their assigns in any suit brought upon this bond" which, according to testimony, may be acted on to pay moneys found to be owed any and all of the contractors involved in the construction of the water system in Tract 33531.

10. There are no claims of lien filed against the subdivision other than that of LDM.
11. City requires the planting of slopes as part of the public improvements and will not issue any building permits until the slopes are planted.
12. There were nine bidders for the subdivision water system of which LDM was the lowest.

LCFDC agrees that Mesa Crest is entitled to be assured that it will not be responsible for any moneys payable to LDM. However, LCFDC argues that this contingency is provided for in the labor and material bond as well as by the set aside of funds at the Bank of California. LCFDC further states it is prepared to cause Bank of California to issue a further specific "set aside" letter to guarantee that LDM will be paid in full if such further assurance is necessary.

Position of Mesa Crest

The evidence presented by Mesa Crest was elicited through the cross-examination of Mesa Crest's general manager, Flynn, and its attorney, Frank W. Doherty, which indicated that:

1. Mesa Crest did not request an advance deposit from LCFDC of the full amount of the job prior to the commencement of construction as it was entitled to do under the provisions of the extension rule.

2. Mesa Crest agreed to forward any invoices received from LDM to LCFDC for payment.
3. LCFDC paid invoices as due directly to LDM through July 1982.
4. Mesa Crest is presently earning approximately 2% to 3% rate of return.
5. The water refund contract is the only contract in existence between Mesa Crest and LCFDC. LCFDC is not a party to a contract for the installation of the water system.
6. The total amount claimed due by the various contractors for the subdivision is \$43,153.70 of which \$28,208.34 is claimed due by LDM.

Mesa Crest argues that had it collected as an advance deposit the full amount of the construction of the water system as it was entitled to, LDM would have been paid in full upon completion of the water system and this matter would not now be before the Commission. Mesa Crest further argues that it is unfair to penalize it for its leniency in not collecting the full amount in advance. According to Mesa Crest, the matter of the moneys owed to the various contractors who participated in the construction of the water system for the subdivision is presently a matter of litigation before the Superior Court in the County of Los Angeles and that this is the proper tribunal for the hearing of such a matter.

Discussion

The focal point of the dispute subject to our jurisdiction relates to the proper application of the principles of the extension rule governing installations to subdivisions. Main Extension Rule 15, Section C.1.a., provides:

"1. Advances

- a. Unless the procedure outlined in Section C.1.c. is followed, an applicant for a main extension to serve a new subdivision, tract, housing project, industrial development or organized commercial district shall be required to advance to the utility, before construction is commenced, the estimated reasonable cost of the extension to be actually installed, from the nearest utility facility at least equal in size or capacity to the main required to serve both the new customers and a reasonable estimate of the potential customers who might be served directly from the main extension without additional extension. The costs of the extension shall include necessary service stubs or service pipes, fittings, gates and housing therefor, and meter boxes, but shall not include meters. To this shall be added the cost of fire hydrants when requested by the applicant for the main extension or required by public authority, whenever such hydrants are to become the property of the utility."

Section C.1.c. provides:

"c. In lieu of providing the advances in accordance with Sections C.1.a. and C.1.b., the applicant for a main extension shall be permitted, if qualified in the judgment of the utility, to construct and install the facilities himself, or arrange for their installation pursuant to competitive bidding procedures initiated by him and limited to qualified bidders. The cost, including the cost of inspection and supervision by the utility, shall be paid directly by applicant. The applicant shall provide the utility with a statement of actual construction cost in reasonable detail. The amount to be treated as an advance subject to refund shall be the lesser of (1) the actual cost or (2) the price quoted in the utility's detailed cost estimate. The installation shall be in accordance with the plans and specifications submitted by the utility pursuant to Section A.5.b."

It will be noted that for both options the cost of the facilities necessary to serve the subdivision is to be paid for in full by the applicant. In this proceeding, Mesa Crest finds itself as a co-defendant in litigation involving a mechanic's lien against the water distribution system through which it is supposed to provide water service to the future applicants of the subdivision. Under these circumstances, Mesa Crest is withholding service pending resolution of the matter.

Litigation of these matters is notoriously slow. It would, therefore, be unreasonable to require LCFDC to wait an undeterminable time to receive service or alternatively to pay moneys which it believes it does not owe. Under these circumstances, a specific "set aside" letter to guarantee that Mesa Crest would be absolved from any liability for the payment of any moneys found to be owed any contractors for the installation of the water system in Tract 33531, as offered by LCFDC, appears to be a reasonable solution of this matter. Consequently, the order that follows will provide for Mesa Crest to immediately provide water service to LCFDC's subdivision upon receipt of a "set aside" letter satisfactory to it and absolving it of the financial responsibility for any moneys found owed various contractors in connection with the water system installed in Tract 33531.

Findings of Fact

1. LCFDC and Mesa Crest entered into a main extension contract on August 5, 1981 providing for on-site and off-site water facilities. The dispute involves on-site water installation.
2. In response to City's requirements, a water system agreement dated July 14, 1981 for the installation of the system between LCFDC and City was executed together with Faithful Performance Bond No. 103028 from DICO and LCFDC in favor of City, and Labor and Material Bond No. 103028A from DICO and LCFDC.
3. The labor and material bond was to the benefit of any and all persons, companies, and corporations entitled to file claims under Title 15 to give a right of action to them

or their assigns in any suit brought upon this bond. Such provisions extend to the contractors involved in the construction of the water system installed in Tract 33531.

4. A mechanic's lien for \$42,273.37 plus annual interest at 7% from August 6, 1982 was filed against Mesa Crest by LDM.

5. A suit for \$42,273.37 with interest from August 6, 1982 has been filed in the Superior Court of the County of Los Angeles by LDM listing Mesa Crest, LCFDC, and Does 1 to 20, inclusive, as defendants.

6. LCFDC elected to exercise its option provided in Section C.l.c. of the extension rule to arrange for the installation of a water system under competitive bidding procedure which resulted in a contract to construct on-site water facilities in Tract 33531 that was executed by Mesa Crest and LDM on November 17, 1981.

7. As the result of controversies among LCFDC, LDM, and other contractors performing work in Tract 33531, LCFDC withheld certain funds.

8. The withheld funds resulted in the above-described mechanic's lien being filed. As a result, Mesa Crest refused to render water service to the subdivision pending resolution of the controversies.

9. The main extension rule contemplates full payment of the construction costs of a water system serving a subdivision prior to the providing of water service through the system.

10. It would be unreasonable to require LCFDC to wait until resolution of the above-described litigation before obtaining service.

11. A "set aside" letter absolving Mesa Crest of all financial responsibilities for any contractor claims arising from the installation of the on-site water facilities in Tract 33531 should remove any basis for Mesa Crest not immediately providing water service to Tract 33531.

12. Because of the urgent need for water the effective date of this order should be today.

Conclusion of Law

Mesa Crest should immediately provide water service to Tract 33531 upon receipt of a satisfactory "set aside" letter from LCFDC absolving it from payment of any moneys found due various contractors for the installation of the water system in Tract 33531.

O R D E R

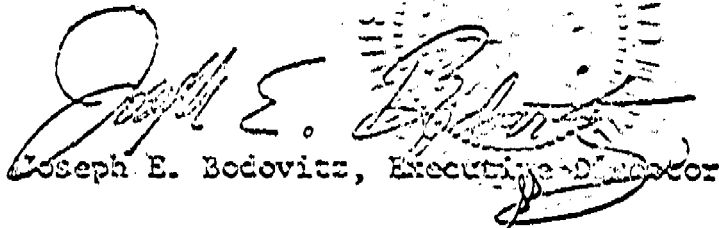
IT IS ORDERED that Mesa Crest Water Company shall provide water service to Tract 33531 within three days of the receipt of a satisfactory "set aside" letter from La Canada Flintridge Development Corporation absolving it of all financial responsibilities for the payment of any moneys found owed to contractors as the result of the installation of the water system in Tract 33531.

This order is effective today.

Dated DEC 1 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C CREW
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director