

2000

Golden Eagle Oil Refinery, Inc v. Woods Cross City : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GOLDEN EAGLE OIL REFINERY,
INC., a Utah corporation,

Plaintiff/Appellant

vs.

WOODS CROSS CITY, a municipal
corporation and political subdivision of
the State of Utah,

Defendant/Appellee.

BRIEF OF APPELLANT

Case No. 20001010 - SC

Priority No.15

BRIEF OF APPELLANT

Appeal from a Final Order of the Second Judicial District Court,
in and for Davis County, Judge Jon M. Memmott

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Oral Argument and Published Decision
Requested

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STATEMENT OF JURISDICTION

Pursuant to Utah Code Ann. § 78-2-2(j), the Supreme Court has original appellate jurisdiction over this appeal from the district court's order of summary judgment.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in holding that the replacement of old storage tanks with new storage tanks violated the City's nonconforming use ordinance, where the replacement was mandated by State law, occurred within the one-year time period contemplated by the City's Ordinance, did not constitute an enlargement of the existing legal nonconforming use under the Ordinance, and had no adverse impact on neighboring properties.

Standard of Review: This case was decided in the district court on cross-motions for summary judgment and involves the application of undisputed facts to applicable State and local law. The standard of review on appeal is therefore correction of error, with this Court according no deference to the trial court. *Nelson v. Salt Lake City*, 919 P.2d 568, 571 (Utah 1996).

Record Citation: This issue was the subject of the briefing on the cross-motions for summary judgment. R. App. at 37-217; *see id.* at 88-98.

2. In the alternative, whether the district court erred in holding that use of the new storage tanks does not constitute a valid accessory use under the City's Ordinance.

Standard of Review: This issue was decided on summary judgment. The standard of review on appeal is therefore correction of error, with this Court according no

deference to the trial court. *Nelson*, 919 P.2d at 571.

Record Citation: This issue was raised and preserved in the briefing on summary judgment. R. App. at 214-17.

DETERMINATIVE LEGAL PROVISIONS

This case is governed by the interpretation of Utah Code Ann. §§ 10-9-103(1)(k) to (l) and 10-9-408(1) to (2)(b), and Woods Cross City Ordinance §§ 12-22-101 to - 106, which are set forth in full in the Addendum. (Also contained in the Addendum is a copy of the District Court's Memorandum Decision.)

STATEMENT OF THE CASE

I. Nature of the Case.

Plaintiff-Appellant Golden Eagle Oil Refinery, Inc. ("Golden Eagle") operates a facility in Woods Cross City for recycling used petroleum products. Due to a zoning change in 1991, Golden Eagle's operations are now classified as a legal nonconforming use under City law. When the current owners purchased the Property and facility in 1993, they began an extensive and very costly effort to clean up the hazardous waste and eliminate the dangerous conditions left by the previous owner. They were applauded and encouraged in these efforts by Defendant-Appellee Woods Cross City ("City") and the Utah Department of Environmental Quality.

Tanks for storing used petroleum products are an integral part of Golden Eagle's nonconforming use, since oil recycling cannot occur without storage tanks. Seventeen of Golden Eagle's storage tanks did not comply with new State environmental regulations.

Accordingly, State regulators at the Department of Environmental Quality ordered that Golden Eagle remove the 17 illegal storage tanks, dispose of the petroleum product therein, and replace them with newer tanks that complied with State law. However, as Golden Eagle was installing six Certified Tanks to replace the 17 Old Storage Tanks, the City intervened and ordered that Golden Eagle remove the new tanks. The City claimed that installation of the new Certified Tanks would violate the City's nonconforming use ordinance.

In response, Golden Eagle brought this action in the district court seeking a declaration of its rights. Among other things, Golden Eagle argued that it had a right to install the Certified Tanks so as to comply with State law and the dictates of State regulators, and that the City could not thwart such compliance with arbitrary restrictions. It also maintained that since they would actually lessen adverse impacts, the six Certified Tanks would not be an enlargement of Golden Eagle's existing nonconforming use under the City's ordinance. In the alternative, Golden Eagle argued that the Certified Tanks should be allowed as an accessory use. However, the district court rejected Golden Eagle's claims and affirmed the City's order compelling removal of the new tanks. Golden Eagle now appeals.

II. Course of Proceedings and Disposition in Court Below.

On June 10, 1999, Woods Cross City informed Golden Eagle that it needed to obtain site plan approval from the City with respect to the replacement of 17 old storage tanks with six newer tanks. *See* Record on Appeal ("R. App.") at 86. On August 10,

1999, the Woods Cross City Planning Commission unanimously agreed that Golden Eagle should be allowed to install the six tanks. *Id.* at 87. On October 6, 1999, the City Council rejected the Planning Commission's recommendation. *Id.* In a letter dated October 7, 1999, the City ordered Golden Eagle to remove the tanks from its property within 14 days. *Id.* at 87-88. After the City rejected a timely appeal of the City Council's decision, on December 16, 1999, Golden Eagle filed this action in the Second Judicial District Court in Davis County (Judge Jon M. Memmott) requesting a declaration that Golden Eagle was entitled to utilize the tanks as part of its valid nonconforming use. *Id.* at 1. Golden Eagle filed an amended complaint on January 13, 2000. *Id.* at 11. On February 3, 2000, Woods Cross City filed an Answer and Counterclaim requesting an injunction requiring Golden Eagle to remove the tanks from its property. *Id.* at 22.

On April 27, 2000, Golden Eagle filed a Motion for Summary Judgment on all claims asserted in the Amended Complaint. *Id.* at 74. On June 13, 2000, the City filed a Cross-Motion for Summary Judgment on its counterclaims. *Id.* at 131. On August 29, 2000, oral argument was held before Judge Memmott on the motions for summary judgment. See Addendum ("Add.") at 7-8. With permission of the court, Golden Eagle submitted a Supplemental Memorandum on September 9, 2000, and Woods Cross City submitted a responsive Supplemental Memorandum on September 14, 2000. R.App. at 208, 219. In a Memorandum Decision dated October 17, 2000, the district court denied Golden Eagle's Motion for Summary Judgment, granted the City's Cross Motion for Summary Judgment, dismissed Golden Eagle's claims with prejudice, and enjoined

Golden Eagle from using the six tanks upon its property. Add. at 21. A final Order, incorporating the holdings of the Memorandum Decision, was issued by the Court on December 1, 2000. R.App. at 248. This timely appeal followed.

In the Memorandum Decision, the district court ruled that (1) Golden Eagle had permanently discontinued the use of its old storage tanks; (2) the installment of the six new tanks constituted a prohibited enlargement of a nonconforming use; and (3) the proposed use of the six new tanks did not constitute an accessory use. Add. at 5-21.

III. Statement of Facts.

Golden Eagle Acquires the Subject Property and Begins Cleanup Efforts. For many years, Plaintiff-Appellant Golden Eagle Oil Refinery, Inc. (“Golden Eagle”) has operated a used-oil reclamation and disposal facility on property (“Property”) located within an industrial zone in Woods Cross City, Utah. *See* R. App. at 78. In 1991, Defendant-Appellee Woods Cross City (“City”) changed the zoning on the Property from a heavy industrial classification, which permitted oil reclamation activities, to a light industrial classification which does not. *Id.* Golden Eagle’s used-oil reclamation facility has continued to operate on the Property as a legal nonconforming use. *Id.* Since 1993, Golden Eagle has continuously possessed a valid business permit from the City allowing it to continue operating its oil reclamation facility. *Id.* at 79-80.

In 1993, Stan Hartmark and Merrill Maughan purchased Golden Eagle and all its assets in order to clean up the Property and continue the company’s used-oil reclamation activities. *Id.* at 79. The previous owners had made a substantial mess of the Property,

leaving behind what could fairly have been described as a dangerous hazardous waste zone. *See id.* at 102-03, 148. In anticipation of a long stay, Golden Eagle began an expensive and large-scale effort to clean up and beautify the Property – an effort which for years has been encouraged, commended, and overseen by City and State officials. *Id.* at 79, 81, 83.

Ultimately, Golden Eagle spent approximately \$1,000,000 to clean up the Property, which included (1) removing and properly disposing of 800 55-gallon drums containing hazardous waste, (2) removing and disposing of tons of soil contaminated by hazardous materials, (3) arranging for the removal and disposal of six cases of highly explosive pitric acid found stored on the Property, and (4) painting and/or installing asphalt, concrete, fencing, lights, flag poles, and landscaping. *Id.* at 83, 148.

Golden Eagle's Operations Necessarily Entail the Storage of Used Petroleum Products in Storage Tanks. Golden Eagle's reclamation business involves the removal of dirt, particles, water, and other contaminants from used petroleum products. To the extent this process is successful, the result is useful petroleum products which Golden Eagle can then market. *Id.* at 78. Because the supply of used petroleum products does not always match an oil reclamation facility's processing capacity, such facilities use large tanks to store used petroleum products until such time as they can be processed or properly discarded; as such, storage tanks are part and parcel of Golden Eagle's reclamation operations. *Id.* Petroleum products which are too contaminated to be recycled must be stored and eventually disposed of through other means. Golden Eagle

provides a valuable service to those in the community who need to properly dispose of used petroleum products, regardless of whether such products can successfully be recycled.¹

Accordingly, prior to the zoning change in 1991, and at all times since, there have been numerous storage tanks on the Property. R. App. at 79. Among those which predated the zoning change were the 17 storage tanks (“Old Storage Tanks”) that are the subject of this litigation. Prior to 1991, and until their replacement in 1998-99, the Old Storage Tanks were continuously used to store used petroleum products. *Id.* at 79, 84, 103.

Oversight and Regulation of Golden Eagle’s Operations and Cleanup Efforts By The Utah Department of Environmental Quality’s Division of Solid and Hazardous Waste. Golden Eagle’s cleanup efforts were conducted under the close scrutiny of State and City officials. On October 25, 1993, the City’s Administrator, Gary Uresk, wrote a letter to the Utah State Department of Environmental Quality’s Division of Solid and Hazardous Waste (the “Division”) regarding Golden Eagle’s request to the Division for an oil reclamation permit. Apparently concerned that Golden Eagle’s storage tanks be properly safeguarded against dangerous leaks, Mr. Uresk requested that Golden Eagle’s permit be postponed until formal rules were adopted governing secondary

¹As a form of hazardous waste, one cannot simply dump used petroleum products into the sewer system or the local landfill. To avoid soil and water contamination, State law requires that petroleum products be disposed of according to specific guidelines. Utah Code Ann. § 19-6-706.

containment systems (*i.e.*, basins and berms used to contain any used oil leaking from storage tanks) for oil recyclers such as Golden Eagle. *Id.* at 80.

On December 22, 1993, the Division issued a permit for Golden Eagle to operate as a used oil reclaimer and used oil transporter. *Id.* However, the permit was expressly conditioned upon Golden Eagle's future compliance with the statutes and rules regulating the reclamation and transportation of used oil. *Id.*; *see* Utah Code Ann. § 19-6-705(1)(c)(iii.). As such, Golden Eagle's operations and its efforts to clean up the extensive mess left by the previous owners were regularly monitored by the Division, as well as encouraged by the City. R. App. at 80-81.

A principal issue in bringing Golden Eagle's operations into compliance with new State environmental regulations was ensuring proper containment of leaks from storage tanks. As Mr. Uresk's letter indicates, that issue was of significant concern to the City. *Id.* at 80. Utah Admin. Code R315-15-5.5(c) states that storage containers used by used-oil processors and re-refiners "shall be equipped with a secondary containment system . . . [which] shall consist of . . . dikes, berms or retaining walls" and a floor which is impervious to used oil. Utah Admin. Code. R315-15-5.5(c).

After inspecting Golden Eagle's facility, on December 12, 1995, David Wheeler, an agent in the Division, drafted a "Used Oil Inspection Report" where he noted that certain tanks "lack[ed] adequate secondary containment," which constituted a "violation of [Utah Administrative Code] R315-15-5.5(c)." R. App. at 81. On January 25, 1996, Dennis R. Downs, Director of the Division, sent a letter warning Golden Eagle to comply

with applicable State regulations, and specifically noting that certain tanks “lacked adequate secondary containment . . . in noncompliance with R315-15-5.5(c) UAC.” *Id.* Mr. Downs reiterated that the continuation of Golden Eagle’s operations was contingent on Golden Eagle (1) placing the tanks in question “into a proper secondary containment, consisting of concrete berms on ALL four sides and a concrete floor”; (2) applying for and receiving a modification to its used oil processor permit which would detail the number, types, sizes and location of all their used oil tanks; and (3) ensuring that “[a]ll other tanks not within concrete secondary containment will be drained and kept empty until the preceding two conditions have been met.” *Id.*

Under the supervision of the Division, over the next four years Messrs. Hartmark and Maughan continued the costly process of cleaning up the Property, progressively bringing Golden Eagle’s operations into compliance with State environmental regulations. *See id.* at 82. Throughout this process, the Division’s repeated concern was that leaking storage tanks be fixed or replaced and that proper secondary containment structures be put into place. *Id.* Indeed, replacement of old tanks was a key element of the cleanup. In a report issued on March 9, 1999, Mr. Wheeler stated that part of the cleanup “plan is to replace [certain] older tanks with new tanks.” The report summary stated that “[n]ew improvements include further tank and secondary containment upgrades” and that “[f]uture improvements include . . . getting tanks ASTM^[2] certified,

²ASTM refers to The American Society for Testing and Materials.

getting new tanks, and [providing] more parking area paving.” *Id.*

Removal and Replacement of the Old Storage Tanks. In 1998, Mr. Wheeler noted that the Old Storage Tanks – which even prior to the 1991 zoning change had been used continuously to store used petroleum products as part of Golden Eagle’s operations – were leaking used petroleum. *Id.* at 84, 103. In response to this hazardous situation, Mr. Wheeler informed Golden Eagle that it must comply with applicable State environmental regulations by removing and disposing of the 17 Old Storage Tanks and replacing them with tanks that complied with new environmental regulations. *Id.*

It is undisputed that there was no feasible method of modernizing the Old Storage Tanks to bring them into compliance with the State’s new environmental regulations; although adequate for Golden Eagle’s reclamation purposes, they simply could not be made to comply with the new State requirements. *Id.* The *only* way to achieve compliance with the new regulations was to remove the Old Storage Tanks, pour concrete containment basins, and then install more modern tanks. *Id.*

To comply with the Division’s demand, in May of 1998 Golden Eagle began the process of emptying the used oil from the 17 Old Storage Tanks, properly disposing of it, and replacing the tanks with 6 newer, safer, “API” certified tanks (“Certified Tanks”) that would meet State standards. *Id.* This was a monumental and expensive process. *Id.* The Old Storage Tanks ranged in capacity from 5,000 gallons to 20,000 gallons and collectively held a total of 18,660 gallons of used petroleum products, an average of 1,090 gallons per tank, with no tank holding less than 500 gallons of petroleum product.

Id. at 84-85. The cost for Golden Eagle to dispose of the used oil was \$2,007.00. *Id.* at 85. Once the Old Storage Tanks were drained, Golden Eagle incurred another \$26,247 in costs to remove them from the Property. *Id.*

Golden Eagle then installed the 6 newer Certified Tanks. *Id.* at 184. Two of these were installed on or about March 31, 1999. *Id.* at 184, 167, 175.³ The four remaining tanks were installed on or about April 22, 1999. *Id.* at 184. Hence, all six of the Certified Tanks were installed less than one year after Golden Eagle removed and disposed of the contents of the Old Storage Tanks. *Id.*

Each of the six Certified Tanks has a capacity of about 19,300 gallons. *Id.* at 85. Thus, while each of the Certified Tanks was smaller than some of the Old Storage Tanks and larger than others, not one of the Certified Tanks was as large as the largest of the Old Storage Tanks. Though not brand new, the Certified Tanks were certified by the American Petroleum Institute. *Id.* Golden Eagle also installed cement containment basins for each Certified Tank as required by State environmental regulations. *Id.* The cost for Golden Eagle to purchase the Certified Tanks, construct the cement containment basins, and install the Certified Tanks within those basins was \$27,690.00. *Id.* at 85. To make the Property more aesthetically pleasing its neighbors, Golden Eagle shifted the location of the tanks away from the edge of the Property to the center. *Id.* at 86.

³The date provided in Golden Eagle's briefing below is March 31, 2000. However, this was a typographical error. The exhibit upon which the affidavit relied expressly indicates the date as March 31, 1999. *See id.* at 175.

In all, Golden Eagle removed the 17 Old Storage Tanks with a combined capacity of 202,000 gallons and replaced them in less than a year with the 6 Certified Tanks with a combined capacity of 116,000 – a reduction in storage capacity of 86,000 gallons. *Id.* at 86. The Certified Tanks eliminated the environmental hazard associated with the Old Storage Tanks and brought Golden Eagle into compliance with State environmental regulations. *Id.* The total cost incurred by Golden Eagle to accomplish this was \$55,944.00, to say nothing of the time and effort of its owners. *Id.*

The City’s Planning Commission Unanimously Endorses Installation of the Certified Tanks. On June 10, 1999, representatives from the City inspected the Property and informed Golden Eagle that it was required to obtain site plan approval from the City for the replacement of the tanks. *Id.* at 86. Golden Eagle disagreed and continues to maintain that no such approval was ever necessary under the City’s zoning laws. *Id.* Nevertheless, to accommodate the City’s request, on July 15, 1999 Golden Eagle paid the filing fee and submitted the requisite application. *Id.*

At the August 10, 1999 hearing, the Planning Commission made extensive inquiries into aesthetic and safety issues relating to the replacement of the tanks. *Id.* Ultimately, the Planning Commission unanimously agreed that the changes created a more desirable situation on the Property and thus that Golden Eagle should be allowed to install the Certified Tanks pursuant to Woods Cross City Ordinance [“Ordinance”] § 12-22-104(a). R. App. at 87.

The City Council Rejects the Planning Commission’s Unanimous Decision

and Demands that the Certified Tanks Be Removed. On October 6, 1999, the Woods Cross City Council rejected the Planning Commission's recommendation and refused to approve any permit relating to the placement of the Certified Tanks. *Id.* In a letter dated October 7, 1999, the City Administrator summarized the City Council's decision, including its view that "[s]ince the old tanks had not been used for at least six years, under the Woods Cross City Zoning Ordinance, they cannot be put back into use as a non-conforming use." The letter concluded:

With these findings, the Woods Cross City Council has determined the old tanks removed from the site had been abandoned and [were] not eligible for reuse as a non-conforming use on the site. With this determination, any attempt to replace these abandoned tanks with new usable tanks can only be viewed as an expansion of a non-conforming use. . . . [T]he City Council has denied your request for the substitution of the tanks and has requested you to remove the six tanks from the site. This letter serves as an official notice that you have 14 days from receipt of this letter to remove the tanks.

Id. at 12.

On November 5, 1999, Golden Eagle filed a Notice of Appeal and Statement of Grounds with the City Council. *Id.* On November 16, 1999, the City Council sent a letter to Golden Eagle stating that the Council had "choose[n] to take no action on [Golden Eagle's] request" and noting that since Golden Eagle had "exhausted all of [its] administrative remedies," if it "wish[ed] to contest the decision of the Council [it would] need to petition the courts" *Id.* This action followed.

SUMMARY OF ARGUMENT

1. Storage tanks are an essential and integral part of Golden Eagle's used-oil reclamation operations, a nonconforming use under the City's Ordinance. Golden Eagle replaced 17 Old Storage Tanks with six newer Certified Tanks having less capacity because State environmental laws and State regulators required it to do so – not because the tanks were obsolete from an operational standpoint. Under these circumstances, the only reasonable and nonarbitrary reading of the City's nonconforming use Ordinance is that Golden Eagle must be allowed to install the six Certified Tanks. Case law addressing this exact issue, as well as elemental principles of due process, hold that where State health and safety laws require that a structure dedicated to a nonconforming use be modernized or replaced, the owner has a legal right to comply with State directives without forfeiting the right to continue the nonconforming use. An exception to this rule would arise if the proposed replacement structure would substantially exceed the scale of the original structure. Inasmuch as Golden Eagle was required by State law to replace the Old Tanks with more modern tanks, and since the new tanks are on substantially the same scale as the old ones, the district court's holding that the City's Ordinance mandated forfeiture of Golden Eagle's nonconforming use in the tanks was plainly erroneous.

2. Moreover, the replacement of the Old Storage Tanks with the Certified Tanks is allowed by right under the Ordinance and State nonconforming use law because it does not constitute an enlargement, extension, or change of Golden Eagle's used oil recycling operations. The Certified Tanks actually have *less* storage capacity than the

Old Storage Tanks and there is absolutely no evidence that the Certified Tanks will have even the slightest adverse impact on neighboring properties. Indeed, all evidence is to the contrary. Further, even if it could be shown that the volume or intensity of Golden Eagle's nonconforming use would increase because of the Certified Tanks – a showing which the City has *not* made – numerous decisions hold that where the nature and character of the use remains substantially unchanged, such an increase does not constitute an illegal enlargement, extension, or change of the nonconforming use. The district court erred in holding otherwise.

3. In the alternative, should this Court view the Certified Tanks as not being an integral part of Golden Eagle's larger nonconforming use, they are unquestionably a valid accessory use since they are subordinate and reasonably related to the primary use of the Property. The district court's holding to the contrary was incorrect and creates a significant injustice.

ARGUMENT

I. LOCAL GOVERNMENTS MUST ALLOW PRIOR NONCONFORMING USES TO CONTINUE EXCEPT AS PROVIDED BY STATE STATUTE.

Serious due process and takings issues arise when a local government decrees that a preexisting use of land is no longer legal. *See, e.g., Gibbons & Reed Company v. North Salt Lake City*, 431 P.2d 559, 563 (Utah 1967) (Absent a nuisance, "a zoning ordinance which required the discontinuance forthwith of a nonconforming use would be a deprivation of property without due process of law."); *see O'Connor v. City of Moscow*,

202 P.2d 401, 403 (Idaho 1949) (“An ordinance which prohibits the continuation of existing lawful businesses within a zoned area is unconstitutional as [a] taking of property without due process of law and being an unreasonable exercise of the police power.”). To avoid such problems, and in the interest of fairness, the Utah Municipal Code constricts the manner in which local governments regulate prior nonconforming uses of land. State law allows prior nonconforming uses to continue but allows municipalities either to reasonably restrict their expansion or to terminate all such uses pursuant to a reasonable amortization period. Woods Cross City has chosen the former of these two options.

A. Prior Nonconforming Uses Continue To Be Legal Unless the Local Government Elects to Phase Out All Nonconforming Uses Through a Reasonable Amortization Schedule.

Despite a zoning change rendering particular land uses or structures illegal, State law guarantees property owners the right to continue a preexisting nonconforming use or structure⁴ – even in perpetuity – unless the municipality elects to follow a specified

⁴The Utah Municipal Code specifically defines a legal nonconforming use:

“Nonconforming use” means a use of land that:

- (i) legally existed before its current zoning designation;
- (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and
- (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.

Utah Code Ann. § 10-9-103(*l*). A nonconforming structure is similarly defined:

“Nonconforming structure” means a structure that:

- (1) legally existed before its current zoning designation; and
- (2) because of subsequent zoning changes, does not conform with the

course. Section 10-9-408 of the Municipal Code plainly provides that “a nonconforming use or structure may be continued.” This baseline rule governs unless the local government chooses to enact a zoning ordinance expressly phasing out *all* nonconforming uses pursuant to a reasonable amortization schedule that protects the owner’s property interests:

[The municipality may enact a zoning ordinance providing for] the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any.

Id. § 10-9-408(2)(b).

B. State Law Allows Municipalities to Reasonably Limit the Extension and Expansion of Prior Nonconforming Uses.

Although State law does not permit local governments to eliminate nonconforming uses without first providing a reasonable amortization period, the Municipal Code does allow municipalities to reasonably limit the extension or expansion of nonconforming uses as well as the restoration or reconstruction of nonconforming structures:

[The municipality may enact a zoning ordinance providing for] the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the zoning ordinance.

Id. § 10-9-408(2)(a).

zoning regulation’s setback, height restrictions, or other regulations that govern the structure.

Id. § 10-9-103(k).

It is important to note the distinction between subsections (a) and (b) of § 10-9-408(2). If a city makes the legislative decision to terminate *all* nonconforming uses within the jurisdiction, it may do so but will be governed by the reasonable phase-out period required by subsection (b). If a city elects not to enact a phase-out period, it may still reasonably regulate nonconforming uses, but it cannot terminate them outright due to the provision stating that “a nonconforming use or structure may be continued.” *Id.* at 10-9-408(1)(a). In other words, a municipality must choose its course. Utah law does not allow a municipality to use regulations promulgated pursuant to subsection (a) to subvert or avoid the reasonable amortization period contemplated by subsection (b). Nor does it allow for the imposition of unreasonable or arbitrary regulations upon nonconforming uses in violation of constitutional due process requirements. *See International Union v. Utah Labor Relations Board*, 203 P.2d 404, 408 (Utah 1949) (“guarantee of due process” requires that “the law shall not be unreasonable, arbitrary, or capricious”). Municipalities are obviously bound by the dictates of due process.

II. WOODS CROSS CITY HAS ELECTED NOT TO TERMINATE ALL NONCONFORMING USES, BUT RATHER TO RESTRICT THEM.

The City Council of Woods Cross City has made the legislative decision *not* to terminate all prior nonconforming uses pursuant to the amortization requirements of § 10-9-408(2)(b). Rather, the City has elected to allow such uses to continue under certain restrictions and conditions:

Except as hereinafter specified, any use, building, or structure, lawfully existing at the time of the enactment or subsequent amendment of this

Ordinance, may be continued, even though such use, building or structure does not conform with the provisions of this Ordinance for the district in which it is located.

Woods Cross City Ordinance § 12-22-102. Like many zoning ordinances, the Woods Cross ordinance limits the enlargement of nonconforming uses:

A nonconforming use shall not be enlarged, extended, or changed unless the use is changed to a use permitted in the district in which it is located, and a nonconforming building shall not be reconstructed or structurally altered unless such alteration results in removing those conditions of the building which render it nonconforming, except as follows

Id. § 12-22-104. The ordinance then lists a number of exceptions, one of which allows “[r]epairs and structural alterations necessary for building safety ... provided that the floor area of such building is not increased.” *Id.* § 12-22-104(b).

The City’s ordinance also provides that once a nonconforming use – or the use of a structure designed for a nonconforming use – has ceased for one year or more, it cannot later be resumed:

Cessation of Use. A use shall be deemed to have ceased when it has been discontinued either temporarily or permanently for a period of one year or more, whether or not with the intent to abandon said use, subject to the following provisions:

(a) Cessation of Use of Building Designated or Designed for Nonconforming Use. Except for residential or accessory farm structure[s], a building or structure which was originally designed for a nonconforming use shall not be put to a nonconforming use again when such use has ceased for one year or more.

....

Id. §12-22-106(a). As discussed below, the trial court’s ruling was expressly based on an erroneous interpretation of this latter provision.

III. IT IS UNDISPUTED THAT GOLDEN EAGLE'S OIL RECLAMATION OPERATIONS ARE AN ONGOING, LEGAL, NONCONFORMING USE WHICH INCLUDES THE STORAGE OF USED PETROLEUM PRODUCTS.

The City freely acknowledges that Golden Eagle's oil reclamation operations are a legal, on-going nonconforming use under the Ordinance, a conclusion expressly affirmed by the trial court. Add. at 20. What both the City and the trial court have refused to acknowledge, however, is that storage tanks – including those at issue here – are an integral part of that unquestionably legal nonconforming use. *Cf. Hugoe v. Woods Cross City*, 1999 UT Ct. App. 281, 988 P.2d 456, ¶ 9 (“The use of the property for parking, storage, and staging activities is an integral part in the operation of a transfer company.”) A key element of Golden Eagle's business is disposing of used petroleum products for its customers. Where possible, the used petroleum is cleansed of contaminants and refined into other useful products which Golden Eagle then markets. Where recycling is not possible or economically feasible, the used product is stored in tanks until such time as Golden Eagle sees fit to take it to a final disposal site.

Thus, storage tanks – whether holding recyclable or nonrecyclable petroleum products – are indispensable to Golden Eagle's overall operations, which the City admits are legal. When the City authorized Golden Eagle to continue its refinery operations as a legal nonconforming use, it necessarily authorized Golden Eagle to employ the essential implements of those operations, including storage tanks. Otherwise the nonconforming use Ordinance would be totally unreasonable and thus a violation of due process. *See*

Gibbons, 431 P.2d at 562 (courts may “set aside” “unreasonable” zoning ordinance).

It is important to note that the Ordinance in no way contemplates the micro-management of businesses engaging in nonconforming uses; it imposes no limits, for instance, on increases in the volume or intensity of a nonconforming business. Moreover, State law does not appear to authorize a municipality to engage in such management. Thus, provided its nonconforming use remains within substantially the same bounds, the Ordinance is silent as to how Golden Eagle may manage its business. Whether and when to use a particular machine, tank, pipe, hose, truck, chemical, etc. in the refining process – including whether to put usable or unusable petroleum products in one tank as opposed to another and whether to wait two weeks or two years before finally disposing of nonrecyclable petroleum products – are matters left entirely to the business judgment of Golden Eagle’s owners and management.

Further, the Ordinance does not purport to divide up the operations of an overall nonconforming use into numerous discrete nonconforming uses, each to be separately regulated or eliminated. As with any multi-part manufacturing operation, Golden Eagle’s operations exist as an integrated whole. To hold otherwise, as the trial court essentially did, would lead to absurd and arbitrary results. For instance, the ordinance bars resumption of a nonconforming use if it ceases for a specified period of time. *See Woods Cross City Ordinance* § 12-22-106. If this were interpreted to apply to each discrete activity or piece of equipment within the operation, it might well require a factory to operate at full capacity or use every machine regardless of market conditions, lest it lose

whatever portion of its operations it failed to fully use. Such a requirement would be arbitrary and capricious, in violation of due process. Markets ebb and flow with supply and demand. Factories often throttle back their operations during economic downturns, sometimes for more than a year, returning to full capacity production when the business cycle swings back. A nonconforming use ordinance that lopped off whatever portion of a legal operation that was not in use for a specified period would violate due process.

There is nothing in the City's nonconforming use Ordinance that requires such an arbitrary approach. Nevertheless, the City has essentially advanced this position throughout this litigation. The City contends that because the Old Storage Tanks allegedly were not used for more than a year, the tanks themselves ceased to be a legal nonconforming use. In fact, there was no such cessation of use, as demonstrated below. But regardless, for the reasons just explained, there is absolutely no warrant under the Ordinance for slicing up Golden Eagle's single nonconforming use into numerous little nonconforming uses which are then subject to termination for a year of nonuse. Maintaining storage tanks on the Property is not a separate nonconforming use or activity apart from the Golden Eagle's overall nonconforming use of oil reclamation. The use of tanks to store contaminated petroleum products is an integral and indispensable element of the legal nonconforming use.

IV. GOLDEN EAGLE CONTINUOUSLY USED ITS STORAGE TANKS AS AN INTEGRAL PART OF ITS OIL RECLAMATION OPERATIONS.

Even assuming *arguendo* that the “Cessation of Use” provision in the Ordinance (§ 12-22-106) applies to discrete activities within a larger nonconforming use, it cannot reasonably be argued that Golden Eagle ceased to use its storage tanks for at least a year. Under any reasonable definition of the term “use,” Golden Eagle has continuously used its storage tanks as an integral part of its oil reclamation operations. There is no basis for district court’s ruling upholding the City’s conclusion that use of the tanks had ceased for a year.

It is undisputed that Golden Eagle continuously used the Old Storage Tanks to hold petroleum products up until the time that each tank was emptied, dismantled, and hauled away. *See* R. App. at 79, 84, 103, 187. By definition, a storage tank is “in use ” if it is storing something, for that is its very purpose. The Old Storage Tanks were originally installed in order to store used petroleum products, either for later recycling or ultimate disposal. So long as these storage tanks were storing used petroleum products, their use did not cease.

When the zoning changed in 1991, making the reclamation operations on the Property a nonconforming use, the Old Storage Tanks were already on the Property being used to store used petroleum products. *Id.* at 84, 101. The Old Storage Tanks were utilized to store used petroleum products when Merrill Maughan and Stan Hartmark purchased the facility in 1993 and were then used continuously for that purpose from that

time until each tank was emptied, dismantled, and hauled away and the new Certified Tanks were installed. *Id.* at 103-04. In fact, at the time the Old Storage Tanks were dismantled, Golden Eagle was required to remove 18,660 gallons of used petroleum products. The tank containing the least amount of material still held at least 500 gallons of used petroleum. *Id.* at 84-85. Therefore, every one of the Old Storage Tanks was in “use” continually from the zoning change in 1991 until the Old Storage Tanks were replaced with the new Certified Tanks. There was no cessation of use.

This straightforward understanding of the term “in use” is consistent with the Utah Court of Appeals’ decision in *V-1 Oil v. Dept. of Environ. Quality*, 904 P.2d 214 (Utah Ct. App. 1995). In *V-1 Oil*, the plaintiff claimed that an underground storage tank did not need to be registered with the Department of Environmental Quality because it was not “in use.” The Utah Court of Appeals affirmed the Hazardous Waste Control Board’s decision that “a tank is ‘in use’ if it contains a regulated substance or petroleum. The tank need not be used to dispense petroleum; *it need only be used to store or contain petroleum in order to be ‘in use.’*” *Id.* at 217 (emphasis added).

In the proceedings below, the City acknowledged that the Old Storage Tanks held petroleum products continuously until their removal, but contended that they were not “in use” after 1993 because no *new* petroleum products were added to the tanks after that time. Under this cramped reading of the Ordinance, a storage tank is only “used” if the contents are regularly rotated (*i.e.*, added and then removed from the tank). Such an argument conflicts with *V-1 Oil* as well as with State regulations governing the closure of

used oil storage tanks.⁵ It also violates a commonsense reading of the Ordinance.

Storage tanks are in use when they are storing. *Cf. Gibbons & Reed Company*, 431 P.2d at 563 (concept of “use” must comport with “the realities of the business”).

The City’s rotation argument raises additional conceptual problems. Under the City’s interpretation, any legal nonconforming business would be required to rotate any stored inventory or materials at least once each year. If the stored material or products did not change for a year, the argument goes, the City could then prevent the company from using their storage facilities based upon a purported cessation of use. That is clearly an unreasonable interpretation of the City’s cessation of use provision, especially since the Ordinance does not purport to micromanage the affairs of lawful businesses. As long

⁵The Standards for Use Oil Processors and Re-Refiners, outlined in Utah Administrative Code R315-15-5 provide in part:

(f) Closure.

(1) Aboveground tanks. Owners and operators who store or process used oil in aboveground tanks shall comply with the following requirements:

(i) At closure of a tank system, the owner or operator shall remove or decontaminate used oil residues in tanks, contaminated containment system components, contaminated soils, and structures and equipment contaminated with used oil, and manage them as hazardous waste, unless the materials are not hazardous waste under this chapter.

Utah Admin. Code R315-14-5.5(f). Accordingly, a tank system is not considered “closed” until all of the used oil residues are removed from the tank and all contaminated system components are properly disposed of. The rules relating to used oil also prohibits the disposal of “an item . . . that contains de minimis amounts of oil” unless “all oil has been removed from the item” and “[n]o free flowing oil remains in the item or substance.” Utah Admin. Code R315-14-1.5. Essentially, used oil storage containers are considered in use and subject to regulation until they are properly emptied and disposed of in accordance with these rules.

as storing petroleum products in tanks is an integral part of Golden Eagle's legal nonconforming use, and provided safety concerns are not at issue, how long Golden Eagle waits to dispose of unusable oil is an issue of the internal operation of its business and not a matter of zoning law.

V. BECAUSE STATE ENVIRONMENTAL REGULATIONS REQUIRED GOLDEN EAGLE TO REPLACE THE OLD STORAGE TANKS, GOLDEN EAGLE HAD A LEGAL RIGHT TO INSTALL THE NEW TANKS PROVIDED THAT ITS OPERATIONS WOULD REMAIN ON SUBSTANTIALLY THE SAME SCALE; REMOVAL OF THE OLD STORAGE TANKS UNDER THESE CIRCUMSTANCES CANNOT REASONABLY BE INTERPRETED AS A "CESSATION OF USE" UNDER THE WOODS CROSS ORDINANCE.

The trial court rejected Golden Eagle's reliance on the commonsense definition of "in use" adopted in *V-I Oil Co. Add.* at 14. However, the court did not expressly adopt the City's position. Instead, the court upheld the City's action on a basis that the City had never really advanced in its briefing: that because the Old Storage Tanks had been removed from the Property and replaced by the Certified Tanks, the use of the Old Storage Tanks had permanently ceased. *Add.* at 16-17. Central to the court's decision was the fundamental misconception that Golden Eagle "*voluntarily* chose to drain and dispose of the waste [in the Old Storage Tanks] and physically remove the tanks from the Property." *Add.* at 17 (emphasis added). The trial court held: "The Court finds that *voluntary* demolition of a structure constitutes a permanent discontinuance of that structure under § 12-22-106 of the Woods Cross Ordinance, and in essence, constitutes a permanent abandonment." *Add.* at 17 (emphasis added).

This holding was patently contrary to the evidence. Golden Eagle did not “voluntarily” dispose of the Old Storage Tanks – it was required to do so by the State’s Department of Environmental Quality in order to comply with new State environmental regulations. As explained below, under such circumstances case law holds that Golden Eagle retained the right to install the Certified Tanks provided its operations would remain on substantially the same scale, which they clearly would. Precluding installation of the Certified Tanks under these facts constitutes an unreasonable and arbitrary application of the City’s Ordinance. The trial court’s holding is also against public policy and threatens to undermine the State’s environmental regulations. Good citizens like the owners of Golden Eagle should be encouraged to comply with State environmental regulations, not punished by unreasonably harsh interpretations of local zoning ordinances when they do so.

A. Golden Eagle Replaced the Old Storage Tanks With the Certified Tanks in Order to Comply with State Environmental Regulations.

The district court’s finding that Golden Eagle “voluntarily” chose to “physically remove the tanks from the Property” is directly contrary to the undisputed facts. Compliance with State environmental regulations governing hazardous waste is obviously not voluntary – it’s the law. In the briefing on summary judgment, the City did not dispute that “[t]here was no feasible method of upgrading the [Old] Storage Tanks to bring them into compliance with the new environmental regulations,” and that “[t]he *only* way to bring the [Old] Storage Tanks in[to] compliance with the new environmental

regulations was to remove them, pour concrete basins, and replace the [Old] Storage Tanks with more modern tanks.” R. App. at 84 (Golden Eagle’s “Statement of Facts as to Which No Genuine Issue Exists,” ¶ 26) (emphasis added); *cf.* R. App. at 131-33 (City’s Memorandum in Opposition does not dispute this fact). The trial court’s finding directly contradicted the undisputed facts and thus was error.

This is a critically important point. From a purely operational perspective, the Old Storage Tanks were fully functional; there has never been any suggestion to the contrary. Fifty years ago, tanks like these would have continued to be used as an integral part of the reclamation operations for years to come, minor leaks notwithstanding. The issue with the tanks was not whether they had worn out from an operational standpoint, but whether they could be made to comply with new and stricter State environmental regulations designed to prevent contamination of the soil and water. As it turned out, compliance with the new regulations required the replacement of the old (but still usable) tanks with new tanks.

B. The Ordinance Should Not Be Read to Prevent the Replacement of Equipment When Replacement Is Necessary to Comply with State Environmental Regulations.

1. The Text of the Ordinance Itself Does Not Require the Interpretation Given by the Trial Court.

There is no reason to interpret the City’s Ordinance in a way that creates the harsh and counterproductive result created by the decision below. Section 12-22-106(a), on which the district court’s ruling is based, clearly contemplates the scenario where a

structure is left unused for a year or is simply torn down. It is silent about instances like this, where replacement of a structure is necessary to comply with new State environmental, health, or safety regulations.

However, § 12-22-104(*b*) indicates that allowing the owner to replace the structure under circumstances such as this is fully consistent with the Ordinance. Section 12-22-104(*b*) specifically allows the owner to make “[r]epairs and structural alterations *necessary for building safety*,” provided “that the floor area of [a nonconforming building] is not increased.” (Emphasis added.) Likewise, § 12-22-102 of the Ordinance provides that “nothing in this Chapter shall prevent or discourage the strengthening or restoring to a safe condition o[f] any part of any building or structure declared unsafe by proper authority.”

These provisions should be read to apply to the instant situation. Replacing the Old Storage Tanks was necessary to correct problems with hazardous waste, a significant “safety” issue by any reckoning; indeed, that was the only way they could be “restor[ed] to a safe condition.” State regulators had determined that the tanks were not in compliance with State environmental regulations, *i.e.*, that the tanks were environmentally “unsafe.” And upon replacement, the total storage capacity of the tanks was “not increased” but rather decreased by 86,000 gallons.

Courts have the duty to interpret statutes so as to avoid unconstitutional or arbitrary results. *See State v. Casarez*, 656 P.2d 1005, 1008 (Utah 1982). This Court must avoid such an interpretation of the Ordinance in this case. The most sensible

reading of § 12-22-106 in light of the whole Ordinance is that it does not preclude the outcome here. In the absence of a clear statutory indication to the contrary, the Ordinance should not be read to produce the unjust result imposed by the City and upheld by the district court.

2. Case Law Holds That the Replacement of a Structure to Comply with State Regulations Does Not Preclude Reconstruction Provided That the Nonconforming Use Remains on Substantially the Same Scale.

Utah's courts have never addressed the situation where a municipality strips a landowner of a vested right to a structure dedicated to a nonconforming use because the landowner endeavored to comply with State health, safety, or environmental regulations. Such scenarios appear to be exceedingly rare, no doubt due to the obvious unfairness.

Yet, the case law that does exist strongly supports Golden Eagle's position. In *Application and Appeal of O'Neal*, 92 S.E.2d 189 (N.C. 1956), the city building inspector and the Commission of Public Welfare notified the owners of a nursing home, a legal nonconforming use, that they would not be allowed to continue operations unless they complied with state building code regulations requiring fireproof facilities. *Id.* at 191. In response, the owners applied to the city for a permit to replace the old frame building with a brick structure that complied with the state building code, but the permit was denied. *Id.* at 192. As here, the city had an ordinance providing that "[n]o nonconforming use may be reestablished in any building or on any premises where such nonconforming use has been discontinued for a period of one year." *Id.* at 193.

On appeal, the North Carolina Supreme Court noted “that the new construction proposed by petitioners [the owners] is not by reason of their choice or voluntary act, but is necessary to meet the requirements of the 1936 North Carolina Building Code.” *Id.* at 195. The court held that under those circumstances the owners had a “right” to a building permit allowing them to replace the old structure with a new one, provided the new structure would be on substantially the same scale as the old:

So far as the nursing home ban in a Residence 1 [zone] is concerned, we conclude that petitioners have the legal right to construct or reconstruct a fireproof building where their present frame building is situated, or in lieu thereof to construct a fireproof building elsewhere on said Lot 1, subject to the limitation that the reconstructed or new building in respect of the accommodations provided will provide facilities for the operation of a nursing home on substantially the same scale as that heretofore operated by petitioners.

* * * *

If, upon submission of detailed plans and specifications, it appears that the new fireproof building will be a facility, comparable in size for the operation of a nursing home on *substantially the same scale* as that in operation when the ordinance was adopted, the permit for the construction and occupation thereof within such limitations should be granted *as a matter of right*.

Id. at 195-96 (emphasis added).

The court in *Calcasieu Parish Police Jury v. Boullion*, 432 So.2d 1181 (La. App. 1983), addressed a similar situation and reached the same result. There, changes in state health laws required a wholesaler of seafood to alter how it packaged and processed seafood. To comply with the new state standards, the wholesaler needed to construct an additional room at its packing facility, a structure dedicated to a legal nonconforming use.

Id. at 1181-82. After consultation with state health authorities, the owner built the additional room. Local zoning authorities later sued on the ground that the addition was an extension of a nonconforming use proscribed by the zoning ordinance. *Id.* at 1182. The owner maintained that because “Health Department regulations required him to provide a[n] [additional] room for his packaging process, [the] addition was not in violation of the zoning ordinance.” *Id.* On appeal, the court agreed, holding that since the extension was required by law it was legal under the zoning ordinance. *Id.* at 1183.⁶

The same principle applies here. As with the old nursing home in *O’Neal*, Golden Eagle’s Old Storage Tanks had to be replaced to comply with new State regulations. Installation of the Certified Tanks was not merely a “voluntary act” but rather one required by State law. *Cf. O’Neal*, 92 S.E.2d at 195. Accordingly, Golden Eagle has a “legal right” to install tanks that will comply with State regulations provided its nonconforming use will remain “on substantially the same scale” as before. *Id.* at 195-96.

This rule is strongly supported by established Utah law, public policy considerations, and basic notions of due process. First, it goes without saying that to the extent local laws or decisions conflict with or undermine State laws or regulations, the State laws must prevail. *State v. Hutchinson*, 624 P.2d 1116, 1121 (Utah 1980) (“[L]ocal governments are without authority to pass any ordinance prohibited by, or in conflict

⁶The zoning ordinance had a proviso allowing a nonconforming use to be enlarged “when required to do so by law or by ordinance.” *Id.* at 1182 n.2. This provision resembles the caveats in §§ 12-22-102 & 12-22-104(b) of the Ordinance at issue here, which allow for restorations and repairs to alleviate safety concerns.

with, state statutory law.”); *Salt Lake City v. Roberts*, 2000 Utah Ct. App. 201, 7 P.3d 789, ¶ 4, *rev. granted*, 11 P.3d 708 (Utah 2000) (ordinances invalid if “inconsistent or conflict with state law”). Here, State law required what the City has attempted to prevent. Second, the rule encourages and facilitates compliance with vital State health, safety, and environmental regulations.⁷ Absent such a rule, property owners will have a strong incentive to avoid compliance lest they lose their right to their nonconforming uses. Third, the rule is narrow and well defined. As was the case in *O’Neal*, the “decision [here] need not extend beyond” the “factual situation” where replacement of an old structure is required to comply with State regulations. *O’Neal*, 92 S.E.2d at 195. Such instances do not arise often and thus are not likely to undermine local policies regarding nonconforming uses. And lastly, the rule is required by basic norms of fairness and due process. Courts must not permit government to force citizens into a proverbial “Catch-22,” where compliance with one law requires the breaking of another or the forfeiture of vested rights. That is not only arbitrary and capricious, it is simply wrong. Yet it is precisely the outcome created by the City and affirmed by the district court.

⁷In light of environmental concerns attending the disposal of used oil, Golden Eagle’s recycling operations clearly advance the public interest. As this Court explained in *Gibbons & Reed Company*, in analyzing the reasonableness of a prohibition on a nonconforming use, the court “must also consider the loss to the public in general” of the “beneficial use” to which the property is being put. 431 P.2d at 563.

3. Golden Eagle's Nonconforming Use Will Remain on "Substantially the Same Scale" as Before Despite the Replacement of the Old Storage Tanks With the Certified Tanks.

There is no evidence that the replacement of the Old Storage Tanks with the Certified Tanks will substantially alter the scale of Golden Eagle's nonconforming use. As before, Golden Eagle will use the Certified Tanks to store used petroleum products. Total storage capacity will have actually *decreased*. The quantity and quality of the petroleum products actually stored in the tanks will depend on customer needs and internal and external market conditions, just as before the State required the new tanks. Whether a tank is half empty or filled to capacity, it occupies the same space and produces the same visual impact on neighboring properties. Golden Eagle has not proposed any physical expansion of its operations or business in light of whatever increases in efficiency or productivity might result from better tanks, and there is no evidence such an expansion would result.⁸ In fact, the impact of Golden Eagle's reclamation activities on the Property itself, as well as the surrounding properties, will almost certainly *decrease* due to the elimination of a significant environmental hazard. Other changes have been made incident to the installation of the new tanks which will make the Property more aesthetically pleasing, further reducing the Property's adverse impacts on the neighbors. *See* R. App. at 86; *cf. Gibbons & Reed Company*, 431 P.2d at

⁸It is possible that some additional oil will be recycled with the Certified Tanks due to efficiency increases, but there is no actual evidence of that. The exact volume of used petroleum products which Golden Eagle processes obviously depends on many variables, only one of which is the capacity of its plant.

563 (fact that gravel operations would not have “any substantial adverse effect upon the value of [neighboring] propert[ies]” important factor in nonconforming use analysis).

In short, if allowed to install the Certified Tanks in compliance with State regulations, Golden Eagle’s reclamation operations will remain on “substantially the same scale” as before. There is no evidence to the contrary. As such, Golden Eagle has the “legal right” to install the Certified Tanks. The district court erred as a matter of law in interpreting the City’ Ordinance as precluding the installation of the Certified Tanks.

VI. GOLDEN EAGLE’S REPLACEMENT OF THE OLD TANKS WITH THE CERTIFIED TANKS DID NOT ENLARGE, EXTEND, OR CHANGE GOLDEN EAGLE’S NONCONFORMING USE AND THEREFORE MUST BE PERMITTED UNDER THE CITY’S ZONING ORDINANCE.

The district court also erred in holding that installation of the Certified Tanks “acts as an enlargement of [Golden Eagle’s] nonconforming use of [the] property.” Add. at 20. Both Utah Code Ann. § 10-9-408 and § 12-22-102 of the City’s Ordinance allow a nonconforming use to continue. Section 12-22-104 of the City’s Ordinance prohibits enlarging, extending, or changing a nonconforming use except in certain specified circumstances. Thus, if the installation of the Certified Tanks does not constitute an enlargement, extension, or change of the nonconforming use (*i.e.*, the operation of an oil reclamation facility), the City had no legal authority to prohibit the installation.

Many courts have held that a nonconforming use need not remain static. Merely intensifying or modernizing a nonconforming use – for example, through substituting more modern equipment and thereby increasing the output of an operation – does not

generally constitute an “enlargement” or “extension” of the nonconforming use where the nature and character of the use are not substantially changed. Nevertheless, the district court held that any modernization of the tanks on the Property would necessarily constitute an enlargement of the nonconforming use. *See Add.* at 18-21. Although Utah courts have never directly addressed this issue, numerous decisions from other jurisdictions demonstrate that the court below was entirely mistaken, especially where, as here, there are no express provisions in the ordinance regulating the volume or intensity of a nonconforming use.

In *Keller v. City of Bellingham*, 600 P.2d 1276 (Wash. 1979), Georgia-Pacific Corporation (“GP”) desired to improve its chlor-alkali facility by adding *inter alia* six new electrolytic cells. *Id.* at 1278. Each cell was a “troughlike structure[] measuring some 50 feet in length, 5 feet in width and about 1 foot in depth.” *Id.* The new cells were “forecast to increase chlorine production [at the plant] by 20 to 25 percent.” *Id.* Much as here, opponents argued that the addition of the new equipment to GP’s nonconforming use constituted an illegal “enlargement” of that use. The Washington Supreme Court disagreed. The court first noted that the “zoning ordinance could have specifically prohibited intensification of a nonconforming use by reference to a specified volume of such use, [but] it did not do so,” choosing instead to limit its “enlargement.” *Id.* at 1279. The established rule is that within reasonable limits increasing the volume or intensity of the nonconforming use is not a prohibited “enlargement” of the use:

Intensification [of a nonconforming use] is permissible [*i.e.*, does not

constitute a prohibited “enlargement”] where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified use is ‘different in kind’ from the nonconforming use in existence when the zoning ordinance was adopted.

Id. at 1280 (internal citations omitted). Because the extra cells “wrought no change in the nature or character of the nonconforming use,” the court held that there had been no prohibited “enlargement” of that use. *Id.*

Similarly, the Supreme Court of Idaho in *Gordon Paving Company v. Blain County Board of County Commissioners*, 572 P.2d 164 (Idaho 1997), addressed whether the modernization of an asphalt plant constituted an enlargement or extension of a nonconforming use.⁹ The court noted that where a “reasonable substitution of more modern facilities for obsolescent equipment” is at issue, generally “such a substitution does not constitute an enlargement or extension” of the nonconforming use. *Id.* at 166 (citing authorities). The same is true, the court held, for increases in the plant’s “volume of output” due to the “greater efficiency of the modernized equipment,” especially where the “environmental impact of the use is substantially reduced despite the increase in volume.” *Id.* The court reasoned:

Case law in other jurisdictions has held that as a matter of law an increase in the volume of use is not an enlargement or extension. The same result

⁹The ordinance also required a variance for “nonconforming changes of use” as well as for “enlargements or extensions” of a nonconforming use. *Id.* at 165. Although the county did not argue that a prohibited “change” in use was at issue, the court noted that “[a]s a matter of law, no change of use occurred” since both before and after the modernization the company was “engaged in asphalt production by the same basic process.” *Id.* at 166 n.1.

must certainly inhere when increased volume is accompanied by a greater compatibility with the surrounding locale.

Id. (citation omitted). Not having enlarged or extended its nonconforming use, the court held that the property owner was not required to seek a variance for its plant modernization.

In an extensive analysis, the Supreme Judicial Court of Massachusetts in *Derby Refining Company v. City of Chelsea*, 555 N.E.2d 534 (Mass. 1990), addressed the issue of what constitutes a “change” or “extension” of a nonconforming use in a case with striking parallels to the instant case. The suit involved a petroleum storage facility that existed as a legal nonconforming use. *Id.* at 536. The new owner, Belcher, decided that the best use of the property was as a liquid asphalt storage facility, which required the installation of “a hot oil heating system to heat the tanks and pipes so that the asphalt could be preserved in a liquid state for pumping.” *Id.* at 536-37. Belcher also “insulated the exteriors of three of the storage tanks to prevent heat loss, added scales to the truck-loading dock, and made various other modifications to the pipes, valves, and tanks.” *Id.* Following changes in the zoning law, a dispute arose about whether the new equipment and facilities constituted a prohibited “change or substantial extension” of the prior owner’s nonconforming use. To answer that question, the supreme court employed a “three-part test”:

(1) Whether the [current] use reflects the nature and purpose of the [prior] use, (2) Whether there is a difference in the quality or character, as well as the degree, of use, and (3) Whether the current use is different in kind in its effect on the neighborhood.

Id. at 539 (brackets supplied by the court; internal quotation marks omitted).

Echoing arguments made here, on the first prong of the test (“[n]ature and purpose of the use”) the opponents maintained that the ordinance was violated because “the use of the facility has changed from the storage of fuel products to storage of a building material [asphalt].” *Id.* at 540. The court flatly rejected this argument:

In the absence of a demonstrated difference in neighborhood impact [which was never shown] the fact that the product being delivered, stored, and distributed has changed from one petroleum product to another petroleum product does not mandate a conclusion that a change in the nature or purpose of the use has occurred.

Id. (emphasis added).

On the second prong of the test (“[q]uality, character, and degree of use”), the opponents argued that “the character of the storage activities occurring on the property has changed due to the fact that liquid asphalt must be kept heated,” a process which “has required substantial physical alternation to the facility, including the erection of two smokestacks.” *Id.* at 540-41. In rejecting this argument, the court first noted the rule that

a valid nonconforming use does not lose that status merely because it is improved and made more efficient, provided, however, that the changes are *ordinarily and reasonably adapted to the original use* and do not constitute a change in the original nature and purpose of the undertaking.

Id. at 541 (internal quotation marks omitted). Having already concluded that no change in the nature of the use had occurred, the court then held that the “modifications” were “ordinarily and reasonably adapted” to the original use:

It is undisputed that liquid asphalt must be heated in order to prevent solidification, and that the modifications Belcher made to the facility were

designed solely to accomplish that end. *There is nothing to suggest that those changes were either extraordinary or unreasonable or that they changed the fundamental nature of the original enterprise.*

Id. (emphasis added). Lastly, the court held that the third prong (“[n]eighborhood impact”) was satisfied because the evidence indicated that Belcher’s use is ““not different in kind in its effect on the neighborhood”” as compared with the prior use. *Id.* at 542.

Numerous other courts have reached similar conclusions when addressing the issue whether improving, modernizing, or intensifying a use (or structures related to that use) constitutes a prohibited enlargement, change, or extension of a nonconforming use.¹⁰

As already demonstrated, there is no evidence that the Certified Tanks will impose

¹⁰*See, e.g., Town of Seabrook v. D’Agata*, 362 A.2d 182, 183 (N.H. 1976) (ordinance prohibiting the “expansion” of a nonconforming use; “Although the general policy of zoning is to carefully limit the extension and enlargement of nonconforming uses, a town may not interpret a use in such a way as to unlawfully reduce the original vested interest acquired by the owner. [Citation.] The fact that improved and more efficient or different instrumentalities are used in the operation of the use does not in itself preclude the use made from being a continuation of the prior nonconforming use providing such means are ordinarily and reasonably adapted to make the established use available to the owners and the original nature and purpose of the undertaking remain unchanged.”); *Zeiders v. Zoning Hearing Board of Adjustment of West Hanover Township*, 397 A.2d 20, 22 (Pa.Cmwlth. 1979) (modernization of nonconforming use must be granted as a “reasonable continuance of a nonconforming use ... unless such a modernization is found injurious to the public health, safety or welfare”); *City of Spring Valley v. Hurst*, 530 S.W.2d 599 (Tex. Civ. App. 1975) (permit to construct building dedicated to nonconforming use must be granted where nonconforming use will not be “extended” but rather business will continue as before, noise level of current activities will be reduced, no new or added activities will be carried out, and no evidence that volume of business will be increased); *see also Siver v. Zoning Board of Adjustment*, 255 A.2d 506, 507 (Pa. 1969) (doctrine of natural expansion of nonconforming use as dictates of business or modernization require is a constitutional right protected by due process of law, but the contemplated expansion must not be detrimental to public health, welfare and safety).

a substantial additional impact on the Property or the neighboring properties, much less that the nature and character of Golden Eagle's nonconforming use will be substantially changed. The evidence shows precisely the opposite, in fact. Installation of the Certified Tanks will result in less environmental contamination and less visual impact, thus reducing the impact of the nonconforming use.¹¹ And it cannot be denied that "the nature and character of the use [will be] unchanged and [that] substantially the same facilities [will be] used" once the Certified Tanks are installed. *Keller*, 600 P.2d at 1280. Even assuming *arguendo* an intensification of Golden Eagle's use, "the intensified use [will not be] 'different in kind' from the nonconforming use in existence when the zoning ordinance was adopted." *Id.* at 1280 (internal citations omitted). And even further assuming that the petroleum products to be stored in the Certified Tanks will differ somewhat from the used oil in the Old Storage Tanks,¹² as the court in *Derby Refining Company* held, "the fact that the product being delivered, stored, and distributed has changed from one petroleum product to another petroleum product does not mandate a

¹¹The court below purported to find that the Certified Tanks increased Golden Eagle's storage capacity by 116,000, but that was simply wrong. The undisputed evidence is that the Certified Tanks have less capacity than the tanks they replaced, not more. *See* R. App. at 86. Whatever restrictions State regulators may have placed on the use of the Old Storage Tanks pending environmental upgrades did not reduce the capacity of those tanks.

¹²Except in the trivial sense that used oil from different sources is unlikely to be chemically identical, there is no evidence that the used oil to be put in the Certified Tanks will differ substantially from what was in the Old Storage Tanks. The district court's suggestions to the contrary were without factual basis.

conclusion that a change in the nature or purpose of the use has occurred.” 555 N.E.2d at 540.

Thus, under the many cases cited above, the mere replacing of the Old Storage Tanks with the Certified Tanks did not constitute an “enlargement” of Golden Eagle’s nonconforming use. As such, the City’s Ordinance did not preclude installation of the Certified Tanks. The district court’s conclusion to the contrary was plainly incorrect.

VII. IN THE ALTERNATIVE, STORAGE OF PETROLEUM PRODUCTS IN THE CERTIFIED TANKS IS A VALID ACCESSORY USE

In the event the Court agrees with the district court’s implicit holding that storing used petroleum products is somehow a separate use from Golden Eagle’s primary reclamation activities, there can be no question that the Certified Tanks would constitute (in the alternative) a lawful accessory use.

A. The Doctrine of Accessory Uses Allows Incidental, Subordinate Uses

Golden Eagle is entitled to utilize the Certified Tanks to store petroleum products as a use which is accessory to the primary nonconforming use of operating an oil reclamation facility. The doctrine of accessory uses has been described as follows:

Under the Doctrine of Accessory Uses, a landowner is permitted to maintain an accessory or incidental use in connection with a permitted use of land if the accessory use is truly incidental to the primary nonconforming use and does not change the basic nature of the use of the property.

Atkins v. Zoning Board of Adjustment of Union County, 281 S.E.2d 756, 760 (N.C. Ct. App. 1981). Consistent with this statement, the City’s Ordinance contains the following definition of “accessory use”:

The term “accessory use” shall mean a use which is incidental to and subordinate to the prescribed permitted use within any respective zoning provisions.

Woods Cross City Ordinances § 12-2-103. Accessory uses are permitted even if the applicable zoning ordinance is silent concerning such uses. *Pratt v. Building Inspector of Gloucester*, 113 N.E.2d 816, 816-17 (Mass. 1953) (considering accessory use argument “even though the ordinance does not expressly permit accessory uses”); *City of Sheridan v. Keen*, 524 P.2d 1390, 1392 (Colo. 1974). (“an accessory use is one which is deemed to be permitted by implication where the ordinance is silent on the particular use in issue”).

B. Permissible Accessory Uses are Distinguishable From Unlawful Expansions.

“[A] lawful nonconforming use may be validly expanded by a reasonable accessory use which is not detrimental to the public health, welfare, or safety.” *Jackson v. Pottstown Zoning Board of Adjustment*, 233 A.2d 252, 255 (Pa. 1967). The distinction between an impermissible extension of a nonconforming use and a permissible accessory use has been described as follows:

The criterion for determining that a modification is an accessory use rather than an extension is that the modification is ‘a use customarily incidental and subordinate to the main or principal use’ . . . or, in other words, a minor use of the property, commonly established as being reasonably related to the primary use.

Maloy v. Town of Guiderland, 461 N.Y.S.2d 529, 530 (N.Y. App. Div. 1983).

Thus, in determining whether a use is an accessory use, the court may consider the following factors: (1) whether the use is customarily incidental to the primary use; (2)

whether the use is subordinate to the primary use; (3) whether the use is reasonably related to the primary use; (4) whether the use is a minor use of the property; and (5) whether the use is reasonable.

In the present case, the installation of the Certified Tanks meets all of these criteria. To the extent the trial court is correct that some distinction can be drawn between Golden Eagle's reclamation operation and the storage of used petroleum products, the storage of petroleum products would necessarily be incidental to and subordinate to the primary use of recycling used oil. Storage of used oil is reasonably related to the recycling of such oil, and constitutes only a minor use of the property. Finally, it is completely reasonable to allow a recycling facility to store the very material which it ultimately recycles; tanks are a necessary implement of the recycling process. Thus, Golden Eagle's use of the Certified Tanks constitutes a permissible accessory use.

The decision in *Gauthier v. Village of Larchmont*, 291 N.Y.S.2d 584 (N.Y. App. Div. 1968), is instructive. In that case, the property in question had been operated as a hotel for over 80 years, with a portion of the premises being used as a bar until 1919. "From 1919 to 1933, although the hotel remained in operation, the bar was closed because of the National Prohibition Act. However, the equipment therein remained intact and that portion of the hotel was used for storage." *Id.* at 586. In 1921 the village enacted a zoning ordinance prohibiting hotels in the relevant zoning district. Subsequently, the village claimed that the bar did not have status as a vested nonconforming use because it was not being used when the ordinance was enacted. The

court rejected this argument:

[T]he contention is meritless in a situation where the principal use was in existence prior to the zoning ordinance and was not abandoned. . . . We are of the opinion that the nonconforming use attached to the hotel as an entity and the latter embodies the bar as an accessory use. . . . Clearly, the service of liquor refreshment is inseparable from a modern hotel and as a matter of law a bar therein is an accessory use. . . . Consequently, as the hotel continued operations during 1919-1933, the right to resume liquor sales was not abandoned. ***Cessation of the accessory use caused by circumstances beyond the control of the user is not sufficient to establish abandonment*** (2 Rathkopf, Zoning and Planning (3d ed.), pp. 61-9, 61-11). . . . We are also of the opinion that there was not an abandonment due to the voluntary termination of liquor sales during the years of 1957-1963. . . . [H]ere the principal use was never discontinued. For these reasons the resumption of liquor sales in 1964 was not an extension of the nonconforming use. . . . The resumption of that activity did not cause a fundamental change in the use . . . , as liquor had been lawfully sold on the premises before and we have earlier concluded that such activity constitutes an essential and integral part of the principal use

Id. at 587-88 (emphasis added).

In *Gauthier*, the sale of liquor had been terminated once as a result of prohibition and a second time on a voluntary basis. Nonetheless, the court allowed the property owner to continue selling liquor as an accessory use. In the present case, any cessation of use of the Old Storage Tanks was mandated by new State environmental laws and regulations. Under the rationale of *Gauthier*, Golden Eagle is entitled to utilize the Certified Tanks for the accessory use of storing used petroleum products.

C. The District Court's Accessory Use Holding Was Erroneous.

In the Memorandum Decision, the district court acknowledged that “[a] lawful nonconforming use may be validly expanded by a reasonable accessory use which is not

detrimental to public health, welfare, or safety.” Add. at 20. Nevertheless, the court held as follows:

[T]he Court does not find the installation of the six Certified tanks with a storage capacity of 116,000 gallons to be “reasonable,” “incidental,” or “subordinate” to the use of the Property. Instead, it substantially expands the use of the Property to store an additional 116,000 gallons of recyclable oil. A change in storage capacity is not permissible when the spirit of the zoning act was to restrict, rather than increase any nonconforming use. Home Fuel Oil Co. v. Glen Rock, 118 NJL 340, 192 A 516. Therefore, the Court does not find the Certified Tanks to be an accessory use.

Add. at 20.

This holding is erroneous in three respects. First, the trial court disregarded the *undisputed* fact that “Golden Eagle removed the 17 [Old] Storage Tanks with a combined capacity of 202,000 gallons and replaced them with 6 Certified Tanks with a combined capacity of 116,000 gallons.” R. App. at 86 (¶ 36). It is undisputed that the replacement of the Old Storage Tanks with the Certified Tanks *reduced* the number of tanks by 11 and *decreased* Golden Eagle’s used oil storage capacity by 86,000 gallons. The district court’s holding was plainly mistaken in this regard; the replacement of the tanks did not “substantially expand[] the use of the Property.” Add. at 20.

Second, as explained more fully below, the mere summoning of the “spirit of the zoning act” does not override a property owner’s express right under the Ordinance to include accessory, incidental uses in conjunction with the primary nonconforming use. And even if the Ordinance’s purported purpose of restricting nonconforming uses were relevant, the reduction in the number and capacity of tanks is certainly consistent with

that purpose. It should also be noted that the present case differs significantly from *Home Fuel Oil*, 192 A.516 (N.J. Super. 1937), which trial court cited. The property owner in *Home Fuel Oil* was seeking to “increase the storage capacity [of its operations] from about one hundred thousand gallons to four hundred and forty thousand gallons,” not decrease the storage capacity, as here. *Id.* at 518. Moreover, *Home Fuel Oil* did not address issues of accessory use.

Third, the district court’s accessory use analysis focused on the *installation* of the tanks rather than the proposed *use* of the tanks. *Add.* at 20. The relevant accessory use is the storage of used petroleum products, not the one-time installation of tanks. To the extent the Court rejects the view that such storage is an integrated and inseparable part of Golden Eagle’s primary nonconforming use (and thus fully permissible as such), it cannot be denied that the storage of used oil is reasonably related to, incidental to, and subordinate to the primary activity of recycling oil. Accordingly, in the alternative Golden Eagle is entitled to store used petroleum products in the Certified Tanks as an accessory use.

VIII. THE DISTRICT COURT’S HOLDING CANNOT BE JUSTIFIED BY THE RATIONALE THAT ANY OTHER HOLDING WOULD RESULT IN A PERPETUAL NONCONFORMING USE.

Section 12-22-101 of the Ordinance states:

The purpose of this section is to control and gradually eliminate those uses of land or buildings, which, although legal at the time of their establishment, do not now conform to the use, height, location, and similar regulations of the district within which they are situated.

The district court repeatedly relied on this section as a key support for its tenuous ruling. The court essentially reasoned backwards from this section to conclude that all of the foregoing arguments – about the need to comply with State environmental regulations, about the new tanks not constituting an enlargement of the nonconforming use, and about the tanks being at least a valid accessory use – must be rejected or else nonconforming uses might continue perpetually, thus subverting the stated purpose of the Ordinance. This argument fails for at least three reasons.

First, as a factual matter, allowing a particular landowner to comply with State environmental regulations is hardly subversive of the broader City goal of gradually eliminating nonconforming uses. Situations such as this are relatively rare. Allowing Golden Eagle, or others similarly situated, to comply with State regulations without being stripped of its nonconforming use would not hinder the City's goal in any meaningful way.

Second, City zoning goals cannot subvert State environmental laws or policies. As noted, to the extent there is a conflict between municipal goals and a State law, the State law wins. *Hutchinson*, 624 P.2d at 1121. Even assuming that installation of the Certified Tanks would undermine City policy, that outcome is nevertheless required to avoid subverting vital State environmental regulations.

But third and perhaps most importantly, merely stating that the broad purpose of the City's Ordinance is to gradually eliminate nonconforming uses does not necessarily mean that the specific terms of the Ordinance actually does that. The devil is in the

details, as they say. Here, contrary to the district court's reasoning, the actual provisions of the Ordinance allows for a nonconforming use to continue in perpetuity. The Ordinance does not prohibit a nonconforming used oil reclamation facility, for instance, from purchasing new parts for its operation and thus continuing in business for the foreseeable future. One can imagine any number of potential nonconforming uses (*e.g.*, farming) which could easily continue forever under the precise terms of the City Ordinance.

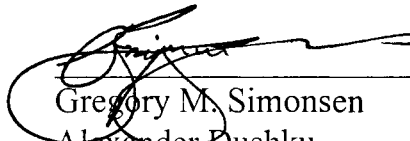
Broad statements of purpose aside, the simple fact is that the City has *not* chosen to eliminate nonconforming uses according to the statutory regime established by the State Legislature. The City could have elected to eliminate all nonconforming uses through a reasonable amortization period as provided by State statute, but for its own reasons it chose not to do so. Instead, the City enacted a regime that allows nonconforming uses to continue to exist – even in perpetuity – but contains such uses within reasonable bounds. As explained above, installation of the Certified Tanks does not violate a fair reading of the actual restrictions in the Ordinance. The district court erred by using a broad policy statement to reach a result which the specific terms of the Ordinance itself do not require.

CONCLUSION

For the foregoing reasons, Golden Eagle respectfully requests that the decision of the district court be reversed and that summary judgment be entered in favor of Golden Eagle.

Dated this 2 day of March, 2001.

KIRTON & McCONKIE



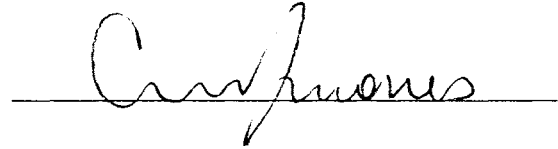
Gregory M. Simonsen
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Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2001, I caused two true and correct copies of the foregoing **BRIEF OF APPELLANT** to be mailed through United States mail, postage prepaid, to the following:

Michael Z. Hayes
Mazuran & Hayes
2118 East 3900 South, Suite 300
Salt Lake City, UT 84124

Attorney for Defendant

A handwritten signature in cursive script, appearing to read "Christopher", is written over a horizontal line.

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Exhibit A

Determinative Legal Provisions

Utah Code

Utah Code Ann. § 10-9-103(1)(k) to (l)

(1) As used in this chapter:

(k) “Nonconforming structure” means a structure that:

- (i) legally existed before its current zoning designation; and
- (ii) because of subsequent zoning changes does not conform with the zoning regulations’s setback, height restrictions, or other regulations that govern the structure.

(l) “Nonconforming use” means a use of land that:

- (i) legally existed before its current zoning designation;
- (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and
- (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.

Utah Code Ann. § 10-9-408(1) to (2)(b)

- (1)
 - (a) Except as provided in this section, a nonconforming use or structure may be continued.
 - (b) A nonconforming use may be extended through the same building, provided no structural alteration of the building is proposed or made for the purpose of the extension.
 - (c) For purposes of this subsection, the addition of a solar energy device to a building is not a structural alteration.
- (2) The legislative body may provide in any zoning ordinance or amendment for:
 - (a) the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the zoning ordinance;
 - (b) the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any; and

Woods Cross City Ordinance

Chapter 12-22 Prior Non-Conforming Uses

12-22-101 Purpose and Objectives

The purpose of this Section is to control and gradually eliminate those uses of land or buildings, which, although legal at the time of their establishment, do not now conform to the use, height, location, and similar regulations of the district within which they are situated.

12-22-102 Continuing Existing Uses

Except as hereinafter specified, any use, building, or structure, lawfully existing at the time of the enactment or subsequent amendment of this Ordinance, may be continued, even though such use, building, or structure does not conform with the provisions of this Ordinance for the district in which it is located. Except as otherwise provided by law, nothing in this Chapter shall prevent or discourage the strengthening or restoring to a safe condition or any part of any building or structure declared unsafe by proper authority.

12-22-103 Construction Approved Prior to Enactment

A building, structure, or part thereof which does not conform to the regulations for the district in which it is situated, but for which a building permit was issued and construction started prior to the enactment of this Title (or a substantially similar preceding provision), may be completed in accordance with such plans, provided work is prosecuted continuously and without delay. Such building shall be deemed to be nonconforming and shall be subject to the regulations set forth herein.

12-22-104 Nonconforming Uses, Substitution, Extension

A nonconforming use shall not be enlarged, extended, or changed unless the use is changed to a use permitted in the district in which it is located, and a nonconforming building shall not be reconstructed or structurally altered unless such alteration results in removing those conditions of the building which render it nonconforming, except as follows:

(a) More Desirable. When authorized by the City Council in consideration of the prior recommendation of the Planning Commission, and in accordance with this Title, a nonconforming use which is determined to be of a more desirable nature may be substituted for another nonconforming use.

(b) Repairs. Repairs and structural alterations necessary for building safety may be made to a nonconforming building provided that the floor area of such building is not increased.

(c) Within Building. A nonconforming use may be extended to include the entire floor area of the existing building in which it is conducted at the time the use became nonconforming.

(d) Force Majeure. A nonconforming building or structure which is damaged or partially destroyed by fire, flood, wind, earthquake, or other calamity or act of nature or the public enemy, may be restored. The occupancy or use of such building structure or part thereof which existed at the time of such partial destruction may be continued or resumed provided that such restoration is started within a period of 1 year and is diligently prosecuted to completion within a period of 2 years. In the event such damage or destruction exceeds 3 times the assessed value of such nonconforming building or structure, no repairs or reconstruction shall be made, except in the case of residences or accessory farm buildings, unless every portion of such building or structure is made to conform to all regulations for new buildings in the zone in which it is located, as determined by the Planning Director.

12-22-105 Change of Use Not Allowed

Whenever a nonconforming use has been changed to a conforming use, such a use shall not thereafter be changed or returned to a nonconforming use.

12-22-106 Cessation of Use

A use shall be deemed to have ceased when it has been discontinued either temporarily or permanently for a period of one year or more, whether or not with the intent to abandon said use, subject to the following provisions:

(a) Cessation of Use of Building Designated or Designed for Nonconforming Use. Except for residential or accessory farm structure, a building or structure which was originally designed for a nonconforming use shall not be put to a nonconforming use again when such use has ceased for one year or more.

(b) Cessation of use of Building Not Designed for Nonconforming Use. A building or structure which was not originally designed as a nonconforming use shall not be put to a nonconforming use again when such use has ceased for 6 months or more.

(c) Cessation of use of Nonconforming Use of Land. A nonconforming use of land not involving any building or structure (except minor structures such as fences,

signs, and buildings less than 400 square feet in area) shall not be resumed when such uses has ceased for 3 months or more.

(d) Cessation of Keeping of Nonconforming Animals. The keeping of nonconforming animals shall not be resumed when such use has ceased for one year.

SECOND DISTRICT CL
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IN THE SECOND DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

GOLDEN EAGLE OIL REFINERY, INC.,
a Utah corporation,

Plaintiff,

v.

WOODS CROSS CITY, a municipal
corporation and political subdivision of the
State of Utah,

Defendants.

**MEMORANDUM DECISION ON
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT**

Case No. 990700470

Judge Jon M. Memmott

The above-entitled matter having come before the Court on Plaintiff's Motion for Summary Judgment; and the Court having reviewed the Motion, and Plaintiff's Objection thereto; and the Court having reviewed Defendant's Motion for Summary Judgment, and Defendant's Objection thereto; and being fully advised in the premises, the court makes the following memorandum decision.

BACKGROUND

The matter before the Court concerns Plaintiff's oil reclamation business and real property upon which the business is located, at approximately 1474 West 1500 South, Woods Cross City, Davis County, Utah (hereafter, the "Property"). Prior to 1991, the Property was operated as a used oil reclamation facility. In 1991, Defendant changed zoning of the Property from heavy industrial classification (including such uses as oil recycling) to a light industrial classification ("I-1") which, according to Woods Cross City, does not allow petroleum-related activities. However, after the zoning change, the used oil reclamation facility continued to

Add - 5

operate on the Property as a nonconforming use. In 1993, Stan Hartmark and Merrill Maughan, the present owners of the Golden Eagle Oil Refinery, purchased the refinery and all its assets in order to clean up the Property and continue the used oil reclamation operations. Golden Eagle obtained a valid business permit from the City to operate its oil reclamation facility and has renewed its permit every year since.

To comply with Utah Administrative Code R315-15-5.5(c), Plaintiff drained and removed seventeen, old storage tanks which were used to store a combined capacity of 202,000 gallons of petroleum waste products, between May of 1998 and June of 1998. The old storage tanks ("Old Tanks") were then replaced with six newer, certified API 650 tanks ("Certified Tanks") with a combined capacity of 116,000 gallons of petroleum products. These tanks were relocated to the center of the Property to make the Property more aesthetically pleasing to neighbors. On June 10, 1999, Golden Eagle was informed that it had to obtain site plan approval from the City for the replacement of the tanks. Golden Eagle submitted the Application and corresponding fee on July 15, 1999. At the August 10, 1999 hearing, the Planning Commission unanimously agreed that the changes by Golden Eagle created a more desirable situation and Golden Eagle should be allowed to install the Certified Tanks. On October 6, 1999, the Woods Cross City Council rejected the Planning Commission's recommendation and refused to approve any permit relating to the replacement of the Old Tanks, finding that the Old Tanks had been abandoned and were not eligible for reuse as a non-conforming use on the site. Furthermore, any attempt to replace the abandoned tanks with new usable tanks would be considered by the city to be an expansion of a

nonconforming use. On November 5, 1999, Golden Eagle filed an Appeal and Statement of Grounds with the City Council, and on November 16, 1999, the City Council informed Golden Eagle that its Appeal was denied.

Plaintiff filed a Complaint for Injunctive and Declaratory Relief on December 16, 1999, and filed an Amended Complaint on January 13, 2000. Defendant's Answer to Plaintiff's amended Complaint and Counterclaim was filed on February 7, 2000. Plaintiff filed a Reply to Counterclaim on February 17, 2000. On April 27, 2000, Plaintiff filed a Motion for Summary Judgment and Supporting Memorandum, claiming: 1) Golden Eagle's oil reclamation operations are a legal nonconforming use; 2) The use of the storage tanks never ceased; and 3) Replacement of the storage tanks with the certified new tanks does not violate Woods Cross city's nonconforming use ordinance. Defendant filed a Rule 56(f) Motion on May 8, 2000, and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment on June 13, 2000. Plaintiff filed a Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment and Memorandum in Opposition to Defendant's Motion for Summary Judgment on June 29, 2000, claiming; 1) Golden Eagle's replacement of storage tanks is barred because the use of the tanks ceased for a one-year period, and 2) "Strengthening or restoration" to a safe condition, under Woods Cross City Ordinance § 12-22-102, does not contemplate complete replacement of facilities which have essentially been abandoned. On July 11, 2000, Defendant filed a Reply Memorandum in Support of its Motion for Summary Judgment and a Notice to Submit for Decision. On August 29, 2000, the Court heard the above-entitled matter, took the matter

under advisement, and requested the parties supplement their arguments. Plaintiff's Supplemental Memorandum was filed on September 7, 2000, and Defendant's Supplemental Memorandum was filed on September 15, 2000. The Court looks to the Utah Code, the Woods Cross City Ordinances and applicable law in determination of the matter.

ANALYSIS

The purpose of summary judgment is to avoid unnecessary trial by allowing the parties to submit the matter on the pleadings where there is no genuine issue to present to the fact finder. In accordance with this purpose, specific facts are required to show whether there is a genuine issue for trial. Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984). In reviewing the summary judgment, the court considers the record in the light most favorable to the party opposing the motion, resolving all doubts in his favor. If after a review of the record, we conclude that a genuine issue of material fact exists, we must reverse the summary judgment and remand for further proceedings on the issue. Atlas Corp. v. Clovis Nat'l Bank 737 P.2d 229 (Utah 1987). The Court having again reviewed the respective memorandums following the August 29, 2000 hearing, considers both motions for summary judgment on the following issues: 1) Whether General Eagle operates as a legal nonconforming use; 2) Whether the use of the Old Tanks ceased at any time for a period of one year prior to their replacement; 3) Whether the nonconforming use ceased for a one year period when the Old Tanks were replaced; 4) Whether the replacement of the Old Tanks with the new Certified Tanks violates Woods Cross city's nonconforming use ordinance; and 5) Whether the

installation of the Certified Tanks constitutes a legal, ancillary use. In determination of these issues, the court recognizes that Utah caselaw is limited concerning cases of nonconforming use, its abandonment and expansion and, therefore, looks to other jurisdictions as well for applicable law.

First, the court considers whether Golden Eagle's oil reclamation operations are a legal nonconforming use. Utah Municipal Code § 10-9-103(l) defines a legal nonconforming use as follows:

- l) "Nonconforming use" means a use of land that:
 - (i) legally existed before its current zoning designation;
 - (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and
 - (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.

UTAH CODE ANN. § 10-9-103(l). Section 10-9-408 U.M.C. provides that "a nonconforming use or structure may be continued" except in certain narrow circumstances enumerated therein, and further authorizes municipalities to enact zoning ordinances relating to the expansion of nonconforming uses:

- (2) The [municipalities'] legislative body may provide in any zoning ordinance or amendment for:
 - (a) the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the zoning ordinance....

UTAH CODE ANN. § 10-9-408(2). Woods Cross City has enacted the following ordinance relating to nonconforming uses:

12-22-102 Continuing Existing Uses

Except as hereinafter specified, any use, building, or structure, lawfully existing at the time of the enactment or subsequent amendment of this Ordinance, may be continued, even though such use, building or structure does not conform with the provisions of this Ordinance for the district in which it is located.

WOODS CROSS CITY ORDINANCES § 12-22-102. The Property was used for used oil reclamation prior to the 1991 zoning change, and has been used continually since that date for used oil reclamation operations. In its Answer to Golden Eagle's Amended Complaint (Answer to Am. Compl. At ¶ 5.) and at the August 29, 2000 hearing, the City acknowledged that Golden Eagle's used oil reclamation facility has remained continuously operational as a legal nonconforming use, and has raised no challenge to Golden Eagle's general operation as a used oil facility. Therefore, the court finds that Golden Eagle's used oil reclamation operations qualify as a legal nonconforming use under the Utah Municipal Code and Woods Cross Ordinance § 12-22-102.

Second, the court determines whether the use of the seventeen Old Tanks ceased for a period of one year between 1991 and 1998. Plaintiff argues that the City relied upon Woods Cross City Ordinance §12-22-106(a) in determining that the old tanks removed from the site had been abandoned and were therefore not eligible for reuse as a nonconforming use on the site. Plaintiff claims that the use of the Old Tanks never ceased for a one-year period and, therefore, their nonconforming use had not been abandoned. The Defendant, on the other hand, claims that Golden Eagle's replacement of the storage tanks is barred because the use of the tanks did in fact cease for at least one year prior to the installation of the Certified Tanks.

In determination of the matter, the Court looks to the City's ordinance relating to the cessation of a nonconforming use, which states as follows:

12-22-106 Cessation of Use

A use shall be deemed to have ceased when it has been discontinued either temporarily or permanently for a period of one year or more, whether or not with the intent to abandon said use, subject to the following provisions:

(a) Cessation of Use of Building Designated or Designed for Nonconforming Use. Except for residential or accessory farm structure[s], a building or structure which was originally designed for a nonconforming use shall not be put to a nonconforming use again when such use has ceased for one year or more.

WOODS CROSS CITY ORDINANCE §12-22-106(a). The Court finds that the issue of whether the use of the tanks ever ceased for a period of one year centers around which definition of "in use" it chooses to accept. More precisely, should storage tanks by the mere fact that they contain hazardous material, be determined as being "in use." When zoning changes occurred in 1991, the Old Tanks were already on the Property, storing hazardous, petroleum materials. When the current owners purchased the facility in 1993, the Old Tanks continued to contain the same hazardous, petroleum materials. Golden Eagle did not add to or empty the Old Tanks, but continued to "use" them to store those same hazardous materials up until the time that each tank was emptied, dismantled, and hauled away. Plaintiff argues that due to the fact the Old Tanks contained petroleum materials, they were "in use," and that the nonconforming use did not cease prior to the replacement of the tanks or when the tanks were replaced.

The Utah Administrative Code R315-15-5.5, provides in part:

(f) Closure.

(1) Aboveground tanks. Owners and operators who store or process used oil in aboveground tanks shall comply with the following requirements:

(i) At closure of a tank system, the owner or operator shall remove or decontaminate used oil residues in tanks, contaminated containment system components, contaminated soils, and structures and equipment contaminated with used oil, and manage them as hazardous waste, unless the materials are not hazardous waste under this chapter.

UTAH ADMIN. CODE R315-14-5.5(f). Plaintiff argues, that by the language of this rule, a tank system is not considered "closed" until all of the used oil residues are removed from the tank and all contaminated system components are properly disposed of. Furthermore, the rules relating to used oil also prohibits the disposal of "an item...that contains de minimis amounts of oil" unless "all oil has been removed from the item" and "[no free flowing oil remains in the item or substance." UTAH ADMIN. CODE R315-14-1.5. Therefore, Plaintiff claims that the Old Tanks were "in use" and subject to regulation until they were properly emptied and disposed of in accordance with these rules.

Plaintiff also sites V-1 Oil v. Dept of Environ Quality, 904 P.2d 214 (Utah Ct. App. 1995). In that case, the plaintiff claimed that an underground storage tank did not need to be registered with the Department of Environmental Quality because it was not "in use." In its decision, the Utah Court of Appeals affirmed the Hazardous Waste Control Board's decision that "a tank is 'in use' if it contains a regulated substance or petroleum. The tank need not be used to dispense petroleum; it need only be used to store or contain petroleum in order to be 'in use.'" Id. at 217.

Defendant argues that Plaintiff's definition of "in use" lacks merit and misinterprets the Court of Appeal's decision in V-1 Oil which also states:

There is no usual and accepted meaning of the terms "in use" in the context of USTs. The record reveals that the federal regulations, Utah's administrative rules, the presiding officer's conclusions, the Board's conclusions, and V-1's interpretation all provide slightly different definitions of the terms. Furthermore, the terms are of such a general nature that the dictionary definitions are not helpful. We therefore construe the terms, and the Board did, in light of pertinent rules of statutory construction.

In **Clover v. Snowbird Ski Resort**, 808 P.2d 1037 (Utah 1991), the Utah Supreme Court outlined several rules of statutory construction that are helpful here. First, "a statute should not be construed in a piecemeal fashion but as a comprehensive whole." *Id.* at 1045. Additionally, "[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose." *Id.* (quoting **Osuala v. Aetna Life & Casualty**, 608 P.2d 242,243 (Utah 1980)). "Finally, in dealing with an unclear statute, this court renders interpretations that will 'best promote the protection of the public.'" *Id.* (quoting **Curtis v. Harmon Elec.**, 575 P.2d 1044, 1046 (Utah 1978)).

Id. at 217. Defendant argues that according to V-1 Oil Co., "a statute should not be construed in a piecemeal fashion but as a comprehensive whole." *Id.* As such, the Woods Cross City Ordinances relating to cessation of a nonconforming use should be construed in light of the City's comprehensive regulations governing nonconforming uses of property.

§12-22-101 of the Woods Cross City zoning ordinance reads:

The purpose and objective of this Section is to control and gradually eliminate those uses or land or buildings, which, although legal at the time of their establishment, do not now conform to the use, height, location, and similar regulations of the district within which they are situated.

Where the Court recognizes that V-1 Oil Co. identifies when an oil storage tank is "in use" for purposes of registration with the Department of Environmental Quality, Division of Environmental Response and Remediation (DERR), the court does not necessarily find it

conclusive in determining when an oil storage tank is in fact being used. The interpretation of "in use" offered by Golden Eagle would allow nonconforming tanks to exist perpetually, solely because some form of petroleum product remains in them. This obviously is contrary to the stated purpose and objective of gradually eliminating nonconforming uses.

Third, the Court examines whether the nonconforming use ceased for a one year period when the Old Tanks were replaced. According to Plaintiff's above argument, the Certified Tanks will not be "in use" until they contain oil petroleum. Where the parties agree that the Old Tanks were drained between May 1, 1998 and June 4, 1998, the parties dispute by what date the new tanks were installed. The court was further informed during oral argument that the City enjoined Golden Eagle from placing any oil within the tanks, but neither party identified what date said order took effect or whether a years passage of time occurred between June 4, 1998 and the date of the City's injunction. Although the Court finds disputed facts on this issue, it does not find those facts to be materially dispositive of either Motion for Summary Judgment.

Fourth, the Court examines whether the replacement of the Old Tanks with the Certified Tanks violated Woods Cross city's nonconforming use ordinance. Woods Cross City Ordinance § 12-22-102 states in part:

Except as otherwise provided by law, nothing in this Chapter shall prevent or discourage the strengthening or restoring to a safe condition o[f] any part of any building or structure declared unsafe by proper authority.

Therefore, if a structure has been declared unsafe by proper authority, the nonconforming use ordinance is not intended to "prevent or discourage" the restoration of that structure to a safe condition.

Plaintiff claims that in 1998, the Division informed Golden Eagle that the seventeen Old Tanks, containing hazardous, petroleum material, were found to be unsafe because they were leaking and did not have proper secondary containment, and that it was required to bring the Old Tanks into compliance with the applicable safety regulations. However, because of stringent new environmental regulations, Golden Eagle determined that it was impossible to bring the Old Tanks into compliance by simply altering or reinforcing them. Therefore, Plaintiff chose to remove the leaking tanks, pour concrete containment basins in a different location, and then install more modern tanks. In doing so, the Defendant argues that it did not enlarge, extend or change its nonconforming use, because the Old Tanks had a combined storage capacity of 202,000 gallons, while the new Certified Tanks have a storage capacity of 116,000 gallons.

Woods Cross Ordinance § 12-22-104 provides the following with respect to the enlargement of a nonconforming use:

A nonconforming use shall not be enlarged, extended, or changed unless the use is changed to a use permitted in the district in which it is located, and a nonconforming building shall not be reconstructed or structurally altered unless such alteration results in removing those conditions of the building which render it nonconforming, except as follows:

(b) Repairs. Repairs and structural alterations necessary for building safety may be made to a nonconforming building provided that the floor area of such building is not increased.

(c) Within Building. A nonconforming use may be extended to include the entire floor area of the existing building in which it is conducted at the time the use became nonconforming....

(d) Force Majeure. A nonconforming building or structure which is damaged or partially destroyed by fire, flood, wind, earthquake, or other calamity or act of nature or the public enemy may be restored....

Plaintiff argues that because the Division required Golden Eagle to make its tanks compliant with applicable safety regulations, § 12-22-102 takes priority over § 12-22-104, allowing the Plaintiff to restore its tanks to a safe condition.

Defendant argues that "strengthening or restoration" to a safe condition, under § 12-22-102 of the Woods Cross City Zoning Ordinance, does not contemplate complete replacement of nonconforming structures, and the installation of the six Certified Tanks therefore is actually an enlargement of Golden Eagle's nonconforming use. Plaintiff's interpretation would again promote the perpetual existence of nonconforming uses in violation of the general purposes and objectives established by the City's ordinances. Additionally, Plaintiff's complete removal of the old Storage Tanks and replacement with new tanks is not in the nature of a simple repair or structural alteration contemplated in subparagraph (b) of § 12-22-104.

The Court finds that the Plaintiff permanently discontinued its use of the seventeen Old Tanks, but not its nonconforming use of the Property. As previously discussed, the seventeen Old Tanks existed on the Property with a legal nonconforming use. From at least 1991 to 1998, the purpose of the Old Tanks, with a storage capacity of 202,000 gallons, was not to contain used petroleum for reprocessing, but to contain hazardous waste. In that period of time, the parties agree that the tanks were used for no other purpose. When the tanks were

discovered to be leaking, the Plaintiff voluntarily chose to drain and dispose of the waste and physically remove the tanks from the Property. The Court finds that removal of the Old Tanks constitutes a permanent discontinuance under § 12-22-106 of the Woods Cross Ordinances.

As previously cited, § 12-22-106(a) of the Woods Cross Ordinances establishes that a "structure which was originally designed for a nonconforming use shall not be put to a nonconforming use again when such use was ceased for one year or more." In this case, the original structures (the Old Tanks) have not been put back into use, and under § 12-22-106 of the Woods Cross Ordinances, the Court finds that the six Certified Tanks are not the "original structures." Therefore, they do not meet the requirements or purpose of the Woods Cross Ordinances. The Court finds that voluntary demolition of a structure constitutes a permanent discontinuance of that structure under § 12-22-106 of the Woods Cross Ordinances, and in essence, constitutes a permanent abandonment.

Therefore, the Court finds that the installation of the six, new Certified Tanks, with a combined storage capacity of 116,000 gallons, at a different location on the Property, does not constitute a repair or a structural alteration under § 12-22-104 of the Woods Cross Ordinances, and does not amount to "strengthening or restoring to a safe condition o[f] any part of any building or structure declared unsafe by proper authority," under § 12-22-102 of the Woods Cross Ordinances. The facts of the case show that the Old Tanks were leaking due to natural deterioration accompanied by age. To replace the tanks would be an entirely new improvement and would extend the use beyond their normal lives, and promote the perpetual

existence of nonconforming uses in violation of the general purposes and objectives established by the City's ordinances. Dienelt v. County of Monterey, 113 Cal App 2d 128, 247 P2d 925 (1952). Therefore, under Woods Cross City Ordinance § 12-22-106, Golden Eagle retains the right to store waste materials for a period of one year from the date the nonconforming use of the Property ceased, but does not retain the right to replace those structures that have been permanently discontinued.

Furthermore, the purpose of the new Certified Tanks is not just to store hazardous waste as the Old Tanks had, but essentially to store used petroleum products for reprocessing. This is an expansion of the purpose of the Old Tanks. It is undisputed that the Old Tanks were not used from 1991 to 1998 to store used petroleum products for reprocessing. Their use was limited to storing hazardous waste. Therefore, the Certified Tanks are designed for a different use. The removal of the Old Tanks and installation of new Certified Tanks acts as a replacement and expansion of a nonconforming use, for which the nonconforming use provisions of the Woods Cross Ordinances were specifically designed to prevent. When the seventeen Old Tanks were removed, their structures' nonconforming use of storing hazardous waste essentially ceases (because the "original structure[s]" were not replaced), and the nonconforming use of the whole Property would be restricted as to that use after one year.

Lastly, the Court determines whether the installation and use of the Certified Tanks constitutes a legal accessory use. In its Supplemental Memorandum, Plaintiff raises the argument that the storing of used oil, whether it is ultimately recycled or not, is an integral part of its business and is therefore sufficient to preserve Golden Eagle's right to use the

Certified Tanks as an accessory use, in conjunction with its oil reclamation operations.

Defendant contends that Plaintiff's argument completely ignores the fact that installation of the Certified Tanks constitutes an unlawful extension of the life of the nonconforming use and is therefore illegal.

Plaintiff defines the doctrine of accessory uses as follows:

Under the Doctrine of Accessory Uses, a landowner is permitted to maintain an accessory to incidental use in connection with a permitted use of land if the accessory use is truly incidental to the primary nonconforming use and does not change the basic nature of the use of the property.

Atkins v. Zoning Board of Adjustment of Union County, 281 S.E.2d 756, 760 (N.C. Ct. App. 1981). Consistent with this statement, the City's ordinances contains the following definition of "accessory use":

The term "accessory use" shall mean a use which is incidental to and subordinate to the prescribed permitted use within any respective zoning provisions.

Woods Cross Ordinances § 12-2-103. Plaintiff claims that the use of the Certified Tanks is clearly a use which is incidental to, subordinate to, and reasonably related to Golden Eagle's primary nonconforming use of the property as a used oil reclamation business. Thus, because Plaintiff's use of the Certified Tanks is incidental to the primary nonconforming use and does not change the basic nature of the use of the property, it is permitted to maintain its accessory use of the tanks.

As previously discussed, the Court finds the installation of the Certified Tanks to be an unlawful replacement and substantial expansion of Plaintiff's nonconforming use. The Court

agrees that "[A] lawful nonconforming use may be validly expanded by a reasonable accessory use which is not detrimental to the public health, welfare, or safety." Jackson v. Pottstown Zoning Board of Adjustment, 233 A.2d 252, 255 (Pa. 1967) However, the Court does not find the installation of the six Certified Tanks with a storage capacity of 116,000 gallons to be "reasonable," "incidental," or "subordinate" to the use of the Property. Instead, it substantially expands the use of the Property to store an additional 116,000 gallons of recyclable oil. A change in storage capacity is not permissible when the spirit of the zoning act was to restrict, rather than increase any nonconforming use. Home Fuel Oil Co. v. Glen Rock, 118 NJL 340, 192 A 516. Therefore, the Court does not find the Certified Tanks to be an accessory use.

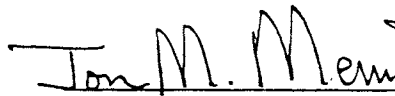
In conclusion, the Court finds that the Plaintiff has a valid nonconforming use as to the Property and business run thereon. The mere existence of the seventeen Old Tanks with the purpose of storing hazardous waste upon the Property from at least 1993 to 1998 does not necessarily make them "in use." Regardless of whether the Old Tanks ever ceased to be "in use" for a period of one year, the Court finds that the voluntary demolition of a building or structure constitutes a permanent discontinuance under § 12-22-106 of the Woods Cross Ordinances. Furthermore, the purpose of the new Certified Tanks is not simply to store hazardous materials as the Old Tanks had, but to contain used petroleum for reprocessing. Therefore, because the purpose of the Certified Tanks is different than that of the Old Tanks and substantially increases Golden Eagle's storage capacity by 116,000 gallons, the installation of the six Certified Tanks acts as an enlargement of Plaintiff's nonconforming use of Property.

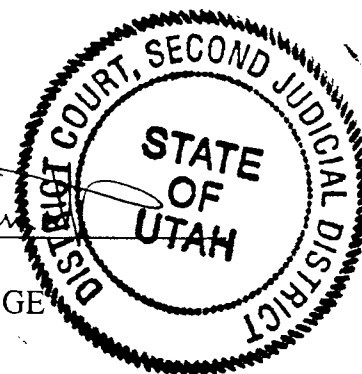
Because the increase of storage capacity is neither "reasonable," "incidental" nor "subordinate" to the Golden Eagle's principal use, but instead substantially increases it, the Court does not find the Certified Tanks to constitute an accessory use.

For the foregoing reasons, the Court respectfully denies Plaintiff's Motion for Summary Judgment, grants Defendant's Motion for Summary Judgment and dismisses Plaintiff's claims with prejudice. Plaintiff is enjoined from using the six Certified Tanks upon its Property.

Dated October 17, 2000.

BY THE COURT:


JON M. MEMMOTT
DISTRICT COURT JUDGE



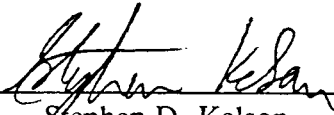
CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on October

14, 2000, postage prepaid, to the following:

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