2000

Golden Eagle Oil Refinery, Inc., a Utah corporation v. Woods Cross City, a municipal corporation and political subdivision of the State of Utah : Brief of Appellee

Utah Court of Appeals

IN THE COURT OF APPEALS 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.	Case No. 20001010-CA Civil No. 990700470 Second District Court, Davis County Priority No. 15

BRIEF OF APPELLEE

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

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STATEMENT OF JURISDICTION

Pursuant to *Utah Code Ann.* § 78-2-2(j), this case was originally filed in the Supreme Court of the State of Utah. On April 18, 2001, this case was assigned by the Supreme Court of Utah to the Utah Court of Appeals. Pursuant to the opinion of the Utah Court of Appeals in the case of Bradley v. Payson City Corp., 413 Utah Adv. Rep. 13 (Utah App. 2001), the Utah Court of Appeals has jurisdiction over this matter.

STATEMENT OF ISSUES PRESENTED

Woods Cross City hereby incorporates by reference the Statement of Issues set forth in the Brief of the Appellant Golden Eagle Oil Refinery, Inc.

DETERMINATIVE LEGAL PROVISIONS

This case is governed by the interpretation of *Utah Code Ann.* § 10-9-408, and §§ 12-22-101 through 106 of the Woods Cross City Municipal Code, a portion of the Woods Cross City Zoning Ordinance. These provisions are set forth in full in the Addendum.

STATEMENT OF THE CASE

Nature of the Case

This case was instituted by Golden Eagle Oil Refinery as a Complaint for Injunctive and Declaratory Relief against Woods Cross City. Golden Eagle owns and operates an oil refinery within Woods Cross City. Golden Eagle's operations are a legal nonconforming use under the Woods Cross City Zoning Ordinances. Golden Eagle replaced 17 old storage tanks on its property with six new certified tanks. At the time the old tanks were disposed of, they

contained some material. From at least 1993 to the time when the tanks were disposed of, no material was put into or removed from the storage tanks. After replacing the tanks, Golden Eagle was advised by Woods Cross City that it needed appropriate land use approvals for the replacement of the tanks. Upon application, approval for replacement of the tanks was denied by the City. Golden Eagle instituted an action in the Second Judicial District Court in and for Davis County, State of Utah, the Honorable Jon M. Memmott. Upon cross motions for summary judgment, Judge Memmott denied Golden Eagle's motion for summary judgment and granted the summary judgment motion of Woods Cross City. This appeal followed.

Statement of Facts

1. Plaintiff Golden Eagle Oil Refinery, Inc. ("Golden Eagle") operates an oil reclamation business at approximately 1474 West 1500 South, Woods Cross City, Davis County, State of Utah (hereinafter, the "Property"). Prior to 1991, the Property was operated as a used oil reclamation facility. R. App. at 226.

2. In 1991, Woods Cross City changed the zoning of the Property from Heavy Industrial to Light Industrial. Under the regulations pertaining to this zoning district, Golden Eagle's operations are not permitted. However, subsequent to the zoning change, Golden Eagle has continued to operate on the Property as a legal nonconforming use. R. App. at 226, 227.

3. In 1993, Stan Hartmark and Merrill Maughan, the present owners of Golden Eagle, purchased the Property. R. App. at 227.

4. Golden Eagle has a valid business license from the City for the operations it conducts on the Property. R. App. at 227.

5. From 1993, when Stan Hartmark and Merrill Maughan, the present owners of Golden Eagle, purchased Golden Eagle, no new substances were delivered to or stored in the Old Tanks. Additionally, from 1993, none of the diesel sludge and/or water in the Old Tanks was used by Golden Eagle in its operations. R. App. at 132, 232.

6. Between May of 1998 and June of 1998, Golden Eagle drained and removed 17 old storage tanks which had a combined capacity of 202,000 gallons. Sometime in May or early June of 1999, the old storage tanks ("Old Tanks") were replaced with six newer, certified API 650 tanks ("Certified Tanks") with a combined capacity of 116,000 gallons. These tanks were relocated to the center of the Property. Golden Eagle did not inform the City about the new tanks until after the City discovered that the new tanks had been delivered to the Property. R. App. at 227.

7. On June 10, 1999, Woods Cross City informed Golden Eagle that site plan approval from the City was required for the placement of the Certified Tanks. Golden Eagle submitted an application and corresponding fee on July 15, 1999. R. App. at 227.

8. A hearing was held before the Woods Cross City Planning Commission on August 10, 1999. At that 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. Id.

9. A hearing was scheduled before the Woods Cross City Council on October 6, 1999. At that hearing, the Woods Cross City Council refused to approve the issuance of site plan approval for replacement of the Old Tanks with the Certified Tanks, finding that Golden Eagle had ceased to use the Old Tanks and that therefore that use could not be reinstalled as a nonconforming use on the Property. Furthermore, any attempts to replace the Old Tanks with the Certified Tanks would be considered by the City to be an expansion of Golden Eagle's nonconforming use. R. App. at 227, 228.

10. On November 5, 1999, Golden Eagle filed an appeal and statement of grounds with the City Council. On November 16, 1999, the City Council informed Golden Eagle that its appeal was denied. R. App. at 228

11. Plaintiff instituted this suit in the Second Judicial District Court in and for Davis County on December 16, 1999. Id.

12. On October 17, 2000, on cross-Motions for Summary Judgment, the District Court issued a Memorandum Decision denying Golden Eagle's Motion for Summary Judgment and granting Woods Cross City's Motion. This appeal followed. R. App. at 226.

SUMMARY OF ARGUMENT

Golden Eagle operates its oil re-refinery in Woods Cross City as a legal nonconforming use. The City has never contended, or taken any position to suggest, that Golden Eagle's operations on the site must be discontinued.

The District Court in this matter, as a matter of law, correctly determined that Golden Eagle ceased to use the Old Tanks on its Property for a period in excess of one year, and therefore abandoned the same. Further, under City ordinances, Golden Eagle is not permitted to replace Old Tanks or abandoned tanks with the new Certified Tanks. Installation of the new Certified Tanks would constitute an unlawful enlargement or expansion of Golden Eagle's nonconforming use on the site in violation of Woods Cross City ordinances.

Additionally, Golden Eagle has argued that state regulations required it to replace the Old Tanks with the new Certified Tanks. This argument is not supported by the facts in the record. The record demonstrates that Golden Eagle was required to take some action to remedy deficiencies with the Old Tanks. However, nothing in state regulations required Golden Eagle to install the new Certified Tanks. For the foregoing reasons, the decision of the District Court in this matter is correct and should be affirmed.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY INTERPRETED STATE LAW AND CITY ORDINANCES RELATING TO GOLDEN EAGLE'S REPLACEMENT OF STORAGE TANKS.

It has been said that "the fundamental problem facing zoning is the inability to eliminate the nonconforming use." 4 E. Yokley, Zoning Law and Practice § 22-14, at 99 (4th Ed. 1979). Although non-conforming uses are constitutionally protected from the retroactive effect of zoning regulations, such uses are not favored by the law, primarily because they detract from the effectiveness of comprehensive land use regulations, often resulting in lower property values and blight. Because of these negative effects, non-conforming uses should be eliminated or reduced to conformity as quickly as possible within the limits of fairness and justice. Accordingly, zoning provisions allowing non-conforming uses to continue should be strictly construed, and zoning provisions restricting non-conforming uses should be liberally construed. County Council v. E.L. Gardner, Inc., 443 A.2d 114, 118 (1982), Accord, Rotter v. Coconino County, 818 P.2d 704 (Ariz. 1991); Hartley v. City of Colorado Springs, 764 P.2d 1216 (Colo. 1988); C&P Building Limited Partnership v. District of Columbia Board of Zoning Adjustment, 442 A.2d 129 (DC Ct. App. 1982); Berkey v. Kosciusko County Board of Zoning Appeals, 607 N.E.2d 730 (In. 1993); Bastian v. City of Twin Falls, 658 P.2d 978 (Id. 1983); Goodwin v. City of Kansas City, 766 P.2d 177 (Kan. 1988); Oliver v. City of Rockland, 710 A.2d 905 (M.E. 1998); City University Park v.

Hagaman, 485 S.W.2d 773 (Tex. 1972); City Council of Baltimore v. Dembo, Inc., 719 A.2d 1007 (Md. Sp. App. 1998); Acton v. Jackson County, Mo., 854 S.W.2d 447 (Mo. 1993); City Lincoln v. Billy Bruce and Betty, 375 N.W.2d 118 (Neb. 1985); New London Land Use Ass'n. v. New London Zoning Board of Adjustment, 543 A.2d 1385 (N.H. 1988); CG&T Corp. v. Board of Adjustment of the City of Wilmington, 411 S.E.2d 655 (N.C. App. 1992); Parks v. Board of County Commissioners, 501 P.2d 85 (Or. App. 1972); City of Myrtle Beach v. Juel P. Corp., 522 S.E.2d 153 (S.C. App. 1999); Brown County v. Meidinger, 271 N.W.2d 15 (S.D. 1978); Badger v. Town of Ferrisburgh, 712 A.2d 911 (Vt. 1998); City of Chesapeake v. Gardner Enterprises, 482 S.E.2d 812 (Va. 1997); Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 959 P.2d 1024 (Wash. 1998); Essex Leasing, Inc. v. Zoning Board of Appeals of the Town of Essex, 539 A.2d 101 (Conn. 1988). Against this background, it is clear that the arguments set forth in Plaintiff's Brief are simply incorrect. Further, it is clear that the District Court's decision in this matter properly construed state statutes and City ordinances relating to non-conforming uses.

In its Brief, Golden Eagle argues that municipalities are required to make a choice relating to nonconforming uses: either (1) terminate all nonconforming uses by amortizing said uses; or (2) allow nonconforming uses to exist perpetually. This argument ignores fundamental rules of statutory construction and is contrary to the common law principles cited above and the statutory scheme established in this state.

The law of this state requires that statutory enactments are to be so construed as to render all parts thereof relevant and meaningful. Courts are to avoid interpretations which would render some part of a statute nonsensical or absurd. Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980). *Utah Code Ann.* § 10-9-408 sets forth basic principles of law relating to nonconforming uses and reads, in part:

> (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
>
> **(c)** the termination of a billboard that is a nonconforming use by acquiring the billboard and associated property rights through:
>
> **(i)** gift;
>
> **(ii)** purchase;

(iii) agreement;

(iv) exchange; or

(v) eminent domain.

Golden Eagle's construction of this section would render the provisions of subsection (2)(a) completely meaningless. If municipalities are required to either amortize nonconforming uses or allow their perpetual existence, there is no need for cities to impose restrictions on nonconforming uses relating to restoration, reconstruction, extension, alteration or expansion. Obviously, the law is not intended to be as restrictive as argued by Golden Eagle. While cities may, in fact, establish reasonable amortization periods for the termination of nonconforming uses, the law also allows for the termination of such uses through cessation of use or abandonment, and the eventual phasing out of nonconforming uses through obsolescence. Additionally, the law protects those uses which have been determined to be proper in the zoning district at issue from the expansion of the nonconforming use. Golden Eagle's argument would undo these fundamental principles of law and, therefore, cannot be accepted.

State law also gives to cities the option to enact nonconforming use regulations which are more strict than those set forth in state statute. *Utah Code Ann.* § 10-9-104 states:

> (1) Except as provided in Subsection (2), municipalities may enact ordinances imposing stricter requirements or higher standards than are required by this chapter.

(2) A municipality may not impose stricter requirements or higher standards than are required by:

(a) Section 10-9-106;

(b) Section 10-9-106.5;

(c) Part 5, Residential Facilities for Elderly; and

(d) Part 6, Residential Facilities for Persons with a Disability.

Given the foregoing, the City is obviously authorized to enact nonconforming use regulations which are more strict than the Utah Code provisions. Accordingly, Golden Eagle's construction of relevant provisions of state law is simply incorrect.

POINT II

THE DISTRICT COURT PROPERLY DETERMINED THAT USE OF THE STORAGE TANKS CEASED FOR A PERIOD IN EXCESS OF ONE (1) YEAR.

In this case the District Court determined that Golden Eagle's use of the old storage tanks ceased for a period in excess of one (1) year. This decision was based on Woods Cross City Ordinances and on the Court's legal interpretation of the term "in use."

Section 12-22-106 of the Woods Cross City Zoning Ordinance relates to the cessation of use of non-conforming uses. That Section, in part, states:

> A use shall be deemed to have ceased when it has been discontinued either temporarily or permanently for a period of one (1) 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 a residential or accessory farm structure, a

> building or structure which was originally designed for a non-conforming use shall not be put to a non-conforming use again when such use has ceased for one (1) year or more.

It is undisputed in this matter that from at least 1993, Golden Eagle put no new material into the storage tanks, nor did they remove any material from those tanks. Accordingly, the District Court determined that the old storage tanks were not in use for a period in excess of one (1) year. Significantly, during all of this time, Golden Eagle continuously used other storage tanks on the Property for storage of used oil products that were to be recycled by Golden Eagle.

In support of its argument that the storage tanks were "in use" Golden Eagle asserts that the mere presence of any petroleum products in the storage tanks means the tanks were "in use." Golden Eagle argues that the storage of petroleum products is an essential and integral part of this business. Therefore, the presence of any material in the tanks necessarily leads to the conclusion that the tanks are "in use." In reviewing this argument, the District Court correctly noted that "the interpretation of "in use" offered by Golden Eagle would allow nonconforming tanks to exist perpetually, only because some form of petroleum products remains in them. This obviously is contrary to the stated purpose and objective of gradually eliminating nonconforming uses." R. App. at 235. The District Court's determination on this point is clearly supported by law and was rendered in accordance with the policy which underlies the law.

Golden Eagle argues that the District Court should adopt the definition of "in use" set forth in V-1 Oil v. Dept. of Environ. Quality, 904 P.2d 214 (Utah App. 1995). However, as noted by the District Court:

> Where the Court recognizes that V-1 Oil Company, 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 the 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.

R. App. at 234, 235. Golden Eagle's arguments are contrary to the policy which underlies the law of non-conforming uses. Therefore, the decision of the District Court was correct.

Golden Eagle also argues that "under the City's interpretation, any legal nonconforming business would be required to rotate any stored inventory or materials at least once each year." (Brief of Appellant at p. 25). This argument is a ridiculous mischaracterization of the City's position. Nowhere has the City argued for the District Court or this Court to adopt a rule which would require inventories to be rotated. In this case, the District Court interpreted City ordinances relating to cessation of use and determined that, because Golden Eagle placed no material, nor removed any material from the old storage tanks at issue, and because there were no facts demonstrating that those tanks were in any way used as any part of Golden Eagle's refining or reprocessing operations from 1993 to the present, the tanks were not "in use" for purposes of City ordinances. This

conclusion, based on undisputed facts in the record, has no application to any of the other irrelevant scenarios proffered by Golden Eagle. The City is simply asking this Court to affirm the District Court's determination, clearly supported by undisputed facts in the record, that the Old Tanks which were replaced by Golden Eagle played no part in their operations from at least 1993 to the present date, and were not "in use."

POINT III

THE DISTRICT COURT PROPERLY DETERMINED THAT GOLDEN EAGLE'S REPLACEMENT OF THE STORAGE TANKS VIOLATES THE CITY'S NONCONFORMING USE ORDINANCE.

Section 12-22-102 of the Woods Cross City Municipal Code 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 or any part of any building or structure declared unsafe by proper authority.

Additionally, § 12-22-104 of the Woods Cross City Zoning Ordinance relates to the enlargement of nonconforming uses and states:

> 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.

In the District Court, and on appeal, Golden Eagle argues that these provisions authorize the replacement of the Old Tanks with new tanks. The District Court determined that Golden Eagle's complete removal of the old storage tanks and replacement of new tanks is not in the nature of a simple repair or structural alteration as contemplated in subparagraph (b) or § 12-22-104. This decision is well supported.

In Selligman v. Von Allmen Bros., Inc., 179 S.W.2d 207 (Ky. App. 1944), the Court of Appeals of Kentucky reviewed a circumstance where the owner of a building housing a nonconforming use replaced decayed wooden walls with brick walls in the structure. In that matter, the court stated:

> The present use of a non-conforming building may be continued but it cannot be increased nor can it be extended indefinitely if zoning is to accomplish anything. It is customary for zoning ordinances to provide that the life of non-conforming buildings cannot be increased by structural alterations when a change is made by the owner in the building he must make it conform to the ordinance. . . . It would not have been difficult for appellee to have made his plans comply with the milk requirement of the health department without replacing the wooden exterior walls of his plant with brick thereby converting it into a new and different structure.

Selligman, 179 S.W.2d 207, 209.

Similarly, in Mossman v. City of Colombus, 449 N.W.2d 214 (Ne. 1989), the Supreme Court of Nebraska reviewed a situation where the owner of a nonconforming

mobile home was prohibited from replacing that mobile home with a new mobile home on the same site. In that case, the court stated:

> The relevant ordinances planned for the gradual elimination of the Mossmans' nonconforming use by permitting them to keep the original mobile home on their property until they decided to replace it. Therefore, the Mossmans lost their investment not as a direct result of the city's zoning ordinance but, rather, because the original mobile home had become shabby.

Mossman, 449 N.W.2d 214, 218.

These cases recognize the fundamental rule of nonconforming use law that structural alterations or repairs and certainly complete replacements are generally disallowed. This assists in achieving the desired objective: to assure that the use eventually will be phased out in favor of those uses deemed proper by the legislative authority enacting the zoning regulations. Golden Eagle's arguments would completely set this principle aside.

Golden Eagle also argues that it was required to replace the Old Tanks by the Utah State Department of Environmental Quality. However, nothing in the record in any way supports Golden Eagle's assertion that it was required to replace the Old Tanks. It is clear from the material submitted by Golden Eagle that the Department of Environmental Quality required Golden Eagle, as part of the cleanup of the Property,[1] to remove the Old Tanks or, at least, to prevent them from leaking and to construct appropriate secondary containment in the area of those tanks. However, the state did not require that Golden Eagle replace those

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[1]Golden Eagle was also required to remove numerous leaking barrels from the Property. R. App. at 3-5.

tanks. In fact, Golden Eagle could have complied with the state's requirements in every respect by simply removing the Old Tanks from the Property along with the old barrels. Nothing in the record supports Golden Eagle's assertion that the state required it to additionally replace the tanks that it removed. This sleight of hand in Golden Eagle's argument is a clear effort to make Golden Eagle's case appear much more sympathetic than it is.

Golden Eagle cites cases from numerous other jurisdictions in support of this argument. However, in each and every case cited by Golden Eagle on this point, the federal or state regulation at issue required replacement or modernization of structures or facilities to continue the use. In this case, Golden Eagle has been operating without the use of the tanks at issue since at least 1993, the entire time that Mr. Hartmark and Mr. Maughan have owned the Property. The assertion that the state required Golden Eagle to install the new Certified Tanks is simply incorrect. Golden Eagle's operation continued on the site without the use of the Old Tanks for at least five (5) years prior to their removal and continues to this day.

In truth, the installation of the Certified Tanks has nothing to do with regulations of the State Department of Environmental Quality and everything to do with current market conditions. Because of increased demand for re-recycled oil products, Golden Eagle wanted to increase its used oil storage capacity. Thus, the District Court's determination that installation of the Certified Tanks violates the City's nonconforming use law was absolutely

correct. If allowed to use those tanks, Golden Eagle's operations on the site will, in fact, expand. More importantly, the life of Golden Eagle's nonconforming use will be significantly extended, in contravention of the stated purpose and objective of nonconforming use law. Therefore, the decision of the District Court on this point should be affirmed.

POINT IV

THE DISTRICT COURT PROPERLY DETERMINED THAT GOLDEN EAGLE'S USE OF THE PROPERTY IS NOT TO BE PERMITTED AS AN ACCESSORY USE.

Golden Eagle argues that its replacement of the Old Tanks is permitted as a valid accessory use to its primary nonconforming use on the Property. In support of this argument, Golden Eagle asserts that its use of the Certified Tanks is incidental to and subordinate to the nonconforming use of its Property. While Golden Eagle's use of the Certified Tanks may very well be incidental and subordinate to the primary use on the Property, a replacement of storage tanks which is prohibited by City Ordinances may not be allowed as an accessory use, particularly where the use Golden Eagle claims as an accessory has ceased for a period in excess of one (1) year, thereby prohibiting its resumption under the City's nonconforming use ordinances.

In Gilchrist v. Town of Lake George Planning Board, 680 N.Y.S.2d 320 (N.Y. App. Div. 3 1998), the Third Appellate Division of the New York Supreme Court reviewed a proposal to install a 2,000-gallon gasoline tank at a marina for the purpose of gasoline sales

to boaters. In that case, the petitioner argued that installation of the tank was an accessory use to its primary nonconforming use. The court declined to accept this argument. The court specifically noted that the tank proposed for installation would replace a tank which had not been used for a period of 15 years. The court noted that:

> Inasmuch as there has been no sale of gasoline in connection with the operation of the marina for at least 15 years, a period in excess of the one-year period specified in the zoning ordinance, (cite omitted), we conclude that the use was abandoned. (Cite omitted)

Gilchrist, 680 N.Y.S.2d 320, 322. Similarly, in this case, the cessation of use, as determined by the District Court, prevents a finding that installation of the Certified Tanks constitutes an accessory use to the existing nonconforming use on the site.

In support of its argument, Golden Eagle continues to assert that replacement of the Old Tanks was required by state law. However, as noted above, the record does not support Golden Eagle's assertion that it was required to replace the storage tanks. The record merely indicates that Golden Eagle was required to address the problems associated with the Old Tanks. Golden Eagle cannot bootstrap its replacement of the Old Tanks with the Certified Tanks by arguing that it is an accessory use. Again, such a practice would eat away at the purpose underlying nonconforming use law and would result in the perpetual existence of nonconforming uses in violation of the stated public policy of eliminating them.

Golden Eagle argues that the District Court's holding on this point is erroneous because "the trial court determined that Golden Eagle's installation of the new tanks

increased its capacity on the site." Golden Eagle argues that facts do not support this conclusion. However, a review of the District Court's Memorandum and Decision clearly indicates that the trial court determined the tanks which were removed were never used in the processing operations on site, which finding is completely consistent with the undisputed facts presented to the Court. Therefore, because the replacement tanks now meet state regulations required for use in the refining process, Golden Eagle's capacity has, in fact, increased over that which existed prior to replacement of the storage tanks. Accordingly, the District Court's decision on this point is correct and Golden Eagle's assertion that it is actually decreasing storage capacity is completely disingenuous and, in fact, misleading.

POINT V

GOLDEN EAGLE'S REPLACEMENT OF THE STORAGE TANKS UNLAWFULLY ENLARGED AND EXTENDED ITS NONCONFORMING USE.

Golden Eagle argues that the District Court erred in holding that installation of the Certified Tanks acts as an enlargement of its nonconforming use of the Property.

Section 12-22-104 of the Woods Cross City Zoning Ordinance states, in part:

> 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.

However, the District Court's decision on this matter properly considered the undisputed facts relating to Golden Eagle's non-use of the Old Tanks and correctly applied the City's ordinances to determine that Golden Eagle's replacement of those tanks was improper.

In Gilchrist v. Town of Lake George Planning Board, 680 N.Y.S.2d 320 (N.Y. App. Div. 3 1998), cited above, the court stated:

> The installation of a new gasoline tank for the purpose of facilitating the sale of gasoline to the public would increase the volume and scope of the business of the marina as it has existed. It would replace an existing tank which has not been used for many years with a larger tank. In our view, this constitutes an expansion and enlargement of the original use of the property as a marina and violates the provisions of the zoning ordinance.

Gilchrist, 680 N.Y.S.2d 320, 322. Similarly, in this case, Golden Eagle's installation of the Certified Tanks will increase the storage capacity of the plant from its previous capacity. Therefore, installation of the Certified Tanks represents an unlawful enlargement of the nonconforming use as determined by the District Court.

Golden Eagle cites case law from other states which indicates a replacement of the Old Tanks does not constitute an extension or enlargement of its use. However, Golden Eagle's argument completely fails to acknowledge the District Court's specific determination that Golden Eagle "permanently discontinued its use of the 17 Old Tanks, but not its nonconforming use of the property." R. App. at 237. Golden Eagle continually argues that the District Court's determination that its capacity on site increased through installation of the Certified Tanks is unsupported by any evidence in the record. However, the record very clearly demonstrates that, under the provisions of § 12-22-106 of the Woods Cross City Municipal Code, Golden Eagle completely ceased its use of the Old Tanks and, in fact, Golden Eagle's current owners never used the Old Tanks to store oil products for recycling. The District Court's determination that the Certified Tanks would add significant capacity to Golden Eagle's operations is fully supported by the undisputed facts in the record.

The cases from other jurisdictions cited by Golden Eagle are readily distinguishable. In Gordon Paving v. Blaine County, 572 P.2d 164 (Id. 1977), the Idaho Supreme Court determined that the modifications at the plaintiff's plant did not result in an enlargement or extension of the use. However, the court specifically noted plaintiff's concession that the increased capacity of the plant resulted from greater efficiency of modernized equipment. In this case, the greater capacity at the plant results from new and additional structures, the new Certified Tanks. Again, it is critical to note at this point the District Court's specific determination, based on the undisputed facts in the record, that the Old Tanks which were

replaced ceased to be used. Therefore, the additional capacity of the new Certified Tanks does constitute an enlargement or extension, contrary to the situation presented in Gordon Paving.

The situation presented in Keller v. City of Bellingham, 600 P.2d 1276 (Wa. 1979), is also significantly different from that presented in this case. In Keller, the court specifically held that:

> When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be prescribed by ordinance. (Cites omitted). Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used.

Keller, 600 P.2d 1276, 1279 (emphasis added). In this case, it is clear that significantly different facilities will be utilized. The new Certified Tanks will be put to a different use and are completely different structures than those which previously existed. Therefore, even under the rules set forth in Keller, Golden Eagle's replacement of the storage tanks does not constitute a permitted enlargement and extension of its nonconforming use.

CONCLUSION

For the foregoing reasons, Woods Cross City requests that the decision of the District Court be affirmed.

DATED this 4th day of May, 2001.

MAZURAN & HAYES, P.C.

By: _____
Todd J. Godfrey
Attorneys for Woods Cross City

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2001, I caused to be mailed, first-class United States mail, postage pre-paid, a true and correct copy of the foregoing **BRIEF OF APPELLEE** to the following:

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ADDENDA

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.

Utah Code § 10-9-408

WEST'S UTAH CODE
TITLE 10. CITIES AND TOWNS
CHAPTER 9. MUNICIPAL LAND USE DEVELOPMENT AND MANAGEMENT
PART 4. ZONING

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

Current through End of 2000 General Sess.

§ 10-9-408. Nonconforming uses and structures

(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

(c) the termination of a billboard that is a nonconforming use by acquiring the billboard and associated property rights through:

(i) gift;

(ii) purchase;

(iii) agreement;

(iv) exchange; or

(v) eminent domain.

(3) If a municipality prevents a billboard company from maintaining, repairing, or restoring a billboard structure damaged by casualty, act of God, or vandalism, the municipality's actions constitute initiation of acquisition by eminent domain under Subsection (2)(c)(v).

(4) Notwithstanding Subsections (2) and (3), a legislative body may remove a billboard without providing compensation if, after providing the owner with reasonable notice of proceedings and an opportunity for a hearing, the legislative body finds that:

(a) the applicant for a permit intentionally made a false or misleading statement in his application;

(b) the billboard is unsafe;

(c) the billboard is in an unreasonable state of repair; or

(d) the billboard has been abandoned for at least 12 months.

***2940** (5) A municipality may terminate the nonconforming status of school district property when the property ceases to be used for school district purposes.

As last amended by Chapter 286, Laws of Utah 1993.