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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

JOHN CONFORTI et al.,

Plaintiffs and Respondents,

v.

EL DORADO/DIAMOND SPRINGS FIRE
PROTECTION DISTRICT,

Defendant and Appellant.

C086226

(Super. Ct. No. PC20160509)

Respondents John Conforti and Catherine Pearl own property that contained two large, permitted propane tanks. A tenant removed the tanks. After the tenant vacated the property, Conforti applied for and received from appellant El Dorado/Diamond Springs Fire Protection District (Diamond Springs) a building permit to rebuild the tanks. Subsequently, Diamond Springs denied Conforti final approval for the one rebuilt tank. The trial court granted Conforti's petition for administrative writ of mandamus. Diamond Springs appeals. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

Respondents John Conforti and Catherine Pearl own property in El Dorado County. Respondent Ferrellgas is a company that leases the property to store and sell propane gas from a large propane tank on the property.¹

Appellant Diamond Springs provides fire protection and emergency services in El Dorado County.

Initial Construction of the Tanks

In 1998 Conforti applied for a special use permit to install two 30,000-gallon propane tanks on the property. In January 2000, following a hearing, Conforti received a special use permit allowing installation of the tanks.

Conforti applied to El Dorado County for a construction permit. In support, Conforti submitted construction and grading plans, certified by an engineering firm. All the county agencies, including Diamond Springs approved the plan.

As part of the installation of the propane storage tanks, Conforti graded the property and installed paving, fencing, lighting, and a transformer. The project cost \$161,397.

Conforti operated the storage tanks as Main Street Gas until 2008. In 2008 Conforti sold the business, including the propane tanks, and leased the property to Titan Propane. Between 2008 and 2010 Titan Propane sold propane from the property.

2010 Fire Code Changes

The National Fire Protection Association's Liquefied Petroleum Gas Code (NFPA 58) is the primary source for the regulations regarding storage, handling, transportation,

¹ Conforti, Pearl, and Ferrellgas are collectively referred to as Respondents.

and use of petroleum gas. In 2010 Diamond Springs adopted several amendments to the 2010 California Fire Code. The California Fire Code is part of the California Code of Regulations, title 24, part 9. The 2010 California Fire Code adopted NFPA 58. (Former Cal. Code Regs., tit. 24, § 3804.1.)

One amendment within Ordinance 2010.02, the ordinance adopting the 2010 Fire Code, increased the required setback distance between large-scale propane facilities and multi-residential developments from 50 feet to one-half mile. The propane tanks on Conforti's property were approximately 200 feet from an apartment building.

Conforti Rebuilds the Propane Tanks

In 2010 AmeriGas purchased Titan Propane and assumed the lease on the property. In August 2012 AmeriGas, without notice, removed the two propane tanks. The removal damaged the infrastructure, making it impossible to reconnect the tanks. Later in 2012 AmeriGas terminated the lease.

Conforti and Pearl leased the propane business to a new tenant, Ferrellgas. Conforti and Ferrellgas decided to replace the tanks.

In October 2012 Conforti submitted a construction permit application to all the appropriate agencies, including Diamond Springs. Along with the application, Conforti submitted plans identical to those used in 2000, since he intended to restore the facility to its original state.

What happened next forms the core of this appeal. According to Conforti, Diamond Springs's employee Gary Baldock "found the plans were satisfactory and approved the permit on behalf of the fire district." Diamond Springs states: "Baldock reviewed the original plans, and then, mistakenly assuming that because they had been approved over a decade before in 2000 they were acceptable for a new project in 2012, signed off on them directly with the county. [¶] Baldock's approval was erroneous for a variety of reasons, but chief among them was that the proposed construction violated the

2010 Fire Code Provision requiring a half-mile setback from multi-residential development.”

El Dorado County issued a construction permit to Conforti in October 2012. The following month, Conforti and Ferrellgas began construction. They decided to replace only one of the 30,000-gallon tanks. The construction and installation ultimately cost \$154,000.

In January 2013 Robert Combs, then Diamond Springs’ Assistant Fire Chief wrote to Conforti.² Combs told Conforti that “The proximity to populated or congested areas and the proposed housing projects in the area, including the geographic elevations of these populations require that a fire safety analysis be submitted to the District before a decision can be rendered.”

The construction of the tank was complete in July 2013. As when the two original tanks were built, the new tank is 200 feet from neighboring residences.

Denial of Final Approval

In July 2013 Conforti applied for a final inspection and approval as required by the permit. Only Diamond Springs refused to approve the completed project.

Diamond Springs retained Interwest Consulting Group (Interwest) to perform a fire safety analysis. On September 3, 2013, Christopher Hall, Ferrellgas’ Operations Manager, met with Diamond Springs Fire Chief Combs and Vernon Brown of Interwest. Combs told Hall the tank was approximately 200 feet from an apartment building, in violation of the fire code. Hall believed that Combs would approve the project “after certain actions were taken to remediate the Chief’s concerns, such as the construction of a

² Although the letter is dated January 22, 2010, the parties agree this is a typographical error.

berm, perhaps another fire hydrant or gas sensors,” and planned to work to accommodate him.

That same day, Diamond Springs Prevention Inspector Scott Thorne sent an email to Hall. Thorne stated, “it is not our goal to jeopardize the project but to help protect or at least mitigate issues that could develop for those that live in our district.”

On September 5, 2013, Brown emailed Thorne, with a copy to Combs, noting “I am suggesting that we get Gary [Baldock, the employee who approved the permit] to put in writing his recollection of the facts so that base is covered.” In his response, Baldock stated “that Rob advised that they were installing another tank in the same location as the previous tank. I drove to the site and saw nothing on the site except 2 existing saddles with no tank. I spoke with John Confort[i] who told me that they weren’t doing anything different than the existing use permit. What happened before or after I don’t have any knowledge of. Sorry.”

Later that month, Interwest advised Combs that Baldock’s approval was issued in error and that Diamond Springs should revoke the permit’s approval and require plans and specifications be submitted to the agency for review. Combs noted in the official records that Conforti’s permit was approved in error. In November 2013 Interwest informed Conforti of 11 actions needed in order for the permit to be given final approval.

In January 2014 Interwest sent a memo to Combs stating the plans submitted by Ferrellgas were of “very poor quality” because they failed to accurately reflect the site and facilities. Interwest also noted Baldock approved the plans but in error. Interwest recommended that Ferrellgas be ordered to disconnect the tank immediately. Later that month Combs issued a stop work notice for the propane installation.

Conforti and Ferrellgas appealed to the Diamond Springs board of directors, arguing Conforti had a vested right to maintain and operate two propane tanks on the property.

Conforti and Ferrellgas also provided a report on the project by a fire protection engineering firm. The report stated, “The current installation meets the setback distances established in the California Fire Code” In addition, the report concluded, “From our analysis it is unclear what conditions are present in El Dorado County which would justify the unique requirements to provide a level of safety above the acceptable level of safety established throughout the rest of California and the United States.” The report also suggested four safety upgrades beyond the code requirements: tank modifications, adding a berm, adding gas leak detectors, and increasing security. Conforti and Ferrellgas informed Diamond Springs that they were willing to implement the safety upgrades recommended in the report.

Interwest wrote to Conforti that, on behalf of Diamond Springs, they had reviewed the report. Interwest denied Conforti’s request, concluding the report “does not adequately address any mitigation for the location of the propane facility located within ½-mile of residential property with density greater than 1-dwelling unit per acre.” Conforti, through counsel, responded, stating he did not agree that the one-half mile restriction was reasonably necessary, but was willing to implement the mitigation measures set out by the engineering firm.

On behalf of Diamond Springs, Interwest replied to Conforti, rejecting the proposed mitigation measures because they did not “offer any reasonable solution to the placement and location of a LPG tank that is greater than 2,000-gallons and located within ½-mile of residential property.” “[B]ecause you have refused to resubmit plans that conform to the requirements of the California Building and Fire Codes and the site does not meet the requirements of . . . Diamond Springs . . . for the installation of LPG tank greater than 2000-gallons, there can be no approval of the project.”

Petition for Writ of Mandate

Respondents filed a petition for writ of mandate and declaratory relief. The first cause of action sought to order Diamond Springs to approve the work performed under the permit. The second cause of action sought declaratory relief finding that “the 2010 version of the fire code adopted by [Diamond Springs] is unenforceable to the extent it extends the 50’ setback to one-half a mile.”

In support of the petition, Respondents argued Conforti had acquired a vested right to install the tanks under the 2000 permit. Conforti also acquired a vested right when he obtained all necessary permits and relied on these permits by doing substantial work and expending substantial sums. Finally, they argued under the California Fire Code, Diamond Springs lacked the authority to extend the setback requirement to one-half mile.

In opposition, Diamond Springs stated that Ordinance 2010.02 was neither arbitrary nor capricious and was based on a reasonable analysis of the local environment. Therefore Diamond Springs was entitled to deference. Diamond Springs also argued Conforti did not have a vested right because the 2012 approval by Baldock was in error and administrative error cannot create a vested right.

Following oral argument, the trial court adopted its tentative ruling granting the petition. The court found “Nonconforming uses that were lawful when approved may continue long after the law is changed to prohibit the use of the subject property in that manner, provided the nonconforming use has not been intentionally abandoned by the property owner.” Therefore, the 2012 approval of the second permit was “valid and not unlawful.” The court also noted the expenditure of \$154,000 “amounts to performance of substantial work and incurring substantial liabilities in good faith reliance on the permit.” The court concluded Diamond Springs was not entitled to refuse to provide final approval.

Diamond Springs filed a timely notice of appeal.

DISCUSSION

I

The parties agree that we review questions of fact under the substantial evidence test and questions of law de novo. Under the substantial evidence standard of review, we consider whether the evidence, viewed in the light most favorable to the prevailing party, supports the trial court's findings, resolving any reasonable doubt in favor of those findings. Under the de novo standard of review, we consider the evidence independently. (*HPT IHG-2 Properties Trust v. City of Anaheim* (2015) 243 Cal.App.4th 188, 200.)

II

Where a permit has been issued and the landowner has relied on it to its detriment, the landowner acquires a vested right. (*HPT IHG-2 Properties Trust v. City of Anaheim, supra*, 243 Cal.App.4th at p. 199.) “If a property owner has performed substantial work and incurred substantial liabilities in good faith reliance on a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit.” (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791, superseded by statute as stated in *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors* (2000) 84 Cal.App.4th 221, 229-230.) A party who in good faith relies on a building permit and performs substantial work and incurs substantial liability in connection with the permit acquires a vested right to complete construction notwithstanding an intervening change in the law that would otherwise preclude construction. (*Aries Dev. Co. v. California Coastal Zone Conservation Com.* (1975) 48 Cal.App.3d 534, 543.)

When zoning laws change, this right is known as a “nonconforming use.” “A legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter.”

(Hansen Brothers Enterprises, Inc. v. Board of Supervisors (1996) 12 Cal.4th 533, 540, fn. 1 (Hansen).)

Respondents argue that the special use permit and approval of all other permits to operate the propane storage facility, which were issued in 2000, and the approximately \$161,000 spent to construct the original facility created a vested right in the property. Conforti subsequently obtained a construction permit to reconstruct the tanks in 2012 after they were removed by a lessee and expended \$154,000 to reinstall one of them, actions which did not abrogate his vested right in maintaining the property.

Diamond Springs contends the 2012 permit was invalid since “there is no dispute that the permit was issued in violation of the half-mile setback provision of the Fire Code” which made the “permit invalid from the moment it was issued.” According to Diamond Springs, the invalid construction permit cannot create a vested right.

The trial court considered both arguments: “The arguments fairly raise the issue of whether or not a lawfully approved special use became an unlawful nonconforming use when a lessee of the property removed storage tanks and damaged other infrastructure at the termination of the lease, thereby making invalid the issuance of a construction permit to repair and replace the facility to the same condition it was when the now nonconforming special use was fully approved by all required governmental entities.”

After reviewing applicable case law, the court noted: “Nonconforming uses that were lawful when approved may continue long after the law is changed to prohibit the use of the subject property in that manner, provided the nonconforming use has not been intentionally abandoned by the property owner.” Applying this principle, the court concluded: “The removal of the storage tanks and damage to the infrastructure of the nonconforming propane storage facility was not done by the property owner, therefore mere removal of the tanks and the need to repair the facility in order to continue to use it as a propane storage facility does not constitute an overt act that implies the owner

intends to abandon his interest in his right to continue the nonconforming use under the previously approved special use permit.”

We agree with the trial court’s analysis and conclusion. The Supreme Court explained: “ ‘[A]bandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use [citation]. Mere cessation of use does not of itself amount to abandonment.’ ” (*Hansen, supra*, 12 Cal.4th at p. 569.)

The facts before us reveal no such abandonment. Conforti never intended to abandon the use of the tanks. After discovering the tanks had been removed by the tenant, Conforti immediately applied for a building permit and submitted plans to reconstruct the tanks. After approval of the permits, Conforti began construction and spent \$154,000 to replace the tank. Nor did Conforti commit any act implying an intent to abandon the nonconforming use. The tanks were removed by Amerigas; Conforti moved swiftly to replace them. Contrary to the position taken by Diamond Springs at oral argument, the removal of the tanks did not extinguish the lawful nonconforming use. “A legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter. [Citations.] The use of the land, not its ownership, at the time the use becomes nonconforming determines the right to continue the use. Transfer of title does not affect the right to continue a lawful nonconforming use which runs with the land.” (*Hansen, supra*, 12 Cal.4th at p. 540, fn. 1.) Diamond Springs could not refuse to provide final approval of the repairs and replacement of the tank, despite the 2010 amendment.


DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)



RAYE, P. J.

We concur:



BUTZ, J.



MURRAY, J.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: Conforti et al. v. El Dorado/Diamond Springs Fire Protection District
C086226
El Dorado County
No. PC20160509

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