FILED
OCT 28 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CITY OF ADAIR,	)	
Plaintiff-Appellee,	)	Filed October 28, 1982
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vs.	)	
KARL KNUTTER, d/b/a ADAIR PELGAS, a/k/a ADAIR PELGAS COMPANY, a/k/a ADAIR PELGAS COMPANY, INC.; and PAUL E. PELLETT, d/b/a PELGAS COMPANY, a/k/a ADAIR PELGAS COMPANY, a/k/a ADAIR PELGAS, a/k/a ADAIR PELGAS CO., INC., a/k/a PELLETT PETROLEUM, a/k/a PELLETT PETROLEUM OF CASS COUNTY,	)	2-312 2-67797
Defendants-Appellants,	)	
and	)	
STATE OF IOWA,	)	
Defendant.	)	

Appeal from Adair District Court - Gene L. Needles, Judge.

Defendants appeal from the trial court's order enjoining their operation of anhydrous ammonia bulk storage facility. AFFIRMED.

Harold G. DeKay, Atlantic, for defendants-appellants.

David L. Jungmann of Don Carlos, Carlberg & Jungemann, Greenfield, for plaintiff-appellee.

Heard en banc.

Defendants appeal from the trial court's order enjoining their operation of an anhydrous ammonia bulk storage facility. On appeal defendants assert that the evidence does not support the court's finding that they had violated the applicable city zoning ordinance, justifying an order enjoining and abating such violation. We affirm.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. In equity, if the judgment is correct "it is our duty to affirm it although the basis upon which the trial court reached its result may not meet with our approval." City of Des Moines v. Harvey, 243 N.W.2d 606, 610 (Iowa 1976) (citations omitted).

I.

Defendants, Karl Knutter and Paul Pellett, doing business as Adair Pelgas Company (hereinafter Adair Pelgas), maintained and operated a propane and anhydrous ammonia distribution facility in the City of Adair. There was no permanent bulk storage of anhydrous ammonia at Adair Pelgas. The anhydrous ammonia was delivered to Adair Pelgas by bringing a 10,000 gallon truck transport onto the premises and then pumping the ammonia into smaller nurse tanks or by filling the smaller nurse tanks at bulk storage plants in other cities.

In 1972, the City of Adair adopted a zoning ordinance, number 148, which divided the city into zoning districts and established a permit procedure for new construction or expansion of land use located within the city limits. In late 1977 or early 1978, Adair Pelgas brought a 10,000 gallon tank transport filled with anhydrous ammonia onto its premises. In January 1978, Karl Knutter submitted an application to the Adair Planning and Zoning Commission requesting permission to construct an anhydrous ammonia bulk storage facility, which would mean making a permanent storage facility. The request was denied and a member of the Adair Development Commission suggested a substitute location at the edge of the city.

This suggestion was prompted by complaints from local residents. After their application had been denied, defendants Pellett and Knutter requested to meet with the City Council to discuss anhydrous storage at Adair Pelgas. The meeting did take place but the council refused to grant defendants a permit.

On June 12, 1978, the City of Adair adopted Ordinance Number 165, which amended Ordinance Number 148. Ordinance 165 became effective upon publication on June 22, 1978. The pertinent provision of that ordinance specifically prohibits the bulk storage of liquid fertilizer in the zoned M-2 Industrial Park District, in which Adair Pelgas was located.

An inspector for the Iowa Department of Agriculture, who inspects the anhydrous ammonia sites in Iowa, visited Adair Pelgas in 1977. He did not inspect the property as one of the "approved sites" on his list to inspect because Adair Pelgas was not an officially approved site. He did, however, observe the anhydrous ammonia on the premises and testified that he "gave them an official [stop sale] notice in [1977] not to transfer anhydrous ammonia to nurse tanks without first having approved a permanent riser and compressor." There is some dispute as to the exact dates that Adair Pelgas was inspected and the notice to stop sale given. A decision of the Iowa Department of Agriculture hearing indicated that the inspection took place in July, 1978, and the official stop sale notice to defendants issued in August, 1979. In any event, on March 27, 1978, defendants filed an application with the Iowa Department of Agriculture to have its Adair property approved as an anhydrous ammonia bulk storage facility. This application stated that the 10,000 gallon tank currently on the Adair Pelgas premises was merely temporary storage and that the defendants intended to replace that tank with a 30,000 gallon anhydrous ammonia tank. The application was returned to the defendants for the reason that Adair Pelgas had not obtained the required approval of the local zoning authority.

Defendants did pour a cement base around a riser used to pump the gas from the bulk tank into smaller, 'nurse tanks', but there is no showing that this work was completed before the effective date of the ordinance. Indeed, the Department of Agriculture's conclusion that there was no permanent storage facility suggests that it had not been completed before the effective date of the ordinance.

On August 28, 1979, plaintiff, City of Adair, filed a petition alleging that defendants had begun to operate an anhydrous ammonia bulk storage facility on its property, thereby violating the city zoning ordinance and creating a nuisance. Plaintiff prayed for an injunction against Adair Pelgas Company's operation of the facility and an order requiring it to remove its equipment by a date certain. Plaintiff also asked for $500 actual damages and $10,000 punitive damages. Adair Pelgas and the individual defendants answered, asserting that they had a right to continue operating the bulk storage facility because they had established the facility before the applicable ordinance was enacted.

The trial court found that defendants had established a bulk storage facility and that it was both a nuisance and a violation of the city zoning ordinance. The trial court enjoined defendants from operating the facility and gave them 60 days to remove their equipment. Defendants then instituted this appeal.

Plaintiff later moved to dismiss defendants' appeal, asserting that the order appealed from was not final because it did not dispose of plaintiff's prayer for damages. The Iowa Supreme Court, by Justice LeGrand, denied the motion to dismiss, and stated that "if it is later determined that the appeal is from an interlocutory ruling, this order shall be authority to proceed with the appeal as provided by Iowa R. App. P. 1(c)." We thus proceed to determine whether the evidence supports the conclusion that defendants were in violation of the city ordinance.

II.

The first part of defendants' argument appears to be that, because they had engaged in some transfer and sale of anhydrous ammonia before June 22, 1978, the effective date of the ordinance prohibiting such use, they should not be subject to its prohibition. The problem with this argument is that it assumes defendants were legitimately operating the transfer and sale of anhydrous ammonia when it became effective. This appears not to be the case.

The testimony of the inspector from the Iowa Department of Agriculture testified that any facility that handles any amount of anhydrous ammonia must be an approved site. It also indicates that, in order to be approved, the storage facility must be one with a permanent installation, with a riser and compressor. The approval requirements also provide that the storage facility must "include an affidavit of approval signed by local zoning authority" if the land is subject to local zoning authority, as is Adair Pelgas. The defendant's application to construct the permanent storage facility was denied.

In their brief, defendants challenge that "[w]hen the local zoning authority refused to approve the changes applied for, such refusal was not based on any standards in the ordinance then in effect." But this does not mean that the zoning authority acted without authority or that its refusal was somehow void. Moreover, defendants do not bring this action seeking judicial review of the zoning authority's denial of their application to construct the permanent storage facility and we do not question the legitimacy of the denial. See Johnson v. Board of Adjustment, City of West Des Moines, 239 N.W.2d 873, 879 (Iowa 1976) (plaintiff carries heavy burden to show Board of Adjustment exceeded its jurisdiction or acted illegally). This is especially true in light of facts on the record suggesting that there were numerous complaints about Adair Pelgas from the local residents.

We thus disagree that the defendants had established the facility before the

applicable ordinance was enacted. On the contrary, the record suggests that they had full knowledge that they were without authority to construct such facility. Accordingly, they had no vested rights in the bulk storage facility when the ordinance went into effect. Discussing the nature of 'vested rights' and enactment of a zoning ordinance, the Iowa Supreme Court in Bracket v. City of Des Moines, 246 Iowa 249, 261, 67 N.W.2d 542, 548 (1954) said:

> Keller v. Council Bluffs, 245 Iowa 202, 212, 213, 66 N.W.2d 113, 119, states: "The theory of vested rights relates only to such rights as an owner of property may possess not to have his property rezoned after he has a building permit and has started his construction or improvement."
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> Huff v. Des Moines, 244 Iowa 89, 95, 56 N.W.2d 54, 57, states: "Almost from the date of the building permit, . . . and well prior to any change in the ordinance, appellants knew steps were being taken to restrict, if not prohibit, the construction of the park. In the face of this they deliberately went ahead with their property. We find no vested rights in appellants nor equitable circumstances. . . ."

While the trial court was incorrect in finding that the ordinance prohibiting location or operation of an anhydrous ammonia bulk storage facility was enacted prior to 1977, defendants had knowledge that they were prohibited from constructing such facility. Thus, they had no vested rights by virtue of their efforts to cement the riser into place.

This case is distinguishable from City of Central City v. Knowlton, 265 N.W.2d 749 (Iowa 1978), the only case cited by plaintiff in his brief. There, the increased use of a proper nonconforming use was found not to be an illegal enlargement of the use. But the initial nonconforming use in that case was lawful. Here, it is clear that defendants' initial use was not approved and thus improper in the first instance. The use does not become proper by increasing it and making the storage facilities permanent.

We therefore agree with the trial court's conclusion that the bulk storage

facility was constructed and maintained in violation of the ordinance.

AFFIRMED.