

Judgment rendered February 20, 2013.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 47,555-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

OSCAR J. TOLMAS

Plaintiff-Appellee

Versus

PARISH OF JEFFERSON, ET AL.

Defendant-Appellant

* * * * *

Appealed from the
Twenty-Fourth Judicial District Court for the
Parish of Jefferson, Louisiana
Trial Court No. 69178-C

Honorable June B. Darensburg, Judge

* * * * *

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* * * * *

Before CARAWAY, MOORE, LOLLEY,
SEXTON (*Ad Hoc*) & HARRISON (*Ad Hoc*), JJ.

SEXTON, J. (*Ad Hoc*) dissents with reasons.

HARRISON, J. (*Ad Hoc*)

The defendant, the Parish of Jefferson (“Parish”), appeals from a trial court judgment enforcing a permanent injunction against it.¹ The plaintiff is Morning Park, LLC (“Morning Park”), the successor in title to the original plaintiff, Oscar J. Tolmas. For the following reasons, we reverse the trial court judgment.

FACTS

In June 1957, Mr. Tolmas purchased a piece of property in Jefferson Parish. The majority of the property was to be developed as a residential neighborhood. On the subdivision plan, the land at issue here, Square 1, was labeled as commercial. Jefferson Parish approved the plan for the subdivision on July 1, 1957. In 1958, the Parish adopted a Comprehensive Zoning Ordinance (“CZO”) and Square 1 was zoned as residential, R-1. In October 1958, the Parish issued Mr. Tolmas a permit to build an office building on the site for his construction business. Thus, despite the residential zoning designation and the CZO, the Parish allowed the use of the property for commercial use in keeping with its prior approval of the subdivision plan.

In 1962, Mr. Tolmas had shells placed on the parking lot of Square 1 up to Veterans Memorial Highway (“Veterans”) to allow ingress and egress to his office. On May 11, 1962, the Parish sent a letter to Mr. Tolmas telling him that the shells were on public property and interfered with a

¹The fifth circuit originally decided this matter in *Tolmas v. Parish of Jefferson*, 2011-492 (La. App. 5th Cir. 12/29/11), 80 So. 3d 1260. On rehearing, the fifth circuit denied a motion to recuse a member of the appellate court panel. The Louisiana Supreme Court reversed the ruling on the motion to recuse, vacated the decision of the fifth circuit, and transferred the case to this court to be heard anew. See *Tolmas v. Parish of Jefferson*, 2012-0555 (La. 4/27/12), 87 So. 3d 855.

street beautification program by the Parish. Mr. Tolmas was told to restore the public property to its former condition, or he would be prosecuted for destroying and defacing public property.

On May 16, 1962, Mr. Tolmas filed a petition for a permanent injunction against the Parish, stating that he owned an office building on Square 1 along with a sign advertising a subdivision called “Cecile Park.” He acknowledged that he put shells from the front of his office building to the shoulder of Veterans to provide ingress and egress from the street to the parking area in front of his office. He claimed that similar ingress and egress were present on other properties and businesses fronting on Veterans. He asserted that the letter from the Parish violated the due process and equal protection clauses of the Louisiana and United States Constitutions. He argued that no other property owners received letters from the Parish and he alleged that the Parish’s actions were discriminatory and unconstitutional. Notably, Mr. Tolmas’ petition did not assert that the Parish’s threatened actions concerned his property’s use for commercial purposes based upon any assertions by the Parish of the zoning limitation for Square 1 as residential property under the CZO.²

He sought a temporary restraining order against the Parish, and in due course, preliminary and permanent injunctions prohibiting the Parish from doing any act which would interfere with his peaceful possession of his

²The Parish’s answer stated: “That plaintiff’s property is residential property and the means provided for ingress and egress are more than adequate to serve the said property.” However, there was no reconventional claim to enjoin the use of the property for the existing commercial activity.

property, including his right to frontage ingress and egress between Veterans and his property.

The trial court granted a temporary restraining order in favor of Mr. Tolmas. A preliminary injunction was issued on October 18, 1962. On February 7, 1963, a consent judgment was entered, ordering that the preliminary injunction be made permanent. The Parish was prohibited from committing any act toward disturbing Mr. Tolmas' peaceable possession of the disputed property, including his right to frontage, entrance and exit from Veterans and his office, as the said rights were enjoyed on May 14, 1962, or from any interference whatsoever to the peaceful use and enjoyment of Mr. Tolmas' property.

The office building was demolished in early 2004. On April 28, 2004, Morning Park purchased the property from Mr. Tolmas. In 2010, Morning Park sought to obtain a building permit for an office building and parking garage to be built on the site, but learned that the property was zoned as residential. The Parish denied Morning Park a letter of clearance to use the property for an office building.

Morning Park filed a motion to enforce the permanent injunction, alleging that all rights to the property held by Mr. Tolmas, including the right to use the property for offices, flowed to Morning Park. Morning Park argued that the injunction should be enforced, restraining the Parish from interfering with Morning Park's use and development of the property for an office building.

A hearing was held on the motion on February 24, 2011. The Parish argued that, because the property was used for a commercial purpose before the Code of Ordinances zoning it as residential, the property could be used for commercial use until such use stopped. The Parish contended that when the building was demolished in 2004, the commercial use stopped and the property reverted to its zoning as residential. The trial court found in favor of Morning Park, enforcing the permanent injunction against the Parish, prohibiting it from interfering with the peaceful possession of Morning Park and its use of the property for offices. The trial court stated:

All right. It appears what the Plaintiffs are requesting is the use of the property for offices. It's very specific in here.

So according to what's filed in the Record and the requests of the parties, the Court is going to enforce the permanent injunction against the Parish of Jefferson barring the Parish of Jefferson from interfering with the peaceful possession of Morning Park, LLC and its use of the property for offices.

That is what was requested. That is what the Court is ordering.

The Parish appealed, arguing that the 1963 permanent injunction in favor of Mr. Tolmas did not transfer to Morning Park the right to use the property for offices and that a valid nonconforming use of the property ended when the nonconforming building was demolished in 2004.

DISCUSSION

La. C.C.P. art. 3601 provides in pertinent part:

A. An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law;

C. During the pendency of an action for an injunction the court may issue a temporary restraining order, a preliminary injunction, or both, except in cases where prohibited, in accordance with the provisions of this Chapter.

D. Except as otherwise provided by law, an application for injunctive relief shall be by petition.

A permanent injunction is a final judgment which extends the life of a proceeding in which it was granted until it is either modified or revoked by the district court which issued it. *South Central Bell Telephone Company v. Dempster*, 303 So. 2d 278 (La. App. 1st Cir. 1973).

At the time of the 1963 judgment, the principle regarding *res judicata* was reflected in former La. C.C. art. 2286 which stated, “the authority of the thing adjudged takes place only with respect to what was the object of the judgment.” The demand of the former suit was required to be founded upon the same “cause.” Citing *Planiol*, the Louisiana Supreme Court in *Mitchell v. Bertolla*, 340 So. 2d 287 (La. 1978), stated: “The Cause is said to be the juridical or material fact which is the basis of the right claimed, or the defense pleaded.”

We find that the 1963 consent judgment making the injunction permanent as to Mr. Tolmas and the Parish did not involve the zoning issues for the use of the property which are now in dispute. The consent judgment resolved a dispute between Mr. Tolmas and the Parish concerning Mr. Tolmas’ right to ingress and egress from the property to Veterans. The dispute arose after Mr. Tolmas placed shells on the property to aid in accessing the property from Veterans. The preliminary injunction entered on October 18, 1962, prohibited Jefferson Parish from committing any act toward disturbing Mr. Tolmas’ peaceable possession of the property including his right to frontage exit and entrance between Veterans and his office. The 1963 consent judgment making the injunction permanent

largely tracked the language of the preliminary injunction and prohibited Jefferson Parish from committing any act toward disturbing Mr. Tolmas' peaceable possession of the property, including his right to frontage, entrance and exit between Veterans and his office, as said rights were enjoyed on May 14, 1962, or from any interference whatsoever to the peaceful use and enjoyment of Mr. Tolmas' property. The injunction never addressed zoning issues or Mr. Tolmas' right to have an office building on the property when it was zoned residential. Although the injunction uses broad language prohibiting the Parish from committing any act disturbing Mr. Tolmas' peaceable possession of Square 1, the injunction, in the context in which it was issued, did not give Mr. Tolmas or his successors the unlimited right in perpetuity to use the property for whatever purpose they might choose. Therefore, the 1963 judgment was not founded on the same cause as the present suit and that judgment is not *res judicata* as to the issues involved in the present case.

The Parish argues that the valid nonconforming use of the property ended when Mr. Tomas' office building was demolished in 2004. La. Const. Art. 6, §17, gives local governments broad powers to adopt regulations for land use, zoning, and historic preservation. *Jenkins v. St. Tammany Parish Police Jury*, 98-2627 (La. 7/2/99), 736 So. 2d 1287. The purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. *Redfearn v. Creppel*, 455 So. 2d 1356 (La. 1984).

A person who purchases land with knowledge, actual or constructive, of zoning restrictions which are in effect at the time of such purchase, is

said to have created for himself whatever hardship such restrictions entail.

Sanchez v. Board of Zoning Adjustments of City of New Orleans, 488 So. 2d 1277 (La. App. 4th Cir. 1986), *writ denied*, 491 So. 2d 24 (La. 1986), *cert. denied*, 479 U.S. 963, 107 S. Ct. 461, 93 L. Ed. 2d 406 (1986).

A use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area in which it is situated, is commonly referred to as “nonconforming use.”

The permitted continuation of a nonconforming use is designed to avoid the hardship, injustice and doubtful constitutionality of compelling the immediate removal of objectionable buildings and uses already in the area.

Redfearn v. Creppel, supra.

In 1958, the Jefferson Parish Council passed the Jefferson Parish Zoning Ordinance, Ordinance 3813, which later became Ordinance 5687. See *Kuhn v. Sciortino*, 483 So. 2d 666 (La. App. 5th Cir. 1986). The CZO was later embodied in Jefferson Parish CZO, Art. XXXVII, Sec. 40. The purpose of nonconforming use regulations is to allow nonconforming uses while upholding the integrity of the district regulations described in this ordinance by carefully guiding nonconforming uses to have as little negative impact on conforming uses as possible. Jefferson Parish CZO, Sec. 40-696.

Any lawful structure, building permit issue, or use existing on or prior to the date of adoption of Ordinance 5687; or whenever a district shall be changed by amendment to this ordinance; may be continued even though

such building, structure, or use does not conform to the regulations of the district in which it is located. Jefferson Parish CZO, Sec. 40-697.

Once a nonconforming use is changed to a conforming use, the nonconforming use shall not be reestablished. Jefferson Parish CZO, Sec. 40-699(d).

The discontinuance or suspension of a nonconforming use or associated activity for any reason shall constitute vacancy of a nonconforming structure, regardless of the intent of the owner or lessee of the premises to continue such nonconforming use or associated activity. Vacancy of a nonconforming for a period of one year shall terminate the nonconforming use. Jefferson Parish CZO, Sec. 40-702.

We find that Mr. Tolmas' office building was a nonconforming use of the property which was allowed by the Parish in 1958 when it issued him a building permit, even though at that time the property had been zoned for residential use. The office building was demolished in 2004. The property appears to have been vacant since that time. Because the nonconforming use has ceased for more than one year, it has terminated. Morning Park is not entitled to make commercial use of Square 1 under the facts presently before this court. We make no decision as to Morning Park's entitlement to a zoning variance and we do not address the merits of any zoning issue that may be raised under normal zoning procedures. Morning Park's remedy is to seek a zoning variance through the appropriate procedures.

CONCLUSION

For the reasons stated above, we reverse the judgment of the trial court and dismiss Morning Park's motion to enforce the injunction against the Parish of Jefferson. We assess all appellate and trial court costs to Morning Park, LLC.

REVERSED AND RENDERED.

SEXTON, J. (*Ad Hoc*), dissenting.

The majority opinion gives bare credence to the compromise entered into in this case between the parties in 1963, and posits the case as basically one of loss of a nonconforming use. I disagree, believing a larger issue is at hand.

While perhaps redundant, a review of the time line herein may be helpful.

- July 1957 - this subdivision, containing the subject property, is zoned commercial by parish ordinance.
- August 1958 - a comprehensive zoning ordinance is adopted by Jefferson Parish zoning the property as residential.
- October 1958 - a building permit is issued by the parish for construction of an office building on the property.
- May 1962 - official objection by letter through the parish attorney objecting to Tolmas' changes and manner of access to subject property from Veterans Highway.
- May 1962 - petition for injunctive relief filed by Tolmas.
- February 1963 - consent judgment granting permanent injunction rendered.

Obviously, there was significant tension during this period between Mr. Tolmas and the parish over the instant property. Even then, most of the property along Veterans was commercial and the adjacent properties were enjoying access to Veterans Highway. However, by letter the parish attorney advised Mr. Tolmas that his action had destroyed improvements made to the property by the parish and that if he did not repair those he

would be prosecuted, the property would be restored and he would be sued for reimbursement. I observe that the five days he was given to begin to restore seems a bit short.

The date of that letter is May 11, 1962, and Mr. Tolmas sued on May 16, 1962, within the five days. The hearing on the preliminary injunction, originally set on May 24, was continued to June 18 and then to June 26, at which time it was apparently heard.³ The parish filed an answer on that date, June 26. In the answer, the parish asserted that the plaintiff was not denied access to Veterans Highway, as plaintiff's property fronted on North Labarre Road and Thomas Drive, both of which intersected Veterans. The parish further pled that plaintiff's property was zoned as residential and his authorized access (not using Veterans) was "more than adequate to serve said property."

Amidst this contentious background, after the hearing, the trial judge issued a preliminary injunction, essentially as prayed for, on October 18, 1962.

Thereafter, almost exactly three months later in an agreement dated January 17, 1963, and identified in the record as PD-1, a letter of compromise was signed by Mr. Tolmas and the president of the Jefferson Parish Council, three councilmen at-large, four district councilmen, the parish attorney, the director of roads and bridges, and the director of the department of safety. Therein these parish authorities and members of the

³We say apparently, as it appears from a plaintiff's brief in the record that testimony was taken at that time. (We have not been favored with minutes.) There is no transcript of that hearing, although there is a transcript of a later motion to tax costs.

parish governing council, on behalf of the parish, and in their individual capacities, all agreed to the permanent injunction as prayed for. They also agreed that there would be no appeal taken from the judgment to be entered as a result of the agreement. Also therein, Mr. Tolmas released any claims against Mr. Dan Hogan, president of the Jefferson Parish Council.

Parenthetically I observe that Mr. Tolmas was the major beneficiary of this compromise. All that Mr. Tolmas released in the compromise was to relinquish any claims from “utterances allegedly made by Mr. Hogan immediately prior to the filing of the suit. . . .” Considering the commercial nature of Veterans Highway, then and now, aspects of equal protection seem clearly implicated in the compromise.

On February 7, 1963, “with the consent of all parties hereto, as evidenced by the document identified as PD-1,” the preliminary writ of injunction granted on October 18, 1962, “is hereby made permanent.”

Significantly, this permanent injunction was a compromise, to which it appears that every parish authority agreed. Since Morning Park is a legal successor to Mr. Tolmas, it enjoys the benefits of such compromise.

Quinette v. Delhomme, 247 La. 1121, 176 So. 2d 399 (1965), *Succession of Cahn*, 545 So. 2d 1158 (La. App. 4th Cir. 1989), *citing Ditch v. Finkelstein*, 399 So. 2d 1216 (La. App. 1st Cir. 1981).

A compromise precludes the parties from bringing a subsequent action based upon the matter that was compromised. La. C.C. art. 3080. A valid compromise can form basis of plea of *res judicata*. *Boyette v. Riverwood Intern.*, 27,980, 27,981 (La. App. 2d Cir. 3/1/96), 669 So. 2d

730, *on rehearing*, 27,980, 27,981 (La. App. 2d Cir. 5/8/96), 674 So. 2d

1102, *writ granted in part and remanded*, 96-1418 (La. 10/4/96), 679 So. 2d

1366.

The law of *res judicata* in effect at the time of the prior judgment in this case, La. R.S. 13:4231,⁴ provided as follows:

The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

In the case *sub judice*, the object or thing demanded in the first suit and the cause of action for injunction are the same as in the current motion to enforce the permanent injunction judgment; that is, the right of the owner of the property to peaceably possess and use the property as Mr. Tolmas was using it at that time, as offices. This use included, but was not expressly limited to, ingress and egress from Veterans Highway.

Indeed, in her ruling herein, the trial judge noted “it appears what the plaintiffs are requesting is the use of property for offices. It’s very specific in here.”

Having heard expert testimony on the issue, the trial court concluded, “the court is going to enforce the permanent injunction against the parish of Jefferson barring the parish of Jefferson from interfering with the peaceful possession of Morning Park, LLC and its use of the property for offices.”

⁴ Former La. C.C. art 2286 was redesignated as La. R.S. 13:4231 by Acts 1984, No. 331, § 7, effective January 1, 1985.

This testimony was by David Halpern, a local attorney and real estate investor, who was accepted as an expert by the parish in the field of real estate development, land use and financial transactions with respect thereto. He reviewed the circumstances of the permanent injunction as compared to the situation in Jefferson Parish at the time and was of the view that Mr. Tolmas was concerned that his property was being treated differently from other properties on Veterans.

I suggest that the majority fails to give credence to the trial court's determination that this injunction was very specific with respect to an office building. In my view, this ruling is not subject to *de novo* review which seems to have been the approach of the majority. It must be shown to be clearly wrong, which I contend the majority has failed to accomplish.

I conclude this case is not merely about shells and a simple loss of a nonconforming use in a zoning case, but is a larger matter involving the right of the usage of private property where the parish governing authority, after its complaints about the usage of the property at issue, in the face of judicial attack, consented to a permanent injunction which trumped their zoning ordinance.

As the Supreme Court pointed out in the *per curiam* granting the writ, reversing the fifth circuit's earlier ruling herein and transferring the case to this court:

The underlying issue presented in this case is whether property along a major thoroughfare in Metairie, Louisiana, currently zoned residential, may be occupied commercially because of a permanent injunction secured by the current landowner's ancestor in title preventing

the defendant Parish of Jefferson from enforcing the zoning regulations.

Thus, I conclude that the injunctive compromise is superior to and supersedes the zoning ordinance, and respectfully dissent.