

**COUNTY COUNSEL
OFFICE MEMORANDUM**



Date: May 28, 2003
To: Board of Supervisors
From: Mary Ann Slutzky, Senior Deputy County Counsel
Re: Farr Appeal of the ARCO Gas Station (02APL-00000-0003; 99-DI-052):
Vested Rights Issue

At the Board of Supervisors hearing of February 4, 2003, the applicant's attorney, Mr. Richard Monk, claimed that ARCO has a vested right to build a gas station on the property located at the corner of Highway 101 and Patterson Avenue. This memorandum responds to Mr. Monk's claim.

The basic vested right rule is that if the County changes its land use regulations, a property owner cannot claim a vested right to build its project unless he/she has obtained a building permit and performed substantial work and incurred substantial liabilities in good faith reliance on the permit.

Mr. Monk claims that because his client obtained a building permit for the original gas station and relied on it to build the gas station, it has a continued vested right to a gas station at this location notwithstanding the demolition of the building in 1990. He relies on Trans-Oceanic Oil Corp., Inc. v. City of Santa Barbara (1948) 85 Cal.App 776, a case that involved a property owner who had a well drilling permit and who was prohibited from accessing his property by the federal government, which used the wells for federal purposes during WWII. In Trans-Oceanic, the court held the property owner retained his right to use the permit once the government returned the property to him, notwithstanding a change in the zoning which precluded this use. The city had argued the use was abandoned; the court disagreed.

In contrast to the facts of Trans-Oceanic, the County never required ARCO to close the gas station nor did it deny access to the property. In July 1987, ARCO voluntarily chose to

demolish and replace its underground fuel tanks. Subsequently, the county required abatement pursuant to standards under the Leaking Underground Fuel Tanks (“LUFT”) program, when an inspection report identified contamination in February 1988. ARCO could have abated the contamination with the gas station and tanks in place (discussion Kate Sulka, Fire Protection Division, Fire Dept.). In fact, hundreds of LUFT sites remain open during abatement including the County Courthouse, the County Administration Building, several County Fire Stations and most gas stations. (Note: All gas stations in the County are potential LUFT sites.) Demolition was a business decision not a County requirement.

ARCO’s assessment plan of April 1988 did not include station removal, nor did a 1989 work plan for the site prepared by ARCO. Thus, ARCO did not consider station demolition a requirement for abatement. In March 1990, an EHS report indicated the site was no longer going to be used as a gas station, although the source of this information is not mentioned. In an August 1990 EHS letter to ARCO regarding the proposed clean up plan, the Department recommended the station be removed to facilitate abatement because it was no longer going to be used as a gas station. ARCO responded that they would tear down the building as recommended; removal was not a requirement – it was a recommendation.

ARCO applied for a Jack-in-the-Box in 1995-1996 and the proposed gas station in 1999. The site was closed as a LUFT site in 1998 (i.e., no contamination found) but subsequently reopened as a LUFT site in January, 2003 because of the possibility that MTBE/fuel oxygenates were on the site. Recent law (AB 2886) identifies MTBE as the high priority contaminant to be addressed by local clean-up agencies (i.e., our County Fire Dept.). The statute requires ARCO to confirm that MTBE is, or is not present, and, if present, requires specific clean up standards and timelines.

At no time was the applicant denied access to his property or required to remove the tanks or structures. Development which vested pursuant to the original permit has been abandoned voluntarily; the vested rights associated with the original permit are no longer applicable. The applicant has voluntarily demolished the structure – it cannot now claim a right to reconstruct that which was previously allowed but no longer is consistent with the zone district

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standards. The Board's conceptual direction does not state that a gas station use is not allowed; the finding is that this particular configuration is inconsistent with applicable development standards and requirements.

In conclusion, the applicant cannot claim a vested right to construct a gas station because the demolition of the original station was voluntary.