STATE OF ILLINOIS
POLLUTION CONTROL BOARD
August 5, 1971

Fred Wachta and J. Richard Mota d/b/a Belle Plaine Subdivision	)	
vs.	)	PCB 71-77
Environmental Protection Agency	)	

Mr. Shelby Yastrow, Attorney for Petitioners
Mr. Delbert Haschemeyer, Attorney for Environmental Protection Agency

Dissenting Opinion (by Mr. Kissel):

Mr. Fred Wachta and Mr. J. Richard Mota d/b/a Belle Plaine subdivision in Gurnee, Illinois (the "Petitioners") filed a Petition for Variance with the Board on April 14, 1971 in which they sought a variance from an order of the Board entered on March 31, 1971, which order prohibited the North Shore Sanitary District from allowing any new sewer connections or additions to old sewers until the District could demonstrate that it could adequately handle the wastes. The Petitioners are developing the Belle Plaine subsivision in Gurnee, and contend that without a variance granted by this Board the Petitioners will lose a great deal of money, which could, according to the Petitioners "perhaps drive Petitioners into voluntary or involuntary bankruptcy." The Environmental Protection Agency (the "Agency") filed a Recommendation concerning the variance on June 8, 1971, the date of the hearing. The Agency recommended that the petition for variance be denied, basically on two grounds; first, that the entire matter of new sewer connections had already been decided in the original North Shore Sanitary District case (PCB 70-7, 70-12, 70-13 and 70-14) and the Petitioners could have participated in that case, and second, that there would be a significant amount of sewage coming from the Petitioners' new homes adding to an already difficult problem.

On February 6, 1970, the Petitioners entered into an agreement with James P. Onan and Linda L. Onan to purchase a tract of land in Gurnee, Illinois for the purpose of subdividing the tract into twenty-seven (27) lots for residential use. (See Pet. Exhibit A) The Petitioners agreed to pay a total price of $50,000 for the tract of land by paying $10,000 down and the balance by January 16, 1972. As of now, the Petitioners owe the Onans $32,500. After buying the property, the Petitioners hired Mr. Robert Sale, an engineer, to prepare a plat and survey of the new subdivision, which he did. (Pet. Exhibit B) He also planned the streets and sewers and his cost to the Petitioners was $3,800. Subsequent to receiving the engineering report, the Petitioners had the streets and sewers put in at a cost of $40,000. They also spent $4,000 on advertising and promotion of the subdivision. To date seven homes have been completed and one is under construction. Five of the completed homes have been sold and two are to be used as model homes. Eventually, the Petitioners expect to have twenty-seven individual homes in this subdivision. Three of the lots had been sold (in addition to the homes constructed or under construction), but because of the order of the Board and Gurnee's enforcement of that order, two of the buyers have rescinded the purchase and the Petitioners have given them their money back.

Before Petitioners began construction of the sewer system, they applied for permits as required by state and local law at the time. In fact, the Sanitary Water Board and the North Shore Sanitary District granted permits to the Petitioners to install and operate the sewer lines. (See Pet. Exhibits C and D) A permit was issued by the Sanitary Water Board on April 10, 1970 and by the District on April 15, 1970. It was after this permission was received that the Petitioners installed, and in the case of seven homes, operated that sewer system.

The above description of facts is necessary even in a dissenting opinion in order to put this case in its proper perspective.

As has been pointed out, the Petitioners are seeking a variance from the Board order of March 31, 1971 in the case of the League of Women Voters of Illinois, et al v. North Shore Sanitary District, PCT 70-7, 70-12, 70-13 and 70-14. After a thorough discussion of the facts in that case the Board, inter alia, issued the following order:

"7. The District shall not permit any additions to present sewer connections, or new sewer connections, to its facilities until the District can demonstrate to the Board that it can adequately treat the wastes from those new sources so as not to violate the Environmental Protection Act, or the Rules and Regulations promulgated thereunder."

The Act provides that the Board may grant individual variances beyond the limitations prescribed in the Act when compliance with an "order of the Board would impose an arbitrary or unreasonable hardship". We have consistently held that in determining whether such a hardship is imposed, we will employ a balancing process; that is, we will look at the detriments which will be faced by the Petitioners in complying with the law and balance that against the benefits to the public in denying the variance, or detriments to the public in granting the variance.

The majority of the Board, after reviewing the facts of this case, have decided that the Petitioners should be allowed to connect only those homes which were under construction or built on the date of this Board's order - March 31, 1971. As to the other lots, the majority apparently feels that if interim treatment can be provided and if a sewer system or waterway (other than the District sewer) can be found to deposit the treated waste water, then the Petitioners can go ahead and build the additional homes. While I agree that the Petitioners should be allowed to connect up the eight homes constructed, or under construction, I strongly disagree with the majority on what should be allowed as to the remaining nineteen homesites. I do believe that the Petitioners should be required to construct interim treatment, if technically feasible, and I do believe that it should be discharged into a place other than the District sewer system; but if no other such place can be found at a reasonable cost to the Petitioners, then I would allow them to discharge the already treated wastes into the District sewer system. An analysis of my position is necessary at this point.

In this particular case there is adequate evidence as to the specific financial hardship which will be imposed on the Petitioners if they cannot connect the remaining 20 lots, and the homes to be put on those lots, to the existing sewer

line. The Petitioners say that if they are not allowed to build and connect the homes to the sewer line, they will not be able to meet the financial commitment in the purchase contract dated February 6, 1970, which requires them to pay the seller of the land the total amount of money by January 16, 1972. If that is true, they will lose the money they have invested in the property which amounts to the $10,000 deposit, plus what has been paid for engineering fees, sewer and street construction and advertising and promotion costs. The latter items amount to about $48,000.

Examination of the Petitioners by the Agency did develop that the men did have sufficient financial ability (although it would be very tight) to buy the property by January 16, 1972 even though no building would be done on the property. It is quite clear, however, that use of these other funds would be the imposition of a financial hardship on the Petitioners. While the record contains a great deal of evidence about financial hardship, the record does not contain any indication as to the other side of the Board's balance, that is, what effect will the wastes have on the Skokie ditch during the next few years while construction of the District's plant is being done. Obviously, the amount of sewage which the homes in Belle Plaine will produce is infinitely small when compared to the amount of sewage now going into the Clavey plant. The Agency estimated that the twenty-seven homes would add about 95 people to the area (although this is the worst case estimation because some of the people who buy homes may come from the District area) which would add 9,500 gallons per day to a plant which now receives up to six and one half million gallons per day. If all we had to decide was whether this particular discharge should be allowed, it is clear that the effect on the total would be minimal and therefore should be allowed. However, we presently have many variance cases before us and this, as others will do, will set a precedent on how the Board will react to other similar variance requests. The question is where should the Board draw the line in cases such as the one presented here. If the decision were to be based solely on the balancing between the effect on the Skokie ditch and the financial hardship, the variance should be denied because the line should be drawn as of March 31, 1971. However, other issues change my mind. First, the State

of Illinois has already granted permission to the Petitioners' to install and operate the sewer system. This permission was granted to the Village of Gurnee in a permit issued by the Sanitary Water Board, per #1970-HB-195, which states:

> "Permit is hereby granted to the Village of Gurnee, Lake County, Illinois, to install and to operate a system of eight-inch sanitary sewers along Pine Grove Avenue, Bell Plaine Avenue, . . . with outlet to existing sanitary sewers . . . tributary to the North Shore Sanitary District Clavey Road Sewage treatment plant . . . ."
> (Emphasis supplied)

The District approved the connection, as well, in its letter to the Village dated April 15, 1970. (Pet. Exhibit D) The Petitioners' had the right to rely, as they obviously did, on the fact that they would be allowed to connect up the individual homes to the sewer line. They had a right to believe that the word "operate" had meaning, and that meaning is that the sewer could be used. The only time a sanitary sewer can be used is if it is connected to a home or business. Not only did the Petitioners have a right to rely on the connections being allowed (in light of the State permit issuance and approval of the District), but the record strongly demonstrates that they did rely on this fact. The purchase and development of this tract of land by the Petitioners was not for a long term investment; rather, it was to develop the property for private homes within 2 1/2 years after purchase. They had to have permits issued quickly so they could decide on whether to invest the little money they had. To now deny the Petitioners the right to connect the homes to the sanitary sewer, which they installed, would be an unconstitutional taking of property by the State, and a denial of due process of law. This kind of reasoning is found in zoning cases. In the first case before this Board, we decided that the law in the area of pollution is closely analogous to the zoning laws. (See Lindgren Foundry, PCB70-1) For example, the concept of using "arbitrary or unreasonable hardship" as the test for the granting of a variation is found both in the Act and in zoning law. Therefore, since zoning law concepts are closely analogous, it was natural to look to this field for guidance in the instant case. A case right on point is Deer Park Civic Association, et al v. City of Chicago, et al, 347 Ill. App. 346, 106 N.E. 2d 823 (1952). In that case the defendant company, an electronic

manufacturer, bought a plant site in Chicago on January 16, 1950. This property was zoned for manufacturing use in 1942, and on March 2, 1951 three ordinances were introduced. They were passed on April 19, 1951 which changed the use designation from manufacturing to family dwelling. The defendant company had applied and received its building permit on April 4, 1951. The question considered by the Appellate Court, which is relevant here, is whether the zoning amendment which became effective on April 19, 1951, revoked the building permit issued April 4. The Court said it did not and allowed the construction of the building on the theory that "any substantial change of position, expenditures, or incurrence of obligations under a building permit enables the permittee to complete the construction and use of the premises for the purpose authorized irrespective of subsequent zoning or changes in zoning". Ibid at page 825, The Court found that what the defendant company had done was sufficient to give it a "vested right" in constructing the building. Other Illinois cases have recited the same principle.

The variance should, in my opinion, be granted to the Petitioners. My decision here, if it had been adopted by the full Board, would have meant that all those people who relied and acted upon permits already issued, or to have been issued (with some strong degree of certainty), would have been able to construct their homes and apartments. Yes, this would have added to Lake Michigan's and the Skokie River's problems, and I am not unmindful of that. But it is difficult for me to fly in the face of all tradition and law in the name of pollution control. We have the necessary administrative tools to abate our pollution problems without destroying the basic rights under which we were all born, and now live.

I believe that one other point needs clarification in the District cases we have before us. The original case which has been cited in this opinion directs that the District not allow any new sewer connections or additions to old ones. The question is whether the District has the authority to grant or deny persons within municipalities in the District the right to connect new homes to existing lines. The statutory authority to the District to do this is not entirely clear, and should be explored by the Agency and those who wish to build homes in cities within the District and connect those new homes to existing sewer lines. The decision on this question is not required for this case, but is one which will obviously be dealt with in the future.

84

I, Regina E. Ryan, Clerk of the Board, certify that Mr. Richard J. Kissel submitted the above dissenting opinion on this 5th day of August, 1971.

Regina E. Ryan