ILLINOIS POLLUTION CONTROL BOARD
May 1, 1980

H. J. BERGMAN BUILDERS, INC., a Delaware Corporation,	)	
Petitioner	)	PCB 79-264
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

TIM SWAIN, ATTORNEY AT LAW, APPEARED FOR PETITIONER;

STEPHEN GROSSMARK, ASSISTANT ATTORNEY GENERAL, APPEARED FOR RESPONDENT:

OPINION OF THE BOARD (by Board Member Goodman):

This opinion supports the Board order herein of April 5, 1980.

On December 13, 1979 Petitioner filed a petition for variance from §§12(b) and 39(a) of the Illinois Environmental Protection Act (Act) and Rule 962(a) of the Board's Water Pollution Rules and Regulations (Water Rules). The Illinois Environmental Protection Agency's (Agency) January 11, 1980 motion to file its recommendation late is granted. On January 21, 1980 the Agency recommended denial of the petition.

The objective Petitioner seeks is an Agency permit in order to construct and operate a sewer extension in Warren County to service a proposed 32-family (72 occupants) moderate income rental housing project. The sewer would connect to the sanitary sewage treatment plant of the City of Monmouth. Two of Petitioner's principals have owned an undivided 50% interest in the site property as beneficiaries of a land trust since June of 1977. (R.68-9).

On June 30, 1976 a six-month building permit was issued to Controlled Builders, Inc. (Pet., Ex.E). On May 27, 1977 the Agency granted Controlled Builders, Inc. Permit No. 1977-HB-4291 to construct the sewer extension and granted the City of Monmouth, under the same permit, the right to own and operate the extension. (Pet., Ex.F). It was not then constructed due to federal funding delays occasioned by Petitioner's revisions of the site plans and the building plans until the Summer of 1979. (Pet., p.5; R.29). In May of 1977 two of Petitioner's principals formed the Corporation and received assignment of Controlled Builders' permit. (R.63-4).

On April 6, 1979 Petitioner received an Agency memorandum regarding the Monmouth plant's critical review status. Monmouth city officials on August 10, 1979 discussed environmental problems regarding the project with Petitioner. (R. 31-2). On August 20, 1979, Petitioner was aware of existing problems with Monmouth's treatment plant, but two days later applied for a construction permit "[i]n order that construction of the project might commence." (Pet., p.5; R.55). It was not until four months later that Petitioner received federal funding for the project. (R.27).

The Agency denied the permit on August 30, 1979 for these reasons: (1) §§12 and 39 of the Act prohibit the Agency from issuing permits for facilities which could tend to cause water pollution; (2) §39 of the Act requires Petitioner to prove that the proposed project will not cause violations of the Act or the Board's regulations; and (3) Petitioner's application did not meet the requisites of Water Rule 962, more particularly because the Agency had information "that the Monmouth Sewage Treatment Plant experiences near continuous bypassing from the headend of the plant." (Pet., Ex.C). The Agency was willing to reevaluate the application upon Petitioner's correcting this deficiency, e.g., by submitting plans for a septic system using holding tanks or other technology.

It was two months after the permit denial that the Agency placed Monmouth's treatment plant on restricted status, although it had been placed on critical review two years earlier, having reached 98% of its capacity. Monmouth had been notified on August 10, 1979 of pending restricted status proceedings. (Rec., pp.1,2; R.129). Monmouth has applied for federal funds to upgrade and expand the plant and projects a October, 1981 completion date, with a January 1, 1982 startup date. (R.116-8).

Petitioner's alternative to using the city's plant is to construct a septic system. Petitioner claims that it has neither funds nor lands for this purpose, and adds that "it is against FmHA [sic] policy to fund any multi-family housing on septic system where an existing community sewer treatment facility is available. Consequently, the funding for this proposed project would be denied." (Pet., p.4). The Board finds that denial of federal funding or lack of other access to funding does not constitute an arbitrary or unreasonable hardship, especially where a project is a proposed one. This is all the more true where Petitioner has not proven an actual denial of funds, but pleads only their threatened denial.

Petitioner does plead the hardship to Monmouth's rental market as identified by a Housing Assistance Plan prepared by the city in an application for Community Development Block Grant

funds. (See Pet., Ex.G). Petitioner does not plead the precise extent of the need for the rental units or the precise extent of the "tight" city rental market.

The Agency is of the opinion that Petitioner's hardship is self-imposed. (Rec., pp.2-5). It states that in 1977, being successor in interest to Controlled Builders' permit, Petitioner knew the plant was nearing capacity. Additionally, since that 1977 permit was issued, three intervening permits for a total of 121,000 gallons per day were issued. Petitioner's August 20, 1979 permit application was made ten days after the city had been notified of pending restricted status proceedings. The city was sued in April of 1979 for water quality violations during bypassing which is necessary when the plant's capacity is exceeded; Petitioner either knew or should have known of the existence and possible effects of this proceeding before it filed its permit application. Petitioner's proposed project would add a hydraulic load of 0.4%. The project would discharge 7,200 gallons per day of domestic sewage into sewers tributary to Monmouth's plant. The plant continues to be subjected to bypassing during wet weather.

There is no doubt that the sanitary sewage treatment plant of the City of Monmouth is heavily overburdened with no prospect for relief for at least 20 months. The proposed additional load of 7,200 gallons per day of domestic sewage or an estimated 0.4% increase in plant loading is not, in of itself, significant. The question which the Board must resolve is whether, given the existing ban on all sewer connections, Petitioner has satisfactorly carried its burden of proving that the sewer ban constitutes an arbitrary and unreasonable hardship in its case.

Although the hardship in this case is not as compelling as some previously considered by the Board under similar circumstances, the Board finds that sufficient evidence exists to warrant granting the proposed variance. The Board is convinced that without the proposed variance the project will have to be abandoned (Pet., Ex. 5). As previously noted, this fact is not sufficient to warrant the granting of a variance.

What is sufficient, however, is the fact that Petitioner has proceeded in a deliberate manner in his development plans including obtaining a permit from the Agency to hook the proposed development to Monmouth's sewage system. While it is true that Petitioner allowed this permit to lapse for reasons largely unexplained by the record, the Board finds that Petitioner's reliance upon the issued permit was reasonable and that it would be arbitrary and unreasonable, in this case, to suddenly deny a new permit because of the miscalculation by a few months of the planning and construction schedule.

Petitioner has shown that its monetary investment of $85,000 is jeopardized by the permit denial, and that this project will be in the public interest (Pet. Ex.8).

Finally, there is the fact that Petitioner's project is not likely to add additional load to Monmouth's sewage system until the end of 1980.

Two citizens testified at the hearing concerning the petition. The thrust of their complaints goes more to the total condition of Monmouth's sewage system than to the construction and hookup of the buildings in question.

After considering and balancing all the evidence in the record, the Board finds that it would be an arbitrary and unreasonable hardship to deny Petitioner the variance requested. The Board will therefore grant variance from Rule 962, of the Board's Water Rules under certain conditions. Variance from Sections 12 and 39 of the Act are hereby denied as unnecessary.

This Opinion constitutes the findings of fact and conclusions of law of the Board in this matter.

Mr. Dumelle concurs.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 1st day of May, 1980 by a vote of 5-0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board