

ILLINOIS POLLUTION CONTROL BOARD
March 21, 1984

VILLAGE OF LOMBARD,)
)
) Petitioner,)
)
) v.) PCB 83-147
)
) ILLINOIS ENVIRONMENTAL PROTECTION)
) AGENCY,)
)
) Respondent.)

MS. RITA ELSNER AND MR. RICHARD KISSELL APPEARED ON BEHALF OF
THE VILLAGE OF LOMBARD;

MR. GEORGE FYLER APPEARED ON HIS OWN BEHALF;

MR. ARTHUR ALLEN APPEARED ON HIS OWN BEHALF;

MR. WAYNE WEMERSLAGE APPEARED ON BEHALF OF THE ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon an October 3, 1983, petition for variance filed by the Village of Lombard ("Lombard") requesting relief from 35 Ill. Adm. Code 309.241(a). On November 11, 1983 the Illinois Environmental Protection Agency ("Agency") filed a recommendation that variance be granted subject to certain conditions. Hearings were held on December 7, 1983 and January 4, 1984, at which witnesses and several members of the public testified. On February 3, 1984 the Agency filed a motion for additional hearing. On February 9, 1984 that motion was granted. The additional hearing was held February 21, 1984. Final briefs were filed by Lombard on February 27, 1984, by the Agency on February 27, 1984 and by the Intervenor on February 27 and February 28, 1984.* On February 10, 1984 the Intervenor, Mr. Arthur Allen filed a motion for additional hearing claiming newly discovered evidence. That motion is hereby denied. The Board could not schedule and hold an additional hearing and still meet the statutory deadline for decision. If Mr. Allen the Intervenor feels this motion is still relevant after decision he may file for reconsideration under 35 Ill. Adm. Code 103.241(a)(1).

*The transcript of the proceeding and the exhibits were filed with the Board on January 27, 1984. The prepared testimony of Mr. Fyler and of Mr. Allen, entered as exhibits, were filed on March 19, 1984. The 54" sewer section of the McClure Report, entered into the record by Mr. Fyler, was filed on March 20, 1984.

On February 29, 1984, intervenor, Mr. Allen, filed a document requesting a formal finding and ruling on expenses charged to him by Lombard for a copy of the transcript. On March 2, 1984, Lombard replied. In Mr. Allen's February 29 filing, it seems clear that he made a private arrangement with the Lombard attorney regarding the transcripts. The Board declines to make a ruling on the validity of private transcript agreements. 35 Ill. Adm. Code 104.202 provides that variance petitioners shall furnish transcripts to the Board at petitioner's expense. The Board notes however, that such transcripts, and other public files, may be copied at the Board for a nominal fee, presently \$0.10 per page.

This variance petition is seeking substantially the same relief as was originally granted in PCB 82-152, June 16, 1983. That order imposed certain conditions upon Lombard, and a Motion for Reconsideration was filed on July 22, 1983. The Motion contained Lombard's objections to the Board's condition that operating permits could not be issued prior to termination of Restricted Status on the applicable portion of the sewer system. The Board denied the Motion on July 26, 1983. Lombard did not sign the certification for the variance granted in PCB 82-152, and has filed the current variance request.

HISTORY

In March 1974, the Agency placed the Village of Lombard on Restricted Status, which included the entire sewer system and wastewater treatment plant. On March 10, 1977 and May 10, 1977, the Lombard wastewater treatment plant and all or part of the sewer system, respectively, were removed from Restricted Status and placed on Critical Review. On June 22, 1979 the Agency placed the northwest and northern-most areas of Lombard's sewer system on Restricted Status and on June 16, 1980 the entire Lombard sewer system was placed on Restricted Status due to surcharging sewers, overflows, and basement backups. On September 14, 1982, the Agency removed the separate sanitary sewers tributary to the new West Side Interceptor from Restricted Status (Rec. p. 4). The sewers in the proposed area of development are currently on Restricted Status.

FACTS

Lombard owns the property on which development is proposed and is acting as agent on behalf of School District #44 which is the beneficial owner of land. Presently, it is the site of Lincoln School and the former Village Hall (Rec. p. 2). Lombard states that both buildings are boarded up and not used for any purpose, and proposes that these properties be privately developed as a means to revitalize the downtown area. The Lombard Center Plan ("Plan") formulated in negotiations with a

developer included 179 total multi-family units, of which 128 would be in a six-story, one-and two-bedroom conventional building, 39 senior units will be in a three-story building, and the remaining 12 units would be attached three-bedroom town homes. The remainder of the site would be a 10,000 square-foot one-story retail and office center with accessory off-street parking (R. 65-66). Lombard anticipated flows from this development to be 48,300 gallons per day (Pet. ¶ 6). During the pendency of this variance proceeding, the expected developer withdrew from negotiations (R. Feb. '84, p. 20). However, Lombard stipulated that the Plan under a new developer, regardless of project details, would not result in an increase in the volume of sanitary discharge, and that the water retention requirements would be the same, although the amount of green space might change (R. Feb. '84, p. 27, 37, 38). Since this portion of the sewer system is on Restricted Status, a variance is necessary before the Agency can issue a Construct and Operating Permit for a sewer extension under 35 Ill. Adm. Code 309.241(a).

The Village of Lombard has a present population of approximately 38,800 people. Existing sewer facilities are both combined and separate sewers and consist basically of four interceptor sewers: a 30-inch serving northern areas, a 54-inch serving west central areas, a 108-inch serving southern and east central areas, and a new interceptor serving separate sanitary sewers in the southern-most areas. The proposed development will be tributary to the 54-inch combined interceptor sewer (Rec. p. 6). Currently, Lombard is participating in a multi-phase state grant project for sewer system rehabilitation with Phases I, II and III aimed at the 30-inch, 54-inch, and 108-inch interceptors, respectively. Phase I is near completion and Phase II will be completed on or before December 31, 1984. Upon completion of Phase II the section tributary to the 54-inch interceptor, which includes the proposed sewer extension, may possibly be removed from Restricted Status (Rec. p. 4). However, there may be only a 50% chance that completion of Phase II will result in a lifting of restricted status (Pet. Br. 15).

At present, several locations served by the 54-inch interceptor are subject to basement backups and sewer system overflows. Several citizen witnesses appeared at the December 7, 1983, hearing to describe these problems which form the basis for the imposition of Restricted Status (R. Dec., 83, p. 185, 281-82).

ENVIRONMENTAL IMPACT

One of the benefits claimed by the Plan is that the storm water from the developed site would be removed from the line tributary to the 54" combined interceptor and routed into a separate storm sewer. Lombard asserts that the stormwater volume removed is much greater than the sewage flow which would be added by the development (Resp. Rec. p. 2).

In the variance petition, (Exhibit E, p. 2) various removal values were presented. These removal values are based on rainfall intensities of 5.3 inches per hour, not total rainfall, which can be misleading when comparing this to the continuous discharge that will occur from the proposed development. The 5.3 inches per hour figure is actually based upon a total rainfall of 0.88 inches occurring over a 10-minute period. As a result, the actual quantities of water that will be eliminated or restricted from entering the system on a day of average rainfall are much less than these amounts. The Board also notes that the comparative information was often presented using different bases.

There are a limited number of issues on which the Board can make factual findings here. It is clear that basement back-ups will continue at least until the sewer separations under Phase II are completed. The Board agrees with the testimony by Mr. Allen, that the domestic sewage component in those back-ups would increase (R. Jan. '84, p. 122-23), but also concurs with the rebuttal by Mr. Huff (R. Jan. '84, p. 173) that BOD and suspended solids will not measurably increase; however, this does not address the point that the potential for health risks would increase if the frequency and duration of basement back-ups remain unchanged.

Lombard requests this Board to find that the Plan will significantly reduce the frequency or duration of basement back-ups and, thus, total environmental impact. Mr. Fyler asserts (R. Jan. '84, p. 49) that less than 1% of peak sewer capacity will be diverted, having an insignificant impact on reducing basement back-ups. The Board is unable to make a finding on this issue because in at least three areas factual information to support such a conclusion is totally lacking or was not persuasive:

- (1) Acreage included in the Phase II project varied from 91 acres to 198 acres. The Phase II project includes the separation of storm sewers and sanitary sewers. This obvious discrepancy has impact on sewer capacity calculations. (R. Dec. '83, p. 407, Jan. '84, p. 86).
- (2) One of the alleged benefits of the Plan is diversion of project area storm water run-off from the combined sewer to the stormwater sewer. The method by which the diversion will be accomplished was not addressed (Ex. E p. 2).
- (3) It is not readily apparent that the proportional relationship between the drainage area contributing storm water to the storm sewer and the discharge

capacity of the sewer downstream was examined. Since the sewer must transmit discharge as it is supplied from the tributary drainage area, both of these factors are crucial in determining available capacity, and any flooding or adverse environmental impacts from the diverted stormwater. However, the petitioners have stated that runoff from this project would not overload the Grove Street storm sewer (Pet. Br. p. 8). If in fact, this statement was framed only to imply that this proportionality was examined and determined to be sufficient, but that these facts were not thoroughly studied, this would amount to an unacceptable omission by the petitioners.

HARDSHIP

For variance to be granted, the Petitioner must adequately prove that, due to the imposition of Restricted Status, arbitrary and unreasonable economic hardship has resulted (Ill. Rev. Stat. 1981, ch. 111½, par. 1035). In cases involving variance from restricted status, petitioners must allege hardship which is different than that which is intended by the imposition of Restricted Status, which creates a moratorium on development until adequate sewage treatment is available. Arbitrary or unreasonable economic hardship is usually found by the Board only where the costs incurred prior to the imposition of restricted status outweigh the environmental harm which would be caused by the granting of variance. The only exception to this is that costs incurred subsequent to the imposition of restricted status may be considered as hardship if such costs resulted from firm commitments made prior to the imposition of restricted status or were incurred based upon a reasonable belief that the area was not under restricted status. In this case, Lombard chose to subsequently fund the planning of the development with full knowledge that Restricted Status had been imposed by the Agency on the entire sewer system in 1980 (R. Dec. '83, p. 80-81). Therefore, that hardship is self-imposed.

However, there is additional community hardship in this situation that the Board finds is arbitrary or unreasonable. Henderson's the downtown "anchor" department store went out of business. Subsequently, part of the building was leased by an apparel store. Lombard's Director of Development stated that the presence of the apparel store did not alter his view about the need for new development as quickly as possible (R. Feb. '84,). The Board recognizes that the loss of an anchor store can seriously threaten the stability of a downtown area. In this case the loss of the anchor store poses a risk of accelerating the deterioration of downtown Lombard that is not offset by the existence of the apparel store.

RESOLUTION

The Board is required to reach a conclusion on environmental impact based on facts in evidence. While testimony was provided regarding the ultimate legal conclusion, the factual information is so conflicting that the Board is unable to formulate a clear and concise understanding of the overall environmental impact of these changes. Although Lombard has demonstrated a reduction in flow to the 54 inch line during storm events, it has not demonstrated that the reduction is sufficient to decrease the extent and the frequency of surcharging. If surcharging continues, the problem could be aggravated because the domestic sewage component of the flows entering basements will be greater.

For these reasons this case is a difficult one. The Board has seriously considered the option of denying this variance request, and granting leave to refile to allow Lombard to fill the troublesome holes in this record. Yet, on balance, the community hardship in the form of accelerated business area deterioration and the likelihood of environmental improvement from completion of Phase II improvements lead the Board to conclude that denial of variance, even on this faulty record, would impose an arbitrary or unreasonable hardship.

The Board will, however, include as conditions some requirements and prohibitions which are based on Lombard's assertions, especially regarding the completion of Phase II, and are designed to prevent problems arising from the unanswered questions concerning the capacity of the Grove Street storm sewer and existence of downstream flooding problems. The variance is conditional, therefore, on completion of Phase II sewer system rehabilitation -- whether or not grant funding is available -- before operating permits may be issued. Lombard, thus, by its own actions, has the ability to offer potential developers some certainty as to when hook-ons will be available, while at the same time basement backups stand a reasonable chance of being eliminated before hook-ons occur. No design changes increasing P.E. above 483 will be permitted. Lombard will further be required to comply with its storm water control ordinances. Diversion of flows to the storm sewer so as to cause or contribute to downstream flooding is prohibited, as is surcharging from the Grove Street storm sewer directly, or indirectly, into the 54 inch interceptor.

As a condition of this variance, the Board does not include an aerated holding tank designed to contain three days of wastewater from the apartment complex, as recommended by the Agency. The holding tank has several inherent problems, namely;

1. the proximity to existing and future residential areas for both practical and aesthetic reasons,

2. possible zoning considerations,
3. the cost of the tank which would have a short service life would be approximately \$200,000.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Village of Lombard is hereby granted a variance from 35 Ill. Adm. Code 309.241 (a) subject to the following conditions:

1. The developments shall be restricted to two parcels of land as described in Exhibits A and B of the Variance Petition, which consist of approximately one-half of the area bounded by the Lombard streets of Lincoln, Grove, Park and St. Charles. This variance authorizes the Illinois Environmental Protection Agency ("Agency") to issue construct-only permits for development upon Lombard's submittal of applications and acceptance of this variance. Operating permits shall not be issued until all of Phase II sewer system rehabilitation is completed and the Agency certifies that it is completed and operational. Storm water from the two parcels of land in question shall be diverted from the 54 inch combined sewer line to the separate storm sewer line prior to issuance of an operating permit.

2. The development of the two parcels of land shall be restricted to a total design population equivalent of 483.

3. The development will strictly adhere to Lombard Storm Water Ordinance, No. 2231, which limits the runoff rate to 0.1 inches per hour.

4. Any water diverted to the Grove Street Storm Sewer shall not cause or contribute to downstream flooding.

5. If any water surcharges from the Grove Street Storm Sewer, such water shall not be allowed to flow into the 54 inch interceptor sewer.

6. Within 45 days of the date of this Order, the Village of Lombard shall execute a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. Said Certification shall be submitted to the Agency at 2200 Churchill Road, Springfield, Illinois 62706. The 45-day period shall be held in abeyance during any period that this matter is being appealed. The form of said Certification shall be as follows:

CERTIFICATION

I, (We) _____, hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 83-147, March 21, 1984.

Petitioner

Authorized Agency

Title

Date

IT IS SO ORDERED.

Board Member Bill S. Forcade dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of March, 1984 by a vote of 5-1.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board