ILLINOIS POLLUTION CONTROL BOARD
December 18, 1986

BRAVO-ERNST DEVELOPERS, Petitioner,	)	
v.	)	PCB 86-10
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and COUNTY OF DUPAGE, Respondents.	)	

ORDER OF THE BOARD (by E. Forcade):

On December 4, 1986, Bravo-Ernst Developers ("Bravo-Ernst") filed a motion to withdraw petition for variance. In its December 5, 1986, Order, the Board stated:

> "... as the Board has already issued a final opinion and order in this case, withdrawal of the petition for variance is inappropriate. The Board construes Bravo-Ernst's motion as a motion to withdraw the September 18, 1986, motion for reconsideration of the August 14, 1986, Opinion and Order. The motion to withdraw is granted."

The Board allowed until December 15, 1986, for appropriate motions, if the intentions of any party were misconstrued. On December 12, 1986, Bravo-Ernst filed a response reasserting that the entire petition for variance should be withdrawn, not the motion for reconsideration. Bravo-Ernst requests the Board "clarify" its December 5, 1986, order to grant withdrawal of the petition for variance.

Bravo-Ernst's December 12, 1986, filing asserts that "no party opposed the grant of ..." the motion to withdraw petition. That is not totally correct. On December 5, 1986, the Illinois Environmental Protection Agency ("Agency") filed a motion for reconsideration urging the Board to: 1) cancel the December 19, 1986, hearing; 2) reaffirm the August 14, 1986, Order denying variance; and 3) enter an Order barring Bravo-Ernst from filing any future variance petitions to obtain the same relief. The Agency reasserted its position in its December 15, 1986, filing. After reviewing the filings, the Board reaffirms its December 5, 1986, Order dismissing the motion for reconsideration.

In Illinois, a plaintiff, in a civil proceeding, has an unqualified right to dismiss an action without prejudice up until hearing or trial on the matter unless a counter claim has been

pleaded by a defendant. 110 Ill. Rev. Stat. 2-1009(a). In Village of South Elgin v. Waste Management, et al., 64 Ill. App. 3d 570, 381 N.E.2d 782 (2nd Dist., 1978), the court held that while the Civil Practice Act was not directly applicable to proceedings before an administrative body, the rules guiding the courts of Illinois do provide the "outer bounds" of what an administrative agency can do regarding motions for voluntary dismissal. 381 N.E.2d at 782-3. Under Illinois law, a motion for voluntary dismissal of a plaintiff's suit after trial has begun is addressed to the discretion of the court and is reversible only for abuse of discretion. Newlin v. Forseman, 103 Ill. App. 3d 1038, 432 N.E.2d 319 (1982).

Under Bauman v. Advance Aluminum Casting Corporation, 27 Ill. App. 2d 178, 169 N.E.2d 382 (1960), once trial or hearing has begun, plaintiff cannot dismiss the suit except by consent or on motion, specifying grounds for the dismissal, supported by affidavit and then only on terms to be fixed by the court. Even if compliance with the Civil Practice Act is achieved, the voluntary dismissal by plaintiff is discretionary with the trial court. In Bauman, the court denied a motion for voluntary dismissal after trial as it would constitute an abandonment of the proceeding that would leave the court without the power to enter judgment. The court found this result "untenable." 69 N.E.2d at 385.

Bauman can certainly be applied to the circumstances here. Bravo-Ernst filed a petition for variance and specifically waived hearing. The Board proceeded to enter its "judgment," a final Opinion and Order. Bravo-Ernst's right to a voluntary dismissal ended when the matter proceeded to judgment. This issue is now within the discretion of the Board. To grant Bravo-Ernst's motion to withdraw after judgment would render the Board's judgment in this matter meaningless. The Board denied the motion to withdraw as inappropriate, since a final action had already been taken. That action is reaffirmed today.

Since all parties are in agreement that the December 19, 1986, hearing should be cancelled, the hearing is cancelled. Bravo-Ernst asserts this matter should remain open with the possibility of a hearing in April, 1987. The Agency argues the December 5, 1986, Order dismissing reconsideration should be affirmed and Bravo-Ernst should be barred from filing future variance petitions for the same relief. As Bravo-Ernst is not presently prepared to go to hearing, the Board believes the appropriate action is to dismiss the motion for reconsideration and close the docket. The Board will not address in this proceeding any future variance petitions that Bravo-Ernst might file.

A second matter of concern in today's order is Bravo-Ernst's assertion that "by grant of reconsideration, the acceptance of additional comments and the scheduling of a further hearing, the Board has implicitly recognized that its order of August 14, 1986

may lack support in the record or at least should be based on a record developed by hearing." This is simply not true. Bravo-Ernst filed this variance request and was free to include all the factual information it wanted. On January 23, 1986, the Board ordered additional information to be filed. Bravo-Ernst was also free in its original filings to request a hearing, at which it could present additional factual information. Bravo-Ernst specifically waived hearing. If Bravo-Ernst now feels that there should have been more facts in the record, or that the record should have been developed at hearing, it cannot place the blame on this Board. Further, the Board disputes the assertion that the August 14, 1986, Opinion and Order lacks support in the record. In the August 14, 1986, Opinion and Order the Board made the following findings:

> " In summary, the record discloses and the Board finds that basement back-ups and manhole surcharging in the Meadows Subdivision are pervasive and severe, that these problems continued as recently as two months before the present petition for variance was filed, and that Bravo-Ernst's proposed development would be directly tributary to the problem area and would exacerbate the problem. Further, the Board finds that the back-ups and surcharge problems are certain to continue as long as DUC fails to identify and correct the illegal sewer connections (sump pumps and drains) which cause the problem. The Board is aware that raw sewage back-up in a basement presents problems of the spread of disease and electrocution, as well as property damage. Regardless of the economic hardship suffered by Bravo-Ernst, the Board finds that its hardship is not sufficient to be arbitrary or unreasonable in light of the increase in the health and safety risk to the people in the Meadows Subdivision. Consequently, the Board, on balance, denies the petition for variance."

There is a substantial quantity of information in the record to support the conclusion that additional flows from Bravo-Ernst's proposed development would exacerbate the already severe basement back-ups in the Meadows subdivision. Bravo-Ernst has never introduced facts or argument to dispute that conclusion. It was an appropriate conclusion as the record existed August 14, 1986, and it is an appropriate conclusion as the record exists today.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 18th day of December, 1986, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board