

ILLINOIS POLLUTION CONTROL BOARD
November 7, 2002

THE CITY OF FARMINGTON,)	
FARMINGTON SANITARY DISTRICT, and)	
FARMINGTON CENTRAL COMMUNITY)	
UNIT SCHOOL DISTRICT NO. 265,)	
)	
Petitioners,)	
)	
v.)	PCB 03-6
)	(Variance – Water)
THE ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by M.E. Tristano):

This matter is before the Board upon a petition for variance (petition) filed by the City of Farmington (City), Farmington Sanitary District, and the Farmington Central Community Unit School District No. 265 (School District) (collectively referred to as petitioners) on July 15, 2002. The petitioners are seeking a variance from 35 Ill. Adm. Code 309.241 as that section applies to the School District's efforts to obtain a construction permit as required by Section 309.202 and operating permit as required by Section 309.203 for the construction and operation of a new K-12 school building, including the attendant sanitary sewer connections to the City waste water collection system and the Sanitary District sewerage treatment plant, located in Farmington, Peoria County.

Pursuant to the Environmental Protection Act (Act), the Board is charged with the responsibility of granting variances from Board regulations whenever immediate compliance with Board regulations would impose an arbitrary or unreasonable hardship on the petitioner. 415 ILCS 5.35(a). The Illinois Environmental Protection Agency (Agency) is required to appear in hearings on variance petitions. 415 ILCS 5/4(f). The Agency is also charged with the responsibility of investigating each variance petition and making a recommendation to the Board as to the disposition of the petition. 415 ILCS 5/37(a).

In a variance proceeding, the burden is on the petitioner to present proof that immediate compliance with Board regulations would cause an arbitrary or unreasonable hardship which outweighs public interest in compliance with regulations. Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 349, 350, 481 N.E.2d 1032, 1036, 1037 (1st Dist. 1977). Pursuant to Section 35(a) of the Act, the Board finds that petitioners have presented adequate proof that immediate compliance with the Board regulations from which relief is being requested would impose such a hardship. 415 ILCS 5/35(a) (1998). Accordingly, the Board will grant the variance request.

PROCEDURAL BACKGROUND

The petitioners filed a variance petition on July 15, 2002. The Agency filed its variance recommendation on August 20, 2002 recommending the variance be granted. Both parties waived hearing. The Board received no public comments on the petition.

FACTUAL BACKGROUND

In 1992, the Agency initially placed the City's wastewater collection system and the Farmington Sanitary District sewage treatment plant on restricted status to avoid hydraulic overloading that had caused sanitary sewer backup and overflow problems. Pet. at 3. In 1996 and 1997, the City constructed an excess flow lagoon to alleviate the overflow conditions, but the operation of the lagoon has been problematic. Due to construction issues, the lagoon failed to adequately hold wastewater. As a result, the sanitary system remained on the restricted status list and the Agency would not issue new construction or operating permits while the sanitary system remained on restricted status. Pet. at 4.

The Farmington Central Community Unit School District has a geographic territory in Peoria, Knox, and Fulton Counties. Presently it operates six attendance centers. Three of these centers, including the high school, are located in the City and are serviced by the sanitary system. The attendance centers are aged and are in need of repair and non-routine maintenance. In the Spring of 2001, the voters of the School District passed a referendum authorizing the issuance of \$14 million in school construction bonds to partially finance the construction of a new K-12 building that will replace the six attendance centers and will house the School District's administrative offices. The 103-acre parcel of land in Peoria County was purchased for the project and annexed to the City. Pet. at 2.

After the purchase and annexation, the School District became aware that the sanitary system was on restricted status and no construction or operating permits for new sewers or pollution sources could be issued until the restricted status had been removed. The School District further learned that the issues facing the sanitary system would prevent the construction and operation of the project until the restricted status was lifted or until the Board granted a variance from those provisions which prohibit the construction and operation of new sewer or waste water sources as long as the system remained on restricted status. Pet. at 2-3.

REQUESTED VARIANCE

The petitioners request a variance from Section 309.241 as that section applies to the School District's efforts to obtain construction and operation permits for building a new K-12 school, including the attendant sewer connection to the sanitary system. Pet. at 1. Section 309.241(a) sets forth that:

The Agency shall not grant any permit required by this Subpart B, except an experimental permit under Section 309.206, unless the applicant submits adequate proof

that the treatment work, pretreatment works, sewer, or wastewater source will be constructed, modified, or operated so as not to cause a violation of the Act or its Subtitle.

The petitioners state that they need relief from Section 309.241 since the sanitary system has been placed on Restricted Status, which is defined at Section 306.402 as an “Agency determination, pursuant to Section 39 of the Act and Section 309.241, that a sewer has reached hydraulic capacity or that a sewage treatment plant has reached design capacity, such that additional sewer connection permits may no longer be issued without causing a violation of the Act or regulations.”

ENVIRONMENTAL IMPACT

When deciding to grant or deny a variance petition, the Board is required to balance the petitioner’s hardship in complying with Board regulations against the impact that the requested variance will have on the environment. Monsanto Co. v. PCB, 67 Ill. 2d 276, 292, 367, N.E.2d 684, 691 (1977).

The petitioners state there will be no adverse environmental impact if the requested variance is granted. It is estimated that average monthly water usage in the school buildings serviced by the sanitary system will increase from approximately 80,000 gallons to 99,000 gallons when the project is complete. The School District has concluded that the extra load will not cause any overflows from the system. Pet. at 14.

Chapman Elementary School in Farmington has had an average monthly water usage of 17,990 gallons. In March and April of 2001, a leak in the water system resulted in usage of 152,900 gallons of water. This additional load was placed in the sanitary system. Despite the increased flow of over 100,000 gallons of water, there were no reported overflows. Further, the additional load occurred while the excess flow lagoon was not operational. The petitioners state this is the best evidence regarding the impact of the additional load to the sanitary system created by the School District. Even when the water usage exceeded the expected average monthly increase occasioned by the project by nearly five times, the sanitary system was able to properly process the additional load without any overflow. As a result, the School District expects that the additional capacity created from the operation of the excess flow lagoon will provide any necessary additional assurance that the project will not result in an adverse environmental impact. Pet. at 14-15. The Agency agrees that little or no environmental impact will occur based upon the evidence presented. The Board finds that there will be no adverse environmental impact if the requested variance is granted.

HARDSHIP

There were two additional options rather than a variance request that the School District explored. The School District maintains both options would lead to severe hardship and would make the construction of the new facility impossible. The first option is to wait until repairs are completed on the sanitary sewer system and the restricted status is lifted, and then apply for the new K-12 facility’s sewer construction and operation permits. The second option is to obtain the

construction permit and then wait until the restricted status is lifted to obtain the operational permit. Pet. at 11.

As for the first option, the School District argues that it cannot wait until the lifting of the restricted status since the timely completion of the new K-12 facility is crucial to the District's budgetary plan. If the new facility cannot be opened in the fall of 2003, the School District will be forced to maintain the old facilities as well as the new K-12 facility. The School District will be required to make costly capital improvements pursuant to the life and safety code to the older facilities despite the fact that each will eventually be closed. The effects on the School District's budget will be very significant. In a worst case scenario, the School District might have to forego construction of the project altogether even though it already has the obligation to repay the bondholders with interest. In order to open the new school on a timely basis, the School District argues it must begin construction this summer prior to completion of the repairs to the lagoon. For this reason, the School District argues that waiting for the repairs of the lagoon to be complete before obtaining the necessary permits could be financially devastating. Pet. at 11-12.

The School District argues that the second option of obtaining a construction permit before the assurance of being able to operate would be risky. With \$31 million at stake, the School Board argues that it cannot begin construction until it has complete assurance of obtaining both a construction and operating permit from the Agency. The School District believes that it is not in the position to absorb any financial risk if the new K-12 facility cannot be built or not connected to the sanitary sewer system. The School District argues that the undue hardship imposed on the School District if the permits cannot be obtained immediately can best be described as a choice between an unacceptable cost overrun in the event construction is delayed and an unacceptable risk of not obtaining an operating permit if the Board were to obtain only a construct-only permit prior to completion of the lagoon repairs. Pet. at 12.

Along with financial hardship, the School District argues that the delay or cancellation of construction of the new K-12 facility will force the use of the older facilities. These facilities are severely aged and in need of repairs and there would be risks associated with fire, weather conditions, aging, and potential intruders in the older facilities. The older facilities would not improve the health and safety of the occupants nor will they allow for student consolidation or provide additional education programs, equipment and security that would be found in the new K-12 facility. Pet. at 13. The Board concludes that an economic hardship would be imposed if the variance was not granted.

PROPOSED BEGINNING AND ENDING DATE FOR THE VARIANCE

The petition is limited to a request for the necessary construction and operating Permits. The School District understands that no continuing permit is required of the School District once the operating Permit is issued and the Project connected to the sanitary system. The petition sought no relief from discharge limits or the other regulations that might require installation of proper equipment. As a result, the petitioners believe that placing beginning or ending dates on the variance would not be appropriate in this case. Notwithstanding this conclusion, the petitioners proposed that any beginning or ending date established by the Board should allow the School District sufficient time to construct and operate the project. A construction permit will be

necessary as soon as possible and an operational permit will be required prior to September 2003. Therefore, the petitioners proposed the beginning as of May 2002 and ending in May 2005. Pet. at 15-16. As of August 9, 2002, neither the School District nor the City had submitted permit applications for the project to the Agency for its review. The Agency believes that a retroactive variance is unnecessary and supports the issuance of a variance effective as of the date of the Board's order.

COMPLIANCE PLAN

Pursuant to Section 104.204(f), the Petitioners are required to present a detailed compliance plan. In this regard, the petitioners note that the only remaining issue that it needs to address to come into compliance is the correction of the defects in the excess flow lagoon. Pet. at 4. Petitioners have provided the compliance plan and have initiated actions to correct the defects in the excess flow lagoon. In 2001, the City hired a consulting firm to assess measures necessary to repair the excess flow lagoon. The consulting firm indicated that the installation of a concrete slope walls and a concrete ramp and stairs in the lagoon would address the leaks and render the lagoon amenable to pumping and cleaning operations. On April 12, 2002, the City accepted a proposal for a design and build contract for the lagoon-repair project, and the Agency issued the needed permit. The City projects that the lagoon rehabilitation project will be completed in August 2002 but it could be delayed by weather or other factors. The Agency has confirmed that the lagoon is currently under repair. Pet. at 5.

AGENCY RECOMMENDATION

The Agency agrees that the petitioners have established an arbitrary or unreasonable hardship. The Agency states that it cannot guarantee that the restricted status will be removed since it must wait until completion of the improvements to the excess flow lagoon and until the soundness of the lagoon has been demonstrated. However, the Agency is in agreement with petitioners that regardless of the status of the sewer system, the inability to issue permits could be financially devastating to the School District's project. The potential hardship, however, is not economic alone asserts the Agency. Undue hardship could also result from attendance of school children in attendance centers that do not meet current health and safety requirements and by the delay of educational opportunities that will be available upon the project's completion. Resp. Rec. at 14.

While the Agency agrees with the petitioners on the environmental impact and the financial hardship, it argues that the variance should be granted from Section 306.402 rather than Section 309.241(a). The Agency argues that granting a variance from Section 309.241(a) for the sewer construction permit for the project could be construed to imply that no aspect of the sewer construction was subject to the Act and regulations. The Agency asserts that this is not the intent of the petitioners. As a result, the Agency recommended that the Board consider the petition as a petition for relief from Section 306.402 and the Agency's restricted status determination as it applies to the project. A variance from restricted status would enable Farmington to allow additional connections to collection system and the Agency to issue permits for the construction and operation of the sewer line even though planned and on-going repairs are not complete and the Agency may not yet remove the City from restricted status. Resp. Rec. at 5-6.

CONSISTENCY WITH FEDERAL LAW

The petitioners and the Agency agree that the variance would be consistent with federal law. In accordance with Section 35 of the Act, the Board may grant variances only where they are consistent with federal law. 415 ILCS 5/35 (2000). The requested variance is consistent with federal law since the sanitary system will be in complete compliance with state law by the time the project is complete. Pet. at 16.

CONCLUSION

In determining whether any variance is to be granted, the Act requires the Board to determine whether a petitioner has presented adequate proof that immediate compliance with the Board regulations would impose an arbitrary and unreasonable hardship upon the petitioner.

As previously stated, the Board finds that, if the variance is not granted, the petitioners will incur an arbitrary or unreasonable hardship. The petitioners have demonstrated that denial of the variance would impose an economic hardship. The Board finds that there will be no adverse environmental impact if the requested variance is granted. As requested by the Agency, the Board finds that the appropriate variance is from Section 306.402 to avoid confusion over the restricted variance. Accordingly, the variance request will be granted from Section 306.402. The variance is effective as of the date of the Board's order.

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

ORDER

1. The Board grants the City of Farmington, the Farmington Sanitary District, and the Farmington Central Community Unit School District No. 265 a variance from 35 Ill. Adm. Code 306.402 to allow the construction and operation of a new K-12 school building, including the attendant sanitary sewer connections to the Farmington City waste water collection system and the Farmington Sanitary District sewerage treatment plant located in Farmington.
2. This variance begins on the date of this order and terminates no later than May 2005.

IT IS SO ORDERED.

If petitioner chooses to accept this variance, within 45 days after the date of this opinion and order, petitioner shall execute and forward to:

Connie L. Tonsor
Associate Counsel
Illinois Environmental Protection Agency
2200 Churchill Road

P.O. Box 19276
Springfield, IL 62794

A certificate of acceptance and agreement to be bound by all the terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the certificate within 45 days renders this variance void. The form of the certificate is as follows:

I (We), _____,
having read the opinion and order of the Illinois Pollution Control Board, in PCB
03-06, dated October 17, 2002, understand and accept the said opinion and order,
realizing that such acceptance renders all terms and conditions thereto binding
and enforceable.

Petitioner

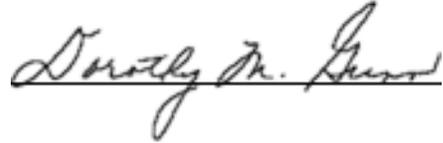
By: Authorized Agent

Title

Date

Section 41(a) of the Environment Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 7, 2002, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board