

ILLINOIS POLLUTION CONTROL BOARD
March 19, 1981

JAMES A. NOBLE,)
)
) Petitioner,)
)
) v.) PCB 80-215
)
) ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)

JAMES K. YOUNG APPEARED ON BEHALF OF PETITIONER.

WILLIAM J. BARZANO, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on the petition for variance filed November 19, 1980, as amended January 30, 1981, for variance from Rules 601, 602(b) and 962 of Chapter 3: Water Pollution. Petitioner, James A. Noble, seeks variance in order to connect a planned 20-unit condominium building to be constructed in the Village of Lombard (Village), DuPage County, to one of the Village's sewers which is on restricted status due to periodic surcharging. The Board will construe the petition as seeking variance solely from Rule 962(a). The Illinois Environmental Protection Agency (Agency), in both its original Recommendation of January 5, 1981 and its amended one of January 16, 1981, has expressed the opinion that variance should be denied. Hearing was held on January 30, 1981, at which Village residents presented comments.

By way of background, the Village of Lombard, in DuPage County, has had considerable problems with its sewer system, much of which consists of combined sanitary and storm sewers. In its Recommendation, the Agency states, without specificity, that "much or all of the Village's sewer system has been on restricted status since March of 1974." (Rec. 3). As the result of an earlier enforcement action brought by the Agency before the Board, the Village was ordered to comply with a stipulated settlement providing, in part, that certain measures be taken to eliminate sewer surcharging Illinois Environmental Protection Agency v. Village of Lombard, PCB 75-101, 23 PCB 203 (August 5, 1976). Notwithstanding, on June 22, 1979 a large portion of the Village's sewer system (not including that of the proposed condominium site) was placed on restricted status. On April 11, 1980, the Agency

and the Attorney General filed a suit against the Village in the DuPage County Circuit Court People and IEPA v. Village of Lombard et al., 80 CH 245. The suit charges the Village and its officials with violations of the Act, the Board's rules, and the Order entered in PCB 75-101, in connection with the operation and maintenance of the Village's sewer system. (It is anticipated that this action may come to hearing in September, 1981. R. 33) Finally, on July 16, 1980 the Agency expanded the area of the sewer system on restricted status to include that serving most of the Village, including the site of Noble's proposed condominium (Resp. Ex. 1, Ex. A to Parties Ex. 1).

The parties have stipulated to many of the facts in this action (Parties Ex. 1). In late 1979 and early 1980, Noble entered into various contracts and agreements for the purchase of certain property in "downtown" Lombard upon which to build his proposed condominium. The agreements and contracts were and are, however, contingent first on the Village's rezoning of the property to limited general residential use, and second the issuance of necessary building permits. None of these contracts has been "closed" to date.

On March 27, 1980 the Village did approve the rezoning of the condominium site, but also added a condition: that Noble acquire an unimproved property adjacent to the site, and maintain that additional property in its unimproved, densely wooded state. Noble has entered into purchase contracts for this required "buffer" property, as well as additional adjoining property to be purchased at the insistence of the sellers of the required "buffer" property, with closing again contingent on issuance of necessary building permits.

The condominium site is presently served by a combined sewer line and a separate storm line. Use of a septic system would not be an acceptable alternative to connection of the condominium units to the sewer system (Parties Exhibit 1). Subsequent to the July 16, 1980 imposition of restricted status on the sewers serving the site, Noble developed a plan to reduce the flow to the combined sewer line. This would involve the disconnection of a storm inlet from the combined sewer line, and its reconnection to the separate storm line (Stip. 4). At hearing, it was explained that this storm water would not then be transported to the Village's treatment plant, but would instead flow to a retention pond tributary to the east branch of the DuPage River. Petitioner also intends to take certain measures to reduce the rate of flow to the storm sewers, by installation of restrictors and retention facilities on both the condominium site and the adjacent unimproved property (R. 9-10).

It was further stipulated that, assuming the accuracy of the figures of Noble's engineers, that the 20 unit condominium would add 0.04 cubic feet per second (cfs) of sanitary sewage to the flow of the combined sewer (60 P.E.). However, disconnection of the storm inlet from the combined sewer, and its reconnection to

the separate storm line would, if the connection were suitably restricted to 1.00 cfs, result in a net decrease to the combined sewer of 0.96 cfs, and a net decrease to the storm sewer of 0.40 cfs. However, the parties also agree that "[n]otwithstanding this flow rate reduction any surcharging problems experienced by the [designated] portion of the Village of Lombard's sewer lines ...will not be resolved by the Petitioner's plan alone." (Parties Ex. 1 and Ex. 8 (a,b,c) thereto).

The Agency pointed out in argument that the combined sewer involved is one identified in the complaint in the Circuit Court action, and that it is alleged that the line periodically surcharges. While the Agency sympathizes with petitioner to some extent, it believes that given the Village's failure to take appropriate remedial action concerning its sewers, the fact that surcharging will continue to occur (although petitioner's flow will not aggravate it), and the "prospective" nature of Noble's alleged financial hardship, that variance should be denied (R. 54-58).

Noble's testimony is that the land purchase contracts for the site and the "buffer" property provide for closing by September 1, 1981. He had intended to finance the purchase of both properties by obtaining a construction loan, for which he has not yet applied. While the record is somewhat unclear in some areas as between fees actually paid in connection with this project, and amounts to which Noble has "obligations" which may be forgiven, Noble appears to have already spent approximately \$10,000 in architects and engineers fees and related expenses (incurring "verbal obligations" for \$12,000 more), as well as obligations for \$18,000 in attorneys fees relative to the zoning matters. He calculates that if the condominium project is completed as planned, that he would realize net profits of between \$100,000 and \$150,000. These profits would be lost if he does not receive the requested variance, close the land purchase contracts, and proceed with his project (R. 18-22, 25-31).

Three citizens testified in opposition to the grant of variance, and presented five letters from more citizens who could not be present at hearing (Citizens Ex. 1). The citizens expressed their concern over the Lombard sewer situation generally, and their appreciation of the protection the restricted status connection ban gives them from aggravation of their current sewer surcharge problems. Mrs. Nancy Manna explained that the storm line to which Noble expects to direct his stormwater has "tremendous problems" and that the retention pond to which it is tributary fails to retain stormwater (R. 42, 53). To rebut this testimony, Noble introduced the affidavit containing an assertion of Wes Brazas, Public Works Director, that the storm line in question "has no known transportation or backup problems" (Pet. Ex. 1).

The Board finds that petitioner has demonstrated arbitrary or unreasonable hardship in that he commenced his project before

imposition of restricted status on the sewer serving his proposed site, that most, if not all of his obligations and expenses were incurred before imposition of the sewer ban, and that the properties must be purchased, if at all, by September 1, 1981. No allegations have been made as to when, if ever, the Lombard treatment plant and sewer system will be upgraded so as to have the capacity to treat its current flows, let alone additional ones; meanwhile, the affected citizens clearly are experiencing severe and continuing hardships as a result of these highly unacceptable conditions. However, under the unique plan presented in this case, it has been stipulated that the petitioner can achieve a net reduction in flows to the combined sewers as well as a net reduction in the diverted storm flows if this variance is granted. Under these circumstances, the Board will grant a variance from Rule 962(a) to connect the planned 20-unit condominium building, conditioned upon the proper implementation of the stipulated offset plan. (The Board is concerned with the dispute over whether the storm water line to the retention basin is functioning properly, and considers its proper operation an essential part of the condition ordering implementation of the offset plan.) To further minimize loadings to the sewers, the Board will require, as an additional condition, the installation of water conserving water closets, faucets and shower heads in each unit.

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

ORDER

Petitioner, James Noble is hereby granted variance from Rule 962(a) of Chapter 3: Water Pollution to allow issuance of sewer construction and operation permits for a 20 unit condominium building subject to the following conditions:

1. Water conserving water closets, faucets and shower heads are to be installed in each unit as it is constructed. Noble and the Agency shall develop a schedule for a reasonable number of inspection tours of the building by Agency personnel who are to verify that water conservation devices have been installed prior to occupancy of the building.

2. Petitioner shall expeditiously proceed to disconnect the storm inlet from the combined sewer, pursuant to the plan outlined in the Joint Stipulation of Facts, which plan is incorporated herein by reference as if fully set forth.

3. Within forty-five days of the date of this Order, the Petitioner shall execute and forward to the Illinois Environmental Protection Agency, Enforcement Programs (Water Pollution), 2200 Churchill Road, Springfield, Illinois 62706, a Certificate of

Acceptance and Agreement to be bound to all terms and conditions of this variance. This forty-five day period shall be held in abeyance for any period this matter is being appealed. The form of the certificate shall be as follows:

CERTIFICATE

I, (We), _____, having read the Order of the Illinois Pollution Control Board in PCB 80-215, dated _____, understand and accept the said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

Petitioner

By: Authorized Agent

Title

Date

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 14th day of March, 1981 by a vote of 5-0.

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