

Before construction had begun, the special use permit expired by its own terms on November 6, 1975, because no substantial progress on the project had been made in the intervening three years, and the zoning reverted to an R-5 Multiple Family District Zoning classification, allowing only 12 apartments on the property. The reason given for the delay is an extended series of court battles to clear title to the property which were not finally resolved until 1979.

Politser now alleges that he will apply for issuance of another special use permit allowing him to construct 2 medium-rise buildings containing 60 units each as a senior citizens development (R.37). However, on March 10, 1978, portions of the City's sanitary sewer system had been placed on Restricted Status by the Agency after it determined that these portions were subject to surcharging and backups during periods of wet weather. Since Politser's proposed development would be tributary to sewer lines which are subject to the restriction, the Agency denied permit issuance. Thus, Politser also needs a variance from Rule 962(a). At hearing the request for variance from the other rules was dropped as unnecessary to allow the permits to issue.

Politser alleges that under normal conditions the wastewater attributable to his development would have no effect on the STP since it is operating at less than 50% of its design capacity. That is uncontroverted. Politser goes on to allege that the additional flow would have little impact on bypass problems in that as much as 36.3 million gallons were bypassed in 1976 and only 0.22 million gallons would be added to that by his project. This, and the conclusion that the Politser development would not cause additional water quality violations are based on Pet. Ex. 4, a study prepared for an earlier, similar petition for variance (Kent Shodeen and City of St. Charles v. EPA, PCB 78-173,32PCB 35, November 2, 1978).

Pet. Ex. 4 was admitted over objection on the basis that it was accepted as an exhibit in Shodeen. Its admissibility is certainly arguable and, as such, it was properly admitted pursuant to Procedural Rule 320. However, the weight to be given to it is lessened by the fact that it was prepared three years ago and prior to the granting of variances to Shodeen and others and was admitted in this case without the availability of any witness involved in the preparation of the report who could be cross-examined.

However, even if the findings of Pet. Ex. 4 were to be accepted as true and of continuing validity, the report only examines wastewater bypasses in the St. Charles sewer system, and that is not the sole adverse environmental impact involved in this matter.

George Braam, Professional Engineer with RJN and Associates, testified that a greater load on the sewer system could result in additional "surcharging, additional backups into the homes, sewer backups into the homes and additional overflows into the river and storm sewer system" (R.152). That testimony is further supported by evidence of sewer surcharging and related basement backups documented by a Sewer System Evaluation Survey conducted under Mr. Braam's direction (City Ex. 6, and see also IEPA Exs. 1-3). It is uncontroverted that the sanitary sewer which runs through the proposed site experiences surcharging and that homes tributary to that sewer line experience basement backups due to that surcharging. There is, however, no testimony as to the severity of this environmental harm. There is also, however, no proposal to mitigate this impact by the petitioner.

The environmental harm must be balanced against the hardship that would be imposed upon Politser if the variance were to be denied. Politser alleges that this hardship results from expenses incurred in obtaining the property as well as the loss in potential value of the subject property.

OBREC spent \$230,000 to acquire title to the property: \$45,000 initial payment, a \$30,000 note, \$85,000 redemption expenses to the Geneva Bank, \$65,000 interest over an 8-year period, \$5,000 in taxes, \$22,000 attorneys' fees and \$8,000 miscellaneous expenses, less \$30,000 from the sale of a two-flat on the property (R.32-33). Of these expenses, apparently all but an unspecified part of the purchase price were incurred solely to acquire the property rather than having been incurred to prepare the site for development (R.74-76). That unspecified part of the purchase price included engineering costs and architectural fees related to planning for the PUD development prior to OBREC obtaining interest in the property (R.74). While OBREC has retained an architect, he has not been paid and, apparently, has not performed any services (R.75-76).

As of the date of the hearing in this matter, construction had not begun and there is no testimony as to any substantial efforts to prepare for commencing construction. No contracts have been entered into for construction and no monies have been expended in planning for the housing project for the elderly. Politser has abandoned his original plans for a PUD development and the property is not properly zoned for the new project, which is significantly different from the previously planned PUD (R.64-65).

While it is regrettable that Politser was involved in litigation for eight years to clear title to his property, the Board cannot consider those expenses in determining hardship based upon the present variance request. Politser's present position is essentially the same as any other person who owns property from which he hopes to profit through development of it. Indeed, Politser's allegations of economic hardship

due to the inability to develop the property are based largely on the speculative hope that the City, which opposes a granting of variance, will approve the rezoning. If it does not, Politser will have suffered no hardship from a denial of variance. If variance were granted in such cases, Restricted Status would become nearly meaningless. There is not even any testimony in the record that housing for the elderly is needed in the City of St. Charles.

Additionally, even assuming that Politser paid considerably more for the subject property than he would have had he known that a 120 unit project might not be allowed, many of the costs advanced as proof of hardship were incurred prior to the zoning reversion and are clearly associated with the PUD rather than the presently proposed development (R.58-59).

Finally, in the Petition for Variance Politser alleges that improvements to the St. Charles' sewer system will eliminate overflows sometime in 1981 (though the Agency points out in its recommendation that the scheduled completion date is in 1983). Even assuming a 1983 date, if Politser can obtain the proper zoning, he could complete the project at that time under a Construct Only permit, and the only hardship would be the cost of carrying the property from the date of this Order until commencement of construction planning.

Thus, the Board finds that there has not been a showing of arbitrary or unreasonable hardship in this matter and the request for variance should be denied.

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

ORDER

R. Elliot Politser's request for variance in this matter is hereby denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of February, 1981 by a vote of 5-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board