

ILLINOIS POLLUTION CONTROL BOARD
May 11, 1978

ORLAND TRAILS CONSTRUCTION COMPANY,)
)
) Petitioner,)
)
) v.) PCB 78-25
)
)
ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)

MR. JEFFREY FORT, OF MARTIN, CRAIG, CHESTER AND SONNENSCHNEIN,
APPEARED ON BEHALF OF PETITIONER;
MR. ARTHUR MUIR, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF
OF RESPONDENT.

OPINION OF THE BOARD (by Mr. Goodman):

On January 30, 1978, Orland Trails Construction Company (Orland Trails) filed a Motion to Intervene, Motion to Reduce Time to Object to Motion to Intervene, and Motion for Modification of Board Orders, under docket number PCB 77-153. On February 2, 1978, the Board construed the motions as a variance petition and assigned the petition the above-captioned docket number. The Agency filed its Recommendation on March 3, 1978. Hearings were held in this matter on March 10 in Joliet, Will County, and on April 4 in Chicago. No citizen witnesses appeared.

Orland Trails, owned by Mr. Thomas Flood, is the developer of the Orland Trails Subdivision, which is within the service area of the Derby Meadows Utility Company (Derby Meadows) treatment plant. In Derby Meadows Utility Company, et al., v. EPA, PCB 77-153, the Board limited to six the number of homes in the Orland Trails Subdivision which could be connected to the Derby Meadows plant at the present time. In this proceeding, Orland Trails seeks to extend to 92 the number of homes which may be connected to the treatment plant.

The current permitted capacity of the Derby Meadows treatment plant is 0.3 MGD. Expansion of the plant is currently under way, and, upon completion and approval of permits by the Agency, the capacity of the plant will be 0.6 MGD. The problem facing Orland Trails as well as the other developers and homeowners involved in the Derby Meadows case is thus only temporary and will presumably be resolved upon completion of the expanded facility.

Orland Trails alleges two-fold hardship from compliance: hardship to people who have contracted for homes with Orland Trails and would be denied those homes if the variance were denied and hardship to Orland Trails and Tom Flood due to extreme financial pressure approaching insolvency as a result of the legal inability to connect more than 6 homes to the plant. The Agency, on the other hand, alleges that any hardship suffered by Orland Trails is self-imposed and that Orland Trails cannot rely on hardship to the homeowners if the Company itself imposed that hardship.

The Board finds that, if indeed Mr. Flood's and Orland Trails' hardship is self-imposed, they are not entitled to a variance merely due to financial pressure. The question to be resolved, therefore, is whether Mr. Flood did create the hardship he now pleads.

The hearing in the Derby Meadows case took place in June, 1977, and the Board's Order allocating to Orland Trails the connection of 6 homes was entered in September. The evidence establishes that Mr. Flood sold homes continuously from May through November, 1977, with 5 sales in May, 4 in June, 3 in July, 10 in August, 11 in September, 9 in October, 5 in November and 2 in January, 1978 (R.137). The question to be answered is: did Mr. Flood have knowledge of the Derby Meadows proceeding and the Board's Order but continue to construct and sell homes despite this knowledge?

Many of the facts of this case are contested. On March 23, 1976, Orland Trails and Derby Meadows signed a contract for the connection of 176 homes to the Derby Meadows system. Michael Baldwin, attorney for Orland Trails, testified that he became aware of problems in the subdivision in June, 1977, when he received a copy of the Environmental Protection Agency's denial of Derby Meadows' request to connect the Orland Trails homes. Tom Flood, developer of Orland Trails, contended that, although he knew of problems with the connections, he relied upon assurances by Derby Meadows through Anthony Perino that the problems

would be temporary. Mr. Flood claims he did not actually know of the hearings before the Board in the Derby Meadows case before receiving a copy of the Board's Order on December 1, 1977. Deborah Senn, however, an attorney with the Agency, testified that she saw and spoke to Mark Randall, one of Orland Trails' attorneys, at one of the Derby Meadows hearings. In addition, Mr. Perino testified that he did not assure Mr. Flood that the problem would be temporary, although the record contains a letter sent by Mr. Perino to Mr. Flood assuring him that Derby Meadows would be able to service Orland Trails by September 30, 1977. Mr. Perino also testified that he saw Mr. Flood sign a document authorizing a Joliet attorney to sign a letter to Derby Meadows which specifically refers to an agreement to allocate permits and to represent him in all matters pending or otherwise involving the Agency.

The evidence indicates that Mr. Flood did have knowledge of the problems with connecting his development and yet continued to sell homes from June, 1977 through January, 1978. Evidence indicates that Mr. Flood may well have had specific knowledge of the Derby Meadows proceeding and the allocation Order. Possibly Mr. Flood relied upon representations by Mr. Perino. However, if Mr. Flood did choose to rely on such representations rather than inquire for himself, such a decision seems poor business judgment at best and certainly involved taking a risk. That risk proved miscalculated, at the expense of the people to whom the homes had been sold.

Orland Trails presented a technical expert at the hearings who suggested that the additional effluent from the 100 homes sought to be connected could be stored in aerated tanks and processed during times of low flow. However, Derby Meadows did not agree to this alternative method and was not joined as a party. The witness also attempted to prove that the effluent could be connected to the Derby Meadows plant without exceeding a 10/12 BOD/suspended solids standard (R.191). However, the Agency's cross-examination of Mr. Eddy revealed that the plants on which he based his conclusion were not necessarily comparable to the Derby Meadows plant.

In the Derby Meadows case, the Board noted that "no development should be undertaken until capacity has been provided to handle the total potential volume of waste to be generated." In this instance, not only did development take place, but Orland Trails continued to sell homes after learning that there was not sufficient capacity in the plant to handle those homes. The

Board finds that because Orland Trails' hardship was self-imposed, this hardship alone is too minimal to justify a further burden on an already overloaded plant. However, the record indicates that approximately 25 homeowners have purchased their homes and are facing a serious hardship by not being allowed to move in (Petitioner's Group Exhibit 26). In fact, the record indicates that some homeowners are living in motels, renting the homes they've sold, or living with relatives. The Board finds that the hardship to these homeowners is so severe that denial of the variance would be arbitrary and unreasonable. We will, therefore, grant the requested variance to allow the connection of 25 homes in addition to those 6 homes allocated to Orland Trails in the Derby Meadows case.

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

Mr. Young dissents.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion was adopted on the 11th day of May, 1978 by a vote of 4-1.



Christan L. Moffett, Clerk
Illinois Pollution Control Board