

ILLINOIS POLLUTION CONTROL BOARD
September 4, 1980

CLEM JURIS and CITY OF SANDWICH,)
)
) Petitioners,)
)
) v.) PCB 80-68
)
) ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)

THOMAS J. KELLY, PETERSEN & HOUP, APPEARED ON BEHALF OF PETITIONER JURIS.

VIRGINIA I. YANG APPEARED ON BEHALF OF RESPONDENT.

C. RONALD COOK APPEARED ON BEHALF OF THE CITY OF SANDWICH.

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

On April 9, 1980 Petitioner Clem Juris filed his first petition for variance from Rules 951, 952 and 962 of Chapter 3: Water Pollution (Chapter 3) and Sections 12 and 39 of the Environmental Protection Act (Act) to allow connection of the sanitary sewers of 37 mobile home sites to a portion of the sewer system of the City of Sandwich (City), which is currently on restricted status. By its Order of April 17, 1980 the Board joined the City as an additional petitioner in this matter.

Juris amended his petition on May 1 and again on June 6, 1980. Objections to the petition were received on April 30, 1980 from Mrs. Ina Boussetot and from an anonymous group of "tenants and citizens"; on May 12, 1980 the City filed an objection to the petition. On May 30, 1980, the Environmental Protection Agency (Agency) filed its Recommendation that the variance be denied.

Hearing was held on June 18, 1980, at which several residents of the City, including Mrs. Boussetot, testified. The City opposed the variance request. Leave was given by the Hearing Officer to file closing briefs within 14 days of the close of hearing. On August 21, the Agency, whose brief was filed on August 1, moved to strike Respondent's brief, filed August 13, on the grounds it was untimely filed. On August 28, Respondent filed a sworn response relating that, by telephone, the Hearing Officer had amended the due date for closing briefs to be 14 days after filing of the hearing transcript. As the transcript was filed July 31, Respondent's brief was timely filed, and the Agency's Motion to Strike is denied.

The facts in this case are generally not in dispute, although their proper interpretation is a matter of substantial dispute. The City of Sandwich, population approximately 5,600, is located primarily in DeKalb County, but with approximately 5% of its geographical area located in Kendall County. In June of 1977, Clem Juris acquired a 10-acre mobile home park known as Triangle Mobile Home Park (Triangle). Triangle's present 52 mobile home-sites are, and the 37 proposed sites for which Juris seeks this variance would be, serviced by water and sanitary sewer systems owned and operated by the City.

On December 4, 1972 the Agency placed the City's wastewater treatment plant on restricted status. In its letter advising the City of this restriction, the Agency explained that the plant was hydraulically overloaded, organically overloaded, and consequently was discharging effluent exceeding the maximum standards for BOD₅ and total suspended solids. It was specifically stated that

"As a result of the overloaded conditions existing at the plant, this Agency has no alternative but to prohibit the installation and operation of any additional sanitary sewer extensions which would be tributary to the Sandwich Treatment Plant" (Resp. Ex. 2, p. 2, emphasis added).

Aided by a federal grant, the City proceeded with the upgrading of its plant. An Infiltration/Inflow (I/I) Study of the sewer system performed in 1974 revealed that the City had problems (R. 96), but by 1977 the City had upgraded its treatment plant to handle an average daily flow of 1.0 mgd and a daily maximum flow of 2.5 mgd (Rec. 2, R. 106, 107).

Juris admits that he was aware of the City's restricted status at the time he purchased Triangle (R. 14). No evidence was introduced to rebut his testimony that he was not told that the restricted status involved anything but the plant in conversation during 1977 with the Agency, and in conversations with the City's Mayor, the chairman of its Sewer Committee, and its plant superintendent, Juris was informed that the City's restricted status related to the treatment plant (R. 23, 46, 14, 15, 20-22).

At the time of Juris' purchase of Triangle, approximately 5 acres of it were undeveloped. In early 1979, Juris took steps toward developing additional sites, the first of which was to obtain necessary permits for 48 additional sites from the Illinois Health Department. Negotiations were commenced with the City concerning annexation of Triangle. It is Juris' un rebutted testimony that at this time he contacted the Agency's Rockford office and was again not informed that the City's restricted status related to anything other than its treatment plant (R. 46-47, 81-82).

On June 11, 1979 Juris and the City executed an Annexation Agreement (Pet. Ex. 1). In paragraph 4, the City covenanted to rezone Triangle to allow for development of 48 sites (which it did by ordinance of the same date, Pet. Ex. 2). In paragraph 6, the City agreed that the "water mains and sanitary sewer lines are of adequate capacity to serve [Triangle] and that the CITY has available water supply and sewage treatment facilities to continue to serve [Triangle]."

Juris, by paragraphs 5 and 7, agreed to dedicate the existing sewer line to the City, and to make certain improvements to the property, including installation of sewers, water service, roads and drives, and specified storm drainage pipes. It was required and agreed that development of the mobilehome park (with the exception of storm drainage pipes) was to commence within 12 months of annexation and to be completed by September, 1981, or two years following issuance of a building permit whichever was later.

Immediately, on June 11, 1979, Juris applied to the Agency for a permit to construct sanitary sewer extensions. In paragraph 5.5 of the application the City certified that "the sewers to which this project will be tributary have adequate reserve capacity to transport the [added] wastewater," and in paragraph 5.6 the City certified to having adequate plant reserve to treat the wastewater (Pet. Ex. 4).

On July 23, 1980, some 6 weeks after Triangle's annexation to the City, the Agency partially lifted the City's restricted status (Resp. Ex. 4). The Agency stated that it was "lifting restricted status from the Sandwich sanitary sewers with the exception of Center Street sewer" which had been the subject of complaints concerning sewer backups (See Resp. Ex. 3). No mention was made of the treatment plant which was the subject of the original restricted status, although Agency testimony clearly indicates that the treatment plant was considered capable of accepting additional new flows (R.114, 115). As Triangle is directly connected to the Center Street sewer, Juris' permit request was denied by the Agency on September 4, 1979. The Center Street sewer currently remains on restricted status.

Juris currently seeks variance for only 37 sites of the 48 additional sites, 13 to be connected in 1980, 13 in 1981, and 11 in 1982. The major points of his petition and testimony are 1) that his decision to purchase Triangle, to allow its annexation to the City, and to make improvements to Triangle contemplating addition of up to 47 sites were reasonable based on the information he had received concerning the City's restricted status, 2) that if variance is denied considerable financial hardship will ensue, and 3) that if variance is granted, the only effect on Center Street residents will be a marginal increase in sewer surcharge on those occasions when surcharge would have otherwise likely occurred. (While the petition contained an assertion of community need for housing for the elderly, the City's objection challenged

this contention. As insufficient testimony was offered by Juris concerning continued need for housing for the City's elderly, the Board disregards this contention.)

In support of his financial hardship claim, Juris produced testimony and documentation concerning improvements made to Triangle. These improvements were required by the Annexation Agreement, but the gist of Juris' testimony was that these conditions in the Annexation Agreement were agreed to by him in order to allow him to expand, and that these improvements would not have been made in conjunction with operation of his present 52 sites (R. 69-74). Separating out what Juris considers to have been normal replacement, repair and upkeep costs, these expansion-related improvements include work done on roadways costing approximately \$26,500, work done on water, sewer, and drainage lines costing approximately \$10,500, and erection of a \$5,000 storage shed (R. 39-40, 62, 70-72, Pet. Ex. 3, Resp. Brief p. 7). Juris also maintains that, in addition to these out-of-pocket expenses for which he has been billed and others for which he as yet has not, he will suffer further hardship in the form of lost revenues, as he would anticipate receiving annual gross revenues of \$38,000 to \$40,000 from the additional 37 sites (R. 41).

Prior to dealing with the environmental impact question, the Board will address the reliance and hardship issues. The Agency generally argues that Juris hardship was self-imposed because Juris was aware since 1977 of the City's restricted status. As to some improvements, such as the roadways and an equipment shed, it is suggested that since the current tenants enjoy benefits from their use, that these expenses are not relevant for consideration in this proceeding. As to the sewer extension, it is additionally noted that Juris admittedly commenced construction before receiving Agency response to his permit application, and continued construction after denial of the permit (R. 63, 83) (Agency Summation Arguments p. 3-4).

The Board disagrees with the contention that Juris' hardship is self-imposed. The Board finds that Juris properly and reasonably relied on the representations of the City and of the Agency concerning the stated reasons for restricted status and the prognosis for their correction. Juris reasonably fulfilled his obligation to determine from the City and the Agency the reasons for the City's restricted status, and the progress of the City's efforts to correct noted deficiencies in the treatment plant. Once the Annexation Agreement was executed, Juris prompt letting of construction contracts and commencement of construction was also reasonable in light of the Agreement's time frame.

Rule 604(b) of Chapter 3 states, in pertinent part that

"Restricted status shall be defined as the Agency determination... that a sewer has reached hydraulic capacity or that a sewage treatment plant has reached design capacity..." (emphasis added)

Once this determination is made, notice of it is required to be given by the Agency and by the entity affected. Rule 604(a) requires the Agency to "publish and make available to the public" quarterly lists of sanitary districts and other entities on restricted status, which lists are to include estimates of sewer and plant capacity and the amount of any additional inflows. The affected entity pursuant to Rule 604(d) is required to advise persons seeking new connections of the Agency's restricted status determination.

The intent of Rule 604 is to give any person affected by or interested in a restricted status determination clear and periodic notice of what problems the Agency has actually found. Rule 604(a) clearly contemplates that the Agency shall specify whether a sewer, a treatment plant or a combination of the two is the cause of a restricted status connection ban. Here, the Agency specified in 1972 that restricted status related to the City's overloaded plant. While it was of course proper for the Agency to place the Center Street sewer on restricted status, as it did July 23, 1979, notice of that sewer's restriction cannot be considered to have been given in 1972. The record does indicate that the Agency expected the City to take steps to correct sewer problems (e.g. R.101-102, Telephone Conversation Record of June 29, 1979, part of Resp. Ex. 3). The record does not show either by reference to telephone conversations, letters, or the filing of a formal complaint, that prior to July 23, the Agency had informed anyone of how critical it felt the sewer problems to be, or that they related to the City's restricted status.

By its letter of July 23, 1979 the Agency did, in effect, lift the restricted status imposed on the treatment plant by its letter of December 4, 1972. The Board finds that the Agency is precluded, in this case, from relying on its imposition of what amounts to a retroactive restricted status on the Center Street sewer. Cf. First National Bank v. Pollution Control Board, 346 N.E.2d 181, 37Ill.App.3d 383 (4th Dist. 1976). Although the Board disapproves of Juris' erroneous sewer construction without permit, this does not affect our result.

Six citizens testified concerning the nature, extent, cause, and results of the Center Street problem, and it was stipulated that 19 other citizens not present at the hearing completed documents entitled "Clem Juris Variance Hearing Testimony Information-Residents" (R199-204).* The record makes graphically clear that the Center

*These documents were marked as Objector's Group Exhibit 5, but were not admitted into evidence by the Hearing Officer. The Board does not reverse this ruling. Admission is not required by Rule 319, since these citizens were not available for cross-examination and no request was made by sponsoring counsel for the scheduling of a second hearing at which they would be present. The Hearing Officer did not abuse his discretion in not admitting the documents pursuant to that portion of Rule 320(a), which allows but does not require admission of evidence which is relevant material, but otherwise objectionable under the rules of evidence.

Street area residents are considerably affected by the poor condition of the Center Street sewer, which is magnified by the area's susceptibility to large amounts of surface run-off. There is some testimony that Triangle may contribute to this run-off problem, but there is also testimony that Triangle's potential surface water problems had been satisfactorily corrected by laying drain tile and raising manholes, actions requested by the City (R.12-13, 24-27, 73, 190-191).

While the actual number of back-up incidents is uncertain, as complaints are not necessarily made after each and every incident, the Agency's files indicate formal complaints were made in four or five months since 1977 (R. 125). Citizens attest that on those occasions when sewer surcharging has occurred, that the event has lasted some hours, leaving basements flooded, often for days, with water containing raw sewage (R. 138, 156, 172, 179). Specific injury to property has included damage to appliances such as washers and water heaters, and destruction of wall paneling, furniture, clothing and other items stored in basements. One individual was medically treated for an ailment directly resulting from sewage back-up (R. 160, Resp. Ex. 5). Property values in the Center Street area have declined according to an area real estate broker (R. 185), and residents' use and enjoyment of their property has been impaired by the inability to improve basements due to fear of water damage (R. 156-157) and by the need to monitor weather conditions to assure that newly-acquired sump pumps are started at the first sign of back-ups (R. 141, 156, 172). Consequently, the citizens of Sandwich are opposed to any new hook-ons to the Center Street sewer, including that proposed by Clem Juris. While they sympathize with Juris' financial problems (R. 208, 210-211), they also feel that their own problems must be solved.

It was stipulated that the City's plant had adequate capacity to treat the proposed additional flows from Triangle (R. 106-107). All 37 of the proposed connections would produce an additional 4.0-4.4 gallons of sewage per minute (R. 30-32). It was also stipulated that a ten inch sewer line will handle a maximum flow of 500 gallons a minute (R. 106-107), so that the additional flow from Triangle would amount to less than 1% of the capacity of the Center Street ten-inch sewer. Most importantly, Mr. Charles E. Corley, an Agency engineer, testified that if the 37 proposed connections are allowed, that, while the amount of sewage surcharged would increase somewhat, the number of back-up incidents, in his opinion, would not increase (R. 131-133).

The Agency argues that variance should not be granted because the City has not demonstrated a commitment to improve or upgrade the Center Street line (Sum. Arg. p. 3). The record bears this out. The Mayor has appointed a Citizen's Advisory Committee to study and recommend solutions to the problem (Resp. Ex. 3). The commitment and concern of member citizens was demonstrated at the hearing by Mrs. Ina Boussetot and Mrs. Pat Janovic, who testified that funds had been sought from but denied by the Department of

Housing and Urban Development (R. 144, 150, Obj. Ex. 4). Yet the City elected not to pursue the Committee's suggestion that an updated survey costing \$5,000 be done, and failed to follow through on applications for two grants identified to it by the Committee (R. 174-175).

The Center Street sewer problem must be corrected, but denial of this variance is not the vehicle by which this correction can be accomplished. However, the City's lack of progress towards solving its sewer problems is not relevant to the Board's findings a) that petitioner Juris has demonstrated that an arbitrary or unreasonable hardship will be imposed if variance is denied, and b) that he has further demonstrated that his proposed connections will have minimal additional impact on what is clearly an overloaded sewer. Variance from Rule 962 of Chapter 3 is hereby granted. Variance from the other rules and sections of the Act specified is denied as unnecessary.

Given the back-up problems of the Center Street sewer, and the lack of immediate plans to correct them, this variance is granted subject to the conditions outlined in the attached order. In order to minimize the environmental impact on Center Street area residents, in addition to the schedule of gradual hook-ons Juris suggested, the Board requires that Juris install and maintain a pump, if necessary, and a holding tank with a capacity sufficient to store the discharge anticipated from all 37 sites for at least three days. Until such time as restricted status is removed from the Center Street sewer, the tank shall be operated during wet weather periods in such a manner as to avoid increase in surcharges from the Center Street Sewer.

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

ORDER

1. Petitioner Clem Juris is hereby granted variance from Rule 962 of Chapter 3: Water Pollution subject to the following conditions:

- a) Of the 37 connections hereby allowed to be made from the Triangle Mobile Home Park to the City of Sandwich sanitary sewer system and treatment plant, 13 are to be made in 1980, 13 are to be made in 1981, and 11 are to be made in 1982.
- b) A pump, if necessary, and a holding tank with capacity sufficient to store the discharge anticipated from all 37 sites for at least three days shall be installed and properly maintained. In consultation with Agency, Juris shall develop an operation schedule for discharges from the tank to the sewer system designed to minimize the loading to the system, especially under wet weather

conditions. This schedule shall be followed until such time as the Center Street sewer is removed from restricted status.

2. Within 45 days of the date of this Order, representatives of the City shall meet and consult with Agency personnel concerning correction of the Center Street sewer problem.

3. The Agency's August 21, 1980 Motion to Strike Respondent's Brief is hereby denied.

4. Within forty-five days of the date of this Order, Petitioner Juris shall execute and forward to the Illinois Environmental Protection Agency, Variance Section, 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:

CERTIFICATION

I, _____, having read the Order of the Illinois Pollution Control Board in PCB 80-68, 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 4th day of September, 1980 by a vote of 5-0.

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