

ILLINOIS POLLUTION CONTROL BOARD  
February 5, 1981

KENDEN KONSTRUCTION, INC. )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) PCB 80-201  
 )  
 ) ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 ) Respondent. )

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

This matter comes before the Board on the petition for variance filed October 31, 1980, as amended December 8 and 16, 1980 by Kenden Konstruction, Inc. (Kenden). Although Kenden originally requested a hearing, it withdrew its request after the filing on January 16, 1980 of the Recommendation of the Illinois Environmental Protection Agency (Agency) supporting the variance. This decision is being given expedited consideration in accordance with the Board's Order of January 22, 1981.

Kenden seeks variance from Rule 962(a) of Chapter 3: Water Pollution in order to receive a sewer construction and operation permit for 8 single family dwellings, generating an estimated total of 3,200 gallons per day of sewage, to be developed in the Westminster Subdivision, City of Darien, DuPage County, Illinois. The sewer would be tributary to the Marionbrook Treatment plant, which is owned and operated by DuPage County. This plant has been on restricted status since April 30, 1979, after notification to DuPage County of the pendency of such action on March 19, 1979.

Kenden had previously received a two-year construct and operate permit for this sewer project, which expired on September 21, 1980. Construction of sewers was not and has not commenced, according to Kenden, because of the "rapid escalation of home mortgage rates together with the general recessionary conditions of the economy as well as the uncertainties of Marionbrook's restricted status" (Am. Pet. 3,4).

Kenden's alleged hardship is financial. The property, when purchased for \$125,000 in 1978, was mortgaged for 24 months for that amount to First Federal Savings and Loan. In October, 1979 Kenden sold one lot outright and entered into sales contracts for two more: each lot is to be delivered in a "fully improved state," which includes sewer connections. Petitioner states that the loan was not paid in February, 1980 when due, and that First

Federal has stated that if the loan was not paid in full by January 1, 1981, that it would foreclose on the property or require that it be deeded the property by Kenden (in lieu of foreclosure). Kenden states that its inability to furnish "fully improved" lots will subject it to breach of contract suit by the "outright" purchaser, and will render it unable to "close" the two other contracts. Foreclosure would cause Kenden to lose the benefit of the following expenditures: \$70,000 in development costs, \$5,000 in engineering costs, \$1,800 in real estate taxes, and \$3,000 in legal fees (2d Am. Pet. 3-4).

Kenden asserts that if variance is granted, construction will be commenced immediately. It anticipates that no sewage will be discharged into the sewer for a minimum of one year after completion of construction (date unspecified). It finally suggests that the 3200 gpd flow is minimal in relation to the plant's flow, so that the environmental impact would be minimal.

The Agency does not comment on these hardship allegations. It supports grant of variance because of the small discharge involved and the fact that a prior permit had been issued. However, the Agency places greater importance on the entry of the DuPage County Circuit Court's Order in People of the State of Illinois v. County of DuPage, No. 80MR432, which in part provides for the upgrading of the Marionbrook plant, and the phasing in of connections to it for persons who had previously received Agency construct only or construct and operate permits. The Agency recommends that variance be granted "subject to the provisions" of that Order.

Under most circumstances, the Board might view the hardship of the Petitioner as, a) hardship experienced by anyone whose property improvements are delayed by the imposition of restricted status, and b) as aggravated by the Petitioner's own actions, especially as it entered into the three sales contracts after restricted status was imposed, and then failed to commence construction while that permit was in effect. However, as the records in other actions concerning the Marionbrook plant have made clear (e.g. Willowbrook Development Corp. v. IEPA, PCB 80-58, July 3, 1980, Corporate West, Inc. et al. v. IEPA, et al., PCB 80-96 to 100 [consolidated], August 7, 1980), the period preceding and following imposition of restricted status on Marionbrook was one of considerable confusion, uncertainty, and imperfect if not conflicting communications. Thus, the Board takes cognizance of the climate in which Kenden's decisions were made. Given this climate, and given the imminent foreclosure of the property involved, the Board finds that, under these individual circumstances, denial of variance would impose an arbitrary or unreasonable hardship. Variance from Rule 962(a) of Chapter 3: Water Pollution is therefore granted. The Board is unclear as to the meaning of the Agency's suggestion that variance be granted "subject to" the provisions of the Order in 80MR432, but for the reasons expressed in County of DuPage, PCB 80-160, January 22, 1981 the Board declines to explicitly condition this variance on that Court Order.

ORDER

1. Petitioner, Kenden Konstruction is hereby granted a variance from Rule 962(a) of Chapter 3: Water Pollution, to allow issuance of a sewer construction and operation permit for 8 single family dwellings in the Westminster Subdivision, City of Darien, DuPage County, for which EPA Permit No. 1978-HB-2114 had been issued in 1978.

2. Within forty-five days of the date of this Order, 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 80-201, 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 \_\_\_\_\_ day of \_\_\_\_\_, 1981 by a vote of \_\_\_\_\_.

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