ILLINOIS POLLUTION CONTROL BOARD
December 19, 1974

FIRST NATIONAL BANK OF SPRINGFIELD Trustee of Trust No. 3010	)	
v.	)	PCB 74-298
ENVIRONMENTAL PROTECTION AGENCY	)	

Mr. Robert S. Cohen, appeared on behalf of Petitioner; Mr. Henry J. Handzel, Jr., and Mr. Delbert Haschemeyer, appeared on behalf of the Environmental Protection Agency.

OPINION AND ORDER OF THE BOARD (by Mr. Dumelle):

On August 12, 1974, petitioner filed a variance petition seeking relief from an Environmental Protection Agency (Agency) sewer ban on connections to the Springfield Sanitary District sewers. The Agency filed an objection on August 15, 1974. On September 10, 1974, the Agency filed a Recommendation to deny the requested variance. Four days of hearings were held during October, 1974 in Springfield. Both parties submitted briefs in this matter.

Petitioner seeks a variance from the ban on further sanitary sewer extensions in the southwestern area of the City of Springfield, which was imposed by the Agency pursuant to Rule 21(a) of Chapter 3: Water Pollution Regulations of the Illinois Pollution Control Board (Water Pollution Regulations). If the requested relief was granted, petitioner would be able to obtain an operating permit which would allow petitioner to connect the four apartment units it has constructed to the Springfield Sanitary District sewers. Petitioner seeks the variance for four apartment buildings known as the Westbrook Phase II, located in the Pinebrook Subdivision, southwestern portion of Springfield. Petitioner serves as trustee under an Illinois land trust. The beneficial interest in this trust is held by Mr. Roy Lambert and Mr. David Eades. Mr. Lambert was the contractor and managing beneficiary (R. 25).

Westbrook Phase II is the second phase of a two-phase apartment complex. Phase I consisted of 144 apartment units, a swimming pool and a laundromat. Phase II consists of 76 apartment units contained in four buildings. Three buildings each house 24 2-bedroom apartments. The fourth building houses 4 1-bedroom apartments. Phase I was the

subject of a previous Board Order (First National Bank of Springfield v. EPA, PCB 72-301, 5 PCB 649 (October 10, 1972)) (hereafter cited as PCB 72-301). In this earlier variance proceeding, the Board granted petitioner a variance to allow the connection of Phase I. Phase I had been constructed at the time the Board entered its Order. The Board dismissed that portion of the original petition with respect to Phase II, the remaining 76 units for which construction had not begun. These 76 units are the subject of the present variance petition. When fully rented, Phase II will generate approximately 22,400 gallons per day (gpd) of sanitary wastes (R. 15).

The chronology of events which have occurred proceeding the filing of this petition is relevant in light of petitioner's claim that it should be granted a variance based upon reliance. On March 1, 1972, petitioner purchased the land in question with the intention of developing it into multi-family dwellings. Construction on Phase I was begun on March 1, 1972. On July 12, 1972 the Agency imposed a two-fold sewer ban on the southwest portion of the City of Springfield (Petitioner Exhibit 3). The sewer ban was imposed for two reasons: 1) because of inadequate treatment plant capacity and 2) because of repeated overflows and basement backups in the Outer Park Drive area of Springfield. Construction of Phase I was completed in the Fall of 1973 (R. 130). The Board granted petitioner a variance for Phase I on October 10, 1972 (PCB 72-301).

The Agency issued a conditional installation permit on December 21, 1972 (Petitioner Exhibit 6). During March 1973, petitioner began to acquire materials and labor and to contract with subcontractors for construction of Phase II (Page 9, Variance Petition). During March 1973, petitioner obtained a permanent mortgage commitment and construction loan (R. 61). Construction began on Phase II in March or April of 1973 (R. 60 and Page 9, Variance Petition). By October of 1973, petitioner had completed 60% of the construction of Phase II (R. 65). In December of 1973, the Agency, the Springfield Sanitary District, and numerous developers, including Mr. Lambert, held a meeting to discuss the issuance of operating permits to holders of conditional installation permits in return for construction of a pumping station by the Springfield Sanitary District (R. 186). During April and May of 1974, petitioner completed construction on Phase II. On July 19, 1974, the Agency denied petitioner's request for an operating permit for Phase II (Petitioner Exhibit 9).

Petitioner bases its current variance request on two grounds: reliance and hardship. Petitioner claims that reading the totality of the circumstances leading up to the present would lead a normal person to conclude that an operating permit would be granted by the Agency once Phase II was constructed (R. 49 and 111 thru 115).

As previously stated, petitioner proceeded to apply for and obtain a conditional installation permit. The application for this conditional installation permit is Respondent Exhibit 3. The actual permit is found in Petitioner Exhibit 6. Petitioner presented testimony to demonstrate that it acted in good faith, in reliance on representations on the Agency and the Pollution Control Board in arriving at its present situation, and thus cannot now be justifiably prevented from obtaining a permit to enable the total rental of the complex. Mr. Lambert testified that he had expected to be issued a permit because the original recommendation of the Agency in PCB 72-301 (Petitioner Exhibit 1), Opinion and Order of the Board, in PCB 72-301 (Petitioner Exhibit 4), letter from Mr. William Pye to Mr. Paul Troemper (Petitioner Exhibit 3), the Agency amended recommendation in PCB 72-301 (Petitioner Exhibit 2), and its application for a conditional installation permit (Agency Exhibit 3) (R. 70 and 71). The Board finds that reliance upon either the original or amended Agency recommendation in the prior variance proceeding (PCB 72-301), could not warrant the granting of the requested relief.

The original Agency recommendation was to grant a variance for those units for which construction had begun -- Phase I -- and to deny the variance relief for the 76-apartment units for which construction had not commenced -- Phase II (Petitioner Exhibit 1, page 3). The amended recommendation was modified based upon a representation by the Springfield Sanitary District that it was engaging in a program, which if properly implemented, would eliminate the overload on the Outer Park Drive interceptor sewer (Petitioner Exhibit 2, page 4). The Agency stated that "it was willing to issue conditional installation permits for construction in the area tributary to that sewer, with connections to be permitted when the overload at the treatment plant is eliminated". The Agency further referred to the Pye letter of August 29, 1972 which imposed the sewer ban (Petitioner's Exhibit 3). It is clear that the Agency's amended recommendation is based upon a representation made to it by the Sanitary District that the sewer transport problems in the Outer Park Drive area, at the time of the Agency's recommendation, were partially solved and would be further solved by the removal of a total of 3.0 MGD of stormwater flow from the Outer Park Drive sanitary sewer. Thus, the Agency's recommendation was changed based upon a representation from the District which failed to materialize, namely that the Outer Park Drive sewer transport problem would be solved. The Board finds that the Agency is not estopped from recommending a denial or the Board estopped from denying the requested relief based upon either of the Agency's original or amended recommendation in PCB 72-301.

Petitioner bases in part its reliance upon the Board's Opinion and Order in PCB 72-301. As previously stated, the Board dismissed as moot a requested variance for Phase II. "There is no evidence or allegation that connections will be needed for the units not under construction (See R. 73), and no suggestion that such an installed only permit will be insufficient to fulfill the petitioner's needs as to those units" (PCB 72-301). The Board, therefore rejected the Agency's recommendation and did not grant the then requested relief for Phase II. The Board noted that the Agency was willing to issue conditional installation permits and that the petitioner did not warrant additional relief. Reliance upon this previous Board order does not work an estoppel upon the Board's denying the present variance petition.

The reasonableness of the reliance upon the August 29, 1972 letter from Mr. William V. Pye, Manager, Division of Water Pollution Control of the Agency, to Mr. A. Paul Troemper, Executive Director, Springfield Sanitary District, (Petitioner Exhibit 3) has been discussed in prior cases dealing with the Agency's imposed sewer ban in the Springfield area (See Springfield Marine Bank v. EPA, PCB 74-117, 13 PCB 196, (July 25, 1975)). Petitioner's Exhibit 3 was sent directly to the District not to petitioner, and therefore, petitioner should have examined other correspondence and events proceeding and following the issuance of the letter. This letter refers to letters of August 11 and August 23, 1972 from the District, whic outline the future steps to be taken by the District to relieve the sewer overload problem. The August 29, 1972 letter did not lift the sewer ban but merely warned the District that continued issuance of conditional installation permits would depend on further progress in relieving the overload problem in the Outer Park Drive area. Reliance upon this letter alone does not warrant the granting of the present requested relief.

The conditional installation sewer permit which was issued to petitioner contains four conditions which are relevent to the question of reliance upon either the conditional installation sewer permit or Petition Exhibit 3. Condition #2 states that hookup to the existing sewers shall not be completed without an operating permit issued by the Agency (Petitioner Exhibit 6). Condition #3 requires that installation of new sewers stop 10 feet from existing sewers and that connection shall not be made until a permit to operate the proposed sewer is issued by the Agency (Petitioner Exhibit 6). Condition #3 also states that the conditional installation permit is issued in reliance upon representations made in Part I and Part II of the application for a conditional permit. Condition #2 of Part II of the application states that relevant parts of the sewer system must have the capacity to adequately transport anticipated waste from the sewer extension described in Part I (the sewers petitioner proposes

to connect) (Agency Exhibit 3). The Sanitary District signed Part II, therefore attesting adequate capacity. However, there is testimony which shows that the sewers continued to surcharge, sewer overflows existed and basement backups existed during the time and subsequent to the time that the conditional installation permit was issued. Special Condition #4 of the conditional installation permit states that "issuance of this permit must not be construed as termination of the sanitary sewer extension restricted status imposed by our letter of July 12, 1972, which remains in effect" (Petitioner Exhibit 6).

Mr. Lambert testified that it was normal experience to proceed in the face of a permit which says one may not use a building until you have various inspectors come out and inspect a building and issue an occupancy permit (R. 25). He therefore stated that it was normal for a contractor or a developer to receive construction permits with reliance on the fact if they do what the construction permit allows them to do properly that it is routine that they would receive a use permit (R. 25). However, such is not the case with conditional installation permits. As in previous cases based with reliance upon similar conditional installation permits issued by the Agency, the Board finds that reliance upon such a permit is a calculated business decision with potential adverse results.

The Board finds that the previously discussed events do not alone or in total constitute a basis upon which sufficient reliance could be made in this case in order to mandate the granting of an operating permit by the Agency or the granting of the requested variance to allow Phase II to be connected to the existing sewer system. Petitioner Exhibit 7, a letter from the Agency to the Sanitary District dated March 15, 1973, clearly establishes that the sewer ban was still in effect and that the Agency was precluded from allowing the operation of sewers installed tributary to the Outer Park Drive area under a "conditional installation permit". Mr. Thompson, the building superintendent, testified that he did not know of the existence of Petitioner Exhibit 7 in March of 1973, and in fact first became aware of the letter in October, 1973 (R. 63). He further testified that if he had known of the existence of Petitioner Exhibit 7 on March 15, 1973, that he would have recommended to Mr. Lambert that the construction be stopped on Phase II because "it still would have been possible to gotten out with very little damage" (R. 180).

The Board finds that it is regrettable that the Agency

did not send notice to all holders of conditional installation permits of the existence of Petitioner Exhibit 7. However, such notice is not mandatory. Mr. William Bush testified that it was a standard practice to send such correspondence to the particular service area (in this case, the Springfield Sanitary District) of restrictions on sewer systems (R. 490). The Board finds that the conditional installation permit which stated that the sewer ban was still in effect should have given Petitioner sufficient notice that potential problems existed in obtaining an operating permit. The Board agrees with the Agency that a developer expending large sums of money should be even more careful that the average person in pursuing construction based only on a conditional installation permit. Petitioner stated that it had no contact with the Agency from the date it was issued a conditional installation permit until October, 1973 (R. 146 and 147). Petitioner cannot base reliance upon one document sent to the District without once seeking to determine if contrary documents exist. Petitioner had several readily available means of determining that adequate transport capacity (including wet weather flows) existed so that the Agency would be able to issue an operating permit. Petitioner could have contacted the District or could have contacted the Agency in this eleven month period. Reasonable care would seem to have directed inquiry to the Agency in view of the nature of the conditional installation permit, the history of previous transport problems, special conditions found in the conditional installation permit continuing the sewer ban, and the amount of investment in the project.

Having determined that petitioner has failed to establish sufficient reliance upon which the Board must grant the requested relief, the Board must proceed to weigh the hardships imposed upon petitioner versus the hardships that would be imposed upon the public in the event that the requested relief were granted. The hardship to petitioner is in the form an economic loss to the two beneficiaries of the land trust, Mr. Lambert and Mr. Eades. It is alleged that the rental income from the partial occupancy of Phase II, together with the profit from Phase I, is insufficient to meet the expenses of Phase I and Phase II (Variance Petition, page 16 and Petitioner's Brief, page 9). From examining the record it appears that this monthly loss is in the approximate amount of $4,800 (Petitioner Exhibit 16). The offsetting income from Phase I is approximately $2,000 (Petitioner Exhibit 16). Petitioner states that its total monthly loss, including interest on equity borrowing and 1975 taxes would be approximately $7,500) (Petitioner Exhibit 16). The Board finds this to be a considerable economic loss. However, petitioner presented no proof that either beneficiary of the land trust would suffer irreparable financial loss which would result

in bankruptcy. Petitioner alleges on page 9 of its Brief that Petitioner will be subjected to bankruptcy if the loss it is suffering is not curtailed. No testimony was presented to indicate that the venture could not be sold to recover any alleged loss of investments.

While the record is not abundantly clear on this point, Mr. Lambert, one of the beneficiaries of the land trust is the sole owner of M & L Construction Company, which was the general contractor for Westbrook Phase II. Mr. Lambert testified that the intent of the construction agreement was for M & L Construction Company not to make a profit (R. 150). However, M & L Construction Company received substantial payments for work done on Westbrook Phase II to cover overhead and other expenses. Mr. Lambert's income statements for 1972 and 1973 show a substantial portion of his income was derived from the endeavors of M & L Construction Company (Agency Exhibits 4 & 5).

By October, 1973, Mr. Thompson testified that he had become aware of a potential problem in obtaining an operating permit through a newspaper article which appeared in the Springfield paper (Petitioner Exhibit 12). By October, 60 to 65% of the construction had been completed (R. 66). Petitioner proceeded with construction because the buildings would have been very vulnerable to deterioration due to the elements of weather (R. 65 and 67). Petitioner testified that by December, 1973 construction was some 90% completed. Petitioner testified that they had proceeded to complete the project because they felt a permit would be issued. Petitioner also testified that it felt an operating permit would be forthcoming because of a proposed project by the Sanitary District that would provide additional sewer capacity. The Board finds that Petitioner, having once made a business judgment to proceed with the construction based on a conditional installation permit, instigated a series of steps to protect the original investment, while hoping to eventually be issued an operating permit for the project.

Petitioner bases, in part, its request for a variance from the Agency imposed sewer ban upon a proposal by the Springfield Sanitary District to construct a pumping station at Fayette Avenue and Jacksonville Branch in Springfield (R. 204). The proposal would have the District pumping excess storm flows from the 27-inch sanitary interceptor sewer serving the southwestern portion of Springfield into a 84-inch storm sewer. Mr. Gerald L. Peters, a district engineer for the Springfield Sanitary District, stated that the purpose of the proposed pumping station would be to reduce the hydraulic head in the interceptor sewer, thereby providing additional capacity in that interceptor sewer (R. 201 and 202). Representatives from the District, the Agency, and various developers who

held install-only permits held a meeting on December 12, 1973 (R. 203). The District proposed that if it proceeded to build the pumping station, then the Agency should issue operating permits for those developers who held install-only permits (R. 204).

The record is not clear on the exact nature of the agreement, if any, that was reached at this meeting. Mrs. Barbara Sidler, an Agency enforcement attorney, testified that she felt an agreement of sorts was reached, but when she later tried to reduce that agreement to writing she was unable to do so (R. 366). She stated that apparently there was not either an agreement or there was a certain amount of fogginess as to whether an agreement had in fact been reached (R. 366). Mr. Thompson said that he felt that there was a verbal agreement reached, subject to approval by the Agency and development of a design for the pumping station (R. 380). He further stated that he felt it was not a binding agreement (R. 380). Mr. Loudermilk, an Agency engineer who was present at the December meeting, stated that the District proposed to install a lift station. If, after actual testing, the pumping station accomplished what it was represented to do, then the Agency would lift the restriction and grant operating permits for those outstanding construct-only permits (R. 404). From these statements of people who were present at the December meeting, the Board finds that the Agency issuance of operating permits in return for the installation of a pumping station was at least conditional upon a showing that the pumping station would in fact provide additional capacity in the southwest interceptor.

While Mr. Peters represented that the pumping station would provide an additional 3.0 MGD of capacity, Agency calculations show a maximum 2.2 MGD. Mr. Peters testifies that groundwater would not significantly reduce this additional capacity (R. 229). Mr. William Bush, Permit Section Manager, Division of Water Pollution Control, Illinois Environmental Protection Agency, testified that the pumping station could provide some additional increase in the effective capacity in the southwest interceptor (R. 496). However, Mr. Bush testified that "there may be more water waiting to simply rush into the sewer and use up that capacity which the pump has freed" (R. 497). Based upon his experience with the Outer Park Drive sewer problems, Mr. Bush states that infiltration of groundwater could result in nearly using up all the capacity that the pump would free up (R. 498). Mr. Bush stated that 1.8 MGD was reportedly eliminated in extraneous flow from the sewer out of a capacity of 5.6 MGD, yet the sewer surcharge problem continued to exist (R. 499). Mr. Bush was unable to provide a professional opinion, because of his experience in the Outer Park Drive flow elimination problem, when asked if the pumping station could

provide an additional 25,000 gallons per day of flow (R. 502). The Board agrees with the Agency that, in light of the history of infiltration problems occurring in the Outer Park Drive area, it is reasonable to obtain demonstrated results prior to agreeing to issue operating permits.

It should be noted that during the times when the District proposes to pump excess storm flows into the 84-inch combined sewer that the combined sewer will be discharging untreated combined sewage to Jacksonville Branch (R. 236 and 237). That is the additional flow added to the 84-inch combined sewer by the pumping station will be bypassed during wet weather at the overflow located at Washington Street (R. 237). Mr. Peters further testified that the proposed pumping station would not eliminate the overflow on the upper Outer Park Drive sewer system but was designed to eliminate any possibility of overflow on the southwest interceptor (R. 256).

Mr. Peters testified that the preliminary plans for the pumping station had been submitted to the Agency and that he estimated that the pumping station would be operating approximately seven months from the date of the hearing (R. 211)

In weighing the hardship imposed upon petitioner, the Board must also look at the hardship imposed upon the public. The parties agreed to a stipulation that outlined the public hardship caused by the inadequate sewer trnasport capacity of the southwest portion of Springfield (October 10, R. 13 through 17). This stipulation sets out citizen testimony that would be presented by citizens in the proceeding and what it would substantiate.

This stipulation is set out on pages 13 through 17 of the October 10, 1974 hearing. "Petitioner does not dispute the hardship to the public in general educed not only from the testimony in this case, but also in several other cases previously before the Board " (Petitioner's Brief pages 9 and 10). The stipulated public testimony, the testimony presented by Mrs. Dorothy Garwood, and the prepared testimony of Mr. James Frost and A.H. Loudermilk serve to reinforce the Board's finding that problems which resulted in the original Agency sewer ban in July 1972 and the discontinuance of the issuance of conditional installation sewer permits in March, 1973 still continues to exist.

The Board agrees with petitioner that there exists adequate sewer capacity to transport dry weather flows in the sewers in question. However, these sewers were designed and intended to serve as a sanitary sewer and at times carry an equivalent dry weather flow in excess of ten times the standard engineering design of 100 gallons per day per

capita (R. 497). During periods of rainfall, the sanitary sewers surcharge -- completely fill and begin to back up -- resulting in sanitary sewage overflowing manholes located above and below the point of interconnection with the Outer Park Drive sewer (October 10, R. 13). Sanitary sewer overflows which contain toilet tissue and human feces have been observed by the Agency inspections on numerous occasions (October 10, R. 14, and Agency Exhibits 6, 7, 9, and 10). The sewage which overflows the manholes discharges through stormwater inlets along Outer Park Drive and eventually to a paved storm channel which parallels Outer Park Drive. This paved channel eventually discharges into a natural drainageway which discharges to Jacksonville Branch, a tributary to Spring Creek. Spring Creek flows to the Sangamon River through both Washington and Passfield Parks. The Agency presented testimony that such sanitary sewer overflows could interfere and degrade the water quality in lakes contained within these parks (October 10, R. 17 and Agency Exhibit 6). In addition to the overflowing of manholes, the inadequate transport capacity in the sanitary sewers results in the backup of sewage into a large percentage of the basements in the Outer Park Drive area (October 10, R. 15). The sewer transport problem has existed for 30 years (October 10, R. 13). Numerous citizens have experienced backups every year for the past 15 years (October 10, R. 15).

It is uncontroverted that the sewer overflows and basement backups represent a health hazard to those who live in the area (October 10, R. 17). Dr. Byron Francis of the Illinois Department of Public Health testified that:

> "A number of communicable diseases are acquired by ingestion of the contents of material which comes from the intestine of an animal or another human, and these can be acquired by contact with sewage..." (R. 448).

Dr. Francis testified that salmonellosis, a communicable disease, could result from fecal material ingested in microscopic amounts (R. 449). He further testified that other communicable diseases such as shigella, viral hepatitis (also referred to as infectious hepatitis), intestinal infections caused by E. coli, typhoid fever, polio myelitis, and other internal viral infections were possible from the context with fecal matter (R. 449 and 450). He testified that he was aware of cases where teenage children had contracted leptospirosis by swimming and diving in a pool contaminated with fecal matter from farm animals (R. 452). He further testified that he was aware of outbreaks of salmonella in Riverside, California and other outbreaks of infectious hepatitis where people had drank well water contaminated with septic tank effluent (R. 456). Dr. Francis also presented testimony that young children are more susceptible to these communicable diseases (R. 450). Dr. Francis testified that swimming or diving in water that is contaminated with sewage

is hazardous (R. 450). He further testified that drinking sanitary sewage overflows occasioned a hazard to children's health (R. 454). Dr. Francis further concluded that based upon the conditions described in the testimony of Mr. Frost that the sewer overflows cause a health hazard (R. 462).

The record clearly establishes that instances of children swimming and playing in the sanitary sewage overflow and drinking sanitary sewage overflows have been observed in the Outer Park Drive area (October 10, R. 14; Agency Exhibit 6, and R. 433).

Petitioner, in an attempt to rebut the significance of the health hazard, established that Dr. Francis was unaware of any outbreak of any such communicable disease in the southwest portion of Springfield R. 464). However, Dr. Francis testified that if the cases of communicable diseases were widely scattered, that they could go unreported to his agency (R. 468). Dr. Francis testified that it was normal procedure for his division of the Illinois Department of Public Health to not undertake a project if another State agency with primary responsibility was taking steps to solve the problem and he felt that such was the case at present (R. 460 and 466). The Board finds that a signficant health hazard is caused by such sanitary sewer overflows and basement backups.

In addition to the health hazard, the problems caused by the inadequacy of the sewer capacity in the Outer Park Drive area result in economic and physical hardships to those who live in the area (October 10, R. 16 and 17). The individual economic and other hardships faced by the approximate 900 homes in the area, when totalled together, reach a substantial economic figure (October 10, R. 17). Examples of the economic hardship are citizens who have been required to dry out air conditioning fans and motors, washing machine motors, and dryer motors at considerable expense (October 10, R. 17). The backup of sewage in the basements has resulted in the destruction of personal articles stored in the basements (October 10, R. 17). During periods when the sanitary sewers are backing up, the citizens are unable to use clothes washing facilities or bathrooms located in their basements.

In rebuttal, petitioner tried to establish that the overflows which occurred in 1973 were the result of rainfall in excess of the average for the past 30 years. The record, however, establishes that overflows have existed in the area for at least 15 years (October 10, R. 15). In an attempt to rebut petitioner's characterization that 1973 overflows occurred during periods where rainfall exceeded the 30 year monthly average, the Agency established that overflows occurred during the month of August, 1973 which had a monthly rainfall average below the 30 year monthly average (R. 427 through 429). In addition, the record establishes that the

instances of basement backups and sewer overflows appear to be increasing each year (R.511). Mrs. Dorothy Garwood testified that such was the case and that during all of 1973 her records showed only 9 instances of basement backups and that to date, that during 1974, 10 instances have occurred (R. 514 and 515). Agency witnesses testified that petitioner's proposed connection would further aggravate the sewage backup and sanitary sewage overflow problems (Agency Exhibit 6, page 10 and R. 481).

Petitioner established that there are available self-help remedies available to those home occupants who have experienced basement backups. These include sewer plugs, sump pumps and standpipes. However, once a plug is installed, the citizens cannot do such normal functions as laundry, use of basement toilets, or basement cleanup (October 10, R. 16). In addition, "because the plug prohibits the backup into the basement, the flooding of the sanitary sewers in the street causes a buildup of pressure in the citizen's sanitary sewer leading from their home. This can cause failure in the seals in the sewer joints, which in turn results in a backup of sanitary sewage into the ground surrounding the sewer leading to house, to the street, and backup under the basement floor. This backup into the ground can cause basement floors to crack. This cracking results in basement flooding through the cracks even though plugs are installed in the drains" (October 10, R. 16). Mrs. Garwood testified that even with the plugs in place, sanitary waste backed up through cracks in her basement floor and that such backups had a very foul odor (R. 512).

The Board, after weighing economic hardship to the petitioner versus the hardship worked to the public in general, finds that petitioner has failed to establish an arbitrary or unreasonable hardship which would allow the Board to grant the requested relief.

Petitioner's case is somewhat unusual because in prior variance cases, the Board has normally granted requested relief in sewer ban cases where the buildings in question were already constructed. This was normally done to insure that vandalism would not result in destruction of the facilities. However, petitioner has taken self-help measures by allowing connection to the sewer system and the occupancy of less than 15 people in each of the four buildings constituting Phase II (R. 358). Petitioner was told by the Springfield Sanitary District that they could connect each building separately without an Agency operating permit if they allowed the occupancy of less than 15 people per building (R. 373). Water Pollution Control Regulations, Rule 902 (now amended and found in Rule 952), requires an Agency operating permit for a sewer extension to serve a building designed or intended

to serve more than 15 people. Phase II consists of three buildings which have a total of 24 units in each building. Clearly, petitioner's buildings were designed and intended to serve more than 15 people. The fourth building contains 4 1-bedroom apartments, and as such, was probably not designed or intended to serve more than 15 people. Petitioner met with representatives from the Agency to discuss the possibility of connection without an operating permit and was told to contact its attorneys (R. 375). Mr. Cohen, attorney for petitioner, telephoned an Agency attorney and told her that he was directing his client to proceed with the installation of the sewer connections. Evidentally the Agency has made a prosecutorial decision not to prosecute the Petitioner for these connections (R. 377). However, such a decision by the Agency does not absolve petitioner from proceeding to connect its facilities without an operating permit in violation of the Board's Rules and Regulations and in violation of Condition #3 of its conditional installation permit.

This is not the first time that petitioner has proceeded to connect buildings located at the Westbrook site without an operating permit. In the previous proceeding, PCB 72-301, the Board stated that "we note that in this case the Petitioner took the law into its own hands and made the connection for the completed units without a permit, well-knowing that a permit was required (R. 70 and 71). That we ultimately allow the use of the connection because of the hardship does not justify such flagrant disrespect for the permit system. We cannot simply ignore this behavior by granting an unconditional variance to the benefit of the wrong". In granting the variance for Phase I, the Board imposed a $2,000 penalty to protect the integrity of the permit system. Petitioner should have ample notice that an operating permit was required before proceeding to connect Phase II.

Because petitioner has allowed occupancy in its buildings, Petitioner has not suffered from the ravages of vandalism on Phase II, with the exception of several minor incidents (R. 141). After partial occupancy of Phase II, Petitioner has suffered very little vandalism (R. 297). For these reasons, the Board does not find that the variance should be granted because of vandalism.

Petitioner has examined both sewage treatment systems and holding tanks. Petitioner submitted preliminary plans and bids for a small package treatment plant to treat wastes from Phase II and a larger plant to handle wastes from other developments within the area (Petitioner Exhibits 13, 13a, 14, 14a, 14b and 15). Mr. Thompson testified that a small on-site "plant could be a practical solution for Phase II

sanitary sewage disposal" (R. 278). He stated that such a plant would "present an on-site degradation to the Westbrook Apartments" (R. 278). Mr. Thompson testified that he felt holding tanks were not practical (R. 190). He stated that the principal objection was to the location of a large 10-day holding tank (R. 193) and such a tank's effect upon the attractibility of the apartment complex (R. 192).

Petitioner alleges in the variance petition that it is willing to install either holding tanks or a private sewage treatment system. However, the Brief filed by Petitioner does not so indicate. After examining the record, the Board is not convinced that holding tanks or a private sewage treatment system are unreasonable. Petitioner is therefore free to further develop such alternatives with the Agency or before the Board in an appropriate proceeding. Petitioner made a calculated business decision to proceed with the construct-only permit and is now suffering the consequences of that decision.

We will direct the Agency to act with the utmost haste in the review of the application of the Sanitary District to install the proposed pumping station. However, this Opinion and Order should not be viewed as a prejudgment on the merits of such a permit application. We are only requiring that the Agency proceed with diligence to review and render a decision on the permit application. The record establishes that in approximately four months the pumping station could be on line. The Agency at that time, after review of the results of the pumping station, might see fit to proceed with the awarding of operating permits for those developers, such as petitioner, who have conditional installation permits.

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

Mr. Henss dissents.

ORDER

Petitioner's request for a variance from the Agency-imposed sewer ban is hereby denied without prejudice. The Agency is directed to proceed with diligence in the review of the construction permit application currently on file by the Springfield Sanitary District for the construction of the proposed pumping station.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 19th day of December, 1974 by a vote of 4-1.

Christan L. Moffett

Christan L. Moffett, Clerk