

ILLINOIS POLLUTION CONTROL BOARD  
October 3, 1972

ILLINOIS NATIONAL BANK OF SPRINGFIELD, )  
Trustee of Trust No. PL 3478 )  
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)  
v. ) # 72-300  
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ENVIRONMENTAL PROTECTION AGENCY )

Robert Cohen, for the Illinois National Bank of Springfield,  
Thomas J. Immel, Assistant Attorney General, for the  
Environmental Protection Agency

Opinion of the Board (by Mr. Currie):

This petition seeks a variance to permit the connection of several properties to municipal sewers in Springfield. The initial petition covered 113 acres of housing developments and an estimated discharge of 400,000 gallons per day. An amended petition was later filed specifying the petitioner's priorities in the event the variance could be granted only in part. The Agency had imposed a ban on further sewer permits in this part of Springfield (southwest) because of an alleged overload of the sewers transporting wastes from that area to the treatment plant, which was itself alleged to be overloaded. The Agency's amended recommendation, in that regard, alleged that "Agency investigators had observed raw sewage and sewage related solids flowing in the streets of southwest Springfield from surcharged manholes in the affected area on April 20 and 21, May 29, and July 9, 1972 following rainy weather." The record supports the allegations as to both sewer and plant overloads, with raw sewage bypassed to streams and to storm sewers, and flowing in streets (R 76-78).

In what we infer may have been a direct result of the Agency's connection ban, significant steps have been taken by the responsible municipal authorities to alleviate the problem, and the Agency has modified its position in consequence:

Since the filing of the original petition in this cause, the District has embarked on a program to eliminate excess storm water from the sewers tributary to the Outer Park Drive interceptor sewer. The Agency estimates that excess storm water flow of 1.8 mgd has been eliminated from one tributary sewer and that an additional 1.2 mgd should be disconnected by December 1, 1972. . . .

The Agency has determined, on the basis of the District's program and the results achieved to date, that the overload problem of the Outer Park Interceptor Sewer has been substantially alleviated and is now willing to issue conditional installation permits for construction in the area tributary to the sewer, with connections to be permitted when the overload at the treatment plant is eliminated.

The overload is expected to be eliminated by March 4, 1972. See Amended Recommendation, pp. 4, 3; R. 46-68, 77. The plan for sewer improvements is detailed in Exhibit 3A; it includes diversion of surface water from a shopping center, disconnection of downspouts, replacement of leaky laterals and the testing, cleaning, and sealing of sewers. We commend this program to the attention of other communities with similar problems, as it effectively demonstrates that significant improvements in sewers determined to be inadequate can be achieved in a relatively short period.

As a result of these improvements in the sewer situation, the Agency has in fact issued "install only" permits upon request for lots within the affected area and states its intention to issue similar permits whenever asked. (Amended Recommendation, pp. 6-7; R. 80-81, 83-84, Exs. 8, 9). Except to the extent that it has been alleged and proved that such a permit would be inadequate to serve the petitioner's needs, the petition must be treated as moot in light of the changed circumstances.

No contention is made that actual construction of buildings has commenced upon the property in question, although preparatory work such as the installation of roads and utilities has been done (R. 11-12). The record is quite clear that nobody is ready to connect to the sewers today:

Q In the event construction were begun now, Mr. Hurwitz, on both the IDA project and the Viking Project, or any other projects, any other unsold lot in your estimation, what would be the construction time for apartments?

A Approximately eight (8) months from the time of starting.

Q Do you anticipate that anything would be concluded or that sewer connections would be required before May 1st, 1973?

A No.

(R. 22).

Thus there is no present need to tap into the City sewers; what is needed, and what was originally denied, was permission to construct the sewer extensions serving the development itself, which need be tapped into the municipal sewer only after construction of the buildings is completed, which will not be before May 1973. Permission to construct the sewers has been or will be granted upon request, with connection not to be accomplished until additional treatment capacity is provided, which is expected to occur in March 1973. As the Agency says with regard to one lot, this situation "appears to be one in which an 'install only' permit is called for and would serve the needs of the parties while preventing any risk of additional pollution." Amended Recommendation, p. 6. Construction may proceed with assurance that, if all goes well with the treatment plant improvement plan, a connection may be had when needed; the public is protected against additional pollution in the event that the improvement plan meets an unforeseen snag. It seems entirely appropriate that the risk of such a snag in most cases should be borne by the developer who makes the business judgment to proceed, rather than by the innocent public.

There is no contention that a conditional permit is inadequate to serve the purposes of the petitioner for any but two portions of the tract in question, and as to other portions the petition must therefore be dismissed as moot. The two portions over which the petitioner expresses continuing concern are the so-called Viking and Illinois Housing Development Authority lots, which we discuss separately.

The petitioner has contracted to sell a part of the land to the Viking Corporation, which has spent about \$100,000 in preparatory work such as "plat specifications and legal actions" but had not commenced actual construction of buildings at the date of the hearing (R. 22-23, 31). A construction permit for sewers was initially denied, but a conditional permit was later granted, and Viking is "proceeding with the conditional permit" (R. 23, 31-33). The petitioner states that it anticipates that Viking will on the basis of the conditional permit release it from its obligations under the contract of sale and admits that upon receipt of such a release the variance request for the Viking lot would become moot (R. 33, 92-93). We agree with the argument of the Agency that, whether or not such a letter is received, a variance for the Viking lot is "completely unnecessary in light of Viking's apparent intention to proceed" (R. 75). No one has any remaining dispute with the Agency regarding this lot; the sole question is whether the petitioner will continue to be subject to legal action in the event that the treatment plant improvements are delayed, and in the further event that such delay causes injury to Viking by postponing its ability to connect. On the facts presently before us the variance petition regarding

the Viking lot is essentially moot, and it must also be dismissed without prejudice.

The final tract in question is to be developed, with financial assistance from the Illinois Housing Development Authority (IHDA), to provide housing for elderly persons and for others of moderate income requiring government subsidies to afford adequate housing (R. 15-16). IHDA has issued a commitment for such assistance provided satisfactory permits can be obtained from the Environmental Protection Agency (R. 14; Ex. 6). The IHDA has made clear that if such permits are not forthcoming the commitment will be withdrawn and the money spent outside the area (R. 21-22). IHDA has also made clear that it must secure, on or before the Initial Closing Date for the project (October 30, 1972) "the written authorization of the Environmental Protection Agency permitting the Development to construct necessary sewer lines and hook on and utilize disposal facilities" (Ex. 6) (emphasis ours). Thus the IHDA will not proceed on the basis of the conditional permit offered, and the controversy over issuance of an absolute permit allowing connection by a date certain is still ripe.

The evidence as to the need for housing for the elderly in the Springfield area is compelling (R. 38-43). The Springfield Housing Authority, with respect to a waiting list, "quit counting at eight hundred" (R. 41). The Agency acknowledges the need and the likelihood that the absence of an install-and-connect permit may deprive Springfield of the needed housing. In *Patricia Development Corp. v. EPA*, #71-161, 2 PCB 469 (Sept. 16, 1971), we allowed connections for persons who had entered into contracts to build homes with federal assistance, even though construction had not commenced at the time the connection ban was imposed, because of the great need for public-aid housing. At the same time we denied variances for persons whose contracts had been entered into after the ban, saying they should have applied to receive the same aid in another place not subject to the ban:

"Persons not committed at the time of the sewer connection ban were on notice that they must look elsewhere to build new homes."

See also the application of these principles in *Lewis v. EPA*, #72-208, 5 PCB \_\_\_\_ (Aug. 22, 1972). It is not wholly clear from the evidence just when the IHDA commitment letter was sent (it is undated, but the Agency's Amended Recommendation dates it June 20, 1972, prior to the July 12 announcement of the sewer ban), or when contracts for construction were entered into (Ex. 1 says as of Sept. 11 that "the contractor is ready to begin construction").

An additional fact, however, makes it unnecessary for us to decide whether the above circumstances would be sufficient without more. As observed by the Agency, the project cannot be constructed before May of 1973 at the earliest, and by that time, barring unexpected difficulties, the treatment plant problem as well as the sewer problem will have been solved. The Agency concludes that

"the risk that completion and connection of the IHDA project will cause violations of the Act or of applicable regulations is minimal. . . . Since the risk of pollution is small, the need for housing of this type in Springfield is substantial, and the risk of losing the available financing is immediate, the Agency recommends that with respect to the IHDA lot, petitioner's variance be granted and that the Board direct the Agency to issue to Petitioner a letter which will satisfy the requirements of paragraph 4(c)(15) of IHDA's Commitment Letter."

We agree. To deny the variance would require the small risk of delay in providing additional sewage treatment to be borne by the IHDA and thus by persons greatly in need of housing; IHDA's insistence that it safeguard the utility of its limited funds to maximize the housing it can provide for such people appears to us justifiable under the circumstances.

ORDER

1. Illinois National Bank of Springfield, Trustee of Trust No. PL 3478, is hereby granted a variance to permit connection of the IHDA lot, as described in the petition as amended, to the appropriate sewer or sewers by a date certain.
2. In all other respects the petition is hereby dismissed as moot, without prejudice.

I, Christian Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this \_\_\_\_\_ day of October, 1972, by a vote of \_\_\_\_\_.

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