

ILLINOIS POLLUTION CONTROL BOARD
November 1, 1973

MRS. ADELE ROACH)
PETITIONER)
)
)
v.) PCB 73-324
)
)
ENVIRONMENTAL PROTECTION AGENCY)
RESPONDENT)
)

CONCURRING OPINION (by Mr. Marder)

Final action was entered in this matter on November 1, 1973. The vote was 3-2, suggesting a high degree of concern by the Board in relation to this matter. A quick review of the facts (see Majority Opinion 73-324) would show that this case involved a sewer ban variance request, which on the surface would seem a rather routine matter for the Board to handle.

This action, however, again raises the question as to whether a variance runs with the land or is an individual right. The Agency, as it has in past recommendations, raises the point that a variance is indeed an individual right and can not be transferred or sold along with property rights. Citations from Title IX, Sections 35-38, of the Environmental Protection Act are raised to support this claim.

It is felt that a sewer ban variance petition is unique in a number of very important ways.

I. Sewer Ban Variance Petitions Are Unique: A study of past Board orders regarding variances will show that the one-year time limitation required in Title IX, Section 36 (b) of the Environmental Protection Act has been strictly adhered to. The exceptions have been, out of necessity and common sense, sewer ban variances. One could not reasonably expect each and every sewer ban variance to be renewable every year - nor could the Board or Agency reasonably be expected to "plug" existing sewer lines after a variance is terminated. A sewer ban variance is granted for the life of the land.

The very interesting question is raised - if a sewer ban variance is issued to Mr. Smith; and a sewer hookup is completed; and the next day he sells his home (with sewer connection) to Mr. Brown, is the variance terminated? Clearly not; the variance has simply been sold with the land. It then seems that the question is not

whether the variance runs with the land - but rather at what point does it start running? It is one of the points of this opinion that the race should start at the beginning.

It is further felt that precedent in this regard has been set in many past cases before the Board.

II. A) Exchange National Bank & Katz-Weiss Construction Corporation v. Environmental Protection Agency PCB 73-15.

In this action the Board granted variance to connect a condominium to the North Shore Sanitary District's sewer systems. The variance was granted to the petitioner, which would allow sale of individual condominiums to persons. Here the variance clearly ran with the land.

B) Mid-City Developers v. Environmental Protection Agency-PCB 72-274.

Variance to add up to 910 population equivalent was granted to Petitioner. Again, Mid-City Developers did not intend to occupy all of the living units but rather to sell the living units and the variance granted.

C) North Shore Sanitary District v. Environmental Protection Agency - PCB 71-343.

Variance was granted from the Board ban imposed under League of Women Voters v. North Shore Sanitary District, PCB 70-7, 12, 13, 14. Variance was granted to add 5,000 living units to the sewers tributary to the Clavey Road and Waukegan plants. Although the permits granted to the District were not sold, they were obviously doled out to various parcels of land within the District. The variances were not granted to an individual person but were rather granted to the North Shore Sanitary District.

Definitions of Person and Individual.

The Agency in its recommendation quotes the words "Person" and "Individual" as a basis for its conclusion that a variance does not run with the land. It is this opinion's contention that the words are not properly defined to warrant such a conclusion.

A) Individual: The word "individual" is defined according to Webster's Seventh New Collegiate Dictionary as:

1. Inseparable
2. Of, relating to, or used by an individual;
(c) intended for one person
3. Existing as a distinct entity

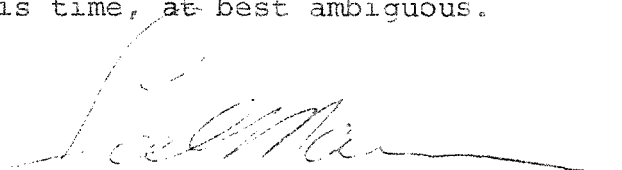
According to Webster's Third New International definitions are ordered by historical citations. It makes no claim as to the validity

of definitions by order. Therefore definition 3 is as valid as definition 2 (c).

B) Person: The Environmental Protection Act clearly defines the word "Person." (See Title I, Section 3 (i).) One definition is "political subdivision." Under this definition, it is believed the North Shore Sanitary District was granted variance (PCB 71-343). The "Person" granted variance did not use the variance, but rather distributed portions thereof to the "land."

Another major point must be entered. A variance is granted in the event that compliance with an existing rule would impose an unreasonable or arbitrary hardship. If the definition of a variance as not running with the land were upheld, unreasonable hardship could indeed be imposed, especially on an individual landowner. It is abundantly clear that a person who has a large proportion of his savings tied up in a piece of property would be hard-pressed to sell this piece of property without a variance. The prospective purchaser would be reluctant to "gamble" on a home site if he were not insured a sewer ban variance. This puts a needy person in the position of having to negotiate the best deal possible for his land - thus very possibly compounding his hardship. A variance is granted to relieve hardship - not to compound it. We can very easily be trapped into the cycle of "No sale because no variance, no variance because of no sale."

Because of the above it is felt that the question of whether a variance runs with the land is, at this time, at best ambiguous. For this reason an "aye" vote was cast.



Sidney M. Marder
Board Member

I, Christan L. Moffett certify that the above Concurring Opinion was submitted by Mr. Marder this 8th day of November, 1973.



