ILLINOIS POLLUTION CONTROL BOARD
December 12, 1972

MID-CITY DEVELOPERS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 72-274
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

Jack Guthman and James L. Marovitz for the Petitioner;
Richard W. Cosby, Assistant Attorney General, for the Respondent.

OPINION OF THE BOARD (by Mr. Parker):

This opinion supports the Board Order in this matter dated November 28, 1972 which granted the petition for variance in this case insofar as it relates to Phase I of the Green Bay Courts development, subject to certain conditions. That Order was required to be entered by that date pursuant to Section 38 of the Environmental Protection Act, as extended by waiver of Petitioner for a limited time period.

Petitioner, Mid-City, seeks a variance from this Board's North Shore Sanitary District sewer ban order* entered March 31, 1971 to permit sewer connection to the North Chicago sewage treatment plant of several hundred low to moderate income housing units to be constructed in a development located in the City of North Chicago known as Green Bay Courts. The development covers 36½** acres located at Green Bay Road and Fourteenth Street in North Chicago (R. 8, 105). It is to include 300 housing units expected to be completed and occupied by September 1, 1974, referred to as Phase I, a commercial shopping area (R. 11), and an additional 275 units, known as Phase II, to be completed some time in 1976 (R. 5).

The construction work on Phase I of the development is expected to begin March 1, 1973 (R. 11-12). Phase I will include 90 one bedroom apartments, 110 two bedroom apartments, 75 three bedroom apartments, and 25 four bedroom apartments (R. 25-26), which are expected to house***approximately 1,000 individuals (R. 27) and to

---

* League of Women Voters of Illinois v. North Shore Sanitary District, PCB70-7, 70-12, 70-13 and 70-14.

** This is part of a 500 acre plot owned by IHDA (R. 104-105).

*** Rentals to be charged the tenants (i.e. apart from government subsidy) are expected to be $135 for one bedroom units, $153 for two bedroom units, $185 for three bedroom units, and $196 for four bedroom units (R. 30). Because of the preliminary nature of the plans the Mid-City general counsel did not know how many bathrooms would be present in each of the units or whether the units would be air conditioned (R. 26-28).

create a sewage waste load amounting to 910 population equivalents (R. 264, 287). Since July 1, 1972, the North Chicago treatment plant effluent has exceeded the BOD and suspended solids standards (see below); thus the need for a variance.

The record insofar as it reflects the history of the development shows that in 1969, the community of North Chicago contacted the Illinois Housing Development Authority (IHDA) for assistance in providing State and Federal mortgage financing for construction of low and moderate income housing in North Chicago (R. 58-61). IHDA in turn requested Mid-City to act as developer in the fall of 1969 (R. 13). In August of 1970, a three party contract was entered into (R. 124-125) between Mid-City, IHDA and a group known as the North Chicago Development Corporation (NCDC)*. The contract (Petitioner's Exhibit 3) provides for NCDC and IHDA to purchase or obtain options on the 36.5 acres of land and later to convey the land to Mid-City for approximately $300,000 (R. 14). Mid-City is not obligated to purchase the land, however, until all necessary governmental approvals are obtained for the project. This means that until and unless the instant variance is granted, Mid-City has no obligation to purchase the land from NCDC and IHDA (R. 128). The land has not yet been conveyed to Mid-City (R. 128)

To date, preliminary approvals have been obtained from the City and the land has been properly zoned. No further approvals are required apart from the sewer connection rights which are the subject of this variance proceeding. In the event of a grant of this variance the specifications and plans will be completed for approval by the City preparatory to issuance of building, and later, occupancy permits (R. 12, 28). It will also be necessary to seek and obtain a feasibility letter from IHDA (R. 85-86).

Petitioner Mid-City contends the record shows sufficient hardship to justify grant of the requested variance, and in any event Mid-City says that recent improvements by the North Shore Sanitary District in the North Chicago treatment plant capacity justify the relaxation of the sewer ban which it seeks. The Agency objects to grant of the variance to the extent that there may be a resulting adverse effect on Lake Michigan if it is granted (R. 20).

Although Mid-City thought prior to March 31, 1972 that it would be able to connect the development sewers to the North Shore Sanitary District system (R. 15), there is no evidence that any investigation was made to see whether the District's system had adequate treatment capacity available or what quality effluent was being produced (R. 31-32). In any event there have not been, and Mid-City concedes this (R. 128, 298-299), any assurances given by the District, municipal officials, or anyone else, to Mid-City relative to sewer connection rights.

* A not-for-profit corporation formed to encourage development of low income housing in the City of North Chicago, and funded by IHDA (R. 65).

Mid-City argues that prior to the March 31, 1971 sewer ban order it had spent approximately $30,000 (R. 102-103) plus time spent by its employees and those of IHDA (R. 101) and other parties interested in the development, all of which may be lost if the project does not go forward (R. 135). On the latter point the IHDA witness did not deny that it might be possible to recoup this loss or part of it through resale of the land should the project be discontinued (R. 136-8). We find the testimony as to these asserted losses unpersuasive, however, since it is largely hearsay (R. 40-43, 46, 54).

While Mid-City does not argue that the $300,000 spent by NCDC and IHDA to acquire the land forms an element of its possible financial loss should this variance be denied (R. 95), Mid-City does point out that it is not the business of IHDA, a state financing agency, to inventory land (R. 96, 133-134). A Mid-City witness said it would be hard to predict whether the project would be continued if the variance is denied (R. 35). The IHDA witness testified that IHDA would still own the land (R. 76) and would have to re-evaluate possible future uses (R. 67-68, 109, 110). The IHDA witness conceded that the $300,000 paid for the land is not a loss at this point in time (R. 94-97, 136).

In support of its Petition, Mid-City presented the testimony of Mr. H. William Byers, General Manager of the North Shore Sanitary District on September 27 and again on October 23, 1972. Mr. Byers testified that the effluent from the District's North Chicago plant averaged 31 mg/l BOD and 34 mg/l suspended solids during the period January 1 through July 31, 1972 (R. 247). These numbers are to be compared with the 20/25 requirement* of effluent standard 404 (b), which became effective on July 1, 1972, and which will apply to the North Chicago plant in September of 1974 when Phase I of the Green Bay Courts development is complete. Mr. Byers testified that the North Chicago plant would, beginning October 10, 1972, begin alum treatment of its effluent to reduce the BOD and suspended solids levels (R. 246-7)**. He said, although

---

* This requirement is tightened to 4/5 on December 31, 1974 (Reg. 404 (d) for discharges to Lake Michigan), but before the end of 1974 the District plans to transfer the present North Chicago plant operations to the District's Gurnee plant (R. 264-265) which does not discharge to Lake Michigan and thus will become subject to the 10/12 effluent standard of Reg. 404 (c).

** Also chlorination of storm water by-passes (R. 246).

somewhat equivocally*, that this treatment will permit addition of up to 1,500 population equivalents of waste load and still enable the 20/25 standard to be met (R. 249, 253, 259, 261-2). Also, the record shows that addition of yet another waste load, the 156 population equivalents (BOD) contemplated by the Fansteel discharge (see EPA Exhibit 2 in EPA v. Fansteel et al., PCB72-76, Board opinion dated November 28, 1972), will have a minimal effect on the North Chicago treatment plant effluent (R. 14, October 23, 1972).

Mr. Byers said he has not made any pilot tests of the new chemical treatment system (R. 255), but that his predictions of the improvements to be expected are based on laboratory tests as well as full scale alum tests made at the Clavey Road plant (R. 258). The witness described his calculations as "very conservative" (R. 262).

Mr. Byers expressed his personal preference that any additional connection rights to be permitted by our Board to the Nroth Chicago plant be granted in connection with a variance sought by the District itself based on actual experience with the new chemical treatment (R. 266, 298), and indicated that the District does plan to seek a variance to permit additional connections to its North Chicago treatment plant in the near future (R. 280-281). At the hearing the Petitioner was asked whether it would be willing to wait a few months to permit the District to gather data on its chemical treatment operations and to seek a variance based on this data (R. 281-284). Petitioner objected that the costs are greater the longer it waits (R. 284), and said that a delay now would cut three months of good construction time off the present March, 1973 starting date (R. 285).

Mayor Kukla of North Chicago also testified on behalf of Petitioner. He vividly described the City of North Chicago and its people. The City has a population of about 47,000 of which about 31,000 are associated with the U. S. Navy (R. 213). Mayor Kukla described the need for housing in the City as acute (R. 180).

---

* At first Mr. Byers said the alum treatment could be expected to drop the present 31/34 levels by about 10 mg/l each, i.e. to about 21/24, which would about meet the 20/25 standard without any added waste load. Stated otherwise, Mr. Byers said the "degree of treatment of about 10 milligrams per liter greater by the added chemical will be equivalent to approximately 1,500 population" (R. 248). Later, Mr. Byers said there would be additional capacity for 1,500 population equivalents and still permit the 20/25 standard to be met (R. 249). Still later, Mr. Byers seemed to revert to the original testimony (R. 252, 259), but the remaining testimony appears consistent that the standard will be substantially met even with the added 1,500 P. E. waste load (R. 253, 254, 260-2). (The term "substantially" characterizes Mr. Byers' testimony at R. 261 that the resulting BOD/SS could end up as high as 23/27 rather than 21/24).

So much for the record proofs. We must, pursuant to statute, determine whether petitioner has proven that denial of its petition would impose an arbitrary or unreasonable hardship on it (Environmental Protection Act, Section 35). We believe that such a hardship has been proven here. As recognized by our Board Procedural Rule 401 (a) (2), we should take into account the costs that compliance would impose on others as well as the petitioner. While Mid-City's asserted $30,000 in pre-March 31, 1971 expenditures was not persuasively proven, the substantial land investment by IHDA ($300,000) is a factor that we can hardly ignore. This, coupled with the acute need for housing in North Chicago, which Mayor Kukla addressed so colorfully, constitutes what we believe to be a serious hardship situation.

While this hardship condition might not, standing alone, be enough to warrant grant of the variance, there is another factor present in this case which effectively resolves any doubts we might have whether a statutory hardship has been proven. That is that the North Chicago treatment plant will, according to the testimony, have enough capacity to handle the waste load that will be added from petitioner's Phase I development (as well as from Fansteel, see p. 4 herein). Mr. Byers' testimony that the plant will be able to accept an additional 1500 P. E. waste load (compare with the 910 P. E. which petitioner will add, plus the 156 P. E. from Fansteel) while still making the 20/25 standard is, we believe, compelling evidence that the variance must be granted. So long as we are assured, as here, that the effluent discharged from the North Chicago plant to Lake Michigan will meet the prevailing standards, the variance should be granted.

On the latter point, the assurances which petitioner has given the Board concerning the North Chicago sewage treatment plant capacity, we must recognize that the record is not as certain as we would like it. Because petitioner has, to serve its needs, filed the instant petition without waiting the few months necessary for the Sanitary District to actually carry out and demonstrate the effectiveness of its chemical treatment program, we must base this variance grant on treatment efficiency predictions rather than on actuality. This is unfortunate. Like Mr. Byers of the Sanitary District, we would have preferred to wait a few months until the District could evaluate its chemical treatment program. At that time, if the District found that BOD/SS levels had dropped low enough to permit an additional 1,500 population equivalents, this could be shown after, rather than before, the fact in a variance proceeding brought by the District. We would then be able to grant the District the right to permit the additional (1,500 P. E.) connections, and to follow its own procedures in determining priorities as between competing permit applicants for the limited number of additional connection rights (Presumably the District

still plans to seek such a variance in the near future, taking cognizance of the whatever commitments it has made for the future, such as in this Mid-City case and the Fansteel case).

As indicated, we believe that Petitioner has, based upon the record in this proceeding, shown the requisite statutory hardship for grant of a variance. It is appropriate, however, for our Order to hold Petitioner to the proofs and representations which it has made before us concerning the expected effectiveness of chemical treatment at the North Chicago treatment plant. Accordingly, our Order dated November 28, 1972 granted the variance as it relates to Phase I of the development subject to a 910 population equivalent waste load limit, and subject to the requirement that the North Chicago plant effluent, with the added waste load, comply (as petitioner represented it would) with the relevant water pollution regulations, and that such compliance be certified by the Agency.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion was adopted by the Board on the 13th day of December, 1972, by a vote of 4 to 0.

Christan L. Moffett