

ILLINOIS POLLUTION CONTROL BOARD  
June 13, 1975

ARNOLD COHN, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 75-102  
 )  
 ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 Respondent. )

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

The Board initially received the Petition for Variance in this matter on February 28, 1975. On March 6, 1975, the Board entered an Interim Order, requiring that Petitioner submit further information to support the original petition. The further information requested was received on March 26, 1975. A Recommendation from the Illinois Environmental Protection Agency, (Agency), recommending that the variance be denied, was received on May 21, 1975. No hearing was held in this matter.

Petitioner here seeks a Variance from the sewer ban in Part 7 of the Board's Order in League of Women Voters of Illinois v. North Shore Sanitary District, PCB 70-7, 12-14, 1 PCB 369, 396 (1971). That Order was modified by the Board on January 31, 1972 in the case of North Shore Sanitary District v. Environmental Protection Agency, PCB 71-343, 3 PCB 541. The Board there granted the North Shore Sanitary District (District) a variance, allowing the addition of a total of 1,000 living units, or 4,000 population equivalents (P.E.) to the sewers tributary to the Clavey Road and Waukegan Sewage Treatment Plants. As a part of that variance grant, however, in paragraph 6, the Board stated that:

C. no connections shall be allowed if any part of the down-stream sewer system is incapable of adequately transporting the additional or new waste to the District's treatment works; 3 PCB at 558.

The original Petition received in this matter indicates that Mr. Cohn seeks permission to build a small retirement home for his mother on a vacant lot in Waukegan, Illinois.

Although Mr. Cohn does not state when he purchased the lot in question, which is located on Theresa Avenue on the north side of the City of Waukegan, he does state that he purchased the lot in a fully improved condition, and that all improvements including sewer hook-up have been installed on Theresa Avenue for 12 years. In support of his variance request, Mr. Cohn states simply that a failure to obtain the variance would result in, "quite a hardship on my mothers[sic] retirement plans both financially, and emotionally."

In its Recommendation the Agency points out that Petitioner's proposed dwelling would, if connected to the Waukegan sewers, be tributary to the Judge Avenue sewer. The Agency classifies the Judge Avenue sewer as hydraulically overloaded; the Board has also noted such conditions in the Judge Avenue sewer. Ben Cooper v. EPA, PCB 74-228 (January 23, 1975). Further, the Agency Recommendation states a belief that the problem with the Judge Avenue sewer will exist for a considerable period of time. Although Mr. Cohn quotes the Waukegan City Engineer as stating a completion date for projects to correct the Judge Avenue sewer problem as being "no longer than 18 to 24 months" away, the Agency states that its investigation has revealed that construction on sewer improvements will not commence until Spring, 1976, and may take as long as two years thereafter to reach completion. The Agency further assumes that during this period of construction the sewer backup problems in the area will continue to exist.

Since the imposition of the sewer ban in League of Women Voters, this Board has dealt with many individual variance requests relating to that Order. These cases have ranged from requests to install additional bathrooms onto an existing dwelling without an increased P.E. loading, to requests that we allow sewerage hook-ups for large projects. See, eg., Haight v. EPA, PCB 71-93, 2 PCB-63 (1971); Patricia Development Corp. v. EPA, PCB 71-161, 2 PCB 469, 471 (1971); Cooper, supra.

The key factor to remember in the analysis of these cases is that the Petitioner bears the burden of proof when seeking a variance from a sewer ban, exactly as is the case with all variances. Lake County School Dist. No. 64, et al. v. EPA, PCB 71-313, 314, 321, 322, 2 PCB 673 (1971) (Preliminary Order of the Board). The Board has in fact granted a considerable number of variances with respect to the North Shore Sanitary District sewer ban. But in each of these cases, the Petitioner has shown that a denial of the variance would work a severe hardship. Eg., Dupre v. EPA, PCB 71-94, 2 PCB 200, 201 (1971) ("construction...substantially complete"); Giancio v. EPA,

PCB 71-100, 2 PCB 211, 213 (1971) (Petitioner living in inadequate quarters-7 people in 4 rooms; septic field impossible; detrimental reliance on preexisting permits); American National Bank and Trust Co., Trust No. 28512 v. EPA, PCB 71-132, 2 PCB 229, 230 (1971) (discussion of hardship on which a variance can be granted; Mr. Currie dissented); McAdams v. EPA, PCB 71-113, 2 PCB 297 (1971) (poverty); Patricia Development, supra (poverty, detrimental reliance). But See, Lawler v. EPA, PCB 71-209, 2 PCB 557 (1971) (Variance denied, family of 6 in 2-bedroom apartment).

It should be noted that in each of the above cited cases the Board was presented with a substantial allegation of hardship, and on that ground granted the variance. The Board has noted that, "merely proving an inconvenience or a slight hardship is not enough to be granted a variance by this Board." Weinstein, et. al., v. EPA, PCB 71-107, 122, 192, 2 PCB 291, 292, (1971). The Board in that case also stated that the hardship alleged "must be substantial for it to outweigh the damage to be caused", and that "just holding the lot is not enough to give a person the right to build in opposition to the sewer ban." 2 PCB at 292, 293. The Board has plainly held that "the hardship of complying with the ban is insufficient when, as here, the only significant step taken before the ban was the purchase of a lot." Scott Volkswagon, Inc. v. EPA, PCB 71-112, 2 PCB 295 (1971).

The Board realizes that this sewer ban, and others, does work an undeniable hardship on those wishing to occupy new quarters. Such hardship, the Board has held, is "inherent in the sewer ban." Andracki v. EPA, PCB 71-149, 2 PCB 363 (1971).

The Board is constrained to deny the variance in this matter. Petitioner Cohn has failed to meet the burden set in the cases cited above; his allegations of hardship are insufficient. While the Board may hypothesize on the possible hardship in this case, the simple allegation of "financial" and "emotional" hardship is not enough to allow the relief requested. In the McAdams case, supra, and in the others cited above, the hardship demonstrated was real and immediate. That has not been shown here.

Nor is the Board moved by the fact that a sewer connection has already been installed at the vacant lot in question. The Board has previously stated that its cases have "made clear that in the absence of other compelling circumstances it is insufficient that such improvements as sewer and water lines and streets have been constructed...since the improvements will still be there when... the ban is lifted."

Mars Development Co. v. EPA, PCB 71-218-219, 2 PCB 689 (1971). Even the expenditure of money for preliminary expenses connected to the building of a house will not suffice to evoke the doctrine of estoppel, and entitle the applicant to the issuance of a permit. Wagner v. EPA, PCB 71-85, 2 PCB 131 (1971).

Our decision here is not a permanent denial of Mr. Cohn's right to build on his vacant property. It is simply a dismissal without prejudice on the facts before us. But in the absence of proof that the sewer ban works an unreasonable hardship on Mr. Cohn, we cannot do otherwise.

We shall dismiss this petition without prejudice, giving Petitioner leave to file a new petition alleging facts that will qualify him for the extraordinary relief sought. See, e.g. Niles Terrace Inc. v. EPA, PCB 71-280, 2 PCB 499 (1971). We also suggest to Petitioner that verification of the Petition would facilitate our future action. Waukegan Park District v. EPA, PCB 71-266, 267, 2 PCB 489 (1971).

This Opinion constitutes the finding of fact and conclusions of law of the Board in this matter.

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that the Petition for Variance in this matter be denied without prejudice.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order were adopted on the 13<sup>th</sup> day of June, 1975 by a vote of 5 to 0.

  
Christan L. Moffett, Clerk  
ILLINOIS POLLUTION CONTROL BOARD