ILLINOIS POLLUTION CONTROL BOARD
August 29, 1972

MARK E. COOK	)	
	)	
v.	)	#72-178
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	
COMMUNITY UNIT SCHOOL DISTRICT NO. 60 LAKE COUNTY, ILLINOIS	)	
	)	
v.	)	#72-223
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

#72-178 JOHN R. SLOAN APPEARED FOR PETITIONER
RICHARD W. COSBY, ASSISTANT ATTORNEY GENERAL, APPEARED FOR THE ENVIRONMENTAL PROTECTION AGENCY.
#72-223 FREDERICK D. RAWLES AND DANIEL M. LONCHER, JR. APPEARED FOR PETITIONER.
RICHARD W. COSBY, ASSISTANT ATTORNEY GENERAL, APPEARED FOR THE ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (BY SAMUEL T. LAWTON, JR.)

This opinion is in support of our order of August 28, 1972 in #72-223 granting the variance sought and our order of August 29, 1972 in #72-178 denying the petition for variance.

Both cases are variance requests seeking permission in each instance to connect a single family residence structure to facilities tributary to the Waukegan Sewage Treatment Plant of the North Shore Sanitary District. In both cases the sewer to which the house would be connected has been classified as over-loaded by the E.P.A., and the sewer connection permit accordingly denied, notwithstanding our recent partial lifting of the sewer connection ban, with respect to the Waukegan plant originally imposed in our decision of March 31, 1971 in case LWV vs. NSSD 70-7.

Both homes were constructed subsequent to the imposition of the March 31, 1971 sewer connection ban. In both cases petitioners have contended that denial of the variance will impose upon them unreasonable and arbitrary hardship, justifying an allowance of the connection sought.

While there are some similarities in the two proceedings there are also substantial differences justifying the reaching of different conclusions in each case. The variance petition with respect to Mark E. Cook is denied. The variance petition with respect to Community Unit School District No. 60, Lake County is granted. The reasons for what might appear to be inconsistent conclusions are discussed below.

Mark E. Cook filed his original petition for variance on April 24, 1972, simply asking permission to connect the house built by him to facilities tributary to the Waukegan plant. On May 3, 1972, we entered an order referring to our partial lifting of the sewer connection ban of March 2 1972 stating that, for all that appeared in the petition, Cook would be

entitled to a sewer connection permit as a result of the March 2, 1972 order. The petition was dismissed as moot. On June 2, 1972 Cook sent to the Board a letter from H. W. Byers, General Manager of the North Shore Sanitary District dated May 11, 1972, advising him that the sewer to which connection was sought had been designated inadequate by the E.P.A., and that a connection permit would be denied. The variance petition was redocketed and hearing held July 13, 1972.

No recommendation has been filed to date by the E.P.A., although Agency counsel appeared at the hearing in opposition to the petition.

Cook's position can best be summarized in the language of his attorney:

> "He relied basically upon information received from City of Waukegan officials and newspaper accounts relating to the the removal of the sewer ban in Waukegan, and built a house that was completed after the sewer ban was partially lifted in Waukegan, requested a hook-up from the North Shore Sanitary District and was denied based on the fact that the E.P.A., had declared this sewer area as being incapable of transporting waste." (R5).

The subject property located at 513 Baldwin in Waukegan was improved for use by petitioner's daughter. Construction appears to have started around January 1, 1972. (R10). Petitioner acknowledged that at the time of construction he knew the sewer ban was in effect but relied on statements made by the Mayor of Waukegan, the City Building Commissioner, petitioner's plumbing contractor and newspaper accounts all to the effect that the sewer ban would be terminated. (R11). Apparently other properties not the subject of this proceeding are also proposed for development by the petitioner in reliance to the foregoing representations.

At no time did petitioner make inquiry of either the North Shore Sanitry District or the E.P.A., with respect to the status of the sewer ban or the condition of the sewer to which the connection was sought. Some inquiry was made of the North Shore Sanitary District after March 11, 1972, when the partial lifting of the sewer ban took place, but only after the house had been erected.

Petitioner represents that the fair cash market value of the house as completed will be $30,000, and that approximately $13,550.00 remains owing by petitioner to the seller of the lot and to sub-contractors.

Contracts for other properties to be improved by petitioner were introduced in evidence although it is not clear whether these lots would be subject to the same prohibition as the subject property. In any event petitioner contends that the capital tied up in the Baldwin property and the jeopardy placed on his credit standing prevents him from pursuing his trade. Mrs. Cook has been subject to hospitalization and surgery in recent months, which has imposed additional financial burden on petitioner

On cross examination Cook acknowledged that the property was purchased in October of 1971, and that at that time he was aware of the imposition of the comprehensive sewer ban pursuant to our order of March 31,

1971. (R27). At the time petitioner received his building permit from the Waukegan Building Department he was advised that a sewer hook-up could not be granted, although Building Department officials stated on that date that the sewer ban would be lifted. According to Cook the City Officials stated with respect to the sewer ban, "What are you waiting for? Go ahead, it's all going to be rolled up. We're going to throw the whole thing over. Go ahead, Cook." (R31).

Installation of a septic tank on the property was considered unacceptable by the Lake County Health Department and installation of a holding tank, while physically possible was deemed unduly expensive both in cost of installation and servicing. Also difficulties would be encountered in the ultimate disposal of wastes. Evidence was introduced that the subject property would generate 200 gallons of effluent per day and possibly less, (R60) which in the judgment of the witness would have a trivial effect on the over-all hydraulic flow handled by the sewer. In dry weather no over-flow problem would exist, but some adverse effect might result in periods of wet weather flow. (R62). However, in the judgment of the same witness the sewer is not adequate to serve as a combined sanitary and storm sewer if excessive amounts of storm water infiltrated into it. (R63).

Complaints were noted from residents connecting to the subject sewer during periods of heavy rainfall, presumably resulting in back-up of sewer connections into their homes. (R65). Testimony was received in the record indicating the basis on which sewers subjected to overload were determined. Those which could not accommodate normal flow during wet weather without by-pass or back-up were "black listed" by the E.P.A.

On the particular sewer in question manholes were bolted down in an effort to eliminate over-flow which nevertheless became cracked and enabled sewer discharge of fecal and other matter. (R80). Observations of this sort were made in the vicinity of the sewer between April 18 and July 10, 1972. The particular sewer in question is designed as a sanitary sewer only and is not built to accommodate storm water flow, although storm water infiltrates into the sewer during periods of wet weather. No effort was made to determine what impact the waste from petitioner's residence would have on the environment, beyond that previously mentioned.

The Community Unit School District No. 60 is also located in Waukegan. As a part of its Vocational Building Trades program students participating in the program have constructed single family residences on property purchased by The Board of Education. Construction takes place over a one to two year period. The home is worked on by students enrolled in the building trades classes, the vocational electric class, the interior design class, and the agriculture and biological occupation classes. Approximately 100 students engage in the construction of the home. Upon its completion, the home is placed on the market and sold. Proceeds of the sale are used to finance the purchase of land and materials for further construction of future homes as part of the Building Trades program.

The subject property of the present petition was purchased on July 8, 1971 for $5,475.00, and was the eighth such project of the program. Construction was started in September of 1971 and is substantially completed. At the time of the purchase a sewer connection had already been stubbed by the prior owner into the Waukegan Municipal Sanitary System, but was not hooked up

and no permit for connection or use had been issued. While the lot in question would otherwise be eligible for a sewer connection permit pursuant to our partial lifting of the sewer connection ban on March 2, 1972, the property would connect to a sewer found to be overloaded which again precludes the granting of a permit.

Petitioner alleges that if the sewer connection is denied the house cannot be sold. Funds for continuation of the program from other sources are not available and the entire Vocation Building Trades program would be terminated. In addition the District will incur a substantial monetary loss resulting from the investment in materials. The petition concludes that denial of the permit will have a substantial detrimental effect on the public welfare, disproportionate with the detriment caused by the additional sewage flow generated from the house.

The E.P.A. recommends that the variance be allowed subject to proof that the sale of the structure is necessary to the continuation of the Building Trades program and that the petitioner obtain one of the connection permits previously authorized for the Waukegan plant.

A stipulation of facts was entered into with respect to the essential allegations of the petition. Hearing was held on the petition on July 22, 1972, at which time the Vocation Building Trades program and the method of financing were described in detail. The testimony supported the contention of the District that the sale of the house was necessary to assure continuation of the program and that no funds were available in the education fund to pursue this program in the absense of such sale. The educational fund is presently operating at a deficit. Approximately $24,000 has been expended for land and materials and the fair market value of the house is considered to be approximately $30,000. Land has been purchased for new residences to be constructed pursuant to the program and students have been registered for the coming fall classes in this respect. In addition to the inability to proceed with the program the testimony indicates that failure to hold the class will entail some loss of State revenue. (R15).

Testimony indicated that 400 gallons per day of effluent would be generated by the house. The sewer could accommodate 624,000 gallons per day. In the judgment of the witness the effluent flow from the house would be "nil" so far as its effect on the sewer system. While the sewer has been classified as overloaded there is no evidence that the proposed connection would create over-flow, back-up or by-pass. (R22).

The District's business manager testified that a deficit in the education fund in excess of a million dollars is anticipated. (R28). Inability to sell the subject property would cause termination of the Building Trades program, as funds would not be available from any other source, other than the money received on sale of the premises.

The two cases present obvious difficulties of reconciliation. In Cook the petitioner got bad advice and followed it. In Community Unit School District, for all that appears on the record, no advice was sought or received. In both cases the land was purchased and construction begun subsequent to the imposition of the sewer ban. In both cases the properties are located in areas that would be eligible for permits as a consequence of our partial lifting of the sewer ban with respect to the Waukegan plant. However, in each case the effluent from the particular house would be directed to a sewer that has been classified by the E.P.A. as overloaded and a permit denied for this reason. The condition of overload is the fault of the City of Waukegan which has failed to keep its sewers in satisfactory condition, and whose officials told Cook to ignore our sewer ban order.

In both cases hardship exists so far as the petitioner is concerned. However, the central issue in both cases, as in all variance cases, is whether hardship is of a degree sufficient to justify a variance. Stated otherwise, the issue is whether the hardship on the petitioner if denied the variance substantially outweighs the burden on the public if the variance is allowed. (See WACHTA & MOTA v. EPA #71-77).

Within this frame of reference we believe the cases are distinguishable. Our denial of variance to Cook does not deny him his investment. At most, his enjoyment of the property or its income has been suspended. Cook bought land and built in the face of the sewer connection ban, gambling on the availability of a sewer connection permit, which because of the overloaded condition of the sewer has been denied, notwithstanding partial lifting of the ban for the Waukegan plant. Cook sought advice from all those except the ones from whom he should have sought it, the E.P.A. His hardship is clearly self-imposed. Further, the records support the conclusion as to the sewer there involved that even a small increase in effluent will worsen an already bad situation, where back-up, by-pass, and over-flow have already resulted in demonstrated damage to the public welfare. An allowance of this petition would be a virtual repudiation of the ban allowing anyone to build in defiance of it and then claim hardship on the basis of self-imposed burdens, giving local officials the power to repeal the sewer connection ban order in effect. The instant case is a particularly good example where petitioner stands ready to proceed with two more construction programs as soon as he gets a go-ahead.

The School District is not without fault and should be rebuked for its actions in the face of the sewer ban. However, the hardship imposed in that case goes beyond the single project involved and has consequences not only detrimental to the school District itself but also to the students, faculty and public at large. (see Congregation Am Echod v. EPA #72-202). Prevention of ability to dispose of the structure would require termination of the Vocation Building Trades Program, a program of obvious value not only to the many students now involved but to all those in the future, who would be participants. The over-all benefit

to the community in such a program is obvious as is the detriment consequental to its abandoment. In Congregation Am Echod (supra) we granted a sewer connection to a home occuped by a rabbi, in order that the entire congregation might be served. We there held that a denial would constitute a hardship not only on the rabbi himself but on the entire congregation which would be deprived of the religious leadership of its pastor. Similarily, termination of the Vocational Trades Program would inflict an unwarranted hardship on the entire community in addition to all affected students, present and future, if this worthwhile program was curtailed.

Furthermore the evidence does not demonstrate the same detrimental consequences from the connection that would maintain in the case of Cook. Lastly, the loss of educational fund revenue resulting from a suspension of the program to a district already operating in a deficit position is a further factor to consider

We find the cases sufficiently distinguishable, notwithstanding certain factual similarities, to justify a difference in ruling. Every variance case and particularly those involving a waiver of a sewer connection ban order requires a balancing of equities. We have endeavored to reconcile these balances in every case on its individual merits. As we said in WACHTA & MOTA v. E.P.A. (supra):

> "Notwithstanding the profound implications of this decision and the pervasiveness of the problem, it is still necessaryto decide the matter before us on the facts set forth in the record. Whether a variation is premised on constitutional considerations of denial of property without due process of law or uncompensated taking (a doctrine frequently employed in challenging the validity of restrictive zoning ordinances, See Bauske v. City of Des Plaines, 13 Ill. 2d 169, 148, N.E. 2d 584 (1958)) on the principle of estoppel, resorted to where vested rights in permits are asserted (See Deer Park supra), or on the statutory basis of unreasonable hardship, the more traditional basis for the granting of a variance, the legal result is in direct consequence of the magnitude of the hardship imposed, as compared with the burdens on the public welfare. No hard line can be drawn and each element must be evaluated on the facts of the particular case."

In denying a petition for variance for sewer connection in Feige v. E.P.A. #72-192 we said:

> "On this state of the record, we must deny the petition for variance. We do not believe that the character and degree of the hardship alleged by petitioner outweighs the hardship likely to result to the community from the additional hydraulic and organic load entering an already overloaded sewer. The specific hardships alleged are insufficient for the granting of a variance, and we have so held in cases involving similar facts. Petitioner's use and enjoyment of the property is at most suspended,

and not terminated and his plight is characteristic of virtually every property owner in an area affected by a sewer ban. As we said in Monyek v. Environmental Protection Agency #71-80, dated July 19, 1971:

> 'Undeniably, petitioner is confronted with some measure of inconvenience in this case. We cannot, however, view petitioner's plight a singular and therefore arbitrary nor can we commiserate to such a degree that we grant rather than deny this request. In cases where a house has been completely built before the date of the order (March 31, 1971) or where substantial steps toward completion have been taken we can clearly judge the hardship of non-connection to be unreasonable. In fact we have done so in the recently decided case of Wachta and Mota, d/b/a Belle Plaine Subdivision v. E.P.A., #71-77. There the petitioner had seven units completely built, and the Board granted a variance to permit the sewer connections. For the remaining lots in the subdivision the Board ordered the builders to present a program to the Board demonstrating the feasibility of alternatives.'"

Cook's situation is distinguishable from that of Nilles, Inc., a respondent in Glovka v. NSSD #71-269. There we did not order Nilles to disconnect the sewer tie-in made shortly after the date of the ban. Nilles had relied on the representations of the NSSD's attorney made a few weeks after the imposition of the ban to the effect that the ban was not applicable to Nilles because of Nilles' possession of a pre-existing state sewer installation permit. Cook, on the other hand, was told expressly by city officials that the ban was in effect and applicable to him but urged to proceed in defiance of it, which advice he followed.

In allowing a variance for sewer connection in Congregation Am Echod (supra) we said:

> "The Agency recommendation is that the variance be granted. Even though there is no direct financial hardship being suffered, we feel that the rabbi, his wife, and all those who benefit from his services will suffer in a special way if the rabbi becomes unable to attend. As we stated in McAdams v. Environmental Protection Agency, PCB 71-113:
>
> > The additional pollution that variances in extreme cases like this will cause will probably be small, for such cases are likely to be rather rare; and it must be borne because the hardship of denial is too great.'"

We believe the rationale of the Feige case applicable to Cook, whereas the rationale of Congregation Am Echod is applicable to the Community School District No. 60, whose circumstances are unique and not likely to be repeated.

Our grant of variance to the School District should not be construed as an invitation to the District or others similarly situated to repeat the events giving rise to our order. What might be considered a hardship on the basis of past events will not give rise to a similar holding in the future. Those buying land or erecting structures in the NSSD are cautioned to ascertain not only the applicability to the sewer ban order but also the suitability of any local sewer to which connection is sought.

We reiterate the manifest need for the City of Waukegan to take affirmative steps to ameliorate the overloaded condition of its sewers which will continue to cause grief and agony to all concerned until the condition is abated. Repair of defective sanitary sewers to prevent infiltration of storm water in periods of wet weather will eliminate the overloaded conditions requiring the E.P.A.'s determination of inadequacy.

This opinion constitutes the finding of facts and conclusions of law of the Board.

Mr. Dumelle dissents believing that the variance should be granted in both cases.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the above Opinion was adopted on the 29th day of by a vote of 4 to 1.

Christan L. Moffett