ILLINOIS POLLUTION CONTROL BOARD
August 5, 1971

FRED WACHTA and J. RICHARD MOTA, d/b/a BELLE PLAINE SUBDIVISION	)	
v.	)	#71-77
ENVIRONMENTAL PROTECTION AGENCY	)	

MR. SHELBY YASTROW, ATTORNEY FOR PETITIONERS
MR. DELBERT HASCHEMEYER, ATTORNEY FOR ENVIRONMENTAL PROTECTION AGENCY

OPINION OF THE BOARD (by MR. LAWTON)

This Opinion supports the Order of the Board entered on July 12, 1971.

Petitioners filed a petition for variance seeking relief from the Board's Order of March 31, 1971 entered in case entitled "League of Women Voters of Illinois, et al v. North Shore Sanitary District" #70-7, 70-12, 70-13 and 70-14, forbidding any new sewer connections to facilities operated by the North Shore Sanitary District until the conditions of overload were corrected. Petitioner is developing the Belle Plaine Subdivision in Gurnee, consisting of 27 lots previously subdivided, in which sewer and street installations have been installed prior to the date of the sewer ban. The Environmental Protection Agency recommended that the variance be denied.

Petitioners purchased their tract pursuant to agreement entered into on February 7, 1970. A $10,000.00 down payment was made against a total purchase price of $50,000.00 with the balance due in January, 1972. An additional loan was incurred by petitioners in the amount of $32,500 to finance the subdivision improvements. Engineering work required by subdivision ordinances was performed and streets and sewers installed at a total cost of $43,800.00. In addition, $4,000.00 was spent on subdivision promotion and advertising. Seven homes have been completed and one is under construction. Of the seven completed, five have been sold and two are presently used a model homes. On the date of the hearing, no specific improvements had been initiated on any of the remaining nineteen lots.

Sewer permits had been granted to the Village of Gurnee for the subdivision by both the State Sanitary Water Board and the North Shore Sanitary District, on April 10 and April 15, 1970, respectively, almost a year prior to the effective date of the sewer ban.

On April 12, 1971, the Village of Gurnee advised Petitioners that it was revoking all building permits granted after April 1, 1971 in consequence of the Board's March 31, 1971 sewer ban order. Our order of July 12, 1971 in this proceeding, permits Petitioners to connect the seven improved lots and one partially improved lot in their subdivision to the North Shore Sanitary District sewer system, subject to the terms and conditions therein provided. A copy of the order is attached to this opinion.

The difficulty in arriving at a decision, as it relates to petitioners' plight but more importantly to the general subject of sewer bans in the North Shore Sanitary District territory, is demonstrated by the two well considered dissenting opinions filed herein, each going in opposite directions. Mr. Kissel's opinion would allow the variation in its entirety as requested by petitioners for all twenty-seven lots of the subdivision. It appears to be Mr. Kissel's contention that failure to allow the permit in its entirety would constitute a deprivation of property without due process of law and constitute a taking without just compensation, both in violation of the Constitutions of the State of Illinois and the United States. An estoppel theory is also suggested although it is not clear against whom the estoppel would run, the entities which have granted the sewer permits (State Sanitary Water Board, North Shore Sanitary District and Village of Gurnee) not being the same entity that has directed their termination, (Illinois Pollution Control Board,). It is arguable, however, that expenditures made in reliance on a previously issued permit gives the permittee a vested right in the permit without the need to invoke an estoppel doctrine. See Deer Park Civic Association v. City of Chicago 347 Ill. App. 346, 106 N.E. 2d 823 (1952). It is Mr. Kissel's contention that irrespective of constitutional or estoppel doctrines, the purchase of the property, the expenditures made in engineering, underground improvements and promotion and the construction and sale of the seven residences, constitute hardship of a magnitude sufficient to invoke the variance powers of this Board. In conceding that these elements if lost or unduly suspended, constitute hardship, the remaining question is what, if any, should the Board allow in variance of the March 31 Order, in consideration of the correlative prospective injury to the public welfare.

Mr. Currie, in his dissenting opinion, does not feel that the possible hardships on Petitioners in being suspended in their capability of improving and disposing of the subdivision, or the alleged risks of forfeiture of petitioners' expenditures, outweigh the injury that would result to the community if the variance is allowed. He suggests that petitioners investment is not lost but its income potential merely suspended, a hardship less severe than that likely to be suffered by the public at large if the variance is allowed. Mr. Currie quite correctly observes that this case cannot be considered in a vacuum, but will serve as a precedent for situations of a similar nature, and, in particular, where construction had been initiated prior to the effective date of the sewer ban.

It is this gradation of feeling within the Board and the magnitude of the problem that has motivated the Board to propose informational hearings on the vital subject of sewer bans throughout the state. Notwithstanding the profound implications of this decision and the pervasiveness of the problem, it is still necessary to 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. A person buying a tract of land with the view of subdivision development, who has made substantial expenditures not only in the land itself but in its improvement, and has violated no law, may reasonably assume that he will be entitled to continue with its development without interference from governmental authority. On the other hand, as Mr. Currie's dissent correctly demonstrates, no one has an absolute right to the use of his land free of prospective restraints that might be imposed if the public welfare so demands. A saloon keeper has no vested right in his permit in the face of the Prohibition Amendment. The owner of a vacant lot, zoned for industrial use, has no absolute immunity against a later governmental reclassification for single-family residences, if such change is demonstrably in furtherance of the public welfare. The burdens imposed on the land owner dictate only in part the propriety of the restraint as applied to him. One element of the instant case which is not clear from the transcript nor discussed at any length in either of the two dissents, is the status of the five improved lots that have been sold. Presumably, persons other than the applicants will suffer hardship if the sewer ban is invoked. We do not know if these homes were purchased for future speculation or immediate occupancy. It does appear evident, however, that persons have made substantial expenditures and investment in reliance on the ability to own and occupy five of the seven homes already constructed. While the certainty of forfeiture of the land because of petitioners' failure to complete the purchase has not been clearly demonstrated, its likelihood cannot be ignored. Nor can we be indifferent to the difficulty of repaying the $32,500.00 loan. We cannot speculate that this potential loss might be recouped by undertaking a new project elsewhere. It may well be that all that would result if we denied the permit would be a postponement of profit. However, the other side of the coin is the possible forfeiture of $70,000.00, which we feel would be unreasonable to impose on the petitioners in the context of the present case, notwithstanding that this decision may serve as a precedent available to all those similarly situated and recognizing that the lifting of our sewer ban, even in a limited manner, will have some undesirable attributed. Accordingly, it would

seem that if a line is to be drawn, it should be in favor of permitting the connection where the developers have fully improved the seven lots and at least five people have acted in reliance on not only their ability to sell, but the ability to occupy the homes and be the beneficiaries of the sewer connection allowance previously granted. There is no question that hardship results from the denial of sewer connection in any respect. The issue is, at this point, does the hardship become unreasonable so as to invoke the constitutional safeguards or the statutory protection inherent in the variation proceeding? It may well be that the Board will be constrained to adopt a position that would entitle sewer tie-ins in all circumstances where substantial investment and development predated the sewer ban. This we do not today decide. We do hold that with regard to the seven homes heretofore constructed, the hardship imposed on petitioners in being denied the right to connect the sewers from these structures, constitutes a hardship of the magnitude sufficient to justify the variation and that the likely detriment to the public is not of a severity to call for its denial.

This Opinion constitutes the findings of fact and conclusions of law of the Board.

I, Regina E. Ryan, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above Opinion on the 5th day of August, 1971.

Regina E. Ryan

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SUPPLEMENTAL OPINION OF THE BOARD (BY MR. LAWTON):

Our July 12 Order, entered in this proceeding, provided as follows:

> "Petitioner shall present to the Board within forty-five days from the date hereof a program for alternative sewer connections and facilities for the remaining lots in its subdivision, with the view of obviating the need for connection to the North Shore Sanitary District facilities, at which time the Board will enter such further order as is appropriate relative to the remaining nineteen lots owned by Petitioners. This program should specifically include an analysis of the possibility of discharging the effluent from a package treatment plant to an adjacent watercourse, together with the costs involved."

In compliance with the above provisions of the order, petitioners submitted a "Feasibility Study of Alternative Sewer Connections and Facilities". The substance of the report indicates that no suitable alternative sewer connections or facilities for the unimproved lots exist other than the connection with the North Shore Sanitary District facilities. The "Cavittet" individual home system unit contemplates disposal in storm sewers which facilities the Village of Gurnee does not possess. A sewage treatment plant for the entire subdivision built at the petitioners' expense would not be economically feasible and running a sewer main to the Des Plaines River would require the acquisition of easements, which petitioners did not believe they could acquire. The subdivision lot size precludes the use of septic systems. The absence of suitable alternative means compels the Board to adhere to its original position as set forth in the body of the Board's original Opinion entered in this case, and permit sewer tie-in to the facilities of the North Shore Sanitary District, only with regard to the improved and partially improved lots of the subdivision as pre-

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viously ordered and deny the variance as to the remaining lots.

This Opinion constitutes the findings of fact and conclusions of law of the Board.

I, Regina E. Ryan, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion was adopted by Mr. Lawton on ths 5th day of August, 1971.

Regina E. Ryan

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