ILLINOIS POLLUTION CONTROL BOARD
August 18, 1983

JAMES S. NOBLE, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 83-39

MR. JAMES K. YOUNG OF GIFFORD, DETUNE & GIFFORD, LTD., APPEARED ON BEHALF OF JAMES NOBLE;

MR. WAYNE L. WIEMERSLAGE, STAFF ATTORNEY, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and

MS. RITA ELSNER, VILLAGE ATTORNEY, APPEARED ON BEHALF OF THE VILLAGE OF LOMBARD.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon a March 18, 1983 petition for variance and an April 19, 1983 amended petition which was filed in response to a March 24, 1983 Board Order for additional information on behalf of James Noble. On June 9, 1983 the Illinois Environmental Protection Agency (Agency) filed a recommendation that variance be denied. Hearings were held on June 10 and 13, 1983 in Lombard. On June 15, 1983 Noble filed an objection and answer to the Agency recommendation. A motion to strike pleadings of the Agency was filed by Noble on July 13, 1983 to which the Agency responded on July 19, 1983. Noble argues that the Agency pleadings and recommendations should be stricken in that no technical information was submitted in support of the statements contained in those documents. That motion is denied in that the "Agency recommendation is simply a statement of the Agency's position" which Noble "has had an opportunity to rebut" (City of Marquette Heights v. IEPA, PCB 81-15, 44 PCB 27, November 5, 1981). Further, the burden of proof is upon Noble to prove his allegations; it is not upon the Agency to disprove them. However, the support for Agency allegations certainly affects the weight they will be given.

Noble requests variance from 35 Ill. Adm. Code 309.241(a) to enable him to proceed with the construction of 32 two-bedroom residential condominium units consisting of eight buildings

with four units per building. The project is to be constructed on 2.84 acres slightly east of Main Street and south of Hickory Street in Lombard. He cannot proceed at present in that the Village of Lombard's sewer system is on restricted status.

On March 19, 1981 the Board granted Noble a variance from old Rule 962(a) [now 35 Ill. Adm. Code 309.241(a)] to allow issuance of sewer construction and operation permits for a twenty-unit condominium building on the western portion of the parcel of land that is the subject of this proceeding (James Noble v. IEPA, PCB 80-215, 41 PCB 105). That variance, however, has not been used, apparently because such development was found to be "economically unsound" (R.30). Noble has instead developed the present 32-unit proposal.

ENVIRONMENTAL IMPACT

Sewage from Noble's proposed development would enter Lombard's 24-inch sanitary sewer line, which is tributary to a 30-inch combined sewer, and which in turn is tributary to a 54-inch combined sewer line. All these lines are currently on restricted status due to periodic surcharging. The 24-inch sanitary sewer runs west on Hickory Street to join the 30-inch combined sewer at the intersection of Hickory and Main Streets where there is an inlet that discharges storm water into the 30-inch combined sewer. A separate storm sewer runs parallel to the 24-inch sanitary sewer on Hickory Street fronting the proposed site. That storm sewer is tributary to a 48-inch storm sewer on Main Street.

Noble proposes an offset plan which he alleges will result in a net reduction in the rate of flows of the combined sewer and the storm sewer by diverting storm flow coming from the subject property away from the combined sewer and redirecting it to the 48-inch storm sewer. He believes he can also reduce the rate of flow of stormwater runoff to the storm sewer by use of detention and restrictors. Petitioner's Exhibit 7 indicates that the net result of his offset plan will be a decrease of flow rate to the 24-inch sanitary sewer of 2.07 cubic feet per second (cfs).

This plan is essentially the same as the plan presented in PCB 80-215 (see Ex. 7, Am. Pet.). Based upon a fifty-year intensity storm of 6.9 inches per hour (10 minute concentration) overall reduction of flows to the 24-inch combined sewer is calculated at 2.07 cfs (cubic feet per second) and 0.44 cfs to the 48-inch storm sewer based upon a fifty-year storm of 5.9 inches per hour (15 minute concentration). Thus, Noble argues that his project will result in an overall environmental benefit.

However, the Agency points out that a more realistic storm event should have been chosen, that while the rate of flow may be reduced, the quantity will be increased, and the quality of

flows would be changed through an increase in the concentration and amount of sewage. Further, the Agency questions whether the detention sites will capture the amount of runoff alleged.

The Board shares the Agency's concern regarding the use of a fifty-year storm. Certainly, surcharging in the Lombard area occurs on a much more frequent basis than that, and data based upon the minimum size storm that causes sewer backups would have been much more relevant than the data presented. The record does indicate that calculations were made of a five-year intensity storm as well. The specific data is not presented, but Albert Kinsey, a registered professional engineer who is president of a consulting firm involved in sanitary and civil engineering, testified that "the outcome still shows that there is a decrease in the sanitary sewer at Hickory and Main," although "there would be a slight increase in the storm sewer flow" (R. 69). At a rainfall intensity of an eighth of an inch per hour there would be an overall increase in the flow to the combined sewer, although Mr. Kinsey pointed out that there would not be any flooding under those conditions.

It appears safe to assume that surcharging occurs at a rainfall intensity of somewhere between a five-year storm and an eighth of an inch per hour. Unfortunately, no assessment of the environmental impact is presented at such levels. However, it is clearly true that there will be an increase in the quantity of storm flow due to an increase in impervious surface area caused by the buildings and pavement proposed. Further, the sewage component of the combined sewer flow will be increased by the addition of 96 Population Equivalents to the sewer line. Additionally, Noble's engineering data concerning the decrease in flow to the 48-inch storm sewer appears to be based upon the assumption that all currently unrestricted runoff flows from the property will be captured by the detention basins (see Pet., Ex. A, May 19, 1983). An inspection of Agency Exhibit H does not appear to confirm that assumption in that much of the 40% of the site area which is not open space appears to drain to the sewers rather than to detention areas. The record fails to explain how complete capture is to be accomplished and, if it is not, what the actual capture would be.

The Board also notes that much of the alleged reduction of flows is premised upon the disconnection of a storm water inlet from the combined sewer, an action which could seemingly be accomplished by Lombard regardless of the granting of this variance. While there may well be an economic advantage (especially to Lombard) to having this change made during Noble's site construction, it does not necessarily represent an environmental benefit which would flow from the grant of this variance. At the time of the initial variance, it seemed that the disconnection might also have been accomplished more expeditiously if made a condition of variance, but that has not been the case.

For all of the above reasons, the Board finds that the record is insufficient to form a conclusion as to the specific environmental impact. The environmental benefit, if any, is highly speculative and may be more than offset by the adverse effects that have been noted above.

HARDSHIP

In PCB 80-215, the Board noted that "Noble appears to have already spent approximately $10,000 in architects and engineers fees and related expenses (incurring "verbal obligations" for $12,000 more), as well as obligations for $18,000 in attorneys fees relative to the zoning matters." The Board also concluded "that most, if not all of his obligations were incurred before imposition of the sewer ban."

In the present proceeding Noble realleges that hardship claimed in PCB 80-215 in addition to "additional obligations and expenditures incurred for the 32 unit development... [which] have all been incurred since July 16, 1980." These expenditures, which include monies spent "for reduction and part payment of land purchase," application fees, architectural fees, engineering fees, and related expenses (Pet. Ex. 6), must be considered as self-imposed hardship in that they were all incurred well after the imposition of restricted status.

Thus, the only hardship which can be considered relevant to the present variance request is that hardship which the Board found in PCB 80-215 to the extent that it remains applicable. The Board agrees with Noble that this second variance request should be treated as though it were an initial petition. That being so, only that part of the hardship found in PCB 80-215 which is directly related to the present request remains relevant. Unfortunately, Noble has not broken down the expenses in that fashion.

Certainly, some, if not most, of the architectural and engineering expenses would relate solely to the formerly proposed 20-unit project and are not relevant to the present variance request. It may also be that some of the attorney's fees would apply only to the former proposal. Therefore, all that the Board can find regarding hardship is that the hardship is substantially less than that found in PCB 80-215.

BOARD ACTION

In determining whether variance should be granted, the Board balances the hardship which would be imposed by denial of the variance against the environmental harm which would result from its granting. Thus, in this case the Board is faced with the task of balancing a poorly supported environmental benefit,

or detriment, against an economic hardship to Noble of an undetermined amount less than $30,000. If the record contained adequate support for the proposition that there would in fact be a substantial environmental benefit and if the hardship were more clearly documented, the Board would be in a position to consider granting the variance. However, based upon the possible range of environmental impact and hardship, the Board cannot determine that variance should be granted. The record is simply insufficient, and since Sections 35(a) and 37(a) of the Environmental Protection Act place the burden of proof upon the variance petitioner to ensure that the record contains "adequate proof" that compliance would impose an arbitrary or unreasonable hardship, variance must be denied.

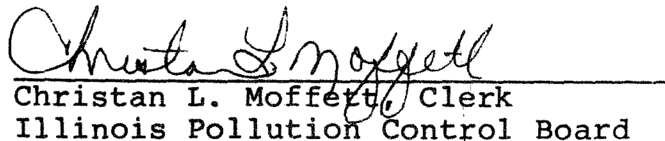
This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

James S. Noble is hereby denied variance from 35 Ill. Adm. Code 309.241(a) for his proposed 32-unit residential development in Lombard.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Order was adopted on the 18th day of August, 1983 by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board