

ILLINOIS POLLUTION CONTROL BOARD
May 3, 1984

ORCHARD HILL BUILDING COMPANY,)
)
Petitioner,)
)
v.) PCB 84-10
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY)
and COUNTY OF DUPAGE,)
)
Respondents.)

MR. RICHARD W. COSBY (DOZORYST, COSBY & BRUSTEIN) APPEARED ON BEHALF OF THE ORCHARD HILL BUILDING COMPANY;

MS. MARY E. DRAKE (ATTORNEY-AT-LAW) APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

MR. ALVIN G. SCHUERING (ATTORNEY-AT-LAW) APPEARED ON BEHALF OF THE COUNTY OF DUPAGE.

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

This matter comes before the Board upon a January 23, 1984 petition and a February 1, 1984 amended petition for variance filed on behalf of Orchard Hill Building Company. The Illinois Environmental Protection Agency (Agency) filed a recommendation on March 2, 1984 that variance be denied. A hearing was held on March 27, 1984 at which all of the parties appeared. On April 12, 1984 Orchard Hill filed a closing statement and the Agency filed an amended recommendation that variance be granted subject to certain conditions.

Orchard Hill requests variance from 35 Ill. Adm. Code 309.241(a) in order that it may improve two tracts of land for single family residences in an area bounded by the Stevenson Expressway, Woodward Avenue, 63rd Street and Clarendon Hills Road, in unincorporated DuPage County, despite the imposition of restricted status. The proposed development consists of two parcels of unimproved land: the Ide farm which consists of 74.85 acres and the Birdsong farm which consists of 59.5 acres. Orchard Hill proposes to construct approximately 200 single

family residences on the Ide farm parcel and 169 single family residences on the Birdsong farm parcel. The proposed residences will house approximately 1292 people and the estimated discharge will be 1292 PE (population equivalents). Both parcels are in an area now served by the Farmingdale Sewage Treatment Plant. However, due to the decision of the Circuit Court in People v. County of DuPage, 80 MR 432, and the plans of the DuPage County Department of Public Works, any flows resulting from the development of the two parcels will eventually be tributary to the Marionbrook and the Knollwood Sewage Treatment Plants.

The area of the proposed development is served by the Farmingdale Village, Marionbrook and Knollwood Interim Sewage Treatment Plants. In addition, the DuPage County Department of Public Works will construct the Knollwood Permanent Sewage Treatment Plant serve the area.

The Farmingdale facility is a 0.25 mgd sewage treatment plant which is located on Woodward Avenue, one half mile south of 87th Street in Downers Grove Township, and which discharges to Lily Cache Creek. On April 19, 1978, the plant was placed on Critical Review by the Agency since it can only accept an additional flow of 62 PE.

The Marionbrook facility is designed to treat an average flow of 5 mgd and a maximum flow of 11 mgd. The plant is located at 17 W 440 North Frontage Road in Darien and discharges into the west branch of Sawmill Creek which is tributary to the Des Plaines River. The facility was placed on Restricted Status by the Agency on April 30, 1979.

The Knollwood Interim facility is a 0.25 mgd package plant located east of Madison Street, west of County Line Road, south of the Atchison, Topeka and Santa Fe Railroad right of way, and north of the Des Plaines River in unincorporated DuPage County. The plant is not presently in use due to insufficient hydraulic loading. When in operation, the plant will discharge to the Des Plaines River.

The Knollwood Permanent facility will be a 7 mgd plant located adjacent to the Knollwood Interim facility and will discharge into the Des Plaines River. Grants for funding the facility have been received, and on January 9, 1984, engineering plans were let out for bid. The Knollwood Permanent facility is expected to be operational by the summer of 1986.

The DuPage County Department of Public Works has initiated two projects to reduce hydraulic loading to the Farmingdale and Marionbrook facilities which will result in the transfer of sewage from the area served by the Farmingdale facility first to the Marionbrook facility and then to the Knollwood Interim facility. The first project, which commenced on January 11, 1984, is to

build an interceptor sewer from the Farmingdale facility to a 36" main which joins the Marionbrook facility and which will divert all flows exceeding 250,000 gallons per day to the Marionbrook facility. Flows generated by the development proposed by Orchard Hill will be diverted to the Marionbrook facility. The second project, which commenced about January 3, 1984, is the Knollwood East interceptor sewer which will allow flow to the Marionbrook facility to be diverted to the Knollwood Interim facility. Both interceptors are scheduled to be completed by December of 1984, but are anticipated to be completed somewhat earlier.

The Farmingdale, Marionbrook, Knollwood Interim and Knollwood Permanent facilities are subject to orders of the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, (People of the State of Illinois v. County of DuPage, 80 MR 432). In its orders of December 8, 1980 and April 14, 1982, the Court imposed certain effluent limitations on the Farmingdale and Marionbrook facilities (20 mg/1 of biochemical oxygen demand (BOD) on a 30-day average and 25 mg/1 total suspended solids (TSS) on a 30-day average), directed that flows from the area served by the Marionbrook facility be diverted to the Knollwood Interim facility, set a schedule for the construction of the Knollwood Permanent facility and required that once the Knollwood Permanent facility was operating, all interim package treatment plants in the area, including the Farmingdale facility, be abandoned. The April 4, 1982, amended order of the Court provides that those who are required to obtain Agency permits and did not hold such permits as of December 4, 1980, must obtain a variance from this Board allowing the Agency to issue a sewer permit. In addition, new connection requests may be filled only to the extent that PE are earned under the Court approved allocation system and are off-loaded from the Marionbrook facility to the Knollwood Interim facility. When the Knollwood East interceptor is completed, 1800 PE can be off-loaded to the Knollwood Interim facility. Pursuant to the Court's order, the County will be credited with 90% of the 1800 PE or 1620 PE.

In order to determine whether Orchard Hill has adequately demonstrated that denial of variance would impose an arbitrary or unreasonable hardship upon it, the Board must examine the purchase of the subject party as well as Orchard Hill's expenses in attempting to develop that property.

Orchard Hill purchased the Ide farm in June of 1973 for \$785,925 and purchased the Birdsong farm in August of 1976 for \$575,000. Within a month of purchasing the Ide farm, Orchard Hill entered into what was to be the first of a series of Sewer Service Agreements with DuPage County in an attempt to secure sewage treatment for flows generated by its development.

The first of the Agreements required Orchard Hill to provide temporary sewage treatment facilities to serve certain areas being developed by the builder. The agreement also required that Orchard Hill pay tap-on fees for each residence built to be placed in escrow for use by the County in financing the construction of the 83rd Street Trunk Sewer. The County agreed to construct the trunk sewer line within four years of the date of the Sewer Service Agreement to tie the areas to be served by the temporary sewage treatment facility to the County's sewage treatment system. The County also proposed that the area be served by the Woodridge Sewage treatment plant.

In accordance with that agreement, Orchard Hill built a temporary sewage treatment facility known as the Farmingdale facility and paid monies into an escrow for each residence constructed. However, the County did not begin construction of the 83rd Street Trunk Sewer within the four years provided by the agreement and on September 7, 1977, the County and Orchard Hill amended the 1973 agreement to give the County until July 5, 1980 to build the trunk sewer. Less than two years later, the agreement was again amended to require the County to construct necessary sewers to phase out the temporary Farmingdale facility by July 5, 1984. Orchard Hill was allowed, assuming an Agency permit could be obtained, to expand the Farmingdale facility from 2,500 PE to 3,985 PE at its own expense by moving certain equipment to the plant from County's Benedale Green plant.

Finally, on December 9, 1980, in a third amendment, the County required that effluent from the Farmingdale facility be sent to Marionbrook, thus abandoning its plans to direct flows from the Farmingdale facility to the Woodridge Sewage Treatment Plant. The County agreed to allow Orchard Hill to rehabilitate and expand the Farmingdale facility by 2,000 PE using the escrow funds. Finally, the County agreed to construct an interceptor sewer to the Marionbrook facility.

The evidence establishes the long-standing and on-going nature of Orchard Hills development project of which the Ide and Birdsong farm parcels are only a part. Orchard Hill began acquiring land for development in April of 1969 and continued purchases through November of 1978 (Pet. Ex. 1, p.2). The Farmington Village development began in 1974 with the construction of 200 homes (R.9, 10 and 39). The land for the overall proposed development consists of approximately 1200 acres which was purchased for \$7.8 million (R.8-10 and Pet. Ex. 1). That Orchard Hill's intent from the inception of the project was to develop the entire acreage is supported by Orchard Hill's construction of the 0.25 mgd sewage treatment plant and the Farmingdale Utility Company which was sized to service 4,000 users, the projected number of residents on the completed development (R. 9-12 and Pet. Ex. 5). While a 0.25 mgd sewage treatment plant is much too small to support 4,000 residents, Robert Gallagher, one of the owners of

Orchard Hill, testified that Orchard Hill did not construct a larger plant because the County had told him that the 83rd Street trunk sewer would be completed by 1976, obviating the need for larger capacity (R.12). Later, when Orchard Hill sought to expand the plant in 1979 by transferring a 100,000 gpd temporary package plant to the Farmingdale site at a cost of \$60,000, the Agency would not permit its use since they refused to permit any more plants under 0.25 mgd (R.14-15). Then, when Orchard Hill later obtained permits at a cost of \$47,000 to enlarge the plant, the County refused to allow it "because they thought the trunk line and the . . . expansion of the Knollwood plant would occur sooner than it has" (R.16-17).

Additional hardship is shown through Orchard Hill's continuing financial loss on the water utility. While operating at a small percentage of its capacity (450 residences out of a potential 4,000) as it is forced to do at present due to Restricted Status, the Utility suffers a substantial operating deficit (Pet. Ex's. 5, 6 and 7). Gallagher and Henry (the owners of Orchard Hill) are obligated to reimburse the utility annually for its operating deficits. Contributions are nonreimbursable and the utility is under no obligation to repay the contribution so long as it is operating at a deficit. Aggregate contributions to the utility equaled \$918,671.00 through December 31, 1983 (R.24-25 and Pet. Exs. 5-7).

Orchard Hill's inability to complete purchase of a portion of the total land purchase (the Zarn property) presents an additional hardship caused by the imposition of restricted status. Unable to develop the property or other properties tributary to the Marionbrook plant because of the inability to connect, the Company could not afford to continue the remaining installments. Consequently it was forced to discontinue payment of the last four \$100,000 installments and to forfeit the contract after having paid \$900,000 (69% of the purchase price) and having received only 38 acres (53% of the acres contracted) (Pet. Exs. 3 and 4).

The Agency asserts and the Board finds that Orchard Hill, as part of a large development project including the construction of a wastewater treatment plant and a water utility, began acquiring land in 1969 and commenced construction on the Farmingdale Village home sites in 1974. That project was interrupted by Restricted Status in 1979, and since that time Orchard Hill has attempted to maintain its position while waiting for Restricted Status to be lifted such that development could continue. Mr. Gallagher testified that in order to avoid loss of the entire project, development must occur very soon (R.27 and Pet. Ex. 1). The Company is willing to release escrow funds to be used for an environmental improvement program which should result in a net reduction of environmental harm if development activity commences under the requested variance.

Orchard Hill asserts that the escrow funds would be better spent on an environmental improvement program, which was described at hearing, rather than on the enlargement of the Farmingdale Plant. The Board finds that in view of the court order requiring the eventual dismantling of that plant, enlargement would not be the best use of available funds (Pet. Ex. 12, Par. 6). The Board also agrees with Orchard Hill that the environmental improvement program as testified to by Mr. Gallagher and Mr. Wilcox would result in a net reduction of environmental harm (R.28, 50-59 and 92-94). That program would involve the following:

1. Purchase, installation and operation of submersible aerators at the Farmingdale Plant which could also be used at other locations after dismantling of that plant, and which should result in improved effluent quality;
2. Purchase, installation and operation of a chlorinator at the Farmingdale Plant which could also be used at other locations after dismantling of that plant, and which should result in improved effluent quality;
3. Purchase, installation and operation of pumps at the lift station immediately upstream of the Marionbrook Plant of such capacity as to eliminate, or substantially reduce, surcharging of the sanitary sewers tributary to the Marionbrook Plant; and
4. Continuation and expansion of the inflow and infiltration study of sanitary sewers tributary to the Marionbrook plant.

The Board finds that the adverse environmental impact which would result from the granting of the requested variance would be minimal. Orchard Hill cannot connect any new residences built on the Ide and Birdsong properties to sewers tributary to the Marionbrook Plant until the Knollwood East interceptor is completed which will allow the off-loading of 180,000 gallons per day. Further, Mr. Gallagher testified that the first residences will not be connected to the sewer system until February, 1985, and the final residences will not be connected until October, 1986, several months after the projected completion date of the Knollwood permanent plant (R.29 and Pet. Ex. 8). Thus, the adverse impact should be minimal. Finally, the Board has every expectation that the escrow funds will be used for environmentally beneficial purposes in accordance with the environmental program which is set out above, and to which Orchard Hills has agreed. However, the Board understands that those funds cannot be used without County approval and will not order that the funds be so used. While the Board strongly urges that the funds be expended in accordance with the program, the failure to do so would not negate the Board's finding of arbitrary or unreasonable hardship.

The Board, therefore, concludes that Orchard Hill has demonstrated an arbitrary or unreasonable hardship and that it should be granted variance from 35 Ill. Adm. Code 309.241(a). However, to assure the minimum of environmental harm, the Board will condition the variance upon the installation of water saving devices to minimize discharge flows.

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

ORDER

Orchard Hill Building Company is hereby granted variance from 35 Ill. Adm. Code 309.241(a) to allow the Agency to issue construction and operating permits for the connection of single family homes on property presently owned by Orchard Hill known as the Ide and Birdsong farms in unincorporated DuPage County to the Farmingdale-Marionbrook-Knollwood sewer system, subject to the following conditions:

1. Water saving faucets and water saving shower heads shall be installed in all units built pursuant to this variance.
2. Water-saving toilets, water dams or similar water conservation devices shall be installed in all units built pursuant to this variance.
3. Within forty-five days from the date of this Order, Orchard Hill shall execute and forward to the Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706, a Certificate of Acceptance and Agreement to be bound to all terms and conditions of this variance. This forty-five day period shall be held in abeyance for any period this matter is being appealed. The form of the certificate shall be as follows:

CERTIFICATE

I, (We), Orchard Hill Building Company, having read the Order of the Illinois Pollution Control Board in PCB 84-10, dated May 3, 1984, understand and accept the said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

Petitioner

By: Authorized Agent

Title

Date

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 3RD day of May, 1984 by a vote of 6-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board