

ILLINOIS POLLUTION CONTROL BOARD
September 3, 1981

H.J. BERGMAN BUILDERS, INC.,)
and THE CITY OF PONTIAC,)
)
) Petitioners,)
)
) v.) PCB 81-67
)
) ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)

CHARLES W. KOHR, MATHIS, SLOAN, LITTLER & KOHR, APPEARED ON BEHALF OF PETITIONER BERGMAN,

BRUCE L. CARLSON APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on the petition for variance filed April 29, 1981 by H.J. Bergman Builders, Inc. (Bergman). On May 1, 1981 the Board ordered joinder of the City of Pontiac (City); on May 14, 1981 Bergman filed an amended petition verifying service of process on the City pursuant to Procedural Rule 305(a). On June 15, 1981 the Illinois Environmental Protection Agency (Agency) recommended that variance be denied. The hearing requested by Bergman was held July 23, 1981.

Bergman petitions for variance from Sections 12(b) and 39(a) of the Environmental Protection Act and Rule 962(a) of Chapter 3: Water Pollution in order to obtain permits to construct and operate a sewer extension to serve a proposed Farmers Home Administration (FmHA) funded 16 unit multi-family rural rental housing project to be constructed in Pontiac, Illinois. The City was joined as a necessary party, as the owner of the sewage treatment plant to which the sewer is tributary. The expected additional P.E. loading to the City's North Street sewer and its plant is 36 P.E. from the proposed 2 buildings, each containing 4 one bedroom and 4 two bedroom apartments.

Although petitioners did not provide the Board with hearing transcripts until September 1, 1981, this action is being given expedited consideration in view of the fact that the Board's decision will determine whether Bergman receives \$510,000 in FmHA funding, obligation of which must be finally approved before the close this month of the current federal fiscal year. As the balance of equities in a variance petition of this sort

is dependent on the timing of events, initially a "bare-bones" chronological approach will be taken toward the presentation of facts.

CHRONOLOGY OF EVENTS

Bergman is a specialist in FmHA construction and has participated in some 60 to 70 such projects (R. 17-20). Beginning in January, 1979, it initiated FmHA-required housing market studies in Pontiac. Receiving FmHA approval of need, Bergman proceeded to select a site and in September, 1979 petitioned the City Council for a special use permit for that site (Pet. 7). Although the original site is not the subject of this petition, as Bergman's option lapsed before the site could be purchased, the subject is germane.

On February 23, 1979 the Pontiac sewage treatment plant was notified it might be placed on the Agency's critical review list because it had reached 95% of its hydraulic load capacity of 21,300 P.E. It was in fact placed on critical review April 6, 1979 (Resp. Ex. 3). Rule 604(a) of Chapter 3 requires that a treatment plant owner notify individuals requesting connections that the plant has been placed on critical review or restricted status. [This individual notice is required by Rule 604(a) to be published by the Agency.] Bergman was not informed by the City of critical review status at that time, or in September, 1979.

In March, 1980 the current site was proposed to FmHA for its approval, the property optioned and monies deposited (Pet. 7). The Agency's March 31, 1980 quarterly Critical Review List, of which Bergman was unaware, listed Pontiac as having zero remaining hydraulic capacity (Rec. 5, Resp. Ex. 7). In May, 1980 final site and building plans and an application for financing were submitted to FmHA (Pet. 7).

It should be noted that in May, 1980 the Board rendered a decision on a Bergman petition for variance concerning another FmHA financed project, H.J. Bergman Builders Inc. v. IEPA, PCB 79-264 (May 1, 1980). In that action, the Board granted variance to allow connection of a 32-unit project to the sewage treatment plant of the City on Monmouth, which was on critical review status at the time Bergman's permit application was denied, and which soon after was placed on restricted status.

Bergman first learned of problems concerning the Pontiac plant at a City Council meeting in December, 1980 (R. 72), at which an enforcement action against Pontiac apparently was discussed, IEPA v. City of Pontiac, PCB 78-124 (December 18, 1980). In that case, the City stipulated to several violations, including failure to meet the BOD₅ and TSS limitations of the Board's Rules. A detailed compliance plan was stipulated to and

accepted by the Board. At hearing, Bergman's treasurer Eugene T. Couglon, testified that "I don't recall...[that] prior to that December council meeting, did it ever come up that we needed a permit" (R. 73).

Bergman states in its petition and testimony that it had been acting in reliance on a sewer permit previously issued to the developer of the "Illini Subdivision" in which Bergman's proposed and optioned site is located. This developer, Pontiac Held Corp., was issued a two-year permit allowing sewer connections for 39 P.E. on May 10, 1979. (This permit lapsed in May, 1981 without being used.) Plans and specifications submitted in connection with this lot show that the sewer extension was to serve lots 135, 136, 137, and 138, although the permit does not so state on its face. As Bergman's project has an estimated loading of only 36 P.E., if the permit were transferable, no problem would have occurred. Bergman's optioned site does not, however, contain these four lots, and the permit is not transferable. In addition, Bergman's optioned site would discharge into a sewer line different than the line into which Lots 135-138 would discharge (Resp. Ex. 2, R. 200-215).

In either February or March, 1981 FmHA "obligated" approximately \$510,000 in loan funds for the Bergman project. On February 5, 1981 the Agency received Bergman's application for sewer permits. On March 6, 1981, the Agency issued a "Notice of Impending Restricted Status" to the City, citing 1) that the plant was not meeting the BOD₅ and TSS loadings established in PCB 78-214, 2) the plant was receiving BOD₅ loadings of 17,280 P.E., and organic load in excess of its design capacity of 16,000 P.E., and 3) the critical review status because of hydraulic capacity imposed April 6, 1979 (Resp. Ex. 3). On March 23, 1981 Bergman's permit was denied by the Agency. The reasons for denial listed in the letter essentially restate the reasons listed above (Pet. Ex. D).

BERGMAN'S HARDSHIP

Economic Effect

In support of its allegation that denial of variance would impose an arbitrary or unreasonable hardship, Bergman makes several arguments. It is uncontroverted that if Bergman is not allowed to connect to the City's sewer system, it will be ineligible for the \$510,000 FmHA loan, since FmHA policy requires connection to any existing community sewer system. While this alone would be insufficient to support a grant of variance (Bergman, supra, at 2), it is also Bergman's unchallenged testimony that this FmHA project is "all we have projected for the year of 1981, from here on in" (R. 26). Bergman's "field people" have been laid off since approximately June, 1981, waiting to begin work on the Pontiac project. While Bergman has submitted other project applications

to FmHA, President Herbert J. Bergman stated that it is FmHA belief that "none of them will be funded at all before some time in 1982" -- dependent of course on the level of funding FmHA itself receives in the new federal fiscal year. The effect of variance denial on the company was described simply as "devastating".

In addition to loss of future funds, Bergman states that it has to date spent upwards of \$28,500 pursuing the Pontiac project (\$4500 site selection, \$8900 market studies administrative, \$10,000 architectural/site plans 4,000, legal fees \$1,000, building permit, and other unquantified) (Pet. 8, R. 24, 25). While Bergman does not explicitly state when most of these expenditures were made, he believes that all were made in reasonable reliance on information available to him.

Reasonable Reliance

Bergman believes that his reliance on the Pontiac Held permit was reasonable, based on the developer's own assertions that adequate P.E. had been "reserved" for the subdivision and therefore the project. When made aware of the critical review status of the City's plant, he relied on the City's opinion that the plant had or soon would have capacity to accept his effluent, as would the sewers.

Bergman called David L. Sullivan, superintendent of the City's treatment plant, as a witness in support of its position. Mr. Sullivan explained that it was his opinion that in April, 1979 when critical review began, that the plant was in fact hydraulically and organically "right at the design limitations" (R. 98). The hydraulic and organic overloads were attributed in part to the largely anticipated continuing large volume and nature of the effluent received by the City from Interlake Steel, as well as the largely unanticipated increase in the volume and concentration of the effluent received from the Pontiac Correctional Center. Since 1979, however, the City has been negotiating with both entities to achieve hydraulic and organic reductions in their effluent. Discharge Monitoring Reports submitted by the City to the Agency for the months February, 1980 to February, 1981 bear out Mr. Sullivan's opinion that these and other efforts to improve plant loading and performance were in part successful; during this period, the actual hydraulic loading was 1.43 million gallons per day (mgd), or 65% of the 2.3 mgd design capacity. However, the BOD₅ loading was 16,694 P.E. or 104% of the 16,000 P.E. design capacity, while the SS loading was 15,260 P.E. or 95% of the 16,000 P.E. design (Resp. Ex. 6). The City is actively pursuing upgrading of the facility through the Construction Grants Program. In July, 1981, the Agency issued a permit for "interim" improvements to increase the plant's organic capacity to 23,000 P.E. This project would be completed approximately one year from its initiation. The date is uncertain, however, as it is contingent on receipt of state funding (the status of which was not explained). (R. 99, 103)

Mr. Sullivan also testified that there were in fact problems with the City's sewer and drainage systems. The North Street combined sewer, to which Bergman's effluent would be tributary, has overflow problems which would not be addressed by the interim plan (R. 102-103). The North Street sewer "is a tremendously large interceptor sewer that has been prone to flooding" in part from rise in levels of the Vermillion River. It is believed that this sewer, which is a 2' X 3' elliptical brick sewer built circa 1890, overflows because of one or more major blockages. The existence of blockages is surmised from observation that past a certain section containing 4 railroad crossings the sewer flows only half full, when after 1½ inches of rain sewers tributary to it are surcharging (R. 115-116). In addition to routine cleaning, the City anticipates investigating the sewer for blockages with the possibility of making extensive repairs. There is no projected time schedule or stated funding source for North Street sewer work (R. 95-97).

Bergman does not address the sewer problem in detail, arguing only that the proposed 36 P.E. addition to the sewer will have minimal additional effect. Bergman strongly argues that his reliance on probable sewer capacity was rendered even more reasonable by permitting decisions made by the Agency during the critical review period.

Since April, 1979 the Agency has issued permits allowing 1705 P.E. to be added to the Pontiac plant--including the permit issued to Pontiac Held. A permit to add 1,000 of these P.E. was issued to one facility, Caterpillar Tractor Co., on July 22, 1980, after the Agency had listed capacity in March, 1980 at zero. While Bergman himself was unaware of and never requested the Agency's critical review lists, lists during this period did not reflect permits issued as they should have been consistent with Agency practice. Which, if any, of these permits may have lapsed without use as did Pontiac Held's, and which have been used and sewers connected, is not contained in the Agency's files (R. 154-155). Based on these facts, Bergman essentially argues that it is inequitable to deny it a permit to add .2% to the plant's total load during the same critical review period in which one permit alone added 6% to the total.

Housing Need

Finally, Bergman argues that variance denial would impose a hardship on the City, which has FmHA determined need for housing in the size and income range to be provided by Bergman's project. Seth Marvin, manager of an FmHA project near Bergman's site, verified that his experience was that the demand particularly for one bedroom units far exceeded the supply (R. 6-16). The City itself did not address this hardship argument made in its behalf.

THE AGENCY'S ENVIRONMENTAL ASSESSMENT

Plant Effluent and Receiving Stream Quality

Stephen E. Baldwin, an Agency Environmental Protection Specialist, testified as to his observations concerning the plant's discharge and the Vermilion River during an inspection on January 27, 1981. Upstream of a discharge point, no sign of degradation was observed. The effluent discharged from the plant contained "a substantial quantity of tiny suspended solid particles, and ...moderate turbidity". Downstream of the discharge, unnatural "black colored septic smelling bottom deposits" were observed. These same conditions, as well as a gray colored slime growth or sewage mold and minor localized foaming, were observed a year before on February 13-14, 1980 (R. 128-129).

In addition to discharging treated effluent, the City also can discharge untreated combined sewer overflow into the river at two discharge points north of the plant (R. 126-127). It can be inferred that during the wet months when plant hydraulic overload has been measured to have occurred (Resp. Ex. 5), that such untreated overflow is directly discharged into the river. It is the Agency's position that aggravation of the river pollution problem by the permitting of Bergman's project should not be allowed.

Sewer problems

Much of the Agency's case at hearing related to the condition of the City's sewers and problems related thereto. In the City of Pontiac Facilities Planning Report, Wastewater Treatment Plant Expansion-Phase II, the City's consulting engineers reported that

"During dry weather there are no known problems in the City attributable to infiltration. Some sewer backups do occur in dry weather but is usually due to collapsed or root-bound service lines. During storms, basements flood in ten to fifty percent of the City depending upon the Vermilion River water level. The major bottleneck to drainage of the north areas during wet weather is the [North Street] 2' X 3' elliptical trunk which flows at full capacity even during small storms, backing up sewers in tributary areas. In the northeast subdivision (shown on Figure 3-1 as area A) [Resp. Ex. 1A] there is evidence that footing drain discharge is causing backup of sanitary sewers during wet weather. More work needs to be done to determine extent of the connections and identify means of relief (Res. Ex. 1, p. 3-5, 6). Bergman's project is tributary to the North Street sewer, and is within the area within which backups occur.

Agency files contain 1980 reports of complaints concerning flooding, draining, and basement backups incidents (R. 146-147). The effects of such incidents were graphically described in the testimony of Mrs. Betty Jane Pouliot, a long term resident of Pontiac and alderman of Pontiac's 1st Ward for the past six years. In addition to personally observing sewer problems, Mrs. Pouliot is the recipient of complaints from her constituents. Mrs. Pouliot has personally observed two manholes on or near North Street whose covers blow off "everytime there is an inch of rain". Of a cover located at North and Walnut, Mrs. Pouliot states "Now, I haven't seen it as high as they tell me it goes. I've only seen it about three feet into the air." When the covers lift, "raw sewerage (sic) spills out into the street onto the berm", and even flowed into a neighboring park. Heavier covers have not been installed because "this will force the sewerage back into the homes. And there have been cases of even floors buckling because of the sewerage underneath the homes." Mrs. Pouliot stated that the relatively recent installation of storm sewers and initiation of sewer maintenance programs have not solved these problems, which have occurred as recently as July, 1981.

The Agency believes that addition of any loading to the sewer could increase the frequency or duration of surcharge events, even if minimally. The presence of sewage and sewage related debris is said to pose a serious threat to public health and safety, as well as being a nuisance. The Agency therefore urges the Board to deny the requested variance.

BALANCE OF EQUITIES

As in many of the Board's recent Rule 962(a) variance cases, the facts as presented show that many parties have mishandled environmentally unsound situations for years at a stretch. While the City would seem to be making progress in handling the problems of its plant, it is remiss in failing to notify Bergman of its critical review status in April, 1979. While placement of a treatment plant on critical review status does not in itself preclude Agency issuance of additional connection permits, the Board seriously questions the soundness of some of the Agency's permitting decisions, particularly those that allowed additional P.E. to be added to the load on Pontiac's plant after the Agency listed remaining plant capacity at zero. Failure to include the fact of issuance of such permits on the critical review list is also questionable, as it frustrates the purpose of such lists, which is to keep interested parties as "up to the minute" as possible concerning a problem plant.

However, these omissions do not serve to exculpate Bergman's failure to investigate the status of the City's plant and sewer system. While the Board might consider such failure reasonable prior to 1980, it is the Board's opinion that a reasonable person who had encountered problems concerning sewer permits on one

project, would take all steps necessary to ensure that no such unwelcome surprises would occur during the course of a later project. The PCB 79-264 petition to allow connection of the Monmouth project was filed December 13, 1979 and decided May 1, 1980. It was in March, 1980 that Bergman applied for FmHA funding for this project without having checked with the Agency concerning permit needs and possible problems. It was a full year later before Bergman contacted the Agency. Bergman states in his petition that it is now too late in the design and funding process to redesign his project to fall into Rule 951(b)(2) of Chapter 3, which provides that permits are not required for single buildings discharging 1500 gpd or less (Pet. 6). Had earlier attention been paid to the permit question, design changes may have been possible. While early reliance on the Pontiac Held permit was certainly understandable, failure to confirm transferability with the Agency ceased to be reasonable after May 1, 1980 if not before. While loss of FmHA funding will have considerable adverse effect on Bergman, the Board reminds Bergman that it was warned that "denial of federal funding or lack of other access to funding does not constitute an arbitrary or unreasonable hardship, especially where a project is a proposed one." Bergman, supra, at 2. The Board finds that Bergman's economic hardship is largely of its own making, and can be afforded little weight.

The weight given to the allegations of potential hardship to the City's middle-income residents and would be residents is over-balanced by the actual hardship which has been and will continue to be imposed on residents experiencing the health threats and nuisance of sewage backup. Denial of variance to Bergman certainly will not stop North Street sewer back-ups, or clean up the Vermilion River. It is also the case that Bergman's proposed additional loading is not in and of itself great, but the hydraulic and organic loadings will aggravate existing problems even if minimally, an occurrence which the Board does not favor [City of Assumption v. IEPA, PCB 80-223 (February 19, 1981) at 2]. As to the increase to the plant itself, the Board continues to conclude that while the additional flow expected from [the project] may appear small in relation to the total flow handled by theplant, "lines must be drawn somewhere even though such successive increase in the load in a sewer may have minimal effect (Springfield Marine Bank v. Pollution Control Board (1975), 27 Ill.App.ed 582, 327 N.E.2d 486, 491)." Willowbrook Development Corporation v. Illinois Protection Agency (1981), 92 Ill.App.3d 1074, 416 N.E.2d 385, 392.

Variance from Rule 962(a) is therefore denied for failure to prove existence of an arbitrary or unreasonable hardship and, certainly, as balanced against the water pollution situation in Pontiac.

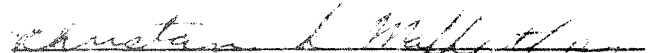
ORDER

Variance from Rule 962(a) of Chapter 3: Water Pollution to allow issuance of a permit to construct and operate sewers to service 8 proposed apartment units to be constructed in Pontiac, Illinois is hereby denied.

IT IS SO ORDERED.

J. Dumelle concurred.

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 September, 1981 by a vote of 5-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board