

ILLINOIS POLLUTION CONTROL BOARD
September 15, 1982

UTE WILLUTZKI,)
)
 Complainant,)
)
 v.) PCB 81-136
)
 VILLAGE OF LOMBARD and JAMES S. NOBLE,)
)
 Respondents.)

MS. UTE WILLUTZKI APPEARED PRO SE.

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

MR. JAMES K. YOUNG APPEARED ON BEHALF OF JAMES S. NOBLE.

OPINION AND ORDER OF THE BOARD (by I. Goodman):

On August 31, 1981 Ute Willutzki filed a Complaint alleging violations of the Act and Chapter 3: Water Pollution by James S. Noble. An Amended Complaint naming the Village of Lombard (Lombard) as an additional respondent was filed on October 16, 1981. On March 19, 1982 the Board denied Noble's February 11, 1982 Motion to Dismiss, and on May 27, 1982 denied his Motion for Reconsideration of that denial. Hearings took place on May 3 and 24, 1982. Noble did not appear at the May 24, 1982 hearing.

The initial Complaint alleged that new evidence had become available since Noble was granted variance from Rule 962(a) of Chapter 3 on March 19, 1982 in Noble v. Illinois Environmental Protection Agency, PCB 80-215. That variance allowed construction and operating permits to be issued for a sewer extension to service a twenty-unit condominium planned by Noble. Variance was subject to two conditions:

1. installation of water-saving devices; and
2. implementation of the sewer use offset plan submitted by Noble in the variance petition.

Willutzki alleged that the potential sewer connection would violate Section 12(a) of the Act and that an affidavit submitted by Noble as Petitioner in PCB 80-215 was inaccurate.

The Complaint offered three incidents of flooding since the variance was granted as evidence that Rule 602(b) of Chapter 3, which prohibits overflows from sanitary sewers, was violated and the affidavit was incorrect in alleging that the storm sewer had no back-up problems. Willutzki requested that the variance granted Noble be revoked.

The Amended Complaint realleged these violations. In addition, Lombard was alleged to have violated Rule 601(a), Malfunctions, of Chapter 3 due to the overflows. As amended, the Complaint also charged Lombard with causing or allowing discharge of contaminants in violation of Section 12(a) of the Act should it permit Noble to connect to the already malfunctioning sewer system. Again, the relief sought was revocation of the variance granted, and that Lombard be enjoined from allowing any additional connections to the sewer system.

At hearing, Willutzki testified along with seven other witnesses. Nancy Manna testified that she had taken pictures on March 17, 1981 of the combined sewer located at Main and Grove Streets, Lombard. The photographs (Compl. Ex. 1) depicted a hole in the sewer line (R. 10). Arthur Allen, a professional hydraulic engineer for forty years, testified that he had also witnessed the hole in the combined sewer at Main and Grove (R. 25). He also submitted a written statement and summarized its contents (Compl. Ex. 2). The statement entitled "Effects of Condominium Construction and Sewer Charges at Main and Hickory Streets, Lombard" had originally been presented to the Lombard Planning Commission. It summarized the sewer surcharging problems and hypothesized as to the sewer system's structural defects. It also pointed out possible defects in the offset plan devised by Noble to obtain the variance.

Of the remaining witnesses, only Peter Davis testified to a specific incidence of flooding in March, 1982. Photographs depicting the same were admitted into evidence (Compl. Ex. 3). The remaining testimony was offered in opposition to the variance granted Noble in a prior proceeding rather than a proof of violations attributable to Lombard's operation of its sewer system.

Through cross-examination, it was determined that the three incidences of flooding listed in the Complaint were not based on Willutzki's personal knowledge but rather from interviews she conducted based on information contained in another lawsuit filed against Lombard. Cross-examination of Peter Davis revealed that the flooding he experienced was an isolated incident (R. 105-106).

Although the Board is aware that the Lombard sewer system is inadequate and subject to malfunctions, it finds that the evidence submitted in this case is insufficient to hold Lombard in violation of Section 12(a) of the Act or Rules 601(a) and 602(b) of Chapter 3.

The Complaint alleged that Noble violated Rules 601(a) and 602(b). Since Noble has not connected his sewer extension, pursuant to the variance, this is an improper allegation.

The principal allegation in the Complaint was that Noble's sewer extension posed a threat of environmental harm, in violation of Section 12(a). The testimony and the Complaint sought to have the variance revoked due to the potential harm it may create. Noble argued that this collateral attack on the variance and its conditions was improper coming much later than 35 days after the variance was granted.

Variance was granted by the Board in PCB 80-215 only after sufficient proof that the proposed extension would not create problems additional to those already experienced by the Lombard sewer system and that, without the variance, Petitioner Noble would suffer arbitrary and unreasonable hardship. The variance granted was not intended to correct the problems related to the sewer system. The water-saving and offset conditions were imposed to assure that the status quo would be maintained and possibly improved, despite any additional loadings due to the condominium unit.

Due to the variance, James Noble now stands in the same posture as his neighbors. He is no more in violation of Section 12(a), or Rules 601(a) and 602(b), than they are in utilizing the Lombard sewer system. Until and unless he exercises the variance granted in PCB 80-215 contrary to the terms set out therein, he has not violated the Act or Rules 601(a) and 602(b).

It should be noted that an enforcement proceeding alleging new evidence possibly could overturn a variance granted by this Board, if it serves to discredit evidence offered during the variance proceeding. In this instance, Willutzki offered testimony of flooding and photographs (Compl. Ex. 1) to discredit an affidavit offered as evidence in PCB 80-215. That affidavit, which was before the Lombard Planning Commission and only an Exhibit in the variance proceeding before the Board, attested to the working condition of the 48 inch storm sewer, whereas Complainant's Exhibit #1 pictured alleged defects in the combined sewer line. The testimony offered by Willutzki's witnesses did not directly attribute the alleged flooding to the storm sewers. Furthermore, in granting the variance, the Board was aware of the problems existing in the Lombard sewer system, and found that the conditions imposed would assure that these problems would not be aggravated.

Based on the record in this case the Board concludes that James S. Noble is not in violation of Rule 601(a) or 601(b) of Chapter 3, or Section 12(a) of the Act.

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

ORDER

The Village of Lombard and James S. Noble are not in violation of Section 12(a) of the Environmental Protection Act (Ill. Rev. Stat. 1981, ch. 111½, §1012(a)), Rule 601(a) or Rule 602(b) of the Board's Chapter 3: Water Pollution.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 15th day of September, 1982 by a vote of 5-0.

Christan L. Moffett, Clerk
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Illinois Pollution Control Board