ILLINOIS POLLUTION CONTROL BOARD
September 23, 1983

CITY OF MT. OLIVE, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND MACOUPIN COUNTY HOUSING AUTHORITY, Respondent.	)	PCB 83-9

ORDER OF THE BOARD (by J. Anderson):

The Board entered its Opinion and Order in this matter on July 26, 1983, denying variance from 35 Ill. Adm. Code 309.241(a) to allow for continued operation of an unpermitted sewer connection to the City of Mt. Olive's (City) sewer of six apartments owned by the Macoupin County Housing Authority (MCHA). On August 29, 1983 the MCHA moved to vacate this Order. The Agency filed its response in opposition September 2, 1983. On September 8, 1983 MCHA moved to file a reply to the Agency response instanter, which motion is hereby granted. The City has made no filings.

MCHA argues that the Board's Order should be vacated because a) no hearing was held in this matter, b) the Board's procedural rules providing that the 90-day time clock is restarted by the filing of an amended petition are void, as being beyond its authority to promulgate, and therefore that, c) the variance has issued by operation of law, d) that hardship to MCHA was not properly considered by the Board. Recitation of the procedural history of this action is a necessary prelude to disposition of these arguments.

The City filed its variance petition January 24, 1983. The Board entered an order on January 27, 1983 requiring the City of Mt. Olive to file an amended petition within 45 days or the petition would be subject to dismissal. The order for specified additional information and joinder of the owner of the subject apartment complex pursuant to 35 Ill. Adm. Code 103.123.

The City provided additional information in a first amended petition filed March 14, 1983. As in the original petition,

Petitioner waived a hearing. The City included the MCHA as a party respondent in the case caption, and the proof of service for this amended petition indicated a copy had been sent to the MCHA. An order was entered by the Board on March 24, 1983 noting that the first amended petition remained deficient as to information on restricted status and did not include evidence of service on the Authority in the manner prescribed by 35 Ill. Adm. Code 103.123. The Board again stated that unless an amended petition curing such defects was filed within 45 days, the petition would be subject to dismissal.

On May 2, 1983, the City of Mt. Olive filed a second amended petition in letter format. Therein, the first amended petition was referenced and an assertion was made that city officials did not realize the possible ramifications of allowing the sewer extension. Also, a copy of the certified mail receipt for service of the variance petition upon the Authority was enclosed, as required by the Board's March 24 Order.

The Agency filed its Recommendation, urging denial of the variance requested, on May 31, 1983. A copy of this Recommendation was served upon William Derby, attorney for the Authority, by certified mail. An opinion and order denying the variance requested was issued by the Board on July 26, 1983.

The City did not object to the City's denomination of it as a respondent or object to the Board's March 24, 1983 Order reflecting this. It did not file a response to the Agency's Recommendation. At no time prior to the Board's final action on July 26, 1983 did the Authority request a hearing or take any other action in this proceeding.

The City's denial of hearing/denial of due process argument is based on the fact that it had been improperly described by the City as a respondent, since the MCHA requires the variance. MCHA asserts that since it was actually a petitioner, although misnamed, that the Board should have held a hearing, since the MCHA did not waive hearing pursuant to 35 Ill. Adm. Code 104.124.

Section 37(a) of the Environmental Protection Act does not guarantee a hearing on every petition for variance. Hearings are required to be held if the Agency or any other person files a written objection within 21 days, or if the Board, "in its discretion, concludes that a hearing would be advisable". No objection was filed in this case,* and the City waived hearing.

*The Second District Appellate Court has ruled that a recommendation by the Agency to deny a variance is not an "objector" which triggers hearing Village of Wauconda v. IPCB and IEPA, No. 81-658 (January 26, 1982).

35 Ill. Adm. Code 103.121(a) provides that misnomer of a party may be corrected at any time, but once joined as a party pursuant to Section 103.121(c), the MCHA failed to petition the Board to correct its designation.

Given MCHA's silence, and the City's waiver of hearing, the Board had no reason to send this case to hearing. MCHA's hearing argument is rejected.

The argument that the requested variance issues by operation of Section 38 due to the Board's failure to take action within 90 days of March 14, 1983 is also rejected. The basis of this argument is that the City's May 2, 1983 filing was not an "amended petition", but instead an "amendment to a petition", since it only added material to and referred back to the defective March 14 pleading, and was not complete in and of itself. While MCHA's assertion may accurately reflect the practice in Illinois courts, this distinction is not recognized in the procedural rules adopted by the Board pursuant to Section 26 of the Act. The Board's March 24, 1983 Order by its terms could be satisfied only by the filing of an "amended petition", and the Board so construed the City's May 2, 1983 producing information in response to deficiencies noted in that Order.

The MCHA's argument that the Board may not provide that an amended petition restarts the 90 day time clock because such would be "an attempt to legislate", rather than a "regulatory function", is absurd. In Modine Mfg. Co. v. IPCB, 40 Ill. App.3d 498 (1976), the Appellate Court for the Second District found that in a variance proceeding the Board had authority to hold a rehearing and issue a decision after the 90th day. The rationale of the court was that "sections [5(d) and 26 of the Act], when read together, provide the necessary authority for the [Board] to hold rehearings as a procedure to correct any error, omission, or oversight found in its first consideration". By analogy, the Board believes that these same sections provide it with necessary authority to create a procedural mechanism to allow a petitioner to correct its own omissions by the filing of an amended petition which restarts the 90 day time clock, as an alternative to having a defective petition dismissed by the Board in exercise of its duty to prevent issuance of variances by default.*

MCHA's final assertion is that the Board did not properly consider hardship to it or its ignorance of restricted status. Section 37 places the burden of proof in a variance petition on those requesting it. It is not the responsibility of the Agency or the Board to "go behind" inadequate pleadings.

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*It is to be noted that in its May 2, 1983 filing, p. 2, the City itself requested additional time to correct any additional omissions.

Having remained silent throughout the course of these proceedings, MCHA is essentially requesting that, since the City was unable to obtain a variance on MCHA's behalf, that MCHA now be allowed an opportunity to do so. Nothing in the Board's rules would preclude MCHA from initiating another variance proceeding.

MCHA's motion to vacate is denied.

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 23RD day of September, 1983 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board