

ILLINOIS POLLUTION CONTROL BOARD  
February 22, 1984

AMERICAN NATIONAL BANK )  
OF CHICAGO, )  
 )  
Petitioner, )  
 )  
v. ) PCB 83-106  
 )  
ILLINOIS ENVIRONMENTAL PROTECTION )  
AGENCY, COUNTY OF DUPAGE; and )  
CITY OF DARIEN, )  
 )  
Respondents. )

RICHARD J. TROY (SNEIDER AND TROY) APPEARED ON BEHALF OF PETITIONER;

MARY E. DRAKE APPEARED ON BEHALF OF RESPONDENT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

This matter comes before the Board upon an August 5, 1983 Petition for Variance filed by the American National Bank of Chicago (American National), an Amended Petition filed September 19, 1983, and a Second Amended Petition filed October 24, 1983. The Illinois Environmental Protection Agency (Agency) filed a Recommendation to deny the variance on November 22, 1983. Hearing was held on December 21, 1983, and thereafter the Agency filed an Amended Recommendation to grant the variance on January 25, 1984.

Petitioner wants to construct sixty townhouse units (to be known as the Highland Estates) in addition to 20 already permitted, on a parcel of land it has been the beneficial owner of since 1972 under Trust No. 76768. That parcel is located in the City of Darien (City), County of DuPage, on the frontage road just north of the Stevenson Expressway (I-55), approximately midway between Route 83 and Cass Avenue. (Legal description contained in Ex. B of the Second Amended Petition). Wastewater from the proposed construction would be directed to the Marionbrook sewage treatment plant (facility) which is owned and operated by Respondent, County of DuPage (DuPage). The

Agency placed that facility on Restricted Status in April, 1979. Consequently, American National has requested variance from Sections 306.105(a) and 309.241(a) of the Board's Water Pollution Regulations, 35 Ill. Adm. Code: Subtitle C, Chapter I, in order to obtain construction or connection sewer permits.

The Marionbrook facility was also the subject of People v. County of DuPage, 80 MR 432 (December 4, 1980; modified on January 7, 1982). In its modified order, the Eighteenth Judicial Circuit Court of DuPage allowed the County of DuPage a 90% credit of the wastewater diverted from the Marionbrook facility to an interim package plant, known as the interim Knollwood plant, to allow for new connections. For those not holding permits from the Agency as of the date of the original order (December 4, 1980), the Court further clarified in its January 7, 1982 Order, requiring that they would be allowed to connect only if they received a variance from the Board "allowing the Agency to issue a sewer permit."

For variance to be granted, the Petitioner must adequately prove that, due to the imposition of Restricted Status, arbitrary and unreasonable hardship has resulted (Ill. Rev. Stat. 1981, ch. 111½, par. 1035). As stated above, Petitioner holds the property in question in trust. To understand the potential hardships involved in this matter, it is necessary to examine the purchase of this land and the efforts to develop it.

In 1972, Edward K. Miller, an insurance agent, took an assignment of the beneficial interest in this land from Ken Nelson, then the owner of the property held in trust by American National. The original purchase price for the approximately 9.1 acres of land was \$200,000. In order to obtain the contract to purchase from other buyers, Mr. Miller paid \$50,000 and assumed a \$150,000 note with Mr. Nelson at 7% interest, or \$10,500 per year. In 1975, Mr. Miller acquired the property. Beginning that year and through the present, Mr. Miller switched to paying Mr. Nelson monthly installments of \$1,741. That same year, he discovered that approximately \$10,000 was due in back property taxes. To avoid foreclosure, Mr. Miller paid those taxes. Since 1975, he has continued to pay the property taxes. From 1975 through 1980 these taxes were approximately \$3,000 per annum. By 1982, they had increased to approximately \$4,400.

To pay the original \$50,000 and back taxes, Mr. Miller took out a loan from one bank, and then, in 1975, transferred the loan to the Heritage County Bank ("Heritage"). Heritage, therefore, has an assignment of beneficial interest in the property held in trust. Originally this loan had a floating rate at two points

over prime. It has since been renegotiated to nearly three points over prime. Since 1978, Mr. Miller has paid \$65,806 in interest to Heritage. The amount paid between 1975 and 1978 was not determined on the record. The note with Heritage, which was originally about \$60,000, is now approximately \$140,000 at 14% interest, and none of the principal has been paid. The property in question has not generated any substantial income over the years from Mr. Miller (R. 35-47).

Since 1972, Mr. Miller has sought to develop the property. When purchased, the property was not yet annexed to the City of Darien or zoned for development. Mr. Miller began negotiating with the Darien Development Committee which encouraged him to convert an existing barn on the property into a restaurant. Drawings for a restaurant and small office complex were drawn up. Over the next few years no restaurateurs could be found who were interested in the project. By 1975-1976, the City of Darien likewise was no longer interested. With the property still not annexed or properly zoned, plans for an office building and sixty housing units were discussed by the City and Mr. Miller. After further negotiations with the City it was agreed that twin office buildings and 48 housing units would be built. In early 1979, the City annexed and properly zoned the property. During the next year Mr. Miller tried to develop the property; due to no takers and the general economic recession, he attempted to market the entire parcel. Finding no buyers, in 1982 he began working with a professional developer, William Spathies. They agreed to develop the property as a residential community, a planned unit development consisting of 80 townhouse units. In January of 1983, the City of Darien agreed to rezone the property from 48 units to 80 units on the condition the barn would be demolished (R. 28-35).

The development of Highland Estates is planned in two phases. The first phase includes five buildings, two of which are being built as models and the other three of which will be built as sales come in (R. 91). Variance is not necessary for these units. The second phase appears to include eight buildings, seven of which would contain eight units each and one with four units. (See Drawings 2-5 contained in Ex. C of the Second Amended Petition).

William Spathies testified at hearing about Restricted Status and the project's current status. Having become associated with the project in 1982, Mr. Spathies soon became involved with the City. He testified that the City's mayor made assurances in January, 1983 that there were no problems in obtaining sewer permits. Mr. Spathies further testified that in numerous conversations with the Darien Planning Commission

pertaining to zoning, sewer and water for the proposed project, no mention was made about the Restricted Status of the DuPage sewer system (R. 70-72). Based on his prior experience of 14 years as a developer, Mr. Spathies assumed that Darien was an appropriate authority to rely upon (R. 83-87). Based on Darien's assurances, Mr. Spathies then commissioned an engineer to prepare engineering drawings and to get sewer and water permits from DuPage County. It was not until April of 1983 that Mr. Spathies learned about the area being under Restricted Status and that the entire eighty units could not be constructed (R. 53, 68, 74).

Nevertheless, one of the buildings in the first phase was redesigned from eight to four units (R. 66). Thus, each of the five buildings contain only four units for a total of twenty units. This design would allow construction to proceed under the Board's rule exempting connections of less than 1500 gallons per day from the permitting requirement. [See 35 Ill. Adm. Code 309.202(b)(2) and (R. 85)]. Since July of 1983, the developers applied for, paid for, and received the necessary building permits from Darien and necessary sewer permits from DuPage (after Agency review) for two of the first five buildings (R. 67, 76). Earthen berms were put in place. Footings and foundations were laid for one building, and the same staked out for a second building (R. 75).

Although the Petitions and the record in this matter are confusing, it appears that variance is sought for the remaining sixty units planned in the second phase; the twenty units in the first phase falling within the permit exemption rule. As the second phase is planned, all but one of the buildings contains eight units, therefore each exceeds the 1500 gallon per day permit exemption rule. Even if the buildings were redesigned, as were two in the first phase, there is insufficient land for easements to connect these buildings to the interceptor. The Board notes that at hearing Mr. Spathies stated that if granted variance, he would prefer to connect three of the five buildings in the first phase by a single connection into the sewer line serving the second phase buildings (R. 100).

As stated above, Petitioner must demonstrate arbitrary or unreasonable hardship for variance to be granted. The record shows that the investments by Mr. Miller from 1972 through the present have been substantial. However, these investments were due to difficulties encountered in the development or selling of this parcel and until April of 1983, were unrelated to the 1979 imposition of Restricted Status. Prior to learning about Restricted Status in April, 1983 it appears that the developers expended funds for an engineer to draw up plans for the eighty units and explore the necessary permitting. It has been since

April, 1983, when they learned about Restricted Status, that the developers expended funds to obtain permits and construct the first two buildings under the initial phase. It was their decision, despite the knowledge of Restricted Status, to build these two model units under the exemption rule.

The developers in this matter have not demonstrated arbitrary or unreasonable hardship distinguishable from that incurred by the petitioners in Unity Ventures v. IEPA, PCB 80-175 (December 15, 1983) and Willowbrook Motel Partnership v. IEPA, PCB 81-149, 53 PCB 05 (July 14, 1983). Petitioners in both those cases were denied variances because the hardship they experienced was no different than that which is intended by the imposition of Restricted Status which creates a moratorium on development until adequate sewage treatment is available. Arbitrary or unreasonable hardship can only be found where the costs incurred prior to the imposition of restricted status outweigh the environmental harm which would be caused by the granting of variance. The only exception to this is that costs incurred subsequent to the imposition of restricted status may be considered as hardship if such costs resulted from firm commitments made prior to the imposition of restricted status or were incurred based upon a reasonable belief that the area was not under restricted status.

In this case the funds to construct Highland Estates were expended after the developers knew of the Restricted Status. Using an exemption intended for single family homes [In the matter of Amendments to 35 Ill. Adm. Code: Subtitle C, R 82-5, 10 (Nov. 18, 1983) at page 5] these developers succeeded in building models, the cost of which possibly can only be recovered through the building and sales of the entire eighty units. However, they chose to make this investment with the full knowledge that Restricted Status had been imposed by the Agency in 1979, and that this prohibited permitting sixty units without a variance. In essence, they gambled that variance would be granted.

The investment for engineering consultation prior to April, 1983 was not quantified on the record. It does not appear, however, to be substantial since the plans were preliminary. Further, much of the developmental expenses which were incurred prior to the imposition of restricted status appear to have been for projects which could not have been completed for reasons apart from the imposition of restricted status, whereas the only costs the Board will consider as hardship are those which were incurred for the project for which variance is requested. In this case the Board will also not consider the costs for carrying the land for those periods during which the intended use or development of that land was for purposes other than that for which variance was requested.

Finally, the developers could not reasonably rely on assurances of the availability of permits from sources other than the Agency. Such an argument is essentially an argument that the Agency is estopped from relying upon the imposition of restricted status to deny a sewer permit due to the statements of city officials. Here, those officials do not stand in such a relationship to the Agency that their actions can be imputed to the Agency, and the estoppel argument must fail [see Drake, et al. v. IEPA, et al., PCB 81-54, 43 PCB 543, October 22, 1981 and Willowbrook Development Corp. v. IPCB, 92 Ill. App. 3d 1074, 416 N.E. 2d 385, 391 (1981)]. The alleged hardships, therefore, do not rise to the level of arbitrary or unreasonable hardship, and variance is denied.

The Board notes that it was not a party to the People v. County of DuPage, id., and that meeting all conditions of that Order other than the obtaining of variance does not assure that variance will be granted since the Board is statutorily required to examine variance requests in terms of arbitrary or unreasonable hardship and not simply in terms of a court's allocation order.

This Opinion supports the Board's Order denying the requested variance which was adopted February 9, 1984, and constitutes the Board's findings of fact and conclusions of law in this matter.

Board Members J. Theodore Meyer and W. Nega dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 22nd day of February, 1984 by a vote of 5-2.

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