ILLINOIS POLLUTION CONTROL BOARD
October 22, 1981

STEVEN DRAKE, ET AL., Petitioners,	)	
v.	)	PCB 81-54
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and THE CITY OF PONTIAC, Respondent.	)	

ROY M. HARSCH AND JOANNA C. NEW, MARTIN, CRAIG, CHESTER & SONNENSCHEIN, APPEARED ON BEHALF OF PETITIONERS,

BRUCE L. CARLSON APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and

C. THOMAS BLAKEMAN, THOMPSON, STRONG & BLAKEMAN, APPEARED ON BEHALF OF THE CITY OF PONTIAC.

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

This matter comes before the Board on a petition for variance filed April 10, 1981 by Steven Drake, Susan Drake, Lowell Drake, Lenora Drake, William F. Brady, and Nancy K. Brady, a partnership (Brady). Brady seeks variance from Rule 962 of Chapter 3: Water Pollution in order to obtain authorization for construction and operation of a sewer extension tributary to the sewage treatment plant (STP) owned and operated by the respondent City of Pontiac (City). On May 15, 1981, the Illinois Environmental Protection Agency (Agency) recommended variance be denied. As the Agency and the Board had received objections to the petition, hearing was held in Pontiac on August 17, 1981. In addition to the testimony and exhibits presented by each of the parties, testimony and exhibits were received from seven Pontiac residents speaking on behalf of themselves and their neighbors.

Variance is requested to provide sewer service to a combined sewer for a planned unit development to be called the Winston Churchill Apartments. The project is ultimately designed to consist of five apartment buildings, 12 units each, of which 11 are to be two-bedroom apartments and 1 to be a one bedroom apartment. The complex is to be located on a 98,556 square foot lot, formerly the site of Winston Churchill College, and before that the Pontiac Township High School.* This property, vacant since the college

*The new high school still discharges to the North Street sewer (R. 286).

building was torn down "sometime after" 1971, occupies most of a block bounded by Michigan Avenue to the north, Locust Street to the east, Indiana Avenue to the south, and Main Street to the west. The site has a higher elevation than most of the surrounding area, which is one of Pontiac's older residential neighborhoods (R. 12-13, 169, Drake Ex. 2).

The permit application for the project, received by the Agency on December 23, 1980 and denied by it on March 16, 1981, estimates the total sewage flow from the project's 5 buildings as a whole to be 17,200 gallons per day (gpd), or roughly 172 P.E. Each building then would discharge an estimated 34,440 gpd or roughly 34.4 P.E. Construction of the entire project was anticipated to be completed by April 1, 1983 (Drake Ex. 7-8). One of the five buildings is complete, and, since March 26, 1981, has been connected to an existing sewer stub found on the site during construction. A water bill for the 62 days preceding July 16, 1981 showed the residents' daily water usage averaged 1315 gallons (Drake Ex. 9). Drake argues that no construction or operation permit is needed for this building, which is claimed to fall within the Rule 951(b)(2) and 953(a) exceptions for a sewer "designed and intended to serve a single building and eventually treat or discharge less than an average of 1500 gallons per day of domestic sewage". Alternatively, he petitions for variance to allow issuance of permits for the completed building and the 4 yet-to-be constructed.

At the outset, the Board rules that, having reviewed the evidentiary objections raised by the parties, the Hearing Officer's decisions are sustained.

CHRONOLOGY OF EVENTS

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 (IEPA Ex. 3-4).

In May of 1980, builder Stephen Drake, his wife, his parents, and his friends the Bradys entered into a contract to purchase the Winston Churchill site, with the intention to construct rental apartments for resale to investors (R. 13, 42).

On May 17, 1980, Drake petitioned the City for a change in zoning, as the site's existing R-3 zoning would not allow development of the project as described above. The Pontiac City Council (Council) referred the petition to the Pontiac Area Planning Commission (Commission) for its recommendation on June 2, 1980.

On August 27, 1980, the Commission, following the Council's refusal to accept an earlier commission approval, approved the

plan "subject to the City and Developer's reaching a solution to drainage of storm water from the area to be developed" (Detering Ex. 1). This qualification was in apparent answer to three citizen objectors who voiced concern about additional loading to an already overloaded sewer, as well as to preliminary calculations of the City's consulting engineer Harold E. Frye of Farnsworth & Wylie. In an August 22, 1980 report presented to the City Council, Frye had stated that the existing sewer was inadequate to handle stormwater run-off from the existing site, and would be insufficient to handle that from the proposed improvement (R. 113).

In previous efforts to facilitate approval, Drake had had his own consulting engineers, Vegryzn, Sarver & Associates, Inc., redesign the project to increase the amount of unpaved area and to cause the project's sanitary flow to be directed into not 1 but 2 existing combined sewer lines. After the August 27 meeting, on Drake's behalf, his engineers completed a design for a 19 acre area storm sewer drainage system. The cost of the system, approximately $111,000, was to be spread by special assessment, of which Drake's share would be $10,000, the rest to be borne by other area residents and the City. This plan was presented to the City Council on October 6, and rezoning was approved. The plan was discussed again at the October 20 meeting, at which over 50 residents appeared in protest.

On November 17, 1980 the City Council enacted the zoning re-classification ordinance (R. 14-15, 111-117, 319-322, Drake Ex. 3-5, 19-20). However, the special assessment plan was never implemented by the City, apparently because of property owner opposition (R. 117).

On November 18, 1980 Drake purchased a City Building permit and commenced construction the next day (Drake Ex. 6, R. 19).*

Rule 604(f) of Chapter 3 requires that an STP owner notify individuals requesting connection that the plant has been placed on critical review or restricted status. Drake testified that neither he nor his consulting engineers had been notified of the critical review status during the proceeding 7 months although permit requirements were mentioned during a City Council meeting. However, it was the testimony of both Eugene Sarver and Robert Russell of Vegryzn, Sarver & Associates, Inc., Drake's consultant since late summer, 1980 that the firm was aware of the plant's critical review status (R. 96, 104). The firm believed that sufficient hydraulic treatment capacity for the project's 172 P.E. nonetheless existed because of its knowledge that the Agency had issued other permits during 1979 and early 1980 (although not since then) (R. 104, 160), and because of a representation of Harold Frye at a City council meeting that the plant had 3,000 P.E. remaining capacity (R. 103).

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*While the petition (Drake Ex. 1) and the permit application (Drake Ex. 7) list December 1, 1980 as the construction start date, the Board resolves the conflict in favor of Drake's direct testimony.

There was no testimony that Drake or his engineers had contacted the Agency concerning the plant's critical review status prior to November 18, 1980. The Agency's Critical Review List, required to be published and available upon request pursuant to Rule 604(a), had showed the plant as having zero reserve capacity beginning June 30, 1980 (IEPA Ex. 5).

On November 21, 1980, Agency employee Kenneth Bauman telephoned Drake's attorney, Ron Fellheimer, to advise him of and to discuss permit requirements relating to the Winston Churchill project (R. 186-187, Drake Ex. 2, Item 8). No permit application having been received by December 1, Mr. Bauman thereupon called engineer Russell. During that conversation, Mr. Bauman expressed Agency concern regarding the treatment plant's capacity, which was described as zero, as well as sewer capacity (R. 187-189, 198, Drake Ex. 2 #9). Mr. Bauman sent Mr. Russell a "follow-up" letter summarizing the conversation on December 18, 1980 (IEPA Ex. 1).

On November 25, 1980, Drake had submitted his Agency permit application to the City for its review and processing (R. 19, 94, Drake Ex. 7). The application was received by the Agency on December 23, with an attached letter dated December 16 signed by Mayor Joseph S. Trainor. The letter states that "there is adequate capacity in the combined sewers serving this property to handle the dry weather flow" [but not] to handle storm run-off from this area." Drake was not sent a copy of this letter (IEPA Ex. 2).

It must also be noted that in December, 1980, a settlement of an enforcement case against the City and its treatment plant operation was accepted by the Board IEPA v. City of Pontiac, PCB 78-124 (December 19, 1980). In that case, the City stipulated to several violations, including failure to meet the BOD_5 and TSS limitations of the Board's Rules. A detailed compliance plan was included.

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 BOD_5 and TSS loadings in the compliance plan established in PCB 78-214, 2) the plant was receiving BOD_5 loadings of 17,280 P.E., an organic load in excess of its design capacity of 16,000 P.E., and 3) the critical review status because of lack of hydraulic capacity imposed April 6, 1979 (City Ex. 3). On March 16, 1981, Drake's permit application was denied by the Agency, for reasons of the above mentioned organic overloading on the plant (Drake Ex. 8).

During the time in which his application was being prepared by his engineers and processed by the City and the Agency, Drake continued construction of his first building. There is no evidence that he contacted either the City or the Agency for information concerning his application during this period. During excavation, he uncovered one of the sewer stubs which had serviced the old high school on the perimeter of the planned building. Therefore, Drake did not construct a sewer extension, planning to connect the new building through the old stub, at the foundation (R. 23).

At some point during the construction period, water saving features were incorporated into the buildings design. In addition to installing water saving toilets and showerheads, Drake did not install garbage disposals and placed washing machines in one area rather than in each apartment (R. 22).

In early March, Drake began to advertise for tenants for the nearly-completed building. An open house was held March 15 and 16, 1981 which was attended by 150 people and which resulted in rental of many of the units.

On March 26, 1981, eight days after Agency denial of the permit, Drake authorized connection of the building to the sewer stub. The building's first occupants moved in on March 29, 1981 (R. 24). No permit denial appeal was filed.

Drake had not applied for required City sewer and occupancy permits prior to connection and tenanting of the building. The City sent a notice of these violations to Drake on April 3, and directed that the building be disconnected within 24 hours. Drake failed to do so. On June 17, 1981 the City filed suit against Drake in the Circuit Court of the 11th Judicial Circuit, Livingston County. This case, City of Pontiac v. Steve Drake et al. No. 81OV143, will continue to pend until resolution of this variance petition (City Ex. 7, R. 85).

After the units in the completed building were fully occupied (at present 30 tenants in the 12 units), the average daily water usage was measured at 1315 gallons, based on a single July, 1981 water bill (R. 22, Drake Ex. 9). This building's discharge is into the Chicago Street sewer. It is also proposed that another of the planned buildings eventually be connected to this sewer, with the other three to be connected through another existing stub to the Locust Street sewer. Both sewers are tributary to the North Street trunk sewer.

On April 22, 1981, two homeowners on Chicago Street experienced major basement flooding containing raw sewage and related debris during a relatively light rainfall. Each normally keeps a plug in the basement drain, and each had not previously experienced sewer surcharging of the magnitude of that event. Surcharge events were also reported in May and August (R. 122-123, 136-137, Kinas Ex. 1-2).

Finally, throughout the course of summer, the City had continued to pursue upgrading of its STP through the Construction Grants Program. In July, 1981, the Agency issued a permit for "interim" improvements to increase the plant's organic capacity to 2300 P.E. Construction contracts have been advertised for bids. This project is scheduled to be completed approximately one year from its inception (R. 286, 296). Sewer maintenance programs, involving cleaning of interceptor sewers and removal of sewer blockages has continued. It was recommended to the City by STP

operator Dave Sullivan that the North Street trunk sewer be televised to determine the cause of a significant blockage in it which severely affects drainage in the area surrounding the Winston Churchill complex (R. 296-301). However, no explanation was given as to potential funding sources of, or a timetable for, repair of this sewer.

DRAKE'S ARGUMENTS AND THE AGENCY'S RESPONSES

The Rule 951(b)(2) exceptions and Starcevich

Drake argues that no variance is necessary, based on the fact that the one period of measurement of the discharge from the completed building is approximately 13 P.E. The building's design estimated discharge of 34.4 P.E. should be disregarded, he asserts, and the 951(b)(2) exception for single buildings discharging less than 15 P.E. applied instead.

He further contends that this 13 P.E. figure will be representative of the discharge from the other 4 planned buildings. Since each of the buildings would eventually discharge less than 15 P.E., each could be hooked into an existing sewer stub without permit, based upon the analysis employed in Starcevich v.Pollution Control Board, 78 Ill. App. 3d 700, 397 N.E. 2d 870 (3rd Dist. 1979).

The Agency believes that Drake's reliance on Starcevich is misplaced, as that Opinion itself makes clear that the distinction between design and actual flow was not at issue. As the court stated

> "it is conceded not only that discharge from each of the buildings is less than 1500 gallons but also that the total discharge from all of the buildings is less than the amount permitted." 397 N.E. 2d at 872.

The interpretation of whether actual flow alone, as opposed to design flow and then eventual discharge, was intended to determine the applicability of the Rule's permit exemption then becomes a matter of first impression.

In the Agency's opinion, the integrity of its permitting process, as well as due process rights of builders, would be impaired if actual post-construction, post hook-on measured average flows are to be considered as determinative of whether construction and operation permits should have been applied for in the first place. If the Agency's design criteria are not used to determine the exemption's applicability, "potential permit applicants would have to estimate [ultimate flows] at their peril...[with the possibility that] a violation of the permit requirements would suddenly arise beginning from the date when construction or operation began" (Agency Br. at 15). In this context, the

Agency notes that water use patterns in the Drake building could easily change to increase the flow, either before the proposed sale through increased occupancy by rental to tenants with larger families, or afterwards by a new owner's installation of individual washers and garbage disposals.

Environmental Impact

In response to Drake's questioning, Agency engineer Thomas McSwiggin stated that addition of Winston Churchill's sanitary flows would, from a practical standpoint, have "no measureable or significant increase on either the sewage treatment plant operations, the effluent from the sewage treatment plant, the Vermillion River, and basement back-up or sewer overflows" (R. 234). Testimony from City engineer Frye and Drake's engineer Sarver indicate that the existing combined sewers can accept the projected sanitary flows from the apartments (R. 308-309, Drake Ex. 16). Drake therefore contends that the addition of new flows to the existing sewers and STP are "de minimis", and that variance should be granted.

The Agency counters that, while the increase in flows might not be measureable, the condition of Pontiac's treatment plant and combined sewers is such that no new flows should be permitted. The STP has, at times, exceeded the elevated limits granted in PCB 78-214 (IEPA Ex. 6), but is currently doing well (R. 239, 240). In March, 1981 it had an actual organic load in excess of design capacity, with 1705 P.E. still outstanding in permits authorizing hook-on. Testimony presented by the Agency's Stephen Baldwin indicated that in January-February 1981, the plant effluent was causing pollution of the receiving stream. The effluent itself contained "a moderate amount of turbidity and also tiny visible suspended particles," while black colored, septic smelling bottom deposits were observed in the river bottom downstream of the plant's discharge (R. 257-260). While the Agency concurs that the interim plant improvements should improve the plants performance, it reminds the Board that the improvements may be inadequate if and when completed.

The Agency views any addition to the combined sewers as posing "a significant threat to public health and safety." Although conceding that the effect of additional flows might not be measureable, Mr. McSwiggin did testify that "the combined sewer overflow would possibly be greater, the total volume, possibly longer in duration, basement back-ups could result in a greater depth of water in the basement" (R. 217). The Agency cites testimony of homeowners Robert Kinas and Mrs. James Hoover, as proving that overflows have increased in number and duration since Winston Churchill's sanitary connection to the Chicago street sewer (R. 122-123, 128, 136-137). Storm run-off from the project into the Chicago and Locust street sewers, then to the

North Street trunk, affects an area where surcharging problems during and before the summer of 1981 were the subject of testimony. Pauline Acklin, who lives on Locust street just north of North street testified concerning bi-weekly overflows of a manhole at that location in June, July and August, 1981. Despite a 300 pound lid on the manhole, "every time it rains" the sewer discharges "Kotex, tampons, chunks of detergent...prophylactics, some B.M. solid matter or what, and toilet paper." Mrs. Acklin herself cleans up this material, hoses down the street and spreads lime to neutralize the resulting odors. Mrs. Acklin is particularly concerned because the street is a route to a grammar school. She noted that "One of the little girls picked up a prophylactic and said, here, I found a balloon...I have grandchildren, and the first thing they want to do is wade in the water" (R. 171-172).

City Council Member Betty Pouliot testified that she has seen the Locust street manhole cover suspended in the air by the force of the sewage, and has seen another cover at North and Walnut lying at some distance from the manhole. After one surcharge event in the immediate area, she testified that raw sewage had spewed into a baseball diamond in Lions Park. Children were prevented from playing in the park long enough to allow City workers, contacted by Mrs. Pouliot, to spread lime. Mrs. Pouliot further noted that one home in her ward is being undermined by the continued surcharging of the North Street sewer (R. 176-177).

While agreeing that Pontiac's combined sewer surcharges are not new, and that the City has been working on its sewers, the Agency insists that no new flows should be added to these overloaded sewers.

Feasible Alternatives

Drake states that he has already implemented some measures to minimize sanitary flows and stormwater runoff, by means of the afore-described building design and construction changes. His proposed storm sewer/special assessment project has not been implemented by the City. Another plan, involving use of orifice restrictors in existing catchbasins to retard entry of stormwater flowing from the property into the combined sewers has also not been implemented (R. 322-321). At hearing, it was also suggested that vigorous enforcement of the City's existing but allegedly ignored ordinance banning downspout connections would retard entry of stormwater into the collection system (R. 324-326).

Since denial of the permit, Drake's engineers have considered options for the handling of sanitary sewage. Septic fields are said not to be a feasible option, despite the fact that the site has a good percolation rate, because of insufficient property available to handle the waste generated from all five buildings (R. 98).

Drake has also rejected the option of installation of a sanitary holding tank, to be pumped out daily for hauling and treatment. Grounds for rejection revolve around the fact that if the tank is not properly serviced, even in inclement weather, by a reliable waste hauler, that material in the tank could become septic (R. 98-99).

Concerning these various alternatives, the Agency notes that orifice restrictors might have little practical effects. Debris may already be retarding inflow, and ponded water might well only find its way into other inlets to the same problem sewers.

"Estoppel"

Drake alleges that both Pontiac and the Agency have engaged in "reprehensible" conduct with respect to the Winston Churchill application (Drake Br. p. 27). Pontiac failed to comply with the notice requirements of Rule 604, regarding both its critical review status, and the notice of impending critical review status received March 6, 1981. Pontiac did not provide Drake with a copy of the letter it attached to his permit application. The City had requested that a meeting held March 31, 1981 with the Agency concerning the plant be "closed". Thus, Drake could not be present (R. 238, Drake Ex. 18). Finally, the City's suit to require disconnection of Winston Churchill because of violation of ordinances was said to have been "on the advice of the Agency" (Drake Gr. Ex. 21, Item 18), implying some bad faith on the City's part.

The Agency, for its part, is charged with violation of its internal Guidelines for Notification of Restricted Status, or Critical Review Pursuant to the Requirements of Rule 604 of Chapter 3: Water Pollution regulations of the Illinois Pollution Control Board (Drake Ex. 21-21). While its critical review lists had been distributed to persons on the Agency's mailing list and to the Illinois News Service, the Agency had not published them in the Board's Environmental Register [guideline IV(2)(a)]. In addition, Drake charges, the Agency should have placed the plant on critical review for organic purposes, as well as hydraulic purposes, once the organic problem was discovered. Once the plant's capacity was listed as zero for any purpose, the Agency should not have continued to issue permits, and should have placed the plant on restricted status, consistent with Parts II and III of the guidelines (Drake Br. 28).

Drake also states that he received differing opinions from Agency personnel regarding necessity of obtaining a permit, based on the fact that conversations with Agency personnel indicated yes, but newspaper quotes indicated otherwise (R. 59-60). These divergent opinions were said to revolve around Rule 951(b)(2) as interpreted by the Starcevich court. Thomas McSwiggin testified that the Agency "disagreed with the decision" and was "probably not following that decision to the letter" in making its permitting decisions (R. 255-256).

Drake believes that, viewing these circumstances in concert, it is obvious that he "has been treated arbitrarily and cavalierly by the Agency" and presumably by the City of Pontiac (Drake Br. at 28). Although the argument is not fully developed, the thrust of Drake's various points would seem to be that variance should be granted to deter the Agency and the City from repeating such "outrageous conduct".

It is the Agency's position that, despite any alleged non-compliance with Rule 604(d) by itself or by Pontiac, that Drake should reasonably have been prompted to contact the Agency early on in the project's life. As early as late summer, 1980, Drake's engineer Russell was aware of critical review status and was aware of organic problems, even if only related to sludge handling problems (R. 148, 160-161). The City did advise Drake of permit requirements during the zoning discussion in October, 1980, even before the Agency's Mr. Bauman called Drake's attorney on November 21 and December 1, 1980. Drake's failure to inquire about permit requirements under these circumstances is thus viewed as "shockingly cavalier" (Agency Br. at 5).

Economic Hardship

Drake alleges arbitrary and unreasonable economic hardship will fall on the Pontiac community and on the partnership if variance is denied. The alleged community hardship involves both loss of jobs, trade, and taxes due to failure to complete the entire project, as well as loss of the planned housing units. Partnership hardship involves loss of monies already expended, as well as anticipated profits.

It is alleged that failure to complete Winston Churchill will involve loss to the community of the wages of some 30 to 40 building tradesman for about one year, in addition to those of several part-time building management and maintenance personnel whose hiring can be anticipated upon the project's completion. However, in Drake's view, the loss to Pontiac of additional middle-income, multiple family, rental housing units is of equal if not greater significance. Studies performed by the Pontiac Chamber of Commerce in 1979 and 1980 have indicated a shortfall of rental housing within the City of all types. This problem is not anticipated to be soon corrected, as only 7 residential building permits have been issued in Pontiac in 1981 (R. 47-49, 325, Drake Ex. 12-15). Drake further alleges that, if variance for the completed building is not granted, his 30 current tenants will be hardpressed to find comparable housing in the Pontiac area (R. 30).

As to itself, Drake alleges that denial of variance for the one completed and five projected buildings would "place the Drake partners on the verge of bankruptcy." As of the date of hearing, over $400,000 was borrowed for acquisition of land and for construction costs for the completed building; interest expended on

the construction loan by itself had come to $12,700. Engineering and attorney's fees incurred in 1981 had amounted to $14,800 with $7,000 more anticipated as a result of this variance proceeding (Drake Ex. 11).

Drake states that, as it had planned to sell the buildings rather than retaining them as an investment, it cannot wait to complete the project until the Pontiac plant is completed. It projects that the current building will operate at an $1,800 monthly net loss, and states that it has borrowed $5,000 to $10,000 monthly to keep the project intact. Drake states that no further construction financing can be obtained unless and until a variance is granted, and that there will be no interim funds available to finance its current mortgage and other loan repayments. Other partnership real estate holdings would have to be sold to cover these debts, "probably" resulting in bankruptcy (R. 28-29, 40-42, Drake Ex. 11).

The Agency argues that, in any event, expenditures made prior to rezoning on November 17, 1980 are irrelevant to proof of hardship in this proceeding, as they had no assurance of ability to construct their project, citing R. Elliot Polister v. IEPA and City of St. Charles, PCB 80-164 (February 19, 1981) at 3. Any hardship caused by expenditures made after that date are viewed as being self-imposed, in view of Drake's failure to investigate the permitting situation, and his decision to connect his building to the sewer system without a permit.

BALANCE OF EQUITIES

The threshold question obviously is whether variance is necessary at all. To resolve this question, the Board must define the scope of the Rule 951(b)(2) permit exemption, in exercise of its Board's quasi-legislative function. [See IEPA v. Pollution Control Board, et al., No. 54131, slip op. at 9-11 (Ill.S.Ct. Sept. 30, 1981).]

The Board itself has not previously addressed the question as to whether design criteria versus actual discharge is determinative of Rule 951(b)(2)'s permit exemption.* However, the Board finds that only through use of design criteria as the determinative factor is the exemption reasonably easy and certain of application by potential permittees and the Agency. The exemption's purpose was to lighten the administrative burden on potentially small dischargers and the Agency's permitting section, and not to create a nightmare of regulatory confusion [see People v. Keeven, 68 Ill.App.3d 91, 385 N.E.2d 804, 811-812 (5th Dist. 1979)(upholding constitutionality of Rule 951).] The Board hardly intended to frame a rule which could be applied only after a "fait accompli".

*The substance of current Rule 951(b)(2) was first adopted as Rule 901(b)(2) in R71-14, and provided in pertinent part, an exemption for (continued next page)

Yet, even were the Board to have otherwise defined the scope of this exemption, the evidence presented concerning actual water usage of the present occupants would have been insufficient to allow the Board to determine if the exemption applied. A single water bill for the months of May and June does not establish, with sufficient certainty, what a building's actual water use patterns would be, and certainly would not apply to the buildings yet to be built, occupied and sold.

As the exemption does not apply, variance is necessary, and the Board must evaluate the merits of this action. The Board has recently adjudicated another variance petition seeking a hook-on to the Pontiac STP in H.J. Bergman Builders, Inc. and The City of Pontiac v. IEPA, PCB 81-67 (September 3, 1981). It would seem to have been an understatement to have remarked there that "many parties have mishandled environmentally unsound situations for years at a stretch" (p. 7). It has become abundantly clear that "[a]lthough combined sewers are a problem all over Pontiac, [it does] not want to limit [its] growth unless absolutely necessary" (IEPA Ex. 2, Pontiac letter of 12/16/80). Pontiac has encouraged development while acting inconsistently both towards potential developers and its current residents. As to the Agency, while the Board appreciates the magnitude of its workload, the record indicates an unsettling lack of consistency in its decisions and actions as they relate to critical review and pending restricted status, as well as notice and permitting during those periods.

Yet, it is also the fact that "a party claiming the benefit of an estoppel cannot shut his eyes to obvious facts, or neglect to seek information that is easily accessible, and then charge his ignorance to others" Willowbrook Development Corp. v. IPCB, 92 Ill.App.3d 1074, 416 N.E.2d 385, 391 (1981). There is sufficient evidence to prove that Drake has done both. Drake

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(footnote continued)

> "any...sewer that is designed and intended to serve a single building and eventually...transport the sewage of 15 or less persons..." R71-14, 4 PCB 5, 29 (Order, March 7, 1972).

The accompanying Opinion makes no direct comment on the substance of this Rule.

In R73-11, 12, Rule 951 was adopted in its current form. The supporting Opinion notes only that former Rule 901

> "was modified to read 'an average of 1500 gallons per day of domestic sewage'. *This change was premised* upon a population equivalent of 100 gallons per person, which equates 15 or more persons to 1500 gallons per day of domestic sewage." R73-11, 12, 14 PCB 661, 679 (Opinion, December 5, 1974).

did not contact the Agency concerning the plant, even though 1) his engineers were aware of critical review status in summer, 1980 and 2) he was informed about permit requirements at City Council meetings in October, 1980. Upon receipt of rezoning on November 17 and issuance of a City building permit November 18, Drake commenced construction without even having filed an application with the Agency, let alone having waited for the Agency's answer. Construction continued even after an Agency employee, on his own initiative, contacted Drake's attorney November 21, 1980 and his engineer December 1, 1980 to discuss a permit application and potential permit problems. The Board finds that Drake's continuation of construction was certainly unreasonable after November 21, 1980, if not from its very start.

The Board finds that Drake's economic hardship is of its own making. To find otherwise would be to reward Drake for a successful flouting of the permit system. The Board does not find any credible evidence that the unpermitted hook-on was made in good-faith reliance on a reasonable interpretation of an arguable Board rule. That there is an indication that the building discharges less than 1500 gpd seems entirely fortuitous, in the absence of pre-hook-on consultation between Drake's and the Agency's engineers.

Drake has not convinced the Board that he has no interim sewage disposal options. That holding tanks require proper servicing and maintenance may render them more costly than a direct hook-on, but does not render them infeasible. As to the completed building, there is no evidence that a septic field cannot be constructed to service that building only.

Drake also alleges hardship to his current tenants if they are forced to find substitute housing. The Board finds that, given the availability of the above described sewage disposal options, that possible imposition of this particular hardship would lie in Drake's control, and so should be afforded little weight.

Here, as in Bergman, the weight given the potential hardship due to loss of additional middle income housing to the City is far outweighed by the actual hardship which has been and will continue to be imposed on residents experiencing the health threats and nuisance of sewage back-up. The mere building of Winston Churchill on a vacant lot has increased storm run-off that, doubtless in conjunction with its illegal connection to an overloaded sewer line, has been proven to have increased sewer discharging. It would appear that to the Chicago, Locust, and North Street sewer lines there can be no "de minimis" additions. Indeed, as the Board alluded to in Bergman (at p. 8), even if additions to these sewers and to the STP could be considered "de minimis", the Pontiac situation is one in which the line against any additional loading must be drawn by the Board, whether or not the City and/or the Agency concur.

Variance from Rule 962(a) is accordingly denied for failure to prove an arbitrary or unreasonable hardship, particularly as balanced against the City's water pollution problems resulting from the marked insufficiency of its sewers and treatment plant.

ORDER

Variance from Rule 962(a) is denied.

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 22nd of October, 1981 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board