

ILLINOIS POLLUTION CONTROL BOARD

May 6, 1976

LAND AMERICA CORPORATION, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) PCB 75-426  
 )  
 ENVIRONMENTAL PROTECTION AGENCY, )  
 )  
 ) Respondent. )

Mr. Samuel T. Lawton, Jr., Attorney, appeared for Petitioner;  
Mr. John Bernbom, Attorney, appeared for Respondent;  
Mr. James K. Young, Attorney, appeared for Intervenor Village of  
Lombard;  
Mr. Michael A. Benedetto, Jr., Attorney, appeared for Intervenor  
People of the State of Illinois.

OPINION AND ORDER OF THE BOARD (by Mr. Zeitlin):

This matter is before the Board on a Petition for Variance filed October 31, 1975 by Petitioner Land America Corporation (Land America), seeking Variances from Rules 958(b) and 962 of Chapter 3: Water Pollution, of the Pollution Control Board Rules and Regulations, for the construction and operation of a sanitary sewer connection to serve a proposed 282-bed nursing home facility to be located in the Village of Lombard.

The Village of Lombard filed a Motion for Leave to Intervene in the matter on November 17, 1975 and, in addition, filed a formal objection to the requested Variance on November 20, 1975. The Attorney General, for the People of the State of Illinois, filed a Motion for Leave to Intervene on November 18, 1975. The Agency's Recommendation was filed on December 10, 1975. A hearing was held on February 20, 1976 in Hinsdale, Illinois, at which all of the above parties were represented, and additional testimony was received from numerous private citizens opposed to the grant of the Variance. Following the hearing the parties filed extensive briefs and other documents, and various individuals filed additional materials objecting to the Variance.

Land America is the contract purchaser of a 1.4 acre parcel of real estate located at Lincoln Avenue and St. Charles Road near downtown Lombard, Illinois, where it proposes to develop and operate a four-story, 282-bed nursing home. The Village, on April 4, 1974, passed an Ordinance providing zoning reclassification and a special use permit for the nursing home. Land America also has a Certificate of Need from the Illinois Department of Public Health with regard to the proposed nursing home. Before it can obtain financing for the

nursing home project, however, Land America must obtain from the Agency the relevant construction and operating permits for the sanitary sewer connection needed to serve the project. This it has been unable to do, and for this reason the Variance is sought.

All parties agree that the site is presently served by a 54-inch combined sanitary and storm sewer, which is tributary to the Village of Lombard North Sewage Treatment Plant (STP). Nor is there any argument on the fact that this sewer is totally inadequate for its present load, much less any additional load. Throughout the service area of the existing 54-inch combined sewer, residences are constantly subject to severe backup and flooding problems. Much of the record is devoted to testimony by individual citizens demonstrating the extent of the present problems in the area, (e.g., R. 15-87).

However, the Village of Lombard is presently undertaking an extensive sewer separation project in the area served by the present 54-inch combined sewer, and in areas tributary to that sewer, also presently served by combined sewers leading to Lombard's North STP. The essence of Petitioner's claim here is that this separation project will alleviate the present backup and flooding problems, relieve overloading at the Lombard North STP, and provide the basis for a Board finding that a Variance is warranted.

The actual effect of Lombard's sewer separation program occupied the majority of the record in this case.

Opposition to the Variance by the People and Lombard itself requires that we examine in detail the likely effectiveness of that sewer separation program, alleged problems at the Lombard North STP and in the DuPage River, and the consequent effects of the proposed nursing home. Agency opposition to Land America's Petition was more specific, and of a legal nature, and will be discussed below.

#### SEWER SEPARATION PROGRAM

Lombard's sewer separation program presently consists of four segments (A, B, C and D). Parts A, B and C consist of storm sewer construction, (Pet.'s Composite Ex. 2); Part D is a storm water pumping station at the East Branch of the DuPage River, (R. 91). These projects constitute phase I, costing approximately \$3.5 million of a \$13 million sewer improvement program. The goals of the program are to reduce the hydraulic load on the Sewage Treatment Plant, separate the sanitary and storm flows, and to prevent backup and flooding in the affected areas, (R. 98-99).

At the time of the hearing, these projects had been largely completed. Parts A, B and C were scheduled to be essentially completed by Spring, 1976; Part D, the pumping station, is scheduled under contract for completion in mid-September, 1976, (R. 104-108). It is not clear, however, exactly how much separation will be accomplished. One witness stated that by the time Part D is completed, all but 5 per cent of the storm water presently entering the 54-inch combined Grove Street sewer will be diverted to the new storm sewer, (R. 107). Another witness, however, stated that only about 60 per cent of the storm water would be removed from the 54-inch combined sewer now servicing the proposed nursing home site, (R. 264). The later witness, Lombard's public works director, even stated that it would be necessary to leave some storm water inflows to the 54-inch combined sewer open, because of that sewer's very slight gradient, (id). His testimony and that of the supervising consulting engineer on the project were contradictory in this regard, (R. 107).

Both witnesses agreed, however, that the sewer separation project would largely alleviate backup and flooding in the areas downstream of the proposed nursing home site, and presently tributary to the combined Grove Street sewer, (R. 106, 110, 265-66).

#### EFFECTS OF THE PROPOSED FACILITY

Land America's Petition claims that its proposed nursing home would generate a sewage flow of 42,300 gallons per day, based on 150 gallons per day per bed. The Environmental Protection Agency's Recommendation, however, estimated the total flow from the proposed nursing home at less than 20,000 gallons per day, showing the basis of the estimate as "data from similar nursing home facilities." That flow would be discharged into an existing 12-inch combined sewer which is tributary to the 54-inch combined sewer discussed above. That 12-inch combined sewer is also a part of the sewer separation program described above.

It was estimated, (R. 154), that the 54-inch sewer has a capacity of 18 to 20 million gallons per day, with no backups or flooding. It was also estimated that, after the sewer separation program described above has been completed, the 54-inch sewer should have an average dry weather flow of 1.7 million gallons per day, (id).

We agree with the Petitioner that, based on these figures and the testimony on the effectiveness of the storm sewer separation program, the flow from the proposed nursing home will probably not contribute to or cause any flooding or backup of sewage into basements. As a further guarantee of that finding, Land America offered in its Petition and in its Brief to install at the proposed nursing home a holding tank with 84,600 gallons capacity. Using Land America's figures, this would provide two days storage capacity; using the Agency's figures, this would provide in excess of four days capacity. Thus, even if the storm sewer separation program is not totally effective, any effect on backups or flooding from the nursing home would be minimal or non-existent.

Turning then to the effect of the proposed nursing home on the Lombard North STP, we also find that the effect would be minimal. First, completion of the sewer separation program should considerably alleviate hydraulic overloads at the North STP during storm periods. Second, Petitioner has committed itself to construct the holding tank mentioned above, which will be designed such that all sewage flows from the nursing home will, during dry weather, be discharged to the plant during off-peak hours; during wet weather, the tank will hold the nursing home's sewage for two to four days, depending on the figures used for sewage generation. We can reasonably expect under these circumstances that the sewage treatment plant will achieve, for the nursing home's effluent, approximately 90 per cent treatment, such as is now being generally achieved, (R. 155). On the record before us, the organic loading on the plant is not a significant issue, and will not be materially affected, (R. 137-140; 142; 146; Rec. pp. 4-5).

Effects on the East Branch of the DuPage River should also be minimal. Part D of the sewer separation program will include retention basins along the River which should provide some relief for the River, (R. 103, 119).

Since it will be at least two years until the proposed nursing home will be completed, and approximately six months until the entire sewer separation program will be completed, we find that the evidence shows that the proposed nursing home will have little, if any, detrimental effect on downstream properties tributary to the 54-inch combined sewer, the Lombard North STP, or the East Branch of the DuPage River.

#### HARDSHIP

Petitioner's claim of hardship here is twofold. First, it claims that it will be irreparably harmed financially if it is unable to obtain the necessary permits, because the financing needed for the project will be unavailable. Should the financing be unavailable, Petitioner's Vice President testified that it would be unable to sustain the \$100.00 per day burden of holding the project in abeyance, (R. 189-211, 229-233). In addition, it appears that federal financing which is now available may not be available at all after mid-1976. Petitioner showed that the company's entire expenditure to date, approximately \$170,000.00, could be forfeited.

Secondly, Petitioner pleads as hardship the need for its proposed nursing home. This issue was not seriously contested by the other parties, and was proved principally through the Illinois Department of Public Health's issuance of the requisite Certificate of Need. All parties cited us to prior cases in which the Board found special hardship in the case of proposed nursing homes.

Only the Attorney General seriously questioned the claimed hardship. He claimed that: 1) Petitioner's vice president's opinion as to the possibility of termination of the project was no more than that -- merely opinion; 2) that the hardship is to be distinguished here because construction of the home has not begun; 3) that the prior cases of "nursing home hardship" to the public can be distinguished; and 4) the hardship was self-imposed. We are persuaded by none of these arguments. The Attorney General offered no concrete evidence to counter Petitioner's business judgement that the investment to date would be lost. Petitioner's Ex. 11, as well as testimony cited above by Land America's vice president, convince us that the hardship here was not self-imposed, in that Petitioner reasonably relied on the sewer separation program as changing its situation. The factual distinctions between this and prior cases cited by the Attorney General are not of sufficient importance to affect our decision.

Based on these facts, we find that the Petitioner has indeed shown that it is entitled to a Variance from Rule 962. Balancing the small likelihood of environmental harm against the strong hardship shown by Petitioner, to both itself and the public, such a Variance is clearly warranted.

Having decided that a Variance from Rule 962 is warranted, we must turn to the Agency's argument that the same is not true of a Variance from Rule 958(b). The Agency's brief correctly notes that it is not Petitioner but the Village of Lombard which would be held liable for violations of the Act or our Regulations, possibly contributed to by sewage flows from the proposed nursing home.

In addition to arguing the possibility that a grant of Variance from Rule 958(b) might impose liability for violations upon Lombard, the Agency argues that such a grant would be an interference with a local governmental function. The Agency states that it cannot support the grant of a Variance from Rule 958(b) when the elected officials of the local government unit involved have made the judgement that there is not in fact sufficient capacity for the additional load, and numerous private citizens oppose the grant of the Variance.

We are not convinced by the Agency's arguments. We find that the test for Variances under Rule 958(b) is essentially the same as that for Rule 962: a balancing of the hardship likely to be suffered by the Petitioner against the likelihood of environmental harm.

We see no interference with local government affairs, as the Agency pleads, in this decision. Lombard correctly declined to provide the certification required by Rule 958(b), since adequate capacity for transport does not now exist. In granting the Variance we decide that such capacity will exist prior to the nursing home's opening, and that as a result there will be little or no environmental damage. The Variance is from the Board's own Regulation, and does not affect any decision by Lombard on the issue of the proposed nursing home.

Nor do we see that the decision will impose any liability on Lombard. Our grant of a Variance will be conditioned on completion of the sewer separation program and the installation of the holding tank mentioned above. These conditions should minimize, or even eliminate, any contribution by the nursing home to possible future violations. Whether Lombard may be liable for future violations is not the issue: It is, instead, whether the grant of this Variance will, or may, impose any additional liability on Lombard. The conditions on the Variance should prevent such an imposition.

This Opinion constitutes the findings of fact and conclusions of law of the Board in this matter.

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that:

1. Petitioner Land America Corporation be granted a Variance from Rules 958(b) and 962 of Chapter 3: Water Pollution, to allow the construction of a 282-bed nursing home in Lombard, Illinois, subject to the following conditions:

a. Said nursing home shall commence operation only after completion of the Village of Lombard's sewer separation program described as "Parts A, B, C and D" in the foregoing Opinion.

b. Petitioner shall construct and operate an 84,600 gallon holding tank for the retention of sewage flows from its nursing home; the tank shall be operated so as to discharge only during off-peak hours of operation for the Village of Lombard North Sewage Treatment Plant and so as to prevent, to the extent possible, discharges to said treatment plant during periods of wet weather excess flows.

2. Petitioner Land America Corporation shall, within thirty (30) days of the date of this Order, execute and forward to the Environmental Protection Agency, Control Program Coordinator, 2200 Churchill Road, Springfield, Illinois 62706, a Certificate of Acceptance in the following form:

I, (We), \_\_\_\_\_ having read the Order of the Illinois Pollution Control Board in case No. PCB 75-426, understand and accept said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

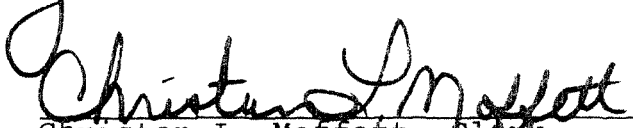
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SIGNED

\_\_\_\_\_  
TITLE

\_\_\_\_\_  
DATE

Mr. James Young concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 6<sup>th</sup> day of May, 1976, by a vote of 5-0.

  
Christan L. Moffett, Clerk  
Illinois Pollution Control Board