ILLINOIS POLLUTION CONTROL BOARD
January 23, 1975

BEN COOPER Petitioner,	)	
v.	)	PCB 74-228
ENVIRONMENTAL PROTECTION AGENCY Respondent,	)	

MR. WAYNE B. FLANIGAN and MR. SHELBY YASTROW, appeared on behalf of Petitioner;
MR. JAMES SCHLIFKE, appeared on behalf of the Environmental Protection Agency

OPINION OF THE BOARD (by Mr. Dumelle):

This Opinion is in support of a Board Order entered on January 3, 1975.

Mr. Ben Cooper filed a petition for variance on June 14, 1974. On June 20, 1974 the Board entered an order requesting additional information to be filed by Mr. Cooper. Mr. Cooper filed an amended variance petition on July 8, 1974. On August 22, 1974 the Environmental Protection Agency (Agency) filed a Recommendation to deny the requested variance. The Board received a letter from Mr. Ernest Dicg, Alderman of Waukegan's Fifth Ward, which contained copies of petitions objecting to the variance request filed by Mr. Cooper. A hearing was held on December 6, 1974. Both parties filed briefs in this matter.

Mr. Cooper seeks a variance from Order #7 of League of Women Voters v. North Shore Sanitary District, PCB 70-7, 12, 13, and 14, as modified by Order #7 of North Shore Sanitary District v. Environmental Protection Agency, PCB 71-343 (hereinafter cited as League v. NSSD and NSSD v. EPA, respectively). Petitioner seeks a variance to allow construction of a 64-unit apartment building, in order to facilitate a sale of the lot in question. The apartment building contemplated by Mr. Cooper would produce 10,000 gallons per day (gpd) of domestic wastes (R. 77). The subject lot is located in the 1500 Block of Westmoreland Avenue and Vlachos Subdivision of Waukegan (R. 65 and 69). Mr. Cooper bought the vacant piece of land in 1964 from Mrs. Vlachos (R. 65). The purchase price was $65,000 with Mr. Vlachos retaining a $40,000 purchase money mortgage (R. 66). Mr. Cooper owes $30,000 on this mortgage (R. 66).

Mr. Cooper alleges that he should be granted a variance based upon the court decision in Wachta v. Pollution Control Board, 8 Ill. 3d 436, 289 NE 2d 485 (1972) (hereinafter cited as Wachta). In the alternative, Mr. Cooper alleges that his individual hardship outweighs that of the public and therefore the Board should grant the requested variance.

Mr. Cooper's property is served by the Westmoreland sanitary sewer. This sanitary sewer is tributary to the Judge Avenue sewer (Agency exhibit 1, and page 1 of the amended variance petition). Mr. Cooper seeks this variance because the Board has previously imposed a sewer ban in the area in question. The North Shore Sanitary District (NSSD) was given guidelines to follow in issuing permits for sewer connections within this area (Order #7 of League v. NSSD, supra). The NSSD is precluded from issuing permits for new connections if any part of the downstream sewers are incapable of adequately transporting the additional or new wastes of the proposed connection (Order #6(c) of NSSD v. EPA). The Judge Avenue sewer is classified by the Agency as hydraulically overloaded and therefore the NSSD is forbidden from issuing permits which would allow the connection of new developments such as that proposed by Mr. Cooper. Therefore, Mr. Cooper needs a variance in order to obtain a permit from the NSSD.

The Board finds that the decision in Wachta and the three subsequent court decisions relying on Wachta (North Shore Sanitary District v. PCB, et al, 22 Ill. App. 3d 28. 3;6 N.E. 2d 782 (1974); Thomas P. Kaeding v. PCB, et al, 22 Ill. App. 3d 31, 316 N.E. 2d 788 (1974); and Alfred B. Bederman v. PCB, et al, 22 Ill. App. 3d 36, 316 N.E. 785 (1974)) are not controlling in this instance. The court in Wachta applied the doctrine of equitable estoppel so as to prevent the denial of connection permits from the NSSD for facilities that had received Sanitary Water Board permits prior to the imposition of this sewer ban in League v. NSSD, supra. Although the City obtained a Sanitary Water Board permit prior to the imposition of the sewer ban, the Board finds that Wachta is distinguishable because of the danger to the public health resulting from sewer overflows, the backup of sewage into basements and the passage of time since the issuance of the permit to the City. In the Wachta decision, as well as the three subsequent decisions, petitioners were seeking to connect to sewers which had adequate capacity, but were tributary to sewage treatment plants that provided inadequate treatment. Such is not the case with the Judge Avenue sewer. The record contains many references to the backup of sanitary waste into homes in proximity to Mr. Cooper's proposed apartment complex (R. 25, 28, 39, 40, 41, 50, 53, 90 and 91).

Such backup of sanitary waste into basements cause a significant hepatitis health hazard. Mr. Herbert Redman, Area Supervisor of the Lake County Health Department, presented evidence of two cases of communicable diseases which occurred during 1974 in the area in which Mr. Cooper's property is located (R. 55). These diseases were shigella and hepatitis (R. 56). He stated that the investigation of these two cases of communicable diseases brought out references to sewer backups and sewer-type odor (R. 57). He testified that the Lake County Board of Health was opposed to any more construction in areas that had sewer problems until such time as the problems were corrected to the revamping of the sewer system (R. 59). Because of these two reported communicable diseases and the potential for others such as salmonellosis, intestinal infections caused bye. coli, typhoid fever, poliomyelitis, and other internal viral infections, the Board finds that there exists a significant public health hazard presented by basement backups in the area served by the sewers to which Mr. Cooper's proposed discharge would be tributary.

Because of this public health hazard, the Board is not estopped from denying the requested relief. Therefore, the Board must weigh the hardship suffered by Mr. Cooper versus the additional hardship to be suffered by the public if the requested relief were granted.

Mr. Cooper's hardship is economic in nature. He currently owes $30,000 to the Vlachos estate for the remainder of the purchase mortgage (R. 66). Mr. Meyer, an attorney representing the Vlachos estate, testified that the note must be paid in full by February 11, 1975 or the estate will instigate foreclosure proceedings (R. 20). Mr. Cooper testified that he could not pay the $30,000 owing on the note by February 11, 1975 (R. 67). He further testified that if he gets the permit -- the result of the requested relief -- he felt the property would be marketable and he could either sell it or borrow additional funds upon it (R. 67). Mr. Cooper has paid approximately $600 to $700 a year in property taxes and interest on approximately the entire purchase price since 1964 (R. 72). Mr Cooper paid an architect between $4,000 and $4,500 to draw up plans for a proposed apartment development to be located on the site (R. 74). Mr. Cooper testified that he does not know if he would sell the lot or continue to develop it (R. 68). Mr. Cooper testified that he has not previously undertaken development on this lot because of financial feasibility and because he was engaged in other activities (R. 86).

The Board must balance a substantial economic hardship suffered by Mr. Cooper with the hardship to be imposed upon the public. As previously stated, the Board finds that a significant public health problem exists in the area. In addition to the health problems, such backups limit the ability of the citizens to utilize their basements. One citizen testified to the destruction of personal property which was placed in the basement while he was moving into his house (R. 25). He testified that he had undergone an insurmountable loss because of the backup of sanitary waste (R. 25).

Mr. Cooper does not deny the existence of basement backups, but instead states that any additional flow from his development would have a minimal impact upon such backups (R. 75 and 77-78). The sewers in question have adequate capacity during dry weather, but because of infiltration or other connections they have inadequate capacity during periods of rainfall. Mr. Rick Springer, an Agency engineer, testified that any additional loading would produce the same amount of additional backups during those times when the sewers were at capacity (R. 91).

The Board finds that any additional waste added to a sewer system, when that sewer system is carrying waste at maximum capacity, will result in additional backups of a like amount. The Board finds that petitioner has failed to establish an arbitrary or unreasonable hardship which outweighs the hardship suffered by the public in the event such relief were granted. Mr. Cooper presented no evidence of alternatives such as holding tanks to be used during wet weather periods.

In addition to the distinguishing public health factor present in this case, the Board finds that Mr. Cooper is barred by laches from asserting his equitable claim. Laches, in a general sense, is the neglect for an unreasonable and unexplained length of time to do that which could and should have been done earlier, if at all. "Laches is such a neglect or omission to assert a right ..., and other circumstances causing prejudice to an adverse party, as will operate as a ban in the court of equity. Unlike limitations, laches is not a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced --an inequity founded upon some change in the condition or relation of the property and the parties. Laches depends on whether, under all the circumstances of the particular case, plaintiff is charged with want of due diligence in failing to institute

proceedings before he did. Where there is such a change in the relations of the parties or such a change in the subject matter of the suit as to render it inequitable to grant relief, it will be refused without reference to the statutory period of limitation". (Holland v. Richards, 4 Ill. 2d 570, 123 N.E. 2d 731 (1955)).

In July of 1958, the Sanitary Water Board issued the City of Waukegan a permit to extend the sewer to which Mr. Cooper now desires to connect (R. 69 and 81 and Petitioner Exhibit 1). Mr. Vlachos, the former owner of the lot in question, proceeded to install the Vlachos Subdivision sewer. Mr. Cooper's predecessor had a valid right to act in reliance upon that permit and to connect to that sewer. However, Mrs. Vlachos sold the property to Mr. Cooper who did not assert that right from 1964 to the present (R. 65).

"Laches ... is a failure to assert a right over a period of time, which when taken in conjunction with all other circumstances would result in undue prejudice to the adverse party. It is thus principally a question of inequity in permitting a claim to be enforced when during the delay there has been a change in condition of the subject matter or relation of the parties resulting in a disadvantage in the party against whom the claim is asserted" (Seymour v. Henbaum, 65 Ill. App. 2d 89, 211 N.E. 2d 897 (1966)). "We may consider that a party is guilty of laches which ordinarily bars the enforcement of his right where he remains passive while an adverse claimant incurs risk, enters into obligations or makes expenditures for improvements or taxes" (Pyle v. Ferrell, 12 Ill. 2d 547, 147 N.E. 2d 341 (1958)).

No one is asserting that the permit which was issued to the City of Waukegan, was not originally valid when there existed adequate sewer transport capacity. The lot was purchased in what was a rapidly developing area and sixteen and one-half years have lapsed since that permit was issued. The doctrine of laches is founded on the maxim that equity aids the vigilant and not those who slumber on their rights (Pyle v. Ferrell, 12 Ill. 2d 547, 147, N.E. 2d 341 (1958)).

The delay in asserting a right must work a disadvantage to the adverse party, as where a claimant fails to assert his right until the condition or situation of the adverse party becomes so changed that it would be inequitable to enforce the right. In the present case, other persons have proceeded to connect to that sewer and other physical forces have acted until there is at present a serious transport problem. The adverse party is the public who suffers from sewer overflows and basement backups which have resulted from this sewer transport problem.