

ILLINOIS POLLUTION CONTROL BOARD

January 3, 1974

SPRINGFIELD MARINE BANK	)	
as Trustee of Trust #51-0239-0	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 73-348
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

DISSENTING OPINION OF MR. HENSS

Petitioner's hardship is not all self-imposed. Major expenditures were made prior to the Agency decision in July 1972 to impose a sewer connection ban. The Agency letter of August 29, 1972 granting a "conditional installation" permit led to further expenditures by the Petitioner. Elements of estoppel are present in this case. The July 1972 decision to ban further sewer connections was a decision of the Environmental Protection Agency. The August 1972 decision to issue conditional permits was also a decision of the Environmental Protection Agency, and seemed to remove the ban. An employee of the Agency, Mr. Abraham Loudermilk, testified:

Q. "What I'm trying to get at, you are telling the hearing officer that it was your opinion that the ban was lifted by this letter upon the completion of the new sewer plant, is that right?"

A. "Essentially, yes." (R. 167)

Q. "So your testimony is that that letter was intended to lift the ban when the new plant was completed, based upon an assumption of the truth of the information received from the City?"

A. "That's right."

Q. "Or from the Sanitary District?"

A. "That's right." (R. 171)

If the Agency employees thought the ban had been lifted, is Petitioner not entitled to that same understanding? Do we require a degree of clairvoyance on the part of Petitioner which is not possessed by EPA employees?

The majority state that Petitioner took a business risk. This is true. He gambled that the sewer improvements would operate "as designed" (See Condition No. 3 of the permit). If the "design" was inadequate the Agency should have detected that error prior to issuing an installation permit. If the Agency intended to prevent use of the sewer when constructed and operated "as designed" it should never have issued a conditional permit which would induce Petitioner to make further expenditures. Implicit in the issuance of a conditional permit is the understanding that an operating permit will be issued within a reasonable period of time.

This case is not substantially different from Viking (PCB 73-236) in which we allowed the sewer connection. The majority say that this case is different because there has been no construction of homes whereas construction was substantially complete in the Viking case. However, this Petitioner has incurred costs of at least \$384,000, a substantial hardship. It seems to me unreasonable to require that this hardship take the form of buildings in place.

In my opinion, the Petitioner should be granted the right to connect 27 homes to the sewer. That number is all that could reasonably be developed in the next construction season and should help Petitioner to avoid any financial problems which might otherwise result from the misunderstanding of the Agency action.

Although I would allow this limited number of connections I would clearly state that further connections will not be authorized until the sewer system can handle the additional load. This should put Petitioner on notice to avoid adding to the financial burden and should remove any misunderstanding or possible questions of estoppel for the future. The sewer is overloaded. There is ample evidence of that fact and of the health and sanitation problems which accompany the overloading of a sewer system. It is entirely proper for governmental agencies to restrict the usage of such a sewer. However, that governmental action should not be so unclear in its meaning as to lead to confusion and financial hardship on the part of those who are making investments in the area. Because the sewer ban was not clearly stated; because Petitioner could reasonably rely upon the August 1972 letter as a relaxation of the ban; and because of the hardship to Petitioner which accompanied this state of confusion I would allow a limited number of connections. At the same time, a clear statement should be made regarding the future. That statement should be to the effect that no further sewer connections will be allowed, nor will conditional permits be issued until such time as the sewer system has been found to be adequate to handle the additional load.

*Donald A. Hines*

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the Above Dissenting Opinion was submitted by Mr. Henss on the 10th day of January, 1974.

Christan L. Moffett