ILLINOIS POLLUTION CONTROL BOARD
August 22, 1972

ESTELLA LEWIS	)	
	)	
	)	
v.	)	#72-208
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	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Opinion of the Board (by Mr. Currie):

This opinion explains the reasons for our order of August 15 dismissing this request for a variance. The petition seeks permission to connect a single-family home to sewers tributary to the North Chicago sewage treatment plant despite our connection ban order of March 31, 1971 (League of Women Voters v. North Shore Sanitary District, #70-7).

Our order forbidding additional connections until substantial improvements were made in the treatment plant was based upon our findings that existing treatment facilities were inadequate; that additional connections would aggravate the situation and cause the discharge of additional ill-treated sewage to Lake Michigan, a body of water deserving special protection because of its unique value and recreational uses; that in the ordinary case these considerations outweighed the inconvenience of delay in the construction of new homes or other buildings. Moreover, as has been confirmed by later experience, a ban on connections serves as a powerful incentive to those charged with responsibility for treating sewage to do whatever is practicable to improve their processes in the shortest possible time. See Danville Sanitary District v. EPA, #72-161 (June 14, 1972); City of Mattoon v. EPA, #72-64 (June 6, 1972); North Shore Sanitary District v. EPA, #71-343 (Jan. 31 and March 2, 1972).

At the same time we have recognized that in certain extreme cases the hardship of denying a connection is so great as to justify the additional pollution that a connection would cause and have granted variances from the order. The principal cases spelling out our policy in this regard are Wachta v. EPA, #71-77 (July 12, 1971) and Patricia Development Corp. v. EPA, #71-161 (Sept. 16, 1971). In Wachta a Board majority held that a connection must be allowed in cases in which construction of the building had begun before the connection ban was imposed, because of expenditures in reliance on the supposed ability to connect and because of the expenses of providing security and maintenance for a finished and vacant building. In Patricia we held that connections must be allowed in cases in which by reason of limited income a commitment for federal mortgage assistance had been obtained for a home contracted

for before the connection ban was imposed. The need for decent housing within financial means in such cases was found to justify the additional pollution.

Mrs. Lewis does not claim to qualify for a connection under the Wachta doctrine, since her home is not yet under construction. Her petition is based upon the Patricia line of cases. Living with two children without support from her divorced husband, she earns a gross weekly income of $137.20; her rent is about to be raised to $155 per month. She alleges that the increased rent "will be beyond your Petitioner's means; "that the apartment in which Petitioner and her children are now residing is not a suitable place to raise children;" and that her efforts to find other suitable accommodations she can afford have been without avail. She contracted to purchase a lot and to have a home built upon it, and on September 1, 1971 she received a commitment for federal mortgage assistance under Section 235 of the National Housing Act. She states that unless she is permitted to begin construction soon, she will be without suitable accommodations and may lose her eligibility for mortgage assistance.

The Environmental Protection Agency asked us to deny the petition, both because there was no specification of why Mrs. Lewis's present housing is not "suitable" and because of another part of the holding in the Patricia case. In Patricia we granted connections for federally-aided homes for which a contract to build had been entered into before connections were forbidden because by entering into contracts the buyers were "abandoning the search for alternative quarters and increasing the hardship that they would suffer if denied their new homes now." On the other hand, variances were denied for federally-aided homes for which no construction contract had been entered into at the time of the connection ban:

> Much as we sympathize with the people who would greatly benefit if they could build these homes, we believe the line must be drawn somewhere to avoid open-ended increases in the pollution of Lake Michigan. Persons not committed at the time of the sewer connection ban were on notice that they must look elsewhere to build new homes. Though homes within the District may be more convenient for these people, we think some consideration must be given to locating new homes in areas where there are adequate sewage treatment facilities. In light of the possibility of constructing comparable homes with similar federal assistance elsewhere, we cannot open the door to the building of new homes even for the needy where the contract to build was not signed at the date of the ban.

Patricia Development Corp. v. EPA, supra.

On the facts as presently alleged, we believe Patricia requires that we not grant this variance. We do not say that no set of facts could possibly justify a hardship connection when the contract and mortgage aid commitment were obtained after imposition of the connection ban; it may be, for example, that in certain cases federal aid was in fact unavailable outside the forbidden area, or that the hardship of living at a considerable distance from one's present employment was prohibitive. We did not find such proof as to the late contracts in Patricia, and we do not find sufficient allegations to that effect in the present petition. We agree with the Agency that there must be some further specification of the inadequacy of present living conditions and the unavailability of satisfactory alternatives before we can allow this connection. We add that we cannot be sure from the petition whether this case really falls within the grant or the denial portion of Patricia; for although it is alleged that the federal aid commitment was received several months after the ban was imposed, we do not know when the contract to build was signed, since the contract is not in our files although the petition states that it will be attached. It may be that a further petition will show Mrs. Lewis did commit herself to build at the requested location before the ban was ordered, and if so she will be entitled to a connection.

If it were not for the unfortunate rule requiring the Board to decide variance cases within 90 days after their filing or have them granted by inaction, we would schedule a hearing or ask for written submissions in which the issues we have raised in this opinion could be fully addressed. We would not wish to stand on the technicalities of pleading, especially in a case brought by an individual not blessed with a large stable of corporate attorneys. It was in hopes of avoiding the expense and inconvenience of a hearing that we decided to pass on the case on the basis of the petition and Agency recommendation alone. The recommendation has alerted us to matters that require further exploration, and it is now too late to hold a hearing within the 90-day period. Our only recourse, therefore, short of granting a variance on the basis of allegations we find not entirely complete in light of the Patricia case, is to dismiss the present petition without prejudice to the filing of a more complete one on which hearings can be scheduled if factual questions remain. The filing of a relatively factual petition, verified, in response to the questions raised in this opinion, might render a hearing unnecessary; and should a hearing be needed we call attention to our procedural rule allowing the Board to assume the cost of the transcript in cases of financial hardship upon request. Of course it may be that the facts are not such as to justify reapplication in light of this opinion.

It would be tempting simply to grant this petition on the ground of the very real desirability of permitting the petitioner to build her new home. The additional waste from a single home will not break Lake Michigan. But although we deal today only with one home, what we hold today will determine what we must do in similar future cases. If we allowed the connection requested today, on the allegations before us, we should find it very difficult to distinguish the next petition seeking to connect another federally-aided house for which commitments were not made until after the connection ban, or any of the next several hundred; and the cumulative effect of many such connections might well be serious. The policy we ununciated in Patricia remains important: Even when federal aid for those without adequate means to provide suitable housing is in issue, the importance of preventing pollution counsels that new homes, except in extraordinary cases, be put in areas with adequate sewage treatment facilities.

The answer to the hardships created by the inability to connect is the improvement of sewage treatment. It was on the basis that such improvements had apparently been made at North Chicago, together with allegations that a family was forced to live apart, that we relaxed the Patricia rule to allow a connection for federally-aided housing not shown to have been committed before the ban in the recent case of Starks v. EPA, #72-157 (May 10, 1972). The presently applicable effluent standard of Rules and Regulations SWB-7 (now PCB Regs., Ch. 3, Rule 404) is 20 mg/l of biochemical oxygen demand and 25 mg/l suspended solids. In the original North Shore Sanitary District case we ordered the District to add alum to its treatment tanks at North Chicago in order to improve the effluent in the interim before it is diverted to the future Gurnee plant for advanced treatment (League of Women Voters v. North Shore Sanitary District, #70-7, July 12, 1971). Since this improvement was to be accomplished by January 1, 1972, the Agency's recommendation in Starks that the effluent had improved to a BOD of 8 and solids of 14, in compliance with the regulations, suggested to us that our alum order had been complied with and foretold the possibility of a general relaxation of the sewer ban. Cf. North Shore Sanitary District v. EPA, #71-343, Jan. 31 and March 2, 1972, in which we relaxed the ban in part on the basis of interim use of chemicals and other improvements at the Clavey Road and Waukegan treatment plants. The recommendation in today's case, however, reports that BOD deteriorated in April to 44 mg/l and solids to 36. We have asked for an explanation of this deterioration (See EPA v. Fansteel, Inc., #72-76, July 25, 1972), which seems to indicate the District may not have complied with our order. We urge the Agency to take appropriate action if that is the case. As the present case illustrates, the failure of the District to do what it can to treat sewage properly, if such be the case, not only contributes to pollution of Lake Michigan;

it can also interfere with the interests of District residents in obtaining adequate housing.

The present petition must be dismissed, for reasons given, without prejudice to the filing of a more detailed petition responding to the questions here raised; and without prejudice, of course,to a general relaxation of the sewer ban based upon proof by the District that it has significantly improved the effluent by doing what this Board ordered to provide better treatment.

The key to normal development of eastern Lake County remains in the hands of the North Shore Sanitary District.

Mr. Lawton dissents, believing the petition should be granted.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that Board adopted the above Opinion this 22ND day of August, 1972, by a vote of 4-1.

Christan L. Moffett