ILLINOIS POLLUTION CONTROL BOARD
July 19, 1971

ROBERT H. MONYEK	)	
	)	
v.	)	PCB 71-80
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Opinion and Order of the Board (by Mr. Dumelle)

Petitioner, Mr. Robert H. Monyek, an individual citizen planning to have a residence constructed in the area served by the North Shore Sanitary District (District) petitioned for a variance from part of the Board's Order in a previously decided case entitled League of Women Voters, et al v. North Shore Sanitary District, PCB 70-7,12,13,14 (March 31, 1971). Mr. Monyek was not a party to that case.

The portion of the order from which the variance was sought is as follows:

> 7. The District shall not permit any additions to present sewer connections, or new sewer connections to its facilities until the District can demonstrate to the Board that it can adequately treat the wastes from those new sources so as not to violate the Environmental Protection Act or the Rules and Regulations promulgated thereunder.

Mr. Monyek sought permission from the Board to be allowed to make a sewer connection sometime after April 1972 (R. 72) so that he could in the meantime proceed to construct a single family dwelling on unimproved real estate which he owns in Lake Forest. Mr. Moneyk purchased the lot in April 1970 but could not build during the subsequent year because mortgage financing could not be obtained.

Variances are usually requested from regulations or statutory requirements. However, in this case an individual variance is sought from the operation of a Board Order. Such a procedure is clearly provided for by the Environmental Protection Act (Act), Section 35. The standard to be applied in such cases is likewise provided for in the Statute and the Board's Rules. In considering whether to grant the variance the Board must consider all the facts and ultimately use its best judgment coupled with the expertise it is statutorily presumed to embody to determine if compliance with the Order from which exemption is being sought will impose an arbitrary or unreasonable hardship on the petitioner. This hardship must then be balanced against the harm done to the environment. Grant of a variance is in effect a license to pollute and as such is an extraordinary privilege. To be sure, in this case the license sought is not the expansive grant asked for in many cases of industrial pollution, nonetheless, it is

one of literally hundreds of units which we are asked to make an exception of. While we are not unmindful or unsympathetic of the inconvenience of the present dilemma we are not persuaded that the instant situation constitutes an arbitrary or unreasonable hardship. The statutory standard does not embrace every hardship, it speaks of arbitrary or unreasonable hardship. Undeniably petitioner is confronted with some measure of inconvenience in this case. We cannot, however, view petitioner's plight as singular and therefore arbitrary nor can we commiserate to such a degree that we grant rather than deny this request. In cases where a house has been completely built before the date of the order (March 31, 1971) or where substantial steps toward completion have been taken we can clearly judge the hardship of non-connection to be unreasonable. In fact we have done so in the recently decided case of Wachta and Mota d/b/a Belle Plaine Subdivision v. EPA, PCB 71-77. There the petitioner had seven units completely built, and the Board granted a variance to permit the sewer connections. For the remaining lots in the subdivision the Board ordered the builders to present a program to the Board demonstrating the feasibility of alternatives.

Building a house is not simply a matter of dealing with bricks and mortar. Various other matters such as permissions from governmental bodies and financing from lending institutions are involved. Mr. Monyek testified regarding financing,"...I was told by mortgage financers not to even bother with the application because there was no chance" (R. 31). He was saying that during 1970 there was no chance of getting the necessary money for a mortgage because the prime loan rate was then 8-1/2% and state law prohibits legal loans at annual rates in excess of 8%. Home mortgage loans were simply not available. So too is there no chance of making a sewer connection if doing so in effect results in the passage of raw sewage to Lake Michigan. The Board's order imposes a sewer connection ban on the District because allowing new connections is tantomount to condoning the passage of raw sewage into Lake Michigan. The North Shore beaches are closed this summer and the operations of the North Shore Sanitary District are coupled to those closings in a direct cause and effect relationship. If the District were not discharging into Lake Michigan or if the District was discharging fully treated sewage the beaches would be open.

Preliminary to the hearing in this matter, Mr. Monyek presented a motion to the Hearing Officer asking to find the EPA in default for failing "to proceed as ordered by the Board"[1] inasmuch as the Agency had not made a timely filing of its recommendation at the hearing held on June 18, 1971.

In his motion Mr. Monyek asked that the EPA, because of their default, be prohibited from testifying and otherwise participating in the hearing. The hearing officer reserved ruling on the motion for

[1] Pollution Control Board Regulations, Rule 319

the Board.

Since the petitioner in every variance proceeding must anticipate a recommendation of denial it must be a most uncommon situation where the petitioner can show actual surprise and prejudice due to the late filing of an Agency recommendation. While we do not condone the Agency's late filing we are not prepared to construct an unnecessary procedural requirement to the resolution of issues on their merits. Defaults are to be discouraged. We believe the principle recently reiterated in Gillespie v. Norfolk and Western Railway Company, 243 N.E. 2d 27 (1968) is a salutary one which governs the instant situation. There the Illinois Appellate Court reversed the trial court's imposition of a default judgment for failure of plaintiff to precisely comply with the court rule regarding the answering of interrogatories. The court said that, "[Defaults] are based on a technique of precedure and should be subject to careful scrutiny." (at 31). The court went on to say that defaults should be employed only when necessary to enforce a just demand and not when a hearing on the merits can be had without undue burden on the parties. We deny petitioner's motion for entry of a default.

This opinion and order constitutes the Board's findings of fact, conclusions of law and order in this case. The requested variance is denied.

I, Regina E. Ryan, Clerk of the Pollution Control Board certify that the Board adopted the above opinion this 19 day of July, 1971.