

ILLINOIS POLLUTION CONTROL BOARD
April 19, 1984

BOB EVANS FARMS, INC.)
an Ohio Corporation,)
)
Petitioner,)
)
v.) PCB 83-65
)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY; THE COUNTY OF DUPAGE,)
)
Respondents.)

MR. MARK KOWALCZYK (KOWALCZYK AND STOGSDILL) APPEARED ON BEHALF OF BOB EVANS, INC.;

MS. MARY DRAKE (ATTORNEY AT LAW) APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

MESSRS. ALLEN SCHUERING AND MARK ENRIGHT (ASSISTANT STATE'S ATTORNEYS) APPEARED ON BEHALF OF THE COUNTY OF DUPAGE.

OPINION AND ORDER OF THE BOARD (by J. D. Dumelle):

This matter comes before the Board upon a May 13, 1983 petition, a June 6, 1983 first amended petition and a July 21, 1983 second amended petition for variance filed on behalf of Bob Evans Farms, Inc. requesting relief from 35 Ill. Adm. Code 309.202, 309.241 and 306.105 to allow the Illinois Environmental Protection Agency (Agency) to issue construction and operating permits for a sanitary sewer system connection to a sewage treatment facility which is on Restricted Status. On July 5, 1983, the Agency filed a recommendation that variance be denied. Hearing was held on December 1, 1983 at which all parties appeared. Bob Evans filed a memorandum on February 14, 1984 and the Agency filed its brief in lieu of closing argument on March 2, 1984.

Bob Evans, an Ohio corporation, intends to construct a 5,000 square foot restaurant with seating for 149 customers. The restaurant is proposed to be located on a parcel of land of approximately 1.5 acres in the Village of Willowbrook, DuPage County, near the intersection of Interstate Rt. 55 and Illinois Rt. 83. Although vacant land exists in the area, the vicinity is rapidly growing with commercial and office development immediately to the east and south (Ex. B1). West of Rt. 83, development is residential.

Bob Evans' restaurant is proposed to be open 363 days per year, 16 hours per day, and will employ 60 to 70 people. Wastewater from the restaurant is proposed to be discharged into a sewer designed and constructed according to the Standard Specifications promulgated by the Illinois Society of Professional Engineers. Daily wastewater flows are estimated at 5500 - 6600 gallons per day based upon a survey of actual water usage at five local installations (Ex. C).

BOD (biochemical oxygen demand) and TSS (total suspended solids) will be controlled by a triple basin grease separator and garbage grinders will be prohibited. Wastewater discharged from the restaurant is proposed to enter the adjacent County-owned sewer system and flows will be conducted into the Marionbrook Wastewater Treatment Plant which discharges into the west branch of Sawmill Creek, a tributary of the Des Plaines river system (Ex. B2). A larger wastewater treatment facility, the Knollwood plant, which is in the design phase, will ultimately treat the bulk of the raw sewage now fed to the Marionbrook plant.

The Agency placed the Marionbrook facility on Restricted Status in April, 1979 due to hydraulic overloading caused by inflow/infiltration (I/I) and poor plant effluent quality (Ex. A2). The facility was also the subject of People v. County of DuPage, 80 MR 432 (December 4, 1980; modified on January 7, 1982) and April 14, 1982). In its modified order, the Eighteenth Judicial Circuit Court of DuPage allowed the County of DuPage a 90% credit of the wastewater diverted from the Marionbrook facility to an interim package plant, known as the interim Knollwood plant, to allow for new connections. For those not holding permits from the Agency as of the date of the original order (December 4, 1980), the Court required that they be allowed to connect only if they received a variance from the Board "allowing the Agency to issue a sewer permit" (See Ex. A1).

The Board notes that it was not a party to the People v. County of DuPage, id., and that meeting all conditions of that Order other than the obtaining of variance does not assure that variance will be granted. For variance to be granted, Bob Evans must adequately prove that, due to the imposition of Restricted Status, arbitrary or unreasonable hardship has resulted (Ill. Rev. Stat. 1981, ch. 111½, par. 1035). To evaluate the potential hardships involved in this matter, it is necessary to examine the purchase of this land and the efforts to develop it as well as the environmental impact which would result from the granting of variance.

Bob Evans argues that it would be unreasonable to deny the requested variance in that the additional wastewater flows

generated by the proposed restaurant are insignificant in terms of total Marionbrook flows and that compensating flow diversion (offloading) which is required under the Court Order results in a net decrease in wastewater flows to Marionbrook. Bob Evans further states that denial of the variance will result in the loss of over \$17,000 spent to date for legal, engineering, architectural, municipal and other fees and costs incurred in meeting the many requirements of the local building and zoning authorities (RII. 30-31)*; the loss of annual sales tax revenues to the Village of Willowbrook, the State and the RTA of \$63,000; the loss of an approximately \$57,000 fee to DuPage County for the space necessary permits (RII. 37-38); the loss of 60 to 70 potential restaurant employees (RII. 36); and the loss of revenues accruing to the various contractors and professions involved in the design and construction of the project.

The Agency, on the other hand, states that "any hardship in the expenditure of funds for legal, engineering, architectural and municipal requirements after the imposition of restricted status is clearly self-imposed," and that it certainly was "not the intent of the Modified Court Order for developers to spend money after the entry of the order so as to create a hardship to meet the criteria of the order" (Rec. p. 3).

Bob Evans has not demonstrated arbitrary or unreasonable hardship distinguishable from that incurred by the petitioners in Unity Ventures v. IEPA, PCB 80-175 (December 15, 1983), Willowbrook Motel Partnership v. IEPA, PCB 81-149, 53 PCB 05 (July 14, 1983) or American National Bank of Chicago v. IEPA, et al., PCB 83-106 (February 22, 1984). Petitioners in each of those cases were denied variances because the hardship they experienced was no different than that which is intended by the imposition of Restricted Status which creates a moratorium on development until adequate sewage treatment is available. Arbitrary or unreasonable economic hardship can generally only be found where the costs incurred prior to the imposition of Restricted Status outweigh the environmental harm which would be caused by the granting of variance. An exception to this is that costs incurred subsequent to the imposition of Restricted Status may be considered as hardship if such costs resulted from firm commitments made prior to the imposition of Restricted Status or were incurred based upon a reasonable belief that the area was not under Restricted Status.

* The hearing transcript consists of a morning and afternoon session separately numbered. References to the afternoon session are (RII. pp).

In this case the funds to construct the restaurant were admittedly expended after Bob Evans knew of the Restricted Status. Bob Evans argues, however, that its expenditures "were made subsequent to the Court Order in No. 80 MR 432," and that it "should not be penalized for relying upon a valid Court Order and the denial of the request for a variance would certainly be unreasonable and arbitrary" (Pet. Memo. p.7). That argument ignores the fact that the valid Court Order upon which Bob Evans supposedly relied required Bob Evans to obtain a variance from the Board. To argue that reliance upon meeting all conditions of that Order other than obtaining a variance is sufficient to support variance relief is to read the requirement of a variance out of the Order: the granting of variance would become a purely ministerial, and therefore useless, act.

The only other hardship asserted by Bob Evans is the adverse impact of Restricted Status upon Willowbrook due to the loss of potential employment opportunities, taxes and consumer spending (see RII. 49-51). However, the large majority of proposed projects can make these same claims, and these are the types of hardship which are expected consequences of the imposition of Restricted Status. Restricted Status serves to minimize the adverse environmental impacts of an overloaded or improperly operated sewage treatment system. It also provides an incentive to remedy the system's shortcomings.

Little or no hardship has been proven in this case which has not been self-imposed or which is not an expected consequence of Restricted Status. The granting of variance might still be appropriate where proof of hardship is minimal if a substantial environmental benefit were proven to result from the granting of variance. However, such is not the case here. While the benefit of off-loading is discussed at length, such off-loading is not the result of Bob Evans' activities (RII. 11-12) and the benefit would in fact be somewhat diminished by allowing Bob Evans' discharge to offset part of the diverted flows. Finally, while there is some testimony regarding the ineffectiveness of the interim Knollwood plant due to insufficient flows being directed to it, that results from an incomplete interceptor rather than an insufficiency of flows which could be diverted.

The Board, therefore, finds that Bob Evans has failed to demonstrate an arbitrary or unreasonable hardship and concludes that the requested variance should be denied.

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

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ORDER

Bob Evans Farms, Inc. is hereby denied variance from 35 Ill. Adm. Code 309.202, 309.241 and 306.105 as they apply to its proposed restaurant development near the intersection of Interstate Rt. 55 and Ill. Rt. 83 in the Village of Willowbrook, DuPage County.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order was adopted on the 19th day of April, 1984 by a vote of 1-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board