ILLINOIS POLLUTION CONTROL BOARD
July 14, 1983

WILLOWBROOK MOTEL PARTNERSHIP, a limited partnership, Petitioner,	)	
v.	)	PCB 81-149
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and THE COUNTY OF DuPAGE, Respondents.	)	

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

This matter comes before the Board upon a September 28, 1981 petition for variance filed by the Willowbrook Motel Partnership (Partnership), an amended petition filed November 9, 1981 and a second amended petition filed March 3, 1983. On December 10, 1981 the Illinois Environmental Protection Agency (Agency) filed a recommendation that variance be denied, but on April 5, 1983 it filed an amended recommendation indicating that variance should be granted subject to certain conditions. Hearing was waived and none was held.

The Partnership requests relief from 35 Ill. Adm. Code 306.105(a) and 309.241(a) [old Rule 604(b) and 962(a) of Chapter 3: Water Pollution] to allow construction of a 106-unit motel and its subsequent connection to the DuPage County Sewer System and Marionbrook Sewage Treatment Plant (Plant) in DuPage County which is operated by the DuPage County Department of Public Works (DPW). In its original petition the Partnership requested variance "until such time as the Marionbrook Sewage Treatment Facility is expanded or a new facility constructed" (Pet. p. 2). In its second amended petition this relief is requested to commence at "such time as the Knollwood East interceptor is completed and offloading from Marionbrook is begun" (2d am. pet., p. 4).

The 106-unit motel is proposed to be constructed on the northeast corner of the intersection of Interstate Route 55 and Route 83 in unincorporated DuPage County. The surrounding vicinity is a rapidly growing residential and office environment which includes a Holiday Inn Motel approximately 500 feet north of the subject property and a Denny's Restaurant a short walk from the property. The Partnership owns and operates 15 motels in Wisconsin, Illinois, Missouri, Minnesota and Nebraska, with additional facilities planned or under construction.

Wastewater discharged from the proposed motel is intended to be discharged to the DuPage County Sewer System along 79th Street and from there to the Marionbrook Plant which in turn discharges to the west branch of Sawmill Creek, a part of the Des Plaines River system.

The Eighteenth Judicial Circuit Court in DuPage County (People v. County of DuPage, 80 MR 432, December 4, 1980), found that the Marionbrook Plant was discharging in violation of effluent limits and accepting flows in excess of its design average hydraulic capacity, resulting in a threat to public health and welfare. However, the Court also found that "it is in the best interests of the public to allow construction permits to be issued by the County so that development may continue in the region served by the Marionbrook plant while at the same time phasing in those connections as the plant demonstrates its ability to treat the new flows to acceptable environmental effluent limits." It went on to order that the County be allowed to issue connection permits for flows tributary to the Marionbrook Plant despite the imposition of Restricted Status by the Agency, "to all those who have previously received sewer permits from the Agency, as well as additional wastewater flows" under certain conditions (generally based upon effluent quality). The Court also ordered the County "to submit a final Facilities Plan for a new treatment plant commonly referred to as the Knollwood plant," to which flows to the Marionbrook Plant over 4 million gallons per day (MGD) are to be diverted by January 1, 1985.

On January 7, 1982 the Circuit Court amended its order in 80 MR 432 to require construction and operation of an "interim package treatment plant known commonly as the Knollwood interim plant" and allowing the County to divert wastewater flows from the Marionbrook Plant to the Knollwood interim plant of up to 0.25 MGD, 90% of which would be credited to the County to allow for new connections. Further, the Court added a condition for future connections to the Marionbrook system that "until completion of the Knollwood permanent facility those who did not hold a permit from the Agency as of the date of the original order (December 4, 1980)" would not be allowed to connect unless they have received a variance from the Board "allowing the Agency to issue a sewer permit." The second amended Petition was filed in an attempt to fulfill that condition.

Prior to the Court's amended order, the Agency had recommended denial of the requested variance based upon its belief that the Partnership's allegations that "the Marionbrook plant should not even be on restricted status" (Pet. p. 8) was based upon inaccurate flow data, that the plant continued to violate effluent limitations, that plant expansion would not be completed on schedule, and that any hardship alleged is self-imposed.

In response to the Partnership's second amended petition, the Agency filed an amended recommendation which concludes that since the Partnership's "request for variance is consistent with the Amended Court Order in 80 MR 432 it is recommended that this request be granted." Such a conclusion is unwarranted as presented in that one of the conditions of the amended order is that a variance be obtained from the Board. The Board is only empowered to grant variances upon a showing of arbitrary or unreasonable hardship. Thus, the Board is required to determine whether such a showing has been made despite the Agency's apparent failure to consider hardship in its amended recommendation.

In its second amended petition the Partnership alleges that denial of variance would result in an arbitrary or unreasonable hardship due to the loss of job opportunities and the concomitant income and taxes to the State, the loss of sales and enhanced property taxes. It also alleged that denial would create a private hardship to the property owner. However, none of these conclusions constitute anything more than the expected consequence of Restricted Status. (See Crook Development Co., et al. v. IEPA, PCB 80-230, 42 PCB 53, June 10, 1981 and Century 21 AG Realtors, et al. v. IEPA, PCB 81-8, 43 PCB 17, July 9, 1981). Any new development will generate jobs, income, taxes to the State and (hopefully) income to the property owner. However, the Board has determined that these benefits are outweighed by the adverse environmental impact of developments which aggravate the problems associated with an improperly functioning sewer and treatment system. Therefore, the imposition of Restricted Status is mandated to minimize increases in flows to the improperly functioning system, and as an expected consequence growth opportunities are deferred until the system is brought into compliance with Board regulations and the Environmental Protection Act.

In its original petition the Partnership had alleged other hardships including the cost of obtaining "Residential Equivalents" from DPW to allow connection to the sewer system, the substantial increase in costs if reapplication is necessary and the loss of "priority" if variance is not granted. However, the Agency concluded in its original recommendation, that such hardship, if any, was self-imposed in that connection was precluded by Court Order at the time of purchase and "constituted a gamble" on the part of the Partnership "that a variance would indeed be granted enabling...[it] to continue the development of the property." The Board notes that even if the connections had been allowed under the Court order at that time, "any permit issued by the Agency without a proper variance would be void" (County of DuPage v. IEPA, PCB 80-160, 40 PCB 335, January 22, 1981). Thus, even putting the Court order aside, the hardship is self-imposed in

that the system was on Restricted Status at the time of purchase of the "Residential Equivalents." Further, claims of economic loss, based on increased costs due to inflation and loss of immediate return on the property, simply represent a delay of an investment opportunity and not an arbitrary or unreasonable hardship. Finally, the allegation that delay in construction will cause the land to lose its present value is insufficiently supported to support a finding of arbitrary or unreasonable hardship.

Therefore, the Board finds that there has been no showing of arbitrary or unreasonable hardship, and variance, therefore, must be denied.

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

ORDER

Variance from 35 Ill. Adm. Code 306.105(a) and 309.241(a) is hereby denied to Willowbrook Motel Partnership.

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 14th day of July, 1983 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board