

**In re: 327 IAC 3-6-4(A), (B) & (C), 327 IAC 3-6-7(1), (2), (3) & (4) Variance Request
for Sanitary Sewer Construction Permit,
Lafollette Station Towne Centre, US 150 and Lawrence Banet Road
2004 OEA 67 (03-W-J-3263)**

TOPICS:

sanitary sewer
sewer construction
potential violations
New Albany
variance
hearing

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Permittee: C. Gregory Fifer, Esq., Young Lind Endres & Kraft
Petitioners, *pro se*: Susan Johnson, Carol Lamb, Wes Griffin, C.O. "Cap" Sterling,
Constance A. Bergen, George Mouser, Grover T. Noe, Yvonne Kersey
IDEM: Anne M. Patterson, Esq.

ORDER ISSUED:

August 11, 2004

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER**

This constitutes notice of a Final Order. This matter having come before the Court on the Final Hearing of the Petition for Administrative Review by Susan Johnson on July 28, 2004; and the Environmental Law Judge having considered the evidence presented at the hearing and being duly advised in the premises, now makes the following findings of fact, conclusions of law and Order:

Findings of Fact

1. In a letter dated November 24, 2003, the City of New Albany (“the City”) requested a variance under Ind. Code §13-14-8-8 of certain provisions of the Indiana Administrative Code, specifically certifications required under 327 IAC 3-6-4(a), (b) and (c), due to the potential for wet weather bypassing in the sewer collection system until improvements to the New Albany sanitary sewer system and wastewater treatment plant (“WWTP”) are completed.
2. The variance was specific to a project involving the construction of a sanitary sewer project for the development of LaFollette Station Towne Centre at U.S. 150 and Lawrence Banet Road in Floyd County (“the LaFollette Station project”).
3. The Indiana Department of Environmental Management (“IDEM”) granted the requested variance in a letter dated December 3, 2003.
4. Petitioner Susan Johnson, among others, timely filed a Petition for Administrative Review of IDEM’s decision to grant a variance to the City of New Albany.
5. On March 3, 2004, the City of New Albany filed a Motion to Dismiss for Failure to State a Claim on Which Relief Can Be Granted and Lack of Subject Matter Jurisdiction.
6. On May 25, 2004, the ELJ entered Findings of Fact, Conclusions of Law and Order on Motion to Dismiss, in which the ELJ dismissed all petitioners except Susan Johnson. The Court advised Ms. Johnson that she had the burden of proving at the final hearing that “IDEM’s approval of the variance directly affects her” and of demonstrating “specifically which regulations IDEM failed to follow in issuing the variance.”
7. The City of New Albany has historically had problems with sanitary sewer overflows (“SSOs”) during wet weather.
8. The SSOs have in the past affected Ms. Johnson and her property as a result of overflowing manholes in the vicinity of her property.

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9. As a result of the SSO problems, the City is currently conducting repairs and improvements to its sewer collection system and wastewater treatment plant under the terms and conditions of a First Amended Consent Decree approved by the court and entered of record on April 30, 2002 (the “Amended Decree”), in the United States District Court, Southern District of Indiana, in Cause No. NA 90-46-C-B/G entitled *United States of America and State of Indiana, Plaintiffs v. City of New Albany, Indiana, Defendant.* (See, City Exhibit “A”)
10. As a part of the Amended Decree, the City is subject to a “sewer ban,” which prohibits the addition of any additional flow to its sewer collection system unless specific conditions are met. However, the Amended Decree allows the City to use 233,444 in existing “credits” pursuant to a previous Agreed Order between the City and IDEM. One “credit” is equivalent to one gallon of flow that may be added to the system.
11. The City had sufficient credits under the Amended Decree to add 5,000 gallons of flow to the New Albany sewer collection system as contemplated by the proposed LaFollette Station project.
12. Maps of the City’s sanitary sewer collection system demonstrate that the proposed sanitary sewer line for the LaFollette Station project and the line that serves Ms. Johnson’s residence do not intersect and that the flows from the respective sewer lines do not commingle until the lines reach the WWTP.
13. In its application for variance, the City presented evidence that it would be unduly burdened if required to comply with the certifications pursuant to 327 IAC 3-6-4(a), (b) and (c). IDEM reviewed the application and supporting evidence and determined that the compliance with the rule would impose an undue burden or hardship on the City.

Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to Ind. Code § 4-21.5-7, et seq.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. Ind. Code §13-14-8-8 sets forth the requirements for obtaining a variance from IDEM rules. The provisions of the statute allow a party that believes that the imposition of a rule will impose an undue hardship or burden to apply for a variance from the rule. If the commissioner determines that immediate compliance with the rule would impose an undue hardship or burden upon the applicant, the commissioner may grant a variance.

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4. In this case, the City applied for a variance from the certification requirements of 327 IAC 3-6-4-(a), (b) and (c) and submitted documentation of an undue burden that would be imposed by compliance with these rules.
5. At all times material to the relevant facts to this proceeding, the City has been subject to the terms and conditions of a First Amended Consent Decree approved by the court and entered of record on April 30, 2002 (the “Amended Decree”), in the United States District Court, Southern District of Indiana, in Cause No. NA 90-46-C-B/G entitled *United States of America and State of Indiana, Plaintiffs v. City of New Albany, Indiana, Defendant.* (See, City Exhibit “A”)
6. IDEM staff testified that it reviewed the application and was satisfied that the City had demonstrated an undue burden or hardship. Ms. Johnson presented no evidence to demonstrate that IDEM failed to comply with the statutory requirements set forth in Ind. Code §13-14-8-8 or that IDEM improperly considered the variance application.
7. Ms. Johnson failed to establish that the proposed flows from the LaFollette Station project would harm or impact her property or that the grant of the variance would directly affect her legal interests.
8. Ms. Johnson failed to establish that IDEM or the City failed to comply with the provisions of the Amended Decree in granting the variance at issue.
9. The IDEM presumes that any person that receives a permit will comply with the applicable regulations. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana, 1998 WL 918589 (Inc.Off.Env.Adjud.)* Ms. Johnson testified that she believed that the addition of the proposed flows from LaFollette Station would cause bypassing at the plant or at other locations in New Albany. However, Ms. Johnson’s belief is not sufficient to prove that such bypasses will occur. As stated above, OEA will not overturn IDEM’s approval of this variance on the allegation that violations will occur.
10. Ms. Johnson failed to prove by a preponderance of the evidence that the variance was issued improperly.

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Order

IT IS THEREFORE ORDERED that the Petition for Administrative Review filed by Susan Johnson is hereby **DENIED**, and the Variance issued by IDEM on November 24, 2003 is hereby **AFFIRMED**.

You are further advised that, pursuant to Indiana Code §4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code §4-21.5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 11th day of August, 2004.

Hon. Catherine Gibbs
Environmental Law Judge