

STATE OF ILLINOIS
POLLUTION CONTROL BOARD

HAROLD L. SWORDS,)
d/b/a HAROLD L. SWORDS & CO.)
)
V.) # 70-6
)
ENVIRONMENTAL PROTECTION AGENCY)

Opinion of the Board (by Mr. Lawton):

Petitioner seeks a variation of the relevant air pollution regulations prohibiting open burning as applied to his lumber mill operation in Peoria. The Board has reviewed the report of the Hearing Officer and the transcript of the proceeding, both of which are incorporated herein by reference. While the request for variation was filed prior to the effective date of the Environmental Protection Act, the determination of this Board is based upon the present act, which by its terms provides that "all proceedings instituted for actions taken after the effective date of this act, shall be governed by this act", (Sec. 49b). Since a request for variation is prospective, the above quoted provision is applicable. It is the decision of the Board that the variation be denied.

Petitioner seeks to be permitted to burn in the open wood scraps, saw dust and edgings resulting from his saw mill operation so as to eliminate existing accumulations. This process allegedly would take from three to five days, if done continuously, presumably during an eight-hour day, or alternatively, could be programmed over a longer period of approximately two weeks with shorter burning episodes. (Rec. 10).

By amendment to his petition, Petitioner also seeks to continue the open burning of wood scraps as above described over a period of one year at the end of which time, Petitioner would presumably cease operation.

Section 2-1.2 of the rules and regulations of the Air Pollution Control Board prohibits open burning of refuse. These rules remain in force and effect until superseded by action of the Pollution Control Board. (Sec. 49c). Moreover, open burning of refuse is outlawed by Section 10 (c) of the Act itself. The standards for the granting of a variation are set forth in Title IX of the Environmental Protection Act. The imperative proof

needed for the granting of a variation is an affirmative showing by the Petitioner that the application of the regulation sought to be varied "would impose an arbitrary or unreasonable hardship" on Petitioner. (Section 35). Petitioner has failed to establish this proof.

Petitioner conducts a sawmill and lumbermill operation at 3605 West Farmington Road, Peoria, Illinois, which the record discloses to be in an industrial area with few residential structures in the vicinity. Nearby and adjacent uses include a packing plant, an auto salvage operation, and an asphalt plant. The burning site is located approximately 1,200 feet from the highway. No evidence was introduced that the past operation caused decreased visibility on the highway or resulted in complaints by the adjacent residents or landowners. Petitioner is operating on leased property pursuant to the terms of which lease he is obligated to remove all waste from the premises upon its termination. Some trade waste produced by Petitioner's operation has on past occasion been sold to paper companies. Petitioner stated that while the trade waste could be disposed in a land fill operation (Rec. 12), such procedure would be "very expensive." He also stated that he is financially incapable of installing incinerators or other equipment for \$30,000 to \$40,000 that would enable his disposal of trade waste in compliance with the law. (Rec. 9). Petitioner's request for variance is based upon the desire to eliminate accumulated waste and continue open burning during the one year phase-out of his business. The evidence indicates that the Petitioner's financial posture is not based solely upon his inability to burn trade waste, but that his termination of operation would take place as stated irrespective of the action of this Board.

On March 30, 1967, the Air Pollution Control Board granted Petitioner's previous variation request to permit open burning of sawdust and waste wood in the amount equal to two truck loads a day. This variation was to expire on November 1, 1967 during which time Petitioner was to report on his progress in providing alternate methods of disposal in compliance with Board regulations. The variance was extended by action of the Air Pollution Control Board to July 1, 1969. The record discloses no reports having been made during any period of the variation and the evidence shows no change in operation in fact having taken place.

On September 17, 1969, a hearing was held on petitioner's request for a further extension of the variation previously granted, which request was denied by the Air Pollution Control Board on September 25, 1969.

The present proceeding was initiated by a letter from Petitioner dated May 11, 1970 requesting a new variation (exhibit I) - "to burn wood scraps for two, possibly three days at the most." After a recommendation of denial by the Technical Secretary, the matter was set for hearing by the Air Pollution Control Board. In the hearing the request was amended so as to also permit open burning not to exceed a period of one year to enable phase-out of Petitioner's business (Rec. 35).

In arriving at its decision to deny the variation, the Board is not unmindful of the character of the area in which Petitioner's operation is located, nor of the absence of expressed complaint by adjacent owners. However, that open burning produces smoke and other contaminants is not denied, and even in the absence of acute local effects may contribute to the overall atmospheric pall. The statutory and legislative prohibitions represent a considered judgment that, in the absence of unusual hardship, open burning is not the way to dispose of waste. Swords was denied a variation under the prior law in 1969. He has made no showing that his alleged hardship is any greater now than it was at that time, and the present standard is if anything more stringent than that applicable in 1969.

The alleged hardship imposed on Petitioner in complying with the law is completely unpersuasive. Petitioner has indicated that there are alternative and presumably legal means of disposal available to him, which he has not seen fit to employ. The granting of a variation presupposes a continuing violation of the law. A demonstration of economic difficulty alone in the face of available alternatives does not justify this unusual relief. Nor is the imposition of an arbitrary or unreasonable hardship established by a mere preponderance of the evidence. The statutory standards require far more than a simple balancing of Petitioner's burden in complying with the regulations against the public benefit in enforcement of the law. The evidence to justify the allowance must be substantial and convincing. A polluter cannot expect the people of the State to underwrite his business operation by assuming the burden of his pollution.

There is square precedent for these principles in Illinois pollution law. Just last spring, in denying another open-burning variance, the late Air Pollution Control Board reasoned as follows:

The mere desire to save money is not ground for a variance; it is always cheaper to pollute than to comply, but the statute and regulations require everyone to make financial sacrifices in order to minimize air pollution. In cases construing analogous variance provisions in zoning ordinances, the courts have made clear time and again that mere financial gain to the Petitioner is not enough to permit violations. E.g., Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333, 338 (1931): "The mere fact that the owner

of a particular parcel of property...can make more money out of it if permitted to disregard the ordinance instead of required to comply with it, is neither a difficulty nor a hardship authorizing the board of appeals to permit such owner to disregard the ordinance...."...Neal Auto Salvage, Inc. #VR 69-23 (February 25, 1970).

Further, the Board must take note of the fact that during the period when Petitioner has been operating with the benefit of a variation, he has totally failed to effectuate any improvement in his operation or manifest any effort to comply with the relevant regulations since the original grant of the variation in March of 1967. The purpose of a variation from the regulations is not to permit an arbitrary and continuing violation of the law while a Petitioner seeks to terminate his business, but rather to grant a period of time during which the operator can take reasonable steps to bring his operation into compliance with the law. Nor has Petitioner complied with the terms of his original variance in making periodic progress reports on alternate methods of disposal. This is, of course, understandable, since no progress in this direction has been made. The word, "progress" as used in the statute and in the prior variation undoubtedly implies and means that the polluter must make efforts to abate the pollution. The statute does not grant to the Board the power to license pollution in the State of Illinois. Rather it imposes on the Board an obligation to require abatement of pollution with the utmost speed. The Petitioner asks this Board to let him pollute for a year or so; this we cannot do.

The Petitioner has failed to satisfy any of the prerequisites for the relief he seeks. That his neighbors may also be violating the law in no way sanctions Petitioner's violation. If others in Petitioner's area are even worse offenders, the answer is vigorous enforcement of the law against them, not a license for Petitioner to continue polluting. The direction of the State should be toward total compliance with the law.

VARIATION DENIED.

I Concur

I Dissent

I, Regina E. Ryan, Clerk of the Board, hereby certify that the Board adopted the above Opinion this 2nd day of SEPTEMBER 1970

Regina E. Ryan
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