

ILLINOIS POLLUTION CONTROL BOARD

ENVIRONMENTAL PROTECTION AGENCY)
)
 v.) # 70-1
)
 LINDGREN FOUNDRY CO.)

Opinion of Mr. Kissel (concurring in part and dissenting in part)

After a thorough review of the hearing record and the briefs submitted by both parties, I would grant Lindgren Foundry a variance to operate its gray iron foundry in Batavia, Illinois, for a period not to exceed nine months. During that period, Lindgren would be required to install a venturi scrubber and other pollution control equipment necessary to bring the plant in compliance with the applicable rules and regulations of the Pollution Control Board.

As regards the enforcement action, I would not order the foundry to cease and desist in the use of the cupola, but would restrict its operation. Further, I concur in the opinion of Mr. Currie that penalties should not be imposed since it was the former, rather than the present, management who permitted the excessive particulate discharges.

The salient facts are as follows: Lindgren Foundry is a gray iron foundry located in Batavia, Illinois. It has apparently been in its present location for some time and, over the years, has expanded from time to time (R. 284). Lindgren was previously owned by one Fred Coda who closed down the business earlier this year since he was unable to pay his creditors. Messrs. Moser and Kristy, who had been seeking to purchase a foundry, made an offer to Mr. Coda to purchase the assets of the company (R. 552, 553). The offer was for \$320,000 in cash to be paid by Moser and Kristy to Coda (R. 514). Coda, however, refused the offer and instead offered to transfer the shares of Lindgren to Moser and Kristy for \$1000 (R. 515). Knowing that they would assume the debts of a non-operating company, Moser and Kristy accepted the offer and initiated a restoration program at Lindgren Foundry; both invested time (from May to August, 1970) and money (about \$30,000) (R. 555, 525). In addition, Moser and Kristy had incurred \$2500 for air pollution consulting services as of the time of the first hearing (R. 503).

Before its closing, Lindgren employed from 90-117 people at any one time (R. 534). Two former Lindgren employees testified that they had not yet found new jobs (R. 382, 404); another testified that he was earning substantially less at another company (R. 400).

The record leaves little doubt that Lindgren Foundry is in an extremely poor financial condition. It has debts of almost \$900,000, \$500,000 of which is owed to unsecured creditors (R. 465). Moser and Kristy are obligated to pay these debts in the same way as the previous owners: the secured creditors will be paid off almost in full; and, based on an agreement, the unsecured creditors will receive a 15% settlement (\$75,000), to be distributed among the creditors (R. 437).

The record clearly indicates that the neighbors of the Lindgren Foundry have suffered some soot accumulation at and about their respective homes. The testimony of some of the witnesses was rather graphic. A painting contractor testified that the houses near the foundry should be painted more often, but that was really a matter of choice by the particular owners (R. 272). Another witness was allowed to testify concerning asthma attacks of her child which she said were relieved completely after the foundry closed (R. 29, 30). This witness was not qualified as a medical expert in diagnosing illnesses of any kind, and therefore, without proper medical testimony, this evidence must not be considered in making any judgments in this case. Other Agency witnesses who testified about the soot accumulation included a man who has lived in the neighborhood for 57 years and another who remains on a month-to-month lease which he could break at any time -- but hasn't. There is no question that these witnesses were sincere, honest people trying to describe a situation which they believed existed in their community. They were no less candid than the one witness who testified that Lindgren Foundry had been no bother to him (R. 415).

The principal question which we have to decide, as indicated by Mr. Currie in the majority opinion, is whether Lindgren is entitled, on the basis of the facts presented in the record, to the variance it has requested. The Environmental Protection Act provides that the Board may grant individual variances whenever it finds upon presentation of adequate proof "that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." The decision thus rests upon the meaning of "arbitrary or unreasonable hardship" as applied to this particular case.

Based upon the legislative history of the Environmental Protection Act, the words "arbitrary or unreasonable hardship" require that the person seeking the variance prove more than just the fact that compliance with the rule, regulation or order of the Board will create a hardship which merely outweighs the benefit to the community if the variance were not granted. Each case must be looked at on its own facts to determine whether such an arbitrary or unreasonable hardship is imposed upon the petitioner. In this particular case, as in all other variance cases, we must weigh the hardship of the petitioner with the benefits which the public may gain if the variance were not granted. If the hardship is significantly greater than those benefits, then we are

obligated under the language of the statute to grant the variance. In looking at the Lindgren record, I believe that the hardships which would be imposed upon not only the petitioner but members of the public at large in not granting the variance are significantly greater than the benefits which would accrue to the public were the variance not granted. The facts which lead to that conclusion and demonstrate the particular hardship are as follows:

1. The owners of the Lindgren Foundry, without having produced one sale, have invested a significant amount of money in the cleaning and restoration of Lindgren Foundry. The record shows that this amount is in excess of \$70,000, in both time and money expended by Moser and Kristy. Further, in applying for the variance, the owners have stated that, within nine months after the date of the receipt of the variance, they would complete installation of pollution control equipment capable of bringing the plant into compliance with the rules and regulations of this Board. Since the expenditure of an amount in excess of \$100,000 is called for for the installation of that equipment, this is certainly an expression of good faith by the new owners of Lindgren Foundry.
2. There are a number of unsecured creditors to whom the Lindgren Foundry owes approximately \$500,000. It is clear from the record that if Lindgren Foundry is not allowed to operate, these unsecured creditors would go unpaid. The record also shows that, if Lindgren is allowed to operate, the creditors will receive a 15% settlement. This means that instead of receiving nothing, the creditors will receive \$75,000.
3. Two witnesses testified that they were former employees of Lindgren Foundry and, to this date, had not found other jobs. While no proof exists in the record that the other 98-115 employees of Lindgren have or do not have jobs, it certainly can be inferred that former employees other than the two who testified are presently not working and on unemployment rolls of the State of Illinois. Allowing Lindgren to operate for the next nine months will allow these jobs to exist both for that nine-month period and, hopefully, for a long time to come.
4. Lindgren Foundry, according to the testimony, is a viable business, but was poorly operated before; due particularly to the prior experience and expertise of Mr. Kristy, however, management should be much improved in the future. The closing of such a significant business as Lindgren would affect not only the property owners in the immediate area but also the City of Batavia itself.

5. Although it is not crucial part of the hardship, there was testimony in the record that Lindgren Foundry was one of a few foundries of its kind and size in the Midwest region. To encourage competition and the growth and development of small businesses has long been among the chief considerations in United States economic policy. Indeed, it is a small price to pay, namely seven months of restricted operation, to maintain this type of business in operation.

The testimony of hardship or detriment to the public in operation of the business primarily came from local residents who testified that soot coming from the Lindgren plant made their patios and houses dirtier. Some testimony by a non-medical witness attempted to show that an asthmatic condition was aggravated by the emissions from Lindgren Foundry. There is no question that the community surrounding Lindgren will suffer some degree of harm during the next nine months. Any such harm would only occur for seven months -- chiefly during the colder season when outdoor recreational enjoyment would not be as severely affected. Weighed against the hardships imposed upon the present owners of Lindgren, the employees of Lindgren, the creditors of Lindgren, and the community at large, such harm seems small indeed. To the neighbors of Lindgren Foundry, this will not be a popular decision, but this Board has an opportunity to insure that the Lindgren Foundry will be not only a viable business, but one which operates within the rules and regulations of this Board. Nine months hence, Lindgren will continue to operate and not cause air pollution in the area.

Though a variance should be granted to Lindgren, it should be granted only subject to a strict implementation schedule and the posting of a performance bond. It would be my recommendation that the Environmental Protection Agency and the representatives of Lindgren work out a schedule for the installation of the pollution control equipment and the operation of Lindgren Foundry during the next nine months in accordance with the following guidelines:

1. The plant will only be operated for seven months out of the nine, since it will take roughly 1-1/2 months to begin operations and approximately 2 weeks to install the pollution control equipment.
2. The Lindgren Foundry will install pollution control devices other than the venturi scrubber on the cupola. Although Mr. Currie, in his opinion, says that these areas cannot be considered at this time, I believe that if a variance is granted, Lindgren, in its good faith effort, should install all those additional devices necessary to bring the plant into full compliance with existing State standards.

3. During the next nine months, Lindgren will not use its ductile iron process.
4. Nor, during the next nine months, will the cupola be operated more than four hours per day.
5. The owners of Lindgren will post a \$100,000 performance bond which will provide that if the installation of the air pollution control device on Lindgren Foundry is not completed prior to nine months after the date of issuance of the variance, the bond will be forfeited.

With these strict conditions, and with an implementation schedule approved by the Environmental Protection Agency, I believe that the interests of the community will be greatly benefited.

A variance should be granted to Lindgren Foundry subject to the terms set forth above.

I concur:

Samuel R. Aldrich

William J. King