ILLINOIS POLLUTION CONTROL BOARD

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

Opinion of the Board (by Mr. Currie):

Lindgren owns a gray-iron foundry in Batavia, Illinois, which was operated in plain violation of the standards for particulate air contaminant emissions until financial difficulties forced its closing about April 1, 1970. Because of Lindgren's failure to submit an acceptable program for reducing emissions, the former Air Pollution Control Board issued a formal complaint against the company. Meanwhile the company has changed hands, and the new owners, on July 10, filed a petition for variance, asking that they be allowed to emit particulates in excess of the regulation limits while installing control equipment. The complaint and variance petition, together with the Agency's objection to the petition, were filed with this Board shortly after its creation in July. We held three evenings of hearings.[1] On the basis of a very complete record and briefs,[2] we conclude that the variance request must be denied and an order entered forbidding the company to operate before adequate controls are installed and functioning.

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1. The Agency's case was presented by its Chief Enforcement Officer. An Assistant Attorney General suggested that it was the responsibility of the Attorney General to act as counsel for the Agency. Mr. Lawton, as Hearing Officer, responded that the Attorney General was free to participate but that the Board would hear anyone designated by the Agency as a principal. The Assistant Attorney General said the Attorney General would have no objection. (R. 8-10).

2. No material submitted after the close of the hearing, other than what was agreed upon by the Hearing Officer, can be considered. To do so would deprive opposing parties of the opportunity for rebuttal.

1. The Principal Issue

The evidence ranges widely over the entire operation of the foundry, which was usefully described by an Agency witness (R. 309-34) and in the Agency's brief (pp. 2-5). But the principal controversy is a narrow and clearly defined one concerning the heart of the foundry equipment, the cupola in which raw materials are heated to produce molten iron. There is now no pollution control equipment on the cupola, and forms submitted by the company show, in accord with standard emission factors published by the National Air Pollution Control Administration (EPA Ex. 35), estimated particulate emissions of 170 pounds per hour (EPA Ex. 3). The regulations limit emissions from an existing cupola of this capacity (ten tons per hour) to 25.10 pounds per hour (Rules and Regulations Governing the Control of Air Pollution, Rule 2-2.54, Table II). Thus it is essentially conceded that present operation of the cupola would violate the regulations.[3]

The new owners of Lindgren have proposed to install a venturi scrubber which is designed to remove 95% of the particulate emissions from the cupola exhaust (R. 86-90) and warranted by the manufacturer to meet emission limitations (R. 99). Ninety-five percent control would reduce cupola emissions to less than ten pounds per hour, well within the standard. The Agency does not dispute the adequacy of this equipment to control the cupola emissions, although it argues that Lindgren has not sufficiently committed itself to the details of the proposal (EPA brief, p. 23).

The main question therefore is whether or not the company is to be allowed to violate the particulate regulations while installing an adequate scrubber on the cupola. This issue arises both in determining what order to enter upon the Agency's complaint and in deciding whether or not to grant the requested variance, for in both instances the statute requires the Board to consider whether compliance with the regulations "would impose an arbitrary or unreasonable hardship." Environmental Protection Act, §§ 31 (c), 35. In both instances, the burden of proving hardship is expressly placed upon the company by the statute. Id., §§ 31 (c), 37.

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3. Lindgren argues in its brief that (p.4) "the extent of the emissions is not known" because neither the company nor the Agency has conducted a stack test. But it is standard practice to prove a violation by the use of emission factors recognized by experts on the basis of experience with similar equipment. To require an expensive stack test in the absence of any testimony suggesting that the standard emission factors

are inaccurate or that the equipment in question is unique would be to impose an unreasonable burden on the enforcement process. The respondent is free to introduce stack test results to rebut the evidence of estimated emissions. But in the absence of any rebuttal, the Agency has proved its case, and the respondent's own estimate is exactly in accord with that of the Agency. That uncontrolled operation of the cupola would violate the regulations is perfectly obvious.

2. The Facts

Lindgren's proof of hardship begins with the owners' emphatic assertion that they will not open the foundry at all if the variance is denied. According to uncontested evidence, delays in the delivery of a fan will require nine months before the scrubber can be made operative (R. 92, 103-04). During two of those months, the foundry must be closed in any event to prepare the equipment for operation and to attach the completed scrubber (R. 493-94). Lindgren argues that the loss of profits due to the seven months' delay in starting operation would make the whole venture financially impossible (R. 71, 74-75). On this premise, they argue that the following losses will occur if their petition is denied:

(1.) The two new owners have invested $1,000 to acquire the company's stock; about $30,000.00 for salaries, cleanup, etc. to the date of the hearing; and the value of their own full-time services from May to August (R. 515-17), which we can roughly estimate at $35,000.[4] They had incurred liability for air pollution consulting services in the amount of $2,500 as of mid-July (R.503). They will not incur liability for the company's old debts, for they can cancel the deal by refusing to pay off the principal creditor (R. 531). If the plant never reopens, the owners will therefore have spent about $70,000 in vain.[5]

(2.) Unsecured creditors in the amount of $500,000 will lose the opportunity for a fifteen percent settlement worth $75,000, because the company's assets will be consumed by secured creditors (R.437,466).

(3.) The company when operating employed about 90 to 100 men, with a payroll of $25,000 per week or $1,200,000 per year (R. 518-19). Three former employees, two of them unable to find work since April, testified they would go back to the foundry if it opened. One, fifty-four years old, married, and with five children, had averaged $190 per week take-home pay at Lindgren and was receiving $80 weekly unemployment compensation at the time of the hearing (R. 383-409). There was no indication of how many former employees were similarly affected.

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4. One of the owners testified that his salary before acquiring Lindgren was"in excess of $50,000" per year (R. 555).

5. In another sense, the owners' loss might be measured in terms of the difference between their anticipated foundry profits and

On the other hand, there is the following evidence to show the harm that will be inflicted on others if a seven-month variance is permitted:

(1.) Photographs showing dense visible cupola emissions were described by several witnesses as "typical" or "representative" of times when the foundry was operating (R. 116-17, 249, 276, 286-87), and one witness attributed to the foundry a general neighborhood haze during times of high humidity and low wind (R. 118).

(2.) Residences abound in the near vicinity of the foundry. Seven neighbors testified as to severe soot accumulations outside and inside their houses that interfered with their enjoyment of their property while the foundry was in operation. They all testified that conditions had enormously improved since the shutdown. (R. 124-27, 160-62, 249-55, 277-79, 286-87, 297-99, 304-06). One witness, who lived next door to Lindgren and had worked at the foundry for thirty years, said he had not been bothered by the foundry emissions, but he acknowledged that others had complained (R. 415-25).

(3.) A professional painting contractor testified that within four blocks of the foundry, houses had to be repainted about every three years as contrasted with every five years elsewhere, at an average cost of about $800, and that cleaning soot off houses near the foundry before painting required an extra day's labor at a cost of about $74 (R. 265-69).

(4.) One witness testified that her six-year-old boy had suffered asthma attacks once in six months before moving near the foundry, every four to five weeks after moving, and not at all since the foundry closed (R. 29-30).

(5.) The Batavia City Council adopted 8-0 a resolution asking that the plant not be operated until controls were in operation (R. 24).

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the money they will earn by putting their capital and talents to some alternative use, subtracting the $70,000 already expended in ascertaining profits in both cases. The upper limit of this difference is indicated by the fact that the owners say they would prefer not to open if they must forgo seven months' revenues, but there is no evidence as to the extent of anticipated profits.

3, The Law

The question before us is whether or not, on these facts, the hardship imposed by refusing the variance so far outweights the benefits to the community as to be "arbitrary or unreasonable."

That denial of the variance would inflict some financial hardship on the company and on others is clear. But if a variance were granted every time it cost money to comply with the pollution laws, nearly everybody would qualify. The statute requires us all to make sacrifices for the common good. It allows relief only when the sacrifice is unreasonable when compared with the benefits it produces.

That the new owners in good faith propose to bring the cupola into compliance with the law is also clear. But while a good faith effort to reduce emissions is a necessary condition for a variance (Swords v. Environmental Protection Agency, #70-6), it is not a sufficient one. Permission to violate the law while making corrections cannot be granted automatically. In general, people may not drive until after their brakes have been repaired, and similarly, they may not operate cupolas until after emission controls are functioning unless the cost of the delay is unreasonable when compared with the benefits.

It is therefore essential in passing upon a variance petition to compare the good effects of compliance with the bad. But, as we held in the Swords case, supra, one cannot show that his hardship is "arbitrary" or "unreasonable" merely by proving that the cost of compliance exceeds the benefits.

The words "unreasonable" and "arbitrary" plainly suggest that the Board is not to examine in every case whether or not compliance would be a good thing. To do so would completely destroy the force of the regulations and encourage excessive litigation. Moreover, if the costs and benefits are anywhere near equal, simple fairness dictates that the burden should be borne by those who profit from the polluting operation rather than by the innocent neighbors. Accordingly, the statute creates a strong presumption in favor of compliance. A variance is to be granted only in those extraordinary situations in which the cost of compliance is wholly disproportionate to the benefits; doubts are to be resolved in favor of denial.

This position is compellingly supported by legislative history as well as by the language and policy of the Act. The original version of the bill provided for variances only if the costs of compliance "totally dwarf(ed)" the benefits. A proposed amendment sponsored by industry would have weakened this to allow variances whenever costs "outweigh(ed)" benefits. The Administration spokesman for the bill stressed before the Senate that this proposal was wholly unacceptable, for reasons indicated in this opinion.

When the present language was proposed as a third alternative, the Administration assured the Senate that the change preserved the substance of the original bill, and on this assurance the amendment was adopted. It is clear that the change was prompted by uncertainty concerning the interpretation of the unfamiliar phrase "totally dwarf." The chosen terms "arbitrary" and "unreasonable" have a more established meaning, and they express a plain sense of disproportion.

"Arbitrary" and "unreasonable" are words used to express great deference and reluctance to interfere. They are words used to describe the limited scope of review of a jury's findings or of a judge's exercise of discretion. They are words used to describe the limited power of a court to set aside a statute on the ground it takes property without due process of law.

The Agency asks us to construe the words "arbitrary" and "unreasonable" in the variance section to require a showing that the denial of the petition would constitute a deprivation of property without due process of law. There is precedent for such a holding both in zoning cases, see Mandelker, Managing Our Urban Environment 762 (1966), and in the interpretation of the Illinois Air Pollution Control Act, predecessor to the present statute. Neal Auto Salvage, Inc. #VR 69-23 (Feb. 25, 1970).

It is not necessary on the present facts to decide whether the variance test of the Environmental Protection Act is a constitutional test. For it is clear that in any event there must be a showing that the cost of compliance is wholly disproportionate to the benefits, and we are persuaded that Lindgren has failed to make this showing. We will face the further question if we encounter a case in which we believe the cost is wholly disproportionate but in which to require compliance would not be unconstitutional.

4. Application of the Law.

Assessing the magnitude of the hardship if we deny the variance is complicated by the fact that there is no testimony to prove or to disprove the owners' implicit argument that the loss of seven months' profit would exceed the loss of their invested time and money. But if we assume they are right, the hardship consists of their loss valued at about $70,000; the creditors' forgone $75,000 settlement; and the lost wages of an unspecified number of former employees for an undeterminable time.

We are not greatly impressed by the owners' own alleged losses. In the first place, they can cut and run if prospects dim; they will not be stuck with a million-dollar plant they cannot sell or with the obligation to pay half a million in old debts. They will lose, at most, $70,000 by their own evidence.

More important, the owners made this investment with full knowledge, or with reason to know, that they could not operate the foundry without complying with the air pollution laws or obtaining a variance; and variances have never been a matter of right. By investing money with reason to know it would be lost absent a favorable decision the owners have created their own hardship. A petitioner may not bootstrap himself into a preferred position by spending money first and then claiming he has been injured. This principle is firmly recognized in zoning cases as well. See, e.g., Bellamy v. Board of Appeals, 32 Misc. 2d 520, 223 N.Y.S. 2d 1017 (Sup. Ct. 1962):

> "Ordinarily, one who purchases property under zoning restrictions is foreclosed from seeking a variance, for it is inferred that he paid a lower price, measured by the effect of the restriction . . . . Purchase of realty under zoning restriction has been widely regarded as self-inflicted hardship, and thus outside variance relief."

One reason for this principle is that a person who invests money with notice that he is taking a risk is in no position to argue that he could not help himself or that he relied to his detriment on rules that were later changed. Another is that to recognize such a self-inflicted hardship would permit anyone wishing to obtain a variance to force the Board's hand by spending money in unjustified expectation that the Board would grant his petition. Such a principle would undermine the purpose of the Act.

It is partly in response to such considerations that the regulations distinguish sharply between new facilities and those that were in operation when the emission standards were adopted. To avoid the very real and uncontrollable hardships of disrupting

existing businesses that had been constructed and operated in legitimate reliance on the absence of emission limitations, the rules allowed businesses in operation a grace period in which to achieve compliance. But the owners of new facilities were in complete control of whether or not they invested funds in polluting equipment. Their hardships were avoidable, and consequently new facilities were required to comply with emission limitations before they began operation. See Rules and Regulations Governing the Control of Air Pollution 2-2.12, 2-2.31,2-2.41. While the Lindgren Foundry was in operation at the time the regulations were adopted in 1967, the grace period for filing a program for delayed compliance expired in 1968. And in terms of the policy distinguishing existing and new businesses in the regulations, the new Lindgren owners are in the position of running a new business, for their entire investment was made after the emission rules took effect. As one of them enthusiastically affirmed during the hearing, the present foundry project is "An entirely new ballgame" (R.36).

We have much more sympathy for the plight of Lindgren's creditors, who will lose $75,000 if the foundry does not open, and for the unfortunate former employees who cannot find comparable work elsewhere. The extent of the workers' misfortune cannot be determined from the record, for we know neither how many people are in this position nor how long they will remain unemployed. We also recognize that their suffering cannot be measured solely in terms of dollars.

The strongest argument for Lindgren is that by putting the neighbors to a temporary inconvenience, we can help to create a viable business that will improve the situation of creditors and former employees and confer permanent benefits on the entire community. But it should be borne in mind that the hardships to the creditors and to the workers would be significantly reduced if the owners would install the scrubber first and then open their foundry. For there are two ways to reach the desired goal, which is that nine months from now Lindgren will be in operation in compliance with the emission limits. To open the foundry before installing the scrubber would place the burden of a less than optimum interim situation on the neighbors; to delay opening until after installation would place it on Lindgren's owners, employees, and creditors. The people who live near the foundry are not responsible for the workers' plight; it can seldom be fair to ask them to bear the cost of alleviating unemployment. Simple fairness dictates that any hardships should be borne by those who will benefit from the operation of the foundry unless the harm to the neighbors is quite small in comparison.

The owners, however, insist that the cost of a nine-month delay in opening the foundry would be prohibitive. They will abandon the venture entirely if the variance is not granted. Whether they do so or not is, of course, a matter for their own business judgment, and it is certainly conceivable that the loss of nine months' profits might make the difference between an investment that is worthwhile and one that is not. But there is no proof of exactly how great the loss of profits is expected to be or of what other factors led the owners to the conclusion that they cannot proceed without a variance. They testified that six weeks would be needed in any event to get the plant ready for operation and that a two-week shutdown would be necessary while connecting the scrubber. This reduces the controversy to seven months' operation. Moreover, their willingness to invest several months of work and several thousand dollars in the foundry with no assurance of a variance casts some doubt as to whether they really would consider the denial of a variance as catastrophic as they say. And it was within their power to shorten the period of delay by ordering the necessary control equipment at the very outset if time was of the essence.

We do not mean to say we are convinced the foundry will open whether or not the variance is granted. If it does, however, the hardship to innocent creditors and workers will be much less than is claimed.

We cannot force Lindgren to make sacrifices in order to minimize the injury which denial would inflict on creditors and employees. But we are asked to force the neighbors to do just that by granting the variance.

As against the loss of wages to an unspecified number of employees, the inability to satisfy bad debts, and the loss of a modest investment by people who were aware of their risk, the record shows that seven months' operation of the plant without controls would cause a significant degree of discomfort and damage to those living nearby. This is no mere technical violation of the standard contributing to the general urban pall without obvious local effects. The record shows conclusively that the uncontrolled operation of the Lindgren cupola causes a major nuisance to the many people living within several blocks of the foundry. Of greatest significance is the overwhelming testimony that Lindgren soot inflicts property damage by increasing painting costs and by soiling buildings and generally makes life unpleasant for the neighbors. A quote from the transcript gives the flavor of what they experienced:

> "There is an accumulation of sooty dirt. It is gritty. It is greasy. I am sure it is all over the outside of our house. . . . Whenever I see this cloud of blue smoke coming, I run upstairs to close the windows. . . .

> "It tracks in on my carpet. It is all over the window sills. It is the type dirt that you cannot clean unless you get a cleaner on a cloth to take it off. It has affected our shrubberies outside . . . .
>
> "I washed out a white blouse and hung it out on the line . . . . and when I went out to get it, it was completely covered. I had to rewash it before I could wear it.
>
> "I could not sit out in my back lawn when this smoke would come across . . . . You would be sitting there, and all of a sudden, you would look down, and you are covered with soot. . . ." (R. 297-98).

And again:

> "The emissions from the plant fall in a rain-like fashion across all of the neighborhood . . . .If you go out on the porch and sit, normal procedure is to, first of all, put shoes on so that you don't get your feet dirty, secondly, to turn the cushions over so the dust falls and the dirt falls down, and thirdly, to carry a rag with which to wipe off the chair before setting yourself." (R 304-05).

This sort of testimony pervades the record. No serious effort was made to disprove that Lindgren was the cause of these unsavory conditions, and witness after witness declared that the situation improved drastically once the foundry was closed. Lindgren has agreed not to use greasy scrap or to overload the cupola, but we have no way of knowing that this will solve the problem. If the obnoxious effects of Lindgren's pollution are due to emission sources other than the cupola, it was up to the company to prove it, and the company was understandably reluctant to do so.

Lindgren repeatedly stressed in cross-examination, in the attempt to minimize the benefit that compliance would confer on the community, that most of the Agency witnesses had moved into the area after the foundry began operation (e.g., R. 33, 163). But while the statute makes priority of location relevant § 33 (c)), it does not make it decisive. As the Illinois Supreme Court held many years ago, the discredited doctrine that one who moves to the nuisance can never attack it would permit a single landowner to destroy the value of neighboring property without paying for it and to freeze the character of the neighborhood until he is bought out--a transaction which the multiplicity of his victims makes extremely improbable:

> "Carrying on an offensive trade for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and travelers upon which it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens. This public policy, as well as the health and comfort of the population for the city, demands". Oehler v. Levy, 234 Ill. 595, 603-05 (1908).

In the present case not only is there one complaining witness who antedated the foundry (R.283); the neighborhood has been substantially residential for some time, and we think it would defeat the purpose of the law to ignore the hardships which uncontrolled foundry operation would have on those who live nearby.

On the basis of the foregoing we find the following:

1. Operation of Lindgren Foundry without emission controls on the cupola would cause emissions nearly seven times those permitted by the regulations. It would seriously inconvenience the many people living nearby through the accumulation of soot, would inflate painting and cleaning costs significantly, and in general would cause a substantial nuisance.

2. The scrubber which Lindgren has promised to install if the variance is granted would assure compliance with the regulations, but it would take nine months to install.

3. The new owners of Lindgren Foundry are in no way connected with or responsible for the failings of the former owner, but any hardships they will suffer from the denial of the variance were brought about by their own voluntary investment with full knowledge of the risk.

4. The hardships to the creditors and to Lindgren's former employees are substantial and regrettable, but they are not so great as to make it arbitrary to insist that Lindgren refrain from making miserable everyone in its vicinity. While the injury that Lindgren's uncontrolled operation for seven months would inflict cannot be reduced to a meaningful dollar figure, the record makes clear that the benefit from compliance will be very substantial, and it is by no means dwarfed by the concomitant cost.

5. We have considered the factors prescribed in § 33 (c) of the statute as relevant in determining whether or not it would be arbitrary or unreasonable to order compliance with the emission regulations; the character and degree of injury caused by uncontrolled

operation; the value of the business; the suitability of the pollution source to the area in which it is located, including priority of location; and the technical and economic reasonableness of reducing emissions. Our conclusion is that in light of all these factors it would not be arbitrary or unreasonable to require compliance, for all the reasons given in this opinion.

In conclusion, the company has failed to sustain the heavy burden of proving that compliance with the regulations would impose an arbitrary or unreasonable hardship. The variance must therefore be denied. Moreover, the evidence is compelling that uncontrolled operation would cause an unjustifiable violation of the regulations. The Agency has gone to the trouble of proving its case against Lindgren; to dismiss its complaint would require a second hearing in the event of a violation. To avoid such delay we shall enter an order directing Lindgren not to operate its cupola in violation of the emission limits prescribed by Table II of Rule 202.54. The Agency seeks money penalties as well. But since we are convinced on this record that the foundry is under entirely new management, imposition of penalties would punish the wrong people for violations which have since been discontinued. The request for penalties is denied.

A number of additional issues were raised during the hearing which we do not resolve. The Agency attempted to show that the cupola scrubber plan would not assure full compliance, for several reasons: The cupola was in bad condition and would not hold the added weight; other areas of the foundry were equipped with less than adequate controls; the cupola would continue to emit carbon monixide; no provision was made to assure that slurry from the scrubber would be disposed of without creating additional pollution; the blueprints for the scrubber had not yet been drawn or the equipment ordered. Lindgren disputed the accuracy or the force of all these contentions, but we need not go into them here since we have denied the variance on other grounds. It is not amiss to point out, however, that the Board will insist before approving any program for air pollution control upon proof that acceptable means are provided for ultimate disposal of the air contaminants that are to be captured.

Finally, the Agency urges that both the cupola and other parts of the foundry have been so operated, and may be so operated in the future, as to cause air pollution as defined by §2 (c) of the Air Pollution Control Act and by §3 (b) of the Environmental Protection Act. Since we have already held that uncontrolled cupola operation would violate the particulate regulations, we need not decide whether or not it would violate the statutes themselves (See §§ 33 (b), 42). Moreover, although there was proof that foundry operations other than the cupola were sources of emissions, the complaint did not give fair notice that other sources were to be the subject of attack in this proceeding. The only source mentioned in the complaint was the cupola. The Agency calls our attention to

paragraph 5 of the complaint, which charges generally that the "operation of the company" caused air pollution, and we recognize that it would be awkward to require great specification from the Agency in cases in which nothing more is known than that obnoxious emissions are coming from somewhere on the premises. But the complaint gave the distinct impression that only the cupola was at issue, although the Agency's intentions could have been clarified by adding a few words indicating that additional emission sources within the plant, as yet undetermined, might be partly responsible for the observed pollution. Further, the complaint specifically asked for a cease and desist order against the cupola alone, thus weakening any notice of broader intentions that might have been conveyed by paragraph 5.

A motion to amend the complaint to include other sources was made and objected to at the close of the Agency's case. We deny the motion. It came too late to afford opportunity to obtain countervailing evidence without delaying the hearing to the prejudice of the company.

The petition for variance is denied. Lindgren Foundry Co. and those in privity with the company are directed not to operate the #7 Whiting cupola at Batavia except in compliance with the particulate-emission regulations adopted by the Air Pollution Control Board.

I concur:

David P. Currie

Jacob D. Dumelle

[illegible]

I dissent:

Samuel R. Aldrich

September 25, 1970

I concur in part and I dissent in part:

[illegible]