

ILLINOIS POLLUTION CONTROL BOARD
January 27, 1971

CITY OF JACKSONVILLE)
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)
 v.) #70-30
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 ENVIRONMENTAL PROTECTION AGENCY)

Opinion of the Board (by Mr. Currie):

On November 4, 1970, the City of Jacksonville filed with this Board a petition seeking a variance to permit the open burning of "three to four truckloads" of diseased elm trees daily in the landfill located "in the country several miles north of the City of Jacksonville." The Environmental Protection Act, § 9 (c), forbids all open burning of refuse, subject to the Board's power to adopt regulations exempting certain types of burning that do not cause harm. The regulations of the old Air Pollution Control Board did not outlaw the burning of diseased trees; the status of these regulations under the present statute is uncertain. We have held hearings on a proposal to allow tree burning on the basis of a permit from the Environmental Protection Agency, after a showing that the operation will be so conducted as to minimize pollution (# R70-11).

In order to obtain a variance a petitioner must show that compliance with the law would impose an "arbitrary or unreasonable hardship." We have had occasion to note the high burden this places on the petitioner. See EPA v. Lindgren Foundry Co., #70-1 (1970).

The Environmental Protection Agency asks us to dismiss the petition for failure to allege the elements of hardship that our rules require. Rule 401 of the Board's Procedural Rules (PCB Regs. Ch. 1, Rule 401) requires the petitioner to include, among other things,

a concise statement of why the petitioner believes that compliance with the provision from which variance is sought would impose an arbitrary or unreasonable hardship, including a description of the costs that compliance would impose on the petitioner and others and of the injury that the grant of the variance would impose on the public.

Rule 405 (b)(1) authorizes the Board to dismiss a petition without hearing whenever it determines "that even if all the facts alleged in the petition are true, the petitioner is not entitled to a variance."

We voted November 10 to hold a hearing, and we delayed the hearing while awaiting the Agency's recommendation. That recommendation--the motion to dismiss--convinces us that no hearing is necessary. The petition alleges that the disposal of diseased elms is a "financial burden"; that "there is not adequate physical space at the present landfill for disposal of these trees by means other than burning"; that the landfill is "in the country"; and that granting the variance "would not impose any hardship or injury on the public." These allegations are insufficient.

The statement that there would be no injury to the public is purely conclusory; a petitioner cannot obtain relief by pleading the ultimate conclusion in the absence of supporting facts. The only fact alleged relevant to the question of injury from the proposed burning is that the landfill is "in the country"; this does not prove there are no people around to be injured. There is no allegation of the kind or extent of expected emissions or of the distance to inhabited areas or traveled roads. We cannot without more facts determine whether or not the proposed burning will cause injury.

Nor are there adequate allegations on which we could base a determination of the degree of hardship the City would suffer if it could not burn these trees at the proposed site. That the disposal of diseased trees is "a financial burden" does not prove how much it would cost to find an alternative to open burning; that there is inadequate space in the present landfill to bury the trees does not prove that no other space can be had, how much it would cost, or whether an incinerator or other device could be obtained to dispose of the trees without the same emissions.

In short, even if we accepted as true all factual allegations of the petition, we could not find proof that compliance with the law would impose an arbitrary or unreasonable hardship.

If it were not for section 38 of the Act, we should be inclined to allow an amendment of the petition, or even to hold a hearing, to correct the above deficiencies. But that section provides that if the Board does not take final action within 90 days after filing of a variance petition "the petitioner may deem the request granted." The petition was filed November 4, 1970 and the Agency's action to dismiss on January 12. There is

no time for a new petition within the allotted time, much less for a hearing or for the Agency investigation required by the statute to give us an adequate record. Consequently the petition is dismissed without prejudice to the filing of a new petition complying with the requirements of Rule 401.

ORDER

After consideration of the pleadings, the Board hereby orders that the petition for variance be dismissed.

I, Regina E. Ryan, Clerk of the Pollution Control Board, hereby certify that the Board adopted the above opinion and order this 27th day of January, 1971.

[Faint signature]

I Concur:

David P. Curran

Richard H. Quinn

[Signature]

James R. Blidrick

John D. Small

I Dissent:

