

AIR POLLUTION:
AIR CONSERVATION:

The Missouri Air Conservation Commission has the authority to grant variances from the provisions of Regulation X, Section B, Paragraph 1, of the "Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area."

OPINION NO. 313

June 3, 1970

Honorable H. D. Shell
Acting Executive Secretary
Missouri Air Conservation Commission
112 West High Street
Jefferson City, Missouri 65101



Dear Mr. Shell:

This is in answer to your request for an official opinion of this office concerning the question whether the Missouri Air Conservation Commission has the authority to grant a variance from the provisions of Regulation X, Section B, Paragraph 1, of the "Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area." As stated in your letter this opinion request was prompted by an opinion of the St. Louis County Counselor's office, dated April 15, 1970, holding that the St. Louis Air Pollution Appeals Board is without authority to grant a variance from an identical county regulation. Since St. Louis County adopted verbatim the State standards and regulations, such interpretation throws into doubt the authority of the State Commission to grant a variance.

The "Missouri Air Conservation Law", Chapter 203, RSMo, enacted in 1965, created the Air Conservation Commission (Section 203.040, RSMo Supp. 1967), and gave the Commission the power to establish areas of the State, designate air quality standards for such areas, adopt emission control regulations, and adopt any rules and regulations consistent with the general intent and purposes of Chapter 203 (Section 203.050, RSMo Supp. 1967).

Accordingly, the Commission did, pursuant to Section 203.070, RSMo Supp. 1967, designate the St. Louis Area, which includes St. Louis, St. Louis County, St. Charles County and Jefferson County,

Honorable H. D. Shell

and did adopt standards, rules and regulations for that area, part of which are in question here.

Regulation X, Section B, Paragraph 1, of which you inquire, reads as follows:

"After three (3) years from effective date of this regulation, no persons shall cause or permit the emission of sulfur dioxide to the atmosphere from any fuel burning installation with a capacity of 2,000 million or more British Thermal Units per hour in an amount greater than 2.3 pounds of sulfur dioxide per million British Thermal Units of heat input to the installation."

Since the effective date of the regulation was March 24, 1967, this prohibition became effective March 24, 1970.

The question is whether the Commission has the authority to grant a variance now from this regulation.

In answering this question consideration must also be given to Regulation XXIV which states the general time schedule for compliance of the St. Louis area regulations, reading as follows:

"Except as otherwise specified, compliance with the provisions of these regulations shall be according to the following time schedule:

A. All new installations shall comply as of going into operation.

B. All existing installations not in compliance as of the effective date shall be in compliance within six months of the effective date unless the owner or person responsible for the operation of the installation shall have submitted to the Executive Secretary in a form and manner satisfactory to him, a program and schedule for achieving compliance, such program and schedule to contain a date on or before which full compliance will be attained, and such other information as the Executive Secretary may require. If approved by the Executive Secretary, such date will be the date on which the person shall comply.

"The Executive Secretary may require persons submitting such program to submit subsequent periodic reports on progress in achieving compliance."

Honorable H. D. Shell

In our opinion neither one of these regulations constitutes a variance and do not preclude the Commission from granting a variance under Section 203.110, RSMo Supp. 1967. Both the time schedules in Regulation X and in Regulation XXIV are not variances but are merely statements when particular regulations are to become enforceable. This is permissible under Section 203.070.4, RSMo Supp. 1967, which states:

"Any standard, rule or regulation or any amendment thereof which is adopted by the commission may differ in its terms and provisions as between particular types and conditions of air pollution or of air contamination, as between particular air contaminant sources, and as between particular areas of the state."

If Regulation X constituted a variance, then it would logically follow that Regulation XXIV was also a variance and the Commission would be precluded from granting variances in any instance.

The definition of variance in Webster's Third New International Dictionary, which applies here, is as follows:

" * * * b: a permission or license to do some act contrary to the usual rule and used esp. of grants of permission or authorizations to build contrary to the provisions of an otherwise applicable zoning ordinance or building code * * * "

The effective date of the prohibition in Regulation X, Section B, Paragraph 1, is three years from March 24, 1967, and for most other regulations is September 24, 1967. A variance is an exception contrary to these requirements or prohibitions in such regulations. Therefore, as stated above, it is our opinion that Regulation X, Section B, Paragraph 1, is not a variance. The intent of the regulation was not to preclude the granting of a variance from Regulation X by the Commission.

Furthermore, it is our opinion that the Commission, even if it attempted to do so, could not preclude by regulation the granting of variances because of the specific language of Section 203.110 which reads in part as follows:

"1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission or executive secretary will result in an arbitrary and unreasonable taking of property or in the

Honorable H. D. Shell

practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variances from any liability imposed by other law for the commission or maintenance of a nuisance."

This law authorizes the Commission to grant "individual" variances from "any" rule or regulation. We do not think that the Commission could, by regulation, take away the right to the variance procedure authorized by statute.

CONCLUSION

It is the opinion of this office that the Missouri Air Conservation Commission has the authority to grant variances from the provisions of Regulation X, Section B, Paragraph 1, of the "Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General