

ILLINOIS POLLUTION CONTROL BOARD
January 11, 1995

BEARDSTOWN AREA CITIZENS)	
FOR A BETTER ENVIRONMENT,)	
)	
Petitioner,)	
)	
v.)	PCB 94-98
)	(Siting Review)
)	
CITY OF BEARDSTOWN AND)	
SOUTHWEST ENERGY CORPORATION,)	
)	
Respondent.)	

CONCURRING OPINION (by C.A. Manning):

On the basis of fundamental fairness, the Board today reverses the siting approval granted by the City of Beardstown for a municipal solid waste incinerator. I agree with the outcome reached by my colleagues and thus join the majority in reversing the City's siting decision; however, I concur to emphasize the statutory framework and caselaw precedent which compels this result.

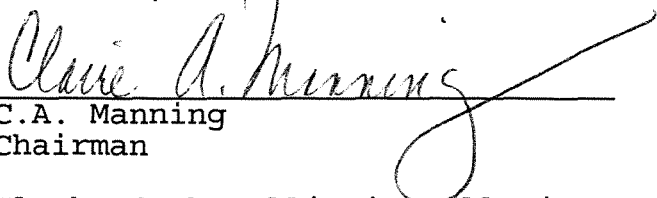
Initially, I wish to stress that I find nothing improper in the Beardstown City Council making a site visit to Semass, the model upon which the proposed incinerator was based. In my opinion, the City Council is comprised of elected officials who not only are statutorily charged with granting or denying siting approval (415 ILCS 5/39.2), but are also charged by their constituents with making a business decision in the community's best interest. It can only be good business sense and can only lead to better public policy, if the decision makers are allowed to view the incinerator model first hand. We, at the Board, may make such a site visit in order to determine a permit appeal or to decide a private enforcement action, and it would be permissible as long as both sides have legal representation at the site.

However, in this case, as in Concerned Citizens for A Better Environment v. City of Havana and Southwest Energy Corporation (May 19, 1994) PCB 94-44, we are limited by bright line precedent providing that once the application for siting approval is filed, the process pending before the City Council is an adjudicatory proceeding rather than one that is legislative. (See E&E Hauling v. IPCB (2nd Dist. 1983) 116 Ill. App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill. 2d 33, 481 N.E.2d 664.) Thus, because the City Council transforms from a legislative body of elected officials into a panel of judges, a fact-finding trip such as the site visit the City Council took to Semass, must conform to the same notions of fundamental fairness as any other procedure used by an adjudicatory body in reaching a decision. (415 ILCS 5/40.1.)

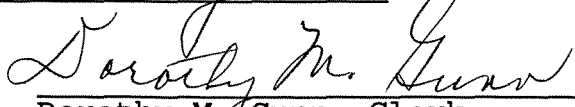
I agree with my colleagues that the manner in which the Semass visit was conducted did not provide the public with a fundamentally fair proceeding to review the merits of the incinerator proposal. I reach this conclusion because the City Council wholly failed to cure the *ex parte* contacts that occurred while the Council Members were at Semass, and additionally, because I believe that the manner in which the trip was funded was improper. While I am not as persuaded by the importance of the public not being invited or present at the site visit itself as are my colleagues, I do agree that the reporter's presence is not enough to make the visit fundamentally fair. We review the procedures employed by the City Council in making a decision and not the actions of the press, and in this case with regard to the Semass visit, the Council Members failed to offer their "findings" and facts upon which they were based into the public record and importantly, failed to subject themselves to cross examination concerning these findings. (415 ILCS 5/39.2(d), (e) and 40.1(a).) Thus, the record, upon which the City Council's siting decision is to be solely based, altogether lacked information about the Semass site visit.

Regarding the trip's funding, when I apply the adjudicatory standards with which the Board must review the City Council's procedures, I find that the City Council allowing the siting applicant to directly fund the site visit does not provide for a fundamentally fair procedure. In the siting process, the City Council is statutorily authorized to assess a fee to cover the necessary and reasonable costs incurred in the siting review process (415 ILCS 5/39.2(k)) which could include costs of hearing, transcribing, or if necessary, site-visits. I would advocate that the siting authorities use this mechanism rather than allow the applicant to directly fund the site visits. In this manner, an adjudicatory body, such as the City Council is insulated from an appearance of impropriety or bias which results when the applicant directly picks up the bill for hotel rooms, dinners and other expenses.

For the above stated reasons, I concur.


C.A. Manning
Chairman

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was filed on the 1st day of February, 1995.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board