

ILLINOIS POLLUTION CONTROL BOARD  
September 19, 1996

CITIZENS UNITED FOR A RESPONSIBLE )	)	
ENVIRONMENT, )	)	
	)	
Petitioner, )	)	PCB 96-238
	)	(Pollution Control Facility Siting
v. )	)	Appeal)
	)	
BROWNING-FERRIS INDUSTRIES OF )	)	
ILLINOIS, INC. and VILLAGE BOARD OF )	)	
THE VILLAGE OF DAVIS JUNCTION, )	)	
ILLINOIS, )	)	
	)	
Respondents. )	)	

CONCURRING OPINION (by J. Theodore Meyer):

I concur with the majority opinion in this matter because, although I agree that petitioner's failure to present arguments regarding its allegations of fundamental unfairness resulted in waiver of those allegations, I believe a useful purpose would be served if the Board reiterated how local siting proceedings are viewed in Illinois.

The nature of a local siting proceeding historically has been perceived as an adjudicatory one. This perception arises from Section 39.2 of the Illinois Environmental Protection Act (Act) which requires the local governing body to determine whether nine statutory criteria have been met by the siting applicant. Only upon demonstration that all nine criteria have been met can a local governing body grant siting approval; however, Section 39.2 does not state that these are the only factors which may be considered. (Fairview Area Citizens Taskforce v. IPCB, 198 Ill.App.3d 541, 555 N.E.2d 1178 (1990).) Thus, although a local siting proceeding may resemble an adjudicatory proceeding, the local governing body may find the siting applicant has met the statutory criteria and properly deny the application based upon legislative-type considerations. (Southwest Energy Corp. v. IPCB, Concerned Citizens for a Better Environment, and City of Havana, 275 Ill.App.3d 84, 655 N.E.2d 304 (4th Dist. 1995).

A recent amendment to Section 39.2 of the Act further accentuates the legislative role in local siting decisions. In 1992 the Illinois General Assembly amended Section 39.2(d) of the Act to add the following sentence:

“[t]he fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue”.

(P.A. 87-1152, eff. January 1, 1993, 415 ILCS 39.2(d).) That amendment demonstrates the General Assembly's recognition that standards governing judicial behavior "cannot and do not apply to such local officeholders". (Southwest Energy Corp., 725 Ill.App.3d at 92, 655 N.E. 2d at 309.)

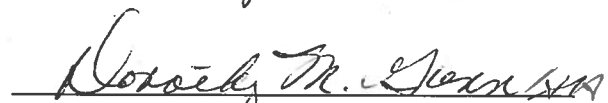
In addition to recognizing the legislative role inherent in a local siting decision, the Illinois Supreme Court has rejected the argument that an intrinsic bias is the automatic result of an administrative body's investigatory and adjudicatory functions. (Id., citing to E & E Hauling, Inc. v. IPCB, 107 Ill.2d 33, 481 N.E.2d 664 (1985) and Citizens Against Regional Landfill v. IPCB, 255 Ill.App.3d 903, 627 N.E.2d 682 (1994). Illinois courts continue to recognize that elected officials almost always remain in their legislative role when taking official actions. (Southwest Energy Corp., 725 Ill.App.3d at 92, 655 N.E. 2d at 309.) Courts have also acknowledged that *Ex parte* contacts are an inevitable, and often necessary, component of an elected official's duties. In fact, one court upheld a local siting decision despite evidence of *ex parte* communications between county board members and constituents opposed to the landfill application. (Waste Management of Illinois, Inc. v. IPCB, 175 Ill.App.3d 1023, 530 N.E.2d 682 (1988).

These views of local siting proceedings underscore the basic principle that administrative proceedings are not entitled to the same procedural protection as are other adjudicatory proceedings; specifically, citizens before a city council are entitled to a fair hearing by reason of fundamental fairness, not the constitutional guarantees of due process. (Southwest Energy Corp., 725 Ill.App.3d at 92, 655 N.E. 2d at 309.) Therefore, principles of fundamental fairness are based upon standards less stringent than those that protect constitutional due process.

Again, I concur in this matter only to explain what I believe are the important aspects of the local decision-making process.

  
 J. Theodore Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was filed on the 25<sup>th</sup> day of September, 1996.

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board