

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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CLERK'S OFFICE

JUL 28 2003

STATE OF ILLINOIS
Pollution Control Board

LOWE TRANSFER, INC. and)
MARSHALL LOWE,)
)
Co-Petitioners,)
)
v.)
)
COUNTY BOARD OF MCHENRY)
COUNTY, ILLINOIS,)
)
Respondent.)

PCB No. 03-221
(Pollution Control Board
Siting Appeal)

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on July 28, 2003, we filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and Village of Cary's Appeal of Hearing Officer Determinations and Request for Board Direction, copies of which are attached and hereby served upon you.

Dated: July 28, 2003

VILLAGE OF CARY

By: Percy L. Angelo
One of its Attorneys

Percy L. Angelo, Esq.
Patricia F. Sharkey, Esq.
Kevin G. Desharnais, Esq.
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190 S. LaSalle Street
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**VILLAGE OF CARY'S APPEAL OF HEARING OFFICER
DETERMINATIONS AND REQUEST FOR BOARD DIRECTION**

The Village of Cary ("Village") on behalf of the Village and its residents, by and through its attorneys, hereby appeals the determinations of the Hearing Officer in this matter limiting the ability of the Village and its citizens to participate in and be informed regarding the status of this action, requests that the Board clarify, and review, if necessary, the Hearing Officer's order permitting withdrawal of the record, and requests that the Board provide direction regarding future opportunities for citizen participation. In furtherance of its motion, the Village states as follows:

FACTUAL BACKGROUND

1. In order to allow the Village and its citizens to remain fully informed of the status of this matter so as to facilitate their effective participation therein, on July 1, 2003, and then again on July 7, as further described in the attached affidavits of Patricia Sharkey and Percy Angelo, the Village of Cary requested that the Hearing Officer allow the Village to participate in, or at least listen to, status conferences in this matter, which have been conducted by telephone and are not otherwise publicly accessible. Attorneys for the Village offered to come to the Board offices to listen to status conferences if that would facilitate matters.

2. The Hearing Officer denied the Village's request, allowing neither participation in nor auditing of status conferences. He explained that attorney-client privileged material or other private matters might be discussed at such conferences, even though the attorney for the Village protested that matters discussed should be publicly available, and that it wasn't clear how there could be any attorney-client privilege in discussions between opposing parties before the Hearing Officer for the Board. The Hearing Officer further stated that the Village could appeal the Hearing Officer's ruling to the Board.

3. The Hearing Officer also informed the Village that it was not allowed to receive copies of Hearing Officer orders, but could purchase copies thereof from the Clerk's Office if the Village so desired. The Hearing Officer orders are also not available on the Board's website.

4. To date, two status conferences have been held in this matter: one on July 7, 2003 and one on July 14, 2003. The Village was not permitted to participate in either status conference.

5. On July 15, 2003, the Hearing Officer issued a Notice scheduling a public hearing in this matter. Despite numerous public comments expressing interest in the proceeding and requesting that the proceedings be held after business hours so as to allow participation by those who must work during the day, the notice did not address opportunities for public comment or establish an evening public comment period.

6. At the July 14, 2003 status conference, the Village understands that Petitioner made an oral motion "withdrawing" a pending motion requesting that it be allowed to "withdraw" the exhibits and records which constitute the record of the McHenry County Board's decision for its personal use. While a written order was eventually issued indicating that "the motion" was granted, it was unclear which motion was in fact granted, and whether Petitioner

was permitted to remove the record. Because the Village was not permitted to audit the status conference, it has no background from which to understand this unclear order.

ARGUMENT

7. The Hearing Officer's rulings have denied the Village of Cary the right to participate in or audit the status conferences, have compromised the Village's and its citizens' ability to remain informed regarding the status of the proceeding, and have inappropriately limited public information regarding and opportunities for participation in this proceeding. For the reasons set forth below, the Village hereby appeals the Hearing Officer's rulings, and requests that the Board direct the Hearing Officer to allow the Village to participate in or audit the status conferences in this matter. Further, given the demonstrated extensive public interest in this proceeding, the Village requests that the Board direct the Hearing Officer to schedule an evening public comment period so as to provide appropriate opportunities for public participation in the Board hearing.

8. Hearing Notice. It is apparent that scheduling issues regarding the proposed hearing before this Board were addressed at the July 14, 2003 status conference from which the Village was excluded. On July 15, 2003, the Hearing Officer issued a Notice of Hearing in this matter, setting forth the proposed hearing schedule. The notice contains a barebones statement merely identifying the hearing date, time, and location (10:30 a.m. on August 14, 2003, at the Cary Junior High Gymnasium.) While the information provided in the notice is unremarkable, what is significant is the information which the notice fails to provide. The Notice of Hearing provides no information regarding hearing procedures, no information regarding the proposed order of proceedings, and no direction or guidance regarding the time for public comment or participation. Although Section 107.404 of the Board's regulations governing these hearings

requires that "Participants may offer comment at a specifically determined time in the proceeding....," 35 Ill. Admin. Code 107.404, the Hearing Notice fails to specify when public comment will be heard. Furthermore, the notice does not address or provide for evening hours to accommodate working members of the public who wish to attend and participate in the hearing.

9. Section 101.110 of the Board's regulations states "The Board encourages public participation in all of its proceedings." In keeping with this stated goal, in the past, where a strong public interest has been demonstrated, particularly in siting appeals, the Board has accommodated public participation by holding proceedings in the evening to allow participation by those who must work during business hours. Clearly, a different approach has been followed here. In the present matter, at least *forty-two* public comments have already been filed (both from residents of Cary and others), demonstrating significant public interest in the proposed hearing. In many of these, commenters specifically request evening hours to facilitate their participation. Yet the Hearing Officer's order does not address or even acknowledge the citizens' concerns, provides no instruction regarding public participation, and makes no arrangements for an after-hours comment period. Apparently, it leaves citizens with no option but to show up at 10:30 a.m. or potentially miss the opportunity to participate. This approach flies in the face of the General Assembly's stated intent that the Environmental Protection Act "increase public participation in the task of protecting the environment," 415 ILCS 5/2(a)(v), as well as the Board's stated goals and past efforts to encourage public participation in its proceedings.

10. Status Conferences. The Village has been informed that the Petitioner has used the status conference as a forum to attack and impugn the motives of the Village of Cary. These attacks include unfounded assertions that the Village will seek to inappropriately supplement the record with new facts not properly before the Board. In fact, quite to the contrary, the Village

believes that the record in this matter is exceptionally strong and fully supports the McHenry County Board's decision denying siting approval. The strength of the record is due in large part to the Village's participation in the proceeding below, including the presentation of a number of expert witnesses. In contrast to Petitioner's unfounded assertions regarding the Village's intentions, the Village intends to focus its efforts in this proceeding on demonstrating the strength of the existing record.

11. The Village's participation has been limited by the Hearing Officer's rulings excluding it from status conferences, only to have its positions and motives distorted by Petitioner's misrepresentations in its absence. Exclusion of the public from status conferences is being used by Petitioner to attack the credibility of the objectors. Opening such proceedings to the public is essential to protecting them from misuse.

12. Public Access to the Record. As set forth in the Village's July 11, 2003 Objection to Plaintiff's Motion, allowing Plaintiff's removal of exhibits and records from the Board Office could significantly impact public participation by making portions of the record unavailable for review by others, particularly since a prior Hearing Officer ruling at the July 7, 2003 status conference granted respondent McHenry County's motion to file limited copies of the record, resulting in only a single copy of some exhibits being filed with the Board. Therefore, if the record is withdrawn, these materials will be unavailable for review by the Board, the Village or its citizens, and other members of the public, significantly hampering their ability to participate in the proceedings. Such removal of exhibits and records from the Board's offices would specifically contravene Section 7(a) of the Act which requires that "all files, records, and data of ...the Board shall be open to reasonable public inspection..." 415 ILCS 5/7(a)

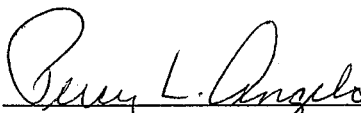
PRAYER FOR RELIEF

WHEREFORE, the Village of Cary requests that the Board reverse the Hearing Officer's determination denying the Village the right to participate in or audit status conferences, and direct the Hearing Officer allow the Village to participate in or audit future status conferences in this matter. The Village further requests that the Board direct the Hearing Officer to establish a public comment period outside of normal business hours as part of the proposed hearing, preferably in the evening, so as to facilitate public participation by members of the public who cannot attend during normal business hours. Finally, it is requested that the Hearing Officer be requested to clarify his order regarding withdrawal of the record, and, to the extent such clarification allows the record to be withdrawn, to overrule such order to the extent necessary to ensure that a full set of record documents remains available at the Board's offices.

Respectfully Submitted,

The Village of Cary

Dated: July 28, 2003

By 
One of its Attorneys

Percy L. Angelo
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Kevin G. Desharnais
Mayer, Brown, Rowe & Maw
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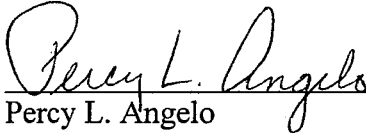
STATE OF ILLINOIS)
)
COUNTY OF COOK) SS:

AFFIDAVIT OF PERCY L. ANGELO

Percy L. Angelo, being duly sworn on oath, deposes and states:

1. I am an attorney representing the Village of Cary in Illinois Pollution Control Board matter PCB 03-221. I previously represented the Village of Cary in the underlying Pollution Control Facility Siting hearings held by the McHenry County Board.
2. On July 7, 2003 I contacted Bradley Halloran, the Hearing Office in this matter, to request that the Village of Cary be permitted to listen to status conferences scheduled in this matter. I offered to come to the Board offices to listen to those status conferences if that would facilitate matters.
3. Mr. Halloran refused to allow the Village of Cary to listen to the status conferences and told me that such auditing was inappropriate, as private matters and attorney-client privileged matters could be discussed. I questioned how an attorney-client privileged matter could be discussed between opposing parties before the hearing officer, and stated that the matters discussed should be publicly available.
4. Mr. Halloran said it was his decision that the Village of Cary could not listen to status conferences, and if the Village wanted, it could appeal its decision to the Board.

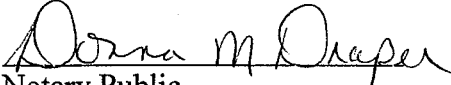
Further Affiant Sayeth Naught.

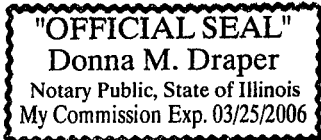


Percy L. Angelo

Dated:

Subscribed and sworn to
before me this 28th day
of July, 2003.


Notary Public



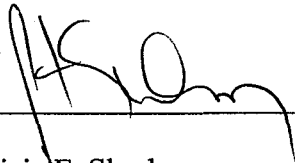
5. Subsequently, I did receive a copy of the Hearing Officer's July 15, 2003 order which, on the subject of the Petitioner's motion to withdraw the record, states :
"On July 9, 2003, petitioners filed a motion to withdraw exhibits and records. On July 15, 2003, the petitioners made an oral motion that the motion filed July 9, 2003, be withdrawn. Petitioners' motion is granted."

This Order leaves unclear which motion had been granted, the July 9, 2003 motion to remove the record or the July 15, 2003 oral motion withdrawing the prior motion. Because I and my co-counsel representing the Village were excluded from the Status Conference and thus were unable to hear the discussion of these motions or the Hearing Officer's ruling, I have no background information with which to clarify this ruling and advise our client.

6. On Monday, July 21, 2003 I checked the Board's web page and found the description of the Hearing Officer's July 15, 2003 order had been changed. It now reads: "... granted petitioners' oral motion to withdraw their July 9, 2003 motion to withdraw exhibits and records;...."

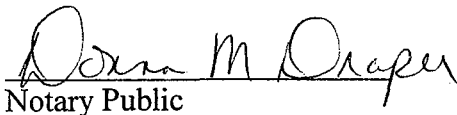
7. Based on the above series of events and what I have been told is Board policy, I and my co-counsel and our client, the Village of Cary, remain uncertain as to :1) the content of the Hearing Officer's July 15, 2003 ruling on the removal of the record ; 2) when there will be an opportunity for public comment at the August 14, 2003 hearing; 3) whether the hearing will include evening hours; and 4) whether the Petitioner or Respondent will be presenting witnesses or new evidence. As a result, I and my co-counsel have been hampered in our ability to prepare for the August 14, 2003 hearing.

Further Affiant Sayeth Not.

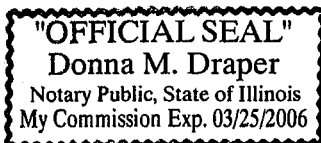


Patricia F. Sharkey

Signed and sworn before me
this 28th day of July, 2003.



Notary Public

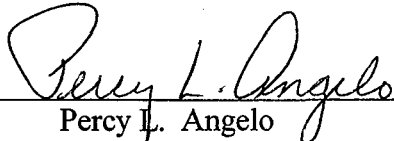


CERTIFICATE OF SERVICE

Percy L. Angelo, an attorney, hereby certifies that a copy of the foregoing Notice of Filing and Village of Cary's Appeal of Hearing Officer Determination and Request for Board Direction was served on the persons listed below by UPS Next Day Delivery on this 28th day of July, 2003:

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