RECEIVED
CLERK'S OFFICE
AUG 25 2003
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Co-Petitioners,	)	
v.	)	PCB No. 03-221
	)	(Pollution Control Board
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS,	)	Siting Appeal)
Respondent.	)	

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on August 25, 2003, we filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and Brief on Behalf of Amicus Curiae Village of Cary, copies of which are attached and hereby served upon you.

Dated: August 25, 2003

VILLAGE OF CARY

By: Percy L. Angelo
One of its Attorneys

Percy L. Angelo, Esq.
Patricia F. Sharkey, Esq.
Kevin G. Desharnais, Esq.
MAYER, BROWN, ROWE & MAW LLP
190 S. LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

THIS DOCUMENT HAS BEEN PRINTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

Percy L. Angelo, an attorney, hereby certifies that a copy of the foregoing Notice of Filing and Brief on Behalf of Amicus Curiae Village of Cary was served on the persons listed below by depositing same for UPS Next Day Air delivery, or by personal delivery in the case of Hearing Officer Halloran, on this 25th day of August 2003.

David W. McArdle
Zukowski, Rogers, Flood & McArdle
50 Virginia Street
Crystal Lake, IL 60014

Charles F. Helsten
Hinshaw and Culbertson
100 Park Avenue
Rockford, IL 61105-1389

Hearing Officer
Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Percy L. Angelo

Percy L. Angelo
Attorney for Village of Cary
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, Illinois 60603
312-782-0600

THIS DOCUMENT HAS BEEN PRINTED ON RECYCLED PAPER

RECEIVED
CLERK'S OFFICE
AUG 2 5 2003
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Co-Petitioners,	)	
vs.	)	PCB 03-221 (Pollution Control Board Siting Appeal)
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS,	)	
Respondent.	)	

Brief on Behalf of Amicus Curiae Village of Cary

The Village of Cary is adjacent to the proposed Lowe Transfer Station and participated actively as a party objector before the McHenry County Siting Committee. Indeed, during the eleven days of hearing Cary and the other objectors presented six expert witnesses in opposition to the proposed siting. Cary appreciates the opportunity to participate as amicus curiae before the Pollution Control Board ("PCB" or "Board"), and provided a statement through its Acting Mayor Steve Lamal in the Board's hearing in this case. Cary strongly supports the denial of siting by the McHenry County Board. Its discussion below relies entirely on the record made before the County as to the three criteria which the County found had not been met, and although the standard for review is whether the County's decision is against the manifest weight of the evidence, in fact, based on the assembled record, the County could not have reached any result other than to deny siting.

The Village of Cary brief amicus curiae will address the Lowe claims that the County's decision below is against the manifest weight of the evidence, that the record fails to show any basis for the County decision and that the County improperly considered the experience of the Applicant. Paragraphs 4(a), (c) and (d) of the Lowe Petition. For the additional Lowe claims regarding the host fee and the compliance of the County decision with County rules, Paragraph

4(a) and (e) of the Lowe Petition. Cary relies on and supports the brief submitted on behalf of McHenry County.

The following is a summary of the factual background. Because of the extensiveness of the record, the facts will be discussed more fully, with citations, in connection with the criteria to which they apply in the body of this brief.

As the Board will note, the record in this matter is voluminous, eleven days of hearing, almost 4000 pages of transcript, over 100 exhibits. The Applicants, Mr. Marshall Lowe and Lowe Transport, Inc. ("Mr. Lowe" or "Lowe") presented several experts. Objectors included numerous citizens who participated actively by testimony and by questioning witnesses, the Plote family which owns the large property next door to the proposed transfer station, the residents of Bright Oaks, an existing 30 year old subdivision within the Village of Cary, only 1346 feet from the proposed site, and the Village of Cary which has been working to bring the Plote property into the village as a residential development for over a decade and which has numerous other development and citizen interests which would be adversely affected by the site. Cary and Bright Oaks each presented expert witnesses in various fields in opposition to the site. In all some seven experts, in fields such as hydrogeology, stormwater management, transfer station design and operation, land planning and real estate valuation testified against the site.

The County Board Committee was extraordinarily diligent in hearing the evidence, reviewing the exhibits and questioning the witnesses. In many respects the facts described below, facts which support, indeed mandate, the decision to reject the site for failure to comply with criteria 2, 3 and 5, of the Environmental Protection Act (the "Act"), were elicited in questioning by the County Committee members, who also, of course, are members of the County Board.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Briefly the evidence showed that the site is extremely small, 2.46 acres, and is located in an area of great sensitivity, without setbacks or effective buffers. To the west and to the north the site and its long entrance road abut the eastern and southern boundary of the McHenry County Conservation District ("MCCD") Hollows Conservation Area, a former mining area which despite its continued I-2 zoning has been fully reclaimed and is now a very successful conservation and recreation area. The site's proximity to the Hollows troubled several Committee Members and led to a resolution by the MCCD Trustees opposing the site.

To the east the site abuts the Plote property, a former mined area now undergoing reclamation for primarily residential use. The Plote property has been planned for residential use in the Cary Comprehensive Plan since 1982, and residential development discussions have been going on between Cary and the Plote family since at least 1986. Mr. Lowe was aware of these discussions, indeed he testified that he bought the site in April 2002 and moved forward with his application in an expedited manner to try to get his facility sited before the Plote development could be established.

To the east of the Plote property, 1346 feet from the site, is the existing 422 unit Bright Oaks subdivision. Bright Oaks is stable and well-maintained, with a high proportion of families with children and senior citizens. As can be discerned from their role in this proceeding, the residents of Bright Oaks love their community.

In addition to these sensitive surrounding uses, the groundwater under the site is also especially vulnerable. The testimony is undisputed that the shallow site groundwater is very fast moving, 56 to 120 feet per day. This shallow groundwater flows immediately north to Lake Plote on the Plote property, then to Lake Atwood on the MCCD's Hollows property, then to wetlands defined as "high quality," "irreplaceable," and "unmitigatable" by the United States

THIS DOCUMENT IS FILED ON RECYCLED PAPER

EPA, and by surface flow to Lake Killarney in the Lake Killarney subdivision. This groundwater and these uses are at risk because the site will use an infiltration chamber to infiltrate stormwater, including contaminated stormwater because there are no check valves or other protections to stop contaminant spills or leaks, directly into the groundwater. This infiltration chamber was selected rather than the more common stormwater detention pond even though it has never been used before by Mr. Lowe or his consultants. The site itself is also not completely paved or curbed, using instead gravel and "gently sloping vegetative waterways," to carry stormwater and its contaminants. And the testimony is clear that stormwater at such a site can have contaminants from spills and leaks.

The testimony is also undisputed that such sites have odors, noise, litter, diesel emissions and dust which, because of the lack of buffer area, will carry offsite to the Hollows conservation area, the Plote property and to Bright Oaks.

The testimony is further undisputed, in fact it rests on Mr. Lowe's own study, that at the only other site in Illinois where a transfer station is so close to a residential area, the Princeton Village subdivision in Northfield Township, there have been unusual negative, or barely positive, property value appreciation rates (less than 1-2%), much less than the norm of 5-6%, suggesting the transfer station has had a serious impact on those values. This is consistent with testimony, even by Lowe's witnesses, that they wouldn't normally put a transfer station next to a residential area because they are incompatible. Other testimony by objectors showed that the proposed site is incompatible with its surroundings, including the Hollows, Bright Oaks, and the proposed Plote development as well as with the longstanding Cary Comprehensive Plan.

Finally, the design and operating plans for the facility show that larger trucks may not be able to turn, there is no sprinkler system or water for firefighting but only a burning pit, and, as

THIS DOCUMENT IS FILED ON RECYCLED PAPER

noted above, there is no way to capture spills or leaks before they go into the infiltration chamber and then into the groundwater.

This site is to be owned and operated by Mr. Lowe, who says he has no experience, who hasn't read his application, testified he felt no obligation to consider the costs to his neighbors and apparently has little sense of responsibility to understand the environmental laws and regulations which do, and will, apply to him.

As described more fully below, the decision of the County Board to deny siting on criteria 2, 3 and 5 is not against the manifest weight of the evidence and is indeed inescapable in light of the record as a whole.

I. Standard of Review and Expert Opinions

A. Standard of Review

A decision of a local siting authority with respect to an applicant's compliance with the statutory siting criteria will not be disturbed unless the decision is contrary to the manifest weight of the evidence. Land and Lakes, v. Illinois Pollution Control Board, 319 Ill.App.3d 41, 53, 743 N.E.2d 188, 197 (3d Dist. 2000), citing Concerned Adjoining Owners v. Pollution Control Board, 288 Ill.App.3d 565, 680 NE2d 810 (5th Dist. 1997). A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain or indisputable. Land and Lakes, 319 Ill.App.3d at 53, 743 N.E.2d at 197; Turlek v. Pollution Control Board, 274 Ill.App.3d 244, 653 N.E.2d 1288 (1995); Tate v. Illinois Pollution Control Board, 188 Ill.App.3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). The broad delegation of adjudicative power to the county board clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the [pollution control facility] site approval process, Medical

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Disposal Services, Inc., 1995 WL 283830, *6; see also Medical Disposal Services, Inc., 286 Ill. App.3d 568, 677 N.E.2d 432 ("We agree that the local site approval process is the most critical stage of the [pollution control facility] approval process."). The Board is not in a position to reweigh the evidence; it is for the local siting authority to determine the credibility of witnesses, to resolve conflicts in the evidence, and to weigh the evidence presented. See Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178; Land and Lakes, 319 Ill.App.3d at 53, 743 N.E.2d at 197, Concerned Adjoining Owners, 288 Ill.App3d at 565, 680 N.E.2d 810. All of the statutory criteria must be satisfied before siting can be granted, and the manifest weight of the evidence standard applies to each criterion on review. Concerned Adjoining Owners, 288 Ill. App. 3d 565, 576, 680 N.E.2d 810, 818.

While Mr. Lowe points to Industrial Fuels & Resources v Illinois Pollution Control Board, 227 IllApp.3d 533, 592 N.E.2d 148 (1st Dist. 1992), to support his contention that the County's decision was against the manifest weight of the evidence, this case is clearly inapposite. In Industrial Fuels, the record contained unrebutted testimony from experts with impressive credentials that a proposed waste-to-energy facility was "state of the art" and exceeded all applicable standards for environmental protection. Id., 227 Ill.App.3d at 549-550, 592 N.E.2d at 159. The court concluded, "This is not a case in which there is a conflict in the evidence on any material issue of fact." Id. In contrast, the record here is replete with testimony from highly credentialed experts who identified serious flaws in the location and in the proposed design and operation of the facility, and who demonstrated that the proposed facility presents significant risks to the environment and will have unacceptable impacts on surrounding land uses. The

THIS DOCUMENT IS FILED ON RECYCLED PAPER

County, as the siting authority, had ample basis to credit the testimony of the objector's experts over the testimony of Lowe's experts in determining that the statutory criteria were not satisfied.[1]

Lowe's attempt to rely on Clutts v. Beasley, 185 Ill.App.3d 543, 541 N.E.2d 844 (5th Dist. 1989) is similarly misguided. In Clutts, a local siting authority granted siting approval for a proposed landfill, and the decision was affirmed by the Board. The record demonstrated that the landfill was designed by an experienced design engineer in accordance with the standards for non-hazardous waste disposal set by the IEPA. Id., 185 Ill.App.3d 546-547, 541 N.E.2d 846. The challenger asserted merely that there was no guarantee the facility would not cause contamination, and that better sites were available. Id., 185 Ill.App.3d 547, 541 N.E.2d 846. In the present case, there are no IEPA standards governing the design of waste transfer stations. The County therefore could not look to whether compliance with such standards had been demonstrated, but was required to consider the conflicting expert testimony in the record on the site design and location and compatibility with the surrounding uses. The County could well have credited the testimony of the objectors' well-credentialed experts regarding the risks posed by the proposed facility and its potential impact on surrounding uses. As set forth in detail below, the record clearly shows a basis for the County's decision to deny siting, indeed in several crucial areas denial was required by undisputed facts in the record.

---

[1] Of course, even if the evidence in support of the Application were strong, and it is not, where conflicting evidence exists, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. Fairview Area Citizens Taskforce v. Illinois Pollution Control Board, 198 Ill. App.3d 541, 550-551, 555 N E.2d 1178, 1184 (3d Dist. 1990). Merely because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for the Board to reverse the local government's findings. File v. D & L Landfill, Inc., PCB 90-94 (August 30, 1990), *aff'd*, 219 Ill. App.3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

THIS DOCUMENT IS FILED ON RECYCLED PAPER

B. The Experts Presented by Objectors Were Well Qualified, Credible, And On Many Dispositive Points Their Opinions Were Unchallenged

In his main brief Mr. Lowe includes a discussion of the experts who testified, a discussion which is very one-sided. According to Mr. Lowe his experts have the experience in siting and testifying in siting cases; the experts of objectors do not, indeed their credentials are, for the most part, not even described. See e.g. Lowe Br. 8 et seq. This, of course, is not the whole story. First, objectors' experts are highly qualified. Larry Thomas, the Village of Cary groundwater expert from Baxter & Woodman, is a registered professional engineer with bachelor's and master's degrees in civil engineering. He has been working in the field of hydrogeology in the area since 1980, in many cases working for area municipalities in locating and protecting their groundwater resources. He has been honored for his work by the American Water Works Association and is past Illinois chair of that organization. He is also diplomate at the American Academy of Environmental Engineers. He works with McHenry County and with the Northeastern Illinois Planning Commission on groundwater management planning. He did a Groundwater Protection Needs Assessment for Cary in 1992 at which time he modeled groundwater flows in the area. Tr. 6-12, (III-3-4-03), C0188.[2] It is simply incorrect for Mr. Lowe to claim that his witness, Mr. Dorgan who was presented only in partial rebuttal to Mr. Thomas, was the only expert in hydrogeology who testified. Mr. Thomas' credentials are stellar and centrally related to the issues in this case.[3]

---

[2] Transcript references before the County Committee are cited Tr. ___, with the hearing date and transcript volume on that date in parentheses. This information is followed by the designation for that volume found in the Index of Record. References to the transcript of the PCB hearing held August 14, 2003, will be PCB Tr. ____.

[3] Mr. Lowe's brief states cryptically that Mr. Thomas' references to hazardous waste were in error. Lowe Br. 10. This is not correct. Mr. Thomas referred to the County data in Lowe's application as to the amount of hazardous waste in the County waste stream which would pass through the transfer station. While much of this material may be household hazardous waste, such as paint thinner, cleaning products or nail polish remover, and thus not RCRA regulated hazardous waste, it nevertheless is hazardous waste with the same chemical properties as regulated hazardous waste and poses the same threat to groundwater if spilled or leaked. The possibility that

(cont'd)

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Mr. Kevin Sutherland, who testified for objectors regarding the design of the stormwater system at the Lowe site, has a B.S. in civil and environmental engineering and a masters in environmental engineering from the University of Illinois. He is a registered professional engineer in Illinois and works for Baxter & Woodman as coordinator of the water resources group where his work involves community stormwater planning, and where he frequently works with local stormwater requirements. Tr. 63-66 (III-3-13-03), C00218; Cary Ex. 44, C00475.

Mr. Andrew Nickodem of Earth Tech has a B.S. degree in civil engineering and is a registered professional engineer who has fifteen years experience in the design, operation, construction, maintenance, monitoring and permitting of transfer stations, being directly involved with the design of ten, four in Illinois. He has worked on many more, over 50 landfills and transfer stations. He is active in several professional organization and sits on the Wisconsin DNR's Liaison Committee for Solid Waste Rules. Most significantly he has also worked as an engineer for three companies owning and operating transfer stations, the only expert to have that operational experience, giving his opinions about leaks and spills, odors, onsite truck movements and transfer station cleanup practices great weight. Tr. 3-6, 17-18 (IV-3-12-03), C00214; Cary Ex. 36, C00458-462.

Mr. Drew Petterson, who testified for Cary as to the site's compatibility with the surrounding area, is an urban planner with Thompson, Dyke and Associates where he is Senior Vice President. He has an undergraduate degree from Northwestern and a law degree from Duke. He is a member of the American Institute of Certified Planners, a position achieved by examination. He has served on the Evanston Planning and Zoning Commissions and was project

---

(... cont'd)

Mr. Lowe does not have the experience to appreciate this risk is one of the issues the County was entitled to consider. See Section V below.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

manager for the development of Cary's 1992 comprehensive plan. He has worked on land planning for a number of municipalities. Tr. 57-60 (IV-3-11-03), C00207; Cary Ex. 28, C00423-425. He quite appropriately relied on the expertise of experts such as Mr. Nickodem as to the operations of transfer stations and their effects, such as odor. This is not only something an expert can do; in fact the existence of offsite odors from transfer stations was undisputed.

Mr. John Whitney testified as a real estate appraisal and valuation expert on behalf of Bright Oaks. He has been practicing in that field for 31 years and has been a member of the Appraisal Institute, or MAI, for 20 years. He has served as a review appraiser for the FDIC and currently serves in that capacity for the Lake County Board of Review. Tr. 24-26 (V-3-13-03), C00220; Bright Oaks Ex. 2, C01283-1285.

The objectors' experts were eminently qualified.

These experts are practicing professionals, not professional testifying experts. Far from a liability, the County Board members were entitled to give their views added weight as a result. Mr. Lowe's experts, Messrs. Gordon, Zinner and Dorgan, testify for, not against, transfer stations. Mr. Harrison agreed that, while he had never previously studied a waste transfer station, in his many years of testifying he almost always testified in favor of the compatibility of his client's use with the area. Tr. 100 (III-3-6-03), C00193; Tr. 51-52 (IV-3-6-03), C00194. The County was entitled to consider this orientation where there was a conflict in the evidence.

The County was also entitled to consider inconsistencies in the experts' testimony. Mr. Lowe makes much of Mr. Gordon's role in teaching a course on transfer stations and preparing certain manuals. At hearing Mr. Lowe's attorney objected to consideration of those same manuals. See e.g. Tr. 5-7 (I-3-3-03), C00181. Mr. Lowe and his witness Mr. Gordon were less happy when it was pointed out that the manuals are inconsistent with Mr. Gordon's design

THIS DOCUMENT IS FILED ON RECYCLED PAPER

and operating plan for the Lowe station. See e.g. Tr. 56-57, 69-70, 72-76 (I-3-3-03), C00181; App. Ex. 8, pp. 7-24, 10-21, C00238; App. Ex. 10, pp. 36-37, C00240 (manual recommendations for high daily volumes of washwater for cleanliness, vector management and regulatory compliance, rather than washing once per week as proposed by Mr. Gordon); Tr. 45-46, 52 (II-3-3-03), C00182; App. Ex. 10, p. 43, C00240 (manual recommendation to orient transfer building with its closed site to the prevailing winds to control litter and odors. Mr. Gordon did just the opposite, leaving the usually open side into which the collection trucks pull immediately facing the McHenry County Conservation District Hollows area, to the west); Tr. 5-8 (II-3-3-03), C00181; App. Ex. 8, pp. 7-10, C00238 (manual design rule of thumb would have required a larger transfer station which would require a sprinkler system); Tr. 38-39 (II-3-3-03), C001182; App. Ex. 8, pp. 8-9, C00238 (manual recommendation for straight and level road segments on either side of the transfer building tunnel in contrast to Lowe design); Tr. 43-44 (II-3-3-03), C00182, App. Ex. 8, pp. 5-27, C00238 (manual recommendation for setbacks and buffer zones). Mr. Lowe may argue that Mr. Gordon had his reasons, or that the manuals are overly conservative, but the County Board members were entitled to conclude that Mr. Gordon's design was not as conservative or state of the art as he claimed, and to rely more heavily on the contrary opinions of objectors' experts.

Finally, on many important points, there was no disagreement between the experts. While Mr. Dorgan for Lowe questioned Mr. Thomas' data about the speed of movement to the lower groundwater, below the level of the Tiskilwa Till, and the consequent risk to the Cary municipal wells (even though he had done no work in the area and Mr. Thomas had), no one challenged Mr. Thomas' testimony as to the movement of shallow groundwater swiftly offsite to Lake Plote, Lake Atwood, Lake Killarney and certain "high quality" and "irreplaceable" area

THIS DOCUMENT IS FILED ON RECYCLED PAPER

wetlands. No one challenged Mr. Nickodem's testimony of onsite spills or leaks which can get into stormwater, though Mr. Gordon would prefer to call them leaks. No one questioned that the site would have odors, litter and noise. No one questioned Mr. Nickodem's Auto Turn program showing larger transfer trailers can't make the turns onsite. No one questioned, indeed Mr. Lowe's own data show it, that the only owned residential area in the state near a transfer station has many homes showing negative or minimal appreciation, under 1%, despite an area norm of 5-6%. The County was entitled to look at these areas of agreement and find that, with everything else presented, they provided strong support for denial.

A final background matter – the Lowe Petition also rests on the claim that "the record fails to show any basis for the County Board's decision." Paragraph 4(d) of the Lowe Petition. The Lowe Petition does not explain what this means and it misstates the applicable legal standard which is "manifest weight of the evidence." As discussed below this claim is also evidently wrong. The record is replete with bases for the County Board's decision.

II. The Record Is Clear That the Facility Is Not Located, Designed or Proposed To Be Operated So As To Protect The Public Health, Safety and Welfare And This Finding By The County Is Not Against The Manifest Weight of the Evidence[4]

Criterion 2 of Section 39.2 requires that the facility be located, designed and proposed to be operated to protect the public health, safety and welfare. Mr. Lowe devoted almost no time to this issue at hearing before the Pollution Control Board other than to argue that the proposed site was zoned industrial, as if that answered every possible question about the environmental suitability of the site. In fact, the experts presented by objectors, experts in transfer station

---

In many respects the evidence supporting the County's findings on criteria 2 and 5 will overlap, e.g. the ture of the site will necessitate certain elements in the plan of operations and the plan of operations will directly dress both criteria 2 and 5. To avoid repetition, the discussion of criterion 2 is incorporated in the discussion of terion 5, and vice versa.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

design and operation, groundwater and surface water, demonstrated serious environmental risks posed by the site location, its design, and its operating plan.

A. The Proposed Site Threatens Groundwater, Lake Plote, Lake Atwood, Lake Killarney and High Quality Wetlands

Because of the site's location near several sensitive uses and the Lowe proposal to use an infiltration chamber to handle stormwater flows, the groundwater at this site is especially vulnerable. The Village of Cary's groundwater expert, Larry Thomas from Baxter & Woodman, testified to the groundwater concerns at the site, Tr. 6-59 (III-3-4-03), C00188; Tr. 5-12 (IV-3-4-03), C00189; Cary Ex. 2, C00326, expanding on some misleadingly vague and wholly inadequate descriptions in the application. See Vol. 1, 2-4, C00001; Vol. 2, App. A, C00002. Without providing a groundwater flow map, the application says that groundwater flows from the site to a lake on the McHenry County Conservation District Hollows conservation area, which it fails to name. Mr. Thomas for the Village of Cary testified that shallow groundwater from the site flows from the site to the north and northeast to Lake Plote on the neighboring Plote property, then to Lake Atwood on the MCCD property and then to wetlands northeast of the site. To the extent the groundwater reaching Lake Atwood exits as surface water, it flows to Lake Killarney. All of these sensitive water bodies are in close proximity to the site. The groundwater flow is relatively rapid, 56 to 120 feet per day. Tr. 25 (I-3-3-03), C00181. This testimony was not disputed. See. e.g. Tr. 87 (I-3-4-03), C00186.

Unfortunately, the uses impacted by the site groundwater are highly sensitive. The significance of Lakes Plote, Atwood and Killarney are self-evident and it is irresponsible for the application not to discuss them. (Cary Ex. 5, C00334 & C00334A, attached hereto as Appendix A, is a site aerial showing the location of the site and the surrounding uses, including the lakes and wetlands). Especially serious, however, is the failure to discuss the impacted

THIS DOCUMENT IS FILED ON RECYCLED PAPER

_:tlands. Mr. Lowe's consultants testified there were no wetlands onsite, but did not address fsite impacted wetlands that would be impacted. Tr. 138 (I-3-1-03), C00178. The Lowe ıpplication, however, includes a letter from the U.S. Fish & Wildlife Service noting the presence .. "high quality," "unmitigatable" and "irreplaceable" wetlands designated L-72, in the site :inity. Vol. I, 2-21, C00001, see Appendix B, attached hereto.[5] Unaccountably, Lowe's ıpplication did not provide the locations of those wetlands, Tr. 32-34 (I-3-3-03), C00181, so the .llage of Cary obtained and provided the applicable map for the record. The mapped wetlands, signated L-72, are immediately north and east of the site, directly downgradient of the subject ite and directly at risk from site groundwater and other site activities. Cary Ex. 14, C00394. ue County record fully supports the conclusion, indeed the record demands it, that the site ses an immediate threat to groundwater and surface waters, including irreplaceable wetlands, vhich the Applicant had sought to obscure by leaving his application incomplete. Mr. Thomas' estimony concerning shallow site groundwater was undisputed, and, indeed, Mr. Lowe barely ches on these issues in his main brief. The failure to address these issues in the application ·ses serious concerns about the credibility of the consultants who prepared the Lowe ›plication.

Mr. Thomas also testified that groundwater in the deep aquifer, beneath the Tiskilwa Till, ··vs toward the Village of Cary municipal wells. He explained that experience in the area, as

---

The standard Fish & Wildlife Service Endangered Species Act clearance letter identified the presence or nce of endangered species. It specifically cautioned that it did not provide clearance with regard to possible ıct on these wetlands due to contaminated groundwater flows. With regard to wetland L-72 the letter said:)ID site #L 72 is a high quality habitat wetland which is considered "irreplaceable" and unmitigatable based on 'act that the complex biological systems and functions that this site supports cannot be successfully recreated in a reasonable time frame using existing restoration or creation methods. This site is designated a McHenry nty Natural Area Inventory. In addition, this ADID site exhibits high water quality values for eline/streambank stabilization and stormwater storage." The letter, from the Application, is attached hereto as :ndix B. As Mr. Nickodem pointed out, even without contamination you can impact a wetland just by changing iow to it. Clearly the wetlands concerns have not been addressed in the Lowe application. Tr. 19-20)-12-03), C00214.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

close as neighboring Fox River Grove, shows that groundwater contamination (in that case solvents from a plating operation) can flow through this till layer, in a period of a few months. Tr. 22-23 (IV-3-4-03), C00189. Other data provided by the Village of Cary also showed that tritium testing of the area groundwater, requested by IEPA, showed it to be under 60 years old, indicating recharge through the till layer, and Illinois State Geological Survey testing of the well nearest the site suggests there is no till present at all. Other evidence demonstrated that the supposed till is not continuous in the area of the site. A well log from the well at the nearby ranger station in the adjacent McHenry County Conservation District property showed sand rather than clay where Lowe's witness believed the till should be, demonstrating that the till is not continuous, and not protective, in the area of the site. Cary Exs. 49-52, C00770-773, C00774-776, C00777-778, C00779-781. Tr. 30 (IV-3-14-03), C00224. While the Applicant belatedly put on a groundwater witness to testify that the till was protective, and that he believed groundwaters underneath the till were 100's to 1000's of years old, in fact his nearest testing to support that opinion was 50 miles away, as he had done no testing at the site at all. The Applicant made no borings to bedrock. Tr. 85 (V-3-3-03), C00185. The Lowe witness admitted there were areas in McHenry County where the till was absent. Tr. 75 (IV-3-7-03), C00199. He further agreed that without testing one could not know whether the till was absent or present at any location, and that the till had not been tested at the proposed site. Tr. 33 (IV-3-14-03), C00224. The Applicant's witness knew nothing about the Fox River Grove contamination. Tr. 77 (IV-3-07-03), C00199. Basically, while the Applicant's expert was willing to draw broad conclusions without site data, those conclusions themselves are unsupported, without any deep soil borings, contrary to available data and are not in the application. They must be disregarded.[6]

---

[6] The Lowe witness, Mr. Dorgan, testified that he had never heard of groundwater contamination problems at (cont'd)

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Most important, however, there is no disagreement about shallow groundwater flow. As Cary's witness Mr. Thomas explained, it goes to Lake Plote, Lake Atwood, Lake Killarney and the "irreplaceable" wetlands northeast of the site.

There was also general agreement that the two downgradient monitoring wells proposed by Mr. Lowe would monitor only the top of the shallow aquifer. Tr. 38-39 (I-3-3-03), C00180; Tr. 51-52 (II-3-4-03), C00187. Contaminants such as solvents and pesticides which are heavier than water and known as "sinkers," would not be captured by them. Tr. 36-39 (I-3-3-03), C00181; Tr. 34-37 (II-3-4-03), C00187; Tr. 47 (IV-3-4-03), C00189.[7] And Mr. Lowe's consultants testified they did not know whether they would in fact be monitoring for the kinds of contaminants actually found in municipal wastes. Tr. 41-43 (I-3-3-03), C00181.

The wetlands map was not the only hydrogeological data missing from the application. To avoid providing a geologic cross-section, Lowe's consultants pretended that the County application calls only for a facility cross-section, Tr. 21 (I-3-3-03), C00181 – which, in fact, is also not provided. Patrick Engineering, the County's consultant, agreed that a geologic cross-section and groundwater data, also missing, were important to understand groundwater impacts. Tr. 64-67 (I-3-14-03), C00221. In fact, documents produced by Patrick Engineering confirmed its concern about groundwater at the site. Mr. Lowe's consultants also testified that they knew

---

(... cont'd)

a transfer station site but agreed he was not aware of any testing to find out about them. Tr. 19 (IV-3-14-03), C00224.

[7] The Lowe witness also agreed that it is usual when monitoring groundwater to put in an upgradient and downgradient well. The Lowe application calls only for downgradient wells. Tr. 84 (IV-3-07-03), C00199. Despite its prior heavy industrial use, Mr. Lowe's consultants did no analysis of existing site groundwater and do not intend to install an upgradient monitoring well which would reveal if there is groundwater contamination coming on to the site, e.g. from Mr. Lowe's existing business, Lowe Enterprises. Tr. 59 (III-3-14-03), C00223; Tr. 10 (IV-3-14-03), C00224. This is a matter of substantial concern given Mr. Lowe's lack of care in operating Lowe Enterprises, discussed in Section V below.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

the County would have groundwater concerns. Tr. 140 (I-3-1-03), C00178. Mr. Thomas' testimony regarding shallow groundwater flow was not disputed.

The groundwater is at special risk at the Lowe site because of the stormwater system Mr. Lowe has proposed. The stormwater infiltration system proposed for the site is designed to inject stormwater into the ground and the groundwater without provision for sealing off possible contamination. Once in the ground the water travels at a very high rate of speed north and northeast to Lake Plote on the Plote property and then to Lake Atwood and the high quality, unmitigatable and irreplaceable wetlands on the McHenry County Conservation District Hollows property.

There is no question that a garbage transfer station can put contaminants in its stormwater – from spills, from broken hydraulic lines, from trucks dripping engine oil and from liquids from the waste which is tracked out of the tipping floor, drips off trucks, or is formed when stormwater comes in contact with wastes on the transfer station ramps. Tr. 29-30 (IV-3-3-03), C00184; Tr. 58-60 (I-3-13-03), C00216; Tr. 14 (II-3-13-03), C00217. Stormwater falling onto the transfer trailers parked onsite can also pick up contaminants which can enter the system. Tr. 84-85 (I-3-3-03), C000181. Such contact water, which is considered leachate, Tr. 48-49 (I-3-3-03), C00181, can easily include hazardous wastes. The County's own figures show that 4080 lbs. of such hazardous wastes, (.34% of the waste load of 600 tons per day) will pass through the site each day. Tr. 33-34 (II-3-4-03), C00187. Using Lowe's proposed infiltration system, any contaminated flows would go directly to groundwater.[8]

The testimony of Cary's expert witness, Andrew Nickodem, an engineer with Earth Tech who designs transfer stations and has actually run transfer stations, confirms that contaminants,

---

[8] See footnote 2, above , with regard to any contention by Applicant that these materials are incorrectly described or do not pose a threat to groundwater.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

including contaminants from hazardous waste, can reach the tipping floor of the station in the leachate from the wastes and be carried onto the apron by trucks pulling out. Contaminants can also reach and be tracked up the transfer station truck ramps. Spills and leaks from equipment can occur anywhere on site, as when hydraulic lines leak. Tr.12-14 (II-3-8-03), C00210; Tr. 9-56 (V-3-12-03), C00215. Cary Ex. 37, C00463. Publications prepared by Mr. Lowe's own experts recognize these possibilities, Marshall Lowe himself recognized some of them, and the witnesses who visited transfer stations and the video of transfer station operations presented at hearing confirmed them to be true. See e.g. Cary Exs. 26-27, C00421-422.

Once in the stormwater system most contaminants will move directly to the groundwater. Oils and gasoline, which are lighter than water, may be trapped by the catch basins. All other contaminants heavier than water (many solvents), or dissolved in water, will pass right through the catch basins and into the groundwater. There is no capability to valve off a spill or to catch a contaminant for testing before it goes to groundwater. Tr. 82-83 (I-3-3-03), C00181. Indeed, there is also no provision in the application for even cleaning the ineffective catch basins which are provided. Tr. 83-84 (I-3-3-03), C00181.

Patrick Engineering, representing the County, agreed that groundwater is a concern if surface waters are directed into groundwater without protection. Tr. 45 (I-3-14-03), C00221. It noted that the application did not provide for any monitoring of stormwater before discharge. Tr. 63 (I-3-8-03), C00202. See also Tr. 66-67 (I-3-8-03), C00202. Patrick was also concerned about stormwater flows on the ramps to and from the transfer building since spills and leaks on these ramps go to the stormwater system. Tr. 20-24 (II-3-14-03), C00222. Mr. Lowe's consultant even testified that he knew groundwater would be a concern to the County. Tr. 140 (I-3-1-03), C00178.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Why did Mr. Lowe's consultants design such a horrendous system? Basically it appears the infiltration system was chosen because the site is not big enough to have a more common stormwater detention basin. As Mr. Lowe commented, land for detention basins is so expensive now that an infiltration system, which can be put under a parking lot or elsewhere underground, is more attractive. Tr. 18 (II-3-8-03), C00201. More attractive perhaps as a matter of cost, if you don't consider the potential for groundwater damage when the site is being used to handle wastes.

There are other problems with the stormwater system besides its inability to stop contaminants. It may be underdesigned, which likely means it would back up and contaminated stormwater could go off the site as overland flow.[9] The application contains no provisions for cleaning catch basins and, as noted above, no provision for valving off and isolating spills. No one responsible, neither Mr. Lowe nor his consultants Dan Zinnen or Keith Gordon, has ever designed or worked with an infiltration system before. Tr. 16 (II-3-8-03), C00201. Instead, Mr. Lowe, who admittedly has no experience, is to be left to run what is essentially an untried system in this kind of sensitive application.

Mr. Lowe's record on stormwater management is not strong. Mr. Lowe's stormwater from his current site is being discharged to the Hollows. It is not disclosed in the application but it was testified at hearing that runoff on the access road to the site would also go to the existing Lowe Enterprises property and then by Lowe's existing stormwater pipe to the MCCD Hollows property. Tr. 41 (I-3-4-03), C00186. This means dripping leachate from garbage trucks on the long access road will be discharged to the Hollows conservation land. For a number of the

---

[9] The system is likely to silt up, decreasing capacity. The designers were apparently unaware of USEPA studies, C04057-7235, App. No. 6, of how much silt would be carried off a site such as the Lowe site into the stormwater and the infiltration system. Tr. 55 (III-3-14-03), C00223. The application does not currently contain any provisions to prevent that. Tr. 86 (I-3-3-03), C00181.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

reasons described, the McHenry County Conservation District voted to oppose the Lowe siting. Their resolution was in the record below at C04057-7235, App. 11, and is attached hereto as Appendix C.

Mr. Lowe's transfer station is designed and proposed to be operated using an untried stormwater system at an unusually small site which will infiltrate contaminated stormwater directly into groundwaters moving rapidly toward very sensitive groundwater, surface water and wetland uses. And this system is to be run by an individual with no experience and no sensitivity for environmental compliance. See discussion below at Section V. The County Board's decision to deny the application on the Section 2 criteria for its failure to protect the public health, safety and welfare is fully justified, and in fact is required, by the groundwater and surface water concerns alone.

B. The Proposed Site Threatens Its Neighbors With Odors, Litter, Dust, Diesel Emissions, Noise and Vectors

There was widespread agreement, including agreement by Mr. Lowe, that transfer stations will have garbage odors that extend offsite. See e.g. Tr. 57-59 (III-3-3-03), C00183; Tr. 24 (II-3-8-03), C00201; Tr. 35 (III-3-8-03), C00202. There will also be dust and diesel emissions. See e.g. Tr. 62 (III-3-1-03), C00180. With the MCCD Hollows property and the Plote property right next door, the existing Bright Oaks subdivision only 1300 feet away, and no room onsite to provide a buffer for odors to disperse, the County's denial of siting based on criteria 2 could also have rested on the issue of odors alone. Indeed the statute says that under the best of circumstances, e.g. with an adequate buffer zone, transfer stations can't be closer than 1000 feet to residential areas and construction and demolition debris recycling can't be closer than 1320 feet. See e.g. 415 ILCS 5/§§21(w), 22.38. The Lowe application presents anything

THIS DOCUMENT IS FILED ON RECYCLED PAPER

but the best of circumstances. It proposes an inexperienced and unconcerned operator on an extremely tiny site.

Patrick Engineering, the County's consultant, agreed that the main size issue at the site is the lack of a buffer zone. Tr. 54 (I-3-14-03), C00221. A manual prepared by one of Lowe's witnesses for the Solid Waste Association of North America ("SWANA"), App. Ex. 8, pp. 43-44, C00238, recommends setbacks from neighboring areas, with downwind neighbors (the Plote property and Bright Oaks are downwind) needing greater setbacks. A USEPA manual recommends facing the blank side of the transfer building to the prevailing wind to provide protection, a recommendation Mr. Lowe's consultants did not follow because the open side of their building faces to the west. App. Ex. 10, p. 43, C00240.[10] The site is simply too close to other uses.

Mr. Lowe and his consultants provided absolutely no evidence on air quality impacts to the site neighbors. No analysis of odors. No consideration of diesel emissions from waiting trucks. Tr. 25-30 (II-3-3-03), C00182. Board Member Koehler specifically asked at the hearing if the Applicant was going to provide such data. Tr. 16 (III-3-4-03), C00187. Air quality can be measured, diesel emissions can be identified and modeled. One is left with the concern that this wasn't done because the Applicant knew the results would be damaging. A wind rose describes the prevalence of wind directions and speeds at a particular location. Not surprisingly, the wind

---

[10] Mr. Lowe's attitude toward these SWANA and USEPA manuals and one written for DuPage County was highly unusual. After marking them as Applicant's exhibits and offering them to the Committee, App. Exs. 8, 9 and 10, C00238, C00239, C00240, Mr. Lowe's attorney became quite exercised by any attempts to refer to these manuals, written and edited by Mr. Lowe's witness, Mr. Gordon, for the purpose of showing that they endorsed a more protective approach than that offered by Mr. Lowe. See e.g. Tr. 5-7, 53-56 (I-3-3-03), C00181. Mr. Gordon's attempts to distinguish what he has said for USEPA, for the County of DuPage and for SWANA from what he did at the Lowe site (saying essentially that smart people don't have to follow the published standards), see e.g. Tr. 8-9 (I-3-3-03), C00181, are deeply troubling and could have been considered by the County in weighing the credibility of Mr. Gordon's work and testimony. Bottom line, the manuals recognize the need for setbacks and buffers. Mr. Lowe hasn't provided them. He can't. He doesn't have room.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

rose for the site, when finally produced, shows winds from the west, west south west, and west north west over 20% of the time, directly toward Plote and the Bright Oaks subdivision. App. Ex. 18, C00286.

Mr. Lowe also agreed that noise could be an issue, Tr. 24 (II-3-3-03), C00182, but failed to address it except to argue that the building orientation (closed to the northeast), plantings, and the use of ramps which would keep transfer trucks under berm levels at some points would help mitigate noise impacts to uses to the east, such as Bright Oaks. The record shows, however, that the exhaust pipes from semi tractors will extend up above the berms and that truck traffic, including backup alarms, will take place outside the building. Of course, the building orientation will also do nothing to help or protect the MCCD Hollows conservation area, which will directly face the long length of the access road as well as the open side of the transfer station. Tr. 71-73, (I-3-14-03), C00221; Tr. 23 (II-3-3-03), C00182.

Lowe's response to these problems was instructive. Mr. McArdle procured a noise expert to testify, took a break from the proceedings to meet with him, and then declined to call him as a witness. Tr. 23-24, 37, 91 (IV-3-07-03), C00199. Clearly his opinions were not going to be favorable to Mr. Lowe. Another Lowe witness tried to offer opinions on noise, but without any expertise. Noise can be measured and its impact at a distance calculated. The Applicant didn't do that. Substantial testimony, and the video of transfer station operations, Cary Ex. 26-27, C00421-422, make it clear transfer stations can be noisy indeed. Mr. Lowe's answer is to point out how noisy his Enterprises concrete recycling operations are already. Nothing in the statute

THIS DOCUMENT IS FILED ON RECYCLED PAPER

allows one to argue that because one has already become a burden and a nuisance to one's neighbors, one should be allowed to extend that nuisance.[11]

Finally, it is clear that litter is a problem at transfer station sites. While Mr. Lowe's consultants said they would initially recommend litter pickup efforts in Bright Oaks, at least until it was clear that the subdivision would not be impacted, Mr. Lowe rejected that idea. So far the sole agreement in his application is to have his limited staff pick up litter along Route 14, a very minimal commitment in light of the proximity to the Hollows conservation area, the Plote property and Bright Oaks. His lack of concern for these issues may well have been deeply troubling to the County.

C. Mr. Lowe's Only Argument For Site Suitability Rests On Its Industrial Zoning Even Though the Standard of Section 39.2(ii) Is Much Broader

Mr. Lowe's consultant named two key items making the site favorable from the standpoint of protection of public health, safety and welfare -- those items being the access to major roadways and the location in an industrial zone. Notably, he said nothing about environmental concerns. Tr. 136 (I-3-1-03), C00178. No testimony was provided that this is a good site environmentally. Instead Mr. Lowe's consultants testified that the site was already selected by Mr. Lowe before they were hired. Tr. 53 (II-3-3-03), C00182.[12]

---

[11] Mr. Lowe produced a report by a noise consultant as part of his public comment after the hearing was closed and when there was no opportunity for cross-examination, C03993-4031. This turned out to be a pattern. See e.g. the public comment on Mr. Lowe's legal compliance, discussed below at Section V. Even without cross-examination, however, this public comment shows substantial noise levels from the proposed operations, close to the state limits for backup alarms at Bright Oaks, 1300 feet away. There is no estimate of noise impacts for the much closer Hollows Conservation Area or the Plote property and the implication must be that noise levels from equipment and backup alarms will violate state standards at those locations. While regulation of backup alarms may be preempted, that is the very reason one shouldn't put a transfer station with constant backup operations near a sensitive use.

[12] Oddly, Mr. Lowe's brief complains that Cary resolved to oppose the transfer station before hiring its experts. Lowe Br. at 1. The situations are hardly comparable. Cary had the benefit of its own planning experience, its own Comprehensive Plan which was inconsistent with the Lowe proposal and its intimate familiarity with the area by which to evaluate the acceptability of the Lowe proposal.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Significantly, at the PCB hearing, almost the only argument made by Mr. Lowe's attorney as to the ability of the location of the proposed site to protect the public health, safety and welfare rested on the industrial zoning of the site. PCB Tr. 22-23. Indeed, Mr. McArdle argued that under the applicable zoning the site could have an asphalt concrete facility, a meat packing plant, a rendering plant, a slaughterhouse, fertilizer products, smelting, a sawmill, a trucking terminal and so on. PCB Tr. 23. Mr. Lowe's brief makes a similar argument. Lowe Br. 27. (He also threatened that the Hollows conservation area could be leased for industrial use, a possibility which has no support in the record. Id.)

Putting aside the obvious, that at 2.64 acres the site would also be too small for most of the uses threatened by Mr. McArdle, as indeed it is too small for a transfer station, it is submitted that Mr. Lowe and Mr. McArdle are missing several important points. First, the Environmental Protection Act assumes that the decision of the County Board will consider a wider range of environmental and safety concerns that those traditionally encompassed by local zoning, including surface and groundwater quality and air quality. Industrial zoning does not answer the questions mandated by Section 39.2 of the Act. Second, consistent with his overall attitude toward environmental compliance, discussed at Section V below, Mr. Lowe's argument assumes that he would be able to operate the uses listed without any consideration for their environmental impacts. Indeed, Mr. McArdle sought valiantly to bar any discussion of zoning operational and performance standards from the County hearing, even though his entire argument rests on the property's zoning. See e.g. Tr. 71-72 (III-3-11-03), C00207. In fact, local zoning rules as well as Pollution Control Board rules and the Environmental Protection Act itself impose standards to prevent those listed uses from being a burden to the neighborhood. For example, under McHenry County requirements, if used for any of the uses referenced by Mr. Lowe, the site

THIS DOCUMENT IS FILED ON RECYCLED PAPER

would require a 100 foot setback from any residential use as well as screening and other protections. McHenry County Zoning Ordinance, Cary Ex. 56, pp. 937 and 947, C00884. The Environmental Protection Act imposes additional requirements. Industrial zoning, if relevant, is meaningful only in the context of the impacts that zoning would permit and those impacts are limited by the setbacks and buffers and performance standards which Mr. Lowe and Mr. McArdle sought to exclude. We are long past the era, if it ever existed, when you could do whatever you wanted with your property without regard to your neighbors or your community. And finally, Mr. Lowe forgets that the issue before the Board is whether the County's decision is supported by the manifest weight of the evidence. The record contains unrebutted evidence of a potentially contaminated runoff to the Hollows from the access road and the stormwater pipe across the current Lowe operations; it contains unrebutted evidence of potentially contaminated groundwater flow at a very fast rate to Lake Plote, Lake Atwood, Lake Killarney, and to high quality and irreplaceable wetlands; and it shows agreement that there will be odor, noise, dust and litter impacts to nearby properties including the Hollows, the Plote property and the existing Bright Oaks subdivision. The County's decision is not only fully supported, it is also inescapable. Industrial zoning is not a license to pollute. If it were so, there would have been no need for the Environmental Protection Act in the first place.

D. Mr. Lowe's Argument At The PCB Hearing That Certain Elements of His Design and Operating Plan Would Mitigate Any Concerns Regarding His Site Location Is Unavailing

At the PCB hearing, Mr. McArdle attempted to argue, apparently with respect to both criteria 2 and 5, that certain proposed design and operating features were state of the art and would mitigate any problems with the site location. PCB Tr. 34. He proceeded by trying to compare these allegedly desirable measures to features proposed by the Village of Cary's witness

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Andrew Nickodem for the Woodland facility in Kane County, a facility for which siting has been denied. By careful selection Mr. McArdle argued that the Lowe features were as good or better than the Woodland features, but the whole record does not bear him out. For example, the Woodland site has only one residence 1400 feet away to the west, primarily upwind, Tr. 30 (III-3-13-03), C00218, while Lowe has the Plote property adjacent to it and 422 homes in Bright Oaks, about 1300 feet downwind. Mr. Nickodem had never seen a transfer site located so close to sensitive areas like the Hollows, Bright Oaks and the planned Plote residential development. Tr. 17-18 (IV-3-12-03), C00214. The Woodland site is paved, with curbing and walls, multiple valved catch basins and a detention pond to stop and isolate spills and leaks. Tr. 18-19, 25-26, 46, 50-54 (II-3-13-03), C00217; Tr. 16-17 (III-3-13-03), C00218. Indeed, Board Member Klasen asked why it shouldn't be an industry standard that all site surfaces should be paved. Tr. 16-17 (III-3-13-03), C00218. Instead, Lowe has no curbing, gravel site areas, "vegetative waterways," Lowe Br. 15, and a stormwater system, with no valving or other mechanism to isolate leaks or spills, which infiltrates stormwater directly to the groundwater.

The possible list continues: Woodland has a sprinkler system, hand held fire extinguishers, a large 200 lb. wheeled water fire extinguisher and a detention pond to provide water to fight fires. Tr. 9-10 (I-3-13-03), C00216, Tr. 29-30 (III-3-13-03), C00218. Lowe has a pit to push burning wastes into. Woodland is surrounded with a full fledged groundwater monitoring system associated with the Woodland landfill. Tr. 21 (III-3-13-03), C00218. Lowe has two downgradient wells which don't go deep enough to catch many of the more serious contaminants such as solvents and no information in the application as to what it will monitor for or whether its monitoring parameters will be consistent with the waste it will receive. Woodland has provision for recycling. Tr. 33 (II-3-13-03), C00217. Lowe does not. At his recent designs

THIS DOCUMENT IS FILED ON RECYCLED PAPER

in Illinois. Mr. Nickodem provided a screening wall around the facility, such as a tollway screening wall, to provide visual, noise and litter screening. Tr. 25-26 (IV-3-12-03), C00214. Lowe has a chain link fence. Mr. Nickodem's recent projects in the Chicago area have involved sites of between 5 and 6 acres, 8 acres and 20 acres. Mr. Lowe's site at 2.64 acres is by far the smallest Mr. Nickodem has seen in recent designs. Tr. 27-28 (IV-3-12-03), C00214. Woodland has an elaborate system to inspect loads for improper wastes, including surveillance cameras, Tr. 22-27 (III-3-13-03) C00218. Lowe has random load checking in minimum space, providing a risk to employees. Tr. 10-11 (II-3-13-03), C00217. Lowe has a long entrance road for queuing vehicles but almost no space onsite. Woodland would have substantial onsite queuing room. Woodland has space for onsite truck movement. Lowe has a site which industry models show will not allow trailers enough room to turn, and no room to park trailers for inspection or other such purposes. See Section IV below. See also Tr. 18-19 (III-3-13-03), C00218.

Lowe does have a concrete building with a liner under the building alone. Lowe has to rely on luck for any accidents, leaks, spills or drips which happen anywhere else on the site, even on the ramps to and from the transfer building, which his infiltration system will send straight to groundwater.[13] The County could have readily determined, and obviously did, that the lined concrete transfer building did not overcome the bad site or the other serious risks of the site design and operation plan.

---

[13] Lowe's attorney argued at the PCB hearing that the amenities or mitigating elements to be provided by Mr. Lowe in his design were essentially eight: the concrete building, the geomembrane liner under the transfer building, the monitoring wells, the long entrance road for queuing, indoor tarping, indoor scales, the fire pit, and the fact of underground loading. PCB Tr. 45. In addition to the points above, Cary's witness pointed out that several of Lowe's design features were either not advantageous (indoor scales, underground loading and radiation detection) Tr. 32-33, 42-43 (I-3-13-03), C00216; Tr. 5-7, 31, 39 (II-3-13-03), C00217, or were dangerous (indoor tarping and underground loading without adequate room to turn on the ramp coming out). Tr. 20-21 (II-3-13-03), C00217

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Mr. Lowe claims that County Board members commented that his design was state of the art and overdesigned. Lowe Br. 11. The two comments quoted occurred early on the third day of hearing, while the Lowe witnesses were still testifying and well before the Committee heard objectors' testimony about the Lowe design. Significantly, the two Board members made the comments in light of their concerns that the Lowe protections were not broad enough, foreshadowing the very points made at a later date by the Cary experts. Committee Chair and Board Member Brewer asked if the barrier kind of protection provided by the liner couldn't be extended to more of the site. Tr. 65 (II-3-4-03), C00186. In light of Lowe's testimony that he was providing an overdesigned facility, Board Member Koehler asked why the Lowe experts could not provide good information on odors and noise. Tr. 16 (III-3-4-03), C00187. Clearly, the Committee members were paying close attention to these issues and decided them against Mr. Lowe when they had the whole record, including the testimony of Cary's experts, before them.

Mr. Lowe's brief makes frequent references to his claims that his facility exceeds standards, is state of the art, is overengineered, or frequently is "extraordinary" (underlining in original). It is worthwhile addressing what those words mean.

First, there are no Illinois regulations for transfer station design, so there is no state standard which can be exceeded (and Mr. Lowe's frequent references to Clutts v. Beasley, 185 Ill. App.3d 543, are inapposite). If there are "standards," they are no more than a statement of what the industry has done in the past, in other locations, and the objectors in this case put on their own experts to address the insufficiencies of the design for the instant location. If it comes down to a battle of experts, the County had good reason to rely on Mr. Nickodem for Cary, who provides such features as sprinkler systems, paved sites and stormwater isolation systems in his

THIS DOCUMENT IS FILED ON RECYCLED PAPER

current designs, rather than Mr. Gordon for Mr. Lowe, who doesn't follow the recommendations in his own manuals. Finally, it is suggested that Mr. Lowe's brief resorts to a certain amount of hyperbole about relatively minor items. He describes the site traffic patterns, separating collection and transfer trucks, as a special amenity, Lowe Br. 12, even though the Auto Turn program says his trucks won't be able to turn. See Section IV, below. He says the enclosure of the scale house exceeds standard design, Id. 13, even though Mr. Nickodem, and common sense, suggests that is essentially irrelevant from an environmental standpoint since the trucks are already tarped and about to leave the site. He congratulates himself that the open side of the transfer building will face west into the prevailing wind, violating Mr. Gordon's own manuals and resulting in a building whose open side directly faces the Hollows conservation area. He refers to his buildings as providing screening, though at most it will be partial and can't make up for the lack of a buffer or for a building which is open toward the Hollows. Mr. Lowe makes up standards for irrelevant matters and claims to exceed them, but leaves important issues unaddressed.

As Mr. Helsten for the County pointed out at the PCB hearing, Mr. Lowe's attorney argued by picking out nuggets of information here and there in the record, hoping no one would notice the many elements of contrary data which the record also contained. As noted above, in many respects his "nuggets" were misstatements of the record, but that tactic should not avail him because it is the record as a whole which must be considered and he must show that the County's decision was against the manifest weight of the evidence. The County Committee saw through the chaff. A burning pit, an infiltration chamber, and a site, without setbacks or buffering distance, which allows spills to reach the ground and sensitive groundwater are not

THIS DOCUMENT IS FILED ON RECYCLED PAPER

sufficiently protective. The County's decision on criterion 2 and its related decision on criterion 5 were driven by the record.

III. The Lowe Transfer Station Is Not Located So As To Minimize Incompatibility With The Character Of The Surrounding Area Or To Minimize The Effect On The Value Of The Surrounding Property

In support of his argument on criterion 3, Mr. Lowe at the PCB hearing relied on two issues, he pointed again to his industrial zoning, and, apparently abandoning the damaging study of Princeton Village in his own application, he referred to two public comment letters from residents of Princeton Village in the vicinity of the Northbrook Transfer Station. His arguments are factually and legally insufficient; they also do not begin to approach the manifest weight of the evidence standard needed to overturn the County decision.

A. The Applicant Focuses On Zoning and Provides No Showing of Compatibility With the Character of the Surrounding Area.

The application identifies the zoning of the surrounding area as primarily industrial, a conclusion reached by assuming the Plote property is industrial (even though the Applicant was well aware, and had been for years, of residential development plans for the property as well as its designation as residential in the Cary Comprehensive Plan).[14] Consistent with that planning, the area is now zoned residential. C04057-7235, App. 4. The application also assumed the McHenry County Conservation District Hollows conservation area was industrial, even though it has been reclaimed for many years and is clearly devoted to very successful conservation and

[14] The extensive process of residential development planning for that property is laid out in the testimony of Mr. Cameron Davis, the Cary Village Administrator, Tr. 23-30 (I-3-11-03), C00205, and Mr. Dave Plote, Tr. 4-10 (VI-3-11-03), C00210 (development discussions beginning in mid 80s – held up by litigation which has been resolved). See also Cary Ex. 22, C00404 & C00404A, Cary Ex. C00398, C00404 and C00404A, and extensive Plote exhibits 1-11, C01193-1232. Many years ago Cary had extended water and sewer service to the area in anticipation of this residential development. C0334 and C00334A, (blue and red lines showing water and sewer), provided as Appendix A to this brief. Mr. Lowe, who bought his site in April 2002, Tr. 27-28 (I-3-8-03), C00200, was well aware of this planning since at least the period when he sat on the Cary Village Board from 1983 to 1989, and indeed tried to expedite his siting application in order to preempt the Plote development. Tr. 90-92 (I-3-8-03), C00200; Tr. 20-21 (III-3-8-03), C00202.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

recreational open space uses. These misassumptions about actual land use render Lowe's conclusions as to the nature of the area, see Vol. I, 3; p. 12 of 23, C00001, materially, in fact overwhelmingly, incorrect. In fact, the only current heavy manufacturing use in the area are Mr. Lowe's two parcels and the neighboring Welsh Brothers facility. The actual industrial uses are very limited, as demonstrated by the site aerial, the testimony of the Cary Village Administrator, and Cary's land use planning expert. Cary Ex. 5, C00334 & C00334A, attached as Appendix A; Tr. 17-56 (IV-3-8-03), C00203; Tr. 6-67 (I-3-11-03), C00205; Tr. 75-98 (IV-3-11-03), C00208. And the Cary Comprehensive Plan, originally adopted in 1982 and updated in 1992, makes it clear that the area is designated for residential and less intensive uses. Cary Ex. 21, C00403. For the convenience of the Board, the map designation from the Cary Comprehensive Plan is attached as Appendix No. D to this Brief.

Despite his knowledge of the Cary Comprehensive Plan and its designations for the development of the area, the Applicant's expert Mr. Peterman testified that he considered only the current zoning. Tr. 73 (IV-3-6-03), C00194. In fact, the only graphic included in the Peterman report shows only zoning (industrial for the Hollows and the Plote property), and fails to identify the actual current land use, which is substantially different from the existing zoning. Tr. 70 (IV-3-11-03), C00208. Because Mr. Peterman did not discuss the proposed transfer station with the Village of Cary, he failed to learn of the extensive residential planning for the Plote property or the fact that the Village had extended municipal services to the Plote property in anticipation of its development as residential as designated in the Plan. Id. Indeed, during the pendency of Lowe's application the Village's Plan was implemented and the current zoning of the neighboring Plote property is residential, implementing a longstanding plan. All of these elements should have been considered by Mr. Lowe and weren't.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Consistent with the Cary plan, the trend in the area is to increased residential uses. Mr. Lowe himself described Cary as having evolved into a bedroom community. See also Tr. 11 (I-3-11-03), C00205. The formerly mined McHenry County Conservation District Hollows property is now a very successful, very cherished park, whose Trustees have unanimously voted to oppose the transfer station. C04057-7235, App. No. 11, found at Appendix C to this Brief. The Plote property is at the conclusion of an extensive post-mining reclamation process and is about to be developed as multiresidential pursuant to the Cary Comprehensive Plan and its annexation by the Village. The long-existing Bright Oaks subdivision which Mr. Lowe's expert, Mr. Peterman, assumed was protected by an 8 to 12 foot berm, Vol. I, § 3, p. 9 of 23, C00001, quite simply isn't. Testimony and pictures demonstrate that there are Bright Oaks homes at the top of the level of the so-called berm which look directly at the proposed site. Indeed the site is the most elevated use in the area and stands out like a sore thumb.[15] Cary Ex. 18, C00400, several of those photographs are also included as Appendix No. E to this Brief. Across Route 14, a business and commercial development is planned by Mr. Bill Kaper. This development is of vital interest to the Village of Cary because of its need for tax-base diversification. Impacts to this property weren't even studied by Lowe. Tr. 9-15 (I-3-11-03), C00205. Nothing in the area is heavy industrial except Mr. Lowe and Welsh Brothers, and the testimony of Cary's land use planning expert was that Mr. Lowe's site was not located to minimize incompatibility with these surrounding land uses. Tr. 91 et seq. (IV-3-11-03), C00208.

On cross-examination, Mr. Lowe's expert, Mr. Peterman, admitted the unsuitability of the site from a land planning perspective. He probably would not put residential next to heavy industrial. Tr. 14 (IV-3-6-03), C00194. See also Tr. 122-125 (III-3-6-03), C00193. He

---

[15] A Lowe expert agreed there can be noise at the top of the berm from as far as the area of the site. Id.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

acknowledged Route 14 at the area of the site is the entranceway to Cary and agreed that it would be his preference not to put a use such as the Lowe site there, but justified the decision because of the County zoning. Tr. 96-98 (III-3-6-03), C00193. County zoning, however, may be considered under Criterion 3 only in the context of zoning performance and environmental controls which would apply to control impacts from industrial uses and only to the extent such zoning reflects actual use. Mr. Lowe's zoning argument is invalid on its face.

Another Lowe expert, Mr. Zinnen, agreed that the closest he had previously put a transfer station to a residence was 1100 feet – to a single residence in Coles County. He'd never worked on a site so close to a large subdivision. Tr. 71 (III-3-3-03), C00183; Tr. 6-7 (IV-3-3-03), C00184. The transfer station simply doesn't belong on Mr. Lowe's 2.64 acres.

Mr. Lowe's testimony as to compatibility with surrounding properties was essentially an argument that the actual surrounding uses should be ignored and planned uses should change and become industrial. See e.g. Tr. 125 (III-3-6-03), C00193, 64 (IV-3-6-03), C00194 (Plote property should be industrial – Hollows is zoned industrial). The County's decision against him was fully supported, and in fact inescapable.

B. The Applicant's Own Data Shows a Potential Serious Impact on Surrounding Properties.

Mr. Lowe's analysis of the impact of his proposed site on surrounding property values proves the opposite of what he intends. The County Committee noted that and was clearly concerned by it, going through extensive questioning to be sure it understood the data. See e.g. Tr. 77 et seq. (V-3-13-03), C00220. Mr. Lowe himself has now realized that and, at the PCB hearing, abandoned reliance on his own application. The evidence, however, is clear and fatal to the application.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Mr. Lowe's consultant, Frank Harrison, began his property value analysis by trying to find residential subdivisions located near transfer stations. In the entire state of Illinois he found only one, a fact which should demonstrate that transfer stations simply don't belong near residential areas. He testified he wasn't surprised there were no others since transfer stations are an industrial use, Tr. 115 (III-3-6-03), C00193, a clear admission again that they don't belong near residential areas. (Mr. Harrison also therefore contradicts Mr. Lowe's argument at the PCB hearing that a transfer station is not really industrial.)[16]

The one site Mr. Harrison found was the Princeton Village subdivision across the Northwestern line railroad tracks from the Northbrook Transfer Station on Shermer Road in unincorporated Northfield Township. Tr. 67 (I-3-6-03), C00191. At their closest point, at the southeast corner of the subdivision, the station is 200 feet from the transfer station, with a substantial 16 foot high berm and the railroad tracks in between.

In order to do his study, Mr. Harrison drew an arbitrary line through the subdivision to create a target and control group, with the target group generally closer to the station. He did no analysis to demonstrate that the control was a valid control, unaffected by the station. Thus his conclusion, that the target and controls both appreciated at about the same rate of slightly over 1%, supposedly demonstrating a lack of transfer station influence, is entirely unsupported. In fact, he admitted that if the entire neighborhood were influenced by the transfer station, then he would expect about the same appreciation rate for both target and control. Tr. 72 (III-3-6-03), C00193. His data shows exactly that.[17]

---

[16] Mr. Harrison studied other sites but his other studies involved industrial neighborhoods or nearby rental properties, Lowe Br. 30-36, and are not relevant to the Lowe effect on nearby residential or commercial properties.

[17] The County's consultant, Patrick Engineering, also noted that Lowe's Princeton Village conclusions depended on where the target-control line was drawn. Tr. 6 (II-3-14-03), C000222.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

What his study did show, a fact noted forcefully by Committee members at the County hearing, is that many properties in Princeton Village appreciated very little and several even declined in value over the period studied. Seven properties declined in value, including properties closer to the transfer station; 18 of 37 had appreciation rates under 1%. See Princeton Village appreciation rates from the Lowe application, C00001, which for ease of reference are included in Appendix No. F. This is a startling result for properties in north suburban Cook County where appreciation rates of 5-6% may be expected. Tr. 87 (V-3-13-03), C00220. In fact, Northbrook, adjacent to where the site is located, has a rate of 16%. Bright Oaks' appreciation rate has been 9.8%. Tr. 54 (III-3-6-03), C00193. A more valid and more logical conclusion, and one closely explored by the County Committee members, see e.g. Tr. 69-74 (IV-3-6-03), C00194 (questioning by Board Member Koehler); Tr. 79-80 (V-3-13-03), C00220 (questioning by Board Member Klasen), is that the transfer station did significantly influence property values throughout the subdivision, with the influence most severe on those properties closest to the station.[18]

Mr. Harrison also failed to acknowledge the significance of the fact that Princeton Village was built after the transfer station, and initial sales would have taken the presence of the station into account. Bright Oaks was built over 30 years ago and is an established and successful community of 422 units, Mr. Harrison's work does nothing to address impacts to existing community property values. (Mr. Lowe's attorney argued at the PCB hearing that Bright Oaks knew of the nearby uses when it was built, ignoring the fact that there are 422 homeowners

---

[18] Mr. Harrison's other studies used (and Michael McCann whom he consulted recommended) targets within roughly ¼ mile of the station and controls over ¾ mile away. Tr. 47 (I-3-6-03), C00191. Similar standards applied to Princeton Village would have made most of the subdivision a target and would have disqualified any part for use as a control. Mr. Harrison's claim that he could find no other similar control in the area (north suburban Cook County) is simply not credible. In fact, he recognized there might be other possible controls ½ mile or so away. Tr. 37 (IV-3-6-03), C00194.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

in Bright Oaks, who bought their homes at different times and may also have known of the successful reclamation of the Hollows and the pending residential development of the Plote property.)[19] Bright Oaks' appraisal expert, John Whitney, testified to exactly these same problems with the Harrison studies. His testimony appears at C00220 (V-3-13-03). He pointed out that the proper analysis would have been one comparing property values before and after a transfer station construction. Tr. 29-30, 84. The transfer station presence was already reflected in the initial Princeton Village values. Tr. 89. He testified that Mr. Harrison's control properties were too close and were likely influenced by the Princeton Village station. Tr. 42-43, 51, 75. He agreed with the question of Ms. Suzanne Johnson, a citizen objector, that Lowe's study could be interpreted as showing a negative transfer station impact throughout Princeton Village. Tr. 50-51. He noted that there was no support for Mr. Harrison's choice of a 1000 foot dividing line through Princeton Village to separate target and control areas. Tr. 43. He believed a mile distance was a better distance to find a control uninfluenced by a transfer station. Tr. 75, 84. And he noted that the 1-2% average appreciation rate found in Princeton Village was not only incorrectly calculated, it was also ["not very good"] compared to the "significantly greater" rates he would expect to see. Tr. 45, 87-88. He testified that the norm was 5-6%. Tr. 87. He agreed with questions by Board Member Klasen that on 30-37 Dartmouth Court in Princeton Village where four of eight homes lost money and one appreciated just 0.1% over 84 months, and in Princeton Village as a whole where 18 of 37 homes had an appreciation rate under 1%, the rates

---

[19] Further, Princeton Village, where Mr. Harrison acknowledges he smelled odors and heard noises from the transfer station, Tr. 88 (V-3-6-03), C00195, is upwind from the transfer station based on the prevailing winds. The impacts on the locations downwind of the Lowe Station, such as the Plote property and Bright Oaks are likely to be even more severe than those at Princeton Village.

It was also learned during the April 10 County Board visit to the Northbrook Transfer Station that it had indeed received complaints from the residents of Princeton Village. C04057-7235, App. No. 7.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

were not good and suggested problems. Tr. 78-80, 88. As Board Member Klasen described it, the data on home value appreciation in Princeton Village was "not pretty." Tr. 79-80.

Oddly, at the PCB hearing Mr. McArdle, Tr. 28-30, criticized Mr. Whitney on the grounds that he had replied to a Committee Member's "hypothetical" fact scenario by saying he couldn't answer the question without a proper study. See Tr. 80-81. Mr. McArdle claimed that without having done such a study of a hypothetical question, Mr. Whitney's testimony was completely negated. That's ridiculous.

First, it is Mr. Lowe who must submit an application, bears the burden of proof, faces the manifest weight of the evidence standard before the Board and must do the studies if studies are required. Mr. Whitney's testimony was that Mr. Lowe had, in fact, not properly studied property value impact and he provided extensive testimony explaining why that was so and identifying specific inadequacies. That is a perfectly appropriate challenge to the sufficiency of the application. See e.g. CDT Landfill Corporation v. City of Joliet, PCB 98-60 (March 5, 1998) 1998 WL 112497, *8-*9, aff'd 303 Ill. App.3d 1119, 756 N.E.2d 493 (3d Dist. 1993)(Table). Further, Mr. Whitney's answer to the Committee Member's question was perfectly reasonable and consistent -- one shouldn't give property impact opinions without a proper study, and Lowe hadn't done one. (Mr. Lowe's own witness testified that if the site in fact had odors, he had no idea what the effect on Bright Oaks would be. Tr. 75-78 (IV-3-6-03), C00194). Mr. McArdle's argument proves too much and emphasizes that the Applicant's own record is insufficient to support a favorable decision on criteria 3 because he had not provided a valid study and the work he did provide shows serious impacts on property values. Mr. McArdle's argument demonstrates that his client must fail.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

It should be noted that Bright Oaks is a good quality, well-maintained subdivision, Tr. 69 (V-3-6-03), C00195, with a high proportion of young families with children and of senior citizens. These groups will be unusually impacted because they are likely to be in the neighborhood during the day when the station is operating. Even Mr. Lowe's expert recognized that senior citizens expected Bright Oaks to be their last home. Tr. 69-71 (V-3-6-03), C00195. They have little flexibility in being able to move and little financial cushion to be able to deal with any loss. As a matter of environmental justice, it is improper to target such a community for the burden of the transfer station.

At the Pollution Control Board hearing, Mr. Lowe's attorney, Mr. McArdle did not refer to his client's own studies showing the devastating effect on Princeton Village, but to two letters he had solicited from local Princeton Village property owners after the County hearing began and it became apparent that his client's study actually supported the objectors. Without support, each contended that property values had increased. Neither letter writer was present at the hearing, let alone subject to cross-examination. Speaking charitably, it is possible they were referring to the 1 to 2% average overall increase, which is so much less than the surrounding area. It is possible they forgot about the seven homes which lost value and the 18 which appreciated less than 1% despite a strong market. It is clear that as current owners their interest is in maintaining their own values.[20] In fact, the record demonstrated, and Mr. Lowe's witness admitted, offsite odors from the Northbrook transfer station. Tr. 88 (IV-3-6-03), C00195. What is stunning, however, is Lowe's decision to abandon his application and point instead to two letters of untested and manifestly insufficient public comment to support his showing on

---

[20] As Board Member Klasen noted with regard to the letters, "I can't see a housing development with these letters that Mr. McArdle gave us from these homeowners that are saying how great this is. You think it would be great if you wanted to get out of there." Tr. 79.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

criterion 3. The County's decision on this criterion was clearly correct, and indeed there is no evidence in the application or in the record to the contrary.

C. The Act Sets Required Setbacks From Residential Property Which Confirm the Propriety of the County Decision and Bar Establishment of the Lowe Site

Mr. Lowe has been inconsistent about the significance of the 1000 foot residential setback standards from transfer stations in Section 22.14 of the Act. He has indicated that he selected the proposed site because it was more than 1000 feet from Bright Oaks (and expedited his application to try to move forward before the neighboring Plote property could be zoned as residential), Tr. 89-90 (I-3-8-03), C00200, but at the same time he has argued that the 1000 foot setback of 22.14 is somehow not applicable in siting. The residential setback, in fact, is important in several ways.

Most directly, Section 22.14 prevents establishment of a garbage transfer station within 1000 feet of a residence or a property zoned residential. No such station can be permitted.[21] Equally important, however, Section 22.14 is important evidence of the legislature's understanding of how close is too close to comply with criteria 2, 3 and 5. As a matter of law, even for an otherwise great site, less than 1000 feet would be too close.

Similarly, Section 21(w) of the Act states that a construction and demolition debris site cannot be any closer than 1360 feet to residences. Such a site would not be likely to have odors or groundwater impacts, but it is still too close as a matter of law.

In light of these legislatively established bare minimums, minimums which apply even where the site itself has adequate buffers and good protections for groundwater and surface water and the like, the decision of the County Committee and County Board are manifestly reasonable,

---

[21] By incorporation in the McHenry County Solid Waste Plan, Section 22.14 renders the site noncompliant with criterion 8. Cary understands that this issue is not ripe at this time but would certainly have raised it if the County had not denied siting on the basis of criteria 2, 3 and 5.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

even if the Plote property were not residential. Reasonable County Board members, like reasonable legislators, could look at the site and the proximity to nearby homes and conclude that they are just too close not to have an unreasonable impact.

In fact, of course, the Plote property is residential which makes the circumstances even more compelling. Mr. McArdle argued at the PCB hearing that transfer stations must be in the middle of populated areas. Cary is a strong supporter of transfer stations, but nothing says that they have to be in people's backyards. In fact, Sections 21(w), 22.14 and 39.2 and expert testimony and common sense make it clear they should not be in people's back yards. Even Mr. Lowe and his experts recognize this. Again and again they referred to the "mitigations" they had attempted to provide to protect site neighbors or cautioned that their conclusions assumed high quality site operations to protect neighbors. See e.g. Tr. 58-59 (III-3-8-03), C00202; Tr. 23 (IV-3-14-03), C00224. In the face of that, when asked whether he felt any obligation to consider the costs to Cary or of his neighbors such as the residents of Bright Oaks, Mr. Lowe announced "Not in the least." Tr. 46-47 (II-3-8-03), C00201. It was entirely reasonable for the County to look at these "mitigations" and decide that a concrete building and a building liner were not enough in light of the serious handicaps of the site itself, the touchstone of criterion 3. The statutory provisions demonstrate that that decision could not have been against the manifest weight of the evidence.

IV. The Plan Of Operations For The Transfer Station Is Not Designed To Minimize The Danger To The Surrounding Area From Fires, Spills Or Other Operational Accidents

In addition to the problems discussed in Section II above, a significant problem with the facility design and plan of operations, one created by the very small size of the site, is the fact that the larger transfer trailers contemplated by the application, and on which site volume and

THIS DOCUMENT IS FILED ON RECYCLED PAPER

truck traffic calculations rely, cannot maneuver around the site without hitting the buildings! The Village of Cary's expert, Mr. Nickodem of Earth Tech, had his staff use a widely accepted computer model called Auto Turn to determine whether a 65 foot transfer trailer truck could make the tight turn down the ramp into the transfer building and then make the tight uphill turn coming out. The Auto Turn program showed it could not. The truck would hit the building going in and hit the inside ramp retaining wall coming out. The program also showed that transfer trucks coming into the site and turning right as contemplated by the site plan would hit the site fence on the right side of the entrance. Tr. 45-52 (IV-3-12-03), C00214; Cary Ex. 40, C00466-C00466A. A copy of this exhibit is also attached as Appendix G to this Brief. This analysis was supported by the SWANA manual written by Mr. Lowe's own expert which also demonstrated that the turning radii provided were at the limit of viability. The manual also recommended straight and level road segments into and out of the transfer station tunnel. App. Ex. 8, pp. 8-9, C00238. The Lowe site obviously doesn't have them.

Mr. Nickodem's office also ran Auto Turn to see whether the transfer trailers could really be parked on the site and brought into use as needed as assumed by the application. It concluded that only six could be parked (instead of 8 or even 10 as testified by Mr. Lowe's consultants, Tr. 36 (II-3-3-03), C00182, and that there would be difficulty moving them around the site unless a smaller yard jockey were used. Tr. 52-56 (IV-3-12-03), C00214; Cary Ex. 41, C00467 & C00467A. The problem then would be to find a way, and a place, on a 2.64 acre site, to switch the yard jockey to an over-the-road tractor. Id.

Mr. Nickodem also identified numerous other onsite truck management problems on the very small site. Tr. 28-34 (IV-3-12-03), C00214.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Mr. Lowe's expert, Mr. Gordon, responded to this problem not by checking Mr. Nickodem's work, which must therefore be taken as unchallenged. Tr. 16-17, 19-20 (III-3-14-03), C00223.[22] Instead, Mr. Gordon said he had used a handheld template to design the site, which was less conservative than Auto Turn, and that in any event the site could use smaller transfer trailers which would be able to turn. Mr. Gordon did not refute Mr. Nickodem's conclusions regarding trailer parking and the need to switch from yard jockeys to over the road tractors. He thought such switching was doable, Tr. 27 (III-3-14-03), C00223, even though it involved switching at the end of the transfer tunnel or at the scalehouse. See also Tr. 18-19 (III-3-13-03), C00218. If the site uses smaller trailers, however, the assumptions which were used throughout the application and the Applicant's testimony to calculate site capacity and traffic volume are no longer supported. Over and over there was unchallenged reference to 65 foot transfer trailers (55 foot trailers), very large transfer trailers, and the weight/volume of material that could be handled in such trailers (120 cu. yds). See e.g. Vol. I, 5-7, C00001; Tr. 24 (II-3-1-03), C00179; Tr. 19, 26 (III-3-14-03), C00223. Mr. Gordon's backtracking is inconsistent with the application and two weeks of testimony. (It is also downright odd – how do you explain to a client that trucks can't turn around his site because you used a template that was not sufficiently conservative.) Mr. Nickodem testified that it is his standard practice to design for WB62s – 65 foot combinations, and indeed this is the only practice that makes sense. Tr. 32 (III-3-14-03), C00223.

---

[22] As pointed out by Ms. Suzanne Johnson, a citizen, it simply made no sense for Mr. Gordon, when he had his staff run Auto Turn to determine what trailers could use the site not to have run it for the largest trailers mentioned in the application, the WB-62s. If it worked for those, it would work for anything smaller. Tr. 61-62 (II-3-15-03), C00227. One is left with the uncomfortable conclusion that he knew Mr. Nickodem was correct and was not forthright about it.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

The turning radius debacle is only one of the more stunning problems posed by the very small site area. Besides the lack of adequate buffer, and the deficient stormwater management discussed above, others include the serious compromises made in site safety in the case of fires and spills. The lack of storage for contact waters and the lack of a detention pond to provide water may or may not have influenced the decision, but the record shows that the site will have neither a sprinkler system nor water capacity to fight fires. Transfer stations do have fires, Tr. 75 (II-3-1-03), C00179; indeed Andy Nickodem testified on behalf of Cary that he had recently designed a replacement transfer station for one which had burned down in Peshtigo, Wisconsin. Tr. 13 (I-3-13-03), C00216. His current practice is always to include sprinkler systems and other firefighting equipment. Instead, Mr. Lowe plans to resort to a pit in which to push burning wastes. Fires for which the pit can't be used, for example because the volume of burning material can't be managed with a front end loader, will simply burn until the Fire Department arrives and even then, because there is no onsite detention pond to furnish water, the Fire Department will have to pump or truck its water from a hydrant at Three Oaks Road and U.S. 14, Tr. 79 (II-3-1-03), C00179, further away even than Bright Oaks. Mr. Lowe's consultants have chosen to have all vehicles refueled inside the transfer building. In addition to fumes, Patrick Engineering, the County's consultant, noted the possibility that front end loaders scraping on the concrete tipping floor could create sparks leading to a dangerous situation. Tr. 82 (I-3-14-03), C00216. Despite this, Mr. Lowe's consultants testified under oath that their design had "every conceivable provision possible" to manage fires. Tr. 43 (II-3-1-03), C00179.

The fire protection issue is complicated by the fact that the facility access road has no bypass lanes, and, if collection and transfer trucks are backed up, emergency access may have to

THIS DOCUMENT IS FILED ON RECYCLED PAPER

be through the neighboring Lowe Enterprises property. Tr. 6 (II-3-14-03), C00222. No easement or access across this site has been provided. Tr. 83 (II-3-1-03), C00179.

Given these issues it is very troubling that Mr. Lowe failed to put on a fire protection expert to justify his design, even though he said he would do so, Tr. 78 (II-3-1-03), C00179, and despite his testifying consultants' claims that they were not responsible for fire control issues and did not know what had been discussed with fire authorities. Tr. 7-10 (II-3-3-03), C00182. This is a legally insufficient showing as to Criterion 5, while creating a substantial risk to neighbors such as the Plote property and the McHenry County Conservation District.

Similarly, management of spills is left unaddressed. Mr. Gordon, an expert for Mr. Lowe, initially ignored the fact that spills from operations other than fueling could occur. Tr. 61 (II-3-1-03), C00179. When confronted with his own written or edited manual referring to such spills, he pretended it referred to "leaks" rather than "spills," as if that makes a difference, even though it uses the term "spills." Tr. 7-14 (III-3-1-03), C00180; App. Ex. 10, p. 35, C00240. Whatever term Mr. Gordon prefers, it is clear both spills and leaks will occur. They will flow into the stormdrains to the infiltration system and then to the groundwater, without any mechanism to halt that flow. The application has no discussion regarding any spill other than on the tipping floor, Vol. I, § 5, Att. 1, p. 5, C00001, and doesn't even provide the correct information for required immediate notification of releases. Compare Vol. I, § 5, Att. 1, p. 9, C00001, and 40 CFR 302.6, (notifications are required by law to National Response Center operated by the U.S. Coast Guard). Indeed, neither Mr. Lowe's consultants nor Mr. Lowe were aware of the correct notification requirements. Tr. 15 (III-3-1-03), C00180; Tr. 18-19 (II-3-8-03), C00201. Indeed Mr. Lowe saw no use in knowing such information in advance of

THIS DOCUMENT IS FILED ON RECYCLED PAPER

the spill. Id. Rather than minimizing damage from spills, the Applicant assumes there won't be any – a clear failure to respond to Criterion 5.[23]

The record shows Mr. Lowe's failure to address basic operational concerns at the site, including safe truck access, response to fires and planning for spills. In many cases, the problems are traceable to or exacerbated by the small size of the site. For the reasons discussed in this Section IV, as well as in Section II above, it is clear that the County decision on criterion 5 is supported by the record.

V. Marshall Lowe Has Neither the Experience, Nor the Environmental Compliance Record Necessary to Run a Transfer Station and This Was Properly Considered in Ruling on Criteria 2 and 5

Section 39.2 of the Act specifically provides that the County Board may consider as evidence the previous operating history and past record of convictions or admissions of violations of the Applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v). In adopting this provision, the General Assembly recognized that it was important that a county board or the governing body of a municipality have the opportunity to investigate and examine the past operating history and past record of convictions and violations of an applicant. Medical Disposal Services, Inc. v. Illinois Environmental Protection Agency, PCB 95-75, PCB 95-76 (consolidated) (May 4, 1995) 1995

[23] The hearing also included an ongoing, and evolving, series of interpretations from Mr. Lowe's consultant about what would be done if hazardous waste was found. Mr. Gordon insisted that suspected hazardous wastes could be taken offsite immediately. Response people would be hired to take such wastes "home with them." Tr. 30 (III-3-1-03), C0180.[23] To emphasize his point he reported that he had spoken with Heritage Environmental in Lemont which would take those wastes offsite immediately. Tr. 42, 53-54 (II-3-4-03), C00187. When objectors provided evidence that Heritage would not, and could not, provide that service, See e.g. Tr. 24-24 (V-3-12-03), C00215, Mr. Dorgan appeared to say that Mr. Gordon had misunderstood, Mr. Dorgan in fact had made the phone call, to R3 not to Heritage, and that R3 would take the material offsite immediately. Tr. 84 et seq. (IV-3-14-03), C00224. This representation took place on the last day of testimony and could not be refuted immediately, but the Village of Cary contacted R3 as soon as possible thereafter and learned that, again, Mr. Lowe's consultant had overstated. R3 cannot take suspected hazardous wastes offsite without toxicity testing which may take days. See C04057-7235, App. No. 14. This is also what the law says and is what other transfer sites have to do as well. 40 CFR 262.11 et. seq. See Tr. 24-27 (V-3-12-03), C00215. Mr. Lowe's lack of experience, and his experts' apparent lack of actual operating experience, were evident throughout the proceedings.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

WL 283830, *6, on appeal Medical Disposal Services, Inc. v. Environmental Protection Agency, 286 Ill. App.3d 562, 568, 677 N.E.2d 428, 432.[24] Consideration of the operator's background also serves to prevent an entity with an imperfect history of operating pollution-control facilities from evading the local approval process by arranging to purchase the site after the seller received local siting approval. 286 Ill.App.3d 565, 677 N.E.2d 432. The County's vote specified that it had taken Mr. Lowe's experience into account in ruling on criteria 2 and 5.

While Mr. Lowe appeals on the basis of the County's consideration of experience with regard to criteria 2 and 5, it is not clear what his reasoning is, and the PCB hearing provided no further elaboration except a comment by Mr. McArdle that the law does not say that no experience is disqualifying. PCB Tr. 48-50.[25] What the law does say, of course, is that experience can be considered, and where the site is located near sensitive uses, threatens vulnerable ground and surface waters, is so small as to have no buffer area or operational room, and is designed without protective systems such as sprinkler systems or firefighting water, it is entirely reasonable, and consistent with the evidence, to consider lack of experience an element in judging compliance with criteria 2 and 5. Notably, Mr. Lowe has changed his mind on this point. At the County hearing, in refusing to provide further information on Mr. Lowe's activities to the County, Mr. Lowe's attorney agreed that Mr. Lowe's past operations "go[es] to his ability to run a transfer station" and could be argued by the parties and considered by the County.

---

[24] In Medical Disposal Services, the Board also determined, and the Appellate Court affirmed, that siting approval was not transferable. While the legislature subsequently amended the statute to provide that siting approval could be transferred, this in no way affects the right of the siting authority to consider the operations history of the applicant in the first instance. The new operator's experience will be considered by the Agency during the permitting process pursuant to Section 39(i) of the Act. 415 ILCS 5/39(i).

[25] If Mr. Lowe's argument is that actual experience may be disqualifying but that total ignorance is protected, he has not provided any support for that proposition, which is contrary to the entire protective plan of Section 39.2. Under that theory the large waste companies should try to find the least experienced people they know to front for them on their applications. No experienced waste company, however, would propose a site so small it can't turn its trucks or a monitoring well system without an ungradient or a deep well. Mr. Lowe's lack of experience shows throughout his application.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Tr. 18 (I-3-14-03), C00221. Mr. Lowe has waived his right to argue that his experience or inexperience couldn't be considered.

So what is known about Mr. Lowe's experience? First, responding to a question from Board Member Koehler, Mr. Lowe admitted he didn't even read his own application. Tr. 48 (IV-3-8-03), C00203. Marshall Lowe also admitted that he has no experience in solid waste management or in running a transfer station. Tr. 19-20 (I-3-8-03), C00200.[26] His application says so as well. Mr. Lowe admitted he had "no clue" who would be the operator of the transfer station. Tr. 59 (III-3-8-03), C00202. He plans to own the site: operations are to be carried out by his wholly owned shell corporation Lowe Transfer, Inc. ("Transfer"). Tr. 50 (III-3-8-03), C00202. Transfer has no experience, no employees, no money. Tr. 27, 51-52 (II-3-8-03), C00201. It is set up to shield Lowe from liability if anything goes wrong. Mr. Lowe and his attorney admitted as much at hearing. Tr. 50-51, 54 (III-3-8-03), C00202.

Mr. Lowe's attorney argued at the Pollution Control Board hearing that a waste transfer station is really just a trucking terminal. PCB Tr. 22-23. Mr. Helsten, attorney for the County, ably responded to this argument, pointing out that the material handled by a transfer station is putrescible, it smells and can have significant potential environmental impacts. PCB Tr. 164. Mr. Lowe's failure to grasp this point is troubling in itself.

Lowe claims his expertise is in heavy equipment operations and management and he himself brought up his current business operations as an example of his background. Next door to his proposed site he has operated a construction and demolition debris recycling business called Lowe Enterprises ("Enterprises") since 1991. He also runs Lowe Excavating ("Excavating") from a separate location. Tiker Trucking is owned by Mr. Lowe and his family

[26] Mr. Lowe was scheduled to testify in his own case only after the Village of Cary noticed him to appear and indicated it would call Mr. Lowe as a witness in its case for the objectors. C03833-3834.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

and is also run from a separate location. Tr. 8-9, 75-76 (I-3-8-03), C00200. It is expected that Tiker will do the hauling to the landfills. Tr. 5 (II-3-8-03), C00201.

It appears that Mr. Lowe is incorrect when he claimed to have no solid waste experience. At Lowe Enterprises Mr. Lowe takes in construction and demolition materials, including asphalt from roads and other materials from building projects, separates them, crushes them, stores them and then sells some portions and disposes of the residuals which he collects in a rolloff and agrees are wastes. See e.g. Tr. 30-33, 40-41 (I-3-8-03), C00200. Mr. Lowe was highly inconsistent in describing the recycled materials, claiming at one point that they were construction and demolition debris, Tr. 32 (I-3-8-03), C00200, backing off from that, Tr. 43 (I-3-8-03), C00200, and then claiming in his arguments below, when he understood that his activities might be in violation of the Act, that they were not waste, even though he admitted that he disposed of residuals. Unfortunately, Mr. Lowe appears to be in violation of the solid waste sections of the Act no matter how these materials are classified, but the equally troublesome issue is Mr. Lowe's indifference to, indeed his disclaiming of any responsibility for his own compliance status unless IEPA specifically tells him he needs to do something. This is not the philosophy underlying the Act.

Section 21(d) of the Act, ILCS 5/21(d) requires a permit for the conduct of "any waste-storage, waste-treatment or waste-disposal operation." Lowe does not have such a permit. Lowe apparently eventually decided, at or after the County hearing, that he does not fall under this provision because his construction and demolition debris is not waste. In fact, he separately admitted it included residuals which are waste and are disposed of, so this argument is unavailing, but it is likely legally incorrect as well since there is a separate exception in the statute for construction and demolition debris sites in counties over 700,000, an exception which

THIS DOCUMENT IS FILED ON RECYCLED PAPER

would be unnecessary if the construction and demolition debris is not covered by the permitting requirement. It is clear Lowe had never considered the relevance of the solid waste management requirements of the Act to his own operations until this proceeding. And what Lowe still fails to acknowledge is that even if he were not subject to the permit requirement of 21(d) he would still be subject to the operating requirements of Sections 21(w) and 22.38. He clearly is not in compliance with these requirements.[27]

Section 21(w) requires a construction and demolition debris operator to maintain documentation identifying the hauler, generator, place of origin and weight or volume of the debris or soil and the place where it is disposed of or treated. Mr. Lowe is not following these requirements. He maintains no documentation; indeed he even allows dumping of materials at his site after hours when it is entirely unattended, and has had consequent fly dumping problems. See e.g. Tr. 30-36, 44, 47-57 (I-3-8-03), C0200.

Section 22.38 applies to facilities accepting exclusively general construction and demolition debris for transfer, storage and treatment and sets out a precise set of operating standards for such a facility. In order to be eligible for the permit exemption in Section 21(d) for facilities in large counties, one must comply with Section 22.38 making clear that it is the intention of the Act that all construction and demolition debris recycling facilities be regulated in some way. There are not intended to be any loopholes. Among other things under

---

[27] Other questions regarding Mr. Lowe's operations were raised as well, e.g. his servicing of vehicles from his operations at one site and taking the wastes to another for burning, without manifests or permits, see e.g. Tr. 7-11, 14-16 (II-3-8-03), C00201; Tr. 76-77 (I-3-8-03), C00200. Objectors moved that the County require Lowe to provide additional information to allow a compliance review of these activities, see C03837-3838, but Lowe's attorney refused. See Tr. 16 (I-3-14-03), C00221. Instead Lowe hired yet another lawyer to provide a "public comment," after the record closed, claiming that certain of Lowe's operations were in compliance, notably the burning of used oil for fuel, and noting that there were no IEPA forms for a Section 21(d) permit. Of course, this statement was not subject to cross-examination, and it certainly is not evidence of Lowe's compliance where the underlying facts are in the possession of Mr. Lowe and are not provided Most tellingly, there was no Lowe response to the allegations that he is in violation of Sections 21(w) and 22.38.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Section 22.38, at Enterprises, Mr. Lowe must follow certain procedures to ship recycled materials offsite within six months, to dispose of non-recyclables within 72 hours, to take no more than 25% non-recyclables, to control noise and stormwater runoff, to control site access, and to keep certain records of his waste sources and material handling and do certain labeling and tagging to show compliance. Again, he has done none of these things. Tr. 30-36, 44-57 (I-3-8-03), C00200. Additionally, even after years of running his construction and demolition debris operation and his special waste hauling operation, Mr. Lowe testified that he doesn't know what to do to respond to a spill in his operations, and doesn't see the benefit of knowing that in advance of the event. Tr. 18-19 (II-3-8-03), C00201.

Mr. Lowe and Mr. McArdle reacted to questions concerning these issues defensively. Lowe claimed that he would do them if necessary and that an IEPA air inspector, who he could not name except that it might be "Terry something," had not mentioned these land pollution violations. He also could not remember when or how often Terry had visited. Tr. 41, 69-70 (I-3-8-03), C0200. Lowe and his attorney also questioned where the requirement for a permit and for compliance with operating standards appears, apparently entirely unfamiliar with the Environmental Protection Act or the possibility that it might apply to Mr. Lowe. When confronted with the requirements of Section 22.38, Mr. Lowe suddenly decided that maybe his operations didn't involve construction and demolition debris, even though he had earlier agreed that they did. Compare Tr. 32 to 41 (I-3-8-03), C0200. He did admit, however, that the residuals from his processing were waste. Tr. 30-33, 41-42 (I-3-8-03), C0200. Later in the hearing, and presumably after reading the statute, Mr. McArdle said that if Mr. Lowe needed a permit for Enterprises he would get one. Tr. 17-18 (I-3-14-03), C00221. In fact, the principles underlying the Environmental Protection Act assume that persons causing pollution impacts must

THIS DOCUMENT IS FILED ON RECYCLED PAPER

understand their legal obligations and comply in advance – not just when they get caught. McHenry County and its citizens have a right to expect a transfer station operator who takes responsibility for environmental compliance – for consulting the statute and the regulations himself and the County Board was entitled to consider Mr. Lowe's lack of concern for identifying and following the applicable environmental laws and regulations.

Mr. Lowe and his consultants testified that he would buy expertise by hiring a so-called "certified operator" with the help of his consultant Weaver Boos. This is not sufficient. As noted in several areas above, Weaver Boos' own testimony indicates important areas of operation where it is uninformed. But more important, the application makes no reference to hiring of a certified operator. See Tr. 17 (III-03-1-03), C00180, and the statute does not contemplate a promise to obtain expertise in the future. What counts is what the record shows about the Applicant's expertise now. And now it is nonexistent or even negative.[28]

Even if a promise to hire expertise could make up for the lack of experience, the evidence at hearing raised serious doubts about that solution in this case. Throughout the testimony of Mr. Lowe's consultants they proved themselves willing again and again to make commitments/recommendations to satisfy the many questions raised about the site (e.g. use of a certified operator, possibility of recycling, litter pickup in surrounding areas, receipt of high level of construction and demolition debris, bonds and etc.). These commitments were not in the application and should not be considered in ruling on site suitability, but the important point here is that Mr. Lowe had already begun to disavow them even before the hearing was concluded.

---

[28] Mr. Lowe's consultant, Mr. Gordon, testified that a certified operator, an idea which has no official standing in Illinois but which Mr. Gordon is promoting, must have a high school degree or a G.E.D., some transfer station experience and have taken Mr. Gordon's three day transfer station course (even though he frequently rejected attempts to rely on the manual for that course). Tr. 93 (IV-3-3-03), C00184. Clearly these very minimal requirements insure nothing.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

See e.g. Tr. 19-20 (II-3-8-03), C00201 (Limited on what is possible to deal with odor complaints.); Tr. 36 (II-03-8-03), C00201 (No high proportion of construction and demolition debris); Tr. 64-67 (II-3-8-03), C00201; Tr. 64 (III-3-8-03), C00202 (No capacity for recycling); Tr. 6-7 (III-3-8-03), C00202 (Insurance might be so costly he wouldn't do it); Tr. 16 (IV-3-8-03), C00204 (Will not follow consultant's recommendations on patrolling for litter).[29] Mr. Lowe's repudiations of his consultant's testimony demonstrate his lack of sensitivity to environmental concerns. They also emphasize the practical limitations, there are legal ones as well, of trying to fix a bad or incomplete application with conditions. Finally, they forcefully demonstrated the practical and legal impossibility of approving a transfer station to be run by an unqualified operator on the assumption that he will hire good people to do the job. Mr. Lowe will always be the one in charge.

Mr. Lowe and his consultants, Messrs. Gordon and Zinnen, agreed that care and quality in facility operations and maintenance, spill prevention and cleanup, infiltration system maintenance and etc. will determine whether the transfer station will work. Tr. 58-59 (III-3-8-03), C00202; Tr. 23 (IV-3-14-03), C00224. In response to questions from Committee Chair Brewer and Board Member Munaretti, Mr. Lowe's compatibility consultant testified that his conclusions assumed that the site would be a first class operation. Tr. 83, 84, 96 (IV-3-6-03), C00194. Mr. Lowe's history, track record, misrepresentations and attitude indicate that he cannot be relied upon to run any site correctly, especially one with the sensitive environmental issues apparent here. After acknowledging the burden posed by his transfer station, Mr. Lowe

[29] Mr. Lowe provided further public comment on insurance after the close of the record, but a representation about environmental insurance coverage means nothing without seeing the proposed policy language to understand what, in fact, it covers. That was not provided.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

was asked if he had given any consideration to the impacts to the Village of Cary. Mr. Lowe's answer was firm.

> Q. Have you given any consideration to the costs to Cary of having this on its border?
>
> A. No.
>
> Q. Do you feel any obligation --
>
> A. Not in the least.
>
> Q. -- to consider that?
>
> A. Not in the least.
>
> Q. Why?
>
> A. Cary and I don't get along. Let's get something straight right now. Cary and I don't get along at all, period. So if you want to go there, go ahead and go there, but it isn't -- I wouldn't.
>
> Mr. McArdle: Do you need that clarified?
>
> Ms. Angelo: No thanks, it's pretty clear.
>
> By Ms. Angelo:
>
> Q. Do you consider any obligation to consider the costs to -- do you feel you have any obligation to consider the costs to your neighbors such as Bright Oaks to have that near them?
>
> A. No, I have not because -- you know, no, I haven't.

Tr. 46-47 (II-3-8-03), C00201.

Mr. Lowe agreed he might feel sorry for the Plotes, who had been planning to develop their property since 1986, but he thought they shouldn't put houses there. Tr. 47 (II-3-8-03), C00201.

He emphasized his unwillingness to be responsible for damages to neighbors. Tr. 56-57 (III-3-8-03), C00202. In fact, Mr. Lowe was stunningly blunt:

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Q. Do you believe that the risk associated with your facility on the surrounding home values to your neighbors should be borne by your neighbors, not by you?

A. Yes.

Tr. 58 (III-3-8-03), C00202.

Mr. Lowe believes the McHenry County Conservation District ("MCCD"), the residents in Bright Oaks, the Village of Cary, the Plote family and the citizens of McHenry County should take the risk of impacts from his transfer station and he has set up Lowe Transfer as a corporate shell to make sure that happens. Mr. Lowe couldn't be bothered to read his own application, but he plans to be legally and financially off the hook when something goes wrong. This is the last person who ought to be running a solid waste transfer station.

The County's consideration of Mr. Lowe's experience, or lack thereof, was entirely proper and consistent with the manifest weight of the evidence.

VI. Conclusion

The record in this case runs to 4000 pages, representing eleven long (often 10+ hour) hearing days and multiple experts presented by objectors, as well as the experts presented by Mr. Lowe. The County Committee participated actively, not only in their attendance and analysis of the documents but in their own questioning of witnesses, which was both observant and informed. In was, for example, Committee Chair and Board Member Brewer who asked why the whole site could not be protected from spills. Board Member Klasen asked why the whole site was not paved. Board Member Koehler asked who was going to provide data on odors and noise. He closely questioned Lowe's property value study. He also asked Mr. Lowe if he'd read his own application. Board Member Klasen noted his strong concern for the site's impact on the Hollows. Tr. 15 (4-28-03), C07237. And it was also Board Member Klasen whose questioning of an appraisal expert pointed out that seven of the homes in Princeton

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Village had lost money and 18 of 37 had an appreciation rate under 1%, a surprising result for an area with expected rates of at least 5-6% and perhaps up to 16%. While objectors presented a powerful case, the Board members themselves were active in asking the tough questions about the Lowe application. Based on its careful analysis, the Committee and then the Board rejected the application on criteria 2, 3 and 5. Their decision was strongly supported, and in fact, inescapable, as discussed above.

Mr. Lowe and his attorney, Mr. McArdle, have suggested that the County succumbed to public pressure.[30] Inconsistently, at the same time, Mr. McArdle noted that the 81 people who gave testimony before the County Committee represented less than ½ of 1% of the County population, suggesting that the numbers of objectors ought to weigh both for and against the County decision.

After the first three days, all of the hearings were held in Woodstock, a good one-half hour drive or more from Cary. Despite this distance many objectors attended multiple hearing days. The fact that 81 commenters testified, many of whom may have been afraid to speak at first, (as one mentioned at the PCB hearing, PCB Tr. 104), is a substantial comment on the level of concern regarding this site and the numbers who will be affected. Many others signed petitions and wrote letters. It was announced that 161 people attended the PCB hearing, in the morning of a weekday.

---

[30] Mr. Lowe and his attorney have sought to discredit and marginalize the citizen participants, suggesting they improperly influenced the decision and objecting to commenters as outside the record before they could even begin to speak. PCB Tr. 54, 65, 75 (in fact public comments on the effect of the facility on Cary's revenue or already high taxes or the initial efforts to consider the Plote development in the mid 80s were entirely proper comments on issues that were indeed in the public record). Mr. Lowe filed motions in limine to prevent and limit public participation before the County hearing, C00173, and before the PCB hearing. Mr. Lowe also attacks the motives of objectors, complaining, for example, that Cary resolved to oppose the transfer station before hiring its experts. In fact, the objectors have been entirely professional and responsible, hiring their own experts, providing valuable and pertinent testimony and asking very thoughtful questions. See e.g. the useful summaries of the record provided by several citizens at the PCB hearing. PCB Tr. 84-87 (Betty Post); 103-106 (Suzanne Johnson). This proceeding was a model of public participation.

THIS DOCUMENT IS FILED ON RECYCLED PAPER

At the same time, the suggestion that the objectors improperly influenced the County Board or Committee is ludicrous. As one of the citizens noted, County Board members are elected from districts, not county wide. Only two members, and only one on the Committee, represent the Cary area. Board Member Klasen who so forcefully pointed out the devastating impact of a transfer station on the Hollows and Princeton Village explained in the hearing that he represents an area on the west end of the County. Mr. Lowe has explicitly announced that he is not making a fundamental fairness attack on the County proceedings and his oblique attack on the participating citizens and County Board members is simply improper. In fact, it is clear that the Committee and the Board were persuaded by overwhelming evidence that this site was not adequately protective and was wrongly located. The citizens and other objectors assembled expert testimony, presented their evidence, and the system contemplated by Section 39.2 for making siting an objective local process worked. The County decision should be affirmed by the Board.

Respectfully Submitted,

The Village of Cary

Dated: August 25, 2003

By _____
One of its Attorneys

Percy L. Angelo
Patricia F. Sharkey
Kevin G. Desharnais
Mayer, Brown, Rowe & Maw, LLP
190 S. LaSalle Street
Chicago, IL 60603-3441
(312) 782-0600

THIS DOCUMENT IS FILED ON RECYCLED PAPER

Appendix to Brief on Behalf of Amicus Curiae of Village of Cary

The following appendices are taken from the record before the County and are included here for the convenience of the Board.

A. Aerial Photo of Site – C00334 & 334A, Cary Ex. 5

B. U.S. Fish & Wildlife August 30, 2002 Letter – C00001, Vol. I §2, Att. 2-21

C. Resolution of McHenry County Conservation District Board of Trustees – C04057 – 7235, App. 11

D. Cary Comprehensive Plan Map – C00403, Cary Ex. 21

E. Photographs of Proposed Site from Bright Oaks Residences – C00400, Cary Ex. 18 (partial)

F. Lowe Study of Princeton Village – C00001, Vol. I §3 (partial)

G. Auto Turn Exhibit – C00467 & 00467A, Cary Ex. 40

Due to the volume of this pleading,

please contact the Clerk's Office

at

312/814-3629

to view this file.