ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Petitioners,	)	
vs.	)	Case No. PCB 03-221
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS	)	
Respondent.	)	

NOTICE OF FILING

TO: See Affidavit of Service

PLEASE TAKE NOTICE that on September 17, 2003, we sent via UPS Overnight Delivery, for filing with the Illinois Pollution Control Board, the attached **Respondent County Board of McHenry County, Illinois' Response to Co-Petitioners' Motion to Deem Lowe's Site Location Application Approved,** a copy of which is attached hereto.

Dated: September 17, 2003

Respectfully Submitted,

On behalf of the County Board of McHenry County, Illinois

By: Hinshaw & Culbertson

Charles F. Helsten (HKL)
One of its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Petitioners,	)	
vs.	)	Case No. PCB 03-221
	)	Pollution Control Facility Siting Appeal
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS	)	
Respondent.	)	

RESPONDENT COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS' RESPONSE TO CO-PETITIONERS' MOTION TO DEEM LOWE'S SITE LOCATION APPLICATION APPROVED

NOW COMES, Respondent, COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS, by and through its attorneys, HINSHAW & CULBERTSON, responding to Co-Petitioners' Motion and Memorandum in Support of Motion to Deem Lowe's Site Location Application Approved. Respondent respectfully requests that this Board deny Co-Petitioners' Motion to Deem Lowe's Site Location Application Approved. Co-Petitioners' Motion should be dismissed because (1) the Board clearly complied with the notice provision set forth in section 40.1(a) of the Act; (2) the notice provision set forth in section 40.1(a) is not jurisdictional, and the relief requested would, in fact, run contrary to both the spirit and intent of the Act, thereby causing harm to the very members of the public who are intended to be the beneficiaries of the notice requirements; and (3) Co-Petitioners' should not be allowed to raise inadequate notice at this time because they failed to raise it at the Board Hearing. For these reasons, Respondent respectfully requests that this Board deny Co-Petitioners' Motion.

1. THIS BOARD COMPLIED WITH THE NOTICE PROVISION SET FORTH IN SECTION 40.1(A) OF THE ACT.

Section 40.1(a) of the Illinois Environmental Protection Act (Act) provides that prior to a hearing before the Pollution Control Board (Board) to contest the decision of the county board, "[t]he Board shall publish 21 day notice of the hearing on appeal in a newspaper of general circulation published in that county." 415 ILCS 5/40.1(a). As noted by Co-Petitioners, of the thirteen newspapers that encompass the Northwest Zone of the Pioneer Press, five are distributed and circulated within McHenry County. (Co-Petitioners' Memo, p. 5; Exhibit C). Of those five newspapers, three newspapers, namely Cary-Grove Countryside, Algonquin Countryside and Lake-in-the-Hills Countryside are all first delivered and issued to post offices located in McHenry County. *Id.* Copies of those three newspapers are delivered to newsstands within McHenry County. *Id.* These facts, presented by Co-Petitioners themselves, demonstrate that the notice provided by the Board clearly comported with the notice provisions of section 40.1(a) of the Act.

Co-Petitioners contend that this provision was not met because Pioneer Press' Northwest Zone newspapers were neither published in McHenry County nor generally circulated in McHenry County. However, Co-Petitioners' arguments must squarely fail, as the newspapers containing notice of the section 40.1 hearing were both published and generally circulated in McHenry County.

a. Notice was provided in newspapers published in McHenry County.

While no courts have specifically examined the notice provisions of the Act to determine the meaning of the word "published," this Board has defined the term "published" as contained in the Act. In *Clutts v. Beasley*, PCB 87-49 (Aug. 6, 1987), this Board was called upon to construe the notice provision of section 39.2 of the Act, which provides that notice is to be published "in a

newspaper of general circulation published in the county in which the site is located." (Emphasis added). 415 ILCS 5/39.2(b). This Board concluded that the term "published" did not mean that the newspaper had to be printed and issued in the County, but simply required that the newspaper be regularly and generally distributed in the county. PCB 87-49, slip op at *4. Therefore, even though the newspaper at issue in *Clutts* was printed in a Missouri city contiguous with the county where the proposed facility was to be located, the notice provided in that newspaper satisfied the notice provisions of the Act because the newspaper was regularly sold, distributed and circulated in the county. Id.

Like the newspaper at issue in *Clutts*, the newspapers at issue here are admittedly not printed in McHenry County; however, five newspapers in which the Board's notice appeared are regularly sold, distributed and circulated within McHenry County. (Co-Petitioner's Memo, pp. 5-6). As a result, those newspapers clearly fit the definition of newspapers "published in that county."

In reaching its conclusion in *Clutts*, this Board relied on the Illinois Supreme Court's decision of *People ex rel. City of Chicago Heights v. Richton*, 43 Ill.2d 267, 253 N.E.2d 403 (1969). In that case, the Court specifically refused to find that "published within such city" as used in the Election Code meant "to print and issue within the city." *Richton*, 43 Ill.2d at 270, 253 N.E.2d at 405. The Court explained that "[t]he primary meaning of the word 'publish' is to make known." 43 Ill.2d at 271, 253 N.E.2d at 405. The Court further found that the legislature clearly did not mean to require publication in a newspaper that was printed in a certain location because "if the legislature intended notice to be given in a newspaper that was both printed and published in the community, it would have done so with the appropriate language." *Id.* Consequently, the Court concluded that the word "published" "is not synonymous with the word

'printed' but means to make public or to make known to people by newspapers of general circulation." *Id.*

The fact that 40.1(a) merely requires a newspaper to be "published" in the particular county and not "printed" in the county recognizes that there are likely counties were no newspaper is printed. In such counties, it would be impossible to provide notice in accordance with section 40.1(a) of the Act if, as contended by Co-Petitioners, section 40.1(a) contained a "printed" requirement. Clearly the legislature would not draft a statute that could not be complied with in all circumstances. Consequently, Co-Petitioners' assertion that the newspaper containing notice must be printed in McHenry County must fail.

Co-Petitioners' contention that notice was not provided in a newspaper published in McHenry County because the newspapers in which the notices were published are printed in Cook County, not McHenry County is directly contrary to *Richton* and other controlling authority. In fact, this Board, as well as the Illinois Supreme Court, have specifically concluded that the term "published" is not the same as "printed." *See Clutts v. Beasley*, PCB 87-49 (Aug. 6, 1987); *People ex rel. City of Chicago Heights v. Richton*, 43 Ill.2d 267, 253 N.E.2d 403 (1969); *see also Second Federal Savings and Loan Assoc. of Chicago v. Home Savings and Loan Assoc.*, 60 Ill.App.3d 248, 376 N.E.2d 349 (1st Dist. 1978). If the legislature wished to require newspapers to be both published and printed in a county, the legislature clearly would have so provided, as it has specifically done in other statutes. *See e.g.* 65 ILCS 5/11-4-8 (requiring public notice to be provided "in some newspaper printed and published with the county"); 755 ILCS 20/3 (requiring publication in "some newspaper printed and published in the county").

Even relying on Co-Petitioners' definition of "published" as "first issued or printed, to be sent out by mail or otherwise," this Board nonetheless still clearly complied with the notice

provisions by publishing notice in the Northwest Zone of the Pioneer Press, since Co-Petitioners concede that three of those newspapers (Cary-Grove Countryside, Algonquin Countryside and Lake-in-the-Hills Countryside) are all first issued to post offices located in McHenry County. In fact, the Illinois Attorney General Opinions cited by Co-Petitioners establish that the post offices from which the newspapers are delivered in McHenry County are the place of issuance for those newspapers. The 1981 Attorney General opinion provided that the newspaper at issue, the Aurthur Graphic Clarion, was printed in Villa Park and then distributed to Douglas and Moultrie Counties. Because the newspapers "are first taken to the Post Office in Moultrie County for mailing to subscribers and then are delivered to newsstands in Moultrie County and Douglas County with the first newsstand deliveries being made in Moultrie County . . . it is clear that the Arthur Graphic Clarion is published in Moultrie County." (Emphasis added.) 1981 Ill. Atty. Gen. Op. 91, slip op. at *2. Additionally, the 1992 Attorney General Opinion specifically provides that "the newspaper in question is published . . . only in the township in which it is delivered for labeling and distributing to post offices." 1992 WL 469746 (Ill.A.G.), slip op. at *2.

In this case, there is no disagreement that the Cary-Grove Countryside, Algonquin Countryside and Lake-in-the-Hills Countryside newspapers are first issued to post offices in McHenry County. Therefore, those newspapers are clearly published in that county, according to any definition of "published." Because Co-Petitioners cannot legitimately assert that the Cary-Grove Countryside, Algonquin Countryside and Lake-in-the-Hills Countryside newspapers are not issued in McHenry County, Co-Petitioners instead conveniently focus solely on Pioneer Press and state that Pioneer Press newspapers are all "published" in Cook County, where the papers are printed. Such an argument is without merit because clearly the separate newspapers

printed by Pioneer Press have separate circulations and are issued at different locations. As such, based on even the most narrow definition of "published", it is clear that the notice provided by the Board was proper under section 40.1(a) of the Act.

b. Notice was provided in newspapers of general circulation in McHenry County.

While no Courts have specifically construed the meaning of the phrase "newspaper of general circulation" in the context of section 40.1(a) of the Act, the Illinois Supreme Court has construed that term in the context of other statutes, and has repeatedly and consistently found that the only requirement for a "newspaper of general circulation" is that it is available to all classes of people. *See People ex. rel Toman v. 110 South Dearborn Street Bldg. Corp.*, 372 Ill. 459, 462, 24 N.E.2d 373, 375 (1939) (finding that the phrase "general circulation" refers to a general newspaper, not one of a special or limited character, that circulates among all classes and is not confined to a particular class or calling in the community); *Eisenberg v. Wabash*, 355 Ill. 495, 497-98, 189 N.E. 301, 302 (1934) ("All that is required is that it be secular in nature; that is circulate among different classes of readers; and that it dispense information which is of interest to the general public."); *Polzin v. Rand, McNally & Co.*, 250 Ill. 561, 575, 95 N.E. 623, 627 (1911) ("A newspaper is of general circulation when it circulates among all classes, and is not confined to a particular class or calling in the community.").

Contrary to Co-Petitioners' assertion that "general circulation" implies that the newspaper must be received by inhabitants throughout the county, courts, including the Supreme Court, have refused to read such an unreasonably narrow requirement into the phrase "general circulation." *See Toman*, 372 Ill. 459, 24 N.E.2d 373; *see also Loy v. Knaak*, 309 Ill.App. 574, 33 N.E.2d 509 (1st Dist. 1941) (finding that a newspaper was of "general circulation" notwithstanding a large percentage of its circulation was on the south side of Chicago). In

Toman, the Court specifically found that the newspaper at issue was a newspaper of general circulation in Cook County, even though it was published and circulated in the southeast part of Chicago, mainly in three or four wards, with a daily paid circulation of 6,000 copies. *Toman*, 372 Ill. at 461, 24 N.E.2d at 374. In finding that such a newspaper was a newspaper of general circulation, the Court explained: "No Illinois authorities have been called to our attention holding that the circulation of a newspaper designated by law for publication purposes must be general throughout the municipal area." *Id.* The Court found that "[t]o require proof that a newspaper for publication purposes has a general circulation throughout the area of the city, county, State or forest preserve district, is to require something that is not in the statute." *Toman*, 372 Ill. at 462, 24 N.E.2d at 375.

This Board should also disregard Co-Petitioners contention that the number of subscribers of the newspapers was somehow determinative of whether the newspapers at issue in this case were "newspapers of general circulation" for two reasons. First and foremost, this Board must disregard Co-Petitioners' alleged evidence of the number of subscriptions of the Pioneer Press newspapers in McHenry County because these alleged facts were not presented in the hearing below and are not supported by oath, affidavit or certification, as required by the Illinois Pollution Control Board Rules. See 35 Ill. Adm. Code §101.504 ("Facts asserted that are not of record in the proceeding must be supported by oath, affidavit or certification."). Rather, those alleged facts are supported only by an e-mail and information contained on a web-site, with none of the alleged information made under oath, certified or verified in an affidavit. Consequently, any alleged information about subscriptions to McHenry County citizens must be disregarded.

Second, even if Co-Petitioners correctly indicated the number of subscriptions to McHenry County residents, Co-Petitioners have still failed to establish that the newspapers at issue are not of general circulation. According to the Illinois Supreme Court: "The general circulation of a newspaper is not determined by the number of subscribers but by the diversity of its subscribers." (Emphasis added.) *Eisenberg*, 255 Ill. at 498, 189 N.E. at 302. Because Co-Petitioners have failed to present any evidence that the Pioneer Press newspapers circulated and issued in McHenry County are limited to a particular class of subscribers, Co-Petitioners' argument that the newspapers at issue were not of "general circulation" must fail. *See Organization of the Greater Algonquin Park District v. Village of Lake in the Hills*, 103 Ill.App.3d 1056, 1061, 432 N.E.2d 306, 310 (2d Dist. 1982) (finding that the unrebutted proof was sufficient to establish that the newspaper at issue was of general circulation).

Co-Petitioners appear to contend that the only newspaper that is of "general circulation" in McHenry County is the Northwest Herald, a newspaper published in Crystal Lake. However, there is no rule that establishes that only one newspaper can be of "general circulation" in any given county. Furthermore, this Board must disregard the maps provided by Co-Petitioners allegedly depicting the circulation of the Northwest Herald, as those exhibits are offered in express violation of the Illinois Pollution Control Board Rules, set forth at 35 Ill.Adm.Code §101.504, as those exhibits were not made under oath, certified or properly referenced or included in the form of an affidavit. Because it is clear that the Pioneer Press' newspapers issued and distributed to McHenry County are newspapers of "general circulation," Co-Petitioners contention that the Board was required to publish notice in the Northwest Herald must fail.

Finally, this Board should disregard Co-Petitioners' assertions that proper notice was not provided to McHenry County residents. In fact, the Board hearing was well-attended by 161

individuals, establishing that adequate notice was clearly provided. Additionally, Co-Petitioners' assertion that only certain residents received notice must also be disregarded, as no evidence was ever offered to support such an assertion. The fact of the matter is that the Lowe Transfer Station was proposed to be located in the southeastern portion of McHenry County, close to the border of Lake County. Therefore, it was entirely appropriate to provide notice to newspapers circulated in those areas, and it was not surprising that many of the objectors that attended the hearing were from those areas, as those are the individuals that would clearly be most affected by the facility.

For the reasons set forth above, the notice provided by this Board was in accordance with section 40.1(a) of the Act. However, even if this Board determines that the notice was not in accordance with the Act, nonetheless, the Board should still not deem Lowe's site location application approved for the reasons set forth below.

2. THE NOTICE PROVISION OF SECTION 40.1 OF THE ACT IS NOT JURISDICTIONAL.

Co-Petitioners repeatedly assert that the notice provision of section 40.1(a) is mandatory and jurisdictional and, therefore, by failing to provide a Board hearing with adequate notice, this Board must simply deem Lowe's site location application approved. This Board must reject such assertions, as the only appellate court to examine the notice provision of section 40.1(a) has clearly held that the notice to be provided by the Board is neither mandatory or jurisdictional. *See McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency*, 154 Ill.App.3d 89, 506 N.E.2d 372 (2d Dist. 1987). In *McHenry County*, the Petitioner argued that that the Board was required to deem its site approved because the Board provided only 20 days notice of the Board hearing, rather than the prescribed 21 days set forth in section 40.1. 154 Ill.App.3d at 95, 506 N.E.2d at 376-77. The Petitioner argued that by giving only 20 days notice of the

hearing, "the PCB violated a mandatory and jurisdictional provision of the Act, and therefore failed to conduct a valid hearing within the required 120 days." Id. Therefore, Petitioner contended that it was entitled to have its landfill site approved. Id. The Court disagreed. 154 Ill.App.3d at 97, 506 N.E.2d at 378.

In determining that the notice provision of 40.1 was not mandatory, the Court in *McHenry County* carefully examined the statutory language of the provision. The court explained that "[w]hile the word "shall" ordinarily indicates a mandatory intent, the rule is not inflexible and the context and purpose of the statute should control." *McHenry County*, 154 Ill.App.3d at 96, 506 N.E.2d at 377, *citing In re Application of Rosewell*, 97 Ill.2d 434, 440-441, 454 N.E.2d 416 (1983); *People v. Youngbey*, 82 Ill.2d 556, 562, 45 Ill.Dec. 938 (1980). After considering the express purpose of the Act, which is to "restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them (415 ILCS 5/2(b)), and the legislature's intent, which was "to place decisions regarding the sites for landfills with local authorities" (*E & E Hauling, Inc. v. Pollution Control Board*, 107 Ill.2d 33, 42, 481 N.E.2d 664 (1985)), the Court concluded that "the legislature could not have intended the PCB's inadvertent and apparently harmless error to result in a deemed site approval. Such a rule would both eliminate any consideration of the site's suitability for a landfill and deprive local authorities of the power given them by the statute." *McHenry County*, 154 Ill.App.3d at 96-97, 506 N.E.2d at 377.

Co-Petitioners cite *Illinois Power Co.* and *Marquette Cement Manufacturing Co.* for their assertion that the notice provisions of section 40.1 are jurisdictional. However, both of those cases are clearly distinguishable because the courts in those cases were construing section 40, not section 40.1, of the Act. It is section 40.1 (and not section 40) of the Act that is in issue in the

present case. Furthermore, the Court in *McHenry County* specifically considered *Illinois Power,* and found that it was not controlling, in large part because the Board in *Illinois Power* purposely avoided the notice provisions set forth in section 40 in order to render a decision within the statutorily-prescribed 90 days. *McHenry County*, 154 Ill.App.3d at 96, 506 N.E.2d at 377. However, in *McHenry County*, the Board's failure to follow the statutory notice provision was inadvertent. *Id.* The Court found that fact to be significant because had the Board in *McHenry County* recognized its error, there would have been ample time to provide 21-day notice and still hold the hearing within the 120-day period. 154 Ill.App.3d at 97, 506 N.E.2d at 378. After contrasting the facts at issue with those of Illinois Power, the Court in *McHenry County* concluded:

> "While we agree that the PCB may not disregard the 21-day notice requirement at will, we conclude that where, as here, the PCB's failure to strictly comply with it was inadvertent, resulted in no prejudice to the applicant, and did not permit the PCB to avoid another, clearly mandatory provision of the Act, the deficiency will not give the appellant the option of deeming the site approved." *Id.*

Like the mistake made by the Board in *McHenry County*, any mistake made by the Board in this case would clearly be inadvertent, as the Board clearly (and properly) believed that it was appropriate to provide notice in the Pioneer Press newspapers. Just as in *McHenry County*, had the inadequate notice been raised in a timely manner, the Board would have been able to remedy to the situation and still had plenty of time to meet the 120-day deadline. Therefore, the Board in this case was clearly not attempting to disregard the notice provision of the statute. Furthermore, like the applicant in *McHenry County*, Co-Petitioners have failed to show any prejudice as a result of the alleged inadequate notice. In contrast, the prejudice to McHenry County and its citizens would be great if approval were granted to Lowe's site application. The citizens of McHenry County, who are intended to be the express beneficiaries of the notice requirements, will clearly be harmed by a transfer station located in their community in an unsuitable location,

as found by the McHenry County Board, and by having their participation in these proceedings disregarded. Consequently, like the Court in *McHenry County*, this Board should find that any deficiency in the notice provided by the Board does not give Co-Petitioners the right to have their site deemed *de facto* approved.

In addition, this Board has agreed with the Court's holding in *McHenry County* and repeatedly cited McHenry County for the proposition that the notice requirements contained in section 40.1 are not jurisdictional. *See Wabash and Lawrence Counties Taxpayers and Water Drinkers Assoc. v. County of Wabash and K/C Reclamation, Inc.*, PCB 88-110 (May 25, 1989); *Laidlaw Waste Systems, Inc. v. McHenry County Board,* PCB 88-27 (June 16, 1988); *Wabash and Lawrence Counties Taxpayers and Water Drinkers Assoc. v. County of Wabash*, PCB 87-122 (Dec. 3, 1987). Based on *McHenry County* and the authorities cited above, it is clear that the notice provisions of section 40.1(a) are not mandatory or jurisdictional, as Co-Petitioners contend. In fact, and directly to the contrary, construing those provisions as mandatory would be detrimental to local governing bodies, as specifically found by the Second District in *McHenry County*, because a harmless error by the Board could result in approval of a site that is harmful to the health and safety of citizens, which in turn would clearly be contrary to the purpose of the Act "to restore, protect and enhance the quality of the environment." 415 ILCS 5/2(b). Such harm would occur despite the fact that it is the citizens of McHenry County who are intended to be beneficiaries of the notice provision, and those citizens were present at the hearing and participated in the hearing. If this matter were decided by default rather than on the facts contained in the record, the very active and significant public participation had in this proceeding would be disregarded entirely.

Therefore, if this Board finds that the notice provision of section 40.1(a) was not met, this Board still should find that any deficiency in notice was merely harmless error, as the Court in *McHenry County* held. To hold otherwise would punish innocent citizens for an innocent mistake made by the Board, which did not cause harm or prejudice to anyone. For the reasons set forth above, Respondent respectfully requests that this Board deny Co-Petitioners' Motion.

3. CO-PETITIONERS MAY NOT RAISE THE BOARD'S NONCOMPLIANCE WITH SECTION 40.1 BECAUSE THEY FAILED TO DO SO AT THE BOARD HEARING.

This Board should find that Co-Petitioners are not allowed to raise their inadequate notice argument at this point because by failing to raise this issue at the Board hearing, Co-Petitioners are now precluded from doing so based on waiver, estoppel and/or laches.

As set forth in the facts presented by Co-Petitioners, the Board provided notice of the Board hearing, pursuant to 40.1(a) of the Act, on July 24, 2003. The exhibits filed with Co-Petitioners' Motion indicates that they investigated the sufficiency of the notice provided at least as early as August 13, 2003, the day before the Board hearing. (See Exhibit B to Co-Petitioners' Memo, an August 13, 2003 fax from Don Brown of the Board to Diane Turnball, a consultant for Co-Petitioners). Had the issue been raised in a timely fashion at the hearing, any desirable correction could have been made, such as additional notice and a continued hearing. Instead, on September 15, 2003, over one month after the hearing, and with 18 days remaining for the Board to reach a final decision in this case, Co-Petitioners asserted for the first time that the newspaper notice provided by the Board over seven weeks earlier was insufficient. Because Co-Petitioners failed to raise this issue either at or before the Board hearing, Co-Petitioners' argument should be deemed waived. *See Haffle & Associates v. Department of Employment Security*, 308 Ill.App.3d 983, 987, 721 N.E.2d 782, 786 (3d Dist. 1999) (holding that arguments not raised at

administrative hearing are waived); *Lebajo v. Dept. of Public Aid*, 210 Ill.App.3d 263, 268, 569 N.E.2d 70, 74 (1st Dist. 1991) (same).

This Board has specifically held that issues not raised at a Board hearing are waived. *See Gere Properties, Inc. v. Jackson County Board,* PCB 02-201 (Sept. 5, 2002). In *Gere*, Petitioner asserted for the first time in its post-hearing brief that the facility at issue failed to meet criterion (viii) of section 39.2(a) of the Act. PCB 02-201, slip op. at *4-5. Gere failed to raise that argument at the hearing itself or in its petition to review, and as a result, this Board refused to allow Gere's untimely argument. *Id.* at 5. The Board found that it was inappropriate for such an argument to be made at such a late date because Gere could have raised the issue earlier, either before or during the hearing itself, but Gere never attempted to do so. *Id.* The Board found that Gere's failure to raise the issue until its post-hearing brief resulted in prejudice to the respondents. *Id.* Consequently, this Board granted the respondent's motion to strike that portion of Gere's brief. *Id.*

Like Gere, Co-Petitioners had the ability to raise the issue of inadequate notice either before or during the Board hearing, but they deliberately elected not to do so. Co-Petitioners' failure to raise this issue will not only prejudice Respondent, but will prejudice McHenry County as a whole because despite the County Board's finding that the Lowe facility did not meet several of the criteria set forth in section 39.2, the facility will be allowed to be developed in the County based on a simple mistake alleged to have been made by the Pollution Control Board.

Additionally, Co-Petitioners should be estopped from raising this notice argument because it is clear that Co-Petitioners purposely waited to object to the notice until it would be impossible for the Board to provide adequate notice for a new hearing prior to the 120-day limitation in which the Board has to come to a final decision. Even though Co-Petitioners were

likely aware of the alleged deficient notice as of July 24, 2003 (the date the notice was provided), and at least as early as August 13, 2003 (when their consultant checked on publication), Co-Petitioners appear to have purposely refused to raise the issue until over seven weeks later, when the situation could no longer be remedied. If Co-Petitioners had raised this issue on July 24, 2003 or even August 14, 2003, at the hearing, and the Board decided that the issue somehow had merit, the Board would have been able to provide notice for a new hearing to be held within 21 days and would have still been able to meet the 120-day requirement. However, because Co-Petitioners waited until it would be physically impossible for the Board to fulfill the 21 day notice requirement of the hearing and the 120-day requirement for a final decision, Co-Petitioners should be estopped from making such an argument now. Otherwise, Co-Petitioners will be allowed to benefit from their own wrongdoing.

It is well-settled that "no one shall be permitted to . . . take advantage of his own wrong." *Loeb v. Gendel*, 23 Ill.2d 502, 505, 179 N.E.2d 7, 9(1961). By allowing Co-Petitioners to sit idly by and wait until it was too late for the Board to hold a new hearing before arguing that the first hearing was held without adequate notice, Co-Petitioners would be allowed to take advantage of their own wrong. Therefore, the doctrine of estoppel should be applied, precluding Co-Petitioners from raising such an argument and preventing an unjust result. *See Tegeler v. Industrial Commission*, 173 Ill.2d 498, 505, 672 N.E.2d 1126, 1129 (1996) (explaining that estoppel is an equitable doctrine invoked to effectuate justice by precluding a party from benefiting from its own wrongdoing). This situation is similar to one presented in the time-worn old proverb where a young man on trial for killing his parents, pleaded to the court: "Have mercy on me. I am an orphan!" Although admitted time-worn, the proverb has direct applicability in this case. Like the man in that proverb, Co-Petitioners have, by their own

actions, created a situation from which they now blithely seek relief. Based on the doctrine estoppel, Co-Petitioners should not be allowed to do so.

Finally, Co-Petitioners should not be allowed to raise the notice argument now for the first time based on the doctrine of laches. Laches is applied when a party's failure to timely assert a right has caused prejudice to the adverse party. *Van Milligan v. Board of Fire and Police Commissioners of the Village of Glenview*, 158 Ill.2d 85, 89, 630 N.E.2d 830, 833 (1994). The two fundamental elements of laches are lack of due diligence by the party asserting the right and prejudice to the opposing party. *Id.* Clearly, both of these elements are present in this case because by failing to investigate and raise the issue of improper notice until seven weeks after notice was provided, Co-Petitioners failed to use due diligence. Furthermore, prejudice is clearly established not only with respect to the McHenry County Board, whose decision will become null and void, but also to the citizens of McHenry County as a whole, who will have an unapproved transfer facility in their community and whose statutory right to public participation will have been abrogated by a decision made by default rather than on the record.

Because Co-Petitioners waited to allege improper notice until a time when a new hearing could not be provided in accordance with the 40.1(a), it is clear that Co-Petitioners were not actually concerned about receiving a fair hearing, but rather, were simply employing a sharp tactical move in an attempt to have their siting application approved without having to actually show that their facility meets the requirements of section 39.2 of the Act. As such, Co-Petitioners' Motion should be dismissed so that Co-Petitioners will not be able to benefit from unacceptable and unfair tactics.

In conclusion, this Board should deny Co-Petitioners Motion because the notice provided by this Board was clearly in compliance with section 40.1(a) of the Act, as notice appeared in

several newspapers of general circulation published in McHenry County. Even if this Board finds that notice was not appropriately given, Co-Petitioners Motion should be denied because the notice provision of section 40.1(a) is not jurisdictional and, therefore, this Board does not have to strictly comply with that provision in order to reach a final decision on Co-Petitioner's Petition. Finally, it would be inequitable for this Board to grant Co-Petitioners' Motion because of Co-Petitioners' delay in objecting to the notice; therefore, waiver, estoppel and/or laches should be employed to disallow Co-Petitioners from benefiting from their own delay.

WHEREFORE, Respondent, COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS, respectfully requests that this Board deny Co-Petitioners Motion to Deem Lowe's Site Location Application Approved.

Dated: September 17, 2003

Respectfully Submitted,
RESPONDENT COUNTY BOARD
OF MCHENRY COUNTY, ILLINOIS

By: Charles F. Helsten (HKL)
Charles F. Helsten

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on September 17, 2003, the **Respondent County Board of McHenry County, Illinois' Response to Co-Petitioners' Motion to Deem Lowe's Site Location Application Approved,** was sent to:

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