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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD CLERK'S OFFICE

AUG 4 2003

LOWE TRANSFER, INC. and)
MARSHALL LOWE,)

Co-Petitioners,)

vs.)

COUNTY BOARD OF MCHENRY)
COUNTY, ILLINOIS,)

Respondent.)

STATE OF ILLINOIS
Pollution Control Board

PCB 03-221
(Pollution Control Board
Siting Appeal)

**VILLAGE OF CARY'S RESPONSE TO
PETITIONERS' MOTION IN LIMINE**

The Village of Cary ("Village") is a public body representing its interests and those of its citizens in this proceeding. The proposed Transfer Station site is located directly adjacent to the Village of Cary and in close proximity to the homes of many Cary residents. On behalf of the residents of the Village of Cary, and by and through the lawyers employed by the Village to represent its citizens in this proceeding, the Village hereby provides its response to the Petitioners' Motion in Limine.

1. Given the unprecedented relief requested by this motion and the potential that a ruling on this motion could limit the record in this case in contravention of law, this motion should be decided by the Board rather than the Hearing Officer.

2. Petitioner's motion is a self-serving attempt to limit public participation in this proceeding to Petitioner's advantage in contravention of the Environmental Protection Act and the Board's rules which encourage public participation in all Board proceedings. The General Assembly's stated intent under the Environmental Protection Act is to "increase public participation in the task of protecting the environment." 415 ILCS 5/2(a)(v). Section 101.110 of

the Board's regulations states "The Board encourages public participation in all of its proceedings." 35 Ill. Admin. Code 101.110) In the face of this statutory and regulatory mandate encouraging public participation, as well as the Board's own order in this case and scores of other siting cases, Petitioner points to no statutes, regulations or case law which give him a right to this unprecedented exclusion and/or time limitations on oral statements by the public.

3. In addition to offering no legal support for this unprecedented request, Petitioner offers no evidence suggesting there is a need to handle this hearing any differently than any of the scores of other siting hearings the Board has held under Section 40.1. There is no factual basis for believing that the citizens attending this hearing will comment on matters outside the record. On the contrary, the record in this case demonstrates that the citizens in large part *made* the record before the County Board – including the testimony in the record of numerous highly pertinent expert witnesses presented by the Village and other citizens. Citizens who actively participated in the County Board proceeding have no need or reason to go outside the record in this case to find support for the County Board's decision. These citizens are well versed in the record and have every right to highlight for the Board the portions of the record that support the County's decision – as surely the Petitioner has a right to highlight any portions of the record he believes the Board should focus on.

4. While portraying this motion as based on a concern that the Board will be confused in the application of the manifest weight standard if citizens are allowed to make oral comments or speak too long, the Petitioner's motion requests relief that goes far beyond admonishing citizens (and anyone else) to limit their comments to the existing record. Rather, Petitioner requests that the Board exclude oral comments by the public *altogether* – in a blanket

ruling. Petitioner also attempts to limit even the reading of written statements to five minutes – on the assumption that a hundred citizens will want to comment. But there is no evidence that a hundred of citizens will want to make oral statements at this hearing. Furthermore, given the fact that the record below is voluminous, limiting comment on it to five minutes would be counter productive. To do so will force members of the public to make only general comments, rather than provide specific comments tied to the record. The Village of Cary intends to provide focused, record-oriented comments which will necessarily take more than five minutes. These detailed comments may allow others to shorten their comments. But to arbitrarily limit the Village's or any other citizen's comments to five minutes could jeopardize the record in this proceeding.

5. As a plethora of Board siting opinions demonstrate, manifest weight of the evidence is a standard of review regularly applied by the Board. The Board has been conducting hearings under this standard since Section 40.1 was enacted. Contrary to Petitioner's apparent assumption, the Board is perfectly capable of assigning appropriate weight to information in the record and information presented at hearing. It need not be shielded from public comment in order to do its job.

6. Petitioner points to a few cases, and only one recent case, in which the Appellate Court over turned the Board's decision in a siting case as against the manifest weight. But none of these Appellate Court reversals were based on a finding that the Board gave improper weight to a public comment made in a Section 40.1 hearing. The fact that the Appellate Court has disagreed with the Board in a handful of cases on where to draw the line using the manifest weight standard does not support the conclusion that the Board must stop accepting public comment at its hearings. Furthermore, should the Petitioner believe that a public comment is

outside the record, he has every opportunity to point that out to the Board in his brief. There is simply no support for the proposition that the Board cannot appropriately apply the standard or review or that allowing public comment will somehow taint the record.

7. The Board encourages public participation in its proceedings, and has always allowed public comment at hearings on siting appeals. Typically, members of the public are given significant leeway in presenting their comments. In our review of Board siting cases, we found no case in which the Board entered a blanket order excluding public comment in Board siting appeal hearings – and Petitioner has pointed to none. We also found no case in which the Board limited public comment to the “fundamental fairness” issue – and again Petitioner has pointed to none. Finally, contrary to Petitioner’s assertion, the Board’s taking of public comment on whether the record supports the local siting body’s decision has never been construed as reversible error – and Petitioner has pointed to no case in which it has.

8. In fact, there is very good reason the Hearing Officer should *not* attempt to limit public comment in the hearing process. The far greater risk of reversible error is that the Hearing Officer does as Petitioner requests and cuts-off public comment in contravention of the statute and regulations, or, at hearing, from the bench, without the benefit of eleven days of County Board hearing transcripts before him, cuts-off valid public comment actually highlighting the record or providing legal argument on facts in the record. This would be reversible error. The record in this case is extensive and the Village and individual citizens from both Cary and other neighboring communities participated in every day of the eleven County Board hearings. We submit that the likelihood that the Hearing Officer will mistakenly cut-off pertinent public comment is greater than the risk that the Board will be misled in the application of its standard of review because a member of the public strays from the record.

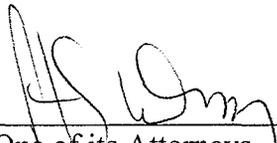
9. Finally, the Village fully agrees that the standard of review here is manifest weight and that the Board is limited to the record presented to the County Board. The Village would welcome an instruction from the hearing officer at hearing to *both* the parties and the public regarding the Board's application of the standard of review and the need to focus on information contained in the record.

WHEREFORE, Petitioner's assertions are without merit and its Motion should be denied.

Respectfully Submitted,

The Village of Cary

By



One of its Attorneys

Dated: August 4, 2003

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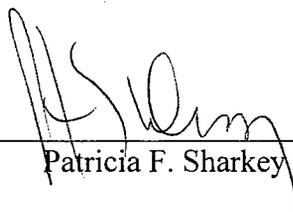
CERTIFICATE OF SERVICE

Patricia F. Sharkey, an attorney, hereby certifies that a copy of the foregoing Notice of Filing and Village of Cary's Response to Petitioners' Motion in Limine was served on the persons listed below by facsimile and by depositing same in the U.S. Mail at or before 5:00 p.m. on this 4th day of August 2003.

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