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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

LOWE TRANSFER, INC. and MARSHALL LOWE, Co-Petitioners, vs. COUNTY BOARD OF McHENRY COUNTY, ILLINOIS Respondents.	)	No. PCB 03-221 (Pollution Control Facility Siting Appeal)

NOTICE OF FILING

TO: See List Referenced in Proof of Service

PLEASE TAKE NOTICE that on September 25, 2003, we filed with the Illinois Pollution Control Board, ***Co-Petitioners' Reply to County's Response to Motion to Deem Lowe's Site Location Application Approved*** in the above entitled matter, a copy of which is attached hereto.

LOWE TRANSFER, INC. and MARSHALL LOWE

By: _____
David W. McArdle

PROOF OF SERVICE

I, a non-attorney, on oath state that I served the foregoing document on the following parties by depositing same in the U. S. mail on this 25th day of September, 2003.

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SUBSCRIBED and SWORN to before me this 25th day of September, 2003

_____
Notary Public

"OFFICIAL SEAL"
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

CO-PETITIONERS' REPLY TO COUNTY'S RESPONSE TO MOTION TO DEEM LOWE'S SITE LOCATION APPLICATION APPROVED

Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe, submit this Reply Brief to the response brief filed by McHenry County on September 18, 2003.

A. Newspapers Containing Notice Were Not First Issued in McHenry County

The County argues that the three post offices in McHenry County where Pioneer Press newspapers were delivered for further distribution are the locations of "first" issue and, thus, publication in McHenry County. (County's Response, p. 5). It should be noted the County completely ignores the two separate and distinct Pioneer Press newspapers delivered to post offices in Lake County. In an attempt to support their position, the County cites the same Attorney General opinions contained in Lowe's Motion. However, the County misstates the holdings of both opinions.

In the 1981 Attorney General Opinion the newspapers were ultimately delivered to subscribers in both Douglas and Moultrie Counties, however, all of the newspapers were sent to one post office, Moultrie, and mailed from there. 1981 Ill. Atty. Gen. Op. 91 (No. 81-037). The Attorney General correctly determined that the location of "first" issue of the newspapers was the

Moultrie Post Office because every mailing originated from this one post office. In this instance, the newspapers for subscribers within McHenry County were printed, sorted and bundled in Northfield then delivered by a private trucking company to five separate and distinct post offices within two different counties. There can be only one place of publication. 1992 Ill. Atty. Gen. Op. 010 (No. 92-010). See also *Garcia v. Tully*, 72 Ill. 2d 1 (1978). Therefore, the location of the "first" Pioneer Press issue and thus, publication, was the place where the newspapers were sorted, bundled, and picked up for delivery by a private trucking company, i.e., the Pioneer Press facility in Northfield, Cook County, Illinois.

The County also misstates the opinion in the 1992 Attorney General Opinion. 1992 Ill. Atty. Gen. Op. 92-010. At page 5 of its brief, the County provides a quotation from this opinion to the effect that the newspaper in question was published "only in the township in which it is delivered for labeling and distributing to post offices". However, this partial quotation was taken completely out of context. The full quotation states:

> The publisher contends that "publication", for purposes of section 103, occurs in each township in which the publisher's truck delivers the papers to a post office. This contention was rejected in opinion No. F-1287, issued November 6, 1964 (1964 Ill. Att'y Gen. Op. 249), wherein Attorney General Clark concluded that a newspaper could have only one place of publication. The publication of a newspaper takes place where it is first issued to the public, i.e., where the first actual distribution of bulk deliveries of the newspaper originates. This conclusion is supported by the opinion in Garcia v. Tully (1978), 72 Ill. 2d 1, wherein the court distinguished between "publication" and "circulation" of a newspaper, **concluding that simultaneous circulation of a newspaper within several townships is not the equivalent of publication in each township**. Accordingly, it is my opinion that the newspaper in question is published, for purposes of section 103 of the Revenue Act of 1939, only in the township to which it is delivered for labeling and distribution to post offices.

The first actual distribution of bulk deliveries of the Pioneer Press newspapers originates at their Northfield facility.

In fact, the County actually supports Lowe's position when stating, "...clearly the separate newspapers printed by Pioneer Press have separate circulations and are issued at different locations". (County's Response, pp. 5-6). Under the Supreme Court's ruling in *Garcia v. Tully.* 72 Ill.2d 1 (1978), such multiple places of issuance ipso facto do not constitute publication at each location. ("The simultaneous circulation of a newspaper within several communities is not the equivalent of publication in each community.") *Id.* at 14.

B. Notice Was Required in a Newspaper of General Circulation in McHenry County – Not a Newspaper of General Circulation in Cary

The County argues, "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**." (County's Response, p. 9). The county, by this admission, acknowledges that notice was not given to residents in all parts of McHenry County but only to those residents of the southeastern portion of the county. What was "entirely appropriate"and legally mandated, however, was for the notice to be published in a "newspaper of general circulation in McHenry County" as required by Section 40.1(a) of the Act. The people in the rest of McHenry County are entitled to be given notice of a hearing for a proposed transfer station located in the unincorporated territory of the county.

In support of its argument the County cites *People ex rel. Toman v. 110 South Dearborn Street Bldg. Corp.* 372 Ill.459; *Eisenberg v. Wabash*, 355 Ill.495; *Polzin v. Rand, McNally & Co.*,

250 Ill. 561; *Loy v. Knaak*, 309 Ill.App. 574 and *Organization of the Greater Algonquin Park District v. Village of Lake in the Hills*, 103 Ill.App.3d 1056. There are several distinctions that must be noted with the cases cited by the County.

First, the County relies on *Loy* for the holding that a newspaper "was of 'general circulation' notwithstanding a large percentage of its circulation was on the south side of Chicago". (County's Response, p. 6). *Loy* is an abstract opinion. The use of abstract opinions is not allowed by the courts. "The use of abstract opinions and rule 23 orders as precedent consistently has been condemned by courts of review – condemnation so universal that no citation is required". *Cochran v. Great Atlantic & Pacific Tea Company, Inc.*, 203 Ill.App.3d 935 (5th Dist 1990). See also *Schusse v. Pace Suburban Bus Division,* 334 Ill.App.3d 960 (1st Dist 2002). Because of the County's misuse of an abstract opinion, all reference to and reliance on the *Loy* case should be totally disregarded by the Board.

The County also misstates the holding in *Organization of Greater Algonquin Park District v. Village of Lake in the Hills.* 103 Ill.App.3d 1056 (2nd Dist 1982). The County cites this case for the proposition that "unrebutted proof was sufficient to establish that the newspaper at issue was of general circulation". (County's Response, p. 8). However, the facts in *Algonquin* are clearly distinct from the circumstances in the Lowe appeal.

In *Algonquin*, as the court stated, "No proof was offered by the objectors at the hearing on the objections that The Cardunal Free Press was not of general circulation within the proposed park district...**Under these circumstances**, the unrebutted proof is sufficient to establish that The

Cardunal Free Press is a newspaper of general circulation in the proposed park district and this objection cannot be sustained". *Id.* at 1061.

Algonquin would only have relevance if the objectors to the issue of general circulation have offered no proof or evidence. Lowe's Motion, however, provided an abundance of evidence demonstrating that the Pioneer Press newspapers have only a local and limited circulation within McHenry County – not the general circulation within McHenry County required by Section 40.1(a). The County's reference to and reliance on *Algonquin* should be totally disregarded by the Board.

The County places the weight of their argument on general circulation on three cases dating back to before 1940 -- *Toman, Eisenberg* and *Polzin*. (County's Response, pp. 6-9). The Supreme Court has, however, since clarified the issue of general circulation in a series of more recent decisions.

In *Garcia v. Tully,* 72 Ill.2d 1 (1978), the court noted, "The very purpose of requiring the publication of official notices is to inform the people concerning proceedings of a public nature for the general welfare." *Id.* at 15. The Supreme Court in *North Shore Savings and Loan Association v. Griffin*, 75 Ill.2d 166 (1979) further clarified the issues regarding proper notice. In its holding the Court stated, "the Commissioner's interpretation of the statute would permit a savings and loan association to place notice in a Chicago newspaper, which has a general circulation throughout the State, to notify residents of downstate communities of a proposed relocation. It is unlikely that the legislature intended such a result". *Id.* at 171.

The purpose of notice is to give all parties an opportunity to support or oppose a matter at issue. *Kleidon v. City of Hickory Hills*, 120 Ill.App.3d 1043, (1st Dist 1983). Substantial compliance with notice provisions has been held to be insufficient where statutory provisions are not merely technical requirements but are jurisdictional. *Village of Southern View v. County of Sangamon,* 228 Ill.App.3d 468 (4th Dist 1992), citing *M.L. Ensminger Co. v. Chicago Title & Trust Co.*, 74 Ill.App.3d 677, (1st Dist 1979). Notice cannot be a mere gesture. *Abandonment of Wells Located in Illinois v. Department of Natural Resources*, 2003 WL 21977009 (Ill.App. 5 Dist), citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

Lowe's application for a siting location approval was for a site in unincorporated McHenry County and by law had to be filed with McHenry County. The service area for Lowe's facility was all of McHenry County. (C00001, Sec. 1). Transfer stations have been identified by the County itself as part of an overall approach to solid waste planning for all the residents of McHenry County. (C00001, Appendix H). **All** residents of McHenry County are entitled to be given an opportunity to voice their opinion at the required public hearing.

The County in its Response, however, argues that notifying only those residents of the southeastern part of McHenry County meets the requirements of notice within the County. The Pioneer Press newspapers used for the notice are "local and limited" newspapers. Pioneer Press by its own notice of publication makes no pretense of being a McHenry County newspaper. Notice in a newspaper of special or limited character such as the Pioneer Press newspapers does not constitute notice within McHenry County as required by Section 40.1(a).

C. Notice Under Section 40.1(a) is Mandatory and Jurisdictional

The County in its Response relies heavily on *McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency*, 154 Ill.App.3d 89 (2nd Dist. 1987) for the proposition that the procedural requirements of Section 40.1(a) are not jurisdictional. (County's Response, p. 9). While citing extensively to portions of this ruling, the County fails to include the last paragraph of the section dealing with notice. The Court concluded its holding by stating:

> In *Illinois Power*, the court recognized that, in addition to its pubic health concerns, the Act requires the PCB to expedite its review process. If the court had not deemed the permits issued under the circumstances presented there, it would effectively have allowed the PCB to avoid the consequences of an impending violation of the 90-day limit by disregarding the notice requirement (137 Ill.App.3d 449, 452, 92 Ill.Dec. 167, 484 N.E.2d 898.) By contrast, the 120-day deadline was in no danger of expiring here. Had the PCB recognized its error, it would have had ample time to give 21-day notice and still hold the hearing within the prescribed period. While we agree that the requirement the PCB may not disregard the 21-day notice requirement at will, we conclude that where, as here, the PCB's failure strictly to comply with it was inadvertent, resulted in no prejudice to the appellant, and did not permit the PCB to avoid another, clearly mandatory provision of the Act, the deficiency will not give the appellate the option of deeming the site approved.

Id. at 97. [Emphasis added.]

The circumstances in *McHenry* are clearly and distinctly in direct opposition to the facts in the Lowe appeal. The *McHenry* ruling depends on three factors being meet: (1) failure to comply was inadvertent; (2) failure to comply resulted in no prejudice; and (3) failure to comply did not permit the PCB to avoid another clearly mandatory provision of the Act. Only under these circumstances does the ruling in *McHenry* apply.

However, the facts in Lowe's appeal clearly demonstrate that the appeal mirrors exactly the situation in *Illinois Power* – not the situation in *McHenry*. The purpose of notice is to give all parties an opportunity to support or oppose a matter at issue. *Kleidon v. City of Hickory Hills*, 120 Ill.App.3d 1043, (Dist 1983). Lowe was prejudiced in that the only McHenry County residents who had notice of the hearing were those neighbors in the southeastern part of the county who are opposed to the siting for purely parochial reasons. When notice is provided to only the area of opposition to a matter, the hearing is effectively skewed such that the opinions that will be heard at any public meeting are one-sided.

The August 14, 2003 public hearing is void because of lack of proper notice and there does not remain enough time to hold another public hearing. If the Board is allowed to ignore the failure of its notice and have no legally noticed public hearing before the end of the 120-day decision deadline, the Board would clearly be in violation of another mandatory provision of the Act. Under both *Illinois Power* and *McHenry*, Lowe's site location application should be deemed approved.

The County in its Response extends its argument further, "Based on *McHenry County* and the authorities cited above, it is clear that the notice provisions of section 40.1(a) are not mandatory and jurisdictional, as Co-Petitioners contend". (County's Response, p. 12). The County attempts to support this bold assertion by offering the legal argument that while notice under Section 40 is jurisdictional, notice under Section 40.1(a) is not. The language used in both sections is exactly the same – "shall publish that 21 day notice in a newspaper of general circulation in that county". Yet, somehow, the County wants the Board to rule that while the

courts have found this requirement jurisdictional for cases filed under Section 40, it is not jurisdictional for cases filed under Section 40.1(a).

It is well settled that in construing statutes one must ascertain and give effect to the intent of the legislature. *Madigan v. Dixon-Marquette Cement, Inc.*, 2003 WL 22049138 (Ill. App. 2 Dist.), citing *Harris v. Manor Healthcare Corp.*, 11 Ill. 2d 350. In ascertaining the intent of the legislature, one examines the statutory enactment and seeks " 'to determine the objective the statute sought to accomplish and the evils it desired to remedy' " *Madigan* at 5, citing *Harris*, 111 Ill. 2d at 362. The courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience, or injustice. *Madigan* at 5, citing *Harris*, 111 Ill. 2d at 363.

To assert that the legislature when it approved two sections of the Act, one immediately following the other, with the same provisions for notice, intended notice to be treated differently for each section is an argument that clearly rises to the level of both absurdity and injustice. Clearly under both legislative intent and court decisions, the notice requirements of Sections 40 and 40.1(a) demand the same compliance and both are mandatory and jurisdictional. To adopt the interpretation of the County achieves nothing other than circumventing both the appeal process and the purposes of the Act.

D. Lowe's Motion Is Not Barred by Waiver, Estoppel and/or Laches

The County incorrectly argues Lowe's motion is barred because "of failing to raise this issue at the Board hearing". (County's Response, p. 13). The notice requirements of Section 40.1(a) are mandatory and jurisdictional as Lowe demonstrated in its Motion and in previous

sections of this reply. The issue of subject matter jurisdiction cannot be waived and can be raised at any time. *Belleville Toyota, Inc. v. Toyota Motor Sales, USA, Inc.*, 199 Ill.2d 325 (2002).

The PCB's failure to comply with the notice provisions of Section 40.1(a) have rendered any subsequent actions by the PCB void. The PCB's lack of compliance with the jurisdictional requirements is subject to attack at any time or in any court, either directly or indirectly. *Abandonment of Wells Located in Illinois v. Department of Natural Resources*, 2003 WL 21977009 (Ill.App. 5 Dist). See also *Ogle County Board v. Pollution Control Board*, 272 Ill.App.3d 184, (2nd Dist 1995).

WHEREFORE, for the reasons set forth above and in Lowe's Motion, the Co-Petitioners request that the Board issue an order (1) finding that the hearing notice was defective and the Board lacks authority to issue a final decision on the merits, and (2) deeming Lowe's site location application approved in accordance with 415 Ill. Comp. Stat. 5/40.1(a).

Respectfully submitted,
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