BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: See Proof of Service

PLEASE TAKE NOTICE that on August 22, 2003, we filed with the Illinois Pollution Control Board, the attached ***Memorandum in Support of the Siting Appeal of Lowe Transfer, Inc. and Marshall Lowe to Contest Site Location Denial***, in the above entitled matter.

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 Memorandum on the following party, by hand delivery on this 22nd day of August, 2003:

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_____

SUBSCRIBED and SWORN to before
me this 22nd day of August, 2003

_____
Notary Public

"OFFICIAL SEAL"
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MEMORANDUM IN SUPPORT OF THE SITING APPEAL OF LOWE TRANSFER, INC. AND MARSHALL LOWE TO CONTEST SITE LOCATION DENIAL

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I. INTRODUCTION

On November 20, 2002, Lowe Transfer, Inc. and Marshall Lowe, co-petitioners ("Lowe') filed a regional pollution control siting location application ("Application") with McHenry County. (C00001; C00002). Following eleven days of public hearings, spanning 3,955 pages of transcript, the McHenry County Board ("County Board") met one time regarding the Application. On May 6, 2003, the County Board spent less than 30 minutes voting on the Application and no time deliberating on it. (C07244; C07245-C07250). There was no discussion regarding the Application, the hours of testimony and public comment, the more than 100 exhibits or the experts. *Id.* The hearing officer submitted no findings for consideration by the County Board. The detailed proposed findings of the County Board staff and consultants were completely disregarded. (C03852-C03992). Instead, without making oral or written findings of fact or credibility, the County Board simply passed a resolution concluding that Lowe met Criteria 1, 4, 6, 7, 8 and 9 and failed to meet Criteria 2, 3 and 5. (C07244: C07245-C07250).

Lowe appeals the denial of its Application for the Northwest Highway Transfer Facility ("Facility") by the County Board, pursuant to Section 40.1(a) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/40.1(a), on grounds that the County Board's decision was against the manifest weight of the evidence and should be reversed.

II. PRIOR PROCEEDINGS

A. Lowe's Application for Site Location Approval.

The Application contained detailed information establishing compliance with the siting requirements in Section 39.2(a) of the Act, and the applicable McHenry County ordinances and procedural rules. (C00001; C00002; C00150-C00166). Of relevance to this appeal are the

requirements of Criterion 2 (design, operation and location), Criterion 3 (compatibility and property value) and Criterion 5 (plan of operations).

In the Application, Lowe proposed to site, permit, construct and operate a new municipal waste transfer facility on property in unincorporated McHenry County, Illinois. The proposed Facility will be used for the consolidation and transfer of municipal solid waste from residential, commercial and industrial waste generators. It will process an average of 600 ton per day. (C00001 Sec. 3, p. 7).

The proposed Facility on a 2.6 acre parcel is adjacent to U.S. Route 14, approximately 1600 feet northwest of the intersection of U.S. Route 14 and Three Oaks Road. (C00001, Sec. 2, p. 2-1). The Facility has direct access to U.S. Route 14, a federal highway and a Class I roadway, with traffic volumes averaging 23,700 per day and a weight limit of 80,000 pounds per vehicle. (C00001, Sec. 6, p. 6).

The USEPA classifies waste transfer stations as a "light industrial" use. (C00001, Sec. 3, p.19). The proposed Facility site is zoned under the McHenry County Zoning Ordinance as "Heavy Industry." (C00001, Sec. 3, p. 6). Permitted uses in the Heavy Industry zoning district include such intense uses as rendering and meat packing plants, wrecking yards, recycling collection and processing facilities (coal, clay, fertilizer), sawmills and slaughterhouses. (C00001, Sec. 3, p. 19; C00263).

The properties immediately adjacent to the proposed Facility site are also within unincorporated McHenry County and are also zoned industrial. The properties to the immediate south and southeast of the Facility are not only zoned Heavy Industry but are currently being used for asphalt and concrete crushing and recycling and concrete pipe manufacturing with outside storage

of large volumes of rock, asphalt and pipe. (C00001, Sec. 3, p. 9). The property east and northeast of the Facility is zoned Light Industry and is a gravel pit currently being reclaimed. (C00001, Sec. 3, p. 8). The parcel of property immediately north, northwest and west of the Facility is zoned I-2 Heavy Industry. While formerly a gravel pit, this property is currently owned and operated by the McHenry County Conservation District ("The Hollows") as a conservation area open to the public. (C00001, Sec. 3, p. 8).

At the time the application was filed on November 20, 2002, no property was zoned residential within 1,000 feet of the Facility. The nearest residentially zoned property or residence was approximately 1,300 feet east of the Facility, being the Bright Oaks Townhome Subdivision ("Bright Oaks"). (C00001, Sec. 2, p. 2-2).

Lowe served and published all required notices within the prescribed time frames, in accordance with the requirements of Sec. 39.2(b) of the Act. (C00002, App. G; C00008; C00009-C0010; C00020-C00023; C00024).

On February 4, 2003, the Village of Cary (the "Village") passed a resolution objecting to the siting of Lowe's proposed Facility. (C01299-C01301). The main thrust of the Village's objection was the proximity of the proposed Facility to the Village corporate limits. The Village board was opposed to having a waste transfer station being located along what it envisioned to be the "gateway" to its Village. *Id.* Bright Oaks was likewise opposed to the proposed use and retained counsel to object and participate in the proceedings below. Finally, Plote, the owner of the property east of the proposed Facility, also retained counsel to oppose the Facility.

B. Public Hearing.

Following the initial organizational meeting of the parties held on February 24, 2003, the public hearings on the Application commenced. (C00175-C00176; C00177). The hearings began on March 1, 2003 and ended on March 15, 2003. (C00178-C00227). Over the course of the public hearings, Lowe and the objectors presented numerous witnesses who testified regarding the sufficiency of Lowe's Application. The witnesses regarding the criteria at issue in this appeal, Criteria 2, 3 and 5, are outlined herein, and the testimony is addressed in detail below.

1. Criterion 2.

Criterion 2 addresses the design, operation and location of the Facility. In support of Criterion 2, Lowe presented its engineers Dan Zinnen, Keith Gordon and Doug Dorgan. The Village offered Andrew Nickodem, Larry Thomas and Kevin Sutherland.

2. Criterion 3.

Criterion 3 focuses on the proposed site's compatibility and impact on property values. With regard to Criterion 3, Lowe presented the testimony of two witnesses: Larry Peterman, a land planner who testified regarding compatibility, and Frank Harrison, a real estate appraiser who testified regarding impact to property values. The Village offered N. Drew Petterson as its witness on the compatibility part of Criterion 3. Bright Oaks offered John T. Whitney as their witness on the property value part of Criterion 3.

3. Criterion 5.

Criterion 5 addresses the plan of operations minimization of danger from fire, spills or other operational accidents. In support of Criterion 5, Lowe presented engineer Keith Gordon. The Village offered Andrew Nickodem.

C. County Board Resolution.

Following closing arguments on March 15, 2003, the County Board only met one time regarding the Application – May 6, 2003 – for less than 30 minutes. On that date, the County Board had absolutely no discussion regarding the evidence presented at the hearings. The County Board simply adopted Resolution 200-305-12-104. (C07244; C07245-C07250). No findings of facts or finding relating to credibility of witnesses were made. *Id.*

III. STANDARD OF REVIEW

When reviewing a local decision on the nine criteria found in Sec. 39.2(a) of the Illinois Environmental Protection Act ("Act") 415 ILCS 5/40.1(b), the Pollution Control Board must determine whether the local decision is against the manifest weight of the evidence. *McLean County Disposal, Inc. v. County of McLean*, 207 Ill. App. 3d 352 (4th Dist. 1991). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain or indisputable, from a review of the evidence. *CDT Landfill Corporation v. City of Joliet* PCB 98-60, slip op. at 4 (1998), citing *Harris v. Day*, 115 Ill. App. 3d 762 (4th Dist. 1983). Where an applicant makes a prima facie showing as to each criterion and no contradicting or impeaching evidence was offered to rebut that showing, a local government's finding that several criteria had not been satisfied was found to be against the manifest weight of the evidence. *Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board,* 227 Ill.App.3d 533 (1st Dist. 1992).

Since 1983, the Board and appellate courts on at least twelve occasions have found the lower tribunal's decision against the manifest weight of the evidence with respect to one or more criteria.[1]

[1] Also, e.g., *CDT Landfill Corporation v. City of Joliet*, PCB 98-60 (1998) (The Board reversed the City of Joliet's decision with respect to an expansion of a landfill and found the city's decision with respect to Criteria 2, 6 and 8 was against the manifest weight of the evidence); *Larry Slates v. Illinois Landfills, Inc.*, PCB 93-106 (1993) (The Board found the City of Hoopeston's decision with respect to site location of a landfill expansion should be reversed with respect to Criterion 1); *Industrial Fuels v. Illinois Pollution Control Board* 227 Ill. App.

As recently as February of this year in *County of Kankakee v. City of Kankakee*, PCB 03-31, 33, 35 (2003), this body reversed the City of Kankakee's decision with respect to a proposed landfill, based on the fact that the city's decision relative to Criterion 2 was against the manifest weight of the evidence. The Pollution Control Board has found previous McHenry County Board's decisions to be in error. See *Waste Management of Illinois v. McHenry County Board,* PCB 86-109 (1986) (The county's findings on Criterion 3 were against the manifest weight of the evidence); *McHenry County Landfill v. County Board of McHenry County,* PCB 85-192 (1986) (The county's denial on Criterion 4 was reversed; The Board found that the applicant had indeed satisfied Criterion 4 based on the manifest weight of the evidence.)

IV. GROUNDS FOR REVERSAL

The record clearly and plainly demonstrated Lowe's compliance with Criteria 2, 3 and 5 of the Act.

A. The County's Decision on Criterion 2 was Against the Manifest Weight of the Evidence.

> Criterion 2: "the Facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii)

3d 533 (5th Dist. 1992) (The Appellate Court reversed both the PCB and the City of Harvey's decision to deny siting approval, finding the decisions against the manifest weight of the evidence on five criteria); *Waste Hauling, Inc. v. Macon County Board,* PCB 91-223 (1992) (The Board found that the Macon County Board's decision denying site approval with respect to expansion of an existing landfill was against the weight of the evidence with respect to Criteria 2 and 6); *Clean Quality Resources, Inc. v. Marion County Board,* PCB 91-72 (1991) (The Board found the Marion County Board's determination on Criterion 3 was against the manifest weight of the evidence); *A.R.F. Landfill, Inc. v. Lake County,* PCB 87-51 (1987) (The Board reversed Lake County's decision to deny the siting of a landfill expansion relating to Criterion 3; Criterion 3 had been satisfied based on the manifest weight of the evidence.); *Industrial Salvage, Inc. v. County Board of Marion,* PCB 83-173 (1984) (The Board reversed Marion County's denial of Criterion 2 based on alleged violations by Industrial; the Board found this to be an inappropriate grounds for denial); *Watts Trucking Service v. City of Rock Island,* PCB 83-167 (1984) (The Board found the City of Rock Island's decision to deny approval for site location was against the manifest weight of the evidence with respect to all Criteria and reversed the City's decision); and *Frinks Industrial Waste v. City of Rockford,* PCB 83-41 (1983) (city's denial of industrial waste processing and transfer facility (special wastes) site location approval reversed; PCB found "no special circumstance could support the city's conclusion that the proposed site is located too close to a school" (2000 feet)), affirmed *City of Rockford v. Illinois Pollution Control Board,* 125 Ill. App. 3d 384 (2nd Dist. 1984).

In denying approval of Lowe's Application, the County's resolution stated – in error – that Lowe had not satisfied Criterion 2. Criterion 2 does not require a guarantee against any risk or problem. *File v. D & L Landfill,* 219 Ill.App.3d 897 (5th Dist. 1991). When an experienced design engineer has designed the Facility in compliance with the standards for non-hazardous municipal waste facilities set by the Illinois Environmental Protection Agency, compliance with these standards satisfies this criterion in the statute. *Clutts v. Beasley*, 185 Ill.App.3d 543 (5 th Dist. 1989). The standard set forth in *Industrial Fuels & Resources v. Pollution Control Board*, 227 Ill. App.3d 533 (1st Dist. 1992) is also relevant to consider. *Industrial* involved the siting application for a pollution control facility for contaminated soils and medical wastes. In *Industrial*, the court reversed the denial of siting on 5 criteria, including Criterion 2, based on manifest weight of the evidence holding as follows:

> Significantly, there is no evidence of record to demonstrate that the design of the facility is flawed from a public safety standpoint or that its proposed operations present an unacceptable risk to the public health, safety, and welfare...On the contrary, the record substantiates Industrial's position that it made a *prima facie* showing as to each criterion and that (the city of) Harvey did not offer contradicting or impeaching evidence to rebut the showing. The experts who testified on behalf of Industrial carried impressive credentials including extensive experience with similar facilities. Their opinions were based on facts and reasonable assumptions...The technology and design of the facility was represented to be state-of-the-art (meaning, in this case, providing for a much higher degree of environmental protection than required under existing standards and laws), and nothing in the record contradicts that assertion.

As presented below, the record in *Industrial* and the record in this case on Criterion 2 are almost identical, based on this standard.

1. **Lowe's Witnesses.**

Dan Zinnen

Mr. Zinnen is a registered professional engineer in Illinois, Wisconsin, Michigan and Indiana. (C00001, Application). Mr. Zinnen has worked on the permitting and design construction of over 100 landfills, including 70 in Illinois. He has done permitting and siting for eight transfer stations, and his firm, of which he is a principal, is currently responsible for regulatory compliance for approximately 24 transfer stations. *Id.*

Keith Gordon

Mr. Gordon, the principal design engineer for the Facility, is a registered professional engineer in 26 states, including Illinois and all of its surrounding states. (C00001, Application; C00179, p. 16). He has been practicing for 26 years in the field of solid, hazardous and radioactive waste management. *Id.* Mr. Gordon is presently serving as a consultant on at least 12 transfer station projects. (C00179, p. 20). Additionally, Mr. Gordon is a Certified Hazardous Materials Manager. (C00001, Application).

Mr. Gordon was appointed to the Technical Advisory Committee providing assistance to USEPA on national solid waste facility siting issues and was retained as editor for USEPA's *Solid Waste Transfer Stations: A Manual for Decision Making*. (C0001, Application; C00240). He is editor-in-chief of the Solid Waste Association of North America ("SWANA") Transfer Station Management Certification Course manual, (C00001, Application; C00179, p. 18; C00238); and lead instructor on transfer station management for SWANA. (C00001, Application; C00179, p. 18).

Mr. Gordon has appeared as a guest lecturer and technical trainer for a variety of technical symposia, regulatory information programs and community forums. (C00001, Application). Mr. Gordon was awarded SWANA's Bronze Medal for Transfer Station Excellence in 1998 for his design at South Central Transfer/MRF, Las Cruces, New Mexico. *Id.*

Doug Dorgan

Mr. Dorgan is a hydrogeologist with over 17 years experience in the geology and environmental geology fields. (C00001, Application; C00199, p. 9). He is a certified professional geologist in both Illinois and Indiana and a certified hazardous materials manager. Mr. Dorgan has been involved in the design, permitting, and management of ongoing groundwater management programs for a wide variety of facilities throughout the country. He has extensive experience in assessment of contamination and impacts to groundwater at various types of facilities including underground storage tanks, hazardous waste management sites, and solid waste management sites. *Id.*

2. Village's Witnesses.

The Village approved Resolution No. #R03-02-01, A Resolution in Opposition to the Siting of the Northwest Highway Transfer Facility at 3412 Northwest Highway, on February 4, 2003. (C01299-C01301). Afterwards, Cary hired its witnesses attempting to back up their public statement of opposition.

Andrew Nickodem

Mr. Nickodem was the design engineer for the Woodland Transfer Station in Kane County and the Fox Valley Transfer Station in DuPage County. (C00215, p. 100). Woodland was denied by the Kane County Board and the PCB in part because Criterion 2 was not satisfied.

Fox Valley's application was withdrawn so that the applicant and its consultants could re-design and re-work the application based on concerns raised by the County. (C00215, pp. 94-95).

During cross-examination, Mr. Nickodem agreed his resume included only 6 transfer stations. (C00215, pp. 98-103). Of these transfer stations, he was the engineer of record for only two – Woodland and Fox Valley. *Id.* He has never taught any courses regarding waste transfer stations. *Id.* He is not a certified transfer station manager or a certified hazardous material manager. *Id.* He has never been a guest speaker regarding transfer station design or operations nor he has ever received any awards for transfer station design. *Id.*

Larry Thomas

Mr. Thomas is a registered professional engineer with an educational background solely in civil engineering. (C00316). He has been the Village Engineer since 1986. (C00188, p. 9).

Mr. Thomas did not review the siting criteria in preparation for his report or his testimony. (C00189, p. 22). He has never been involved in the design of a transfer station and has no experience with either transfer stations or landfills. (C00189, pp. 28-29). He is neither a licensed geologist or licensed hydrogeologist. (C00189, p. 50). His repeated references to hazardous waste in his report were in error. (C00189, p.59-60; C00190, pp. 57-58).

Kevin Sutherland

Mr. Sutherland is a registered professional engineer employed by the Village's Engineer. He has been working in this capacity since 1997.

3. The Transfer Station Is Designed So As to Protect the Public Health, Safety and Welfare.

The record clearly and plainly discloses the Lowe transfer station design satisfied Criterion 2. The Facility has more engineered protection for surrounding property owners than any other facility in the state. (C00001, Executive Summary; Sec. 2, pp. 2-4 to 2-5; Sec. 5, pp. 5-3 to 5-4).

The record contains numerous statements from both County Board members and participants describing the Lowe Facility as "over-engineered" and "state-of-the-art". Donald Brewer, Chairperson of the Siting Committee, commented the design of the facility has "gone to extra measure with the bells and whistles, with the over engineering of this site." (C00186, p. 62). Ken Koehler, a member of the Siting Committee, characterized the Lowe Facility as "an over-designed facility." (C00187, p. 16). The Facility's design and its operations plan include many features that far exceed those found in transfer stations within the State of Illinois. (C00001, Sec. 2, pp. 2-4 to 2-5).

Lowe's witness, Mr. Gordon, explained that there are four design components to be considered when designing a transfer station: (1) waste receiving; (2) waste unloading and inspections; (3) waste loading; and (4) tarping and weighing. Each of those four elements for the Facility were designed to exceed minimum industry standards or minimum regulatory requirements in order to minimize against potential impacts from the Facility. (C00001, Sec. 2, pp. 2-4 to 2-5); C00179, p. 23).

a. **Waste Receiving.**

Queuing

The queuing (also known as stacking) distance on the access drive between U.S. Route 14 and the entrance to the site is designed to accommodate more than twice the typical peak flow requirements. *Id.* The Facility can queue in excess of 20 vehicles at one time, which is twice Mr. Gordon's recommended design standard. (C00001, Sec. 2, pp. 2-5 to 2-6; C00179, pp. 24-25). According to the County Staff and Consultants Report, if no traffic movement occurred on the entrance during the maximum traffic period, all collection trucks could be stored on site. (C03860). The ample queuing distance will clearly prevent the possibility of any trucks backing up onto U.S. Route 14. (C00001, Sec. 5, pp. 5-4 and 5-7 and Sec. 6, p. 24).

In his report on behalf of the Village, Mr. Nickodem suggested the queuing distance provided by Lowe was insufficient and could cause a backup of trucks onto U. S. Route 14. (C00463, p. 2). Yet Mr. Nickodem admitted Lowe could queue approximately 18 more trucks from the entrance gate to the scale house than his design for Woodland provided, even though, Woodland was designed for 2000 tons per day while Lowe was designed for only 600 tons per day. (C00215, pp. 109-111).

Internal Traffic Flow

The internal traffic system is designed to separate the transfer trailer traffic from the collection truck traffic. (C00001, Executive Summary; Sec. 2, p. 2-8; Sec. 5, pp. 5-7 to 5-8; Sec. 5, Drawing 5-E-8). This is one of the health and safety features that Mr. Gordon emphasizes in SWANA's site management courses. (C00179, p. 36; C00238).

Scale House

The scale house building, separate from the transfer building, will be enclosed to minimize the potential for noise, dust and any visual aspects. (C00001, Sec. 5. Drawing 5-E-2 and Drawing 5-E-9). This feature exceeds standard design for a waste transfer station. 99% of waste transfer stations provide for outdoor scales. By having the scale house enclosed, noise, dust and visual impacts will be minimized. (C00179, p. 26). The enclosed scale house is designed with radiation detection and carbon monoxide detection further exceeding standard designs for a waste transfer station. (C00001, Sec.5, p. 5-4); *Id.*).

For the Village, Mr. Nickodem testified he included no radiation detector at Woodland. (C00217, pp. 31-32). However, he agreed radiation detection is more protective of the public health, safety and welfare. *Id.*

Mr. Nickodem's report for the Village indicates the screening proposed for Lowe was inadequate. (C00463, p. 2). However, Mr. Nickodem testified the scale house and the concrete transfer building would provide screening from noise and visual impacts for both Bright Oaks and The Hollows. (C00216, pp. 7 and 34-42). Additionally, he agreed Lowe's concrete building provides more noise abatement than the steel building he designed for Woodland. Mr. Nickodem agreed Lowe's concrete building and the 1200-1400 foot distance between the Facility and Bright Oaks provides a noise buffer for the residents. *Id.*

b. Waste Unloading and Inspections.

After exiting the scale house building, collection trucks approach the apron and back into one of six different unloading bays in the transfer building. All unloading of waste will take place within the transfer building. (C00001, Executive Summary; Sec. 2, p. 2-7: Sec. 5, p. 5-3).

This design feature was deliberately chosen so the risk potential for blowing litter by untarping on the apron would be eliminated. (C00179, p. 65). Certain bays will be utilized in sequence, and the drivers will back from left to right to maximize visibility. (C00001, Sec. 5, p. 5-7; C00179, p. 27). This activity is screened from The Hollows to the west by the scale house and Bright Oaks to the east by the transfer building.

The tipping floor can accommodate more than twice the anticipated incoming waste during peak hours and has 20 foot wide rather than 15 foot wide bays. The bays were increased to the 20 foot width to ensure the operation will be safe and efficient. (C00179, p. 28). In fact, the only concern expressed during the hearings regarding the tipping floor was it seemed to be too large. (C00180, pp. 76-77). The transfer building will also include a special segregated waste contingency management area. (C00001, Sec. 5, p. 5-28 and Drawing 5-E-3); C00179, p. 28).

Mr. Nickodem in his testimony on behalf of the Village admitted that he did not include a separate waste contingency management area in the Woodland design. (C00217, pp. 12-13). He justified this omission on the basis that Woodland didn't plan on having unacceptable waste at the facility. *Id.*

c. Waste Loading.

All loading of the transfer trailers will take place within the enclosed loading tunnel. (C00001, Executive Summary; Sec. 2, pp. 2-5 and 2-8; Sec. 5, pp. 5-6 to 5-8). The transfer trailers enter directly into the transfer building via the drive through tunnel. *Id.* The transfer building is designed with ramps of extremely gentle slopes to allow for easy access to and from the loading tunnel. (C00001, Sec. 5, p. 5-8; C00179, p. 31). Slotted drains have been designed

on both sides of the tunnel for surface water protection, specifically, to minimize the amount of contact water generated. (C00001, Sec. 5, pp. 5-9 to 5-10; C00179, p. 31).

In his testimony for the Village, Mr. Nickodem raised criticism about the loading tunnel and its safety. (C00214, pp. 48-51). He testified his design for Woodland provided for the transfer trailers backing into the transfer building for loading. *Id.* He further testified there is more potential for accidents in a backing maneuver than the drive through maneuver proposed by Lowe. *Id.*

d. Tarping and Weighing.

After the transfer trucks have been loaded, they will be tarped indoors, an additional feature that exceeds standard design for a waste transfer station, to completely eliminate the potential for blowing litter. (C00001, Sec. 2, pp. 2-4 to 2-5; C00179, p. 33). All pavement in the tarping gallery is within the contact water system and any water will go into the contact water storage tanks instead of into the surface water system. (C00001, Sec. 5, pp. 5-9 to 5-10 and Drawing 5-E-4; C00179, p. 32). It is plain to any observer that these design features and operating practices will minimize impacts to surrounding property owners.

e. Storm Water Management.

The storm water system designed for the Facility will cause all surface water on-site to flow into an underground chamber where it will be stored before percolating into the ground. (C00001, Sec. 2, pp. 2-9 to 2-12; C00179, pp.12-13; C00223, pp.46-62). The design includes gently sloping vegetative waterways allowing for the settlement of silt as water flows through those drainage ways. There are water quality catch basins for the removal of silt, oil and grease before stormwater enters the underground chamber. The operations plan for the Lowe Facility

provides for routine inspection and maintenance of the stormwater system. *Id.* There will be no surface discharge from the system (with the exception of a very small discharge in the event of a 100-year storm). Furthermore, the storm water system is designed to comply with both the existing County drainage standards as well as the proposed McHenry County Watershed Development Ordinance. (C00001, Sec. 2, pp. 2-9 to 2-12; C00179, p. 12).

Mr. Nickodem, on behalf of the Village, agreed it is not normal to find a lot of oil, grease and grit that could get into the storm water system on a transfer station site. (C00216, p.49). He further testified oil and grit separators are used in transfer station designs to provide additional safeguards. *Id.* A leaking collection truck is a minimal occurrence at a transfer station. (C00217, p. 16).

For the Village, Mr. Thomas in his report opined the water quality catch basins were to small to effectively remove oil from the storm water in high flow conditions. (C00326, p.6). However, he admitted he had done no calculations to support this statement. (C00189, 0. 63). In his report, Mr. Thomas recommended that the storm water run off at the Lowe Facility be pre-treated. (C00326, p. 3). However, he testified he knew of no transfer stations in the United States that utilize pre-treatment of storm water. (C00189, p.28).

For the Village, Mr. Sutherland in his report opined the proposed detention provided by Lowe will be significantly less than the detention required. (C00478). However, on direct examination, Mr. Sutherland requested this statement be eliminated from this report. (C00218, p. 69-71). He further advised recommendation three in his report also required correction. *Id.*

He agreed more detention is required under the proposed McHenry County Watershed Development Ordinance than under existing regulations. (C00219, p. 18). Lowe is not required

to meet the draft Ordinance. *Id.* at p. 26 While criticizing the capacity of the proposed underground storm water chamber, Mr. Sutherland admitted he had performed no calculations that would demonstrate its lack of capacity. (C00218, pp. 92-93). He further admitted he could not say the calculations contained in the application were incorrect. (C00219, p. 13).

f. Groundwater Protection.

A hydrogeologic study was completed by a licensed hydrogeologist and is included as part of the application. (C00002, App. A). Other than Lowe's witness, Doug Dorgan, no other hydrogeologist testified and the County made no credibility finding in support of its resolution.

Geomembrane Liner

The Facility is designed to protect groundwater using a reinforced concrete floor with sealed joints to prevent leakage through the floor. As an additional safety feature, the design includes the placement underneath the entire transfer building of a high density polyethylene geomembrane liner. (C00001, Sec. 2, p. 2-9 and Sec. 5, p. 5-9 and Drawing 5-E-4; C00178 , p. 139). The additional cost of the installation of the geomembrane is estimated at $50,000. (C00186, p. 61).

The geomembrane liner is a feature that exceeds standard design for a waste transfer station and has never been used in Illinois in a transfer station facility design. (C00178, pp. 139-140). The geomembrane liner provides an additional means of guaranteeing no groundwater contamination from the transfer process. (C00001, Sec. 2, p. 2-9; C00178, p. 140; C00179, p. 30). The Facility will contain two storage tanks of 1,000 gallons each that will be more than sufficient to handle any accumulated liquid contact water. (C00001, Sec. 5, pp. 5-9 to 5-10; C00178, pp. 140-141).

For the Village, Mr. Nickodem testified that the geomembrane liner under the Lowe transfer building provides additional protection from any potential groundwater contamination. (C00216, p. 43). Mr. Nickodem also testified a geomembrane liner was not proposed for Woodland or any other transfer station facility he had ever seen. *Id.* Mr. Nickodem further admitted he never even considered such a design feature for Woodland even though Woodland is adjacent to the Illinois prairie path and its sensitive nature. *Id.*

For the Village, Mr. Thomas testified one cannot make a general statement about the time it takes water to move through any type of generalized till because "in each location it's entirely different". (C00189, p. 26). Yet in his testimony, he estimated, based on the modeling previously done for the Village, that groundwater from the Lowe site would take 10 to 20 years of travel time horizontally before it would reach the Village's Well Number 8. (C0190, pp.78-81). Mr Thomas opined that the vertical travel time for water to percolate through the 120 foot clay layer would be anywhere from three months to a couple of years. When asked the basis for his opinion, he answered he had no actual knowledge of the soils under the Facility site and his opinion was based on his experience. *Id.*

U. S. Route 14 storm water system goes directly into the same groundwater system of the Lowe Facility. (C00189, p. 30). Mr. Thomas agreed the potential risk for contamination from broken truck lines on the site is the same as for vehicles on U. S. Route 14. *Id.* at p. 47.

Mr. Thomas admitted he knows of no transfer stations that have caused groundwater contamination. (C00190, p.75). He further admitted he knows of no contamination from surface water run off at any transfer station. (C00190, p.88).

Groundwater Monitoring Wells

Additionally, the Lowe Facility is designed with two groundwater monitoring wells that will allow monitoring of groundwater beneath the Facility to detect any impact to groundwater from the transfer station. (C00001, Sec. 2, pp. 2-12 to 2-13; C00179, pp. 5-6). The State of Illinois requires monitoring wells for landfills, but not for transfer stations. (C00199, p. 66). Again, this feature is a first in Illinois for a transfer facility not associated with an existing landfill. The record discloses the Lowe Facility will not have any impact on area wells or down stream Lake Killarney or Lake Plote due to the number of redundant design features including the geomembrane liner and the two groundwater monitoring wells. (C00179, p. 7). The record clearly discloses that the Facility was designed with the protection of the area's groundwater as one of its key design elements.

g. Additional Special and Unique Design Features.

In order to avoid developing a wind tunnel effect in the loading tunnel, the transfer building has been designed with automatic doors that will shut after transfer trucks enter the tunnel– further reducing the potential for litter and noise. (C00001, Sec. 5, pp. 5-7 to 5-8; C00179, pp. 33-34). The transfer building has been designed to have the open side face into the prevailing wind. The wind will hit the closed or blind side of the building minimizing the potential for wind-blown distribution of litter from the building or tunnel. (C00001, Sec. 5, pp. 5-3 to 5-4; C00179, p. 34).

Another special design feature minimizing any potential impacts is the loading tunnel system. The loading tunnel will be 10-feet below grade and lined on the side nearest Bright Oaks with an exterior earthen berm and landscaping. (C00001, Sec. 5, p. 5-3; C00179, pp. 34-35).

There will be an additional six (6) foot high retaining wall along the edge of the tunnel ramps into and out of the transfer building. (C00001, Executive Summary; Sec.3, Part 2, Drawings 3-L-1 to 3-L-3). This combination of design features clearly will minimize noise, litter and visual impact to the Bright Oaks Subdivision and The Hollows.

As an additional redundant design safeguard, there will be a second inspection inside the scale house building to confirm transfer trucks are properly tarped and operating properly. There will be a control gate inside the scale house operated by the scale house attendant. No transfer truck will be allowed to leave unless the trailer has been fully covered and inspected. (C00001, Sec. 5, p. 5-8 and Drawing 5-E-9; C00179, pp. 35-36).

The transfer building is designed using pre-cast concrete which exceeds standard design for a waste transfer station. Over 95% of transfer stations are constructed using metal. The concrete construction will provide noise abatement and aesthetics. (C00001, Sec. 5, p. 5-4; C00179, p. 38). The concrete structure eliminates the need for any provisions for insulation for noise abatement purposes. The concrete structure is another amenity that is not part of the conventional transfer station design. (C00179, p. 38).

The transfer building incorporates a number of additional design features to minimize potential odor and to provide vector control, including having automatic doors on the tunnels, opening the building on only one side, mechanical carbon filter ventilation, prompt removal of waste, daily cleaning of the transfer building and paved surfaces, the concrete transfer building, retention of a professional exterminator and no overnight storage of waste on site. (C00001, Executive Summary and Sec. 5, pp. 5-3 to 5-4; C00179, pp. 40-42).

For the Village, Mr. Nickodem testified that removing all the waste from the tipping floor at the end of each day is the key to controlling vectors, along with good housekeeping and maintenance practices. (C00217, pp. 23-25). He agreed that all of the odor control measures he proposed for Woodland were included in the Lowe Facility. (C00217, pp. 25-28). However, the Woodland facility planned to store waste after hours on the site both in the building and outside. *Id.* He included no carbon filters in his Woodland design, but agreed that carbon filters in the ceiling ventilation system as proposed by Lowe would reduce odor. (C00217, pp. 30-31)

h. Landscaping Plans.

The Facility was designed to protect The Hollows adjacent to the Facility through an extensive landscaping plan, building orientation and building appearance, installation of the geomembrane liner and groundwater monitoring wells and operational features specifically selected to minimize any potential impacts. (C00001, Sec. 2, p. 2-3). The landscaping plan was developed through consultation with the Conservation District and its staff. (C00001, Sec. 3, Part 2; C00178, p. 138). There is also extensive landscaping and a tiered berm proposed for the eastern property line that faces Bright Oaks. (C00001, Sec. 3, Part 2, Drawings 3-L-1 to 3-L-7; C00192, pp.22-23). Evergreen tress were chosen for the landscaping to provide a year-round screening. (C00001, Sec. 3, Part 2; C00195, pp. 93-94).

It is indisputable the record discloses the Facility has been designed with provisions that exceed industry standards and regulatory requirements. It is also clearly evident from the record the design of the Facility will protect the public health, safety and welfare.

4. The Transfer Station Is Located So As to Protect the Public Health, Safety and Welfare.

The site chosen for the Lowe Facility is zoned I2 - Heavy Industry in McHenry County. (C00001, Sec. 3, p.6). The Facility has direct access to U.S. Route 14, a federal highway, with traffic volumes averaging 23,700 per day. U.S. Route 14 is a Class I Roadway with a weight limit of 80,000 pounds per vehicle. (C00001, Sec. 6, p.6). The County's Solid Waste Management Plan, 10-Year Update states that the ideal transfer station location should have access to major roadways. (C00002, App. H, p. 8-47). The County's Plan also states that a transfer station should be in industrial zoned areas. *Id.* p.9-36. The record discloses the Lowe Facility's location meets the standards of the County's Plan. See Criterion 3, page 23, for more detail, *infra*.

5. The Facility's Operations Plan Is Designed So As to Protect the Public Health, Safety and Welfare.

The Facility will not accept hazardous waste. (C00001, Application; Sec. 5, pp. 5-2 and 5-3). Incoming waste will be screened for potential hazardous waste by trained employees. (C00001, Sec. 5, pp. 5-22 to 5-24; C00179, p. 29). In the event any potential hazardous waste is brought on site, it will immediately be segregated into a contingency waste management area in order to identify, preclude and, ultimately, determine the appropriate method for disposal. *Id.* Emergency response contractors will be retained to identify, test, isolate and haul off any material deemed as hazardous. *Id.*

Lowe will retain a certified transfer station operator as manager, even though Illinois presently does not require certification of transfer station operators. (C00179, p. 39). The entire staff will be required to receive training in waste screening, health and safety protocol and

emergency response. (C00001, Sec. 5, p. 5-22; C00179, p. 39). Lowe will assign a minimum of one laborer for litter management. (C00001, Sec. 5, pp. 5-15 to 5-16; C00179, p. 40).

The record discloses the superior qualifications of Lowe's experts Keith Gordon, Dan Zinnen and Doug Dorgan. It is indisputable that Mr. Gordon's experience and record in solid waste transfer station design and management are recognized nationally. As this Board has determined previously, a facility designed by an experienced design engineer to be in compliance with the standards for non-hazardous waste set by the Illinois Environmental Protection Agency satisfies Criterion 2. *Clutts v. Beasley,* 185 Ill.App.3d 543 (5th Dist. 1989). As the record clearly and plainly demonstrates the Lowe Facility was designed to not only meet existing standards but, in fact, exceeds most of those standards.

As demonstrated by the record, the Village's witnesses only speculated on general issues of possible concern. All of the Village's witnesses failed to provide any evidence and, in many cases, their opinions were contradicted by their own testimony. The record is devoid of any evidence the design of the facility does not meet EPA and industry standards. The record, in fact, discloses all governmental minimum standards have been met and in many cases exceeded. The record clearly demonstrates Lowe employs state-of-the-art technology in both design and operations – a fact acknowledged by siting committee members and opponents. The manifest weight of the evidence in the record clearly and plainly demonstrates Lowe met its burden of proof for Criterion 2.

B. The County Board's Finding on Criterion 3 Was Against the Manifest Weight of the Evidence.

> Criterion 3: "the Facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property."
> 415 ILCS 5/39.2(a)(iii)

The County Board's finding on Criterion 3 was also against the manifest weight of the evidence.

Criterion 3 requires only that the applicant establish the facility be located to minimize, not eliminate, the effect on surrounding property values. *File v. D&L Landfill*, 219 Ill. App.3d 897 (5th Dist. 1991). The law requires only that the location minimize incompatibility and effect on property values, not guarantee that no fluctuation will result. *Clutts v. Beasley*, 185 Ill. App.2d 543 (5th Dist. 1989). Nor does the statute require the applicant choose the best possible location to guarantee that no fluctuation in property value occurs. *Sierra Club v. Will County Board,* PCB 99-136, slip op. at 27 (1999), citing *Clutts v. Beasley,* 185 Ill.App.2d 543 (5th Dist. 1989).

Criterion 3 does not require proof that the applicants can assure the public an odor-free facility or roads utterly devoid of stray papers. *E & E Hauling, Inc. v. Pollution Control Board*116 Ill.App.3d 586 (2nd Dist. 1983). Few applicants could gain approval under a standard so strict.*Id.* This criterion requires an applicant to demonstrate more than minimal ~~efforts to reduce the facility~~'s incompatibility. *File*, 219 Ill.App. 3d at 907. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. *T.O.T.A.L. v. City of Salem*PCB 96-82 (1996); *Waste Management, Inc. v. Pollution Control Board,* 123 Ill.App.3d 1075 (2nd Dist. 1984). Criterion 3 calls for the facility to be located so as to 'minimize' incompatibility – but does not allow rejection simply because there might be some reduction in value. *A.R.F. Landfill, Inc. v. Lake County,* PCB 87-51 (1987), citing *Watts Trucking Service, Inc. v. City of Rock Island,* PCB 83-167.

Lowe, in its Application and at the public hearing, demonstrated that no or little incompatibility exists and that it had taken extraordinary measures to minimize any perceived incompatibility and property value impact.

1. Lowe's Witnesses.

Larry Peterman

Mr. Larry Peterman testified regarding the first part of Criterion 3. Larry Peterman is the Vice President of Real Estate Development for Hitchcock Design Group and has over thirty-two years of experience in land planning. He has been involved in over one-thousand projects related to land planning and evaluating compatibility of property, including sand/gravel excavation and long-term reclamation plans for Prairie Materials and Meyer Materials and landfill expansion and transfer site for CDT Landfill. (C00001, Application; C00191, pp. 60-61).

Frank Harrison

Frank Harrison testified regarding the impact of the Facility on property values. Mr. Harrison is a professional real estate appraiser and consultant who has worked in the real estate industry for 32 years. (C00001, Application ; C00191, p. 6). He has CRS, MAI and CRE designations as an appraiser. (C00001, Application; C00191, p. 7). Mr. Harrison has extensive experience in evaluating impacts of property values due to various land uses, including interstate highways, gravel operations, sewer treatment plants and peaker power plants. (C00191, pp. 8-9). He has appeared in administrative proceedings regarding zoning issues in an estimated 30 to 40 different governmental jurisdictions primarily within McHenry and Lake counties. (C00191, p. 11).

Mr. Harrison was appointed to the original Real Estate Appraisal Board of the State of Illinois in 1989 by Gov. James Thompson. (C00001, Application). He was on the Board for 10 years serving as its Chair for the last two years. Mr. Harrison has written courses, books and seminars for the Appraisal Institute. In 1996, his book, *Appraising the Tough Ones,* was

published by the Appraisal Institute. Mr. Harrison has received numerous awards in the appraisal field including being the recipient twice of the Appraisal Institute's George L. Schmutz Memorial Award for his contributions to the advancement of appraisal knowledge. *Id.*

2. Village's Witness.

The Village approved Resolution No. #R03-02-01, A Resolution in Opposition to the Siting of the Northwest Highway Transfer Facility at 3412 Northwest Highway, on February 4, 2003. (C01299-C01301). Afterwards, the Village hired its witnesses attempting to back up their public statement of opposition.

The Village offered N. Drew Petterson as its witness regarding the incompatibility portion of Criterion 3. Mr. Petterson admitted he had never visited a transfer station site before writing his report or giving his testimony in opposition to the Lowe Facility. (C00209, p.39-41). Mr. Petterson further admitted he had never previously rendered an opinion on a transfer station nor done any studies concerning Criterion 3. (C00209, p.41).

3. Bright Oaks' Witness.

Bright Oaks offered John T. Whitney as its witness on the property value portion of Criterion 3. C00220 (p. 24). Mr. Whitney prepared no written report. He simply offered testimony. *Id.*

4. The Location of the Facility Minimizes Incompatibility.

Mr. Peterman evaluated the location of the Facility relative to adjacent land uses by reviewing all the appropriate subdivision and zoning ordinances and comprehensive plans. (C00001, Sec. 3, Part 1, p. 4; C00191, p. 63). Mr. Peterman reviewed the site plan for the

Facility. (C00001, Sec. 3, Part 1, p.4; C00192, p. 18). He also examined the site and the surrounding area. (C00001, Sec. Part 1, p.4; C00191, p. 64).

The proposed Facility and surrounding properties are not incompatible. The proposed Facility site is zoned I-2. (C00001, Sec. 3, Part 1, p. 6; C00191, p. 5). The Welch and Lowe Enterprises properties immediately adjacent to it are also zoned I-2. (C00001, Sec. 3, Part1, p. 9; C00191, p. 5). Both the Facility site and the adjoining properties to the south and southeast presently have heavy industrial uses. *Id.* The Facility's existing zoning classification would allow for many more intense industrial uses than the proposed waste transfer station. (C00001, Sec. 3, Part 1, p. 19; C00192, pp. 26-27; C00263-C00276). Permitted uses in the Heavy Industry zoning district include such intense uses as meat packing plants, automobile wrecking yards, recycling collection and processing facilities, rendering plants, sawmills and slaughterhouses. (C00001, Sec. 3, p. 19; C00263). Although the adjacent property, The Hollows, has a recreational use, it is also zoned I-2, and, as such, may be leased for an industrial use. (C00192, p. 8). Thus, the character of the surrounding area is significantly influenced primarily by existing industrial, business and related uses, and no incompatibility exists. (C00001, Sec. 3, Part 1, p. 12; C00192, pp. 5-7).

As previously mentioned, the USEPA classifies waste transfer stations as a "light industrial" use (C00001, Sec. 3,Part 1, p.19). However, the County staff and consultants were not convinced transfer stations are best classified as an "industrial" use. (C03868). In its findings of fact, the County staff and consultants concluded transfer stations lack any type of manufacturing element. As such, transfer station operations more closely reflected an intense commercial use, rather than industrial type of use. *Id.* Whether deemed an "intense commercial"

or a "light industrial" use, the proposed Facility is clearly compatible with surrounding property uses and certainly less intense than the permitted uses under the I-2 zoning district.

The landscaping for the site along the northwesterly boundary was designed in consultation with the McHenry County Conservation District to protect The Hollows. (C00001, Sec. 3, Part 2 ; C00192, p. 26). The types and amounts of vegetation along the joint property line with The Hollows were selected as a result of this consultation. There is also an extensive landscaping and berm proposed for the eastern property line that faces Bright Oaks. (C00001, Sec. 3, Part 2, Drawings 5-L-1 to 5-L-7; C00192, pp. 22-23). Evergreen tress were chosen for the landscaping to provide a year-round screening. (C00001, Sec.3, Part 2; C00192, p.22; C00195, pp. 93-94). The cost estimate for the landscaping to create a buffer to the properties to the east was $100,000. (C00194. p. 22).

Mr. Peterman identified fourteen factors demonstrating the Lowe Facility met the first part of Criterion 3. (C00001, Sec. 3, Part 1, pp. 19-21). These factors included its industrial zoning, its access to a federal highway, no overnight storage of waste on site, peak traffic periods for Lowe do not coincide with the U.S. Route 14 peak traffic periods, the extensive landscaping plan, and the design and operations plan for the Facility. *Id.*

The Village witness, Mr. Petterson, never contradicted the evidence provided by Lowe. In fact, Mr. Petterson agreed the concrete transfer building would provide a visual screen better than a metal building and would reduce the sound emanating from the site. (C00209, pp.32-36). Given the landscaping proposed for the Facility, Mr. Petterson testified the only part of the Facility you would probably see from Bright Oaks would be the top of the transfer building. *Id.*

Mr. Petterson agreed the underground transfer trailer tunnel will screen noise from Bright Oaks and the Hollows and the carbon filters will mitigate odors. *Id.*

Mr. Petterson never was on the proposed site, he simply drove by. (C00209, p. 35). At the hearing, Mr. Petterson admitted the opinion in his report that the Facility was not large enough to create an effective buffer was not based on any personal expertise with odors emanating from a transfer station, nor any studies of how large buffers need to be to be effective. (C00209, pp. 42-44). Instead Mr. Petterson's opinion was based solely on conversations with the Village hired experts who told him there would be odors. *Id.* In fact, throughout his testimony, Mr. Petterson consistently admitted his opinions on various features of the Facility were not based on any studies nor grounded upon his education, experience and expertise but were based on conversations with the Village's retained witness, Mr. Nickodem. (C00209, pp. 46-50, 53-54).

Mr. Petterson acknowledged he had no personal knowledge of the effects of noise and odor from a transfer station on adjoining properties. (C00209, pp. 53-57). Mr. Petterson admitted he relied totally on Mr. Nickodem's comments as the basis of his opinions instead of any personal knowledge or experience. (C00209, pp. 63-65).

The record clearly reveals that with the location of the Facility in an area of industrial and commercial uses as well as the many extensive design features proposed for the Facility there is no or little incompatibility and that Lowe has taken extraordinary measures to minimize any perceived incompatibility.

5. The Location of the Facility Minimizes the Effect on Property Value.

Lowe also demonstrated that it had taken extraordinary design and operational measures to minimize any impact the proposed Facility might have on surrounding property values.

Mr. Harrison testified he is very familiar with the Facility site and its surrounding properties as he has appraised those properties in the past. (C00191, p. 12). He inspected all properties within one mile of the Facility as well as inspecting the applicable zoning maps and comprehensive plans for both McHenry County and the Village. (C00001, Sec. 3, Part 3, p. 1; C00191, p. 13).

As part of his property value impact study, Mr. Harrison studied eight waste transfer stations located in the Chicago area. (C00001, Sec. 3, Part 3, p. 1; C00191, pp. 25-26). In investigating the eight transfer stations, he attempted to determine the character of the surrounding area to determine whether any of the stations would be potentially applicable to the study he was undertaking with respect to the Lowe Facility. He used four of the eight transfer stations in his study. (C00001, Sec. 3, Part 3, p. 2; C00191, pp. 27-28). Mr. Harrison performed his study by evaluating a "target area" and a "control area." A "control area" is an area where the properties are similar to those in the "target area", but they are removed from the potential area of influence, usually by geographic means such as distance. (C00001, Sec. 3, Part 3, p.7; C00191, pp. 31-32).

a. Northbrook Transfer Station Study.

Mr. Harrison analyzed the Northbrook Transfer Station ("Northbrook"), located in unincorporated Northfield Township, adjacent to the Villages of Glenview and Northbrook. (C00001, Sec. 3, Part 3, p. 6; C00191, p. 33). Northbrook received an average of approximately

350 tons of waste per day in 1998 and 1999. It is situated on approximately 2.42 acres. (C00001, Sec. 3, Part 3, p. 6; C00191, p. 36).

Northbrook is located within approximately 200 feet of a town home development known as Princeton Village. Princeton Village and Northbrook are separated by a railroad right-of-way. (C00001, Sec. 3, Part 3, p. 7; C00191, p. 34). Northbrook has been in existence and operational since 1983. *Id.* Princeton Village, which consists of 195 attached town home units, commenced development in 1989 and is presently fully developed. The price range for the town homes in Princeton Village is between $300-$400,000. *Id.*

Mr. Harrison testified there were no other similar developments to Princeton Village in the general geographic area he could use for comparison purposes. (C00191, p. 35). He used a line of approximately 1,000 feet from the transfer station as the separation for the target and control areas. *Id.*

After Mr. Harrison identified his target and control areas for Northbrook, he obtained information relative to sales that have occurred in both those areas. He used the Multiple Listing Service records and public records at the township offices. (C00001, Sec. 3, Part 3, p. 7; C00191, p. 36). For the target area, he identified 37 properties where there were sales and re-sales between March of 1990 and February of 2002. (C00001, Sec. 3, Part 3, p. 8; C00191, p. 36). He did not do any adjustments to the sale and re-sale data. (C00191, p. 37). Based on the sale and re-sale data he obtained, Mr. Harrison concluded that the annual appreciation rate for the target area was 1.257% per year. (C0001, Sec. 3, Part 3, p. 8; C00191, pp. 37-38). For the control area, he found 25 sales. Based on his sale and re-sale data, he determined an average annual appreciation rate for properties in the control area of 1.325%. *Id.*

Based on his comparison of the annual appreciation rates for the target and control areas, Mr. Harrison concluded that the location of the Northbrook Transfer Station did not influence surrounding property values. (C00001, Sec. 3, Part 3, p. 9; C00191, pp. 38-39).

Testifying for Bright Oaks, Mr. Whitney agreed that the Northbrook site in Mr. Harrison's study was most representative of the Lowe site. (C00220, p.77). However, Mr. Whitney testified there are two factors in Princeton Village that could possibly effect the values of surrounding property – the railroad track and the transfer station, (C00220, pp.55-56). He further agreed the value of homes in Princeton Village already reflected the influence of the railroad track because the railroad track pre-existed the development of Princeton Village. (C00220, pp. 56-59).

Letters From Princeton Village Residents

There were two letters sent to the County Board from residents in Princeton Village. (C00191, pp. 42-46; C02450-C02452). Mr. John Crawford, a lawyer, is the President of the Princeton Village Homeowners' Association as well as a Trustee of the Glenview Village Board. *Id.* Princeton Village was approved by the Glenview Plan Commission and the Village Board twelve years ago. The village officials did not find the creation of Princeton Village to be incompatible with the operation of the Northbrook transfer station. Princeton Village has many residents, including Mr. Crawford, who have been there from the beginning, and the value of the homes has increased consistently over the years. *Id.*

Mr. William Bashkin, an appraiser, lives in one of the buildings closest to Northbrook. *Id.* All of the properties in Princeton Village have consistently maintained their property value, and, in fact, values have increased each year. In Mr. Bashkin's work as well as in discussions

with other residents of Princeton Village, the slight difference in value of homes between homes on the western and eastern side of the subdivision is directly attributable to the location of the railroad tracks and not to the uses on the east side of the tracks. *Id.*

Who would be in a better position to verify the lack of impact of a neighboring transfer station than the residents who have lived near one for years? According to County staff, the letters of John Crawford and William Bashkin indicate the residents of Princeton Village do not believe the presence of the Northbrook transfer station has an impact on their property values. (C03872).

b. Groot Transfer Station Study.

Mr. Harrison analyzed the Groot Chicago Transfer Station ("Groot") located near O'Hare International Airport. (C00191, pp. 46-47). Groot sits on 6.63 acres. In the year 2000, it received 1,888 tons of waste per day. (C00001, Sec. 3, Part 3, p. 18; C00191, pp 47-48). Mr. Harrison set up the target area approximately 1/4 mile from Groot in all directions. The target area contained 43 improved industrial properties that sold between April of 1985 and August of 2002. (C00001, Sec. 3, Part 3, p. 19; C00191, p. 48). The control area was located in the same industrial park but approximately 3/4 mile away from Groot. For the control area, he found 42 sales that occurred between December of 1987 and June of 2002. *Id.*

Mr. Harrison did two types of analyses for Groot. (C00001, Sec. 3, Part 3, pp. 19-21; C00191, p. 48). He first looked at the average unit price of the industrial sales in both the target and control areas. He calculated the average sales price in the target area was $34.63 per square foot; for the control area, it was $33.54 per square foot. (C00001, Sec. 3, Part 3, p. 20; C00191,

p. 49). Based on that data, Mr. Harrison concluded that there was no influence by Groot on surrounding property values. *Id.*

In addition to doing an average unit price analysis, Mr. Harrison did a sale and re-sale analysis in the same target and control areas. He identified 6 sales and re-sales in the target area and calculated an average appreciation rate of over 3% per year. (C00001, Sec. 3, Part 3, pp. 20-21; C00191, pp. 49-50). For the control area, he found 7 sales and calculated an average appreciation rate of 2.34% per year. *Id.* Based on his analyses of the average unit prices and sale and re-sale analyses, Mr. Harrison concluded that Groot had no measurable influence on the value of industrial properties in the surrounding area. (C00001, Sec. 3, Part 3, p. 21; C00191, p. 50).

c. Rolling Meadows Transfer Station Study.

Mr. Harrison analyzed the Rolling Meadows Transfer Station ("Rolling Meadows"). This facility is located on 6.7 acres and in the year 2000 received 755,000 tons of waste. (C00001, Sec. 3, Part 3, p. 30; C00191, pp. 50-51). For Rolling Meadows, there was insufficient sale activity to do any type of meaningful sale and re-sale analysis. (C00191, p. 51). Mr. Harrison divided the target area and the control area with a large industrial property.

For the target area, he identified 8 properties that had sold between September of 1995 and December of 1999. (C00001, Sec. 3, Part 3, pp. 31-32). Based on those sales, he calculated an average unit price of $42.17 per square foot. *Id.* For the control area, he found 11 properties that sold with an average unit price of $42.63 per square foot. *Id.* From his comparison of those average unit prices between the target and control areas, Mr. Harrison concluded that there was no measurable impact on surrounding industrial property values by Rolling Meadows. *Id.*

d. ARC Disposal and Recycling Facility Study.

Mr. Harrison's fourth study involved an analysis of the ARC Disposal and Recycling Facility ("ARC") in Mt. Prospect, Illinois. The ARC facility is located on 3.28 acres and was constructed in 1984. (C00001, Sec. 3, Part 3, p. 39; C00191, p. 54). In the year 2000, it received an average of 922 tons of waste per day. *Id.*

Mr. Harrison included ARC in his analysis because the Village's Comprehensive Plan designates part of the adjoining property as "multiple family" and there are numerous apartment buildings near ARC. (C00001, Sec. 3, Part 3, p. 40; C00191, pp. 52-53). In analyzing whether ARC had any impact on the neighboring apartment buildings, Mr. Harrison first investigated whether there had been sales of any apartment buildings and found there had not been. (C00001, Sec. 3, Part 3, pp. 40-41; C00191, pp. 53-54). Therefore, he conducted his analysis by determining whether the amount of rent charged for those properties had been effected by the facility. *Id.*

Mr. Harrison used three apartment complexes as the target area and six apartment complexes as the control area. (C00001, Sec. 3, Part 3, p. 41; C00191, pp. 54-55). In addition to analyzing the rent, Mr. Harrison also spoke to a number of managers of the apartment buildings and inquired as to what factors affected their occupancy rates. (C00001, Sec. 3, Part 3, p. 42; C00191, p. 55). Based on his interviews with managers and the analysis of the rents in the area, Mr. Harrison concluded that rents for the target and control areas were reasonably close and that ARC has not influenced the rents for apartments in the surrounding area. (C00001, Sec. 3, Part 3, pp. 42-43; C00191, pp. 55-56).

Mr. Harrison concluded that based on the analysis he performed at the four different transfer station sites, the Lowe Facility is located and has design features that will minimize any effect on the value of surrounding property. (C00001, Sec. 3, Part 3, p. 43; C00191, pp. 56-57).

The testimony of Bright Oaks witness did not diminish any of the testimony offered by Lowe's witness. Mr. Whitney admitted he was not present to hear Mr. Harrison's testimony. (C00220, p.55). While the majority of Mr. Whitney's comments related to his objections to the methodology Mr. Harrison had used, Mr. Whitney agreed the methodology of target and control areas is an acceptable method of evaluating values. (C00220, p.54). According to County staff and consultants, the procedure used by Mr. Harrison was appropriate to determine impact of a proposed development on surrounding properties. (C003871).

Mr. Whitney admitted gravel mining on The Hollows site pre-existed the development of Bright Oaks and the mining on the Plote property took place subsequent to the development of at least part of Bright Oaks. (C00220, pp.60-62). He further admitted Bright Oaks values already incorporate these surrounding industrial uses. He also agreed the heavy industrial uses adjacent to Bright Oaks and the potential zoning and heavy uses of adjoining properties did not inhibit the development of Bright Oaks. *Id.*

Mr. Whitney admitted he made no independent study of the raw figures he used to critique Mr. Harrison's report. (C00220, p. 63). He was unaware of any published reports on the impacts of transfer stations on communities in northern Illinois nor did he consult with any other professionals with experience in transfer stations before reaching his opinions. (C00220, p. 83).

Board Member Ann Kate

Siting Committee Member Ann Kate asked Mr. Whitney:

> Bright Oaks has a grocery store strip mall shopping center with fast food restaurants not too far away. It has an extremely busy highway, Highway 14 not too far away, and at one time it had gravel mining. There is industry around. There is a railroad track nearby. Would a transfer station make that much difference if it went in?

(C00220, pp. 80-81). Mr. Whitney replied "**without having done a proper study on the effect of surrounding property values, I really couldn't responsibly answer your question**." *Id.* Mr. Whitney further responded to Ms. Kate, "**I don't have an opinion until I do that type of analysis**." *Id.* As County staff and consultants observed in its findings of fact, Mr. Whitney raised numerous concerns about the methodology used, but he did not say Lowe's proposed development would negatively impact property values. (C03873). In fact, he had no opinion on the subject. *Id.*

As the record discloses, Mr. Petterson and Mr. Whitney only speculated on possible concerns. Mr. Petterson and Mr. Whitney failed to provide any evidence in the record and, in many cases, they were contradicted by their own testimony. The record discloses the suitability of the location for a waste transfer station and the substantial features incorporated into the design and operation of the Facility to minimize any perceived impacts on surrounding properties and property values. The manifest weight of the evidence in the record clearly and plainly demonstrates that Lowe met its burden of proof for Criterion 3.

C. The County Board's Finding on Criterion 5 Was Against the Manifest Weight of the Evidence.

The County Board's finding on Criterion 5 was against the manifest weight of the evidence.

> Criterion 5: "the plan of operations for the Facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents. 415 ILCS 5/39.2(a)(v)

Criterion 5 requires minimization, not elimination, of any problems because it is virtually impossible to guarantee that no accidents will occur. *Wabash and Lawrence Taxpayers Association v. Pollution Control Board*, 198 Ill. App.3d 388 (5th Dist. 1990). The issue is safety, with the emphasis on avoiding or minimizing damage from catastrophic accidents. *Industrial Fuels & Resources v. Pollution Control Board*, 227 Ill. App.3d 533 (1st Dist. 1992). An accident-proof facility is not required. *Id.* Criterion 5 does not allow rejection of site location suitability based only on the existence of a danger; rather, it requires approval if the facility is designed to minimize the danger. *Watts Trucking Inc., v. City of Rock Island,* PCB 83-167 (1984).

A plan of operations is sufficient where it provides a reasonable blueprint or overview of procedures, and includes (a) identification of persons responsible for implementation, (b) description of emergency procedures, (c) list of outside agencies to be notified and (d) emergency response instruction for facility personnel. *Industrial Fuels & Resources v. Pollution Control Board*, 227 Ill.App.3d 533 (1st Dist. 1992). The plan need not include all details of any coordination agreements with police, fire and disaster relief agencies. An alleged lack of detail will not establish that the plan is insufficient. *Fairview Area Citizens Task Force v. Illinois Pollution Control Board*, 198 Ill.App.3d 541 (3rd Dist. 1990). There is no requirement that emergency procedures be in writing. *A.R.F. Landfill, Inc. v. Lake County,* PCB 87-51 (1987).

Lowe presented the testimony of Keith Gordon regarding Criterion 5. The Village offered Andrew Nickodem as its witness on Criterion 5.

Mr. Keith Gordon testified the Facility is designed to minimize the danger to surrounding areas due to fire, spills or other operational accidents. (C00179, p. 43). The transfer building is a

concrete structure. (C00001, Sec. 2, p. 2-8; C00179, p.38). This design was chosen for noise abatement and aesthetics among other reasons. It adds to the cost, but also adds to the appearance of the building and does a better job of noise abatement. *Id.* The transfer building is designed with a segregated contingency waste management area to isolate any unacceptable items for identification and appropriate removal. (C00001, Sec. 5, p. 5-28; C00179, pp. 28-29). Lowe will retain the services of an emergency response contractor to deal with any unacceptable wastes received at the Facility. *Id.*

Groundwater Protection

The Facility is designed to protect groundwater through a design of the transfer building whereby all tipping will be on a reinforced concrete floor with joints that will be sealed so there is no leakage through the floor. As an additional protective measure, the design includes the placement underneath the entire transfer building of a high density polyethylene geomembrane liner. (C00001, Sec. 2, p. 2-9 and Sec. 5, p. 5-9; C00178, p.139); C00179, p. 30).

The geomembrane liner is a feature that exceeds standard design for a waste transfer station. The geomembrane liner provides an additional means of assuring there will not be groundwater contamination from the transfer process. (C00178, p.140). Of the 12 transfer stations Mr. Gordon is currently working on, not a single one except the Lowe Facility provides a geomembrane liner. (C00179, p. 30). A geomembrane liner is not a common installation and is a design feature of the Facility above and beyond industry standards and regulatory requirements. *Id.*

Internal Traffic Flow

One of the health and safety features for transfer station design is to separate the transfer trailer traffic from the collection vehicle traffic. (C00001, Sec. 2, p. 2-8 and Sec. 5, p. 5-8; C00179, p. 36). At the Lowe Facility, both the collection vehicles and transfer trailers have their own individual routes on the site. *Id.* All loaded vehicles have the right-of-way on the Facility site. (C00179, p.31).

Fire Prevention Plan

Lowe will be storing no waste on site overnight. (C00001, Executive Summary; Sec. 5, p.5-4). This operational decision was made not only to reduce the potential impacts from odor and vectors but also to eliminate any possible fire hazard. The Facility has been designed with a hot-load management area ("fire pit"), sand pile and alarm systems to minimize the potential for accidents, spills or fires. (C00001, Sec. 5, p. 5-32 and Attachment 1, pp. 4-5; C00179, pp. 43-44). The fire pit is a unique design not common for transfer stations. *Id.* The pit is sized to hold the equivalent of two collection truck loads. This allows the segregation of the hot load from other areas of the Facility. *Id.* The plan for this unique feature was designed in coordination with the Cary Fire Protection District and exceeds standard design for a waste transfer station. (C00001, Sec. 5, p. 5-29; C00179, pp. 43-44).

In the event of a fire, Facility personnel will immediately direct the truck or push the material into the fire pit. *Id.* The Facility has been designed with the purpose of prohibiting the spread of fire. *Id.* The fire protection plan has been approved by the Cary Fire Protection District as well as the Applicant's own fire safety consultant. (C00001, Sec. 5, p. 5-29; C00002, App. J).

A detailed Fire and Accident Prevention Plan was included in the application. (C00001, Sec. 5, Attachment 1). This plan outlines the procedures for fire prevention and control (pp. 3-5), spill prevention and control (pp. 5-6), accident prevention and control (pp. 7-8), non-conforming waste materials (p.11), management of wastes generated from emergency actions (pp. 12-13) and temporary interruption to operations (p.14).

In his testimony for the Village, Mr. Nickodem criticized the fire safety plans for the Lowe Facility for not having a sprinkler system. (C00215, pp.31-32). However, he agreed sprinkler systems are not a standard design feature in the solid waste industry. (C00215, p.84). He testified the proposed design of the Lowe Facility does not violate any fire code regulations. (C00216, pp.9-10). He agreed it is a rare occurrence that a fire protection service has to come to a waste facility to assist in a fire. (C00216, p.15).

Mr. Nickodem testified the removal of waste from the Lowe Facility at the end of each operating day would lower the incidence of fire. (C00215, p.118). He further testified there was less chance of a fire at the Lowe Facility than at Woodland. (C00216, pp. 10-11).

Fueling of Equipment

To minimize the possibility of any potential contamination due to spills during the fueling of the equipment used on site, Lowe will have all fueling done inside the transfer building. The fueling will be done in the area next to the contingency waste management area. (C00001, Sec. 5, Attachment 1, p. 5).

In his testimony, Mr. Nickodem criticized Lowe's plans for fueling the equipment used on site. (C00215, p.31). He stated all the facilities he has seen fuel their equipment outside the building.

(C00215, p.92). He testified, however, it is advantageous to fuel inside in the event there was a spill since the spill would go into the contact water system and be contained. (C00216, p.24).

Emergency Access Gate

To ensure there will always be access for emergency personnel and vehicles to the Facility, Lowe has provided an emergency access gate to the site from its adjoining property. (C00001, Sec. 5, p. 5-4; C00179, pp. 79-80). In the event that the access drive is totally blocked, emergency vehicles will have access to the site through this emergency entrance. *Id.*

Mr. Nickodem testified he had not provided for an emergency access to the Woodland Facility. (C00216, p.22). He agreed if there was a lot of traffic at the entrance to Woodland, both inbound and outbound, it would be a problem for emergency vehicles to have access to the site. (C00216, p.22). He agreed having an emergency access as proposed for the Lowe Facility was an advisable design feature for transfer stations. *Id.*

Operations Plan

Lowe developed both an Operations Plan and a Fire and Accident Prevention Plan for the Facility. These plans will be the operational guides for the Facility and its employees. (C00001, Sect. 5 and Attachment 1; C00179, pp. 44-45). All staff will be required to have training in waste screening, health and safety protocol and emergency response. (C00179, p. 39). Lowe's Operations Plan provides for random inspections of incoming loads. (C00001, Sec. 5, p. 5-23). At least three times a week, truckloads will be selected and scrutinized. *Id.* Lowe will hire a certified transfer station operator as the manager for the Facility. (C00179, p. 39). Though certified transfer station operators are not currently a requirement in Illinois, it is required in many other states. *Id.* A detailed Operations Plan was included in the application dealing with such issues as impact

mitigations (C00001, Sec.5, pp. 5-3 to 5-4), regulatory compliance (C00001, Sec. 5, pp. 5-4 to 5-5), security and access control (C00001, Sec. 5, pp. 5-6 to 5-7), traffic flow and traffic control (C00001, Sec. 5, pp. 5-7 to 5-9), contact water management system (C00001, Sec. 5, pp. 5-9 to 5-10), storm water management (C00001, Sec. 5, pp. 5-10 to 5-12), site personnel and equipment (C00001, Sec. 5, pp. 5-13 to 5-5-17), daily operations (C00001, Sec. 5, pp. 5-17 to 5-22), and waste screening and exclusion (C00001, Sec. 5, pp. 5-22 to 5-24).

In his testimony for the Village, Mr. Nickodem admitted he had not proposed random load inspections for unacceptable waste for Woodland. (C00217, pp. 10-12). He testified random inspections are required for landfills but he does not propose them for transfer stations. *Id.* He agreed random inspections provide for more inspections for unacceptable waste but didn't have an opinion if random inspections would be more protective of the public health, safety and welfare. *Id.*

In his report for the Village, Mr. Nickodem stated the untarping of collection vehicles is not discussed in the application. (C00463, p. 5). However, the record discloses there are repeated references in the application to the fact all untarping will be within the transfer building. (C00001, Executive Summary; Sec. 2, p. 2-7; Sec. 5, p.5-3, 5-6, 5-7, and 5-18). This feature was further re-iterated in Mr. Gordon's testimony. (C00179, p.65). This operational feature was deliberately chosen over untarping on the apron so the risk potential for blowing litter would be eliminated. *Id.*

In his report, Mr. Nickodem stated no provisions had been made to provide for screening of truck and equipment noise from surrounding properties. (C00463, p. 5). However, in his testimony, Mr. Nickodem admitted the scale house and the concrete transfer building would provide screening for noise and visual impacts from both Bright Oaks and The Hollows. (C00216, p. 7 and pp. 34-42). Lowe's concrete building provides more noise abatement than the steel building he designed for

Woodland and the concrete building and the 1200-1400 foot distance between the Facility and Bright Oaks provide a noise buffer for the residents of Bright Oaks. *Id.* The record discloses Lowe provides multiple features for screening noise including, but not limited to, having all unloading and loading take place in an enclosed building, orienting the open side of the transfer building away from The Hollows and Bright Oaks, constructing the transfer building of pre-cast concrete instead of metal, the underground transfer trailer tunnel with automatic doors, an earthen landscaped berm on the side of the transfer building facing Bright Oaks, and six foot high retaining walls along the ramps into and out of the tunnel along the sides nearest to The Hollows and Bright Oaks. (C00001, Executive Summary, Sec. 2 and Sec. 5).

Mr. Nickodem stated in his report that an emergency action plan was not included in the application. (C00463, p. 6). The record discloses such a plan is contained in Attachment 1 to Section 5 of the application. While it is entitled, *Fire and Accident Prevention Plan* (as per the requirements of the County's siting ordinance), the plan provides all the procedures to cover emergencies at the Facility.

Additionally, Mr. Nickodem's report stated no fire control plan was included in the application and no procedures for handling spills are found in the application. *Id.* Once again, the record discloses that these plans are contained in the *Fire and Accident Prevention Plan* included as Attachment 1 to Section 5 of the application.

The Facility's controls and procedures, safety features, fire and accident prevention plans, training of its personnel, security system and provision of an emergency access are all disclosed in the record. The record demonstrates Lowe's compliance with all required regulations. The record is devoid of any evidence the Lowe Facility is substandard or poses any safety hazard. The record

clearly discloses Nickodem presented no evidence and, in many cases, was contradicted by his own testimony. The record plainly demonstrates that Criterion 5 has been met.

D. County's Misapplication of Previous Experience to Criteria 2 and 5.

Section 39.2(a) of the Act provides the following language:

> The county board or the governing body of the municipality may also consider as evidence the previous operating experience 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) under this Section. [Emphasis added]

The County Board adopted Resolution No. R-200305-12-104 denying the siting approval for the Lowe facility on May 6, 2003. (C07244: C07245-C07250). Paragraph II(J) stated:

> Unnumbered Criterion: The Board has considered as evidence the previous operating experience of the applicant and past record of convictions or admissions of violations of the applicant when considering Criteria (ii) and (v) of 415 ILCS 5/39.2(a).)

In his remarks to the County Board, Mr. Helsten, attorney for the County, informed the Board that "this is simply a polling that we will do to determine whether you took into consideration the previous operating experience of the Applicant in the area of solid waste management and its prior operating record...your consideration would apply to criterion 2 and criterion 5." (C07244, p.47).

Mr. Lowe has never operated a solid waste facility and he has never been convicted of or even cited for any kind of local, state or federal violations. (C00001 Sec. 10). Another company owned by the principals in Lowe operates a asphalt and concrete recycling operation on the adjacent property. *Id.* This operation has an air permit from the IEPA. While the Village spent a great deal of time during the public hearing, questioning Mr. Lowe about his current operations, the record is

completely devoid of any evidence of "convictions or admissions of violations" by Mr. Lowe or his company.

Criterion 2 of Section 39.2(a) does not mention either the skill of the operator or the history of violations; indeed, the criterion focuses on the facility itself, without regard to the operator. *Watts Trucking, Inc. v. City of Rock Island,* PCB 83-167 (1984). Past performance, and the consideration thereof, is discretionary by the County Board. *Citizens for Controlled Landfills v. Laidlaw Waste Systems, Inc.,* PCB 91-89 and PCB 91-90 (consolidated) (1991). In the past, even if the record contains evidence of past violations that is not sufficient to support a denial on Criterion 2. *Waste Hauling, Inc. v. Macon County Board,* PCB 91-223 (1992).

There is a legitimate interest in preventing persons with a prior history of violations from operating waste facilities. *Martel v. Mauzy,* 511 F. Supp. 729 (1983). However, this interest is poorly served when an applicant, like Lowe, who has never been found by an administrative or judicial body to have violated any legal standards regarding waste facilities is denied. *Id.*

Section 39.2(a) does not say the county board may consider an applicant's "lack of experience" when considering criteria (ii) and (v) which seems to be the County's position. Under the County's interpretation of this section, the only applicants who could apply for siting approval would be those persons and businesses in existence at the time the Act was amended to included this provision. There is nothing in the Act or in the discussions of the General Assembly that would provide the basis for such a narrow and restrictive interpretation. In fact, the Supreme Court in *City of Elgin v. County of Cook*, 169 Ill. 2d 53 (1995), stated, "Given the pressing need for pollution control facilities, the Act encourages the development of environmentally sound facilities through the establishment of a uniform, statewide environmental policy dealing with such facilities".

The County's denial of Lowe's application in regards to Criteria 2 and 5 based on "previous operating experience" and "prior operating record" cannot be supported by the record. Despite the voluminous nature of the record in this siting application, the record is totally devoid of any evidence of complaints, violations or enforcement actions against Mr. Lowe. The County Board has denied Lowe's application when Mr. Lowe has never been found by any administrative or judicial body to have violated any legal standards regarding waste facilities as reflected in the record. The County Board's decision on Criteria 2 and 5 should be reversed.

E. The County Board's Imposition of A Host Fee as a Special Condition Was Unauthorized and Unlawful.

McHenry County is a non-home-rule county. The County Board adopted Resolution No. R-200305-12-104 denying the siting approval for the Lowe facility on May 6, 2003. (C07245; C07244). Paragraph II(H) contained a Special Condition No.1 which stated:

> The Applicant shall pay the host fee in the amount of $1.90 per ton, that amount being found from the record as a whole to fairly compensate the County for potential impacts caused by the transfer station and to meet those goals and requirements imposed upon the proposed facility by the McHenry County Solid Waste Management Plan. Said host fee shall be increased in January 1 of each calendar year for which the facility is open by the amount of the increase in the Consumer Price II Index for the Great Lakes Region for the prior calendar year.

The County Board vote on Special Condition No. 1 was 21-0. (C07244, pp. 42-44; C07248). There was no discussion by the County Board on Special Condition No.1. *Id.*

The County's Solid Waste Management Plan contains no provision for a host fee. (C00002, App. H). The record is devoid of any discussion by either the Siting Committee or the County Board where a determination was made of the "cost of the potential impacts caused by the transfer station". (C00177-228; C07237; C07244). Even if the figure of $1.90 per ton had been demonstrated by the

County Board to somehow be related to the Lowe application, the County Board, as a non-home-rule county, was without the necessary legal authority to impose such a fee.

A non-home-rule unit's sole power to regulate a new pollution control facility is found in Section 39.2. which allows local authorities to approve site location suitability in accordance with the criteria there stated. *Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc.,* 144 Ill.App. 3d 334 (2nd. Dist. 1986). Section 39.2 does not grant the power to assess fees against an applicant. *County of Lake v. Pollution Control Board,* 120 Ill. App. 3d 89 (2nd Dist. 1983). Moreover, the imposition of a fee is not a reasonable and necessary condition in order to accomplish the purposes of Section 39.2. *Id.* To extend Section 39.2 to allow the imposition of a fee would go beyond the confines of the statute. *E & E Hauling, Inc. v. Forest Preserve District of DuPage County,* 629 F. Supp. 973 (1986), citing *County of Lake v. Pollution Control Board,* 120 Ill. App. 3d 89 (2nd Dist. 1983). Section 39.2 does not grant the authority to require financial responsibility. *Id.* Financial responsibility is not part of the criteria to be considered in granting approval. *Id.*

The County Board had no statutory authority to impose Special Condition No 1 on Lowe and, as such, the County Board's decision should be reversed and Special Condition No.1 should be stricken.

Conclusion

The courts acknowledge the normal deference given to a local body's decision, as long as it is not against the manifest weight of the evidence. *Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board*, 227 Ill. App. 3d 533 (1st Dist. 1992). But as the court stated in *Industrial*, "Nevertheless, when an applicant provides the requisite information and evidence on

all of the statutory criteria(which appear to be fairly rigorous), the Board should not abdicate its statutory role in the siting approval process." *Id.* at 550.

For the reasons set forth in this memorandum, the applicants respectfully request that the Pollution Control Board reverse the decision of the McHenry County Board denying Lowe's application with regard to Criteria 2, 3 and 5 and strike special condition No. 1 of Criterion 8..

Respectfully submitted,
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