

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUN 19 2003

STATE OF ILLINOIS  
Pollution Control Board

LOWE TRANSFER, INC. and )  
MARSHALL LOWE, )  
 )  
Co-Petitioners, )  
 )  
vs. )  
 )  
COUNTY BOARD OF MCHENRY )  
COUNTY, ILLINOIS, )  
 )  
Respondent. )

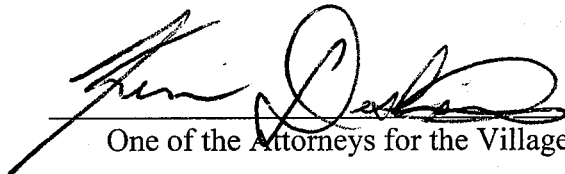
PCB 03-221  
(Pollution Control Board  
Siting Appeal)

NOTICE OF FILING

To: See attached

Please take notice that I have this day filed with the Illinois Pollution Control Board the **Village of Cary's Motion to Intervene and Appearances** on behalf of the Village of Cary, copies of which are attached and hereby served upon you.

Dated: June 19, 2003

  
\_\_\_\_\_  
One of the Attorneys for the Village of Cary

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Patricia F. Sharkey  
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STATE OF ILLINOIS  
*Pollution Control Board*

VILLAGE OF CARY'S MOTION TO INTERVENE

The Village of Cary, by its attorneys, Mayer, Brown, Rowe & Maw, hereby moves for intervention as a party participant in this siting appeal pursuant to 35 Ill. Adm. Code 101.402. In support of its motion, Cary states as follows:

1. On June 5, 2003, co-petitioners Lowe Transfer, Inc. and Marshall Lowe (together, "Lowe") filed the instant appeal contesting the May 6, 2003 decision of the County Board of McHenry County (the "County") denying Lowe's application for site location suitability approval for a proposed waste transfer station. The proposed transfer station would have been located on a 2.46 acre site off of U.S. Route 14 in McHenry County, just outside the limits of the Village of Cary (the "Site").<sup>1</sup>

2. The proposed Site is so located as to have a significant impact on the Village of Cary. The Site is adjacent to the Village of Cary and is within Cary's municipal planning area. It is just west of and in close proximity to residential areas within the Village of Cary, including the decades old Bright Oaks subdivision of over 400 units only 1300 feet away. The fifty-five acre Plote Property, recently annexed to the Village for development of a residential subdivision,

<sup>1</sup> The facts stated herein are taken from the record assembled by the McHenry County Board in its facility siting hearings.

directly abuts the site, with the result that the proposed waste transfer station site is directly adjacent to property zoned residential within the Village of Cary. Such location bars use of the Lowe site for a garbage transfer station pursuant to 415 ILCS 5/22.14. The site is also in close proximity to commercial areas in Cary used and proposed for use as shopping areas for Cary residents. The McHenry County Conservation District property known as the Hollows is adjacent to the west and north of the Site, and is frequently used by Cary residents for recreational purposes including hiking, fishing, boating, picnicking and camping. Other recreational areas within the Village of Cary are also located so as to be potentially impacted by the proposed transfer station. As identified below, groundwater and surface waters affected by the proposed site have an immediate impact on the Village of Cary and on the lakes, "high quality" and "irreplaceable" wetlands and water supply wells used by the Village.

3. The County issued its timely decision denying siting approval after holding 11 days of public hearing, during which extensive testimony and cross-examination was presented and substantial evidence and public comment was received.

4. The Village of Cary participated extensively in the proceedings before the County, participating actively on every day of hearings, presenting the testimony of numerous expert witnesses, including all but one of the experts presented by site opponents, introducing extensive evidence, cross-examining petitioner's witnesses, and calling the applicant, Marshall Lowe, as a witness after he failed to appear in his own case-in-chief. The evidence presented included:

- a) The testimony of a hydrogeologist with extensive experience in the McHenry County area, including testimony regarding the sensitive hydrogeology of the area, and the threat to area groundwaters, surface waters, the Cary drinking water wells, and wetlands designated as "high quality" and "irreplaceable" by the U.S. Corps of Engineers, which is posed by the proposed transfer station design calling for injection of

runoff directly into the groundwater. These affected groundwaters, surface waters and wetlands are immediately downgradient of the proposed site.

- b) The testimony of an environmental engineer with extensive experience in designing and operating waste transfer stations, including testimony on the design of the proposed facility and the proposed plan of operation, noting the extremely small size of the site, the lack of any sprinkler or other fire protection system other than a pit into which burning wastes could be pushed, the lack of sufficient turning radii on site for the larger transfer trailers accessing the site, the failure to provide adequate protection to prevent site wastewater from entering into groundwater, and odor, noise, litter and dust impacts to nearby areas including Cary, the nearby and adjacent residential areas and the Hollows recreational area.
  - c) The testimony of a certified urban planner, including testimony on the inconsistency of the proposed transfer station with the Cary Comprehensive Plan and with surrounding residential, commercial and park and recreational uses.
  - d) The testimony of a traffic engineer, including testimony on the impacts of the proposed transfer station on traffic in the vicinity of the site and the failure to provide basic traffic information and to even consider traffic routes to be used by transfer trucks accessing the site.
  - e) The testimony of the Village of Cary Administrator on the impacts of the proposed transfer station on the Village of Cary, Lowe's failure to contact the Village to determine compatibility, the failure of the site to comply with the Cary Comprehensive Plan and the effect on nearby and adjacent commercial and residential development projects in the Village.
  - f) Testimony of the applicant regarding his complete, and admitted, lack of experience in the field of transfer station operations and submission of evidence obtained from Illinois EPA of his environmental record with regard to his existing businesses.
5. The Board's procedural rules at 35 Ill. Adm. Code 101.402, provide in relevant

part:

- a) The Board may permit any person to intervene in an adjudicatory proceeding. . . .
- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.

- c) Subject to subsection (b) of this Section, the Board will permit any person to intervene in any adjudicatory proceeding if:
  - 1) The person has an unconditional statutory right to intervene in the proceeding; or
  - 2) It may be necessary for the Board to impose a condition on the person.
  
- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:
  - 1) The person has a conditional statutory right to intervene in the proceeding;
  - 2) The person may be materially prejudiced absent intervention; or
  - 3) The person is so situated that the person may be adversely affected by a final Board order.

A siting appeal is an adjudicatory proceeding. 35 Ill. Adm. Code 107.100(a).

6. Under Section 22.14 of the Environmental Protection Act, 415 ILCS § 5/22.14, it is illegal to locate a garbage transfer station within 1000 feet of any dwelling or an area zoned residential. The 55 acre Plote property which adjoins the proposed Lowe facility has been included in the Cary Comprehensive Plan for residential use for over a decade and extensive testimony at hearing showed the ongoing negotiations between the Village and the Plote family over several years time to develop a plan for the residential development of the property. The Village has invested in an extension of water and sewer service to the Plote property in preparation for its residential use. That property has now been annexed by the Village of Cary, and the siting of the Lowe garbage transfer station would infringe the unconditional statutory rights of the Village and the Plote family under Section 22.14, and by infringing those rights would necessarily impose an extremely onerous condition on the Village and the Plote family if

the Board were to overturn the decision of the County.<sup>2</sup> In fact, development of the Lowe station would prevent the long-planned residential development of the Plote property and render useless the public investments for water and sewer service made by the Village in connection with that development. Accordingly, the Board must permit the Village to intervene pursuant to 35 Ill. Adm. Code § 101.402(c).

7. In addition, Cary should be permitted to intervene under Section 101.402(d). A decision by the Board overturning the County's denial of siting would infringe the Village's rights under Section 22.14 of the Act and would render useless the investments made by the Village. In addition, Cary is so located as to be materially prejudiced if it is not allowed to intervene in this proceeding, and as to be adversely impacted by an unfavorable Board decision. As described above, the Site is located adjacent to the Village of Cary, and is adjacent and in close proximity to residential, commercial and recreational areas therein, such that the citizens of Cary will be significantly impacted by the proposed transfer station. Cary was the primary participant in the proceedings before the McHenry County Board, supplying much of the evidence on which the Board's decision was based. In addition to the expert testimony described above, Cary provided, among other things, the following evidence at hearing:

- evidence with respect to the nature and environmental compliance (or more particularly noncompliance) of Lowe's existing operations. It was the Village of Cary which called Mr. Lowe as a witness – he declined to testify as a witness in his own case—and elicited and provided evidence concerning his existing operations and their environmental record. Mr. Lowe's appeal specifically

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<sup>2</sup> Mr. Lowe testified at the hearing before the County that he expedited his application filing in hopes of siting his garbage transfer station before the Plote property could be annexed by the Village.

challenges the right of the County to have considered evidence of Mr. Lowe's experience and record.<sup>3</sup>

- evidence, by way of official aerial maps, that the "high quality" and "irreplaceable" wetlands mentioned but not located in the application were, in fact, directly and immediately down gradient of the proposed site.
- evidence of the groundwater impacts of the proposed facility including impacts to downgradient lakes, high quality and irreplaceable wetlands and the Cary water supply wells.
- evidence as to the nature of the surrounding residential and commercial land uses, much of which was left out of the application which incorrectly described the area as primarily industrial (based on the original industrial zoning of the Hollows, now used as a recreational area, and the Plote property, planned and now zoned for residential use).
- evidence as to the analysis done by the County's consultant. It was the Village of Cary which called the consultant as a witness. The County itself presented no evidence. The consultant's comments were presented as public comment, not as evidence subject to cross-examination, after the close of the public hearing.
- evidence of the effort by Lowe to subvert the County proceeding. The Village of Cary, through a freedom of information request to the County, provided evidence to the record showing that Lowe's attorney also represents the County, that Lowe

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<sup>3</sup> Lowe's appeal fails to explain, however, how the County's consideration was improper since the Environmental Protection Act specifically provides for such consideration. 415 ILCS 5/39.2(a). The remainder of his appeal is similarly devoid of explanation of what was wrong with the County action, creating the risk that no one will know what Lowe is actually complaining about until perhaps his post-hearing brief to this Board. Lowe has also failed to show that he timely objected at hearing to any of the issues he now seeks to raise on appeal.

tried to hire the County's own consultant and then hired a consultant recommended by the County's consultant, that at Lowe's initiative, the County reviewed and provided comments on drafts of Lowe's application before its filing, and that at Lowe's request the County agreed to keep Lowe's pending application anonymous before its filing. Lowe further sought to limit and impede the participation of objectors.

The record in this case would have been seriously incomplete, and controlled entirely by the applicant, without the participation of the Village of Cary, the Plote family, the residents of Bright Oaks and the citizens of Cary and the surrounding communities.<sup>4</sup>

8. The participation of the Village in this proceeding is necessary to insure that the County decision is vigorously defended on appeal and that the Board is informed of the overwhelming support in the record for the County decision.

9. Lowe seeks to appeal, among other issues, on the basis that the McHenry County Board "granted" its application as to certain criteria with conditions. To the extent the Lowe application was granted, and it was approved with respect to several criteria, the Village of Cary also seeks to participate to the extent necessary to preserve its right to appeal any grant of the Lowe application and to address the Lowe appeal of a condition to the McHenry County Board's approval of any criteria.

10. Cary's motion for intervention is timely, and its participation will not delay or otherwise prejudice the proceeding. Cary is filing this petition for intervention shortly after

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<sup>4</sup> In light of the Lowe efforts to work ex parte with the County, and the limited information made available through its freedom of information request, the Village of Cary feared possible bias in favor of Lowe by the County and noted that concern at hearing. It was gratified by the careful and open-minded attention given to its decision by the County Board and its Siting Committee and is surprised to see Lowe raise as contested issues on appeal matters which he himself proposed in his application (e.g. host community fees and Mr. Lowe's lack of experience, which were included in the siting application).



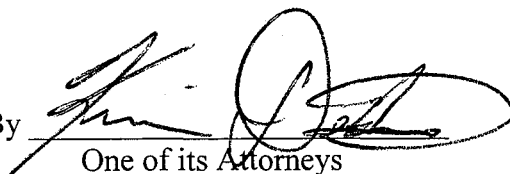
Lowe filed its petition for review, and prior to any action by the Board. Further, the Board's decision in this matter will necessarily be based on the record developed in the siting proceeding before the County, in which Cary was an active participant, which record will already be before the Board. Cary's familiarity with the record below will assist the Board in understanding all issues in this case.

11. 35 Ill. Adm. Code 107.202, which identifies the parties necessary to a siting proceeding, is to be read in conjunction with 35 Ill. Adm. Code 101.402, which provides for joinder of a party in an adjudicatory proceeding where a condition may be imposed on the intervening party, where necessary to allow that party to protect an important interest and to avoid material prejudice. Cary has made the requisite showing that it will be impacted by action of the Board overturning the County decision, that it has important interests and investments in need of protection, including interests guaranteed by 415 ILCS 22.14 barring a garbage transfer station within 1000 feet of an area zoned residential, and that it will be prejudiced if not allowed to intervene.

WHEREFORE, Cary requests that it be given intervention as a party in this proceeding.

Respectfully Submitted,

The Village of Cary

By   
One of its Attorneys

Dated: June 19, 2003

Percy L. Angelo  
Patricia F. Sharkey  
Kevin G. Desharnais  
Mayer, Brown, Rowe & Maw  
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**Certificate of Service**

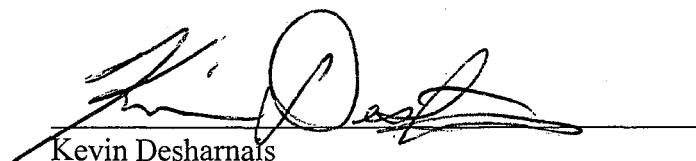
Kevin Desharnais, an attorney, hereby certifies that on June 19, 2003 he served copies of the foregoing **Notice of Filing, Village of Cary's Motion to Intervene and Appearances** on the following persons by U.S. Mail, First Class, proper postage prepaid:

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

Mr. Michael W. Tryon  
Chairman, McHenry County Board  
McHenry County Government Center  
2200 North Seminary Avenue  
Woodstock, IL 60098

Assistant State's Attorney R. Glenn Gable  
State's Attorneys Office  
McHenry County Government Center  
2200 North Seminary Avenue  
Woodstock, IL 60098

Ms. Katherine C. Schultz  
McHenry County Clerk  
McHenry County Government Center  
2200 North Seminary Avenue  
Woodstock, IL 60098

  
Kevin Desharnais

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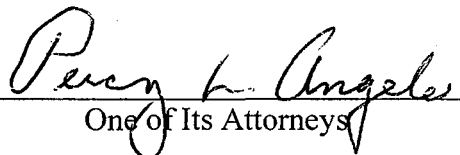
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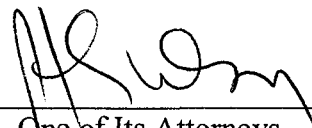
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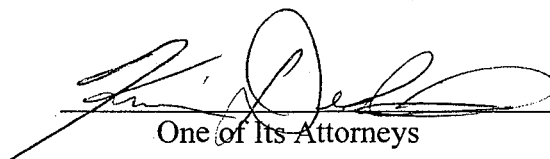
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**APPEARANCES ON BEHALF OF THE VILLAGE OF CARY**

The undersigned hereby file their appearances in this proceeding, on behalf of the Village of Cary.

  
\_\_\_\_\_  
One of Its Attorneys

  
\_\_\_\_\_  
One of Its Attorneys

  
\_\_\_\_\_  
One of Its Attorneys

Dated: June 19, 2003

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