

Lowe Transfer, Inc. and Marshall Lowe
v. County Board of McHenry County, Illinois
Before the Illinois Pollution Control Board
Case No. PCB 03-221

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **RECEIVED**

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JUL 28 2003

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

PCB 03-221)
(Pollution Control Board)
Siting Appeal)
STATE OF ILLINOIS
Pollution Control Board

MOTION IN LIMINE

The Co-Petitioners, LOWE TRANSFER, INC. and MARSHALL LOWE, through their attorneys, ZUKOWSKI, ROGERS, FLOOD & McARDLE, hereby move the Pollution Control Board to enter an order, in limine, restricting the scope of the hearing to be conducted on August 14, 2003, to (1) preclude Section 101.628(a) oral statements; (2) limit the time for Section 101.628(b) oral comments to five minutes per participant in the event the total number of participants is 25 or more, and (3) limit all Section 101.628 statements by parties and participants to Criteria 2, 3, 5, the un-numbered criteria and the fee conditions imposed by the County Board, and based only on the record generated in the proceeding before the McHenry County Board.

The grounds for this motion are as follows:

1. This is an appeal, pursuant to 415 ILCS 5/40.1(a), of the denial by the McHenry County Board of Co-Petitioners' application for siting of a municipal solid waste transfer facility. The basis of the Co-Petitioners' appeal is essentially limited to whether the decision by the McHenry County Board was against the manifest weight of the evidence. No issues of fundamental fairness were raised.

2. Illinois law clearly provides that the Pollution Control Board must confine itself to the record developed by the Local Pollution Control Facility Siting Authority where issues of fundamental fairness of the proceeding are not involved. *Land and Lakes Co. v. Illinois Pollution Control Board*, 319 Ill. App. 3d 41 (generally, the PCB must confine itself to the record developed by the Local Pollution Control Facility siting authority; however, in some cases, it is proper for the PCB to hear evidence relevant to the fundamental fairness of proceedings where such evidence necessarily lies outside the record). *City of East Peoria v. Illinois Pollution Control Board*, 117 Ill. App. 3d 673 (in reviewing the denial by the County Board of the petition for approval to locate a sanitary landfill, it was error for the Pollution Control Board to consider, on a de novo basis, the evidence in the record concerning public health impact of the proposed landfill; instead, the Pollution Control Board should have determined whether the County Board's conclusions concerning the public health consequences of the proposed siting of the sanitary landfill were against the manifest weight of the evidence); *Waste Management of Illinois v. Illinois Pollution Control Board*, 123 Ill. App. 3d 1075 (1984) (holding that the petitioner's argument that the record on review should have been determined on a de novo basis was incorrect, "although we recognize the statute as drafted does not clearly establish the proper standard to be applied by the PCB (citations omitted), the courts which have considered this question concluded the PCB's application of the manifest weight standard is correct"); *County of Lake v. Illinois Pollution Control Board*, 120 Ill. App. 3d 89 (2nd Dist. 1983) (wrongful application of a de novo hearing standard invalidated PCB findings).

3. 35 Ill. Adm. Code 107.404 provides, in part, as follows:

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Parties to the proceedings will have all rights of examination and cross-examination relevant in any judicial proceeding. Persons who are not parties, as set forth in Section 107.202 of this part are considered participants and will have hearing participation rights, as determined by the hearing officer, in accordance with 35 Ill. Adm. Code 101.628. Participants may offer comment as a specifically determined time in the proceeding, but may not examine or cross-examine witnesses for either party. (Emphasis added.)

4. 35 Ill. Adm. Code 101.628 provides for three different levels of statements from participants, oral statements, written statements and public comments or amicus curiae briefs.

Section 628(a) clearly makes oral statements permissive, determined by the hearing officer:

The hearing officer may permit a participant to make oral statements on the record when time, facilities and concerns for a clear and concise hearing record so allow. The oral statements must be made under oath and are subject to cross-examination. (Emphasis added.)

5. In the instant case, because the appeal is based strictly on manifest weight of the evidence, and based on the cases cited above, it may very well lead to a reversible error to permit oral statements from participants at the hearing. Section 101.628(a), oral statements, should be allowed only de novo proceedings where evidence is required for the Board to decide the merits of the case and, thus, cross-examination is required. Participants will still be permitted to express their positions via Section 101.6289(b) or (c), so long as the written statements are based on the record.

6. Section 628 statements, in any form allowed by the hearing officer, should be strictly limited to the record as generated at the McHenry Count Board level. Statements beyond

that migrate into the de novo process. Any such statements are outside the record and will constitute reversible error if allowed.

7. It is the undersigned's understanding that the Village of Cary is anticipating more than 100 residents to be in attendance at the scheduled hearing on August 14, 2003. If this is the case, a time limit should be imposed to prevent an unreasonably longer process. The record already in existence no doubt contains everyone's concerns and extraneous comments should be restricted.

WHEREFORE, the undersigned attorney, on behalf of the Co-Petitioners, LOWE TRANSFER INC., and MARSHALL LOWE, request the Pollution Control Board to enter an order, in limine, restricting the scope of the hearing to be conducted on August 14, 2003, to (1) preclude Section 101.628(a) oral statements; (2) limit the time for Section 101.628(b) oral comments to five minutes per participant in the event the total number of participants is 25 or more, and (3) limit all Section 101.628 statements by parties and participants to the record generated in the proceeding before the McHenry County Board.

Respectfully submitted,
LOWE TRANSFER, INC. and
MARSHALL LOWE
By: Zukowski, Rogers, Flood & McArdle



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