

ILLINOIS POLLUTION CONTROL BOARD

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OCT 06 2003

STATE OF ILLINOIS
Pollution Control Board

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

Case No. PCB 03-221

NOTICE OF FILING

TO: See Affidavit of Service

PLEASE TAKE NOTICE that on October 2, 2003, we mailed for filing with the Illinois Pollution Control Board, the attached **Respondent County Board of McHenry County, Illinois' Response to Co-Petitioners' Motion to Strike Portions of County's Response to Motion to Deem Site Location Application Approved**, a copy of which is attached hereto.

Dated: October 2, 2003

Respectfully Submitted,

On behalf of the County Board of McHenry
County, Illinois

By: Hinshaw & Culbertson

Charles F. Holsten (HKL)
One of its Attorneys

HINSHAW & CULBERTSON
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389
815/490-4900

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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COUNTY BOARD OF MCHENRY COUNTY,))
ILLINOIS)
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Respondent.)

Case No. PCB 03-221
Pollution Control Facility Siting Appeal

RESPONDENT COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS' RESPONSE TO CO-PETITIONERS' MOTION TO STRIKE PORTIONS OF COUNTY'S RESPONSE TO MOTION TO DEEM SITE LOCATION APPLICATION APPROVED

NOW COMES, Respondent, COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS, by and through its attorneys, Hinshaw & Culbertson, and in response to Co-Petitioners' Motion to Strike Portions of County's Response to Motion to Deem Site Location Application Approved, states as follows:

1. Co-Petitioners' Motion to Strike is improper.

Co-Petitioners' Motion to Strike is inappropriate as it generally consists of an argument and disagreement with Respondent's Response to Co-Petitioners' Motion to Deem Lowe's Site Location Application Approved. This is not the purpose of a motion to strike. A motion to strike is appropriate when a pleading is insufficient in law or contains immaterial matter. *See* 735 ILCS 5/2-615 (2002); *see also* 35 Ill. Adm. Code 101.500(a) (explaining that that the Board may entertain motions permissible under the Illinois Code of Civil Procedure). In this case, the matter attacked by Co-Petitioners in their Motion to Strike are not immaterial matters but, rather, is a matter of argument. As such, Co-Petitioners' Motion to Strike is improper.

Through their Motion to Strike, Co-Petitioners are clearly attempting to raise an issue and argument that they have no right to raise in such a motion. Rather, the appropriate vehicle in

which to raise such an issue would be through a Reply to the County's Response, after seeking and receiving permission from the Board or hearing officer to file such a document. *See* 35 Ill. Adm. Code §101.500(e). Co-Petitioners have filed a Reply, but they have failed to seek or receive permission from this Board or the hearing officer to file such a Reply; therefore, that Reply should be disregarded. (*See* Respondent's Motion to Strike Co-Petitioners' Reply to County's Response to Motion to Deem Lowe's Site Location Application Approved). Furthermore, Co-Petitioners' Reply fails to mention the issue raised in Co-Petitioners' Motion to Strike. As such, that issue should be deemed waived.

To the extent that this Board considers the argument raised by Co-Petitioners, Co-Petitioners' arguments have no merit, as set out below.

2. **Co-Petitioners erroneously implied that notice had to be printed in McHenry County.**

Co-Petitioners contend that they did not assert that notice under section 40.1 of the Act had to be printed in McHenry County; however, in Co-Petitioners' Memorandum in Support of their Motion, Co-Petitioners assert that Pioneer Press' newspapers are published at its Northfield facility, the location where the newspapers are printed and bundled. (*See* Lowe's Memorandum in Support of Motion to Deem Lowe's Site Location Application Approved Due to the Board's Failure to Comply with the Act's Publication and Notice Requirements, pp. 5-6). By asserting that publication of the newspaper occurred where the newspapers were printed, Co-Petitioners were clearly suggesting that the location of printing is also the location of publication. As such, it was entirely appropriate for Respondent to supply to this Board the overwhelming authority that provides that "published" does not mean "printed."

It is simply nonsensical for Co-Petitioners to assert that they were not suggesting that the location of printing is also the location of publication in light of Co-Petitioners' assertion that the

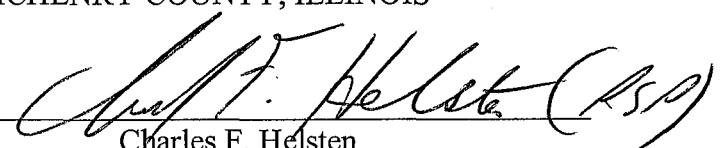
place of publication of the newspapers at issue was the Northfield facility – the location of their printing. Co-Petitioners further contended that Northfield could be the only possible place of publication because the newspapers were distributed from that facility. However, it only makes sense that newspapers will be distributed from the facility from which they are printed. Therefore, under Co-Petitioners' reasoning, the location of the printing of a newspaper will always be its place of publication because newspapers obviously have to be distributed from their place of printing. As such, Co-Petitioners were clearly asserting that a newspaper's location of printing also determines the location of the newspaper's publication, thereby implying that the newspapers at issue in this case had to be printed in McHenry to meet the requirements of section 40.1 of the Act. As set forth in Respondent's Response, such assertions are erroneous.

WHEREFORE, Respondent, County Board of McHenry County, Illinois, respectfully requests that this Board deny Co-Petitioners Motion to Strike.

Dated: October 2, 2003

Respectfully Submitted,
RESPONDENT COUNTY BOARD
OF MCHENRY COUNTY, ILLINOIS

By: _____


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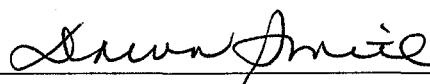
The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on October 2, 2003, the **Respondent County Board of McHenry County, Illinois' Response to Co-Petitioners' Motion to Strike Portions of County's Response to Motion to Deem Site Location Application Approved**, was sent to:

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

Dorothy M. Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, IL 60601

Bradley Halloran
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
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By depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.



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