


ROSEVILLE
REQUEST FOR COUNCIL ACTION

Date: November 8, 2010
Item No.: 13.a

Department Approval



City Manager Approval



Item Description: Bituminous Roadways Asphalt Plant Proposal Update

BACKGROUND

For the past year, the Bituminous Roadways proposal to construct an asphalt plant at 2280 Walnut Street in Roseville has been under environmental review and permitting with the Minnesota Pollution Control Agency (MPCA). The City was recently informed that the MPCA is suspending its review due to the ordinance recently passed by the City of Roseville prohibiting asphalt plants in industrial zoning districts. (Attachment A). An update of the status of the proposed asphalt plant is described below:

Prohibited Industrial Zoning District Uses Ordinance

The City Attorney has sent a letter to Bituminous Roadways informing them of the decision of the MPCA to suspend the environmental review due to the recent adoption of the ordinance prohibiting certain uses (Ordinance #1397), including asphalt plants. (Attachment B) As part of the letter, the City Attorney is asking, (based on the passage of ordinance prohibiting certain uses within the Industrial Zoning Districts), whether Bituminous Roadways will be withdrawing their application for a conditional use to have outside storage as part of the asphalt plant. Staff will update the City Council at the meeting if we receive a response from Bituminous Roadways.

If Bituminous Roadways does not withdraw their conditional use request, the City will need to take up the matter and make a decision regarding the application. Because the City received notice from the MPCA that the environmental review has been suspended, staff believes the 60-day clock for a decision has started. Given an October 29, 2010 receipt of notice date, the City will have until December 28, 2010 to make a decision regarding the conditional use application.

Staff would propose bringing the matter forward for City Council consideration on November 22, 2010.

Due to the adoption of Ordinance #1397, staff feels that a denial is warranted since the conditional use request for outdoor storage is in conjunction with an asphalt plant, which is a prohibited use in the I-2 Industrial Zoning District. The City Council would not need to adopt findings regarding the projects ability to meet the criteria for issuing a conditional use as described in Chapter 1014.01(D), since the outside use is an accessory use to a prohibited principal use. However, the City Council should adopt findings laying out the reasons and facts for denial, namely the fact that an asphalt plant and crushing is not a permitted use and thus an accessory use (outdoor storage of aggregate material) is not allowed. Staff would utilize the time between the November 8th meeting and the meeting on November 22nd to properly draft such findings.

Previous Industrial Zoning District

31 Staff considers the matter whether or not the asphalt plant as proposed would be allowed a moot point
32 due to the adoption of Ordinance #1397. As outlined in the memo from the City Attorney that was
33 reviewed at the October 25, 2010 City Council meeting, there are additional land use approvals needed
34 for the project as proposed to be constructed. The operation of the overall asphalt plant is comprised of
35 several different components, such as outdoor storage of aggregate (a conditional use), crushing (not a
36 permitted use and would require an interim use approval), and storage tanks (a conditional use), that
37 would need to be approved by the City Council.

38 **Performance Standards**

39 Staff continues to look at the information provided to the MPCA as part of the environmental review
40 process to determine if the asphalt plant as originally proposed could meet the City's Zoning Code
41 performance standards. Serious doubt that Bituminous Roadways can meet the City's industrial
42 performance standards have been raised by the public and the City Council. As part of this analysis,
43 staff has requested the information gathered so far by the MPCA, including any responses prepared to
44 MPCA staff to the comments received as part of the EAW. Staff is hoping to complete this review in
45 the next few weeks and will inform the City Council of our analysis. If it is determined that
46 Bituminous Roadways cannot meet the industrial performance standards, staff will notify the applicant
47 of that fact and inform them that their proposal is not permitted since it cannot meet our performance
48 standards. Bituminous Roadways could appeal staff's decision on the use not meeting the City's
49 performance standards to the City Council for final determination on the matter as prescribed in
50 Chapter 1015.04 (C) of the City Code. If an appeal request is submitted, the City Council would hear
51 that matter at a public meeting within 30 days of receiving the request.

52 It is important to point out that not all of the performance standards need to be violated for the use to be
53 considered not permitted. For your information, here are the performance standards as they appear in
54 the City Code. The Council should be aware that the particular wording of the performance standards
55 may limit our ability to interpret whether a certain use meets or does not meet the code.

56 *D. Performance Standards:*

57
58 *1. Noise: Any use established in an industrial district shall be so operated that no noise resulting from*
59 *said operation which would constitute a nuisance is perceptible beyond the premises. This does not*
60 *apply to incidental traffic, parking and off-street loading operations.*

61
62 *2. Smoke And Particulate Matter: The emission of smoke or particulate matter is prohibited where such*
63 *emission is perceptible beyond the premises to the degree as to constitute a nuisance.*

64
65 *3. Toxic Or Noxious Matter: No use shall, for any period of time, discharge across the boundaries of*
66 *the lot wherein it is located, toxic or noxious matter of such concentration as to be detrimental to or*
67 *endanger the public health, safety, comfort or welfare or cause injury or damage to property or*
68 *business.*

69
70 *4. Odors: The emission of odorous matter in such quantities as to be readily detectable beyond the*
71 *boundaries of the immediate site is prohibited.*

72
73 *5. Vibrations: Any use creating periodic earthshaking vibrations, such as are created by heavy drop*

74 *forges or heavy hydraulic surges, shall be prohibited if such vibrations are perceptible beyond the*
75 *boundaries of the immediate site.*

76
77 *6. Glare or Heat: Any operation producing intense glare or heat shall be performed within a*
78 *completely enclosed building.*

79
80 *7. Explosives: No activities involving the storage, utilization or manufacture of materials or products*
81 *which could decompose by detonation shall be permitted except such as are specifically licensed by the*
82 *city council. Such materials shall include, but not be confined to, all primary explosives such as lead*
83 *oxide and lead sulfate; all high explosives and boosters such as TNT, RDS, tetryl and ammonium*
84 *nitrate; propellants and components thereof such as nitrocellulose, black powder, ammonium*
85 *perchlorate and nitroglycerin; blasting explosives such as dynamite, powdered magnesium, potassium*
86 *chlorate, potassium permanganates and potassium nitrate, and nuclear fuels and reactor elements such*
87 *as uranium 235 and plutonium.*

88

89 **Next Steps**

90 Any future action will be based on the response of Bituminous Roadways. If the company decides to
91 withdraw their application for a conditional use, no further action needs to be taken by the city besides
92 acknowledging receipt of the withdrawal. If Bituminous Roadways decides to not withdraw their
93 conditional use application and/or contests the applicability of Ordinance #1397 to their project, the
94 City Council will need to take up consideration of the conditional use request and/or the appeal of
95 staff's decision that Ordinance #1397 applies to their proposal to the City Council for your
96 determination. Whatever the next steps are, it is essentially up to Bituminous Roadways to make a
97 decision on how they will proceed.

98 **REQUESTED COUNCIL ACTION**

99 No specific action is required at this time. This report provided for informational purposes.

Prepared by: Patrick Trudgeon, Community Development Director (651) 792-7071
Caroline Bell Beckman, City Attorney (651) 223-4999

Attachments: A: Letter for the MPCA dated October 29, 2010
B: Letter to Attorney Greg Korstad, Larkin, Hoffman, representing Bituminous Roadways, dated
November 1, 2010
C: Memo from City Attorney dated November 3, 2010



Minnesota Pollution Control Agency

520 Lafayette Road North | St. Paul, MN 55155-4194 | 651-296-6300 | 800-657-3864 | 651-282-5332 TTY | www.pca.state.mn.us

October 29, 2010

Mr. Bill Malinen
 City Manager
 City of Roseville
 2660 Civic Center Drive
 Roseville, MN 55113

Dear Mr. Malinen:

As you are aware, Bituminous Roadways, Inc. has proposed and submitted permit applications for the construction of an asphalt production facility at the southeast corner of Terminal Drive and Walnut Street, within an industrial district in the city of Roseville, Minnesota. The primary elements of the proposed project include an asphalt plant, aggregate storage piles, periodic crushing operations, liquid asphalt cement storage tanks, and related material storage and handling facilities. The project was subject to the preparation of a mandatory Environmental Assessment Worksheet (EAW) with the Minnesota Pollution Control Agency (MPCA) acting as the responsible governmental unit. An EAW was prepared for the project and distributed for a comment period that began on July 12, 2010, and ended on September 10, 2010. Numerous comment letters were received during the EAW comment period, including a letter from the city of Roseville requesting the preparation of an Environmental Impact Statement.

On October 11, 2010, the Roseville City Council adopted an amendment of its land use ordinance that prohibits using land zoned as "industrial" for asphalt plants and for crushing or recycling of aggregate materials. The amended ordinance would appear to preclude the construction of an asphalt plant or aggregate crushing activities on the proposed project site. The ordinance amendment was published and became effective on October 19, 2010. Consequently, the proposed Bituminous Roadways Roseville Asphalt project, as it was described in an air quality permit application submitted to the MPCA and as it was reviewed in the EAW, appears to be prohibited by this newly enacted local law.

The MPCA does not conduct environmental review on projects that are prohibited by local law or are denied by another governmental unit and has suspended work on the environmental review and permitting of the project. If circumstances change regarding the status of permit application(s) submitted to the city or if the MPCA has not appropriately interpreted the amended ordinance, we request that you inform the MPCA.

If you have any questions or require further assistance, please contact me at 651-757-2181.

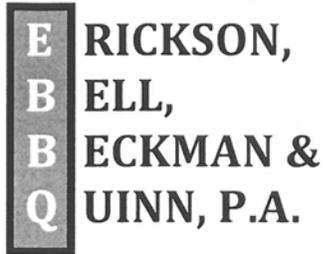
Sincerely,

A handwritten signature in black ink that reads "Craig Affeldt".

Craig Affeldt
 Supervisor, Environmental Review Unit
 St. Paul Office
 Regional Division

CA:mbo

cc: Kent Peterson, President, Bituminous Roadways, Inc.
 Kathleen Winters, Office of the Attorney General
 Kevin Kain, MPCA



1700 West Highway 36
Suite 110
Roseville, MN 55113
(651) 223-4999
(651) 223-4987 Fax
www.ebbqlaw.com

James C. Erickson, Sr.
Caroline Bell Beckman
Charles R. Bartholdi
Kari L. Quinn
Mark F. Gaughan
James C. Erickson, Jr.
Robert C. Bell - *of counsel*

November 1, 2010

Via E-mail and U.S. Mail

Mr. Greg Korstad
Larkin Hoffman Daly & Lindgren, Ltd.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, MN 55431

RE: City of Roseville - Bituminous Roadways Conditional Use Permit Application
File No.: 1011-00196-1

Dear Mr. Korstad:

Enclosed please find correspondence from the MPCA indicating that they are suspending the environmental review process, based on the City's adoption of Ordinance 1397, amending section 1007.015 of the City Code to prohibit, among other uses, asphalt plants in the I-2 District.

In light of the MPCA's recent suspension of this matter, the Conditional Use Permit Application will be returned to the Council for consideration. Please advise if your client would like to withdraw the Application for the Conditional Use Permit because of the City's adoption of Ordinance 1397 (copy attached).

Thank you for your consideration.

Very truly yours,

ERICKSON, BELL, BECKMAN & QUINN, P.A.

Caroline Bell Beckman

CBB/ljl/kmw

Enclosures

cc: Mayor and Members of Council
Mr. Bill Malinen
Mr. Pat Trudgeon

E RICKSON,
B ELL,
B ECKMAN &
Q UINN, P.A.

1700 West Highway 36
Suite 110
Roseville, MN 55113
(651) 223-4999
(651) 223-4987 Fax
www.ebbqlaw.com

Attachment C
James C. Erickson, Sr.
Caroline Bell Beckman
Charles R. Bartholdi
Kari L. Quinn
Mark F. Gaughan
James C. Erickson, Jr.
Robert C. Bell – *of counsel*

MEMORANDUM

TO: Bill Malinen, Mayor, and Members of Council
FROM: Caroline Bell Beckman
DATE: November 4, 2010
RE: Bituminous Roadways
Our File No: 1011-00196-1

As you know, the City has pending an application from Bituminous Roadways for a commercial use permit for outside storage to an asphalt plant. The Bituminous Roadways Conditional Use Permit Application was subject to a mandatory EAW by the Minnesota PCA. The EAW was then pending before the MPCA regarding request for preparation of an Environmental Impact Statement.

The Council, at its October 11, 2010 council meeting, adopted Ordinance No. 1397, which would amend 1007.015 to prohibit asphalt plants in the I-2 District. This Ordinance became effective upon publication on October 18, 2010.

On October 29, 2010, the Council was notified by the MPCA, that in light of the City's recent ordinance amendment precluding asphalt plants in the industrial district, that the MPCA is suspending the environmental review because "the MPCA does not conduct environmental review on projects that are prohibited by local law." See attached letter from MPCA.

Recommended Procedure

First, by the attached November 3, 2010 correspondence from our office to Bituminous Roadways' attorney, Greg Korstad, Bituminous has been given notice of the adoption of the ordinance amendment precluding asphalt plants. We have also inquired whether Bituminous still wishes to proceed with the Conditional Use Permit. Assuming Bituminous wishes the Conditional Use Permit Application to be heard by the City Council, the following is the recommended procedure for the same.

1. The matter should be scheduled before the Council within sixty (60) days of October 29, 2010, as the 60-day rule arguably may no longer be suspended.
2. The City, if it agrees with our legal opinion that the ordinance amendment effective October 18, 2010 applies to Bituminous should find the Conditional Use Permit Application moot and deny the same.
3. The City may also wish to examine whether the asphalt plant was permitted under the City's prior ordinance. This determination would be based on the accumulated information obtained through the Conditional Use Permit Application and an analysis of whether the asphalt plant, as proposed by Bituminous, was a permitted use. In determining whether the asphalt plant was a permitted use, the City would look at the following:
 - a. As indicated in our Memorandum of October 14, 2010, the application as proposed included not only the production of asphalt, but also outside storage of materials, storage tanks, a laboratory and crushing operations. The City should look at the totality of the use proposed.
 - b. The City may also wish to consider the performance standards (based upon the information received on this application) and whether the standards can be met. If not, regardless of the passage of the amendment to Ordinance 1007.015, the use is not permitted. If the City finds the plant as proposed is not permitted, even under the old Ordinance, then again, the Conditional Use Permit may be denied on those grounds.
4. Finally, should the City make a determination that our ordinance amending 1007.015 does not apply to Bituminous, and that the asphalt plant as proposed is a permitted use, then the City may consider the merits of the conditional use permit and what conditions, if any, may be applicable.

CBB/ljl/kmw

cc: Pat Trudgeon